LexisNexis

Date and Time: Wednesday, October 25, 2023 1:34:00 PM CST

Job Number: 208875917

Documents (100)

1. Teladoc, Inc. v. Tex. Med. Bd., 2015 U.S. Dist. LEXIS 166754

   Client/Matter: -None-

   Search Terms: "antitrust law"

   Search Type: Natural Language

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

2. Ford Motor Co. v. Titan Enter., 2015 U.S. Dist. LEXIS 169664

   Client/Matter: -None-

   Search Terms: "antitrust law"

   Search Type: Natural Language

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

3. Palms & Sands Owners Ass'n v. Bank of Am., N.A., 2015 Cal. App. Unpub. LEXIS 9158

   Client/Matter: -None-

   Search Terms: "antitrust law"

   Search Type: Natural Language

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

4. Bray v. Bank of Am. Corp., 2015 U.S. Dist. LEXIS 194907

   Client/Matter: -None-

   Search Terms: "antitrust law"

   Search Type: Natural Language

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

5. Killian Pest Control, Inc. v. Hometeam Pest Def., Inc., 2015 U.S. Dist. LEXIS 192648

   Client/Matter: -None-

   Search Terms: "antitrust law"

Search Type: Natural Language

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

6. SolarCity Corp. v. Salt River Project Agric. Improvement & Power Dist., 2015 U.S. Dist. LEXIS 170109

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

7. United States ex rel. Univ. Loft Co. v. Avteq, Inc., 2015 U.S. Dist. LEXIS 194643

Client/Matter: -None-

Search Terms: "antitrust law"

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

8. Boffa Surgical Group LLC v. Managed Healthcare Assocs., 2015 IL App (1st) 142984

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

9. UniStrip Techs., LLC v. LifeScan, Inc., 153 F. Supp. 3d 728

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

10. Rivera-Nazario v. Corporacion Del Fondo Del Seguro Del Estado, 2015 U.S. Dist. LEXIS 173012

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

11. *Sprint Communs. Co. v. Bernsten, 152 F. Supp. 3d 1144*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

12. *TMT Mgmt. Grp., LLC v. U.S. Bank N.A., 2016 U.S. Dist. LEXIS 23790*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

13. *Neal v. Select Portfolio Servicing, Inc., 2016 U.S. Dist. LEXIS 772*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

14. *Hemlock Semiconductor Corp. v. Kyocera Corp., 2016 U.S. Dist. LEXIS 915*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

15. *In re Am. Express Anti-Steering Rules Antitrust Litig., 2016 U.S. Dist. LEXIS 3332*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

16. *In re TFT-LCD Flat Panel Antitrust Litig., 637 Fed. Appx. 981*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

17. *In re Zinc Antitrust Litig., 155 F. Supp. 3d 337*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

18. *Reed Constr. Data Inc. v. McGraw-Hill Cos., 638 Fed. Appx. 43*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

19. *Clary v. State Farm, 2016 La. Dist. LEXIS 10574*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

20. *Park Irmat Drug Corp. v. OptumRx, Inc., 152 F. Supp. 3d 127*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

21. *In re Pre-filled Tank Antitrust Litig., 2016 U.S. Dist. LEXIS 194545*

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Search Terms: "antitrust law"

Search Type: Natural Language

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

22. *Dial Corp. v. News Corp., 165 F. Supp. 3d 25*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

23. *Conn. Ironworkers Emplrs. Assoc. v. New Eng. Reg'l Council of Carpenters, 157 F. Supp. 3d 173*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

24. *Robb v. Conn. Bd. of Veterinary Med., 157 F. Supp. 3d 130*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

25. *State v. Au Optronics Corp., 2016 Ill. Cir. LEXIS 13879*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

26. *Int'l Constr. Prods. LLC v. Caterpillar Inc., 2016 U.S. Dist. LEXIS 6826*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

27. [Trendsettah USA, Inc. v. Swisher Int'l, Inc., 2016 U.S. Dist. LEXIS 184758]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

28. [In re Trulia, Inc. Stockholder Litig., 129 A.3d 884]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

29. [Resco Prods. v. Bosai Minerals Grp. Co., 158 F. Supp. 3d 406]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

30. [Valspar Corp. v. E.I. du Pont de Nemours & Co., 152 F. Supp. 3d 234]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

31. [Heartland Payment Sys., Inc. v. Mercury Payment Sys., LLC, 2016 U.S. Dist. LEXIS 9078]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

32. *In re Pool Prods. Distrib. Mkt. Antitrust Litig., 158 F. Supp. 3d 544*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

33. *Reese v. Pook & Pook, LLC, 158 F. Supp. 3d 271*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

34. *In re Cathode Ray Tube (CRT) Antitrust Litig., 2016 U.S. Dist. LEXIS 24951*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

35. *Van Ornum v. AMA, 2016 U.S. Dist. LEXIS 44805*

Client/Matter: -None-

Search Terms: "antitrust law"

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

36. *Garrison v. Oracle Corp., 159 F. Supp. 3d 1044*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

37. *In re Processed Egg Prods. Antitrust Litig., 2016 U.S. Dist. LEXIS 12604*

Client/Matter: -None-

Search Terms: "antitrust law"

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

38. *Manitou N. Am. v. McCormick Int'l, 2016 Mich. App. LEXIS 198*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

39. *Shahinian v. Medical Staff of Los Robles Hosp. & Med. Ctr., 2016 U.S. Dist. LEXIS 190539*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

40. *United States ex rel. Nargol v. DePuy Orthopaedics, Inc., 159 F. Supp. 3d 226*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

41. *G.U.E. Tech, LLC v. Panasonic Avionics Corp., 2016 U.S. Dist. LEXIS 188759*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

42. *It's My Party, Inc. v. Live Nation, Inc., 811 F.3d 676*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

43. *In re Urethane Antitrust Litig., 2016 U.S. Dist. LEXIS 15137*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

44. *Hicks v. PGA Tour, Inc., 165 F. Supp. 3d 898*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

45. *Razmco & Assocs. v. BB&T Ins. Servs. of Cal., 2016 Cal. App. Unpub. LEXIS 1039*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

46. *In re Opana Er Antritrust Litig., 162 F. Supp. 3d 704*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

47. *Marruffo v. Mannatto, 2016 U.S. Dist. LEXIS 194640*

Client/Matter: -None-

Search Terms: "antitrust law"

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

48. *United States v. Blavatnik, 168 F. Supp. 3d 36*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

49. *Campbell v. Othoff, 2016 U.S. Dist. LEXIS 34684*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

50. *In re Ambac Bond Ins. Cases, 2016 Cal. App. Unpub. LEXIS 1230*

Client/Matter: -None-

Search Terms: "antitrust law"

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

51. *In re Domestic Drywall Antitrust Litig., 163 F. Supp. 3d 175*

Client/Matter: -None-

Search Terms: "antitrust law"

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

52. *Hunter v. Holsinger, 2016 U.S. Dist. LEXIS 20057*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

53. *In re First Am. Home Buyers Prot. Corp. Class Action Litig., 313 F.R.D. 578*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

54. *In re Pool Prods. Distrib. Mkt. Antitrust Litig., 166 F. Supp. 3d 654*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

55. *Rochester Drug Co-Operative, Inc. v. Warner Chilcott Co. (In re Loestrin 24 Fe Antitrust Litig.), 814 F.3d 538*

Client/Matter: -None-

Search Terms: "antitrust law"

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

56. *Inline Packaging, LLC v. Graphic Packaging Int'l, Inc., 164 F. Supp. 3d 1117*

Client/Matter: -None-

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

57. *Salveson v. JP Morgan Chase & Co., 166 F. Supp. 3d 242*

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

58. Am. Steel Erectors, Inc. v. Local Union No. 7, Int'l Ass'n of Bridge, 815 F.3d 43

Client/Matter: -None-

Search Terms: "antitrust law"

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

59. In re K-Dur Antitrust Litig., 2016 U.S. Dist. LEXIS 22982

Client/Matter: -None-

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

60. In re Opana ER Antritrust Litig., 2016 U.S. Dist. LEXIS 23319

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

61. Obesity Research Inst., LLC v. Fiber Research Int'l, LLC, 165 F. Supp. 3d 937

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

62. Castaneda v. Wells Fargo Home Mortg., 2016 U.S. Dist. LEXIS 23998

Client/Matter: -None-

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

63. Isenberg v. United Teachers L.A., 2016 Cal. App. Unpub. LEXIS 1379

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

64. *Joe Hand Promotions, Inc. v. Bragg, 2016 U.S. Dist. LEXIS 24752*

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Search Terms: "antitrust law"

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

65. *Merced Irrigation Dist. v. Barclays Bank PLC, 165 F. Supp. 3d 122*

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

66. *Mkt. Am., Inc. v. Doyle, 2016 NCBC LEXIS 182*

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Search Terms: "antitrust law"

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

67. *Costco Wholesale Corp. v. AU Optronics Corp., 2016 U.S. Dist. LEXIS 54495*

Client/Matter: -None-

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

68. *Procaps S.A. v. Patheon Inc., 2016 U.S. Dist. LEXIS 32520*

Client/Matter: -None-

Search Terms: "antitrust law"

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

69. Balmes v. Ill. Bell Tel. Co., 2016 U.S. Dist. LEXIS 33339

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Search Type: Natural Language

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

70. In re Lithium Ion Batteries Antitrust Litig., 2016 U.S. Dist. LEXIS 34566

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Search Type: Natural Language

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

71. Gumwood HP Shopping Partners, L.P. v. Simon Prop. Grp., Inc., 2016 U.S. Dist. LEXIS 35759

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Search Type: Natural Language

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

72. United States v. Tribune Publ'g Co., 2016 U.S. Dist. LEXIS 54494

Client/Matter: -None-

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

73. Arapahoe Surgery Ctr., LLC v. Cigna Healthcare, Inc., 171 F. Supp. 3d 1092

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

74. Medical Ctr. at Elizabeth Place, LLC v. Atrium Health Sys., 817 F.3d 934

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

75. United States Postal Serv. v. Postal Regulatory Comm'n, 816 F.3d 883

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

76. Alaska Elec. Pension Fund v. Bank of Am. Corp., 175 F. Supp. 3d 44

Client/Matter: -None-

Search Terms: "antitrust law"

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

77. Lippincott v DirecTV, Inc. (In re NFLs Sunday Ticket Antitrust Litig.), 2016 U.S. Dist. LEXIS 41639

Client/Matter: -None-

Search Terms: "antitrust law"

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

78. BHL Boresight, Inc. v. Geo-Steering Solutions, Inc., 2016 U.S. Dist. LEXIS 44729

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

79. [Dana v. Hershey Co., 180 F. Supp. 3d 652]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

80. [McCoy v. Nestle United States, Inc., 173 F. Supp. 3d 954]

Client/Matter: -None-

Search Terms: "antitrust law"

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

81. [Buena Vista Estates, Inc. v. Santa Fe Solid Waste Mgmt. Agency, 2016 U.S. Dist. LEXIS 191812]

Client/Matter: -None-

Search Terms: "antitrust law"

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

82. [Beltran v. InterExchange, Inc., 176 F. Supp. 3d 1066]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

83. [BRFHH Shreveport, LLC v. Willis Knighton Med. Ctr., 176 F. Supp. 3d 606]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

84. [Meyer v. Kalanick, 174 F. Supp. 3d 817]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

85. *Bloyer v. St. Clair County, 179 F. Supp. 3d 843*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

86. *Suture Express, Inc. v. Owens & Minor Distrib., 2016 U.S. Dist. LEXIS 47421*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

87. *Dispatch & Tracking Sols., LLC v. City of San Diego, 2016 Cal. App. Unpub. LEXIS 2572*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

88. *GreenCycle Paint, Inc. v. PaintCare, Inc., 2016 U.S. Dist. LEXIS 47960*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

89. *Quest Integrity USA, LLC v. A.Hak Indus. Servs. US, LLC, 2016 U.S. Dist. LEXIS 120241*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

90. State v. Au Optronics Corp., 2016 Ill. Cir. LEXIS 13875

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

91. In re Cathode Ray Tube (CRT) Antitrust Litig., 2016 U.S. Dist. LEXIS 99365

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

92. Terry v. McNeil-PPC, Inc. (In re Tylenol (Acetaminophen) Mktg., Sales Practices & Prods. Liab. Litig.), 181 F. Supp. 3d 278

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

93. Lenhoff Enters. v. United Talent Agency, Inc., 2016 U.S. Dist. LEXIS 77958

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

94. Cave Consulting Grp., Inc. v. OptumInsight, Inc., 2016 U.S. Dist. LEXIS 54367

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

95. Encana Oil & Gas (USA), Inc. v. Zaremba Family Farms, Inc., 2016 U.S. Dist. LEXIS 180946

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

96. Silverhorse Racing, LLC v. Ford Motor Co., 2016 U.S. Dist. LEXIS 185749

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

97. Dodge Data & Analytics LLC v. iSqFt, Inc., 183 F. Supp. 3d 855

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

98. In re Pool Prods. Distrib. Mkt. Antitrust Litig., 2016 U.S. Dist. LEXIS 57390

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

99. Eisai, Inc. v. Sanofi Aventis U.S., LLC, 821 F.3d 394

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by

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

100. *Kent v. R.L. Vallee, Inc., 2016 Vt. Super. LEXIS 12*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

Teladoc, Inc. v. Tex. Med. Bd.

United States District Court for the Western District of Texas, Austin Division

December 14, 2015, Decided; December 14, 2015, Filed

1-15-CV-343 RP

Reporter

2015 U.S. Dist. LEXIS 166754 *; 2015-2 Trade Cas. (CCH) P79,437

TELADOC, INC., ET AL., Plaintiffs, v. TEXAS MEDICAL BOARD, ET AL., Defendants.

Prior History: *Teladoc, Inc. v. Tex. Med. Bd., 112 F. Supp. 3d 529, 2015 U.S. Dist. LEXIS 90230 (W.D. Tex., 2015)*

Core Terms

supervision, immunity, Plaintiffs', state action, state policy, antitrust, limitations, regulations, patient, telemedicine, anticompetitive, consultation, allegations, registrant, laches, interstate commerce, medical practice, judicial review, make clear, decisions, limitations period, in-person, parties, modify, affirmative defense, antitrust violation, motion to dismiss, state agency, discriminates, pleadings

Counsel: **[*1]** For Teladoc, Inc., Teladoc Physicians, P.A., Kyon Hood, Emmette A. Clark, Plaintiffs: Drew Navikas, LEAD ATTORNEY, PRO HAC VICE, Cleary Gottlieb Steen & Hamilton, LLP, Washington, DC; Dudley D. McCalla, Joshua A. Romero, LEAD ATTORNEYS, Matt Dow, Jackson Walker, LLP, Austin, TX; George Cary, Leah Brannon, LEAD ATTORNEYS, Cleary Gottlieb Steen & Hamilton, LLP, Washington, DC.

For Texas Medical Board, Michael Arambula, M.D., Pharm. D., in his official capacity, Manuel G. Guajardo, M.D., in his official capacity, John R. Guerra, D.O., in his official capacity, J. Scott Holliday, D.O., M.B.A., in his official capacity, Margaret McNeese, M.D., in his official capacity, Allan N. Shulkin, M.D., in his official capacity, Robert B. Simonson, D.O., in his official capacity, Wynne M. Snoots, M.D., in his official capacity, Karl Swann, M.D., in his official capacity, Surendra K. Varma, M.D., in her official capacity, Stanley Wang, M.D., J.D., MPH, in his official capacity, George Willeford, III, M.D., in his official capacity, Julie K. Attebury, M.B.A., in her official capacity, Paulette Barker Southard, in her official capacity, Defendants: James Carlton Todd, LEAD ATTORNEY, Office of the Attorney **[*2]** General, State of Texas, Austin, TX; Sean P. Flammer, LEAD ATTORNEY, The Office of the Texas Attorney General, Austin, TX.

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For New Benefits, Ltd., Amicus: Charles Stephen Kelley, LEAD ATTORNEY, Mayer Brown LLP, Houston, TX.

For Texas Nurse Practitioners, Amicus: Randy Howry, LEAD ATTORNEY, HowryBreen & Herman, LLP, Austin, TX.

For Federation of State Medical Boards, Amicus: Jack R. Bierig, Steven J. Horowitz, LEAD ATTORNEYS, PRO HAC VICE, Sidley Austin, LLP, Chicago, IL; Kelley A. Conaty, LEAD ATTORNEY, Sidley Austin LLP, Dallas, TX.

For Texas Neurodiagnostic Associates, Inc., William L. High, M.D., PhD, Amicus: George James Mallios, LEAD ATTORNEY, Mallios & Associates, Austin, TX.

For Texas Medical Association, Amicus: Donald P. Wilcox, LEAD ATTORNEY, Texas Medical Association, Austin, TX.

For American Osteopathic Association, Texas Osteopathic Medical Association, Amicus: Mark D. Tillman, LEAD ATTORNEY, Tillman Batchelor LLP, Irving, TX.

For Southwest Pharmacy Solutions, Inc., doing business as, American Pharmacies, **[*3]** Amicus: Miguel S. Rodriguez, LEAD ATTORNEY, Taylor Dunham and Rodriguez LLP, Austin, TX.

Judges: ROBERT L. PITMAN, UNITED STATES DISTRICT JUDGE.

Opinion by: ROBERT L. PITMAN

Opinion

ORDER

Before the Court are Defendants' Amended Motion to Dismiss, filed July 30, 2015 (Clerk's Dkt. #64) and the responsive pleadings thereto. After reviewing the pleadings, relevant case law, as well as the entire case file, the Court issues the following order.

I. BACKGROUND

Plaintiffs Teladoc, Inc. and Teladoc Physicians, P.A. (jointly "Teladoc"), Kyon Hood, M.D. ("Dr. Hood"), and Emmette Clark, M.D. ("Dr. Clark") bring this action against fourteen members of the Texas Medical Board ("TMB") in their official capacities[1] challenging recent regulatory changes adopted by the TMB.

The TMB is a state agency **[*4]** "statutorily empowered to regulate the practice of medicine in Texas." *22 Tex. Admin. Code § 161.1*. *See also* *Tex. Occ. Code Ann. § 152.001* (TMB has "the power to regulate the practice of medicine," noting TMB replaces former Texas State Board of Medical Examiners). Teladoc describes itself as providing "telehealth services," utilizing telecommunication technologies to provide health care services outside the traditional models wherein medical professionals provides services in an in-person office or hospital setting. According to Plaintiffs, "[t]elehealth providers are generally available 24 hours per day, 365 days per year, for a fraction of the cost of a visit to a physician's office, urgent care center, or hospital emergency room." (Am. Compl. ¶ 2).

Teladoc's services are typically available to individuals whose employer has contracted with Teladoc for a per-member subscription fee. Individuals register with Teladoc either by telephone or online, creating a personal account, including information such as a medical history, physician, contact information, and medical records. Registrants may also upload photographs and medical records to Teladoc's system for inclusion with their medical history. (*Id.* ¶¶ 44-45).

Registrants seeking a physician consultation **[*5]** can log into Teladoc's web portal or call a toll-free number to place a request for consultation. Teladoc employs board certified physicians who are provided specialized training in treatment and diagnosis via telephone. Once a Teladoc physician accepts the request for consultation, the physician reviews the requesting registrant's information and medical records through the website, then calls the registrant by telephone and consults with him or her. Based on the medical records and history, reported symptoms, and other information the physician elicits during the consultation, the physician dispenses medical advice, including referring the registrant to a physician's office, dentist, or emergency room. When deemed appropriate, the physician can prescribe certain medications.[2] Following the consultation, the Teladoc physician

[1] Plaintiffs originally named the TMB and fourteen of its members in both their individual and official capacities. The parties thereafter stipulated to the dismissal of the TMB and its members in their individual capacities, based on the parties' agreement that full relief could be obtained against the TMB's members in their official capacities. For convenience's sake, the Court refers herein to the members of the TMB collectively as "the TMB."

enters notes and findings into the registrant's record, which is available to the registrant and, if the registrant chooses, is forwarded to his or her primary-care physician. (*Id.* ¶¶ 46, 69-71, 77-85).

This action relates to the TMB's adoption of revisions to Chapters 174 and 190 of the Texas Administrative Code title which governs the TMB. Chapter 174 regulates the practice of telemedicine medical services in Texas. *22 Tex. Admin. Code § 174.1*. Chapter 190 sets forth disciplinary guidelines for the practice of medicine in Texas. *22 Tex. Admin. Code § 190.1*.

As originally adopted by the TMB in 2003, *section 190.8(1)(L) ("Old Rule 190.8")* prohibits prescription of any "dangerous drug or controlled substance" without first establishing a "proper professional relationship" which requires, in pertinent part, "establishing a diagnosis through the use of acceptable medical practices *such as* patient history, mental status examination, physical examination, and appropriate diagnostic and laboratory testing." *22 Tex. Admin. Code § 190.8(1)(L)* (emphasis added). In 2004 the TMB adopted regulations specifically governing "telemedicine." *22 Tex. Admin. Code §§ 174.1, et seq.*

Effective October 2010, the TMB amended its telemedicine regulations, restricting the definition of "telemedicine" to consultations using "advanced telecommunications technology that allows the distant site provider to see and hear the patient in real time." *Id.* *§ 174.2*. The amended regulations also made clear that, to establish a "proper physician-patient relationship," **[*7]** telemedicine providers were required to conduct a physical examination of a patient. *Id.* *§ 174.8 ("New Rule 174")*. In response to the amended regulations, Teladoc restricted the services it offered in Texas, specifically eliminating the option of video consultation. (Am. Compl. ¶¶ 100-02).

In June 2011, the TMB issued a letter to Teladoc, stating the language of *Old Rule 190.8* required a "face-to-face" examination prior to prescription of a dangerous drug or controlled substance. Plaintiffs allege the letter was prompted by complaints from Texas physicians about competition from Teladoc. (*Id.* ¶¶ 104-05).

Teladoc sought legal recourse by bringing suit against the TMB in Texas state court. (*Id.* ¶ 106). In July 2011 the state court issued a temporary restraining order barring enforcement of the TMB's interpretation of *Old Rule 190.8*. (*Id.* ¶ 107). In December 2014 the court of appeals held the "TMB's pronouncements in its June 2011 letter are tantamount to amendments to the existing text," finding the TMB had effectively substituted "including" for the actual "such as" phrase. *Teladoc, Inc. v. Texas Med. Bd., 453 S.W.3d 606, 620 (Tex. App.—Austin 2014, pet. filed)*. Thus, the court found the "TMB's pronouncements hardly 'track' *[Old] Rule 190.8* . . . rather, they depart from and effectively change that text," rendering **[*8]** the June 2011 letter a procedurally invalid amendment to *Old Rule 190.8*. *Id.*

In response, the TMB issued an "emergency" rule on January 16, 2015, amending *Old Rule 190.8*. The emergency amendment mandated a "face-to-face visit or in-person evaluation" before a physician can issue a prescription. (Am. Compl. ¶ 111). Teladoc sought and obtained a temporary injunction of the emergency rule in Texas state court. (*Id. ¶¶ 113-14*). The TMB then engaged in a formal rulemaking, resulting in an April 10, 2015 vote by the TMB to adopt *section 190.8(1)(L) ("New Rule 190.8")* which sets forth practices the TMB deems to be violations of the Texas Medical Practices Act. According to the TMB, that new rule would require a face-to-face visit before a physician can issue a prescription to a patient, regardless of medical necessity. (*Id. ¶ 115*).

Plaintiffs filed this action on April 29, 2015, asserting Defendants have committed a violation of ***antitrust law***, as well as the *Commerce Clause of the Constitution* in adopting *New Rule 190.8* and *New Rule 174*. The TMB seeks to dismiss Plaintiffs' claims, arguing they are barred by the statute of limitations, the TMB is immune from antitrust liability, and Plaintiffs have failed to state an actionable claim under the *Commerce Clause*. The parties have filed responsive pleadings and **[*9]** the motion is now ripe for review.

---

[2] According to Teladoc, its physicians do not prescribe "DEA-controlled substances (including narcotics) or what are referred to as lifestyle drugs (i.e., Viagra, **[*6]** or diet pills)." (Am. Compl. ¶ 82).

II. STANDARD OF REVIEW

A federal court must dismiss an action "[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction." *Fed. R. Civ. P. 12(h)(3)*. Thus, lack of subject-matter jurisdiction may be raised at any time by any party, or by the court sua sponte. *Bank One Texas v. United States, 157 F.3d 397, 403 (5th Cir. 1998)*; *MCG, Inc. v. Great Western Energy Corp., 896 F.2d 170, 173 (5th Cir. 1990)*. However, the plaintiff bears the burden of establishing federal jurisdiction. *Burge v. Parish of St. Tammany, 187 F.3d 452, 465-66 (5th Cir. 1999)*. *See also* *Coury v. Prot, 85 F.3d 244, 248 (5th Cir. 1996)* (presumption against subject matter jurisdiction must be rebutted by party bringing action to federal court). A motion to dismiss for lack of subject matter jurisdiction must be considered before any other challenge. *See* *Steel Co. v. Citizens for Better Environment, 523 U.S. 83, 94-95, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998)* ("The requirement that jurisdiction be established as a threshold matter ... is inflexible and without exception"); *Moran v. Kingdom of Saudi Arabia, 27 F.3d 169, 172 (5th Cir. 1994)* (court must find jurisdiction before determining validity of claim). On a *Rule 12(b)(1)* motion, "the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case." *MDPhysicians & Assocs., Inc. v. State Board of Ins., 957 F.2d 178, 181 (5th Cir. 1992)*.

When evaluating a motion to dismiss for failure to state a claim under *Rule 12(b)(6)* the complaint must be liberally construed in favor of the plaintiff and all facts pleaded therein must be taken as true. *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 164, 113 S. Ct. 1160, 122 L. Ed. 2d 517 (1993)*; *Baker v. Putnal, 75 F.3d 190, 196 (5th Cir. 1996)*. Although *Federal Rule of Civil Procedure 8* mandates only that a pleading contain a "short and plain statement **[*10]** of the claim showing that the pleader is entitled to relief," this standard demands more than unadorned accusations, "labels and conclusions," "a formulaic recitation of the elements of a cause of action," or "naked assertion[s]" devoid of "further factual enhancement." *Bell Atl. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. Rather, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Id. at 570*. The court must initially identify pleadings that are no more than legal conclusions not entitled to the assumption of truth, then assume the veracity of well-pleaded factual allegations and determine whether those allegations plausibly give rise to an entitlement to relief. If not, "the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" *Ashcroft v. Iqbal, 556 U.S. 662, 679, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Fed. R. Civ. P. 8(a)(2)*).

III. ANALYSIS

Defendants contend the claims asserted by Plaintiffs attacking *New Rule 174* should be dismissed as barred by limitations. Defendants also maintain Plaintiffs' claim of an antitrust violation is barred by the doctrine of state action immunity. Finally, Defendants argue Plaintiffs have failed to state a claim under the *Commerce Clause*.

A. Statute of Limitations

Suits asserting antitrust violations under the *Clayton Act* are generally **[*11]** subject to a four year statute of limitations. *15 U.S.C. § 15b* (action to enforce *Clayton Act* "shall be forever barred unless commenced within four years after the cause of action accrued"). The limitations period for a claim asserted under *42 U.S.C. § 1983* ("*Section 1983*") is determined by the state's personal injury limitations period. *Whitt v. Stephens Cnty., 529 F.3d 278, 282 (5th Cir. 2008)*; *Price v. City of San Antonio, 431 F.3d 890, 892 (5th Cir. 2005)*. In Texas it is two years. *Tex. Civ. Prac. & Rem. Code Ann. § 16.003*. The parties agree *New Rule 174* took effect on October 17, 2010. Plaintiffs did not file this action until April 29, 2015, more than four years later. The TMB maintains each of Plaintiffs' claims attacking *New Rule 174* are thus time barred.

As an initial matter, Plaintiffs point out that the TMB's assertion of limitations fails to account for all of the Plaintiffs. Specifically, they note that Dr. Hood first became licensed to practice medicine in 2014 and Dr. Clark did not begin practicing telemedicine through Teladoc until 2013. Plaintiffs correctly maintain neither would have had standing prior to beginning the practice of telemedicine to assert any injury from *New Rule 174*. *See* *Price v. City of San Antonio, 431 F.3d 890, 893 (5th Cir. 2005)* (cause of action under *section 1983* accrues when plaintiff "knows or has reason to know of the injury which is the basis of the action."); *Bourns, Inc. v. Raychem Corp., 331 F.3d 704, 711 (9th Cir. 2003)* ("Only an actual competitor or one ready to be a competitor can suffer antitrust **[*12]** injury.").

The TMB suggests these facts are of no moment, arguing "[b]y plaintiffs' reasoning, a corporation can perpetually evade both limitations and laches by continuing to recruit new employees or contractors." (Def. Reply at 31).[3] But this argument merely buttresses Plaintiffs' point, that the TMB has focused only on Teladoc's claims, not those of the individual doctor plaintiffs. At a minimum, the TMB has failed to show limitations bars their claims.

Plaintiffs also argue the continuing violation doctrine acts to forestall the TMB's limitations argument. "Generally, a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business." *Rx.com v. Medco Health Sols., Inc., 322 F. App'x 394, 396 (5th Cir. 2009)* (quoting *Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 338, 91 S. Ct. 795, 28 L. Ed. 2d 77 (1971))* ("[I]f a **[*13]** plaintiff feels the adverse impact of an antitrust conspiracy on a particular date, a cause of action immediately accrues"). When a plaintiff alleges a continuous antitrust violation, suit may be brought within four years after the defendant "commits an additional overt act in furtherance of the antitrust conspiracy or commits an act that by its very nature is a continuing antitrust violation." *Kaiser Alum. & Chem. Sales, Inc. v. Avondale Shipyards, Inc., 677 F.2d 1045, 1051 (5th Cir. 1982)*, Similarly, in a claim asserted under *Section 1983*, the continuing violation theory can relieve a plaintiff of showing that all of the defendant's conduct occurred within the limitations period, but only if the plaintiff can show "a series of related acts, one or more of which falls within the limitations period." *Montgomery v. Louisiana, 46 Fed. Appx. 732 (5th Cir. 2002)* (quoting *Messer v. Meno, 130 F.3d 130, 134-135 (5th Cir. 1997))*.

Plaintiffs point to their allegations of actions taken by Defendants between the adoption of *New Rule 174* and the filing of this action as evidencing a continuing violation by Defendants. Specifically, Plaintiff allege the TMB's General Counsel sent a letter in June 2011 to Teladoc asserting a new interpretation of *Old Rule 190.8*, a letter which Plaintiffs assert was prompted by complaints from Texas doctors concerning competition from Teladoc. (Am. Compl. ¶¶ 104-05). Plaintiffs further allege the TMB **[*14]** thereafter sent letters to several of Teladoc's clients stating Teladoc was in violation of *Old Rule 190.8*, despite the stay of that interpretation issued in July 2011 by the Texas state court. (*Id. ¶ 109*). In addition, Plaintiffs allege Defendants adopted an invalid "emergency" amendment to *Old Rule 190.8* in January 2015, before finally adopting *New Rule 190.8* in April 2015. (*Id. ¶¶ 111-19*).

The TMB maintains the allegations do nothing more than suggest Plaintiffs suffered continuing effects from the adoption of *New Rule 174*. In an antitrust case, "[f]or statute of limitations purposes, . . . the focus is on the timing of the causes of injury, i.e., the defendant's overt acts, as opposed to the effects of the overt acts." *Varner v. Peterson Farms, 371 F.3d 1011, 1019 (8th Cir. 2004)* (quoting *DXS, Inc. v. Siemens Med. Sys., Inc., 100 F.3d 462, 467 (6th Cir.1996))*. Nor can a plaintiff use the continuing violation theory to resurrect claims alleging a civil rights violation "concluded in the past, even though its effects persist." *McGregor v. La. State Univ. Bd. of Supervisors, 3 F.3d 850, 867 (5th Cir. 1993)*.

Plaintiffs, in contrast, characterize their allegations as a setting forth a continuous course of conduct by the TMB, aimed at interfering with Plaintiffs' ability to engage in telemedicine. The Court agrees this view more correctly describes Plaintiffs' claims here. This conclusion is supported by the fact that, according to Plaintiffs, **[*15]** the TMB began its course of conduct prior to adopting *New Rule 174* by attempting to enforce a new reading of *Old Rule 190.8*, and when that attempt failed, continued its course of conduct by adopting the new rule.

Moreover, as the TMB admits, the question of limitations is not purely a matter of statutory proscription when solely equitable relief is sought. Rather, in such cases, courts apply the doctrine of laches, instead of the analogous

[3] The TMB further suggests prior lack of standing is insufficient to prevent the application of limitations. No authority is cited for that proposition, however. Moreover, Dr. Hood lacked standing to attack the rules governing the practice of medicine in Texas prior to his licensure because he had not suffered any injury prior to that date. The TMB provides no explanation as to how his ability to seek relief for his alleged injury could have expired prior to his suffering the injury.

limitations period. *Kaiser Alum., 677 F.2d at 1057*. *See* *Solo v. SD-3C LLC, 751 F.3d 1081, 1084 (9th Cir. 2014)*, *cert. denied*, *135 S. Ct. 1733, 191 L. Ed. 2d 701 (2015)* ("Because Plaintiffs seek only injunctive relief under federal law, their federal antitrust claim is subject to the equitable doctrine of laches and not the four-year statute of limitations in . . . the *Clayton Act*"). To establish that a cause of action is barred by laches, the defendant must show: (1) a delay in asserting the right or claim; (2) that the delay was not excusable; and (3) that there was undue prejudice to the defendant. *Johnson v. Crown Enters., Inc., 398 F.3d 339, 344 (5th Cir. 2005)*. However, if the claim is brought outside the analogous limitations period, "the bare fact of delay creates a rebuttable presumption of prejudice" to the defendant. *Kaiser Alum.. 677 F2d at 1057* (citing *IT&T v. General Tel. & Elecs. Corp., 518 F.2d 913, 926 (9th Cir. 1975))*.

The TMB contends the presumed prejudice from Plaintiffs' delay is sufficient to justify the invocation **[*16]** of laches to bar their claims. Plaintiffs point out, however, that the Fifth Circuit has stated "[t]he concept of undue prejudice, an essential element in a defense of laches, is normally inapplicable when the relief is prospective." *Envtl. Defense Fund v. Marsh, 651 F.2d 983, 1005 n.32 (5th Cir. 1981)*. *See* *Danjaq LLC v. Sony Corp., 263 F.3d 942, 959-60 (9th Cir. 2001)* ("almost by definition, the plaintiff's past dilatoriness is unrelated to a defendant's ongoing behavior that threatens future harm"); *Lyons P'ship, L.P. v. Morris Costumes, Inc., 243 F.3d 789, 799 (4th Cir. 2001)* ("A prospective injunction is entered only on the basis of current, ongoing conduct that threatens future harm. Inherently, such conduct cannot be so remote in time as to justify the application of the doctrine of laches."). In addition, Plaintiffs suggest it would not disserve the public interest to permit their attack to proceed. This suggestion is supported by the fact that in seeking, and obtaining, a preliminary injunction, Plaintiffs presented evidence that consumers will face higher prices for medical care, as well as reduced access as a result of the TMB's restrictions on telemedicine. The TMB provides no rebuttal to these arguments. Accordingly, the Court concludes application of laches is not justified on the facts of this case at this point. The TMB's motion to dismiss on the basis of limitations is, therefore, **[*17]** properly denied.

B. State Action Immunity[4]

The TMB next contends Plaintiffs' antitrust claim is barred by the doctrine of state action immunity. States are generally permitted to regulate their economies in ways they see fit, including "impos[ing] restrictions on occupations, confer[ring] exclusive or shared rights to dominate a market, or otherwise limit[ing] competition to achieve public objectives." *N.C. State Bd. of Dental Exam'rs v. FTC, 135 S. Ct. 1101, 1109, 191 L. Ed. 2d 35 (2015)*. Thus, in most situations "federal antitrust laws are subject to supersession by state regulatory programs." *F.T.C. v. Ticor Title Ins. Co., 504 U.S. 621, 632, 112 S. Ct. 2169, 119 L. Ed. 2d 410 (1992)*. As a result, the Supreme Court has "interpreted the antitrust laws to confer immunity on anticompetitive conduct by the States when acting in their sovereign capacity." *Id. at 1110* (citing *Parker v. Brown, 317 U.S. 341, 350-51, 63 S. Ct. 307, 87 L. Ed. 315 (1942))*. However, the Supreme Court has also made clear that so-called "*Parker* immunity" is afforded only if two requirements are satisfied: "first that 'the challenged restraint . . . be one clearly articulated and affirmatively expressed as state policy,' and second that 'the policy . . . be actively supervised by the State.'" *FTC v. Phoebe Putney Health Sys., 568 U.S. __, __, 133 S. Ct. 1003, 1010, 185 L. Ed. 2d 43 (2013)* (quoting *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105, 100 S. Ct. 937, 63 L. Ed. 2d 233 (1980))*. The Supreme Court has further **[*18]** cautioned that "given the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws, 'state-action immunity is disfavored.'" *Phoebe Putney, 133 S. Ct. at 1010* (quoting *Ticor Title, 504 U.S. at 636*).

1. Burden of Proof

As an initial matter, the parties disagree concerning which of them bears the burden of establishing the applicability of state action immunity. The TMB argues the doctrine is jurisdictional. The TMB thus maintains Plaintiffs bear the

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[4] In opposing Plaintiffs' application for a preliminary injunction the TMB declined to assert any immunity defenses. Accordingly this issue is addressed for the first time herein.

burden to establish the immunity does not deprive this Court of jurisdiction. Plaintiffs contend the doctrine is an affirmative defense, therefore the TMB bears the burden to show its applicability.

Clearly, the doctrine enunciated in *Parker* is considered one of immunity. *See* *N.C. State Bd. of Dental Exam'rs, 135 S. Ct. 1101* (repeatedly referring to "*Parker* immunity"); *Acoustic Sys., Inc. v. Wenger Corp., 207 F.3d 287, 293 (5th Cir. 2000)* (referring to state action doctrine as "immunity from suit"). *But see* *Surgical Care Ctr., L.C. v. Hospital Serv. Dist. No. 1, 171 F.3d 231, 234 (5th Cir. 1999)* (en banc) (noting "*Parker* immunity" is "inapt description" as it is "more accurately a strict standard for locating the reach of the *Sherman Act*"). Merely labeling a doctrine one of immunity, however, does not necessarily render it a matter of jurisdiction. For example, qualified immunity, while conferring **[*19]** immunity from suit, is an affirmative defense which must be established by the defendant. *See* *Crawford-El v. Britton, 523 U.S. 574, 586, 118 S. Ct. 1584, 140 L. Ed. 2d 759 (1998)* (qualified immunity is affirmative defense and burden of pleading it rests with the defendant); *Pasco ex rel. Pasco v. Knoblauch, 566 F.3d 572, 577 (5th Cir. 2009)* ("As an affirmative defense, qualified immunity must be pled and proved by the defendant."). More to the point, in application state action immunity has been treated as a defense to be proved by the purported state actor. *See, e.g.,* *Ticor Title, 504 U.S. at 625* (state action immunity was "[o]ne of the principal defenses" asserted); *Town of Hallie v. City of Eau Claire, 471 U.S. 34, 38-39, 105 S. Ct. 1713, 85 L. Ed. 2d 24 (1985)* ("municipalities must demonstrate" that their actions were taken pursuant to state policy to obtain immunity); *Patrick v. Burget, 486 U.S. 94, 101, 108 S. Ct. 1658, 100 L. Ed. 2d 83 (1988)* (concluding respondents had not succeeded in showing active supervision required to result in state action immunity); *Acoustic Sys., 207 F.3d at 294* (state action immunity "provides only a defense against liability"); *Yeager's Fuel v. Pennsylvania Power & Light Co., 22 F.3d 1260, 1266 (3d Cir. 1994)* ("Cases since *Parker*, however, clarify that state action immunity is an affirmative defense as to which [defendant] bears the burden of proof"); *Nugget Hydroelectric, L.P. v. Pacific Gas & Elec. Co., 981 F.2d 429, 434 (9th Cir. 1992)* (party claiming immunity must demonstrate that its conduct satisfies requirements of state action immunity). Accordingly, the Court concludes the TMB bears the burden of showing it is entitled to the protection of state action immunity.

2. Supervision

The parties **[*20]** agree that a showing of active state supervision is required to obtain the protection of the state action doctrine. They disagree as to whether such supervision exists over the TMB.

An important backdrop to the case is the Supreme Court's most recent decision concerning state action immunity. At issue in that case was whether the North Carolina State Board of Dental Examiners ("the Board") was entitled to the protection of the doctrine. As in this case, the Board was largely composed of market participants. The Board argued its members were invested by North Carolina with the power of the State and thus, the Board's actions were protected by state action immunity. The Supreme Court rejected that argument, and made clear that a "nonsovereign actor controlled by active market participants—such as the Board—enjoys *Parker* immunity *only* if" it was subject to active state supervision and the challenged restraint was an expression of state policy. *N.C. State Bd. of Dental Exam'rs, 135 S. Ct. at 1110* (emphasis added). While the Supreme Court did not need to decide whether state supervision existed because the Board made no claim that it was actively supervised, the Court did address the issue, stating:

> It suffices to note that the inquiry regarding **[*21]** active supervision is flexible and context-dependent. Active supervision need not entail day-to-day involvement in an agency's operations or micromanagement of its every decision. Rather, the question is whether the State's review mechanisms provide "realistic assurance" that a nonsovereign actor's anticompetitive conduct "promotes state policy, rather than merely the party's individual interests."
>
> The Court has identified only a few constant requirements of active supervision: The supervisor must review the substance of the anticompetitive decision, not merely the procedures followed to produce it; the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy; and the "mere potential for state supervision is not an adequate substitute for a decision by the State." Further, the

> state supervisor may not itself be an active market participant. In general, however, the adequacy of supervision otherwise will depend on all the circumstances of a case.

N.C. State Bd. of Dental Exam'rs , 135 S. Ct. at 1116-17 (internal citations omitted). In this case, the TMB argues it is subject to active state supervision because its decisions are subject to judicial review by the courts of Texas and the State **[*22]** Office of Administrative Hearings ("SOAH"), as well as review by the Texas Legislature.

As to the first, Texas law permits a party adversely affected by an agency rule to challenge "the validity or applicability of the rule" by filing a challenge in a Travis County district court. *Tex. Gov't Code Ann. § 2001.038*. That review, however, is limited to inquiring whether the decision exceeded the statutory authority granted to the agency. *See Harlingen Family Dentistry, P.C. v. Tex. Health & Human Servs. Comm'n, 452 S.W.3d 479, 481-82 (Tex. App.—Austin 2014, pet. dism'd)* ("An agency's rules must comport with the agency's authorizing statute"); *Tex. Orthopaedic Ass'n v. Tex. State Bd. of Podiatric Med. Exam'rs, 254 S.W.3d 714, 719-20 (Tex. App.—Austin 2008, pet. denied)* ("when determining whether an agency's rule is valid, we must ascertain whether the rule is contrary to the relevant governing statutes, or whether the rule is in harmony with the general objectives of the statutes involved") (citations omitted). *See also Patel v. Tex. Dep't of Licensing & Regulation, 469 S.W.3d 69, 80 (Tex. 2015)* (plaintiffs "cannot attack the constitutionality of the statutes pursuant to *Section 2001.038 of the APA*").

The TMB maintains the review effectively permits an evaluation of whether a contested rule is consistent with state policy because state laws are the embodiment of state policy. But courts have made clear the review of the validity of a rule does not permit evaluation of the policy underlying the rule. *See Office of Pub. Util. Counsel v. PUC of Tex., 104 S.W.3d 225, 234 (Tex. App.—Austin 2003, no pet.)* (noting court's role "in assessing a rule's validity is to carry forward **[*23]** statutory directives, rather than weigh the wisdom of a particular policy"); *Gulf Coast Coalition of Cities v. PUC, 161 S.W.3d 706, 712 (Tex. App.—Austin 2005, no pet.)* ("This Court does not decide matters of policy; we are limited to evaluating whether the Commission acted contrary to the statute"). In contrast, the Supreme Court has made clear that to qualify as active supervision "the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy." *N.C. State Bd. of Dental Exam'rs, 135 S. Ct. at 1116*. And the TMB has not pointed to any example of judicial review which rejected the validity of a rule on the ground it did not "accord with state policy." In addition, the judicial review on which the TMB relies merely permits a court to determine a rule is invalid. It does not, therefore, meet the Supreme Court's mandate that "the supervisor must have the power to veto or *modify* particular decisions to ensure they accord with state policy. *Id.* (emphasis added).

The TMB also, in a footnote, suggests judicial review under two other sections of the Texas Government Code codifying Texas' version of the Administrative Procedures Act ("APA") is sufficient to constitute active supervision. Under those sections, an agency rule is "voidable" if it fails to comply with the procedural requirements **[*24]** of the APA, including failure to include a "reasoned justification for the rule as adopted" which "demonstrates in a relatively clear and logical fashion that the rule is a reasonable means to a legitimate objective." *Tex. Gov't Code Ann. §§ 2001.033* & *2001.035*. But the Supreme Court has made clear that the "supervisor must review the substance of the anticompetitive decision, not merely the procedures followed to produce it." *N.C. State Bd. of Dental Exam'rs, 135 S. Ct. at 1116*. *See Patrick, 486 U.S. at 104* (finding judicial review, if it existed, was limited to whether reasonable procedure afforded and plaintiff doctor's conduct posed threat to patient safety and thus did not satisfy active supervision). And the reasoned justification requirement, as the TMB itself points out, amounts to little more than a certification that "the rule, as adopted, has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority." *Tex. Gov't Code Ann. § 2001.033*. This adds little to the review under *section 2001.038* which the Court has found insufficient to constitute active supervision.

The TMB further maintains it is subject to active supervision because the disciplinary actions it takes are subject to judicial review. Texas law grants the TMB the authority to issue a cease and desist order prohibiting a person from engaging **[*25]** in an activity the TMB believes violates a rule adopted by the TMB. *Tex. Occ. Code Ann. § 165.052(a)*. "If after the issuance of a cease and desist order the individual wishes to appeal the entry of the order, the individual may file a petition" in state district court. *22 Tex. Admin. Code § 187.83(f)*. Further, "[a] person whose license to practice medicine has been revoked or who is subject to other disciplinary action by the board may appeal to a Travis County district court." *Tex. Occ. Code Ann. § 164.009*.

Both appeals are governed by *section 2001.174 of the Texas Government Code*. *See* *Brooks v. Texas Med. Bd., 2015 Tex. App. LEXIS 6142, 2015 WL 3827327, at *2 (Tex. App.—Austin June 18, 2015, no pet.)* (review of cease and desist hearing conducted by TMB); *Rodriguez-Aguero v. Texas Med. Bd., 2010 Tex. App. LEXIS 3220, 2010 WL 1730023, at *3 (Tex. App.—Austin Apr. 30, 2010, no pet.)* (review of order revoking license to practice). Under that provision, the court

> shall reverse or remand the case for further proceedings if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
> (A) in violation of a constitutional or statutory provision;
> (B) in excess of the agency's statutory authority;
> (C) made through unlawful procedure;
> (D) affected by other error of law;
> (E) not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole; or
>
> (F) arbitrary or capricious **[*26]** or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Tex. Gov't Code Ann. § 2001.174. As with the other provisions cited above, the review available under this section is limited, and fails to confer on the reviewing court a method for looking to whether the decision of the TMB is "in accord with state policy." Nor is the reviewing court permitted to modify any decision, but rather is limited to reversing or remanding the TMB's decision. *See* *R.R. Comm'n of Tex. v. Torch Operating Co., 912 S.W.2d 790, 792 (Tex. 1995)* (review under *section 2001.174* "is a limited standard of review that gives significant deference to the agency" and "does not allow a court to substitute its judgment for that of the agency"). Significantly, the TMB does not cite to any case supporting its view that this type of review constitutes active supervision, while Plaintiffs cite to a string of cases concluding the opposite. *See, e.g.,* *Patrick, 486 U.S. at 104-05* (review limited to determining if board followed reasonable procedure and sufficient evidence existed to find terminated physician's conduct threatened patients "falls short of satisfying the active supervision requirement"); *Pinhas v. Summit Health, Ltd., 894 F.2d 1024, 1030 (9th Cir. 1989)* (judicial review evaluating "if the decision was substantively rational, lawful, not contrary to established public policy and the proceedings **[*27]** were fair" under which "court may not substitute a judgment for that of the governing board even if it disagrees with the board's decision" not active supervision); *Shahawy v. Harrison, 875 F.2d 1529, 1535-36 (11th Cir. 1989)* (where "courts merely review the board's decisions for procedural error and insufficient evidence" state did not actively supervise board).

Finally, the TMB argues the Texas Legislature exercises sufficient oversight to constitute active supervision. According to the TMB, the oversight consists of the "sunset review" process and a provision requiring the legislature to be notified of proposed rule changes.

As to the first, under sunset review, a state agency is evaluated to "determin[e] whether a public need exists for the continuation of a state agency" and the legislature thereafter simply votes whether to "continue the agency." *Tex. Gov't Code Ann. §§ 325.011* & *325.015*. Plaintiffs point out the last sunset review conducted of the TMB was in 2005. The rules challenged in this lawsuit were adopted well after that review, and the next review will not be conducted until 2017. Further, the TMB itself admits that the Sunset Commission does not have the power to veto or modify any rule adopted by the TMB.

As to the second, Texas law requires that every proposed state agency **[*28]** rule be referred by the presiding officer of each house "to the appropriate standing committee for review before the rule is adopted." *Tex. Gov't Code Ann. § 2001.032(a)*. The standing committee is authorized simply to "send to a state agency a statement supporting or opposing adoption of a proposed rule." *Tex. Gov't Code Ann. § 2001.032(c)*. Clearly absent is any authority to veto or modify the rule. Plaintiffs maintain, even in combination, this purported legislative review thus falls well short of the active supervision required.

The TMB suggests Plaintiffs have mischaracterized the relevant inquiry. The TMB contends legislative review need only put in place a system that provides "realistic assurance" that state regulators overseeing a profession to which they belong will promote state policy rather than their private professional interests. But the Supreme Court has made abundantly clear that the "mere presence of some state involvement or monitoring does not suffice." *Patrick, 486 U.S. at 101*. Rather, active supervision

> requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy. Absent such a program of supervision, there is no realistic assurance that a private **[*29]** party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests.

Id. See also 324 Liquor Corp. v. Duffy, 479 U.S. 335, 345, n.7, 107 S. Ct. 720, 93 L. Ed. 2d 667 (1987) (periodic reexamination by state legislature of proposals to alter liquor pricing system did not constitute active supervision because it failed to "exert[] any significant control over" terms of restraint). Accordingly, the Court finds the TMB has failed to show the active supervision required to merit dismissal on the basis of state action immunity.

3. Clear Articulation

Plaintiffs also contend the TMB is not entitled to claim state action immunity because it has failed to show the challenged rules were enacted pursuant to a clearly articulated state policy. To satisfy the clear-articulation test, the "anticompetitive effect" in dispute should be the "foreseeable result of what the State authorized." *United Nat'l Maint., Inc. v. San Diego Convention Ctr., Inc., 766 F.3d 1002, 1010 (9th Cir. 2014) cert. denied*, *135 S. Ct. 980, 190 L. Ed. 2d 835 (2015)*. The statutory authority need not "explicitly permit[] the displacement of competition," rather, it is enough, "if suppression of competition is the 'foreseeable result' of what the statute authorizes." *City of Columbia v. Omni Outdoor Advert., Inc., 499 U.S. 365, 372-73, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991)*.

As the Court has concluded the TMB has failed to show its adoption of the challenged rules is subject to active state supervision, this second requirement **[*30]** of state action immunity need not be addressed.

C. Dormant *Commerce Clause*

Plaintiffs maintain both *New Rule 174* and *New Rule 190.8* violate the *Commerce Clause* because they discriminate against physicians who are licensed in Texas, but are physically located out of state. The "negative" or so-called "dormant" aspect of the *Commerce Clause* prohibits "economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 337-38, 128 S. Ct. 1801, 170 L. Ed. 2d 685 (2008)*. The Supreme Court has made clear "[t]ime and again," that state laws violate the *Commerce Clause* if they mandate "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Granholm v. Heald, 544 U.S. 460, 472, 125 S. Ct. 1885, 161 L. Ed. 2d 796 (2005)* (quoting *Oregon Waste Sys., Inc. v. Dep't of Envt'l Quality, 511 U.S. 93, 99, 114 S. Ct. 1345, 128 L. Ed. 2d 13 (1994))*.

The TMB argues Plaintiffs' *Commerce Clause* claim fails for several reasons. First, they suggest such a claim is not cognizable under *Section 1983*. However, the Supreme Court rejected that argument more than twenty years ago, clearly holding a claim based on the *Commerce Clause* could be brought under *Section 1983*. *Dennis v. Higgins, 498 U.S. 439, 451, 111 S. Ct. 865, 112 L. Ed. 2d 969 (1991)*. *See Adar v. Smith, 639 F.3d 146, 161 n.9 (5th Cir. 2011)* (noting in *Dennis v. Higgins*, "the Court held that violations of the *commerce clause* may be redressed by *§ 1983*.").

The TMB also suggests Plaintiffs' *Commerce Clause* claim should be dismissed because it is contrary to their claim of an antitrust violation. The TMB points out that Plaintiffs' antitrust claim rests **[*31]** on their ability to show the

TMB was not subject to active state supervision, but their *Commerce Clause* claim requires a showing that the TMB is a state actor. According to the TMB, those two arguments are irreconcilable.

The Court disagrees. In pertinent part, Texas law provides that "[t]he Texas Medical Board is an agency of the executive branch of state government with the power to regulate the practice of medicine." *Tex. Occ. Code Ann. § 152.001(a)*. This statement clearly indicates the TMB acts on behalf of the state. Plaintiffs correctly point out that the question of immunity from antitrust liability rests on a different determination. That is, whether the TMB is subject to active state supervision in its decisions which have an anti-competitive effect. In contrast, liability under *Section 1983* requires only a showing that the TMB is a state actor. Accordingly, Plaintiffs' *Commerce Clause* claim need not be dismissed on this basis.[5]

Finally, the TMB maintains Plaintiffs cannot establish more than "an indirect burden on interstate commerce" which does not violate the *Commerce Clause*. *Dickerson v. Bailey, 336 F.3d 388, 396 (5th Cir. 2003)*. The Fifth Circuit has explained:

> A statute violates **[*32]** the dormant *Commerce Clause* where it discriminates against interstate commerce either facially, by purpose, or by effect. If the statute impermissibly discriminates, then it is valid only if the state "can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest." If the statute does not discriminate, then the statute is valid unless the burden imposed on interstate commerce is "clearly excessive" in relation to the putative local benefits.

Allstate Ins. Co. v. Abbott, 495 F.3d 151, 160 (5th Cir. 2007) (internal citations omitted).

As Plaintiffs point out, both *New Rule 174* and *New Rule 190.8* require a physician to provide an in-person physical exam of a patient to create a relationship with that patient. They maintain this requirement constitutes intentional discrimination against physicians located out of Texas and cannot withstand the strict scrutiny applicable to such regulations. Plaintiffs concede the regulation is facially neutral, but contend the regulation is nonetheless subject to rigorous scrutiny because, even though it does "not in explicit terms seek to regulate interstate commerce, it does so nonetheless by its practical effect and design." *C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 394, 114 S. Ct. 1677, 128 L. Ed. 2d 399 (1994)*. The TMB, in turn, contends the challenged rules are not discriminatory, and **[*33]** thus not subject to rigorous scrutiny.[6] The TMB further maintains the rules withstand the lower level of scrutiny as Plaintiffs have not alleged facts sufficient to shown any burden imposed is "clearly excessive" in relation to the local benefits.

According to the TMB, the new rules are not discriminatory because "a Teladoc physician physically located in San Antonio advising a user in Dallas is no less inconvenienced by the requirement than a Teladoc physician in Oklahoma City." (Def. Mot. at 33). Plaintiffs respond by citing cases holding the mere fact that a regulation burdens some in-state commerce, as well as interstate commerce, does not insulate it from a *Commerce Clause* challenge. *See C & A Carbone, 511 U.S. at 391* (ordinance requiring processing of waste to be performed within limits of town "is no less discriminatory because in-state or in-town processors are also covered **[*34]** by the prohibition"); *Dean Milk Co. v. City of Madison, 340 U.S. 349, 354 n.4, 71 S. Ct. 295, 95 L. Ed. 329 (1951)* (striking down ordinance requiring all milk in city to be pasteurized within five miles of city lines, finding it was "immaterial that Wisconsin milk from outside the Madison area [was] subjected to the same proscription as that moving in interstate commerce"); *Six Kingdoms Enters., LLC v. City of El Paso, 2011 U.S. Dist. LEXIS 2114, 2011 WL 65864, at *8 (W.D. Tex. Jan.*

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[5] In addition, the Court notes that, even if the theories are contradictory, a litigant is permitted to offer alternative theories of liability.

[6] It is worth noting that the Fifth Circuit has characterized "the jurisprudence in the area of the dormant *Commerce Clause* [as], quite simply, a mess," based on the Supreme Court's admitted failure to "produce a readily discernable standard for distinguishing between statutes that have discriminatory effects and those that merely create incidental burdens." *Churchill Downs Inc. v. Trout, 589 F. App'x 233, 235 (5th Cir. 2014)* (citing *GMC v. Tracy, 519 U.S. 278, 298 n.12, 117 S. Ct. 811, 136 L. Ed. 2d 761 (1997))*.

10, 2011) (striking down ordinance regulating sale price of puppies, finding "[w]hile it is true that the low price also likely thwarts the sale of pets in El Paso from other parts of Texas, this does not change the fact that the ordinance discriminates against interstate commerce.").

Plaintiffs further argue, even if the challenged rules are not viewed as discriminatory in effect and design, the rules cannot withstand a *Commerce Clause* challenge under even the lesser standard. In support, Plaintiffs point to their allegations that Teladoc's business model, including obtaining and retaining national clients, depends on being able to provide telehealth in Texas without the requirement of conducting an in-person physical exam before treating patients. (Am. Compl. ¶ 144). Plaintiffs have further alleged the challenged rules do not provide local benefits because the current regulatory scheme mandates that physicians abide by standards of **[*35]** care which dictate when an in-person physical exam is necessary. Further, they have alleged that the current standard of care permits a physician to provide "on-call" services to patients of other physicians without an in-person physical exam. (*Id. ¶¶ 137-38*). Finally, Plaintiffs have alleged the challenged rules are affirmatively harmful to public health because they reduce access to affordable and convenient treatment. (*Id. ¶¶ 129-34*).

The Court finds Plaintiffs' allegations sufficient at this early stage of the litigation. Resolution of Plaintiffs' Commence Clause challenge is "one of degree," requiring the Court to determine "the nature of the local interest involved, and [] whether it could be promoted as well with a lesser impact on interstate activities." *Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970)*. This inquiry is inherently fact-intensive. *See* *Colon Health Centers of Am., LLC v. Hazel, 733 F.3d 535, 546 (4th Cir. 2013)* (reversing dismissal of dormant *Commerce Clause* claim because "[t]he *Pike* inquiry, like the discrimination test, is fact-bound" and declining to "attempt to forecast what further investigation may demonstrate."). Accordingly, the Court declines to dismiss Plaintiffs' *Commerce Clause* claim at this time.

IV. CONCLUSION

Accordingly, the Court hereby **DENIES** Defendants' Amended Motion to Dismiss (Clerk's Dkt. #64).

SIGNED on December 14, 2015.

/s/ Robert L. Pitman **[*36]**

ROBERT L. PITMAN

UNITED STATES DISTRICT JUDGE

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Ford Motor Co. v. Titan Enter.

United States District Court for the Central District of California

December 18, 2015, Decided; December 18, 2015, Filed

2:14-cv-07701-RSWL (JCx)

Reporter
2015 U.S. Dist. LEXIS 169664 *

FORD MOTOR COMPANY, Plaintiff, v. TITAN ENTERPRISE INC., Defendant.

Prior History: *Ford Motor Co. v. Titan Enter., 2014 U.S. Dist. LEXIS 174399 (C.D. Cal., Dec. 17, 2014)*

Core Terms

undisputed, discounts, exported, In-Service, no-export, affirmative defense, damages, summary judgment motion, summary judgment, no evidence, genuine, parties, rule of reason, material fact, anticompetitive

Counsel: **[*1]** For Ford Motor Company, Plaintiff: Jennifer B Wieland, LEAD ATTORNEY, Timothy J Riemann, PRO

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For Titan Enterprise Inc, Defendants: Barry S Jorgensen, Barry Jorgensen Law Offices, Diamond Bar, CA.

Judges: HONORABLE RONALD S.W. LEW, Senior United States District Judge.

Opinion by: RONALD S.W. LEW

Opinion

ORDER Re: Plaintiff's Motion for Summary Judgment, or, in the Alternative, Partial Summary Judgment [57]

Currently before the Court is Plaintiff Ford Motor Company's ("Plaintiff") Motion for Summary Judgment, or, in the Alternative, Partial Summary Judgment [57] ("Motion").

The Court, having reviewed all papers submitted and pertaining to Plaintiff's Motion [57], **NOW FINDS AND RULES AS FOLLOWS**: The Court **GRANTS** Plaintiff's Motion for Summary Judgment [57] in its entirety.

I. FINDINGS OF FACT

1. Plaintiff Ford, a Delaware corporation with its principal place of business in Michigan, manufactures new motor vehicles bearing the Ford and Lincoln brand names. Joint Stip. Facts ("Stip. Facts") PP 1, 6, ECF No. 43 (undisputed).[1]

2. Defendant Titan Enterprise Inc. ("Defendant") is a California corporation with its principal place of business in California. Id. at P 2 (undisputed).

3. The Court has subject matter jurisdiction over this Action under *28 U.S.C. § 1332*, and personal jurisdiction over Defendant. Id. at PP 3-4 (undisputed).

4. Venue is proper in the Central District of California pursuant to *28 U.S.C. § 1391(a)*. Id. at P 5 (undisputed).

3. Plaintiff offers incentive programs to qualified individuals and businesses to, among **[*3]** other things, encourage high-volume purchases of Ford vehicles. Id. at P 7 (undisputed).

4. One such incentive program is Plaintiff's Competitive Price Allowance Program ("CPA"), through which Plaintiff provides discounts to qualified high-volume purchasers of Ford vehicles through the Ford Fleet Program. Id. at P 8 (undisputed).

5. On September 18, 2013, Plaintiff and Defendant voluntarily executed a CPA Contract for the 2014 Program Year. Id. at P 9 (undisputed).

6. Pursuant to the CPA Contract, Plaintiff provided discounts to Defendant in exchange for Defendant's purchase of large numbers of Ford vehicles (the "Vehicles" or "Ford Vehicles"). Id. at P 13 (undisputed). Defendant agreed that, to be eligible for any discounts, the Vehicles must be operated solely in the United States and could not be exported. Id. at P 14 (undisputed).

7. The export prohibition is found in several of the CPA Contract's provisions, including:

a. The "Eligible Vehicles" provision: "Vehicles must be registered solely in the United States and must be operated in the United States." Id. at P 14a (citing CPA Contract, p. 4) (undisputed);

b. The "In-Service Requirements" provision: "The minimum in-service requirement for commercial vehicles is 12 months or 20,000 **[*4]** miles (whichever comes first). Vehicles must be registered and operated solely in the 50 United States." Id. at P 14b (citing CPA Contract, p. 4) (undisputed).

8. Plaintiff told Roger Catoire, an employee of Defendant who served as Defendant's primary negotiator of the CPA Contract, that pursuant to the "In-Service Requirements," Vehicles purchased under the CPA Contract must be operated in the United States. Id. at PP 12, 15 (undisputed). Mr. Catoire understood that this meant that the vehicles could not be exported. Id. (undisputed).

9. In 2014, Defendant purchased 185 Vehicles under the CPA Contract. Id. at P 16 (undisputed).

10. Plaintiff fulfilled its obligations and duties owed to Defendant under the CPA Contract by, among other things, manufacturing, delivering, and discounting the Vehicles purchased under the CPA Contract. Id. at P 17 (undisputed).

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[1] The parties stipulated **[*2]** in their Joint Stipulated Facts that "no facts other than the facts contained [in the Stipulated Facts] may be submitted or referenced in support of or in opposition to any motion for summary judgment." Stip. Facts 2:3-5. Defendant concedes in its Statement of Genuine Disputes in Opposition to Plaintiff's Motion for Summary Judgment [60] ("Statement of Disputes") that "all facts submitted in [Plaintiff's] Statement of Uncontroverted Facts were stipulated to by" Plaintiff and Defendant. Def.'s Statement Disputes 1:25-2: 1. Given this concession and the language of the parties Joint Stipulated Facts [43] that the parties "jointly stipulate to the following facts," the Court finds that each of the facts contained in the Stipulated Facts is undisputed.

11. Defendant received discounts from Plaintiff totaling $823,000 for the Vehicles purchased under the CPA Contract. Id. at P 18 (undisputed).

12. Defendant did not operate the Vehicles solely in the United States. Id. at P 19 (undisputed). Less than 12 months after receiving the Vehicles, Defendant exported to China all of the Vehicles purchased under the CPA Contract. Id. at P 21 (undisputed).

13. Defendant **[*5]** did not comply with the "12-month or 20,000 mile" "In-Service Requirements" provision under the CPA Contract. Id. at P 20 (undisputed).

14. Plaintiff demanded that Defendant return the $823,000 in discounts it received pursuant to the CPA Contract. Id. at P 22 (undisputed).

15. Defendant refused to return any amount to Plaintiff. Id. (undisputed).

16. Defendant agrees that the CPA Contract is legally binding and valid, except for the export prohibition. Id. at P 23 (undisputed).

II. LEGAL STANDARD

Federal Rule of Civil Procedure 56 states that a "court shall grant summary judgment" when the movant "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*. "The party moving for summary judgment has the initial burden of proof to show "no genuine dispute as to any material fact." *Fed. R. Civ. P. 56(a)*; *In re Oracle Corp. Securities Litigation, 627 F.3d 376, 387 (9th Cir. 2010)*. "A party asserting that a fact cannot be . . . genuinely disputed must support the assertion by: citing to particular materials in the record, including . . . stipulations." *Fed. R. Civ. P. 56(c)(1)(A)*. "In determining any motion for summary judgment . . ., the Court may assume that the material facts as claimed and adequately supported by the moving party are admitted to exist without controversy except to the extent that such material **[*6]** facts are (a) included in the 'Statement of Genuine Disputes' and (b) controverted by declaration or other written evidence filed in opposition to the motion." *Local Rule 56-3*.

Where the non-moving party bears the burden of proof at trial, the moving party need only prove that there is an absence of evidence to support the non-moving party's case. *In re Oracle Corp., 627 F.3d at 387*. If the moving party meets this burden, the burden then shifts to the non-moving party to produce admissible evidence showing a triable issue of fact. *Id*.; *Nissan Fire & Marine Ins. Co. v. Fritz Cos., 210 F.3d 1099, 1102-03 (9th Cir. 2000)*; see *Fed. R. Civ. P. 56(a)*.

III. BACKGROUND

A. Factual Background

Plaintiff is a motor vehicle designer and manufacturer. First Am. Compl. ("FAC") P 7, ECF No. 23; Stip. Facts P 1. Plaintiff offers incentive programs, such as its Competitive Price Allowance ("CPA") Program, which "provides discounts or credits to qualified high-volume purchasers of Ford vehicles through the Ford Fleet Program." FAC P 9; Stip. Facts PP 7-8. On September 18, 2013, Plaintiff and Defendant executed a CPA Contract.[2] FAC P 10; Stip. Facts P 9. Under the CPA Contract, Plaintiff agreed to provide discounts to Defendant in exchange for Defendant's purchase of large numbers of Ford vehicles. FAC P 13; Stip. Facts P 13. The CPA Contract states: "Titan **[*7]** Enterprise Inc. must acquire 250 units during the course of the program year [i.e., the calendar year]. In the event this volume has not been reached, you will be required to reimburse Ford all or a portion of the CPA funds paid."

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[2] The parties filed the CPA Contract under seal [56].

FAC P 14 (citing CPA Contract, p. 3). The CPA Contract also contained terms[3] requiring that, in order to be eligible for any discounts, Defendant's purchased vehicles must be operated in the United States and could not be exported. FAC P 15; Stip. Facts PP 14-15. Specifically, the "In-Service Requirements" provision states: "The minimum in-service requirement for commercial vehicles is 12 months or 20,000 miles (whichever comes first). Vehicles must be registered and operated solely in the 50 United States."[4] Stip. Facts P 14b (citing CPA Contract, p. 4, "In-Service Requirements").

In 2014, Defendant purchased over 185 vehicles from Ford ("Ford Vehicles" or "Vehicles"). FAC PP 18-19; Stip. Facts P 16. Defendant received combined discounts totaling $823,000. FAC PP 18-19; Stip. Facts P 18.

In May 2014, "[Plaintiff's] personnel verified that dozens of Ford Explorers purchased by [Defendant] pursuant to the CPA Contract were [] found at a port of entry in mainland China." FAC P 20; see Stip. Facts P 21. On June 17, 2014, Jim Chen, president of Defendant Titan Enterprise Inc., allegedly "admitted to [Plaintiff] that he exported to China some or all of the Ford Explorers [Defendant] purchased pursuant to the CPA Contract." FAC P 23; Stip. Facts P 21. Defendant also allegedly failed to purchase at least 250 vehicles, as required by the CPA Contract. FAC P 21. The parties stipulated that Defendant did not comply with the "In-Service Requirements" provision of the CPA Contract. Stip. Facts P 20.

B. Procedural Background

On October 3, 2014, Plaintiff filed its Complaint [1], alleging claims for breach of contract and fraud. On January 27, 2015, Plaintiff timely filed its FAC [23], which amended the Complaint to state only a claim for breach of contract. **[*9]**

On February 17, 2015, Defendant filed a Motion to Dismiss [20] under *Federal Rule of Civil Procedure 12(b)(6)*, which this Court denied [32].

On May 7, 2015, Defendant filed its Answer to the First Amended Complaint [36]. In its Answer, Defendant asserted twelve affirmative defenses.

On August 27, 2015, the parties filed a Joint Motion for Order: (1) Modifying the Scheduling Order, and (2) Granting Leave to Amend Defendant's Answer to First Amended Complaint [39]. The Court granted Defendant leave to amend its Answer to withdraw all affirmative defenses except the defense that the no-export clause in the CPA Contract is an undue restraint of trade. Order 2:4-7, ECF No. 40. The Court also granted the parties' joint stipulation that only facts contained in the Joint Stipulated Facts may be relied on for purposes of summary judgment. Id. at 2:9-13.

On September 8, 2015, the parties filed their Joint Stipulated Facts [43]. Exhibit 1 to the Stipulated Facts [56] contains the parties' confidential CPA Contract, which was filed under seal. On September 15, 2015, Defendant filed its Amended Answer to the First Amended Complaint [51], which asserted its sole affirmative defense that the no-export clause of the CPA Contract is an undue **[*10]** restraint of trade.

On October 16, 2016, Plaintiff filed the present Motion [57] and Statement of Uncontroverted Facts [58]. The Opposition [59], Statement of Genuine Disputes [60], and Reply [61] were timely filed. The hearing was set for December 1, 2015 [57], and the matter was taken under submission on November 23, 2015 [62].

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[3] For example, the "Eligible Vehicles" provision states: "Vehicles must be registered solely in the United States and must be operated in the United States." Stip. Facts P 14a (citing CPA Contract, p. 4).

[4] The CPA Contract also provides for the possibility of fleet incentive chargebacks if the "In-Service Requirements" are violated. **[*8]** See CPA Contract, p. 4.

IV. DISCUSSION

A. Breach of Contract Claim

Under California law, the essential elements of a claim for breach of contract are (1) the existence of a contract, (2) Plaintiff's performance or excuse for nonperformance, (3) Defendant's breach, and (4) resulting damages to Plaintiff. *San Mateo Union High Sch. Dist. v. Cnty. of San Mateo, 213 Cal. App. 4th 418, 152 Cal. Rptr. 3d 530, 548 (Cal. Ct. App. 2013)*; *Greenwich Ins. Co. v. Rodgers, 729 F. Supp. 2d 1158, 1163 (C.D. Cal. 2010)*.

"[T]he measure of damages . . . is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom." *Cal. Civ. Code § 3300*. The aim of contract damages is to put the injured party in as good a position as he or she would have been had performance been rendered as promised. *PAI Corp. v. Integrated Science Solutions, Inc., No. 06-CV-05349-JCS, 2015 U.S. Dist. LEXIS 63045, 2015 WL 2265671, at *5 (N.D. Cal. May 13, 2015)*. "Where the fact of damages is certain, the amount of damages need not be calculated with absolute certainty." *GHK Associates v. Mayer Group, Inc., 224 Cal. App. 3d 856, 274 Cal. Rptr. 168, 179 (Cal. Ct. App. 1990)*.

Here, the parties explicitly stipulated to **[*11]** each of the elements for breach of contract except damages. First, the parties voluntarily entered into a valid CPA Contract whereby Plaintiff agreed to provide discounts to Defendant in exchange for Defendant's purchase of large numbers of Ford Vehicles and adherence to the terms of the CPA Contract. Stip. Facts PP 9, 23. Defendant agreed that, to be eligible for any discounts, the Vehicles had to be operated in the United States and could not be exported. *Id. at P 14*. Defendant stipulates that, except for the export provision, the CPA Contract is legally binding and valid. *Id. at P 23*.

Second, Plaintiff fulfilled its obligations under the CPA Contract by, among other things, discounting the Vehicles Defendant purchased pursuant to the CPA Contract. *Id. at P 17*.

Third, the "In-Service Requirements" provision of the CPA Contract required Defendant to operate the Vehicles solely in the 50 United States, and Defendant stipulated that it understood that the "In Service Requirements" provision of the CPA Contract meant that the vehicles could not be exported. *Id. at PP 14-15*. Thus, Defendant breached the CPA Contract when it did not operate the Ford Vehicles solely in the United States, as required by the minimum "In Service Requirements" **[*12]** provision of the CPA Contract. *Id. at PP 19-20*.

As to damages, Plaintiff demands the return of the $823,000 in discounts. *Id. at P 22*. The Court finds that $823,000 will put Plaintiff in as good a position had performance been rendered as promised. See *Cal. Civ. Code § 3300*; *PAI Corp., 2015 U.S. Dist. LEXIS 63045, 2015 WL 2265671, at *5*. The parties stipulate that Defendant received $823,000 in discounts for the Ford Vehicles Defendant purchased pursuant to the CPA Contract. Stip. Facts P 18. Defendant received this discount in exchange for its adherence to certain restrictions, including a minimum purchase requirement and a prohibition on exporting. Since Defendant did not comply with the restrictions, Defendant is not entitled to the discount. Moreover, the CPA Contract provides for the possibility of fleet incentive chargebacks if the "In-Service Requirements" are violated. See CPA Contract, p. 4. In this case, the fleet incentive amounted to $823,000. Because Defendant failed to comply with the conditions of the CPA Contract, Defendant is required to pay the full price for the Ford Vehicles to put Plaintiff in the same position had Defendant performed under the CPA Contract as promised.

As to Plaintiff's breach of contract claim, Plaintiff shows that there is no genuine dispute as to any **[*13]** material fact, and Plaintiff is entitled to judgment as a matter of law. Accordingly, the Court **GRANTS** Plaintiff's Motion as to its claim for breach of contract.

B. Undue Restraint of Trade Affirmative Defense

Section 1 of the Sherman Act prohibits "[e]very contract, combination . . . or conspiracy, in restraint of trade." *15 U.S.C. § 1*. Under ***antitrust law***, "[r]estraints imposed by agreement between competitors have traditionally been denominated as horizontal restraints, and those imposed by agreement between firms at different levels of distribution as vertical restraints." *Bus. Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 730, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988)*. A vertical nonprice restraint is judged under the "rule of reason." *Id. at 735-36*.

The rule of reason "requires the antitrust plaintiff to demonstrate that a particular contract or combination is in fact unreasonable and anticompetitive." *California v. Safeway, Inc., 651 F.3d 1118, 1133 (9th Cir. 2011)* (quoting *Texaco Inc. v. Dagher, 547 U.S. 1, 5, 126 S. Ct. 1276, 164 L. Ed. 2d 1 (2006))* (internal quotation marks omitted). "Under this rule, the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 885, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007)* (quoting *Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977))*. Factors to take into account include (1) "specific information about the relevant business," (2) "the restraint's history, nature, and effect," and (3) "[w]hether the businesses involved have **[*14]** market power." *Id. at 885-86* (internal citations omitted).

Here, on Plaintiff's Motion for Summary Judgment, Defendant bears the burden of proof on its affirmative defense. *In re Oracle Corp., 627 F.3d at 387*. The Court finds that Plaintiff has shown that there is no evidence to support Defendant's affirmative defense because the Joint Stipulated Facts[5] contain no evidence that the CPA Contract created a manufacturer-dealer like relationship between Plaintiff and Defendant or that the no-export clause is anticompetitive. See *id*.; *Safeway, 651 F.3d at 1133*. Moreover, Defendant has not met its burden of producing admissible evidence showing a triable issue of fact. *In re Oracle Corp., 627 F.3d at 387*.

In its Opposition, Defendant makes two arguments. Defendant first argues that the CPA Contract cannot be construed as a prohibition on exporting the Vehicles. Def.'s Opp'n 9:9-12. This argument is misplaced. A plain reading of CPA Contract clearly states the vehicles must be operated in the United States, and therefore cannot be exported. The CPA Contract term requiring that "Vehicles must be registered and operated solely in the 50 United States" is the equivalent of a prohibition on the Vehicles' export outside the United States.

Defendant's second argument is that the no-export clause cannot be reasonable because Defendant's exporting the Vehicles does not compete with or injure Plaintiff. Def.'s Opp'n 9:18-21. However, in order to survive summary judgment, Defendant must present admissible evidence showing a triable issue of fact that the no-export clause has an anticompetitive effect, not that Defendant's violation of the no-export clause did not compete with Plaintiff. It does not follow **[*16]** that because Plaintiff did not sustain damages due to Defendant's exporting the Vehicles, the no-export clause has adverse anticompetitive effects, and is therefore, an unreasonable restraint of trade.

Under the rule of reason, Plaintiff has shown that there is no evidence that the CPA Contract created a manufacturer-dealer or a broker-like relationship between Plaintiff and Defendant. The CPA Program provides discounts or credits to high-volume purchasers of Ford vehicles, in exchange for agreeing to the restriction that the vehicles must be operated in the United States and could not be exported. Stip. Facts PP 7-8, 14. The Stipulated Facts provide no evidence that the CPA Program intended to place the Vehicles for resale into the stream of commerce. Accordingly, there is no evidence that the CPA Contract created a manufacturer-dealer or a broker-like relationship between Plaintiff and Defendant.

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[5] The parties stipulated that "no facts other than the facts contained [in the Joint Stipulated Facts] may be submitted or referenced in support of or in opposition to any motion for summary judgment." Stip. Facts 2:3-5. The Stipulated Facts makeno mention of Defendant's affirmative defense. Only paragraphs 15 and 23 are relevant to the affirmative defense. These paragraphs state, in relevant part: "Ford personnel told Mr. Catoire that, pursuant to the 'In-Service Requirements,' vehicles purchased pursuant to the CPA Contract had to be operated in the United States, and Mr. Catoire understood that **[*15]** this meant the vehicles could not be exported," and "Except for the export prohibition, [Defendant] agrees that the CPA Contract is a legally binding and valid contract." Stip. Facts PP 15, 23.

Second, even if such a relationship was shown, and assuming the "In-Service Requirements" provision constitutes a restraint, the restraint would be a vertical restraint subject to the "rule of reason." *Bus. Electronics Corp., 485 U.S. at 735-36*. Under the "rule of reason," Plaintiff has shown that there is no evidence to support that **[*17]** the no-export provision "should be prohibited as imposing an unreasonable restraint on competition." *Leegin Creative Leather Prods., Inc., 551 U.S. at 885*. The Stipulated Facts make no mention of any relevant factors or circumstances suggesting that the no-export clause has any anticompetitive effect. As Plaintiff notes, Defendant has not (1) defined the relevant market, (2) shown that Plaintiff has any market power in any relevant market, or (3) shown how the "In-Service Requirements" have or possibly could restrict output and raise prices to consumers in the United States. Pl.'s Mot. 7:15-18.

Accordingly, the Court finds that (1) Plaintiff has met its burden to prove that there is an absence of evidence to support Defendant's affirmative defense, and (2) Defendant has not met its burden to produce admissible evidence showing a triable issue of fact. For these reasons, Plaintiff's Motion [57] is **GRANTED** and the affirmative defense **DISMISSED**.

V. CONCLUSION

Based on the foregoing, the Court **GRANTS** Plaintiff's Motion for Summary Judgment [57] in its entirety. Judgment in favor of Plaintiff Ford Motor Company and against Defendant Titan Enterprise Inc. shall be entered accordingly.

IT IS HEREBY ORDERED that Plaintiff shall submit a proposed **[*18]** judgment within ten (10) days of the date of this Order.

IT IS SO ORDERED.

DATED: December 18, 2015

/s/ Ronald S.W. Lew

HONORABLE RONALD S.W. LEW

Senior U.S. District Judge

Palms & Sands Owners Ass'n v. Bank of Am., N.A.

Court of Appeal of California, Fourth Appellate District, Division One

December 18, 2015, Opinion Filed

D068681

Reporter
2015 Cal. App. Unpub. LEXIS 9158 *

PALMS & SANDS OWNERS ASSOCIATION, INC., Plaintiff and Appellant, v. BANK OF AMERICA, N.A. et al., Defendants and Respondents.

Notice: NOT TO BE PUBLISHED IN OFFICIAL REPORTS. *CALIFORNIA RULES OF COURT, RULE 8.1115(a)*, PROHIBITS COURTS AND PARTIES FROM CITING OR RELYING ON OPINIONS NOT CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED, EXCEPT AS SPECIFIED BY *RULE 8.1115(b)*. THIS OPINION HAS NOT BEEN CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED FOR THE PURPOSES OF *RULE 8.1115*.

Subsequent History: Modified by *Palms & Sands Owners Ass'n v. Bank of Am., N.A., 2015 Cal. App. Unpub. LEXIS 9455 (Cal. App. 4th Dist., Dec. 29, 2015)*

Related proceeding at *Palms & Sands Owners Ass'n v. Bank of Am., N.A., 2017 Cal. App. Unpub. LEXIS 6303 (Cal. App. 4th Dist., Sept. 15, 2017)*

Prior History: [*1] APPEAL from a judgment of the Superior Court of Riverside County, No. RIC1207056, Thomas A. Peterson, Judge and David M. Chapman, Judge.

Disposition: Affirmed.

Core Terms

unfair, trial court, leave to amend, foreclosure, unjust enrichment, cause of action, foreclose, trust deed, Respondents', Declaration, restitution, demurrer, lender, consumer, amend, cases, homeowners association, sustain a demurrer, business practice, unpaid assessment, public policy, Residential, courts, paying, liens, loans

Counsel: Catanzarite Law Corporation, Kenneth J. Catanzarite, Nicole M. Catanzarite-Woodward, and Brandon E. Woodward, for Plaintiff and Appellant.

Bryan Cave, Stuart W. Price, Andrea N. Winternitz and Sean David Muntz, for Defendants and Respondents.

Judges: HALLER, J.; MCCONNELL, P. J., O'ROURKE, J. concurred.

Opinion by: HALLER, J.

Opinion

Bank of America, N.A. and ReconTrust Company (Recon) (together, Respondents) successfully demurred to the first amended complaint of the Palms & Sands Owners Association, Inc. (the Association). On appeal, the

Association contends the trial court erred by (1) sustaining the demurrer without leave to amend, (2) denying the Association's motion for leave to amend, (3) entering judgment in favor of Respondents while the motion for leave to amend was still pending, and (4) sustaining certain of Respondents' evidentiary objections. We reject these contentions and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The Development and Association

"Palms & Sands" is a common interest development in Rancho Mirage, California. Sixteen of its 71 fee simple parcels **[*2]** are improved with residential duplexes (Residential Units); one parcel is improved with access roads, lawn area, a pool and pool house, and a laundry facility, all of which are used and shared by the owners in common.

The Association manages Palms & Sands under a Declaration of Covenants, Conditions, Restrictions and Easements (the Declaration) that governs each property owner within the development. The Declaration defines "owner(s)" as "[t]he parties . . . holding a recorded fee simple interest in a Lot . . . . 'Owner' does not include any party having an interest in a Lot merely as security for the performance of an obligation."

The Association maintains the common area roads, parking lot, pool, yard, and buildings; pays property taxes on the common lots; provides trash pickup for the Residential Units; maintains insurance coverage for common area and Residential Unit building structures; and provides water service, general maintenance, and management services.

The Declaration authorizes the Association to require each owner to pay regular and special assessments "for improvement and maintenance of the Common Area(s), administration of the Property, and to promote the recreation, safety, **[*3]** and welfare for the common good of all the owners." Under this authority, the Association levied a regular monthly assessment to pay for the services described in the preceding paragraph. Under the Declaration, an owner's acceptance of a deed to a lot within the development constitutes the owner's agreement to pay the assessments, which are "the personal obligations of the owner . . . ."

If an owner fails to pay an assessment, the Declaration authorizes the Association to record a lien against that owner's lot. "In addition to all other legal rights and remedies," the Association may sue the owner to collect the unpaid assessments or foreclose on the lien.

Unit 8

In December 2002, Ron Bailey purchased Unit 8 at Palms & Sands. In February 2005, he borrowed $129,000 from Countrywide Home Loans, Inc. (Countrywide Loans). The loan was secured by a first deed of trust that named Recon as trustee. Countrywide Bank assigned its interests in the first deed of trust to CitiMortgage, Inc. (Citi) in 2005.

In July 2005, Bailey obtained a $51,000 home equity line of credit from Countrywide Bank, N.A. The line of credit was secured by a second deed of trust that also named Recon as Trustee. In 2013, **[*4]** Countrywide Bank assigned its interests in the second deed of trust to Bank of America.

As a result of these transactions, Citi holds the first deed of trust; Bank of America holds the second deed of trust; and Recon is trustee of both deeds of trust. Bank of America is the servicer of both loans.

At times not specified in any filed pleading, Bailey defaulted on his loans, stopped paying the Association's monthly assessments, and died. The Association initially opened an estate for Bailey, but his heirs had no interest in pursuing it because Unit 8 was then valued at less than $60,000 while its encumbrances exceeded $200,000.

The Complaints

In May 2012, the Association sued Bailey and other Residential Unit owners on a variety of legal theories to recover unpaid assessments. In December 2013, the Association amended its complaint to add Respondents as defendants on four causes of action: breach of oral and written contract, breach of implied contract, declaratory relief, and unjust enrichment. The Association alleged that notwithstanding Respondents' knowledge that Bailey (and his estate) had failed to pay Association assessments, Respondents "strategic[ally]" and "wrongful[ly]" delayed foreclosing on Unit 8 to **[*5]** allow market conditions to improve; in the meantime, Respondents enjoy the benefits the Association provides in maintaining and insuring Unit 8, yet avoid paying the monthly assessments Respondents would incur if they were to acquire title to Unit 8 by foreclosure.

Bank of America moved for judgment on the pleadings and Recon demurred. The trial court dismissed the Association's contract-based claims, but granted leave to amend as to the unjust enrichment and declaratory relief claims.

In April 2014, the Association filed a first amended complaint that, as relevant here, sought to recover Bailey's unpaid assessments on Unit 8 from Respondents under unjust enrichment and declaratory relief grounds.

Respondents demurred. While the demurrer was pending, the Association moved for leave to file a second amended complaint adding a cause of action against Respondents for violation of California's Unfair Competition Law (UCL) (*Bus. & Prof. Code, § 17200*).[1] The Association supported its motion with a declaration from the Association's proposed banking industry expert, who opined Respondents' strategic delay in foreclosing on Unit 8 constituted an unfair business practice.

The Trial Court's Rulings

At the hearing on Respondents' demurrer, the trial court announced its tentative decision to sustain the demurrer without leave to amend. The court reasoned that although Respondents were entitled to foreclose, they were not obligated to do so and, thus, had not been unjustly enriched. The Association's counsel requested the trial court immediately consider its motion for leave to amend, which was scheduled to be heard a few weeks later. The court responded it had read the expert's declaration and thought amending to allege a UCL violation "might be, perhaps, a good way for the [Association] to go," but the court was not in a position to accelerate the hearing on the motion for leave to amend.[2] The court adopted its tentative ruling as final on July 9, 2014.

On July 11, Respondents served a notice of ruling and attached a trial court order (1) sustaining the demurrer without leave to amend, (2) dismissing the claims against Respondents with prejudice, and (3) stating judgment shall be entered in Respondents' favor.

On July 15, the Association objected to the notice of ruling "in that it asserts [Respondents] were dismissed with prejudice" even though the Association's motion for leave to amend a new claim against them was still pending. On

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[1] The proposed second amended complaint alleged Bailey **[*6]** stopped paying assessments in February 2010 and died in March 2011. It further alleged the Unit 8 assessments were $14,000 in arrears as of April 2014. As discussed below, the second amended complaint was never filed.

[2] The court's full explanation was as follows: "Well, I read the declaration of the banker expert, if you will. I'm not in a position to advance that motion to today and grant the motion to amend **[*7]** to allege that cause of action. I mean, I looked at it and I thought about it, and personally I thought it might be, perhaps, a good way for the plaintiff to go, but I wasn't sure. And I understand the plaintiff's position. They're sitting there, they're not getting their money, and they want it. And I—I just can't, in my own mind, come up with some legal theory as to how they are going to get it. [¶] . . . [¶] . . . You go ahead and come in here on July 28, and you can argue what you want to us at that time."

July 18, the Association filed a motion for reconsideration on the same basis. Respondents opposed the Association's various requests for relief and objected to the expert's declaration.

On July 28, **[*8]** the trial court entered a judgment dismissing Respondents with prejudice. The same day, the court continued the hearing on the Association's motion for leave to amend so it could be heard in conjunction with the motion for reconsideration.

On August 18, the trial court issued tentative rulings denying the Association's motions for leave to amend and for reconsideration. The trial court denied leave to amend on the basis the Association "cited no authority that a lender is required to foreclose on a deed of trust when a borrower defaults. Foreclosure is just one of the avenues open to the lender in the event the borrower defaults on the underlying obligation. [¶] Objections to declaration of [the proposed banking expert] are sustained."

The trial court explained it was denying the motion for reconsideration because the court lacked jurisdiction by virtue of having already entered a judgment dismissing Respondents, but further explained it would have denied the motion in any event for the same reasons it denied the motion for leave to amend.

The Association did not request oral argument and the court adopted its tentative ruling as final on August 19, 2014.

DISCUSSION

I. *Demurrer*

The Association **[*9]** contends the trial court erred by sustaining Respondents' demurrer to the unjust enrichment claim. The Association does not challenge the ruling as to the declaratory relief claim.

A. *Standard of Review*

"In reviewing a judgment following the sustaining of a demurrer without leave to amend, we decide de novo whether the complaint states facts sufficient to state a cause of action." (*Bower v. AT&T Mobility, LLC (2011) 196 Cal.App.4th 1545, 1552, 127 Cal. Rptr. 3d 569*.) "We treat the demurrer as admitting all facts properly pleaded, but we do not assume the truth of contentions, deductions or conclusions of law." (*Ibid.*) We may also consider documents attached to the complaint and matters subject to judicial notice.[3] (*Hoffman v. Smithwoods RV Park, LLC (2009) 179 Cal.App.4th 390, 400, 102 Cal. Rptr. 3d 72*.) "A reviewing court will affirm a judgment based on the sustaining of a demurrer on any properly supported ground, regardless of the trial court's reason for its ruling." (*Bower, at p. 1552*.) "'However, it is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory.'" (*Ibid.*)

B. *Analysis*

Our court has repeatedly held ""[t]here is no cause of action in California for unjust enrichment."" (*Levine v. Blue Shield of California (2010) 189 Cal.App.4th 1117, 1138, 117 Cal. Rptr. 3d 262*, quoting *Durell v. Sharp Healthcare (2010) 183 Cal.App.4th 1350, 1370, 108 Cal. Rptr. 3d 682* (*Durell*); see *Melchior v. New Line Productions, Inc. (2003) 106 Cal.App.4th 779, 793, 131 Cal. Rptr. 2d 347* ["'The phrase "Unjust Enrichment" does not describe a theory of recovery, but an effect: the result of a failure to make restitution under circumstances where it is equitable to do so.'"].) Thus, the Association's allegation that Respondents have been unjustly enriched by their strategic delay in foreclosing on Unit 8 does not state a cause of action. (*Levine, at p. 1138*.) However, because "[u]njust enrichment is synonymous with restitution" (*Durell, at p. 1370*), on review of an order sustaining a demurrer we may assess whether the Association's allegations state a cause of action that may give rise to a right to restitution. (See *McBride v. Boughton (2004) 123 Cal.App.4th 379, 387-388, 20 Cal. Rptr. 3d 115* (*McBride*).)

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[3] We deny the Association's motion for judicial notice. The documents attached as Exhibits A through C of the motion are already in the appellate record, and the document attached as Exhibit D postdates the judgment and is not necessary **[*10]** for our determination of the issues on appeal.

"'Under the law of restitution, "[a]n individual is required to make restitution if he or she is unjustly enriched at the expense of another. [Citations.] A person is enriched if the person receives a benefit at another's expense. [Citation.]" [Citation.] However, "[t]he fact that one person benefits another is not, by itself, sufficient to require restitution. The person receiving the benefit is required to make restitution **[*11]** only if the circumstances are such that, as between the two individuals, it is *unjust* for the person to retain it."'" (*Durell, supra, 183 Cal.App.4th at p. 1370*.) "There are several potential bases for a cause of action seeking restitution. For example, restitution may be awarded in lieu of breach of contract damages when the parties had an express contract, but it was procured by fraud or is unenforceable or ineffective for some reason. [Citations.] Alternatively, restitution may be awarded where the defendant obtained a benefit from the plaintiff by fraud, duress, conversion, or similar conduct. . . . [Citations.] In such cases, where appropriate, the law will imply a contract (or rather, a quasi-contract), without regard to the parties' intent, in order to avoid unjust enrichment." (*McBride, supra, 123 Cal.App.4th at p. 388*, fn. omitted.)

The Association has not alleged facts establishing it is entitled to restitution from Respondents. It has not alleged the existence of a contract between it and Respondents that was procured by fraud or was otherwise invalidated. (*McBride, supra, 123 Cal.App.4th at p. 388*.) Instead, the only contract the first amended complaint identifies is the Declaration, which expressly excludes lenders from the definition of owners responsible for paying assessments.

Nor has the **[*12]** Association identified fraudulent or other untoward conduct by Respondents that would render their refusal to foreclose or pay assessments unjust. Although the Association alleges it has incurred expenses in maintaining the development's common areas and in insuring the collateral for Respondents' loans (Unit 8), we are not persuaded it would be unjust for Respondents to retain those benefits.

The Association argues Respondents are unjustly enriched because their "benefit will never need to be repaid because when they finally decide market conditions are right, their foreclosure wipes out the unpaid [Association] fees so there is no reimbursement." This argument is unavailing for several reasons. First, the Association ignores the fact Bailey (and his estate) are primarily responsible for the assessments. Even if Respondents foreclose on Unit 8, Bailey's underlying contractual obligation to pay the assessments will survive foreclosure as the foreclosure only extinguishes junior liens, not the contractual obligations secured by them. (See *Diamond Heights Village Assn., Inc. v. Financial Freedom Senior Funding Corp. (2011) 196 Cal.App.4th 290, 301, 126 Cal. Rptr. 3d 673* (*Diamond Heights*).)

Second, the Association is speculating regarding Respondents' motives and is assuming Respondents' eventual foreclosure and sale **[*13]** of Unit 8 would not yield sufficient proceeds to reimburse the Association for Bailey's unpaid assessments. Moreover, the Association cites no authority, and we are aware of none, that requires the holder of a deed of trust to foreclose at a particular time so that a homeowners association can replace a nonpaying owner with a paying one. To the contrary, lenders are generally entitled to foreclose if and when they choose. (See *Sierra-Bay Fed. Land Bank Assn. v. Superior Court (1991) 227 Cal.App.3d 318, 334-335, 277 Cal. Rptr. 753* ["in this state a commercial lender is privileged to pursue its own economic interests and may properly assert its contractual rights"].)

Third, it is unclear that Respondents have received or ever will receive a benefit at the Association's expense. In light of the significant amount of debt encumbering Unit 8-$200,000 compared to its alleged value of $60,000—the only entity likely to benefit from the Association's efforts is the holder of the first deed of trust (nonparty Citi).

Finally, and most fundamentally, the Association's grievance is not so much with Respondents as it is with California's lien priority scheme. That is, although the Association is entitled to record a lien of its own against Unit 8 to secure Bailey's unpaid assessments, that lien would **[*14]** be junior to the first and second deeds of trust and would be extinguished in the event of a foreclosure on either senior lien. (*Civ. Code, § 5675* [homeowners association assessments become lien on owner's separate interest when association records notice of delinquent assessment with county recorder]; *Diamond Heights, supra, 196 Cal.App.4th at p. 301* [condominium assessment liens follow California's "'first in time, first in right'" lien priority scheme]; *Dover Mobile Estates v. Fiber Form Prods., Inc. (1990) 220 Cal.App.3d 1494, 1498, 270 Cal. Rptr. 183* ["Liens which attach after execution of the foreclosed trust deed are extinguished. The purchaser at the trustee sale therefore takes title free of those junior or subordinate liens."].) The Association is not required to wait for senior lienholders to foreclose on their liens; it could foreclose on its own lien first. (See *Civ. Code, § 5700*; *Diamond Heights, supra, 196 Cal.App.4th at pp. 301-302*.) Yet the Association has not done so, presumably for the same type of strategic reasons for which it faults Respondents.

Moreover, although the parties have not cited any cases addressing homeowners association challenges to lien priority statutes, our independent research reveals that the courts that have considered such challenges—Connecticut and Florida state appellate courts—have rejected them. (See *Dime Sav. Bank, FSB v. Muranelli (Conn.Ct.App. 1995) 39 Conn. App. 736, 667 A.2d 803, 806* [rejecting association's argument that "because [association] expenditures **[*15]** are used for the common good of all units and the mortgagee often takes title to the unit as a result of the foreclosure action, the mortgagee realizes a gain at the expense of the association"]; *U.S. Bank Nat'l Ass'n ex rel. Harborview 2005-10 Trust Fund v. Tadmore (Fla.Ct.App. 2009) 23 So.3d 822, 823* (*Tadmore*) [reversing trial court's order requiring lender to pay association dues during foreclosure action where association challenged lender's alleged "'undue delay in pursuing . . . foreclosure'"]; *U.S. Bank N.A. v. Farhood (Fla.Ct.App. 2014) 153 So.3d 955, 959-960* [reversing trial court's order requiring lender to pay homeowners association dues as sanction for dilatory pursuit of foreclosure action].)[4]

Our independent research also reveals that some state legislatures have addressed the Association's dilemma by adopting **[*16]** the Uniform Common Interest Ownership Act of 1982[5] (UCIOA) or similar statutory provisions that create a "superpriority lien" for homeowners association assessments, which allow a portion of the assessments to survive foreclosure of an otherwise senior lien. (See, e.g., *SFR Invs. Pool 1 v. U.S. Bank, N.A. (Nev. 2014) 334 P.3d 408, 410-412*.) However, California's Law Revision Commission recommended against adopting the UCIOA in 2003. (See Cal. Law Revision Com. (Nov. 21, 2003), Minutes, p. 8.)

Because California does not recognize a cause of action for unjust enrichment, and because the Association has not alleged facts entitling it to a restitution under some other cause of action, the trial court did not err by sustaining Respondents' demurrer.

II. *Denying Leave to Amend to Allege a UCL Violation*

The Association contends the trial court erred by denying it leave to further amend its complaint to allege a violation of the UCL's "unfair" prong. Respondents counter that allowing the amendment would have been futile because the Association could not state a valid UCL claim. We agree.

A. *Standard of Review*

"'A general demurrer may be sustained without leave to amend where it **[*17]** is probable from the nature of the defects and previous unsuccessful attempts to plead that the plaintiff cannot state a cause of action.' [Citation.]" (*Oddone v. Superior Court (2009) 179 Cal.App.4th 813, 823, 101 Cal. Rptr. 3d 867*.) Similarly, a trial court may deny a motion for leave to amend where the proposed amended claims lack merit. (*Oakland Raiders v. National Football League (2005) 131 Cal.App.4th 621, 652, 32 Cal. Rptr. 3d 266*.) We review an order denying leave to amend in either circumstance for an abuse of discretion. (*Oddone, at p. 823*; *Foxborough v. Van Atta (1994) 26 Cal.App.4th 217, 230-231, 31 Cal. Rptr. 2d 525*.)

B. *The UCL's "Unfair" Prong*

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[4] The Association's reliance on *In re Spa at Sunset Isles Condo. Ass'n, Inc. (Bankr. S.D. Fla. 2011) 454 B.R. 898*, is misplaced. There, the bankruptcy court held federal bankruptcy law preempted Florida's statute relieving lenders of liability for homeowners association assessments prior to foreclosure. (*Id. at pp. 905-906*.) No bankruptcy preemption issues apply here. Moreover, the bankruptcy code at issue required only that the association's expenditures benefit the lender; there was no requirement, as there is under California law, that the lender's retention of the benefit be unjust. (*Id. at p. 908*.)

[5] (Unif. Common Interest Ownership Act of 1982, § 3-116 (amended 2008), 7 pt. II, U.L.A. 374.)

California's UCL defines "'unfair competition' as 'any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising.'" (*Zhang v. Superior Court (2013) 57 Cal.4th 364, 370, 159 Cal. Rptr. 3d 672, 304 P.3d 163* (*Zhang*).) Because the statute "'is written in the disjunctive, it establishes three varieties of unfair competition—acts or practices which are unlawful, or unfair, or fraudulent.'" (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co. (1999) 20 Cal.4th 163, 180, 83 Cal. Rptr. 2d 548, 973 P.2d 527* (*Cel-Tech*).)

"The standard for determining what business acts or practices are 'unfair' in consumer actions under the UCL is currently unsettled." (*Zhang, supra, 57 Cal.4th at p. 380, fn. 9*.) "In *Cel-Tech*, the Supreme Court addressed the term 'unfair' in the context of actions between competitors alleging anticompetitive practices, but it broadly criticized previous attempts to define 'unfair' as 'too amorphous' to provide guidance." (*Graham v. Bank of America, N.A. (2014) 226 Cal.App.4th 594, 612, 172 Cal. Rptr. 3d 218* (*Graham*), quoting *Cel-Tech, supra, 20 Cal.4th at pp. 184-185*.) "Previously, courts defined 'unfair' **[*18]** as a practice that offends public policy or "'is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers'" or required courts to ""weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim.""" (*Ibid.*, quoting *Cel-Tech, supra, 20 Cal.4th at p. 184*.)

"The *Cel-Tech* court concluded it must 'require that any finding of unfairness to competitors under [*Business and Professions Code] section 17200* be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition' and, in actions challenging a direct competitor's 'unfair' act, defined the term as 'conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.'" (*Graham, supra, 226 Cal.App.4th at p. 612*, quoting *Cel-Tech, supra, 20 Cal.4th at pp. 186-187*.)

"Thereafter, the appellate courts split regarding the definition of 'unfair' business practices in consumer actions." (*Graham, supra, 226 Cal.App.4th at p. 612*.) In *In re Ins. Installment Fee Cases (2012) 211 Cal.App.4th 1395, 1418, 150 Cal. Rptr. 3d 618*, we described the following three-way split:

"One line of cases applied a pre-*Cel-Tech* balancing test for determining whether a business practice is unfair, under which the court examines the practice's ""impact on its alleged **[*19]** victim, balanced against the reasons, justifications and motives of the alleged wrongdoer. In brief, the court must weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim . . . . [Citations.]' . . . [A]n 'unfair' business practice occurs when that practice 'offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.'" (*Smith v. State Farm Mutual Automobile Ins. Co. (2001) 93 Cal.App.4th 700, 718-719, 113 Cal. Rptr. 2d 399* . . . .)

"A second line of cases adopted the following test or factors for determining unfairness set forth in *section 5* of the Federal Trade Commission Act (*15 U.S.C. § 45(n)*: '(1) [t]he consumer injury must be substantial; (2) the injury must not be outweighed by any countervailing benefits to consumers or competition; and (3) it must be an injury that consumers themselves could not reasonably have avoided.' (*Camacho v. Automobile Club of Southern California (2006) 142 Cal.App.4th 1394, 1403, 48 Cal. Rptr. 3d 770*. . . .)

"A third line of cases, represented by *Gregory v. Albertson's, Inc. (2002) 104 Cal.App.4th 845, 128 Cal. Rptr. 2d 389* . . . (*Gregory*), applied a more rigorous test for unfairness in consumer UCL actions. The *Gregory* court disagreed with the balancing test applied by courts before *Cel-Tech*, stating: '*Cel-Tech* . . . may signal a narrower interpretation of the prohibition of unfair acts or practices in *all* unfair competition actions and **[*20]** provides reason for caution in relying on the broad language in earlier decisions that the [*Cel-Tech*] court found to be "too amorphous." Moreover, where a claim of an unfair act or practice is predicated on public policy, we read *Cel-Tech* to require that the public policy which is a predicate to the action must be "tethered" to specific constitutional, statutory or regulatory provisions.'"

"This court has consistently followed the *Gregory, supra, 104 Cal.App.4th 845* . . . line of cases and has held a plaintiff alleging an unfair business practice must show the 'defendant's "conduct is tethered to an[] underlying constitutional, statutory or regulatory provision, or that it threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of an ***antitrust law***."'" (*Graham, supra, 226 Cal.App.4th at p. 613*.)

C. *Analysis*

The Association's proposed UCL cause of action does not allege conduct that is "unfair" under *Gregory*'s definition. The UCL claim is premised on the same facts as the unjust enrichment claim. However, as discussed in part I, *ante*, the Association has not cited any authority to which to "tether" its UCL claim. In fact, Respondents cite authority suggesting California's public policy discourages rapid foreclosures, which is contrary **[*21]** to the Association's theory of the case. (See *Jolley v. Chase Home Finance, LLC (2013) 213 Cal.App.4th 872, 903, 153 Cal. Rptr. 3d 546* ["[T]he California Legislature has expressed a strong preference for fostering more cooperative relations between lenders and borrowers who are at risk of foreclosure, so that homes will not be lost."].) Accordingly, the trial court did not abuse its discretion in denying the Association leave to amend a cause of action under the UCL's "unfair" prong.

III. *Evidentiary and Procedural Challenges*

The Association contends the trial court erred by dismissing Respondents before the court ruled on the Association's motion for leave to amend and by sustaining Respondents' evidentiary objections to the banker's declaration. Even if either of these actions was erroneous, any error was not prejudicial in light of our conclusions above.

DISPOSITION

The judgment is affirmed. Respondents are entitled to their costs on appeal.

HALLER, J.

WE CONCUR:

MCCONNELL, P. J.

O'ROURKE, J.

End of Document

Bray v. Bank of Am. Corp.

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

December 21, 2015, Decided; December 21, 2015, Filed

Case No: 8:15-cv-2532-T-35TBM

Reporter

2015 U.S. Dist. LEXIS 194907 *; 2015 WL 13826464

TAMPA PATRICK RYAN BRAY, Plaintiff, v. BANK OF AMERICA CORP. and BANK OF AMERICA, N.A., Defendants.

Subsequent History: Motion denied by *Bray v. Bank of Am. Corp., 2017 U.S. Dist. LEXIS 232310 (M.D. Fla., Jan. 23, 2017)*

Summary judgment granted by, Motion denied by, As moot *Bray v. Bank of Am. Corp., 2018 U.S. Dist. LEXIS 187674 (M.D. Fla., Aug. 20, 2018)*

Prior History: *Bray v. Bank of Am., 2014 U.S. Dist. LEXIS 192507 (M.D. Fla., July 29, 2014)*

Core Terms

first-filed, antitrust, cases, transferred, alleges, parties, anti-tying, appears, overlap, anti trust law, tied product, provisions

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For Peter J. Grilli, Mediator: Peter John Grilli, LEAD ATTORNEY, Peter **[*2]** J. Grilli, PA, Tampa, FL USA.

Judges: MARY S. SCRIVEN, UNITED STATES DISTRICT JUDGE.

Opinion by: MARY S. SCRIVEN

Opinion

ORDER

THIS CAUSE comes before the Court for consideration of the Motion to Transfer Venue or, in the Alternative, to Stay the Case Pending Resolution of Plaintiff's Previously-File Action Against Bank of America (Dkt. 14) filed by Defendants, Bank of America Corp. and Bank of America, N.A. ("BANA") and the Response in opposition thereto (Dkt. 15) filed by Plaintiff, Patrick Ryan Bray ("Bray"). Upon consideration of all relevant filings, case law, and being otherwise fully advised, the Court **GRANTS** Defendants' alternative request to stay the case, for the reasons set forth below.

I. BACKGROUND

a. The Instant Suit

Plaintiff Bray initiated this action against Defendants, Bank of America Corp. and BANA on October 27, 2015. (Dkt. 1) In his Complaint, Bray alleges that BANA committed violations of the Sherman Act, *15 U.S.C. § 1, et seq.*, the Clayton Act, *15 U.S.C. § 12, et seq.*, and the Florida Antitrust Act, *Fla. Stat. § 542.15, et seq.* (Id.) Bray's antitrust claims are expressly premised on BANA's alleged violation of the Bank Holding Company Act, *12 U.S.C. § 1972*, which prohibits banks from engaging in certain "tying" arrangements. (Id. at ¶¶ 42, 56, 104, 106, 108, 113, 118, 120)

Bray alleges **[*3]** that he independently managed a General Public Account ("GPA") through bonds and bond mutual funds for a company called American Express Incentive Solutions ("AEIS"), which later changed its name to Intelispend Prepaid Solutions ("Intelispend").[1] Intelispend was owned by Martiz Holding, Inc. ("Maritz"), which had a syndicated loan for which BANA acted as the arranger. Bray alleges that in 2009, as a requirement for the renewal of the syndicated loan, BANA required that the GPA be collateralized and that all of its marketable securities in bond mutual funds be transferred to BANA's affiliate, Merryll Lynch. Bray alleges that this requirement constituted a violation of the Bank Holding Company Act ("BHCA"), *12 U.S.C. § 1972*, which prohibits the conditioning of the extension of credit on the customer's obtaining certain other services from the bank or one of its affiliates. Bray alleges that he was damaged by BANA's allegedly unlawful requirement that Martiz move the GPA to its affiliate Merryll Lynch because he was no longer able to independently manage the GPA. Following the move of the GPA, Bray accepted a position with Merryll Lynch so that he could continue to manage the GPA on behalf of Intelispend. **[*4]** However, Bray alleges that the move caused him to take a 50% reduction in pay as a Merryl Lynch employee compared to his previous career working as an Independent Investment Advisor. Bray also alleges that the unlawful requirement damaged other entities with which he did business because they could no longer profit from his independent management of the GPA.

b. Bray's Prior Pending Suit against BANA

On February 10, 2014, Bray filed an action in this Court against BANA. (See Dkt. 10, 13; see also *Patrick Ryan Bray v. Bank of America*, Case No. 8:14-cv-332-T-23TBM (M.D. Fla.)) Bray's Complaint in that action alleged claims against BANA for: 1) the prohibited tying of services under the BHCA, *12 U.S.C. § 1972*; 2) libel; 3) slander; and 4) harassment. (Dkt. 14-1 at P. 2-18) On July 29, 2014, the Honorable Steven D. Merryday granted BANA's motion under *28 U.S.C. § 1404(a)* and transferred the case to the Eastern District of Missouri, Eastern Division. (Id. at P. 20-23)

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[1] AEIS was originally a joint-venture between Maritz and American Express. (Dkt. 1 at ¶ 17) In February of 2010, Maritz purchased the minority shares held by American Express in AEIS. (Id. at ¶ 18) After becoming the 100% owner of AEIS, Maritz changed the name from AEIS to Intelispend. (Id.)

Following the transfer of the case, Bray withdrew the harassment claim and the District Court for the Eastern District of Missouri ("Missouri District Court") dismissed his state law defamation claims for failure to state a claim upon which relief may be **[*5]** granted and dismissed his BHCA claim due to lack of Article III standing. (See *Patrick Ryan Bray v. Bank of America*, Case No.4:14-cv-01336-CEJ (E.D. Mo.) (hereinafter "Missouri case") at Dkt. 50, 51) Bray appealed the dismissal of his claims to the United States Court of Appeals for the Eighth Circuit. (Id. at Dkt. 55) On August 3, 2015, the Eight Circuit affirmed the Missouri District Court's dismissal of Bray's state law defamation claims and reversed the dismissal of his BHCA claim. (Id. at Dkt. 61) The Eight Circuit remanded the BHCA claim, directing the Missouri District Court to determine in the first instance whether Bray has standing to pursue his claim in light of the Supreme Court's decision in *Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 134 S. Ct. 1377, 1391-92, 188 L. Ed. 2d 392 (2010)*. (Id.) Per the Missouri District Court's direction, the Parties have now fully briefed the Article III standing issue and the Court's decision remains pending. (Dkt. 13; Missouri Case at Dkt. 74-78)

c. The Instant Motion

On November 30, 2015, Defendants filed the instant motion requesting that the Court transfer this action to the Eastern District of Missouri pursuant to *28 U.S.C. § 1404(a)*. (Dkt. 14) Defendants contend that this case should be transferred to the Eastern District of Missouri for the same **[*6]** reasons that Judge Merryday transferred Bray's previously-filed case to that venue. Additionally, because the two cases are so closely related, both legally and factually, Defendants state that they intend to request consolidation of the two cases, should the Court order the requested transfer of this case. Alternatively, Defendants request that the Court stay this case pending the outcome of the closely-related Missouri case.

Bray responds objecting to the requested transfer, arguing that the two cases are not related, that Defendants' motion simply represents a forum-shopping attempt, and that a transfer in this case would only operate as an inconvenience to Bray and his witnesses.

II. DISCUSSION

Based on the foregoing facts, the Court finds that a determination of whether the first-filed rule should apply to the Missouri case and this action and whether this action should be transferred to the Eastern District of Missouri, Eastern Division under the rule is warranted. "The first-filed rule provides that when parties have instituted competing or parallel litigation in separate courts, the court initially seized of the controversy should hear the case." *Collegiate Licensing Co. v. Am. Cas. Co. of Reading, Pa., 713 F.3d 71, 78 (11th Cir. 2013)*. "Thus, [the Eleventh Circuit **[*7]** has held] that '[w]here two actions involving overlapping issues and parties are pending in two federal courts, there is a strong presumption across the federal circuits that favors the forum of the first-filed suit under the first-filed rule.'" Id. (quoting *Manuel v. Convergys Corp., 430 F.3d 1132, 1135 (11th Cir. 2005)*). The Eleventh Circuit "require[s] that the party objecting to jurisdiction in the first-filed forum carry the burden of proving 'compelling circumstances' to warrant an exception to the first-filed rule." *Manuel, 430 F.3d at 1135*. Moreover, "[t]he first-filed rule not only determines which court may decide the merits of substantially similar cases, but also generally establishes which court may decide whether the second filed suit must be dismissed, stayed, or transferred and consolidated." *Collegiate Licensing, 713 F.3d at 78*. Collegiate Licensing also teaches that "the court initially seized of the controversy" should make the determination in the first instance of whether the first-filed rule applies and whether the instant action should be transferred. *713 F.3d at 78*.

As a threshold matter, it is undisputed that the Missouri case was filed first. That action commenced with Bray filing his Complaint in this Court on February 10, 2014. Thereafter, the case was transferred to the Eastern District of **[*8]** Missouri. Although the case was technically filed first in this Court, between the two cases currently pending, the Missouri District Court is the forum that is seized of the initial controversy and the first-filed case. Accordingly, the Missouri District Court should make the determination of whether the first-filed rule applies and whether the case should be transferred because it is "the forum of the first-filed suit." *Collegiate Licensing, 713 F.3d at 78*.

Likewise, it appears facially that the two actions involve "overlapping issues and parties." Manuel, 430 F.3d at 1135. Bray is the Plaintiff in both cases. In the Missouri case, BANA is the only defendant. In this case, both BANA and Bank of America Corp. are listed as defendants. According to the Complaint, BANA is a wholly-owned subsidiary of Bank of America Corp. (Dkt. 1 at ¶¶ 23-24) Therefore, it appears that the interests of Bank of America Corp. are similarly aligned with those of BANA. The "precise identity of parties is not required" for application of the first-filed rule. Rudolph & Me, Inc. v. Ornament Central, LLC, No. 8:11-cv-670-T-33EAJ, 2011 U.S. Dist. LEXIS 100430, 2011 WL 3919711, at *2 (M.D. Fla. Sept. 7, 2011). In this case, there appears to be sufficient overlap and/or privity between and among the parties in both cases to warrant a determination **[*9]** by the Missouri District Court of whether the first-filed rule should apply.

Additionally, although the title of the claims for relief may not be identical, the central issue presented in both cases is the same.

> The applicability of the first-filed rule is not limited to mirror image cases where the parties and the issues perfectly align. Rather, the principles underlying the rule support its application where the subject matter of the later filed case substantially overlaps with that of the earlier one.

Rudolph, No. 8:11-cv-670-T-33EAJ, 2011 U.S. Dist. LEXIS 100430, 2011 WL 3919711, at *2. As Bray's Complaint makes clear, the crux of this case concerns whether BANA's requirement that Maritz move the GPA's marketable securities in bond mutual funds to BANA's affiliate, Merryll Lynch, as a condition of the renewal of Maritz's syndicated loan constituted an impermissible tying arrangement. Although Bray's Complaint in this action does not include a claim explicitly asserted under the BHCA, his general antitrust claims are expressly premised on BANA's alleged violation of the BHCA's anti-tying provisions. (Dkt. 1 at ¶¶ 42, 56, 104, 106, 108, 113, 118, 120) Accordingly, both cases concern the same central issue and arise out of the same operative **[*10]** set of factual circumstances.

Furthermore, the cases contain substantial overlap in the legal issues presented as well. Under antitrust laws, a tying arrangement is "an agreement by a party to sell one product [the 'tying' product] but only on the condition that the buyer also purchases a different (or 'tied') product." Integon Life Ins. Corp. v. Browning, 989 F.2d 1143, 1150 (11th Cir. 1993) (citation omitted). Tying arrangements may violate the general antitrust provisions of the Sherman Act and the Clayton Act, which apply to all businesses, including banks. See Heatransfer Corp. v. Volkswagenwerk, A. G., 553 F.2d 964, 976 (5th Cir. 1977).[2] In order to prove a general antitrust illegal tying claim, a plaintiff must prove the following five elements: "(1) two separate products, a 'tying' or 'desirable' product and a 'tied' or 'undesirable' product; (2) [that] the buyer was in fact forced to buy the tied product to get the tying product; that is, a 'tying'; (3) [that] the seller possessed sufficient economic power in the tying product market to coerce the buyer's acceptance of the tied product; (4) an anti-competitive effect in the tied product market; and (5) the involvement of a not insubstantial amount of interstate commerce in the tied product market." Integon, 989 F.2d at 1150.

When Congress passed the BHCA, it intended to "apply the general principles **[*11]** of the Sherman Antitrust Act prohibiting anticompetitive tying arrangements specifically to the field of commercial banking." Parsons Steel, Inc. v. First Alabama Bank of Montgomery, N.A., 679 F.2d 242, 245 (11th Cir. 1982). However, the BHCA's anti-tying provisions extend further than the anti-tying provisions of the general antitrust laws because "[a] plaintiff is not required to prove the last three elements of a[n] anti-trust tying claim in order to establish a violation of the BHCA anti-tying provisions." Integon, 989 F.2d at 1150 (citing Parsons, 679 F.2d at 245). Thus, the required elements for a tying claim under the BHCA include: "(1) two separate products, a 'tying' or 'desirable' product and a 'tied' or 'undesirable' product; and (2) [that] the buyer was in fact forced to buy the tied product to get the tying product; that is, a 'tying'." Id.

As to Bray's anti-tying claim asserted under the Florida Antitrust Act, it too appears to overlap his BHCA claim. Notably, Florida Statute § 542.32 provides that "[i]t is the intent of the Legislature that, in construing [Florida's antitrust laws], due consideration and great weight be given to the interpretations of the federal courts relating to

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[2] In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

comparable federal antitrust statutes." Accordingly, Florida courts construe the Florida Antitrust Statute in accordance with federal court decisions construing **[*12]** the federal antitrust statutes. See *St. Petersburg Yacht Charters, Inc. v. Morgan Yacht, Inc., 457 So. 2d 1028, 1032 (Fla. 2d DCA 1984)*. Furthermore, tying claims asserted under the Florida ***Antitrust law*** have essentially the same elements as tying claims asserted under the federal antitrust laws. See *Day v. Le-Jo Enterprises, Inc., 521 So. 2d 175, 177 (Fla. 3d DCA 1988)*. The principal difference between the two claims is that "under the Florida act there is no jurisdictional requirement that interstate commerce be involved." St. *Petersburg Yacht Charters, Inc., 457 So. 2d at 1032*; see also *id. at 178* ("Since the [plaintiffs'] antitrust claim is brought under the Florida Antitrust Act of 1980, the federal requirement . . . that interstate commerce be involved need not be met.").

Accordingly, although Bray may be required to prove additional elements in order to succeed on his federal and state anti-tying claims asserted in this action, he will be required to prove the same underlying elements here as he is required to prove in the Missouri case. It further appears, at least from the allegations of Bray's Complaint, that this case may also ultimately require an examination of the issue of Article III standing, which is already being untaken by the Missouri District Court in the Missouri case on remand. (See Dkt. 1 at ¶¶ 83-92) Therefore, it appears facially that inconsistent rulings and the duplication of efforts **[*13]** and judicial resources might result if both cases were to proceed simultaneously in two different venues. This is precisely the situation that the first-filed rule seeks to avoid. See *Supreme Intern. Corp. v. Anheuser-Busch, Inc., 972 F. Supp. 604, 606 (S.D. Fla. 1997)*.

Although Bray may be able to show that "compelling circumstances" exist warranting an exception to the first-filed rule, cases addressing this issue suggest that this Court defer to the Missouri District Court's determination of the issue. *Collegiate Licensing, 713 F.3d at 78*; *Manuel, 430 F.3d at 1135*. Therefore, this Court finds that the Missouri District Court should determine whether the application of the first-filed rule is warranted here and whether this action should be transferred to the Eastern District of Missouri. Accordingly, this action is stayed pending the Missouri District Court's determination.

III. CONCLUSION

Upon consideration of the foregoing, it is hereby **ORDERED** as follows:

1. The Court **STAYS** this action pending a determination by the U.S. District Court for the Eastern District of Missouri, Eastern Division as to whether the first-filed rule applies to the Missouri case and this action and whether this action should be transferred to the Eastern District of Missouri, Eastern Division for further proceedings.

2. Defendants shall provide a copy **[*14]** of this Order along with their request for a determination of the Missouri District Court on this issue. Defendants shall file a notice with this Court within **seven (7) days** of the Missouri District Court's determination of this issue. Presumably, the Missouri District Court will direct any further briefing that it may require.

3. The Court has also considered Bray's Motion for Reconsideration (Dkt. 20) directed at the Court's previous order extending the deadlines for Defendants to respond to the Complaint and for the Parties to conduct their case management meeting. (Dkt. 19) Because this entire case is now stayed pending a determination by the Missouri District Court, that Motion (Dkt. 20) is **DENIED as moot**.[3]

4. The Clerk is **DIRECTED** to **TERMINATE** any pending motions until the Missouri District Court has determined how the two actions should proceed. If, after the Missouri District Court's determination concerning

[3] The Court has considered the arguments raised in Bray's Motion, specifically that he was not given an opportunity to file a response to the motion requesting extension prior to the Court's ruling. The Court granted the extension of deadlines due to the nature of the dispute raised in the motion to transfer. Had the Court awaited Bray's response, its ruling would have been the same. Therefore, the Court did not require a response prior to ruling on the motion requesting extension. If the Missouri Court declines to accept transfer, Bray will have an opportunity to weigh-in on the setting of case management deadlines in this case.

the possible transfer of this case, the Court retains jurisdiction over this matter, the Court will direct the Clerk to reinstate any terminated motions.

DONE and **ORDERED** in Tampa, Florida, this 21st day of December, 2015.

/s/ Mary S. Scriven

MARY S. SCRIVEN

UNITED STATES DISTRICT **[*15]** JUDGE

Killian Pest Control, Inc. v. Hometeam Pest Def., Inc.

United States District Court for the Northern District of California

December 21, 2015, Decided; December 21, 2015, Filed

Case No. 14-cv-05239-VC

Reporter

2015 U.S. Dist. LEXIS 192648 *; 2015 WL 13385918

KILLIAN PEST CONTROL, INC., Plaintiff, v. HOMETEAM PEST DEFENSE, INC., et al., Defendants.

Prior History: *Killian Pest Control, Inc. v. HomeTeam Pest Def., Inc., 2015 U.S. Dist. LEXIS 78001 (N.D. Cal., June 16, 2015)*

Core Terms

tube-in-the-wall, markets, alleges, install, geographic, locks, pest control, antitrust claim, competitors, homeowners, antitrust, patent, anticompetitive conduct, monopoly, violations, consumers, motion to dismiss, anti trust law, monopoly power, baseless

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Judges: VINCE CHHABRIA, United States District Judge.

Opinion by: VINCE CHHABRIA

Opinion

ORDER GRANTING IN PART AND DENYING IN PART THE MOTION TO DISMISS

Re: Dkt. No. 46

Killian Pest Control contends that HomeTeam Pest Defense is violating the antitrust laws by locking its competitors out of a particular type of pest control business. HomeTeam has moved to dismiss the Second Amended Complaint

("SAC"). The motion is granted to the extent Killian seeks to assert claims relating to 35 geographic markets in which it does not operate, in which it has not attempted to operate, and in which it has expressed no intent to operate. The motion is denied with respect to the antitrust claims asserted for the two geographic markets in which Killian does operate.

I.

The allegations discussed in this opinion, which must be assumed true for purposes of this motion, are taken from the SAC and the documents it relies on. *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*.

HomeTeam provides a unique kind of pest control service. It partners with home builders to install "tube-in-the-wall" pest control systems that allow homeowners to fight termites and other pests without having to spray chemicals in the living areas of their homes. **[*3]** The tubes, which contain small perforations, run through the walls of the home. The system is serviced by squirting pesticides into a "port" that accesses the tubes from the exterior of the house. The pesticides travel through the tubes and exit through the perforations, while remaining inside the walls and outside the living areas. HomeTeam gets paid by homebuilders for installing the system into homes as they are being built. It also gets paid by homeowners for servicing the systems after the homes are purchased. HomeTeam installs and services tube-in-the-wall systems in many places throughout the country. HomeTeam used to own a patent for the tube-in-the-wall system, but it has expired.

Killian Pest Control does business in and around Bakersfield and Fresno, California. During the 1990s, Killian tried to get into the business of installing tube-in-the-wall systems, as well as servicing those systems. Killian originally had a business arrangement with HomeTeam that allowed Killian to install tube-in-the-wall systems. But HomeTeam sent Killian a letter asserting that it "no longer [had] any rights or license to use any of [HomeTeam's] patented technologies, including Tubes-In-The-Wall, **[*4]** trademarks, or other Intellectual Property Rights of [HomeTeam]." As a result, Killian "quit marketing [its] ability to install tube-in-the-wall pest defense systems," and limited itself to servicing those systems.

Almost 10 years later, in 2004, HomeTeam started trying to push Killian and others out of the servicing business. This is discussed more fully in Section III, but for now suffice to say that by this time HomeTeam had started doing a number of things to prevent anyone else from servicing the tube-in-the-wall systems. For example, HomeTeam started placing locks on the ports to the systems, without giving the key to the homeowners. (HomeTeam justified this in part by claiming to be the owner of the ports to the systems). HomeTeam also misled homeowners into believing they were not permitted to use anyone else to service the systems, and that servicing by anyone other than HomeTeam would damage the systems.

Killian was, with the permission of its clients, breaking the locks (since the clients didn't have keys) to provide the service they desired. HomeTeam sent two letters to Killian, threatening to sue it for a variety of reasons if it didn't stop breaking the locks and servicing **[*5]** the systems. HomeTeam ultimately did sue Killian, in state court. And now Killian has sued HomeTeam in federal court, alleging that HomeTeam is violating the antitrust laws by locking everyone else out of the market (literally and figuratively) for servicing tube-in-the-wall pest control systems.

In a prior round of motions, the Court ruled that Killian has adequately pled the relevant product market — the market for servicing tube-in-the-wall systems. But the Court granted HomeTeam's motion to dismiss on the ground that Killian had not pled enough facts to adequately explain what the relevant geographic market might be. Now, in the SAC, Killian alleges that there are a number of individual geographic markets throughout the country in which HomeTeam behaves anticompetitively. HomeTeam has moved to dismiss the SAC.

II.

The first question presented by the new motion to dismiss is whether Killian, as a competitor who does business in Fresno and Bakersfield, has standing to sue for alleged antitrust violations committed by HomeTeam throughout the country.

Killian now alleges that there are 37 "individual regional geographic markets for HomeTeam's services," and that these 37 individual markets **[*6]** correspond to "specific metropolitan 'statistical areas' that have been defined by the United States Government's Office of Management and Budget."[1] The SAC includes concrete allegations about two of these 37 markets — Bakersfield and Fresno. And it includes concrete allegations about the effect of HomeTeam's conduct on those two markets. It alleges that HomeTeam engaged in improper tactics that eliminated competition in those markets, in a way that harmed competition to service tube-in-the-wall systems (namely, by freezing out Killian), which in turn forced consumers to pay supracompetitive prices for servicing. The SAC also alleges that HomeTeam's anticompetitive conduct directly harmed Killian. This is enough to allege standing to challenge HomeTeam's conduct in the geographic markets where Killian has operated. *See, e.g., Bhan v. NME Hospitals, Inc., 772 F.2d 1467, 1470 (9th Cir. 1985)*; *Glen Holly Entm't, Inc. v. Tektronix, Inc., 352 F.3d 367, 372 (9th Cir. 2003)* (To allege antitrust injury for purposes of establishing antitrust standing, a plaintiff must plead "unlawful conduct, . . . causing an injury to the plaintiff, . . . that flows from that which makes the conduct unlawful, and . . . that is of the type the antitrust laws were intended to prevent."' (quoting *Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of Cal., 190 F.3d 1051, 1055 (9th Cir. 1999))*).

However, Killian does not allege it ever participated **[*7]** in the other 35 markets. Nor does Killian allege it has attempted to, or genuinely intends to and is prepared to, expand its business into any of the other markets, only to be stymied by HomeTeam's anticompetitive conduct in those markets. *Bubar v. Ampco Foods, Inc., 752 F.2d 445, 450 (9th Cir. 1985)*. The closest the SAC comes to addressing this issue is in Paragraph 73, which alleges that Killian "planned to open in California and Arizona by 1994, expand to Nevada in 1995, and then open in New Mexico, Colorado, Oregon, Hawaii, and Texas in 1996." But this background allegation was in reference to Killian's earlier efforts to enter the market for *installing* tube-in-the-wall systems, and to HomeTeam's alleged efforts to prevent Killian from entering *that* market. The SAC does not assert antitrust violations with respect to the installation market, however, and more importantly it does not allege that HomeTeam's anticompetitive conduct in the *servicing* markets during *this* decade has stymied any effort by Killian to expand into the other servicing markets. Indeed, there is no allegation that Killian has made any effort to, or possessed any desire to, expand its servicing business into the other markets. Therefore, Killian lacks standing to pursue **[*8]** antitrust claims for anticompetitive conduct in geographic markets other than Fresno or Bakersfield. *Cf. Glen Holly Entm't, 352 F.3d at 372*; *Bourns, Inc. v. Raychem Corp., 331 F.3d 704, 712 (9th Cir. 2003)*; *Bhan, 772 F.2d at 1470*; *Bubar, 752 F.2d at 450*; *Solinger v. A&M Records, Inc., 586 F.2d 1304, 1309-1310 (9th Cir. 1978)*.

Killian protests that the question whether it may complain of anticompetitive conduct in the other 35 markets is not really one of standing. Killian contends it is a question of damages, and that the absence of injury to it in the 35 other markets will simply mean that if it establishes antitrust violations in those markets it won't be able to collect damages for them. If Killian had alleged a single, unified but non-contiguous market for servicing of tube-in-the-wall systems that existed in various places around the country and that Killian only participated in portions of that single market, perhaps this argument would work. But Killian chose to allege 37 "individual" geographic markets for servicing tube-in-the-wall pest control systems. And although the SAC is virtually silent about how these markets compare to one another, it hints that there may be competitive distinctions among them that matter for antitrust purposes. For example, the SAC alleges: "The individual geographic markets for servicing of the tube-in-the-wall system may include, in addition to HomeTeam **[*9]** and other national competitors, regional firms who are willing to service tube-in-the-wall systems but have been unable to enter the market due to HomeTeam's monopolization of the service market." SAC ¶ 203.

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[1] To be more precise, the current iteration of Killian's complaint alleges only 36 individual markets, because Killian's lawyers forgot to include the Fresno metropolitan statistical area. However, Killian's lawyers have made clear that this was an inadvertent omission, and Killian will not be penalized for this. Killian will be permitted to amend the operative complaint to cure this omission. For the sake of efficiency, this discussion assumes that Killian has actually alleged all 37 of the markets it intended to allege, because that will be the case once Killian's lawyers fix the mistake.

Given the way Killian has alleged the geographic markets, it lacks standing to pursue antitrust claims with respect to the ones in which it has not been, and is not likely to be, injured.

III.

"'The offense of monopoly under *§ 2 of the Sherman Act* has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.'" *Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 481, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)* (quoting *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966))*. At the pleading stage, Killian satisfies these elements.

A.

To adequately plead possession of monopoly power in a relevant market, "[a] plaintiff must [both] allege that the defendant has market power within a 'relevant market,'" and must provide a facially plausible definition of that market. *Newcal Indus., Inc. v. Ikon Office Sol., 513 F.3d 1038, 1044, 1045 n.4 (9th Cir. 2008)*. Defining the relevant market requires alleging both "a relevant product market and a relevant geographic market." *Sidibe v. Sutter Health, 4 F. Supp. 3d 1160, 1174 (N.D. Cal. 2013)*; *see also* *Newcal, 513 F.3d at 1045 n.4*.

As the Court ruled in its June 16, 2015 Order, Killian **[*10]** has adequately pled a relevant product market: the market for service of tube-in-the-wall pest control systems. The SAC now also adequately pleads the two individual relevant geographic markets in which Killian has standing to sue — the Bakersfield and Fresno markets — because it plausibly describes "in reasonably concrete geographic terms" the boundaries of those two areas of effective competition for service of tube-in-the-wall systems. *See* *Sidibe, 4 F. Supp. 3d at 1175*.

And Killian has plausibly alleged that HomeTeam "controls [or controlled during the relevant period] nearly 100% of the . . . market" for servicing tube-in-the-wall systems in Bakersfield and Fresno.[2] *Kodak, 504 U.S. at 481*. That is sufficient to allege HomeTeam possesses or possessed monopoly power in these two markets at the relevant time. *Id.* ("80% to 95%" market share is a monopoly under *Section 2*); *Grinnell Corp., 384 U.S. at 587 n.2* (87% is a monopoly under *Section 2*).

B.

Killian has also plausibly alleged that HomeTeam willfully maintained its monopoly in the Bakersfield and Fresno service markets through anticompetitive conduct, i.e., that Killian used its monopoly power "'to foreclose competition, to gain a competitive advantage, or to destroy a competitor.'" *Kodak, 504 U.S. at 482-83* (quoting *United States v. Griffith, 334 U.S. 100, 107, 68 S. Ct. 941, 92 L. Ed. 1236 (1948))*. The SAC explains that

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[2] The SAC alleges that although HomeTeam purported to leave the Bakersfield market in 2014 (in an attempt to encourage Killian to settle prior state-court litigation between the parties), it merely handed its operations over to Orkin, a company owned by HomeTeam's parent company, Rollins. Even if HomeTeam has truly exited the Bakersfield market, its allegedly monopolistic conduct before its exit is still a proper basis for an antitrust claim for damages, and also likely does not moot Killian's prayer for injunctive relief with respect to that market, given the SAC's allegation that HomeTeam left the market despite that it was profitable and could easily return to the same improper tactics as before. *See, e.g.,* *United States v. Concentrated Phosphate Exp. Ass'n, 393 U.S. 199, 203, 89 S. Ct. 361, 21 L. Ed. 2d 344 (1968)* (noting, in an antitrust case, that "[m]ere voluntary cessation of allegedly illegal conduct does not moot a case; if it did, the courts would be compelled to leave '[t]he defendant . . . free to return to his old ways.'" (quoting *United States v. W. T. Grant Co., 345 U.S. 629, 632, 73 S. Ct. 894, 97 L. Ed. 1303 (1953)* (alterations original)). In any case, Killian also alleges HomeTeam continues to engage in monopolistic conduct in the Fresno market.

HomeTeam "used its monopoly over **[*11]** [the installation of tube-in-the-wall pest control systems] to gain . . . a monopoly over the service of" those systems. *Image Tech. Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1208 (9th Cir. 1997)*. HomeTeam allegedly accomplished this in part by placing locked covers on the ports of the tube-in-the-wall systems it installed, to prevent competitors from servicing those systems. HomeTeam also allegedly refused to give homeowners a key to the locks, falsely claimed that it owned the locks, and deliberately misled homeowners into thinking that service by another provider could damage the tube-in-the-wall system, despite having no reason to believe this was the case. Killian further alleges that HomeTeam engaged in "bad faith enforcement" of its expired patent for the tube-in-the-wall system to discourage competitors in the service market. *Nat'l Semiconductor Corp. v. Linear Tech. Corp., 703 F. Supp. 845, 850 (N.D. Cal. 1988)*. HomeTeam threatened competitors by falsely claiming that servicing tube-in-the-wall systems violated HomeTeam's patent on the system (which is impossible, because the patent was for the system itself, not for a method of servicing the system). Killian also alleges that, in 2013, HomeTeam threatened to sue Killian for patent infringement if it attempted to install a tube-in-the-wall system, despite knowing the patent on that **[*12]** system had expired in 2007. The SAC suggests HomeTeam did this to discourage Killian from competing with HomeTeam in the service market as well.

Killian further alleges that HomeTeam eventually brought an objectively baseless lawsuit against it when Killian ignored HomeTeam's threats and broke locks with the homeowners' permission to service tube-in-the-wall systems installed by HomeTeam. Killian alleges that HomeTeam knew there was no legal basis for that lawsuit. While HomeTeam is correct that *Noerr-Pennington* doctrine immunizes legitimate litigation from antitrust claims, the specific allegations about the baselessness of HomeTeam's pre-suit assertion of patent rights and the baselessness of HomeTeam's insistence that it owned the locks are sufficient, at the pleading stage, to warrant a conclusion that HomeTeam's conduct falls into the "sham litigation" exception to *Noerr-Pennington* doctrine. *Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 60, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993)*; *see also Boone v. Redev. Agency of City of San Jose, 841 F.2d 886, 894 (9th Cir. 1988)*. Moreover, Killian has alleged that the lawsuit was part of a larger plan by HomeTeam to stifle the competition by installing the locks, misleading homeowners about the system, and threatening to bring baseless litigation against other competitors that attempted to service the systems. **[*13]** "When . . . the [protected] activity is but a part of a larger overall scheme to restrain trade, there is no overall immunity" for the anticompetitive conduct. *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc., 690 F.2d 1240, 1263 (9th Cir. 1982)*. That is, litigation that would normally be protected under *Noerr-Pennington* (because it is not objectively baseless) may still give rise to an antitrust claim if the litigation is part of a larger plot by the defendant to violate antitrust laws. *Id.*

It also does not matter, at least at the pleading stage, that HomeTeam obtained its monopoly power in the servicing market partly by reaching service agreements with some of the people who purchased houses with tube-in-the-wall systems. Although "the law prohibits an antitrust claimant from resting on market power that arises *solely* from contractual rights that consumers knowingly and voluntarily gave to the defendant," *Newcal, 513 F.3d at 1048* (emphasis added), that rule does not apply where the defendant obtained the monopoly only partially by that means, or where the defendant reached the contractual agreements in an anticompetitive market, or where "market imperfections, as well as [the defendant's] . . . deceit, prevent consumers from realizing that their choice in the initial market will impact their **[*14]** freedom to shop in the aftermarket," *id. at 1050*. Here, Killian has alleged that HomeTeam's market power does not arise "solely" from these service contracts, but also from other anticompetitive behavior; indeed, it is undisputed that not all purchasers of homes with tube-in-the-wall systems have service contracts with HomeTeam. And Killian has alleged that HomeTeam deliberately misled consumers to prevent them from realizing they were limiting their choice in the market for service of their tube-in-the-wall systems. Accordingly, this "is not a case in which the alleged market power flows [solely] from [knowing and voluntary] contractual exclusivity." *Id.*

At root, one major problem with HomeTeam's argument for dismissal is that it assumes consumers went shopping for tube-in-the-wall systems and freely negotiated contracts with HomeTeam to service those systems. But based on the allegations in the SAC (as well as common sense), the homeowner-consumers in this case did not go out and purchase tube-in-the-wall systems; they went out and purchased houses that happened to have tube-in-the-wall pest control systems installed in them (only to be misled into signing anticompetitive service contracts at **[*15]** closing). Given this, and given the other conduct alleged in the SAC, the cases in which antitrust claims are foreclosed by a consumer's decision to limit his choices in the future do not control. *Cf. Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 440 (3d Cir. 1997)*.

For all these reasons, Killian has stated a claim for violation of *section 2*. The motion to dismiss Killian's Sherman Act claim as to the Bakersfield and Fresno markets is denied.

IV.

Because Killian's Sherman Act *section 2* claim survives, Killian's state-law antitrust claims also survive. *See Cnty. of Tuolumne v. Sonora Cmty. Hosp., 236 F.3d 1148, 1160 (9th Cir. 2001)* ("The analysis under California's ***antitrust law*** mirrors the analysis under federal law because the Cartwright Act was modeled after the Sherman Act." (citation omitted)). Likewise, Killian's California Unfair Competition Law claim survives because HomeTeam's allegedly unlawful conduct consists solely of the antitrust violations, and so the UCL claim stands or falls with those antitrust claims. *See, e.g., PNY Techs., Inc. v. SanDisk Corp., No. C-11-04689 YGR, 2012 U.S. Dist. LEXIS 55965, 2012 WL 1380271, at *15 (N.D. Cal. Apr. 20, 2012)*.

IT IS SO ORDERED.

Dated: December 21, 2015

/s/ Vince Chhabria

VINCE CHHABRIA

United States District Judge

End of Document

[SolarCity Corp. v. Salt River Project Agric. Improvement & Power Dist.]

United States District Court for the District of Arizona

December 21, 2015, Decided; December 21, 2015, Filed

No. CV-15-00374-PHX-DLR

Reporter

2015 U.S. Dist. LEXIS 170109 *; 2015-2 Trade Cas. (CCH) P79,419

SolarCity Corporation, Plaintiff, v. Salt River Project Agricultural Improvement and Power District, et al., Defendants.

Prior History: *[SolarCity Corp. v. Salt River Project Agric. Improvement & Power Dist., 2015 U.S. Dist. LEXIS 146904 (D. Ariz., Oct. 27, 2015)]*

Core Terms

immunity, electricity, rates, state-action, prices, substantive grounds, articulated, ratemaking, absolute immunity, anti trust law, regulation, retail, difference of opinion, antitrust, certify, argues, entity, political subdivision, controlling question, interlocutory appeal, question of fact, anticompetitively, customers, displace, alleges

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Judges: Douglas L. Rayes, United States District Judge.

Opinion by: Douglas L. Rayes

Opinion

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ORDER

Before the Court are Defendant Salt River Agricultural Improvement and Power District's (the "District") Motion **[*2]** for Certification under *[28 U.S.C. § 1292(b)]*, (Doc. 82), and Motion to Stay, (Doc. 83). The motions are fully briefed, and neither party requested oral argument. For the reasons below, both motions are denied.

BACKGROUND

Plaintiff SolarCity Corporation, a manufacturer and distributor of solar panels, filed suit against the District and the Salt River Valley Water Users' Association (the "Association") alleging violations of federal and state antitrust laws. (Doc. 39.) SolarCity alleges that the District and the Association, operating as the Salt River Project ("SRP"), exercise monopoly power over the sale of retail electricity in the greater Phoenix-metro area. (*Id.*, PP 1-2.) It claims SRP imposed a fee that makes it economically infeasible for customers to obtain some of their electricity from solar systems and that the fee has the effect of eliminating competition from SolarCity and other solar companies in the market. (*Id.*, PP 4, 13.)

The District and the Association both filed motions to dismiss, which raised several immunities based on the District's status as a political subdivision of the State of Arizona. (Docs. 52, 53.) On October 27, 2015, the Court dismissed the Association and several of SolarCity's antitrust claims. **[*3]** (Doc. 77.) It also found that the *Local Government Antitrust Act ("LGAA")* barred SolarCity's claims for damages under federal ***antitrust law*** because the District is a political subdivision of Arizona, but denied the District's motion with respect to the remaining immunity defenses. (*Id.* at 22-26.) SolarCity's claims for equitable relief under *§ 2* of the Sherman Act (monopolization and attempted monopolization) and damages claims under state antitrust and tort law survived. The District now moves for the Court to certify three issues for interlocutory appeal pursuant to *28 U.S.C. § 1292(b)*: (1) whether it is immune from all remaining claims under the state action doctrine, (2) whether it is immune from all damages claims under Arizona Revised Statute ("A.R.S.") *§ 12-820.01*, and (3) whether it immune from all remaining claims under the filed-rate doctrine. (Doc. 82.) The District also requests that the Court stay the case pending its appeal. (Doc. 83.)

LEGAL STANDARD

Under *§ 1292(b)*, the district court shall state in a non-appealable order if the court is of the "opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially **[*4]** advance the ultimate termination of the litigation[.]" *28 U.S.C. § 1292(b)*. The "requirements of *§ 1292(b)* are jurisdictional," and the procedure is a "narrow exception to the final judgment rule[.]" *Couch v. Telescope Inc., 611 F.3d 629, 633 (9th Cir. 2010)* (internal quotations omitted). "The party seeking certification has the burden of showing that exceptional circumstances justify a departure from the 'basic rule of postponing appellate review until after the entry of a final judgment.'" *Fukuda v. County of Los Angeles, 630 F. Supp. 228, 229 (C.D. Cal. 1986)* (quoting *Coopers & Lybrand v. Livesay, 437 U.S. 463, 475, 98 S. Ct. 2454, 57 L. Ed. 2d 351 (1978))*. "[A] party's strong disagreement with the Court's ruling is not sufficient for there to be a 'substantial ground for difference.' [In addition,] [t]hat settled law might be applied differently does not establish a substantial ground for difference of opinion." *Couch, 611 F.3d at 633*.

ANALYSIS

I. Motion for *§ 1292(b)* Certification

The District argues that each immunity issue satisfies the requirements of *§ 1292(b)*. It claims that resolution of these issues would avoid the risk of piecemeal litigation and multiple appeals, which would lower the costs and burden for both the parties and the Court. (Doc. 82 at 2.) The Court disagrees.

A. State-Action Immunity

State-action immunity "exempts qualifying state and local government regulation from federal antitrust, even if the regulation at issue compels an otherwise clear violation **[*5]** of the federal antitrust laws." *Cost Mgmt. Servs. v. Wash. Nat. Gas Co., 99 F.3d 937, 941 (9th Cir. 1996)* (internal quotation marks omitted). The doctrine originated in *Parker v. Brown, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943)*, in which the Supreme Court found that the "*Sherman Act* was not intended to apply to acts of the States 'as sovereigns.'" *Springs Ambulance Serv., Inc. v. City of Rancho Mirage, Cal., 745 F.2d 1270, 1272 (9th Cir. 1984)*. But "this state-action immunity does not apply automatically to the state's political subdivisions." *Id.* "As with private parties, immunity will only attach to the activities of local governmental entities if they are undertaken pursuant to a 'clearly articulated and affirmatively expressed' state policy to displace competition." *F.T.C. v. Phoebe Putney Health Sys., Inc., 133 S. Ct. 1003, 1011, 185 L. Ed. 2d 43 (2013)*. "[G]iven the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws, 'state-action immunity is disfavored[.]'" *Id. at 1010* (quoting *F.T.C. v. Ticor Title Ins. Co., 504 U.S. 621, 636, 112 S. Ct. 2169, 119 L. Ed. 2d 410 (1992))*.

The District argues that the question of state-action immunity is a controlling question of law because, if it applies, it bars all of SolarCity's antitrust claims.[1] An issue is "controlling" if its resolution on appeal "could materially affect the outcome of litigation in the district court." *In re Cement Antitrust Litig., 673 F.2d 1020, 1026 (9th Cir. 1982)*. Because equitable relief under the federal antitrust laws is the crux of SolarCity's case, the Court concludes that application of state-action immunity is a controlling **[*6]** question of law under *§ 1292(b)*. *See* *Springs Ambulance, 745 F.2d at 1272* (granting permission for interlocutory appeal of district court's order denying state-action immunity on motion to dismiss after district court found that it is a controlling issue of law). However, the Court finds that the District has failed to demonstrate a substantial ground for difference of opinion on this issue.

In ruling on the motion to dismiss, the Court concluded that whether Arizona has articulated a clear policy permitting the District's conduct is a question of fact and noted that SolarCity had adequately alleged that Arizona has no such policy. (Doc. 77 at 25.) The District argues that the "clear articulation" prong is a question of law that the Court should have decided in its Order. The Court agrees with the District. "[T]he state-action immunity question is one of law that turns on whether the displacement of competition with monopolies in the [relevant] market was 'clearly articulated and affirmatively expressed as state policy.'" *Columbia Steel Casting Co. v. Portland Gen. Elec. Co., 111 F.3d 1427, 1442 (9th Cir. 1996)*.

However, correction of this error on appeal would not materially advance the ultimate termination of the litigation because there is no substantial ground **[*7]** for difference of opinion that the District's alleged conduct is not protected by state-action immunity. Had the Court decided the issue as a matter of law, it would have found that Arizona has not expressly articulated a clear policy authorizing the conduct of the District. *See* *Cost Mgmt., 99 F.3d at 942* ("the relevant question is whether the regulatory structure which has been adopted by the state has specifically authorized the conduct alleged to violate the *Sherman Act*"). In fact, the opposite is true. *A.R.S. § 40-202(B)*, cited by SolarCity in its response to the District's motion to dismiss, provides that "[i]t is the public policy of this state that a competitive market shall exist in the sale of electric generation service." The District did not address this statute in its reply brief, even though, as the moving party, it had the burden of demonstrating that state-action immunity protects its conduct. In light of the statute, there are no substantial grounds for disagreement that Arizona has no clearly expressed and affirmative policy displacing competition in the retail electricity market.[2]

Nonetheless, the District argued that "Arizona's clearly articulated policy, which is expressed in the Arizona Constitution and statutes, has been to displace unfettered competition with an elaborate regulatory structure." (Doc. 53 at 10.) It claimed "[r]etail electric rates in Arizona are not determined by competition," and cited a litany of statutes and regulations pertaining to the Arizona Corporation Commission's ("ACC") authority to prescribe rates for public service corporations and the ratemaking process in general. (*Id.* at 10-11.); *see also* *Ariz. Const. Art. 15 § 3*

[1] It would not bar SolarCity's remaining state law tort claims.

[2] The District presents no additional arguments on the merits of its state-action immunity defense. Instead, it only takes issue with the **[*8]** Court's finding that whether Arizona has a clearly expressed and articulated policy displacing competition in the retail electricity market was a question of fact.

(mandating that the ACC "shall, prescribe just and reasonable rates and charges to be made and collected, by public service corporations"). In essence, the District argued that its conduct is a foreseeable result of Arizona's regulatory scheme pertaining to electricity rates because the retail electric market is heavily regulated, no other companies are certified to provide retail electricity, and electricity rates are set by the ACC, not the market. *See* Hallie v. Eau Claire, 471 U.S. 34, 43, 105 S. Ct. 1713, 85 L. Ed. 2d 24 (1985) (finding that state-action immunity applies **[*9]** if "anticompetitive effects logically would result from [the State's] authority to regulate").

At most, the District demonstrated that Arizona does not permit retail electricity *rates* to be determined in the open market. This is the function of the ACC. But the fact that electricity rates are heavily regulated does not mean that the District is free to act anticompetitively when setting its own prices for distribution of electricity, which incorporates those rates. *See* Phoebe, 133 S. Ct. at 1012 ("Our case law makes clear that state-law authority to act is insufficient to establish state-action immunity; the substate governmental entity must also show that it has been delegated authority to act or regulate anticompetitively."). Nor is the District's anticompetitive conduct a foreseeable result of fixed electricity rates. The District adheres to an administrative scheme when setting its "terms and conditions for customer selection, complaint resolution, consumer protection, stranded costs, distribution service rates and charges, system benefit charges and other related matters[.]" A.R.S. § 30-802(B). But this hardly indicates that the District is free to act anticompetitively. Rather, the purpose of the administrative process **[*10]** governing the District's prices is to "promote consistent statewide application of [the public power entities'] respective rules, procedures and orders." *Id.* § 30-802(A).

In summary, had the Court reached the issue as a matter of law, it would have concluded that Arizona does not have a clearly articulated policy to displace competition in the retail electricity market. The clearly articulated policy in Arizona *favors* competition. Although the Court erroneously concluded that application of state-action immunity presented questions of fact, correction of this error on appeal would not materially advance the ultimate termination of this case because, given the undisputed language of A.R.S. § 40-202(B), it is beyond substantial dispute that the District's alleged conduct is not protected by state-action immunity. Therefore, the Court declines to certify this issue for interlocutory appeal.

B. Absolute Immunity Under Arizona Law

A.R.S. § 12-820.01 provides "absolute immunity" for a public entity's "exercise of a judicial or legislative function." As a political subdivision of the state, the District is a "public entity" under Arizona law. *See* A.R.S. § 12-820(7) ("'Public entity' includes this state and any political subdivision of this state."). This **[*11]** immunity applies to damages only, not equitable relief. *See* AlliedSignal, Inc. v. City of Phx., 182 F.3d 692, 697 (9th Cir. 1999) (citing Zeigler v. Kirschner, 162 Ariz. 77, 781 P.2d 54, 61 (Ariz. Ct. App. 1989)). Because this issue turns on questions of fact and would only bar damages, not SolarCity's claims for equitable relief under the federal antitrust laws, it is not a controlling question of law. *See* In re Cement Antitrust Litig., 673 F.2d at 1026.

In addition, there are no substantial grounds for difference of opinion regarding the Court's decision. The Court found that whether the District's alleged ratemaking ability is a legislative function is a question of fact. (Doc. 77 at 23.) The District argues this is a question of law. (Doc. 82 at 8.) Absolute immunity is generally a question of law for the court to decide; however, "[b]ecause absolute immunity is related to a defendant's status, usually there are limited factual determinations necessary to resolve the issue." Link v. Pima Cty., 193 Ariz. 336, 972 P.2d 669, 674 (Ariz. Ct. App. 1998) (internal citations omitted). "If an absolute immunity defense is raised and related factual issues exist, those issues should be resolved by the jury as in qualified immunity cases." *Id.*

The District labels its conduct as ratemaking, but there is no authority holding that the District's adoption of prices for sale of retail electricity is ratemaking, let alone that it is a legislative function. The cases **[*12]** cited by the District in its motion applied to the ACC's ratemaking ability, not the District's. *See* Arizona Corp. Comm'n v. State ex rel. Woods, 171 Ariz. 286, 830 P.2d 807, 812 (Ariz. 1992) (noting ratemaking is a legislative power of the ACC); Arizona Corp. Comm'n v. Superior Court, 107 Ariz. 24, 480 P.2d 988, 991 (Ariz. 1971) (same). The prices set by the District for its distribution of electricity are wholly separate from the ACC's process for setting the rate of a commodity sold by a public utility.

The District claims "it is the *substance* of the public function at issue that determines whether it is legislative in character and that if ratemaking is legislative in character for the ACC, it is legislative in character for the District as well." (Doc. 83 at 13.) But when ruling on a motion to dismiss, the Court is limited to the allegations in the complaint. Here, the allegations of the complaint do not allow the Court to make any determination about the District's price setting function, i.e., whether this function has the same features that make the ACC's rate setting functions legislative in character. Instead, SolarCity alleges that the District acts more like a private corporation because its Board approves the prices after it receives comment from interested parties, it is not subject to any regulation by any state agency with respect to determining **[*13]** its prices, it refused to release information about the process, and it never released a final decision stating the factual and legal bases for the prices. (Doc. 39, PP 42, 91-102.) Whether the District engages in ratemaking at all, let alone any legislative functions as a traditional branch of government, remains to be determined on a fully-developed factual record. The Court will not certify this issue for interlocutory appeal.

C. Filed-Rate Doctrine

The filed-rate doctrine "precludes interference with the rate setting authority of an administrative agency[.]" *Wah Chang v. Duke Energy Trading & Mktg., 507 F.3d 1222, 1225 (9th Cir. 2007)*. Rates that are deemed reasonable by a regulatory agency are insulated from challenge. *See Ark. La. Gas Co. v. Hall, 453 U.S. 571, 577, 101 S. Ct. 2925, 69 L. Ed. 2d 856 (1981)*.[3] Originally, the doctrine applied to rates reviewed and filed by federal agencies. *See id. at 578*. Several states have adopted the doctrine, *see Qwest Corp. v. Kelly, 204 Ariz. 25, 59 P.3d 789, 800 (Ariz. Ct. App. 2002)* (listing cases), but Arizona has not, *see id.; see also Johnson v. First Am. Title Ins. Co., No. CV-08-01184-PHX-DGC, 2008 U.S. Dist. LEXIS 93415, 2008 WL 4850198, at *4 (D. Ariz. 2008)* (Arizona "has never adopted the filed-rate doctrine"). Here, the Court concluded that the doctrine did not apply because, even assuming the prices set by the District are "rates," "SolarCity does not challenge the District's electricity rates as unreasonable, but instead alleges the District imposed **[*14]** the rates to exclude it from the market." (Doc. 77 at 25.)

Assuming *arguendo* that this is a controlling question of law, there are no substantial grounds for difference of opinion regarding the Court's finding. The filed-rate doctrine is one of deference for a regulatory agency's conclusion that a rate for some type of public good or service is reasonable. *See Hall, 453 U.S. at 577*. The purpose of the doctrine is to prevent "price discrimination among rate payers" and preserve "the role of regulatory agencies in deciding reasonable rates for public utilities and services." *Qwest, 59 P.3d at 799*. Federal courts "apply the filed rate doctrine out of deference to a 'congressional scheme of uniform . . . regulation.' Otherwise [courts] would impermissibly 'usurp[ ] a function that Congress has assigned to a federal regulatory body.'" *Cty. of Stanislaus v. Pac. Gas & Elec. Co., 114 F.3d 858, 862 (9th Cir. 1997)* (quoting *Hall, 453 U.S. at 579, 582)* (internal citations omitted).

SolarCity does not challenge the reasonableness of any "filed rate" set by any regulatory agency. It does not claim the District's prices are too high, too low, or that they are artificially inflated to increase profit. Rather, they challenge the **[*15]** District's discriminatory pricing directed at restricting competition. The result would be the same had the District decided to refuse electric service to customers who purchase some of their electricity from SolarCity.

The District also conflates the *rate* for electricity, which is determined by the ACC, and the *prices* set by the District for distributing that electricity via the grid. The District does not claim to be a regulatory authority, it does not argue that Arizona grants it any authority to set uniform prices for distributing electricity, and it does not file the prices with

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[3] Although refined in *Hall*, the doctrine originated in *Keogh v. Chicago & Northwestern Railway, Co., 260 U.S. 156, 43 S. Ct. 47, 67 L. Ed. 183 (1922)*, and has been criticized and narrowed by the Ninth Circuit in *Cost Management, 99 F.3d at 943-48*.

any other governmental unit but itself.[4] No regulatory authority, such as the ACC, approved the District's electricity prices, and thus there is no reason to assume the prices are reasonable as a matter of law.[5]

Furthermore, the doctrine does not bar antitrust suits by competitors alleging that "the rates which were adopted were adopted in part because of an antitrust violation on the part of the defendant." *Cost Mgmt., 99 F.3d at 947*. The District argues SolarCity brings this action "in the shoes" of electric customers. (Doc. 99 at 11.) But the Court has concluded that SolarCity is a competitor of the District, and SolarCity alleges the District violated antitrust laws when it changed its pricing structure. The doctrine simply does not apply to this case, and the Court declines to certify this issue for interlocutory appeal.

D. Conclusion

The District has failed to establish exceptional circumstances that would justify immediate appeal of these issues. *See Livesay, 437 U.S. at 475*. The motion is denied.

II. Motion to Stay

The District requests that the Court stay this action pending resolution of its appeal on two issues: state-action immunity and absolute immunity under Arizona law. (Doc. 83.) The District appealed the Court's ruling on these issues on November 20, 2015. (Doc. 81.) It argues these two immunities are immediately appealable at this stage, and thus the Court should stay the case.[6] Even assuming these issues are appealable **[*17]** as of right, it "is firmly established that an appeal from an interlocutory order does not divest the trial court of jurisdiction to continue with other phases of the case." *Plotkin v. Pac. Tel. & Tel. Co., 688 F.2d 1291, 1293 (9th Cir. 1982)*.[7] Although the Court must wait for the Ninth Circuit's determination before proceeding on those issues, the Court is not required to stay the entire case. *See Britton v. Co-op Banking Grp., 916 F.2d 1405, 1412 (9th Cir. 1990)* ("Absent a stay, an appeal seeking review of collateral orders does not deprive the trial court of jurisdiction over other proceedings in the case, and an appeal of an interlocutory order does not ordinarily deprive the district court of jurisdiction except with regard to the matters that are the subject of the appeal."). As stated above, the Court declines to certify the three immunity issues for direct appeal, and it sees no reason to further delay the case.

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[4] If, for instance, SolarCity filed suit challenging the rates for electricity set by the ACC, the doctrine would apply and bar the suit. *See Hall, 453 U.S. at 584*

[5] The District argues that its Board approved the prices, and thus they are entitled to deference. But the District cannot self-police its own rates, especially given the Board is elected by its "shareholders," much like a for-profit corporation. (Doc. **[*16]** 39, PP 24, 25).

[6] The cases cited by the District in support of immediate appeal are not Ninth Circuit authority, and each case dealt with a trial court's denial of an immunity at the summary judgment stage, not the 12(b) stage. *See Commuter Transp. Sys., Inc. v. Hillsborough Cty. Aviation Auth., 801 F.2d 1286, 1289 (11th Cir. 1986)* (finding district court's order denying summary judgment on state-action immunity grounds a final appealable decision); *Tucson Unified Sch. Dist. v. Borek, 234 Ariz. 364, 322 P.3d 181, 184 (Ariz. Ct. App. 2014)* (accepting special action jurisdiction of trial court order denying **[*18]** summary judgment on absolute immunity under *A.R.S. § 12-820.01*); *Pinal Cty. v. Cooper, 360 P.3d 142, 2015 WL 6157397, at *2 (Ariz. Ct. App., 2015)* (allowing appeal of immunity claims denied on motion for summary judgment).

[7] The Court has serious doubts as to whether the two immunity issues are immediately appealable. "Federal appellate jurisdiction is generally limited to review of 'final decisions of the district courts of the United States.'" *DC Comics v. Pac. Pictures Corp., 706 F.3d 1009, 1012 (9th Cir. 2013)* (quoting *28 U.S.C. § 1291*)). The Court did not make a final decision on the state-action doctrine or absolute immunity under Arizona law. The District is free to raise these immunities at summary judgment.

The District asks the Court to use its discretion and stay the case because the District is likely to succeed on its immunity claims, and it will suffer irreparable injury if the Court denies the stay. (Doc. 83 at 9.) "A stay is not a matter of right, even if irreparable injury might otherwise result." *Nken v. Holder, 556 U.S. 418, 433, 129 S. Ct. 1749, 173 L. Ed. 2d 550 (2009)*. Whether to impose a stay is an exercise of judicial discretion guided by four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other [parties]; and (4) where the **[*19]** public interest lies." *Id. at 434*.

The Court has already concluded that the District is unlikely to succeed on its state-action immunity defense and that questions of fact preclude a determination that the District is absolutely immune under Arizona law. In addition, were the Court inclined to grant the stay, the harm suffered by SolarCity would likely outweigh the harm suffered by the District. SolarCity has allegedly been ousted from the market by the District. Not only does it lose sales, it loses customer goodwill and market share. The District, meanwhile, suffers only monetary harm as a result of litigation, i.e., the money it spends defending itself. Monetary harm is not irreparable. *See* *Sampson v. Murray, 415 U.S. 61, 90, 94 S. Ct. 937, 39 L. Ed. 2d 166 (1974)* ("Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough."). As such, the Court will not exercise its discretion to stay this case.

Because the Court declines to certify these issues for appeal, and because the Court finds that the District failed to present "a substantial case for relief on the merits," *see* *Lair v. Bullock, 697 F.3d 1200, 1204 (9th Cir. 2012)*, the District's motion to stay is denied.

IT IS ORDERED that the District's motion for certification pursuant to *28 U.S.C. § 1292(b)*, (Doc. **[*20]** 82), and motion to stay, (Doc. 83), are **DENIED**.

Dated this 21st day of December, 2015.

/s/ Douglas L. Rayes

Douglas L. Rayes

United States District Judge

End of Document

[United States ex rel. Univ. Loft Co. v. Avteq, Inc.](#)

United States District Court for the Western District of Texas, San Antonio Division

December 22, 2015, Decided; December 22, 2015, Filed

CIVIL NO. SA-14-CA-528-OLG

Reporter
2015 U.S. Dist. LEXIS 194643 *; 2015 WL 13548950

UNITED STATES OF AMERICA ex rel. UNIVERSITY LOFT COMPANY, ET AL., Plaintiff, v. AVTEQ, INC.; KLN STEEL PRODUCTS, CO., LLC; THURSTON MANUFACTURING; DEHLER MANUFACTURING, INC.; JOHN O'DONNELL; and KELLY O'DONNELL, Defendants.

Subsequent History: Adopted by, Dismissed by, in part, Motion denied by, in part *United States ex rel. Univ. Loft Co. v. Avteq, Inc., 2016 U.S. Dist. LEXIS 196583, 2016 WL 9461763 (W.D. Tex., Jan. 8, 2016)*

Prior History: *United States ex rel. Univ. Loft Co. v. Avteq, 2015 U.S. Dist. LEXIS 191538 (W.D. Tex., Oct. 14, 2015)*

Core Terms

bids, defendants', allegations, false claim, Sherman Act, tortious interference, motion to dismiss, Lanham Act, competitors, third amended complaint, unfair competition, argues, certifications, conspiracy, false advertising, antitrust, cause of action, contracts, pleaded, Clayton Act, recommendations, bid-rigging, individual defendant, consumers, rigging, prospective business relationship, advertising, parties, reply, direct competitor

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Judges: PAMELA A. MATHY, UNITED STATES MAGISTRATE JUDGE.

Opinion by: PAMELA A. MATHY

Opinion

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

TO: Honorable Orlando L. Garcia

United States District Judge

Pursuant to the order of referral of the above-styled and numbered cause to the undersigned United States Magistrate Judge,[1] and consistent with the authority vested in United States Magistrate Judges under the provisions of *28 U.S.C. § 636(b)(1)* and Rule 1 of the Local Rules for the Assignment of Duties to United States Magistrate Judges, Appendix C to the Local Rules for the Western District of Texas, the following report is submitted for your review and consideration.

I. JURISDICTION

Plaintiff United States of America *ex rel*. University Loft Company ("University Loft," "plaintiff," or "relator") has alleged subject matter jurisdiction under various provisions, including: *31 U.S.C. § 3732(a)* (*False Claims Act*); *31 U.S.C. § 1345* (United States as plaintiff); *28 U.S.C. § 1331* (federal question); *15 U.S.C. § 1121* and *28 U.S.C. §§*

[1] Docket no. 31 (filed Sept. 23, 2015).

1338(a) (Lanham Act); 15 U.S.C. §§ 15(a) and 26 (Antitrust claims under Sections 4 and 16 of the Clayton Act); and supplemental jurisdiction over state law claims.[2]

II. SELECTED SUMMARY OF PROCEDURAL HISTORY

Plaintiff initiated this case on June 11, 2014, when it filed an original complaint, **[*5]** which named four defendants: Avteq, Inc. ("Avteq"), KLN Steel Products Company, LLC ("KLN"), John O'Donnell, and Kelly O'Donnell.[3] Plaintiff's action is principally a *qui tam* complaint within the meaning of the False Claims Act, brought by University Loft, on behalf of the United States.[4] University Loft is an American company that manufactures and/or assembles furniture in factories located in Indiana and Tennessee.[5] Plaintiff alleges the collective corporate defendants have "common management and manufacturing facilities;" however, they "represent themselves to the Government and the public at large since 2012 as separate companies under the Avteq Group umbrella (the "Avteq Group")."[6] John O'Donnell and Kelly O'Donnell are alleged to "own and/or control the companies of the Avteq Group."[7] Defendants are alleged to be a direct competitors of the plaintiff and "often bid for the same contracts in supplying furniture and related items for government installations."[8] Plaintiff alleges "[i]n recent years [], University Loft has lost multiple contracts to companies in the Avteq Group"[9] due to defendants' engagement "in numerous illegal activities which have given them an unfair competitive advantage **[*6]** over University Loft."[10] Plaintiff further alleges "Defendants have defrauded the United States out of millions of dollars by engaging in a range of illegal activities involving procurement and delivery of goods under Government Contracts."[11]

Plaintiff's original complaint asserted claims in four counts, with counts one through three asserted against all four defendants and count four asserted against Avteq and KLN:

> count one—"Violation of the False Claims Act - 31 U.S.C. § 3729(a)(1)(A);"
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> count two—"Violation of the False Claims Act - 31 U.S.C. § 3729(a)(1)(B);"
>
> count three—"Conspiracy to Violate the False Claims Act - 31 U.S.C. § 3729(a)(1)(C);" and
> count four—"Unfair Competition by Avteq and KLN."[12]

On April 15, 2015, plaintiff filed its motion to file first amended complaint *in camera* and under seal.[13] On April 22, 2015, the Court denied its motion to seal and, in sum and in part, unsealed plaintiff's original complaint, the United

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[2] Docket no. 41 at 2.

[3] Docket no. 1.

[4] Docket no. 41 at 3.

[5] Id. at 5.

[6] Id. at 5.

[7] Id at 6.

[8] Id. at 6.

[9] Id. at 5, ¶ 20.

[10] Id. at 6, ¶ 20.

[11] Id. at 6, ¶ 21.

[12] Docket no. 1 at 10-12.

[13] Docket no. 7.

States' notice of election not to intervene, and all filings to be made after the date of the order.[14] On April 22, 2015, plaintiff filed a first amended complaint, that, in sum, added Thurston Manufacturing ("Thurston") as defendant and asserted three federal False Claims Act causes of action against all defendants, one Lanham Act cause of **[*7]** action against Avteq, and a cause of action for violations of state statutes against Avteq, KLN, and Thurston:

count one—"Violation of the False Claims Act - *31 U.S.C. § 3729(a)(1)(A)*;"

count two—"Violation of the False Claims Act - *31 U.S.C. § 3729(a)(1)(B)*;"

count three—"Conspiracy to Violation of the False Claims Act - *31 U.S.C. § 3729(a)(1)(C)*;"
count four—"False Advertising by Avteq of the Lanham Act;" and
count five—"Unfair Competition by Avteq, KLN, and Thurston."[15]

After the return of service on KLN, Avteq, and Thurston,[16] but before defendants filed an answer or responsive pleading, plaintiff filed a second amended complaint, on July 31, 2015.[17] Plaintiff's second amended complaint added Dehler Manufacturing, Inc. ("Dehler") as a party defendant and a new cause of action for tortious interference with prospective business relationships against all defendants:

count one—"Violation of the False Claims Act - *31 U.S.C. § 3729(a)(1)(A)*:"

count two—"Violation of the False Claims Act - *31 U.S.C. § 3729(a)(1)(B)*:"

count three—"Conspiracy to Violation of the False Claims Act - *31 U.S.C. § 3729(a)(1)(C)*;"
count four—"False Advertising by Avteq of the Lanham Act;"
count five—"Unfair Competition by Avteq, KLN and Thurston;" and
count six—"Tortious Interference with Prospective Business Relationships."[18]

On September 4, 2015, all defendants jointly filed **[*8]** motions: (1) to dismiss for failure to state a claim, and (2) for more definite statement.[19] Plaintiff filed separate responses to both motions on September 21, 2015.[20] The same day, plaintiff filed a motion for leave to file third amended complaint.[21] On September 23, 2015, the District Judge referred the case to the undersigned for pretrial management.[22] On October 5, 2015, Defendants filed a consolidated response to plaintiff's motion for leave to file third amended complaint and reply in support of their motion for more definite statement and a reply to plaintiff's response filed to its motion.[23] On October 12, 2015, plaintiff filed its reply in support of its motion for leave to file third amended complaint.[24]

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[14] Docket no. 8.

[15] Docket no. 9 at 12-15. Plaintiff did not specify whether the unfair competition cause of action was alleged under federal or state law (or which state law applies).

[16] Docket nos. 14, 15, 16. Plaintiff did not request issuance of summons until May 27, 2015 and July 16, 2016. Docket nos. 10, 12.

[17] Docket no. 18. The same day, defendants acknowledged service of the second amended complaint. Docket no. 20.

[18] Id. Plaintiff did not allege which specific law applies to its claims for unfair competition and tortious interference with prospective business relationships.

[19] Docket nos. 23, 24.

[20] Docket nos. 28, 29.

[21] Docket no. 30.

[22] Docket no. 31.

[23] Docket nos. 35, 37.

[24] Docket no. 39.

The undersign entered its report and recommendation on October 14, 2015.[25] Thereafter, the District Court entered an order adopting the recommendations made in the report, granted plaintiff's motion for leave to file a third amended complaint, denied as moot defendants' motion for more definite statement,[26] and denied without prejudice defendants' motion to dismiss plaintiff's second amended complaint.[27]

Plaintiff's third amended complaint is plaintiff's "live" pleading.[28] The third amended **[*9]** complaint included an additional cause of action for bid-rigging in violation of the *Sherman Act* and Clayton Act against all defendants and added "details" to "clarif[y] its allegations" in response to defendants' previous motions for more definite statement and to dismiss.[29] In sum, the third amended complaint alleges the following causes of action:

> count one—"Violation of the False Claims Act - *31 U.S.C. § 3729(a)(1)(A)*" (asserted against all defendants);
>
> count two—"Violation of the False Claims Act - *31 U.S.C. § 3729(a)(1)(B)*" (asserted against all defendants);
>
> count three—"Conspiracy to Violation of the False Claims Act - *31 U.S.C. § 3729(a)(1)(C)*" (asserted against all defendants);
> count four—"False Advertising by Avteq of the Lanham Act" (asserted against Avteq, KLN, and Thurston);
> count five—"Bid-rigging in Violation of the Sherman Act and Clayton Act" (asserted against all defendants);
> count six—"Unfair Competition by Avteq, KLN and Thurston" (asserted against Avteq, KLN, and Thurston); and
> count seven—"Tortious Interference with Prospective Business Relationships" (asserted against Avteq, KLN, and Thurston).[30]

On November 4, 2015, defendants filed a motion to dismiss third amended complaint.[31] On November 13, 2015, plaintiff filed its response to defendants' motion. **[*10]** [32] On November 25, 2015, defendants filed their reply.[33]

III. ISSUE

Whether defendants' motion to dismiss plaintiff's third amended complaint should be granted or denied.

IV. STANDARDS

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[25] Docket no. 40.

[26] Docket no. 44.

[27] Id.

[28] Docket no. 41.

[29] Docket no. 30 at 1.

[30] Docket no. 41 at 34-42. Plaintiff did not allege which specific law applies to its claims for unfair competition and tortious interference with prospective business relationships. Further, the Court notes that the plaintiff's count four heading indicates the Lanham Act claims are brought only against Avteq; however, upon review of plaintiff's allegations contained therein, it appears that plaintiff seeks to allege her Lanham Act claims against all corporate defendants. Id. at 36-38. Further, in plaintiff's response to defendants' motion to dismiss third amended complaint, plaintiff clarified "University Loft seeks to hold Individual Defendants [Kelly O'Donnell and John O'Donnell] liable only for violations of the FCA and Sherman Act." Docket no. 50 at 2.

[31] Docket no. 47.

[32] Docket no. 50.

[33] Docket no. 53.

A. *Fed. R. Civ. P. 12(b)(1)*

As federal courts have limited jurisdiction, the court must diligently assure itself that it has the power to adjudicate the claims before it. "A case is properly dismissed for lack of subject matter jurisdiction when the court lacks the statutory or constitutional power to adjudicate the case."[34] Motions filed under *Rule 12(b)(1) of the Federal Rules of Civil Procedure* permit a party to challenge the subject matter jurisdiction of the district court to hear a case.[35]

Lack of subject matter jurisdiction may be found in one of three instances: "(1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts."[36] The burden of proof for a *Rule 12(b)(1)* motion to dismiss is on the party asserting jurisdiction.[37] Accordingly, plaintiff constantly bears the burden of proof that jurisdiction does in fact exist.[38]

A facial attack on subject matter jurisdiction requires the court to decide if the plaintiff has correctly alleged **[*11]** a basis for subject matter jurisdiction.[39] Such an attack is valid if, from the face of the pleadings, the court can determine it lacks subject matter jurisdiction.[40] When a *Rule 12(b)(1)* motion attacks the lack of subject matter based on the face of the complaint, the motion is analyzed under the same standard as a motion to dismiss under *Rule 12(b)(6)*,[41] in that all factual allegations in the complaint are taken as true and construed favorably to the plaintiff.[42]

In deciding a *Rule 12(b)(1)* motion, a federal court may consider the facts in the record, whether disputed or undisputed.[43] But, a *Rule 12(b)(1)* motion based on evidence in the record, also termed a factual attack, does not accept as true the factual allegations in the live complaint.[44] Factual attacks challenge "the existence of subject matter in fact, irrespective of the pleadings, and matters outside the pleadings, such as testimony and affidavits are

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[34] *Home Builders Ass'n of Miss., Inc. v. City of Madison, Miss., 143 F.3d 1006, 1010 (5th Cir. 1998)* (quoting *Nowak v. Ironworkers Local 6 Pension Fund, 81 F.3d 1182, 1187 (2d Cir. 1996))*.

[35] *FED. R. CIV. P. 12(b)(1)*.

[36] *Williamson v. Tucker, 645 F.2d 404, 413 (5th Cir.)*, cert. denied ***454 U.S. 897, 102 S. Ct. 396, 70 L. Ed. 2d 212 (1981)***. See *Ramming v. United States, 281 F.3d 158, 161 (5th Cir. 2001)* (citing *Barrera-Montenegro v. United States, 74 F.3d 657, 659 (5th Cir. 1996))*.

[37] *McDaniel v. United States, 899 F.Supp. 305, 307 (E.D. Tex. 1995)*, aff'd, ***102 F.3d 551 (5th Cir. 1996)***.

[38] *Menchaca v. Chrysler Credit Corp., 613 F.2d 507, 511 (5th Cir.)*, cert. denied ***449 U.S. 953, 101 S. Ct. 358, 66 L. Ed. 2d 217 (1980)***.

[39] *Venture I, Inc. v. Orange County, Tex., 947 F. Supp. 271, 276 n.7 (E.D. Tex. 1996)*.

[40] Id.

[41] Id.

[42] *Williamson, 645 F.2d at 412*.

[43] *Id. at 413*.

[44] Id.

considered."[45] Unlike a *Rule 12(b)(6)* motion, a *Rule 12(b)(1)* motion is not converted to a summary judgment when a court considers matters outside the complaint.[46] This is true because:

> [A]t issue in a factual 12(b)(1) motion is the trial court's jurisdiction -- its very power to hear the case -- there is substantial authority that the trial court is free to **[*12]** weigh the evidence and satisfy itself as to the existence of its power to hear the case. In short, no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating the merits of jurisdictional claims.[47]

When a *Rule 12(b)(1)* motion is filed with a *Rule 12(b)(6)* motion, the court generally will consider the *Rule 12(b)(1)* jurisdictional attacks before addressing any attack on the merits.[48] This requirement prevents a court without jurisdiction from prematurely dismissing a case with prejudice. The court's dismissal of a plaintiff's case because the court lacks subject matter jurisdiction is not a determination of the merits and does not prevent the plaintiff from pursuing a claim in a court that does have proper jurisdiction.[49]

B. ***Fed. R. Civ. P. 12(b)(6)***

Pursuant to *Rule 12(b)(6) of the Federal Rules of Civil Procedure*, a plaintiff must state a claim upon which relief can be granted or the complaint may be dismissed with prejudice as a matter of law.[50] When considering a motion to dismiss for failure to state a claim, the "court accepts 'all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff.'" **[*13]** [51] To withstand a *Rule 12(b)(6)* motion, "the plaintiff must plead 'enough facts to state a claim to relief that is plausible on its face.'"[52]

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[45] *Garcia v. Copenhaver, Bell & Assocs., M.D.'s, P.A., 104 F.3d 1256, 1261 (11th Cir. 1997)* (quoting *Mortensen v. First Fed. Sav. & Loan Ass'n, 549 F.2d 884, 891 (3rd Cir. 1977))*. See also *Williamson, 645 F.2d at 413* (explaining federal court "may hear conflicting written and oral evidence and decide for itself the factual issues which determine jurisdiction").

[46] *Williamson, 645 F.2d at 412*.

[47] *Id. at 413* (quoting with approval *Mortensen, 549 F.2d at 891* (emphasis added)).

[48] *Hitt v. Pasadena, 561 F.2d 606, 608 (5th Cir. 1977)* (per curiam). In Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp., the Supreme Court explained that although "a federal court generally may not rule on the merits of a case without first determining that it has jurisdiction over the category of claim in suit (subject-matter jurisdiction) and the parties (personal jurisdiction)," as without jurisdiction it cannot decide the merits of the case, "there is no mandatory 'sequencing of jurisdictional issues.'" *549 U.S. 422, 428-29, 431, 127 S. Ct. 1184, 1191, 167 L. Ed. 2d 15 (2007)* (citations omitted). "[A] federal court has leeway 'to choose among threshold grounds for denying audience to a case on the merits." *Id. at 431* (citation omitted). Such "threshold grounds" that can be addressed before an adjudication of the cause include a federal court: (a) "declining to adjudicate state-law claims on discretionary grounds . . . [without] . . . first determin[ing] whether those claims fall within its pendent jurisdiction," id. (citation omitted); (b) deciding whether the parties present an Article III case or controversy before abstaining under Younger v. Harris," *id. at 1191-92* (citations omitted); (c) "disposing of an action by a forum non conveniens dismissal, bypassing questions of subject-matter and personal jurisdiction," *id. at 1192*. Other threshold questions include immunity and class certification, such that federal courts may dismiss a case based on immunity, *Powerex Corp. v. Reliant Energy Services, Inc., 551 U.S. 224, 127 S. Ct. 2411, 2415, 2418-19, 168 L. Ed. 2d 112 (2007)*, and may deny class certification before determining subject matter and personal jurisdiction.

[49] *Hitt, 561 F.2d at 608*.

[50] *Fed. R. Civ. P. 12(b)(6)*.

[51] *In re Katrina Canal Breaches Litig., 495 F.3d 191, 205 (5th Cir. 2007)* (quoting *Martin K. Eby Constr. Co. v. Dallas Area Rapid Transit, 369 F.3d 464, 467 (5th Cir. 2004)*; *Jones v. Greninger, 188 F.3d 322, 324 (5th Cir. 1999)*; ***Chehardy v. Allstate Indem. Co., 552 U.S. 1182, 128 S. Ct. 1231, 170 L. Ed. 2d 63 (2008))***, cert. denied sub nom, ***Xavier Univ. of La. v. Travelers Cas.***

Rule 8(a)(2) of the Federal Rules of Civil Procedure sets out the fundamental pleading standard for civil litigation and governs all claims in a civil suit, requiring "a short plain statement of the claim showing that the pleader is entitled to relief."[53] Although "heightened fact pleading of specifics"[54] may not be adopted when not authorized by the Federal Rules of Civil Procedure,[55] the complaint **[*14]** taken as a whole "must contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory"[56] and a plaintiff's pleading obligation includes the twin requirements of fact-based pleading and plausibility. More specifically, "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do."[57] "Factual allegations must be enough to raise a right to relief above the speculative level . . . on the assumption that all of the allegations in the complaint are true (even if doubtful in fact)."[58] Although the Supreme Court in Twombly stressed that it did not impose a probability standard at the pleading stage, nevertheless, the allegation of a mere possibility of relief does not satisfy the threshold requirement of *Rule 8(a)(2)* that the "plain statement" of a claim include factual "allegations plausibly suggesting (not merely consistent with)" an entitlement to relief.[59]

Prop. Co. of Am, 552 U.S. 1182, 128 S. Ct. 1230, 170 L. Ed. 2d 63 and ***Chehardy v. Allstate Indem. Co., 552 U.S. 1182, 128 S. Ct. 1231, 170 L. Ed. 2d 63 (2008)***.

In *Katrina Canal Breaches, 495 F.3d at 205 n.10*, the United States Court of Appeals for the Fifth Circuit acknowledged the United States Supreme Court's abrogation of the "no set of facts" standard for determining the adequacy of a pleading in Bell Atlantic Corp. v. Twombly, a Sherman Act case:

> We have often stated that a claim should not be dismissed under *Rule 12(b)(6)* unless the plaintiff would not be entitled to relief under any set of facts or any possible theory he may prove consistent with the allegations in the complaint. See, e.g., *Martin K. Eby Constr., 369 F.3d at 467* (quoting *Jones, 188 F.3d at 324*). This standard derived from Conley v. Gibson, which stated that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L.Ed.2d 80 (1957)*. But recently in Bell Atlantic, the Supreme Court made clear that the Conley rule is not "the minimum standard of adequate pleading to govern a complaint's survival." *127 S.Ct. at 1968-69*.

[52] *Id. at 205* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570-72, 127 S. Ct. 1955, 1974, 167 L. Ed. 2d 929 (2007))*.

[53] *Fed. R. Civ. P. 8(a)(2)*.

[54] *Twombly, 550 U.S. at 570, 127 S.Ct. at 1974*.

[55] See, e.g., *FED. R. CIV. P. 9(b)* (allegations of fraud or mistake to be stated with particularity); *Swierkiewicz v. Sorema, N.A., 534 U.S. 506, 508, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002)* ("[A] complaint in an employment discrimination lawsuit [need] not contain specific facts establishing a *prima facie* case of discrimination under the framework set forth in *McDonnell Douglas Corp. v. Green, 411 U.S. 792 [, 93 S. Ct. 1817, 36 L.Ed.2d 668] (1973)*.").

[56] *Twombly, 550 U.S. at 562, 127 S. Ct. at 1969* (quoting *Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (7th Cir. 1984)* (internal quotation marks omitted; emphasis and omission in original)).

[57] *Id. at 555, 127 S. Ct. at 1964-65* (citing *Papasan v. Allain, 478 U.S. 265, 286, 106 S.Ct. 2932, 2944, 92 L. Ed. 2d 209 (2007))*.

[58] *Id. at 555, 127 S. Ct. at 1965* (as quoted in *Katrina Canal Breaches, 495 F.3d at 205*).

[59] *Id. at 557, 127 S.Ct. at 1966*. See also *Ashcroft v. Iqbal, 556 U.S. 662, 684, 129 S.Ct. 1937, 1953, 173 L. Ed. 2d 868 (2009)* (rejecting the argument that the Twombly plausibility pleading standard applied only in antitrust cases and expressly holding the standard applies "all civil actions.").

When ruling on a motion to dismiss under *Rule 12(b)(6)*, a court must accept as true all of the factual allegations **[*15]** contained in the complaint.[60] But, a court need not accept as true "conclusory allegations, unwarranted factual inferences, or legal conclusions," which will not defeat a *Rule 12(b)(6)* motion to dismiss.[61] In Iqbal, the Court formalized a two-pronged approach to apply the underlying jurisprudential principles of Twombly.[62] The first prong required the Court to separate factual allegations from legal conclusions. The Court dismissed those allegations deemed to be "conclusory" on the basis that bare legal conclusions are not entitled to the privilege that all well-pleaded facts be taken as true at the motion to dismiss stage.[63] The second prong then applied the plausibility test to the remaining allegations.[64] That two-pronged approach is now the standard for evaluating the plausibility of a complaint under *Rule 8(a)(2)*.

V. DISCUSSION

Defendants include four **[*17]** main subsections of argument in their motion to dismiss: (1) "U-Loft's Lanham Act Claim (Count 4) should be dismissed because U-Loft lacks standing and has failed to state a claim;" (2) "U-Loft's Sherman/Clayton (Count 5) and 'Unfair Competition' (Count 6) Claims should be dismissed because i) 'unfair competition' is not an independent cause of action and ii) U-Loft lacks standing and has failed to state a claim under the Sherman/Clayton Act;" (3) "U-Loft's Tortious Interference (Count 7) claim should be dismissed because U-Loft did not plead Defendants had actual knowledge of contracts U-Loft was pursuing and thus failed to state a claim;" and (4) "U-Loft has failed to state a claim for relief against KOD [Kelly O'Donnell] and JOD [John O'Donnell], individually, because U-Loft has not alleged any facts which would allow the Court to pierce the corporate veil."[65] The Court addresses the parties' arguments as to each cause of action separately. Although this report does not

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[60] *550 U.S. at 555, 127 S.Ct. at 1965* (citing *Swierkiewicz, 534 U.S. at 508 n.1, 122 S. Ct. at 996 n.1*; *Neitzke v. Williams, 490 U.S. 319, 326-27, 109 S. Ct. 1827, 1832, 104 L. Ed. 2d 338 (1989)*; *Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S. Ct. 1683, 1686, 40 L. Ed. 2d 90 (1974))*.

[61] *Plotkin v. IP Axess, Inc., 407 F.3d 690, 696 (5th Cir. 2005)* (citing *Southland Sec. Corp. v. INSpire Ins. Solutions, Inc., 365 F.3d 353, 361 (5th Cir. 2004))*.

[62] *Iqbal,, 556 U.S. at 677-79, 129 S.Ct. at 1949-50*.

[63] Id. Iqbal illustrated its analysis of the first prong as follows:

> We begin our analysis by identifying the allegations in the complaint that are not entitled to the assumption of truth. Respondent pleads that petitioners "knew of, condoned, and willfully and maliciously agreed to subject [him]" to harsh conditions of confinement "as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest." **[*16]** Complaint ¶ 96, App. to Pet. for Cert. 173a-174a. The complaint alleges that Ashcroft was the "principal architect" of this invidious policy, id., ¶ 10, at 157a, and that Mueller was "instrumental" in adopting and executing it, id., ¶ 11, at 157a. These bare assertions, much like the pleading of conspiracy in Twombly, amount to nothing more than a "formulaic recitation of the elements" of a constitutional discrimination claim, *550 U.S., at 555, 127 S.Ct. 1955*, namely, that petitioners adopted a policy "'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Feeney, 442 U.S., at 279, 99 S.Ct. 2282*. As such, the allegations are conclusory and not entitled to be assumed true. *Twombly, supra, 550 U.S., at 554-555, 127 S.Ct. 1955*. To be clear, we do not reject these bald allegations on the ground that they are unrealistic or nonsensical. We do not so characterize them any more than the Court in Twombly rejected the plaintiffs' express allegation of a "'contract, combination or conspiracy to prevent competitive entry,'" *id., at 551, 127 S.Ct. 1955*, because it thought that claim too chimerical to be maintained. It is the conclusory nature of respondent's allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth.

Id. at 680-81, 129 S. Ct. at 1951.

[64] Id. (explaining that although the Court must "take all of the factual allegations in the complaint as true," it is "not bound to accept as true a legal conclusion couched as a factual allegation" (internal quotation marks omitted)).

[65] Docket no. 47 at 2.

note all arguments made by the parties in their detailed submissions, all relevant portions of the record have been fully considered in connection with this preparation of this report.

A. Count IV - Lanham Act

1. standing [*18]

a. summary of arguments

Defendants argue plaintiff lacks standing under Article III and the Lanham Act's statutory standing.[66] Under Article III, defendants argue plaintiff has failed to meet all elements required to having standing. First, defendants argue plaintiff "failed to allege (and cannot allege) that any certification representation was a factor in Defendants obtaining any contract. . . .that U-Loft did not obtain and could otherwise have obtained based on a certification."[67]

Second, defendants argue their "actions have no bearing on whether U-Loft is eligible to participate in bids or contracts set aside for certified businesses or selected for student housing contracts slated for businesses with certifications."[68] Third, defendants argue there is "no causal connection between the alleged damages and Defendants' actions."[69] Fourth, defendants argue "U-Loft cannot demonstrate that its alleged injury is likely to be redressed by a favorable decision."[70]

Further, defendants argue plaintiff lacks "statutory standing" required by the Lanham Act for two reasons.[71] First, defendants argue plaintiff's allegations do not fall within the zone of interests protected by the statute because **[*19]** plaintiff "did not allege facts supporting an injury to a commercial interest in business reputation or sales lost."[72] Second, defendants argue plaintiff "cannot meet the proximate causation prong of the statutory test"[73] because plaintiff failed to allege that it lost business as a "result of Defendants' alleged misrepresentations as opposed to less nefarious market factors or that U-Loft was otherwise eligible to be selected over Defendants."[74]

In response, plaintiff argues four main points. First, plaintiff argues that it has sufficiently pleaded an injury in fact or an invasion of a legally protected interest because its Lanham Act claim "is *only* targeting situations where Corporate Defendants and University Loft *are* competitors"[75] and "harm is presumed when advertising is literally

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[66] Docket no. 47 at 5 (citing docket no. 41 at PP 1, 17, 18, 21, 109).

[67] Id. at 5 (citing docket no. 41 at PP 17, 18, 21, 23, 90-93, 109).

[68] Id. at 6. Although plaintiff argues "a procurement officer might give additional consideration to a vendor" who alleges specific certifications, defendants argue the "hypothetical 'might' does not confer standing." Id. (citing docket no. 41 at ¶ 27).

[69] Id. at 7.

[70] Id. Defendants argue regardless of whether defendants are enjoined from the alleged false advertising, "U-Loft still is not able to solicit, procure or obtain contracts or bids set aside in whole or in part for businesses with such certifications in government contracting or student housing." Id.

[71] Id.

[72] Id. at 8.

[73] Id. at 9.

[74] Id.

[75] Docket no. 50 at 3 (emphasis in original).

false."[76] Second, plaintiff argues "[t]here is no requirement that University Loft prove it would have won the contracts absent the false advertising to obtain this recovery."[77] Plaintiff argues to get the injunctive relief it seeks, "it is enough to show 'sufficient evidence that [University Loft] had been or was likely to be injured as a result of the violation of the Act.'"[78] Third, plaintiff argues the proximate **[*20]** causation prong is satisfied because "Corporate Defendants' false advertising misled potential customers []" which damaged its commercial interest in sales.[79]

In reply, defendants argue plaintiff has failed to allege that defendants' false advertising was "a factor in award of the contract."[80] Further, defendants argue in the bidding process "[t]he contract is either Set Aside or Unrestricted." As a result, "[i]f it is Set Aside, then U-Loft concedes it has no standing. If it is Unrestricted, then there is no injury and no casual connection/proximate causation between Defendants' conduct and U-Loft's injury."[81]

b. analysis

In consideration of "Article III's limitation of the judicial power to resolving Cases and Controversies, and the separation-of-power principles underlying that limitation" the Supreme Court has "deduced a set of requirements that together make up the 'irreducible constitutional minimum of standing."[82] The doctrine of standing "serv[es] to identify those disputes which are appropriately resolved through the judicial process."[83] The three elements of Article III standing are succinctly stated as: "[P]laintiff must have suffered or be imminently threatened with a concrete **[*21]** and particularized 'injury in fact' that is fairly traceable to the challenged action of the defendant and likely to be redressed by a favorable judicial decision."[84]

In addition to Article III standing, a plaintiff must also satisfy a two-part test for "statutory standing" under the Lanham Act, because "whether the plaintiff is authorized to sue under the statute is different in kind from whether the plaintiff has Article III standing or prudential standing."[85] In Lexmark, the Supreme Court described the two presumed elements of statutory standing as follows: (1) "a statutory cause of action extends only to plaintiffs whose

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[76] Id. at 4 (citing *Logan v. Burgers Ozark Country Cured Hams, Inc., 263 F.3d 447, 462 (5th Cir. 2001))*. Despite the plaintiff's argument that harm is presumed when advertising is literally false, the Fifth Circuit in Logan did not hold that harm to a competitor is presumed from literally false advertising; rather, the Court held that "when the statements of fact at issue are shown to be literally false, the plaintiff need not introduce evidence on the issue of the impact the statements had on consumers. . . . In such a circumstance, the court will assume that the statements actually mislead consumers." *Logan, 263 F.3d at 462* (citing *Pizza Hut, Inc., v. Papa John's Int'l, Inc., 227 F.3d 489, 497 (5th Cir. 2000))* (emphasis added).

[77] Id.

[78] Id. (citing *Schlotzsky's, Ltd. v. Sterling Purchasing & Nat'l Distrib. Co., 520 F.3d 393, 401 (5th Cir. 2008)* (quoting *King v. Ames, 179 F.3d 370, 373-74 (5th Cir. 1999)*).

[79] Id. at 5.

[80] Docket no. 53 at 2.

[81] Id. at 2-3.

[82] *Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 134 S.Ct. 1377, 1386, 188 L. Ed. 2d 392* (citing *Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S.Ct. 2130, 2136, 119 L. Ed. 2d 351)* (internal quotations omitted).

[83] *Lujan, 504 U.S. at 560, 112 S.Ct. at 2136* (citing *Whitmore v. Arkansas, 495 U.S. 149, 155, 110 S.Ct. 1717, 1722, 109 L.Ed.2d 135 (1990))*.

[84] *Lexmark 572 U.S. 118, 134 S.Ct. at 1386* (citing *Lujan, 504 U.S. at 560, 112 S.Ct. at 2130*).

[85] *Greater Houston Transp. Co. v. Uber Technologies, Inc., No. 4:14-0941, 2015 U.S. Dist. LEXIS 28867, 2015 WL 1034254, at *7 (S.D.Tex. March 10, 2015)*.

interest 'fall within the zone of interests protected by the law invoked;"[86] and (2) "a statutory cause of action is limited to plaintiffs whose injuries are proximately caused by violations of the statute."[87] As a result, the "direct application of the zone-of-interests test and the proximate-cause requirement supplies the relevant limits on who may sue."[88]

The "first part of this standing test concerns the question whether the interest sought to be protected by the complainant is arguably within the zone of interest to be protected or regulated by the statute or constitutional **[*22]** guarantee in question."[89] To fall within the zone of interests "in a suit for false advertising under *§ 1125(a)*, a plaintiff must allege an injury to a commercial interest in reputation or sales."[90]

The "second part of this test requires that injuries be proximately caused by violations of the statute,"[91] which "generally bars suits for alleged harm that is 'too remote' from the defendant's unlawful conduct."[92] The plaintiff "must show economic and reputation injury flowing directly from the deception wrought by the defendant's advertising; and that occurs when deception of consumers causes them to withhold trade from the plaintiff."[93] To survive a motion to dismiss, "[i]t is sufficient that [plaintiffs] pleaded that customers were induced by false advertising to offer their business to Plaintiffs' competitors instead of Plaintiffs."[94]

Concerning Article III standing, the Court finds plaintiff does not meet the required standing elements.[95] First, plaintiff has failed to allege an injury in fact that resulted from defendants' alleged false certification because plaintiff makes no allegation that any contract bid was lost, resulting in injury to plaintiff's commercial interest, due to defendants' false advertising. Second, although **[*23]** plaintiff's allegations against defendants could demonstrate potential injury to its bid competitors, plaintiff has failed to provide a particularized statement of facts sufficient to allege a casual connection between an injury in fact and the conduct of which plaintiff complains. There is no allegation that defendants' false certifications were ever an applicable factor in a government unrestricted bid contest in which plaintiff and defendant(s) were direct competitors. Thus, the Court does not find plaintiff has provided a particularized statement of facts sufficient to show plaintiff suffered a concrete and particular injury in fact that is fairly traceable to defendants' alleged false advertising of certain certifications. Third, the Court could offer no relief that would allow plaintiff to become a competitor in the restricted bid process or would otherwise have

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[86] *Lexmark, 572 U.S. 118, 134 S.Ct. at 1388* (citing *Allen v. Wright, 468 U.S. 737, 751, 104 S.Ct. 3315, 3324, 82 L. Ed. 2d 556 (1984))*.

[87] *Id. at 1390*.

[88] *Id. at 1391* (internal quotations omitted).

[89] *Uber, No. 4:14-0941, 2015 U.S. Dist. LEXIS 28867, 2015 WL 1034254, at *7* (citing *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153, 90 S.Ct. 827, 830, 25 L. Ed. 2d 184 (1970))*.

[90] *Lexmark, 572 U.S. 118, 134 S.Ct. at 1382, 1390*.

[91] *Uber, No. 4:14-0941, 2015 U.S. Dist. LEXIS 28867, 2015 WL 1034254, at *7*.

[92] *Lexmark, 572 U.S. 118, 134 S.Ct. at 1390*.

[93] *Id. at 1391*.

[94] *Uber, No. 4:14-0941, 2015 U.S. Dist. LEXIS 28867, 2015 WL 1034254, at *8*.

[95] Docket no. 41 at 36. In its third amended complaint, plaintiff alleges "Avteq falsely claims on its website and other marketing materials that it is an '8A woman-owned, HUBZone certified firm.'" Id. at 36-37. In addition, plaintiff alleges Avteq "represents on the GSA Advantage! Website that it is a disadvantaged woman-owned small business." Id. at 37. Further, plaintiff claims that "Dehler and Thurston both represent on the GSA Advantage! Website that it is a veteran-owned small business." Id.

any effect on plaintiff's commercial interest if defendants could no longer claim to have specific business certifications.

Concerning Lanham Act statutory standing, although plaintiff satisfies the first prong of analysis regarding the zone of interests qualifier because the Lanham Act's purpose, in part, is to provide **[*24]** competitors "protection against a myriad of deceptive commercial practices, including false advertising or promotion,"[96] plaintiff fails to satisfy the second prong regarding proximate cause. Plaintiff has not shown an economic or reputation injury "flowing directly from the deception wrought by the Defendant's advertising. . . ."[97] As stated previously, plaintiff has not pleaded the government was induced by defendants' alleged false advertising to offer its business to the defendants instead of the plaintiff. Further, plaintiff has not pleaded that defendants' alleged false advertising was the proximate cause of plaintiff failing to win bids in any unrestricted competitive bid process. Rather, plaintiff's only contention is that "a procurement officer might give additional consideration to a vendor that represented itself" with the alleged false certifications.[98] This allegation, even if true, is insufficient to support an inference that the government, as a customer, was lured away from awarding bids to plaintiff due to defendants' alleged false advertising of specific business certifications. Ultimately, plaintiff has not pleaded a particularized statement of facts to show a causal connection **[*25]** between its alleged harm and the influence of certifications in an unrestricted bid competition. As a result, plaintiff has not sufficiently alleged a link or proximate cause between defendants' alleged false advertising and a resulting injury to plaintiff. Therefore, defendants' motion to dismiss plaintiff's Lanham Act claim under *Rule 12(b)(1)* based on plaintiff's lack of standing should be **granted**.

2. *Rule 12 (b)(6)* failure to state a claim

a. summary of arguments

Defendants alternatively argue plaintiff has failed to state a Lanham Act claim for false advertising because, in sum, plaintiff "wholly failed" to allege: (1) "Defendants' certification representations deceived or had the capacity to deceive a substantial segment of potential customers;" and (2) "the alleged misrepresentation was material or likely to influence the consumer's purchasing decision."[99] As a result, defendants argue plaintiff does not meet the pleading requirements "because it has not demonstrated that it was actually injured or is likely to be injured as a result of Defendants' representations, and not stemming from the fact that it does not qualify for any of the discussed certifications."[100] In response, plaintiff argues the Lanham Act **[*26]** prohibits "'any false designation of origin or misleading description of fact' that 'misrepresents the nature, characteristics, qualities or geographic origin' of good or services," thus "falsely representing that goods/services are provided by a certified woman-owned business or the like falls squarely within the Lanham Act's prohibition."[101]

b. analysis

Section 43(a) of the Lanham Act, *15 U.S.C. § 1125(a)*,[102] provides, in relevant part:

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[96] *Uber, No. 4:14-0941, 2015 U.S. Dist. LEXIS 28867, 2015 WL 1034254, at *6*.

[97] *Lexmark, 572 U.S. 118, 134 S.Ct. at 1391*.

[98] Docket no. 41 at 9 (emphasis added).

[99] Docket no. 47 at 10.

[100] Id. at 11.

[101] Docket no. 50 at 5 (citing *15 U.S.C. § 1125(a)*).

(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which— * * *
(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable to in a civil action by any person who believes that he or she is or is likely to be damaged by such act.[103]

The Lanham Act's purpose is to provide "protection against a myriad of deceptive commercial practices, including false advertising or promotion."[104] A *prima facie* case **[*27]** of false advertising includes five elements:

(1) A false or misleading statement of fact about a product;
(2) Such statement either deceived or had the capacity to deceive a substantial segment of potential consumers;
(3) The deception was material, in that it is likely to influence the consumer's purchasing decision;
(4) The product is in interstate commerce; and
(5) The plaintiff has been or is likely to be injured as a result of the statement at issue.[105]

Defendants' arguments in support of dismissal under *Rule 12(b)(6)* specifically challenge two of the Lanham Act's *prima facie* elements: (1) "Defendants' certification representations deceived or had the capacity to deceive a substantial segment of potential consumers;" and (2) "the alleged misrepresentation was material or likely to influence the consumer's purchasing decision."[106] The Court must decide if the plaintiff has stated "enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of [the claim or element]."[107] The plaintiff must provide "more than labels and conclusions, and a formulaic recitation of a cause of action will not do."[108]

The Court agrees that plaintiff has failed to sufficiently allege that defendants' allegedly **[*28]** false advertising of its business certifications was a material factor in the government awarding bids in an unrestricted bid contest, such that plaintiff suffered a disadvantage in the bidding process or lost winning bids. Although plaintiff conclusorily alleges it has "suffered injury to its commercial interest in sales caused by Avteq's false advertising,"[109] plaintiff has not pleaded a particularized statement of facts to show a direct and material correlation between the defendants' alleged false advertising and what loss the plaintiff suffered. Stated differently, plaintiff has not alleged in any instance that plaintiff and defendants were ever direct competitors in a bid process for which specific certifications were influential or material to the awarding of such bid. In essence, when the alleged certifications were applicable in the competitive bid process, the government was only a potential customer of the alleged defendants and not a potential customer of the plaintiff. Thus, plaintiff fails to sufficiently plead that the alleged deception was material as applied to the competition between the parties or that the deception was likely to influence the consumer's purchasing **[*29]** decision resulting in harm to plaintiff. Therefore, defendant's motion to dismiss plaintiff's Lanham Act cause of action under *Rule 12(b)(6)* because plaintiff has failed to state a claim for relief should be **granted**.

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[102] Docket no. 47 at 3-11.

[103] *15 U.S.C. § 1125(a)*.

[104] *Uber, No. 4:14-0941, 2015 U.S. Dist. LEXIS 28867, 2015 WL 1034254, *6*.

[105] Id. (citing *IQ Prods. Co. v. Pennzoil Prods. Co., 305 F.3d 368, 375 (5th Cir. 2002)*).

[106] Docket no. 47 at 10.

[107] *Twombly, 550 U.S. at 545, 127 S.Ct. at 1965*.

[108] *Twombly, 550 U.S. at 545, 127 S.Ct. at 1965*.

[109] Docket no. 41 at 31.

3. conclusion

For the reasons summarized in this report, plaintiff has failed to satisfy the standing requirements under Article III and the Lanham Act and has failed to state a Lanham Act claim. Accordingly, defendants' motion to dismiss Count IV- Lanham Act in plaintiff's third amended complaint should be **granted** and plaintiff's Count IV - Lanham Act claim should be **dismissed**.

B. Count V - Sherman Act and Clayton Act

1. standing

a. summary of arguments

Defendants argue plaintiff does not have Article III standing and statutory standing under the Sherman Act and Clayton Act because "U-Loft did not suffer injury" due to defendants' alleged bid-rigging.[110] Instead, defendants argue, plaintiff failed to win bids "because its own bid was not the lowest price or fastest delivery time"[111] and "if U-Loft's bid had been the low bid, nothing else would have prevented U-Loft from winning the contract."[112] Thus, defendants argue, the "lack of proximate cause negates Article III standing and requires dismissal." **[*30]** [113]

Further, defendants argue "U-Loft lacks statutory standing or antitrust injury," because defendants "alleged bid-rigging actually increased competition by providing consumers with lower prices."[114] Finally, defendants argue plaintiff lacks standing because "U-Loft is not a proper plaintiff, in its own right, to complain about alleged bid rigging by Defendants when the focus of the allegations relate to alleged misrepresentations made to the government to secure payment of claims."[115]

In response, plaintiff argues "the government is only required to obtain a limited number of bids on certain contracts" and "[s]ubmitting multiple bids gave Avteq Group an advantage in these situations (and harmed the government), precisely because there were fewer true competitors involved in the bidding process."[116] Thus, "the United States did not obtain truly competitive bids, or get what it bargained for when it accepted a tainted bid."[117] Lastly, plaintiff argues "[r]estraint in the market affects consumers and competitors in the market; as such, they are the parties that have standing to sue."[118]

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[110] Docket no. 47 at 13.

[111] Id.

[112] Id.

[113] Id.

[114] Id. at 14 (citing *Brunswick Corp. v. Pueblo Bowl-O-Mat Inc., 429 U.S. 477, 488, 97 S.Ct. 690, 697, 50 L. Ed. 2d 701 (1977))* (emphasis in original).

[115] Id.

[116] Docket no. 50 at 8.

[117] Id.

[118] Id. at 8 (citing *Bell v. Dow Chemical Co., 847 F.2d 1179, 1183 (5th Cir. 1988))*.

In reply, defendants argue "U-Loft failed to address how its alleged injury falls into the type of injury **[*31]** the anti-trust laws were designed to prevent"[119] because "U-Loft's entire claim of damages is based on its claim to profits that would have been earned had defendants company not been awarded contracts."[120]

b. analysis

The Sherman Act, under *15 U.S.C. § 1*, provides "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . .is declared to be illegal." Article III and the Sherman Act's "statutory standing" elements are merged into a single inquiry, under the antitrust standing analysis.[121] To have standing to pursue an antitrust claim, the plaintiff must show: "(1) injury-in-fact, an injury to the plaintiff proximately caused by the defendants' conduct; (2) antitrust injury; and (3) proper plaintiff status, which assures that other parties are not better situated to bring suit."[122]

First, the Court must determine if plaintiff alleged an injury-in-fact, proximately caused by defendants' alleged conduct. Plaintiff alleges it is a direct competitor to the corporate defendants for government bids and defendants allegedly "repeatedly and illegally colluded with each other in submitting bids on government contract to the detriment of University Loft."[123] Further, **[*32]** plaintiff alleges defendants' separate bids were purposefully structured with varying terms to appeal to the purchaser.[124] By submitting multiple bids, defendants advanced their commercial interest, especially "in procuring contracts that only required the government to obtain a limited number of bids."[125] The Court finds the plaintiff, as a direct competitor bidding against defendants when an alleged bid rigging scheme was conducted, would suffer harm if defendants' bid rigging advanced the defendants' bids over the plaintiff's bids.

Second, the Court must consider whether plaintiff's injury is the type that the antitrust laws were intended to prevent.[126] "Antitrust injury for standing purposes should be viewed from the perspective of the plaintiff's position in the marketplace, not from the merits-related perspective of the impact of defendant's conduct on overall competition."[127] Taking the plaintiff's allegations as true, the plaintiff is not simply a remote or indirect victim of the defendant's alleged scheme. Instead, plaintiff is a direct competitor for government contracts and participated in bidding processes, alleged to be manipulated by the defendants.[128] An antitrust injury "should **[*33]** reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation."[129] The Court

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[119] Docket no. 53 at 6.

[120] Id. at 7.

[121] See *Bell, 847 F.2d at 1182* ("Antitrust injury is a component of the standing inquiry, not a separate qualification;" "[p]roviding antitrust injury is a necessary requirement for providing standing; the former cannot stand alone from the latter.").

[122] *Doctor's Hosp. of Jefferson, Inc. v. Southeast Med. Alliance, Inc., 123 F.3d 301, 305 (5th Cir. 1997)* (citing *McCormack v. NCAA, 845 F.2d 1338, 1341 (5th Cir. 1988))*.

[123] Docket no. 41 at 38.

[124] Id. at 19.

[125] Id.

[126] *Bell, 847 F.2d at 1183* (citing *Brunswick, 429 U.S. at 477, 97 S.Ct. at 690*).

[127] *Doctor's Hosp., 123 F.3d at 305*.

[128] Docket no. 41 at 38.

[129] *Brunswick, 429 U.S. at 489*.

views the plaintiff's alleged antitrust injury from the plaintiff's position in the marketplace and finds plaintiff, as defendants' direct competitor, has allegedly suffered injury by losing government contracts due to defendants' bid-rigging scheme, which is a fundamental antitrust injury.

Lastly, the Court must determine if plaintiff has proper status to challenge defendants' alleged bid rigging scheme as a direct competitor in the bidding process.[130] "Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to antitrust violation"[131] and the court must find "the plaintiff's demand for relief ultimately serves the purposes of ***antitrust law*** to increase consumer choice, lower prices and assist competition, not competitors."[132] "Restraint in the market affects consumers and competitors in the market; as such, they are the parties that have standing to sue."[133] Plaintiff has alleged losses and a competitive disadvantage due to defendants' bid-rigging, which appear to come within the "conceptual bounds of **[*34]** antitrust injury, whatever the ultimate merits of this case."[134] As a result, defendants' alleged conduct would serve to place restraint on the competitive bidding market and plaintiff, as a competitor, has proper plaintiff standing to pursue an antitrust claim against the defendants.[135]

2. failure to state a claim

a. summary of arguments

Defendants argue plaintiff has failed to state a claim under the Sherman/Clayton Act because she has failed to allege the first and second elements of the claim as by the Texas Court of Appeals: "1) a contract, combination . . . . or conspiracy between competitors, 2) is unreasonable, and 3) has an adverse effect on competition in the relevant market."[136] Defendants argue "U-Loft has pleaded that bids submitted by Defendants were reviewed, edited, and controlled by a single decision maker, and as such, there can be no restraint of trade as it relates to the bid-rigging allegations."[137] Defendants argue "U-Loft did not allege that Defendants were in fact competitors among themselves, only that they allegedly misrepresented being competitors with one another to the government."[138] Further, defendants argue "U-Loft also wholly failed to plead the conduct was unreasonable, **[*35]** if in fact deemed a restraint of trade."[139]

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[130] *Doctor's Hosp., 123 F.3d at 305* (citing *McCormack, 845 F.2d at 1341*).

[131] *Bell, 847 F.2d at 1183 (5th Cir. 1988)* (citing *Associated Gen. Contractors v. Carpenters, 459 U.S. 519, 535, 103 S. Ct. 897, 907, 74 L. Ed. 2d 723 (1983)* (quoting *Hawaii v. Standard Oil Co., 405 U.S. 251, 263 n.14, 92 S.Ct. 885, 891 n.14, 31 L. Ed. 2d 184 (1972))*.

[132] *Doctor's Hosp., 123 F.3d at 306*.

[133] *Bell, 847 F.2d at 1183* (citing *Associated Gen. Contractors, 459 U.S. at 539, 103 S.Ct. at 909*; *Eagle, 812 F.2d at 540*).

[134] *Doctor's Hosp., 123 F.3d at 305*.

[135] See *Bell, 847 F.2d at 1183*.

[136] Docket no. 47 at 14-16 (citing *Puentes v. Spohn Health Network, 2009 Tex. App. LEXIS 4131, *9-10 (Tex. App. - Corpus Christi 2009))*.

[137] Id. at 15-16.

[138] Id. at 16.

[139] Id.

In response, plaintiff argues "bid rigging is a *per se* violation of the Sherman Act."[140] As a basis of its Sherman Act claims, plaintiff argues defendants represented to the government that they were not a single economic unit, but were, instead separate companies for competitive bidding purposes, thus "Defendants cannot now complain that University Loft is alleging that Corporate Defendants were separate competing entities."[141] In sum, plaintiff argues either defendants "(i) violated the FCA by lying to the government about being separate companies for competitive bidding so they could illegally submit multiple bids, or (ii) violated the anti-trust laws by colluding with each other to rig bids."[142]

In reply, defendants argue: (1) "U-Loft confused the elements required to plead an FCA claim with those under the Sherman Act;"[143] and (2) "U-Loft conceded that Defendants' statement of law—that a single economic unit or a parent and its subsidiary cannot be liable for bid rigging under the Sherman Act—is correct" and "U-Loft incorrectly argues that it pleaded Defendants were competitors with one another."[144]

b. analysis

Liability under the Sherman Act, *15 U.S.C. § 1*, **[*36]** derives from "contract, combination . . . or conspiracy, in restraint of trade or commerce."[145] "Conspiracies to submit collusive, noncompetitive, rigged bids, allocate customers, and fix prices are *per se* violations of the Sherman Act."[146] To establish a violation of the Sherman Act section prohibiting conspiracies to restrain trade, a plaintiff must demonstrate that: (1) defendants engaged in a conspiracy; (2) the conspiracy had the effect of restraining trade; and (3) trade was restrained in the relevant market.[147] "Because *§ 1* of the Sherman Act "does not prohibit [all] unreasonable restraints of trade . . . but only restraints effected by a contract, combination, or conspiracy, [t]he crucial question is whether the challenged anticompetitive conduct stem[s] from independent decision or from an agreement, tacit or express."[148] "The court's inquiry should ultimately focus upon 'form[ing] a judgment about the competitive significance of the restraint."[149]

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[140] Docket no. 50 at 6 (citing *United States v. Rose, 449 F.3d 627, 630 (5th Cir. 2006))* (emphasis in original).

[141] Id.

[142] Id. at 7.

[143] Docket no. 53 at 4.

[144] Id.

[145] *Twombly, 550 U.S. at 548, 127 S.Ct. at 1961*.

[146] *Rose, 449 F.3d at 630* (internal quotations and original emphasis omitted).

[147] *Marucci Sports, L.L.C. v. NCAA, 751 F.3d 368, 373 (5th Cir. 2014)* (internal quotations omitted). See also *Abraham & Veneklasen Joint Venture v. Am. Quarter Horse Ass'n, 776 F.3d 321, 327 (5th Cir. 2015)*. The Court notes that defendants argue pursuant to a Texas Court of Appeals case, the a Sherman/Clayton Act cause of action requires: "1) a contract, combination . . . or conspiracy between competitors, 2) is unreasonable, and 3) has an adverse effect on competition in the relevant market." Docket no. 47 at 14-15. See *Puentes, 2009 Tex. App. LEXIS 4131, *9-10*. But, the Court does not adopt the elements of the Sherman Act as cited by the defendants. Rather, the Court follows Fifth Circuit precedent in stating the elements for a cause of action under *§ 1* of the Sherman Act.

[148] *Twombly, 550 U.S. at 553, 127 S.Ct. at 1964* (citing *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 775, 104 S.Ct. 2731, 2744, 81 L. Ed. 2d 628 (1984))*; *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537, 540, 74 S.Ct. 257, 259, 98 L. Ed. 273 (1984))* (internal citations omitted).

[149] *Marucci Sports, 751 F.3d at 374* (citing *National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85, 103, 104 S. Ct. 2948, 2961, 82 L. Ed. 2d 70 (1984)*).

Applying Rule 8(a)(2) and cases, the Supreme Court has held "stating [] a [Sherman Act] claim requires a complaint with enough factual matter (taken as true) to suggest an agreement was made."[150] "Antitrust claims do not necessitate a higher pleading **[*37]** standard and a plaintiff need only plead enough facts to state a claim to relief that is plausible on its face."[151] The plaintiff should plead "enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of illegal agreement."[152]

Under the first element of an antitrust claim, concerning engagement in a conspiracy, the Court must determine whether the plaintiff sufficiently alleges that the defendants "engaged in concerted action—that is, a 'conscious commitment to a common scheme designed to achieve an unlawful objective.'"[153] The "pivotal question is whether the concerted action was a result of an agreement" between the defendants.[154] In favor of dismissal defendants argue "a single economic unit or a parent and its subsidiary cannot be liable for bid rigging under the Sherman Act" and plaintiff "did not allege the Defendant Companies were competitors with one another, but instead they were 'separate economic actors.'"[155]

"As a general rule, Section 1 of the Sherman Act does not apply to single entitles,"[156] although the Supreme Court has "long held that concerted action under § 1 does not turn simply on whether the parties involved are legally distinct entities" and the Court has "eschewed **[*38]** such formalistic distinctions in favor of a functional consideration of how the parities involved in the alleged anticompetitive conduct actually operate."[157] "Substance, not form, should determine whether an entity is capable of conspiring under § 1."[158] Participants to a bid rigging scheme should not be afforded protection against Sherman Act claims simply because they seek to be classified as a single economic unit. The inquiry concerns not whether "two legally distinct entities have organized themselves under a single umbrella" rather, "the question is whether the agreement joins together independent centers of decisionmaking," which if it does "the entities are capable of conspiring under § 1, and the court must decide whether the restraint of trade is an unreasonable and therefore illegal one."[159]

Plaintiff alleges the individual defendants structured competitive bids to maximize the potential for one of the corporate defendants to win the government contracts,[160] thus demonstrating a "conscious commitment to a common scheme designed to achieve an unlawful objective."[161] When corporate defendants allegedly submitted bids in a competitive bid process against each other with varying bids terms, through **[*39]** the coordinated efforts

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[150] Twombly, 550 U.S. at 545, 127 S.Ct. at 1959.

[151] Marucci Sports, 751 F.3d at 373(citing Wampler v. Southwestern Bell Telephone Co., 597 F.3d 741, 744 (5th Cir. 2010)) (quoting Twombly, 550 U.S. at 556) (internal citations omitted).

[152] Twombly, 550 U.S. at 545, 127 S.Ct. at 1959.

[153] Marucci Sports, 751 F.3d at 375 (internal quotations omitted).

[154] Id. at 375 (internal quotations omitted).

[155] Docket no. 53 at 4-5.

[156] Abraham, 776 F.3d at 327 (citing Am. Needle, Inc., 560 U.S. at 195, 130 S.Ct. at 2205)).

[157] Am. Needle, Inc., 560 U.S. at 190, 130 S.Ct. at 2208-09.

[158] Id. at 194 (citing Copperweld, 467 U.S. at 773 n.21, 104 S. Ct. at 2743 n.21) (internal citations omitted).

[159] , 560 U.S. at 196, 130 S.Ct. at 2212.

[160] Docket no. 41 at 19.

[161] Marucci Sports, 751 F.3d at 375.

between the individual defendants and corporate defendants, such bid rigging demonstrates an agreement between competitors to restrain trade. As a result, defendants' alleged actions demonstrate an agreement, tacit or express, to increase each corporate defendants' chances of winning the bids through their collusive effort.

Further, the Court must evaluate the "competitive significance of the restraint."[162] By allegedly submitting two or three bids on government projects that may only require the government to consider a minimum of three bids, a direct restraint of trade would occur, either by: (1) effectively shutting down the bid process so fewer or none of the defendants' competitors' bids would be considered; or (2) manipulating the terms of bid through coordinated efforts to beat their competition. To prevent such manipulation, the Federal Acquisition Regulation rules require bid prices to be calculated "independently, without, for the purpose of restricting competition, any consultation, communication, or agreement with any other offeror or competitor."[163] Because coordinated bids are expressly prohibited by the Federal Acquisition Regulation rules, defendants' **[*40]** alleged collusive bidding would be a direct a violation of the rules and would significantly restrain the competitive bid process.

Taking all allegations as true, plaintiff's allegations are sufficient to indicate "concerted action that is not categorically beyond *§ 1*."[164] The Court cannot say there are insufficient facts to state a claim and that it is implausible that defendants engaged in a conspiracy, effectively restraining the government bid process in the specialized government installations market.[165]

3. conclusion

Plaintiff has pleaded facts sufficient to demonstrate standing under the antitrust laws at issue and plaintiff has pleaded sufficient facts to state a claim under *§ 1* of the Sherman Act. Accordingly, defendants' motion to dismiss plaintiff's Count V - Sherman Act and Clayton Act alleged in the third amended complaint should be **denied**.

C. Count VII - Tortious Interference with Prospective Business Relationships

1. summary of arguments

Defendants argue plaintiff "did not plead all required elements of its tortious interference claim because "U-Loft has not alleged Defendants intentionally interfered with the [business] relationship, which requires actual knowledge."[166] Defendants **[*41]** argue they "could only obtain actual knowledge of the contracts U-Loft was pursuing if U-Loft disclosed such [] contracts or relationships, in violation of general procurement procedures."[167]

In response, plaintiff argues it has stated a claim for tortious interference through its allegation that "[Corporate] Defendants carried out such actions [tortious interference] with a conscious desire to prevent Plaintiff from obtaining these contracts or they knew the interference was certain or substantially certain to occur as a result of their

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[162] *Id. at 374*.

[163] *48 C.F.R. § 52.203-2 (2013)*.

[164] *Am. Needle, Inc., 560 U.S. at 186, 130 S.Ct. at 2212*.

[165] See *Twombly, 550 U.S. at 564, 127 S.Ct. at 1970*.

[166] Docket no. 47 at 17.

[167] Id.

conduct."[168] Thus, defendants' "interference allegations are more than plausible" to state a claim for tortious interference.[169]

In reply, defendants argue plaintiff's claim of tortious interference is "a mere conclusory allegation with no factual support and does not overcome a 12(b)(6) motion."[170] Further, defendants argue "[a]ctual knowledge requires more than just a hunch or speculation that U-Loft might bid on certain contracts."[171]

2. analysis

To establish a claim for tortious interference with prospective business relationships, a plaintiff must establish:

> (1) there was a reasonable probability that the plaintiff would have entered into a business relationship **[*42]** with a third party; (2) the defendant either acted with a conscious desire to prevent the relationship from occurring or knew the interference was certain or substantially certain to occur as a result of the conduct; (3) the defendant's conduct was independently tortious or unlawful; (4) the interference proximately caused the plaintiff injury; and (5) the plaintiff suffered actual damage or loss as a result.[172]

Defendants specifically challenge the second element of plaintiff's Count VII - Tortious Interference with Business Relationships cause of action[173] regarding whether defendants had actual knowledge that plaintiff was its competitor for certain government bids.[174] Intentional interference does not necessarily require actual knowledge. Instead, the "defendant intentionally interferes if it desires to bring about the interference or if it knows the interference is certain or substantially certain to occur as a result of its conduct."[175] "If the interference was merely an incidental result of conduct that the defendant was engaging in for another purpose, the interference may be considered unintentional."[176]

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[168] Docket no. 50 at 10 (citing docket no. 41 at ¶ 122).

[169] Id. at 11.

[170] Docket no. 53 at 8.

[171] Id. at 9.

[172] *Coinmach Corp. v. Aspenwood Apartment Corp., 417 S.W.3d 909, 924 (Tex. 2013)* (citing *Wal-Mart Stores, Inc. v. Sturges, 52 S.W.3d 711, 726 (Tex. 2001)* (addressing requirement of predicate tort or unlawful conduct); *Bradford v. Vento, 48 S.W.3d 749, 757 (Tex. 2001)* (holding defendant must intend to interfere). See *Richardson-Eagle, Inc. v. William M. Mercer, Inc., 213 S.W.3d 469, 475 (Tex.App.-Houston [1st Dist.] 2005, pet. denied)* (listing elements); *Hill v. Heritage Res., Inc., 964 S.W.2d 89, 115 (Tex.App. - El Paso 1997, pet. denied)* (same)).

[173] Docket no. 47 at 17-18; docket no. 53 at 8-9.

[174] Docket no. 47 at 17. Defendants argue *Texas Oil Co. v. Tenneco, Inc., 917 S.W.2d 826, 834 (Tex.App.-Houston [14th Dist.] 1994)*, rev'd on other grounds, *958 S.W.2d 178 (Tex.1997)*, requires the defendants to have "actual knowledge" to intentionally interfere with a business relationship. The court's holding addressed intentionality, holding that "[i]ntentional conduct means that 'the actor desires to cause the consequences of his act, or that he believes the consequences are substantially certain to result from it." *917 S.W.2d at 834* (citing *Southwestern Bell Tel. Co. v. John Carlo Texas, Inc., 843 S.W.2d 470, 472 (Tex.1992))* (quoting *RESTATEMENT (SECOND) OF TORTS § 8A* (1965)).

[175] Id. See also *Restatement (Second) of Torts § 766B cmt. d* (Am. Law Inst. 1979).

[176] *Bradford, 48 S.W.3d at 757*. See also *Restatement (Second) of Torts § 766B cmt. d* (Am. Law Inst. 1979); *Coinmach Corp., 417 S.W.3d at 930* (Guzman, J., concurring).

In viewing the third amended complaint as a whole and taking **[*43]** all allegations as true,[177] the Court cannot say that plaintiff has failed to plead enough facts to state a claim for relief that is plausible on its face.[178] Under the first element of the claim, there is a reasonable probability that plaintiff would have entered into certain government contracts due to their previous frequency of competing against defendant in their specialized industry and plaintiff's history of winning bids over defendants.[179] Under the second element, there are sufficient allegations that defendants acted with a conscious desire to prevent the relationship from occurring between the plaintiff and the government or that the defendants knew their acts were certain or substantially certain to interfere with the prospective business relationship between the plaintiff and government. From its specialized business industry, defendants would have known its common competitor for government contracts, the plaintiff, was substantially certain to submit bids for student housing and military installation bids. Through its participation in alleged tortious or unlawful acts, defendants "surely knew of the substantial likelihood that [plaintiff] would lose prospective business" from **[*44]** the government because plaintiff was a frequent direct competitor for those specific types of government contracts.[180]

Further, the plaintiff has satisfied the third, fourth, and fifth elements of the claim by alleging defendants' actions were independently tortious or unlawful and the interference would deprive the plaintiff of a business relationship, thus proximately causing the plaintiff injury. Lastly, by losing the bid contest due to alleged unlawful conduct, the plaintiff would suffer actual damage or loss as a result.

3. conclusion

The Court finds the plaintiff **[*45]** has met its minimum burden under *Rule 8(a)(2)* to state a claim for tortious interference with prospective business relationships claim. Accordingly, defendants' motion to dismiss third amended complaint regarding plaintiff's Count VII - Tortious Interference with Prospective Business Relationships should be **denied**.

D. Count VI - Unfair Competition

1. summary of arguments

Defendants argue "[t]he law of unfair competition is the umbrella for all statutory and nonstatutory causes of action arising out of business conduct which is contrary to honest practice in industrial or commercial matters" and is "not, in and of itself, a separate tort."[181] Thus, defendants argue "[b]ecause U-Loft does not have viable claims under the

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[177] Plaintiff has alleged that defendants tortiously interfered with its prospective business relations:

> By virtue of the illegal acts described [in the third amended complaint] that violate the False Claims Act these Defendants have tortiously interfered with Plaintiff University Loft's prospective business relations with the United States. These Defendants were able to underbid Relator or otherwise secure awards of Government contracts by engaging in unlawful conduct such as bid-rigging and delivering low bids with the intention to substitute cheaper nonconforming or noncompliant products or with the intention to later seek an increase in funding once the bid was secured.

Docket no. 41 at 40.

[178] See *Twombly, 550 U.S. at 547, 127 S.Ct. at 1960*.

[179] See *Gil Ramirez Group, L.L.C. v. Houston Indep. Sch. Dist., No. 4:10-cv-4872, 2012 U.S. Dist. LEXIS 163506, 2012 WL 5633880, *14 (S.D.Tex. Nov. 15, 2012)*

[180] Id. Plaintiff included seventeen examples of specific government contracts that it alleges "one or more of the companies in the Avteq Group tortiously interfered with Plaintiff's rights." Docket no. 41 at 41.

Lanham Act, Sherman/Clayton Act, or for tortious interference as discussed herein, there is no viable underlying claim to which unfair competition can attach and Count 6 must be dismissed."[182]

In response, plaintiff agrees with the defendants that "unfair competition is not, in and of itself, a separate tort."[183] Thus, plaintiff argues it "expressly based this claim on four different types of illegal actions," including the "violations of the Sherman Act, the FCA, the Lanham Act and Texas tortious **[*46]** interference law constitute unfair competition under Texas law."[184] Plaintiff argues "Defendants appear to concede [] that if any one of the Sherman Act, Lanham Act and/or tortious interference claims survives[,then] the unfair competition claims also survives."[185] As a result, the "main disagreement between the parties is whether the FCA claims that Defendants have not challenged can serve as a basis for the unfair competition claim."[186] Plaintiff further argues, even if the Court granted defendants' motion to dismiss third amended complaint, as to all counts, and plaintiff's Lanham Act, Sherman/Clayton Act, and tortious interference claims were dismissed, its unfair competition claim would remain because the "FCA provides that a civil action may be brought 'for the person and for the United States Government,' indicating that the relator can also assert its own claims."[187]

In reply, defendants argue "U-Loft failed to find one case that allowed an unfair competition claim to 'piggy-back' or boot-strap to an FCA claim"[188] and "[b]ecause U-Loft has not alleged any direct injury by way of the alleged misrepresentations made to the government by Defendants, U-Loft cannot bootstrap a claim for **[*47]** unfair competition [] to the FCA claims."[189]

2. analysis

In previous sections of analysis, the Court recommended the plaintiff's Lanham Act claim should be dismissed, but that plaintiff's Sherman Act and Clayton Act claims, and tortious interference with prospective business relationships claim should remain pending. Accordingly, the Court need not reach the issue of whether the plaintiff's False Claim Act claims may serve as the basis for plaintiff's unfair competition claim, because defendants have not provided argument or authority to show that plaintiff's unfair competition claim cannot relate to plaintiff's claims for violations of the Sherman Act and Clayton Act and tortious interference.

E. Piercing the Corporate Veil

1. summary of arguments

Defendants argue plaintiff failed to state a claim for the individual liability of Kelly O'Donnell or John O'Donnell because "U-Loft has failed to allege any bad acts committed by KOD [Kelly O'Donnell] or JOD [John O'Donnell], in

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[181] Docket no. 47 at 11-12.

[182] Id. at 12.

[183] Docket no. 50 at 9.

[184] Id. (citing docket no. 41 at ¶¶ 118-120).

[185] Id. at 10.

[186] Id.

[187] Id. (citing *31 U.S.C. § 3730 (b)(1)*) (emphasis added).

[188] Docket no. 53 at 7.

[189] Id. at 8.

their individual capacities, and has not pleaded any other basis to pierce the corporate veil."[190] Defendants argue no liability for Kelly O'Donnell or John O'Donnell would be created under the *Texas Business Organizations Code, § 22.235*, unless their "conduct was **[*48]** not exercised 1) in good faith, 2) with ordinary care, and 3) in a manner the officer reasonably believed to be in the best interest of the corporation."[191] Further, defendants argue, "there is nothing in U-Loft's Complaint to suggest the actions by KOD and JOD were anything other than in the course and scope of their position as agents for the Defendant Corporations."[192]

In response, plaintiff sets forth it "seeks to hold Individual Defendants liable only for violations of the FCA and Sherman Act."[193] Plaintiff argues the False Claim Act "clearly encompasses corporate principals, who cause their companies to present a false claim for payment or false documents in support of a claim."[194] Further, plaintiff argues under the Sherman Act, "[i]ndividuals or corporate officers may be subject to liability for a *Section 1* violation of the Sherman Act when they 'knowingly participate[] in effecting the illegal contract, combination or conspiracy,' whether they authorize, order, or help perpetrate the violation."[195]

In reply, defendants argue plaintiff's citations to authority in support of its False Claim Act claims fail to demonstrate how personal liability for Kelly O'Donnell and John O'Donnell could exist. **[*49]** [196] Further, defendants argue:

> "[i]ndividual liability of KOD is unjustified because U-Loft did not allege KOD: (1) participated in any of the alleged bid-rigging activities; (2) personally bidrigged; (3) knew that JOD was allegedly reviewing bids prior to submission to the government; or (4) otherwise authorized or ordered the alleged bid-rigging to take place."[197]

As a result, defendants argue "JOD's individual liability is unjustified as JOD cannot legally conspire with himself."[198]

2. analysis

The False Claim Act imposes liability on <u>any person</u> who:

> (A) knowingly presents, or <u>causes</u> to be presented, a false or fraudulent claim for payment or approval; (B) knowingly makes, uses, or <u>causes</u> to be made or used, a false record or statement material to a false or fraudulent claim; . . . .[199]

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[190] Docket no 47 at 18.

[191] <u>Id.</u> at 19.

[192] <u>Id.</u>

[193] Docket no. 50 at 2.

[194] <u>Id.</u> at 12.

[195] <u>Id.</u> (citing *In re Air Cargo Shipping Servs. Antitrust Litig., No. 06-MDL-1775(JG)(VVP), 2010 U.S. Dist. LEXIS 146492, 2010 WL 10947344, at *11 (E.D.N.Y. Sept. 22, 2010)* (quoting *United States v. Wise, 370 U.S. 405, 416, 82 S.Ct. 1354, 1361, 8 L. Ed. 2d 590 (1962))*.

[196] Docket no. 53 at 9.

[197] <u>Id.</u> at 10.

[198] <u>Id.</u>

[199] *31 U.S.C. § 3729(a)(1)(A-C)* (emphasis added). Plaintiff argues defendants John O'Donnell and Kelly O'Donnell are individually liable under the False Claims Act and Sherman Act. Thus, the Court limits the scope of its analysis to those applicable causes of action regarding the defendants' individual liability. Docket no. 50 at 2.

Further, the False Claim Act applies to any defendant who "knowingly assist[s] in causing the government to pay claims grounded in fraud, without regard to whether that person ha[s] direct contractual relations with the government."[200] "Thus, a person need not be the one who actually submitted the claim forms in order to be liable."[201] When a plaintiff alleges that the defendants "assisted one another and cooperated in **[*50]** a scheme or pattern of billing for and covering up these false-claim items" the "knowing assistance standard of Hess and Peterson" shall "suffice to implicate all Defendants."[202] For example, False Claim Act liability may exist for physicians who argued claims were "billed by the hospital, not the physicians" and "they do not bill for physician services and had no part in the admission or [unnecessary] upgrade of patients to ICU" because the charges generated arose only by doctor's orders.[203] As a result, individual physicians could be liable for their knowing assistance in causing "the government to pay claims grounded in fraud."[204]

In the third amended complaint, plaintiff alleges both individual defendants should be liable "through causing or knowingly assisting corporate defendants" to perpetuate False Claims Act violations, thus, subjecting themselves to liability.[205] Plaintiff's allegations against the individual defendants demonstrate sufficient allegations to state a claim for individual liability under the False Claim Act. The Fifth Circuit found physicians to be individually liable for the submission of false claims in violation of the False Claim Act, which stands to reason **[*51]** that a corporate officer who allegedly caused the corporation to present false claims and false documents to the government in connection with each of the schemes described in plaintiff's third amended complaint, or knowingly assisted them in doing so, would also have individual liability for such acts.[206] Even if the individual defendants did not personally submit the false claims to the government for payment, there are sufficient allegations that Kelly O'Donnell and John O'Donnell "knowingly assisted in causing the government to pay claims grounded in fraud."[207] As a result, by allegedly participating in a scheme or pattern of false claim submission, the individual defendants have subjected themselves to individual liability under the False Claims Act.

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[200] *United States ex rel. Riley v. St. Luke's Episcopal Hosp., 355 F.3d 370, 378 (5th Cir. 2004)* (internal quotation marks omitted) (quoting *Peterson v. Weinberger, 508 F.2d 45, 52-53 (5th Cir. 1975)* (quoting *United States ex rel. Marcus v. Hess, 317 U.S. 537, 544-45, 63 S.Ct. 379, 384, 87 L. Ed. 443 (1943))*. See also *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp., 125 F.3d 899, 903 (5th Cir. 1997)* ("the FCA imposes liability not only on any person who submits a false or fraudulent claim for payment, but also on any person who makes a false statement in order to get a false or fraudulent claim paid.")

[201] *Riley, 355 F.3d at 378* (citing *United States v. Mackby, 261 F.3d 821, 827 (9th Cir. 2001))*.

[202] Id. See *Hess, 317 U.S. at 537, 63 S.Ct. at 379*; *Peterson, 508 F.2d at 52-53*.

[203] *Id. at 378*.

[204] Id.

[205] Plaintiff alleges, in-part, the individual defendants violated the False Claim Act through their actions when they caused and/or knowingly assisted corporate defendants to present false claims and false documents for payment "that falsely represented furniture supplied by HJA complied with TAA [Trade Agreements Act], caused and/or knowingly assisted corporate defendants to present false claims and false documents for payment "that falsely represented furniture at issue was manufactured by Thurston," caused and/or knowingly assisted corporate defendants to present false claims and false documents for payment "that falsely represented the furniture at issue conformed to the specifications at issue," caused and/or knowingly assisted corporate defendants to present false claims and false documents for payment "that falsely represented that they had not engaged in collusive bidding," "presented claims for payment with fabricated freight charges," and were "involved in presenting claims for payment with padded invoices." Docket no. 41 at 13, 15, 19, 22, 25, 29.

[206] *Riley, 355 F.3d at 378*. See docket no. 50 at 11.

[207] Id.

In addition, the Supreme Court has found individual liability for antitrust claims: "We construe the Sherman Act in its common-sense meaning to apply to all officers who have a responsible share in the proscribed transaction."[208] The Court held, "a corporate officer is subject to prosecution under *§ 1* of the Sherman Act whenever he knowingly participates in effecting the illegal contract, combination, or conspiracy—be he one who authorizes, **[*52]** orders, or helps perpetrate the crime— regardless of whether he is acting in a representative capacity."[209]

Plaintiff alleges the individual defendants violated the Sherman Act by making false certifications during the bidding process,[210] structuring bids in a bid-rigging scheme[211] and engaging in "collusive bidding."[212] Through these allegations, it appears the individual defendants could have authorized, ordered, or helped to perpetrate an antitrust violation and plaintiff has plead enough facts to state a claim for individual liability under the Sherman Act,[213] because the individual defendants could be liable through their knowing participation in an alleged illegal conspiracy, regardless of their representative capacity. As a result, the Court finds Kelly O'Donnell and John O'Donnell may be subject to liability under the Sherman Act for their alleged "responsible share in the proscribed transactions."[214]

3. conclusion

Accordingly, defendants' motion to dismiss third amended complaint regarding plaintiff's claims against individual defendants, Kelly O'Donnell and John O'Donnell, should be **denied**.

VI. RECOMMENDATIONS

For the reasons discussed, based upon the record thus far developed, it is recommended **[*53]** that defendants' motion to dismiss third amended complaint[215] is **GRANTED** in part and **DENIED** in part, as specified in this report. More specifically, defendants' motion to dismiss Count IV - False Advertising in Violation of Lanham Act claims should be **granted** and the claims should be **dismissed**; in all other respects, defendants' motion to dismiss should be **denied** at this time.

If, after the consideration of objections to this report, the District Judge accepts each of the recommendations in this report, the following claims in plaintiff's third amended complaint will remain pending for further disposition:

- as against all defendants, plaintiff's claims for Count I—Violation of the False Claims Act - *31 U.S.C. § 3729(a)(1)(A)*; Count II—Violation of the False Claims Act - *31 U.S.C. § 3729(a)(1)(B)*; Count III—Conspiracy to Violation of the False Claims Act - *31 U.S.C. § 3729(a)(1)(C)*; and Count IV— Bid-rigging in Violation of the Sherman Act and Clayton Act.

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[208] *Wise, 370 U.S. at 409, 82 S.Ct. at 1357 (1962)* (citing *Carolene Products Co. v. United States, 323 U.S. 18, 21, 65 S.Ct. 1, 3, 89 L. Ed. 15 (1944))*.

[209] *Id. at 416*.

[210] Docket no. 41 at 16-20.

[211] Id. at 19.

[212] Id. at 20.

[213] *Wise, 370 U.S. at 416, 82 S.Ct. at 1362*.

[214] *Id. at 409, 82 S.Ct. at 1357-58*.

[215] Docket no. 47.

- as against corporate defendants, plaintiff's claims for Count VI— Unfair Competition and Count VII— Tortious Interference with Prospective Business Relationships.

VII. INSTRUCTIONS FOR SERVICE AND NOTICE OF RIGHT TO OBJECT/APPEAL

The United States District Clerk shall serve a copy of this Report and Recommendation **[*54]** on all parties by either: (1) electronic transmittal to all parties represented by an attorney registered as a Filing User with the Clerk of Court pursuant to the Court's Procedural Rules for Electronic Filing in Civil and Criminal Cases; or (2) by certified mail, return receipt requested, to any party not represented by an attorney registered as a Filing User.

As provided in *28 U.S.C. § 636(b)(1)* and *FED. R. CIV. P. 72(b)*, any party who desires to object to this Report must **file** with the District Clerk and **serve** on all parties and the Magistrate Judge written Objections to the Report and Recommendation within **14 days** after being served with a copy, unless this time period is modified by the District Court. A party filing Objections must specifically identify those findings, conclusions or recommendations to which objections are being made and the basis for such objections; the District Court need not consider frivolous, conclusive or general objections.

A party's failure to file timely written objections to the proposed findings, conclusions and recommendations contained in this Report will bar the party from receiving a *de novo* determination by the District Court.[216] Additionally, a party's failure to file timely written objections **[*55]** to the proposed findings, conclusions and recommendations contained in this Report will bar the aggrieved party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the District Court.[217]

SIGNED and **ENTERED** this 22nd day of December, 2015.

/s/ Pamela A. Mathy

PAMELA A. MATHY

UNITED STATES MAGISTRATE JUDGE

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[216] See *Thomas v. Arn, 474 U.S. 140, 150, 106 S.Ct. 466, 472, 88 L. Ed. 2d 435 (1985)*.

[217] *Acuna v. Brown & Root Inc., 200 F.3d 335, 340 (5th Cir. 2000)*; *Douglass v. United Servs. Auto. Ass'n, 79 F.3d 1415, 1428 (5th Cir.1996)*.

Boffa Surgical Group LLC v. Managed Healthcare Assocs.

Appellate Court of Illinois, First District, Fifth Division

December 23, 2015, Decided

No. 1-14-2984

Reporter

2015 IL App (1st) 142984 *; 47 N.E.3d 569 **; 2015 Ill. App. LEXIS 962 ***; 399 Ill. Dec. 887 ****; 2016-1 Trade Reg. Rep. (CCH) P79,445

BOFFA SURGICAL GROUP LLC, JAMES BOFFA, and ANDREW AGOS, Plaintiffs-Appellants, v. MANAGED HEALTHCARE ASSOCIATES LTD., and SWEDISH COVENANT MANAGED CARE ALLIANCE, Defendants-Appellees.

Prior History: [*1]** Appeal from the Circuit Court of Cook County. No. 11 L 13125. Honorable Ronald Bartkowicz, Judge Presiding.

Disposition: Affirmed.

Core Terms

circuit court, defendants', patients, conspiracy, antitrust, tortious interference, amended complaint, prospective economic advantage, cause of action, staff privileges, third party, allegations, staffing, network, seal, medical practice, anti trust law, membership, restraint of trade, interfered, amend, second amended complaint, motion to dismiss, anticompetitive, expectancy, privileges, reconsider, referrals, parties, argues

LexisNexis® Headnotes

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

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

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

Issues of law are reviewed de novo.

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

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

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

A circuit court's denial of leave to file an amended complaint is reviewed under the abuse of discretion standard.

Antitrust & Trade Law > Business & Corporate Compliance > Antitrust

Governments > Legislation > Interpretation

HN3[] Antitrust & Trade Law

See *740 ILCS 10/11* (2010).

Antitrust & Trade Law > Sherman Act > Claims

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

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN4[] Sherman Act, Claims

See *740 ILCS 10/3(2)* (2010).

Antitrust & Trade Law > Sherman Act > Claims

Governments > Legislation > Interpretation

Antitrust & Trade Law > Public Enforcement > State Civil Actions

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

HN5[] Sherman Act, Claims

Illinois courts construe *740 ILCS 10/3(2)* (2010), in accordance with the construction given its federal counterpart, the Sherman Act, *15 U.S.C.S. § 1*. To state a cause of action under *740 ILCS 10/3(2)*, a complaint must allege the existence of an illegal combination or conspiracy. Although courts have been liberal in reading antitrust complaints, they have required at least that the defendants be identified, that the conspiracy be explained and that relevant facts of the claimed agreement be disclosed.

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

Healthcare Law > Healthcare Litigation > Actions Against Facilities

HN6[] Regulated Practices, Price Fixing & Restraints of Trade

A hospital has an unquestioned right to exercise some control over the identity and number to whom it accords staff privileges. Moreover, of the legion of cases that addressed the issue, the cases almost always come to the same conclusion: the staffing decision at a single hospital was not a violation of the Sherman Act, *15 U.S.C.S. § 1*. A staffing decision does not itself constitute an antitrust injury. If the law were otherwise, many a physician's workplace grievance with a hospital would be elevated to the status of an antitrust action. To keep the antitrust laws from becoming so trivialized, the reasonableness of a restraint is evaluated based on its impact on competition as a whole within the relevant market.

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

HN7[] **Intentional Interference, Elements**

To plead a sufficient cause of action for tortious interference with prospective economic advantage, a plaintiff must allege that (1) he had a reasonable expectancy of a valid business relationship; (2) the defendant knew about the expectancy; (3) the defendant intentionally interfered with the expectancy and prevented it from ripening into a valid business relationship; and (4) the intentional interference injured the plaintiff. A plaintiff states a cause of action only if he alleges a business expectancy with a specific third party as well as action by the defendant directed toward that third party. It is not enough for the defendant's action to impact a third party; rather, the defendant's action must be directed towards the third party.

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

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

HN8[] **Standards of Review, Abuse of Discretion**

Courts are given broad discretion in liberally allowing amendments of pleadings to foster the policy of resolving controversies on their merits, *735 ILCS 5/2-616* (2010). Nevertheless, plaintiffs do not have an absolute and unlimited right to amend. Appellate courts review a trial court's decision to grant or deny a motion for leave to amend a pleading under the abuse of discretion standard. In determining whether the circuit court properly exercised its discretion, the courts consider (1) whether the proposed amendment would cure the defective pleading; (2) whether other parties would sustain prejudice or surprise by virtue of the proposed amendment; (3) whether the proposed amendment is timely; and (4) whether previous opportunities to amend the pleading could be identified. Where it is apparent even after amendment that no cause of action can be stated, leave to amend should be denied.

Counsel: FOR PLAINTIFFS-APPELLANTS: Jonathan Novoselsky, Chicago, IL.

FOR DEFENDANTS-APPELLEES: Sedgwick, LLP, Chicago, IL, OF COUNSEL: Fred A. Smith III and Diana M. Karnes.

Judges: JUSTICE LAMPKIN delivered the judgment of the court, with opinion. Justices Gordon and Palmer concurred in the judgment and opinion.

Opinion by: LAMPKIN

Opinion

[571]** JUSTICE LAMPKIN delivered the judgment of the court, with opinion.

Justices Gordon and Palmer concurred in the judgment and opinion.

[**889] OPINION**

[*P1] Plaintiffs Boffa Surgical Group LLC, Dr. James Boffa, and Dr. Andrew Agos (collectively, the Boffa Group) were not asked to participate in managed care groups at a hospital where they had staff privileges. The Boffa

Group sued defendants Managed Healthcare Associates Ltd. (MHCA) and Swedish Covenant Managed Care Alliance (SCMCA), alleging antitrust violations and tortious interference with prospective economic advantage. The circuit court dismissed the Boffa Group's amended complaint for failure to state a cause of action, and the Boffa Group appealed.

[*P2] We affirm the judgment of the circuit court. We hold that the circuit court properly dismissed the Boffa Group's claim that defendants violated Illinois ***antitrust law*** because, without something more, a staffing pattern dispute at one hospital does **[***2]** not cause an unreasonable restraint of trade within the ambit of the antitrust laws. The circuit court also properly dismissed the Boffa Group's claim of tortious interference with prospective economic advantage because they failed to allege defendants engaged in conduct directed at a specific third party.

[*P3] I. BACKGROUND

[*P4] Plaintiff Boffa Surgical Group LLC is a medical group comprised of general surgeons licensed to practice medicine in Illinois, and plaintiffs Dr. Boffa and Dr. Agos are two of its general surgeons. Defendant MHCA is an independent practice association that arranges for the delivery of health care services to individuals covered by various health plans. Defendant SCMCA is a physician hospital organization. MHCA does credentialing for SCMCA. Both MHCA and SCMCA provide to the public at Swedish Covenant Hospital what are generally known as healthcare maintenance and management association services. The Boffa Group was not asked to be participants or physician members in MHCA and SCMCA. However, the Boffa Group had privileges to practice medicine, and did practice medicine, at Swedish Covenant Hospital. The Boffa Group also practiced medicine at other facilities in Illinois. **[***3]**

[*P5] In December 2011, the Boffa Group sued defendants, alleging they engaged in conduct that served an anti-competitive objective in violation of Illinois ***antitrust law*** and interfered with plaintiffs' prospective economic advantage. The Boffa Group amended its complaint in March 2012 and alleged that, although they had privileges and continued to practice at Swedish Covenant Hospital, defendants unreasonably restrained competition at the hospital by excluding the Boffa Group from defendants' network even though the number of physicians in that network was not adequate to provide the necessary services for public health. The Boffa Group alleged this anticompetitive limitation of membership to a select group limited the number of physicians who could provide services to the hospital's patients, limited referrals by physicians with privileges at the hospital, limited the public's access to the Boffa **[**572]** **[****890]** Group's services, and intentionally prevented the Boffa Group from obtaining prospective business at the hospital. The Boffa Group alleged such practices had prevented one patient from receiving prompt treatment and resulted in that patient's death.

[*P6] Defendants moved the court to dismiss the amended **[***4]** complaint under *section 2-615* of the Code of Civil Procedure (Code) (*735 ILCS 5/2-615* (West 2010)), contending the factual allegations were insufficient to establish the elements of an antitrust violation or tortious interference with prospective economic advantage. Defendants argued that the Boffa Group could not allege an unreasonable restraint on the relevant market where they continued to provide services at Swedish Covenant Hospital and various other institutions located in Illinois and there were 21 other hospitals or medical centers within 20 miles of Swedish Covenant Hospital.

[*P7] After the parties briefed the motion to dismiss, the circuit court granted the motion in favor of defendants on November 6, 2012. Concerning the antitrust claim, the court concluded there were inadequate grounds for the court to interfere with the hospital's staffing decisions and the Boffa Group failed to allege an unreasonable restraint of trade where they still practiced medicine in the relevant marketplace. Concerning the tortious interference claim, the court found the Boffa Group failed to allege the necessary element that defendants interfered with action directed toward a specific third party, namely, the patients.

[*P8] The Boffa **[***5]** Group moved to vacate and set aside the dismissal order, contending the court erred in its application of the case law concerning the antitrust claim. The Boffa Group also contended they would be able to state a claim for tortious interference with prospective economic advantage if they were able to file a second amended complaint under seal. After the parties briefed the motion to vacate and set aside the dismissal order, the circuit court denied that motion on April 5, 2013. Thereafter, the Boffa Group filed an emergency renewed motion to vacate and set aside the dismissal order, seeking leave to file an amended complaint on the tortious interference claim. Citing statutory confidentiality provisions, the Boffa Group asserted that filing the amended complaint under seal would allow defendants to defend on the issue of specific patients without publicly disclosing those patients. The circuit court granted the Boffa Group's motion and gave them leave until May 27, 2013 to file an amended complaint with respect to the tortious interference claim only.

[*P9] After that deadline lapsed, the Boffa Group filed a motion for leave to file their complaint under seal. After hearing oral argument, **[***6]** the circuit court continued the motion to July 10, 2013, at which time the Boffa Group was to either have written consent from the patients to file the complaint or prove to the court that written consent was not required. That deadline lapsed, and the court gave the Boffa Group until August 12, 2013 to file an amended complaint under seal.

[*P10] On September 12, 2013, the Boffa Group sought leave to file their amended complaint under seal, seeking an extension of time due to a docketing error. The circuit court allowed them to file an amended complaint *instanter* but denied their request to file it under seal, finding that they had failed to show a need for filing the complaint under seal. On September 24, 2013, the Boffa Group moved the court to reconsider allowing them to file the complaint under seal. They stated the basis for this request was to protect the identity of other physicians, not the **[**573]** **[****891]** prospective patients. The circuit court denied the motion and gave the Boffa Group until October 4, 2013 to file the second amended complaint.

[*P11] On October 4, 2013, the Boffa Group filed their second amended complaint, alleging violations of Illinois ***antitrust law*** and tortious interference with **[***7]** a prospective economic advantage against defendants. The Boffa Group argued defendants required them to provide "fill-in" service but excluded them from membership in defendants' network and thereby interfered with the Boffa Group's ability to treat patients at Swedish Covenant Hospital and resulted in the loss of valuable referral business from individual physicians and physician groups.

[*P12] Defendants moved to dismiss the complaint pursuant to *section 2-615* of the Code, arguing the Boffa Group failed to correct the deficiencies previously recognized by the court in its initial dismissal decision. In the alternative, defendants moved to dismiss pursuant to *section 2-619* of the Code (*735 ILCS 5/2-619* (West 2012)), arguing internal staffing decisions at private hospitals were not subject to judicial review unless the hospital's decision resulted in a revocation, suspension or reduction of a physician's existing staff privileges. After the parties briefed the motion, the circuit court granted defendants' *section 2-615* motion to dismiss the second amended complaint on March 6, 2014.

[*P13] The Boffa Group moved the court to reconsider the dismissal and sought leave to file another amended complaint. After the parties briefed the motion to reconsider, **[***8]** the circuit court denied that motion on May 6, 2014, denied the Boffa Group's request to file an amended complaint, and dismissed the second amended complaint with prejudice. On June 5, 2014, the Boffa Group filed a renewed motion to reconsider or vacate the dismissal, arguing that newly discovered evidence—*i.e.*, a newspaper article about Swedish Covenant Hospital's managed care issues—merited reversal of the court's dismissal of their claims with prejudice. On September 19, 2014, the circuit court denied the renewed motion and stated that this order was final and appealable. The Boffa Group appealed on September 24, 2014.

[*P14] II. ANALYSIS

[*P15] Because this matter was disposed of at the trial level upon defendants' motion to dismiss pursuant to *section 2-615* of the Code, the issue before this court is whether the dismissed complaint stated a cause of action upon which relief can be granted. *Metrick v. Chatz, 266 Ill. App. 3d 649, 651-52, 639 N.E.2d 198, 203 Ill. Dec. 159 (1994)*. ***HN1***[] The issue presented is one of law; consequently, our review is *de novo. T&S Signs, Inc. v. Village of Wadsworth, 261 Ill. App. 3d 1080, 1084, 634 N.E.2d 306, 199 Ill. Dec. 467 (1994)*. Furthermore, ***HN2***[] we review the circuit court's denial of leave to file an amended complaint under the abuse of discretion standard. *Mendelson v. Ben A. Borenstein & Co., 240 Ill. App. 3d 605, 618-19, 608 N.E.2d 187, 181 Ill. Dec. 114 (1992)*.

[*P16] A. Illinois Antitrust Act Claim

[*P17] To support their claim of a violation of *section 3(2) of the Illinois Antitrust Act (Act) (740 ILCS 10/3(2)* **[***9]** (West 2010)), the Boffa Group alleged defendants entered into an arrangement with Swedish Covenant Hospital to provide services to the hospital but limited the number of physicians admitted to defendant's organizations and excluded defendants from membership in defendants' group. The Boffa Group alleged defendants lacked the ability to provide the public in their area with medical services solely with their staff **[**574]** **[****892]** physicians and, thus, asked the Boffa Group on a regular basis to provide emergency medical services and treat patients admitted to Swedish Covenant Hospital. The Boffa Group argued that their exclusion from defendants' network restrained competition in the geographic market at and around Swedish Covenant Hospital by limiting the Boffa Group's ability to provide patient care and denying their services to the public. The Boffa Group contends they sufficiently pled the ultimate facts needed to support their claim of conspiracy under the Act and suggest that if they are permitted to conduct discovery, additional supporting facts will come to light.

[*P18] Defendants respond that the Boffa Group has failed to state a cause of action under *section 3(2)* of the Act because their only complaint of an **[***10]** antitrust violation is that they were not afforded membership in defendants' network. Defendants argue this claim, which is based solely on allegations concerning a single hospital's staffing decision, is insufficient under the Act to constitute an unreasonable restraint of the trade of providing medical services to patients. Defendants also assert there is no antitrust violation here because the Boffa Group continues to perform surgery at Swedish Covenant Hospital and there are 21 other hospitals and medical centers within 20 miles of that hospital; consequently, there is no restraint of trade or impact on competition as a whole within the relevant market. In addition, defendants argue the Boffa Group's complaint failed to allege a violation of *section 3(2)* of the Act because there were no factual allegations of a conspiracy, a restraint on trade, or that the staffing decision was for an anticompetitive purpose which operated to restrain trade.

[*P19] ***HN3***[] "When the wording of this Act is identical or similar to that of a federal ***antitrust law***, the courts of this State shall use the construction of the federal law by the federal courts as a guide in construing this Act." *740 ILCS 10/11* (West 2010). *Section 3(2)* of the Act provides **[***11]** in relevant part that ***HN4***[] "[e]very person shall be deemed to have committed a violation of this Act who shall *** [b]y contract, combination, or conspiracy with one or more other persons unreasonably restrain trade or commerce[.]" *740 ILCS 10/3(2)* (West 2010). ***HN5***[] Illinois courts construe *section 3(2)* of the Act in accordance with the construction given its federal counterpart, *section 1 of the Sherman Act*, under *15 U.S.C. § 1*. *Laughlin v. Evanston Hospital, 133 Ill. 2d 374, 384, 550 N.E.2d 986, 140 Ill. Dec. 861 (1990)*.

[*P20] To state a cause of action under *section 3(2)* of the Act, a complaint must allege the existence of an illegal combination or conspiracy. *Adkins v. Sarah Bush Lincoln Health Center, 129 Ill. 2d 497, 520-21, 544 N.E.2d 733, 136 Ill. Dec. 47 (1989)*. "Although courts have been liberal in reading antitrust complaints, they have required at least that the defendants be identified, that the conspiracy be explained and that relevant facts of the claimed agreement be disclosed." *Id. at 521* (where a physician alleged that the denial of his application for renewal of staff privileges was a conspiracy by the hospital and its administrators designed to restrict trade, the court affirmed dismissal of the conclusory and general complaint, which failed to contain allegations describing or suggesting "when, how or what the defendants agreed to do to restrict the plaintiff's right to practice medicine or what the purpose of such an agreement was," and failed to allege **[***12]** facts showing that the conspiracy unreasonably restrained trade). See also *Holzrichter v. County of Cook, 231 Ill. App. 3d 256, 263, 595 N.E.2d 1237, 172 Ill. Dec. 567 (1992)* (complaint failed to **[**575]** **[****893]** "articulate specific acts, statements or directives from the [American Medical Association] that would support the contention that [it] perpetrated or joined in such a conspiracy to harm or control the health care market by concealing malpractice"); *Regal Motors, Inc. v. Fiat Motors of North America, Inc., 133 Ill. App. 3d 370, 376, 479 N.E.2d 1, 88 Ill. Dec. 666 (1985)* (complaint failed to allege "how the alleged conspiracy manifested itself with respect to the marketplace or what ultimate anticompetitive effects were realized").

[*P21] Although the seventh circuit decision in *BCB Anesthesia Care, Ltd. v. Passavant Memorial Area Hospital Ass'n, 36 F.3d 664 (7th Cir. 1994)*, is not binding precedent on this court, we find its reasoning persuasive and applicable to the instant case. In that case, the plaintiffs, a group of nurse anesthetists competed with physician anesthesiologists to provide anesthesia services at the only acute care general hospital in Jacksonville, Illinois. The plaintiffs alleged the hospital and the defendant doctors with staff privileges violated *section 1 of the Sherman Act* when the hospital terminated its contract with the plaintiffs and replaced them with services offered by physician anesthesiologists. *Id. at 664-65*.

[*P22] The court noted ***HN6***[] a "hospital has an unquestioned right to exercise some control over the **[***13]** identity and number to whom it accords staff privileges." *Id. at 667*. Moreover, of the legion of cases that addressed the issue, the cases "almost always come to the same conclusion: the staffing decision at a single hospital was not a violation of *section 1 of the Sherman Act*." *Id. at 667-68*. The court stated:

> "A staffing decision does not itself constitute an antitrust injury. 'If the law were otherwise, many a physician's workplace grievance with a hospital would be elevated to the status of an antitrust action. To keep the antitrust laws from becoming so trivialized, the reasonableness of a restraint is evaluated based on its impact on competition as a whole within the relevant market.' " *Id. at 669* (quoting *Oksanen v. Page Memorial Hospital, 945 F.2d 696, 708 (4th Cir. 1991))*.

The court concluded that the plaintiffs failed to state a claim under *section 1 of the Sherman Act* because they could continue to practice at the hospital or elsewhere and the hospital could continue with its present arrangement or choose another; the only restraint alleged was that the plaintiffs could not currently practice in the business form they preferred and the hospital may have charged somewhat higher prices. *Id. at 668*. Taking the pled facts as true, the court held that it could not infer that the plaintiffs' claim fell within **[***14]** the ambit of the *Sherman Act*, and the court would need better reasons before it would engage in the "micromanagement of the staffing arrangements at [the hospital] under the aegis of the antitrust laws." *Id. at 669*.

[*P23] The facts of *BCB Anesthesia Care, Ltd.* are very analogous to the instant case. Like the nurse anesthetists in that case, the Boffa Group here continued to practice at Swedish Covenant Hospital and elsewhere in Illinois; the only restraint was that they could not practice as they would have preferred, as members of defendants' network of physicians. Furthermore, defendants' conduct here has an even less restraining effect on competition in the relevant market than in *BCB Anesthesia Care, Ltd.*, where the nearest hospital was 23 miles away in Springfield. The facts alleged by the Boffa Group do not bring their claim within the ambit of *section 3(2)* of the Act, and the reasons urged by the Boffa Group do not persuade this court to micromanage Swedish Covenant Hospital's **[**576]** **[****894]** staffing and healthcare management arrangement with defendants under the aegis of the Act. *Section 3(2)* of the Act requires the Boffa Group, in addition to alleging illegal conspiracy, to plead facts that show that the conspiracy unreasonably **[***15]** restrained trade. *Adkins, 129 Ill. 2d at 521-22*. The complaint merely alleges defendants entered into an amorphous and poorly explained agreement to exclude the Boffa Group and concludes that defendants' conduct was for an anticompetitive purpose. The complaint lacks specific allegations supportive of an illegal antitrust conspiracy or agreement or that such a conspiracy or agreement truly operated to restrain trade. There are no factual details given as to the who, when, or how of the purported conspiracy or how it resulted in a restraint of trade in the marketplace, particularly when there are 21 competing hospitals or medical centers within a short distance of Swedish Covenant Hospital and the Boffa Group, at all relevant times, enjoyed staff privileges and carried on their medical practice at Swedish Covenant Hospital and other Illinois institutions. Accordingly, we conclude that dismissal of the Boffa Group's antitrust claim was proper.

[*P24] The Boffa Group argues this court should not follow *BCB Anesthesia Care, Ltd*. and should instead follow *Brader v. Allegheny General Hospital, 64 F.3d 869 (3d Cir. 1995)*, where the court held that the plaintiff physician, who sued a hospital and other physicians for *Sherman Act* violations based on his loss of staff privileges, adequately **[***16]** alleged an antitrust injury. We conclude, however, that *Brader* addressed a set of facts and issues that are distinguishable from the instant case. In *Brader*, the defendant peer review board allegedly violated the *Sherman Act* when its summary suspension of the plaintiff's staff privileges prevented him from obtaining staff privileges not only at the defendant hospital, but also at other hospitals in neighboring counties. *Id. at 872*. Like *BCB*

Anesthesia Care, Ltd., and unlike *Brader*, nothing prevented the Boffa Group from working at Swedish Covenant Hospital or hospitals in Chicago and elsewhere. The Boffa Group alleged they continued to perform surgery, albeit subject to defendants' limitations, at Swedish Covenant Hospital. Additionally, this court takes judicial notice that there are 21 other hospital or medical centers within 20 miles of Swedish Covenant Hospital where the Boffa Group can and does provide services.

[*P25] The Boffa Group also cites *Summit Health, Ltd. v. Pinhas, 500 U.S. 322, 111 S. Ct. 1842, 114 L. Ed. 2d 366 (1991)*, and *Fuentes v. South Hills Cardiology, 946 F.2d 196 (3d Cir. 1991)*, and argues allegations concerning the exclusion of a single physician from the medical market were sufficient to state a claim under the *Sherman Act*. We find the Boffa Group's reliance on those distinguishable cases to be misplaced. In *Summit Health* ***[***17]*** , the Court addressed the interstate commerce requirement of the *Sherman Act* with respect to the attempted exclusion of a physician from a particular geographic market. An ophthalmologist alleged that a hospital, its corporate owner, and its medical staff conspired in violation of *section 1 of the Sherman Act* to prevent him from providing ophthalmological services in the Los Angeles market by, *inter alia*, initiating peer review proceedings against him, summarily suspending and terminating his medical staff privileges, and threatening to distribute an adverse report about him to all hospitals in the market area. *Summit Health, 500 U.S. at 324*. Similarly, in *Fuentes, 946 F.2d at 197-98*, the plaintiff physician alleged that he could **[**577]** **[****895]** not obtain another position both within and outside Pennsylvania as a result of the termination of his privileges due to the defendants' wrongful conduct. Here, in contrast, the Boffa Group's allegations establish that they have not been denied access to the market for surgical services in the Chicago area because they continue to practice at Swedish Covenant Hospital and elsewhere in Illinois.

[*P26] B. Tortious Interference With Prospective Economic Advantage

[*P27] The Boffa Group argues they pled sufficient facts to state a claim of **[***18]** tortious interference with prospective economic advantage where they alleged defendants unfairly limited referrals of patients to members of defendants' in-house physicians group, which was restricted in size and inadequate to service the needs of the patients of Swedish Covenant Hospital. Furthermore, although the Boffa Group had a medical practice at Swedish Covenant Hospital and elsewhere, they alleged defendants' refusal to offer them membership in defendants' group prevented them from obtaining any referral business from fellow physicians who had patients at Swedish Covenant Hospital and thereby unlawfully prevented them from obtaining the necessary benefits and economic advantage that would have resulted from the "fill-in" service they provided at Swedish Covenant Hospital. The Boffa Group argues the circuit court improperly required them to provide evidentiary facts to prove their allegation that defendants' denial of full network membership to them caused other physicians not to refer business to them.

[*P28] ***HN7***[] To plead a sufficient cause of action for tortious interference with prospective economic advantage, a plaintiff must allege that (1) he had a reasonable expectancy of a valid **[***19]** business relationship; (2) the defendant knew about the expectancy; (3) the defendant intentionally interfered with the expectancy and prevented it from ripening into a valid business relationship; and (4) the intentional interference injured the plaintiff. *Douglas Theater Corp. v. Chicago Title & Trust Co., 288 Ill. App. 3d 880, 887, 681 N.E.2d 564, 224 Ill. Dec. 249 (1997)*. "A plaintiff states a cause of action only if he alleges a business expectancy with a specific third party as well as action by the defendant directed toward that third party." *Associated Underwriters of America Agency, Inc. v. McCarthy, 356 Ill. App. 3d 1010, 1020, 826 N.E.2d 1160, 292 Ill. Dec. 724 (2005)*. It is not enough for the defendant's action to impact a third party; rather, the defendant's action must be directed towards the third party. *Schuler v. Abbott Laboratories, 265 Ill. App. 3d 991, 995, 639 N.E.2d 144, 203 Ill. Dec. 105 (1993)* (where the plaintiff alleged the defendant, his former employer, interfered with prospective economic advantage by threatening to enforce a noncompetition agreement with respect to two prospective employers, *section 2-615* dismissal was proper because the defendant did not direct its activity to anyone other than the plaintiff, even though such activity would likely dissuade the prospective employers).

[*P29] The Boffa Group has failed to meet the requirement of alleging a business expectancy with a specific third party. Their complaint merely alleges that defendants' conduct prevented unnamed physicians from referring patients to **[***20]** the Boffa Group and prevented unnamed patients from receiving services from the Boffa Group. They have also failed to allege any conduct by defendants directed at those unnamed physicians and patients. Even if defendants' conduct of not offering the Boffa Group membership in defendants' network was likely to dissuade other physicians from making referrals to the Boffa Group **[**578]** **[****896]** or dissuade other patients from using their services, "[c]ourts have rejected this argument, instead requiring that the interfering action be directed in the first instance at the third party." *Id.* Accordingly, the circuit court properly dismissed the Boffa Group's claim of tortious interference with prospective economic advantage.

[*P30] C. Denial of Leave to Amend

[*P31] The Boffa Group argues the circuit court deprived them of the opportunity to present a valid complaint by dismissing their claims with prejudice and without leave to amend. The Boffa Group does not propose any amendments that would cure their defective pleading; they argue, without providing any specifics, that if they were permitted to conduct discovery, supporting facts would come to light.

[*P32] ***HN8***[] Courts are given broad discretion in liberally allowing amendments of pleadings **[***21]** to foster the policy of resolving controversies on their merits. *Cook v. Board of Education of Edwardsville Community Unit School District No. 7, Madison County, 126 Ill. App. 3d 1013, 1019, 467 N.E.2d 305, 81 Ill. Dec. 605 (1984)*; *735 ILCS 5/2-616* (West 2010). Nevertheless, plaintiffs do not have an absolute and unlimited right to amend. *Ruklick v. Julius Schmid, Inc., 169 Ill. App. 3d 1098, 1113, 523 N.E.2d 1208, 120 Ill. Dec. 297 (1988)*. We review a trial court's decision to grant or deny a motion for leave to amend a pleading under the abuse of discretion standard. *Selcke v. Bove, 258 Ill. App. 3d 932, 937, 629 N.E.2d 747, 196 Ill. Dec. 202 (1994)*. In determining whether the circuit court properly exercised its discretion, we consider "(1) whether the proposed amendment would cure the defective pleading; (2) whether other parties would sustain prejudice or surprise by virtue of the proposed amendment; (3) whether the proposed amendment is timely; and (4) whether previous opportunities to amend the pleading could be identified." (Internal quotation marks omitted.) *Hayes Mechanical, Inc. v. First Industrial, L.P., 351 Ill. App. 3d 1, 7, 812 N.E.2d 419, 285 Ill. Dec. 599 (2004)*. Where it is apparent even after amendment that no cause of action can be stated, leave to amend should be denied. *Ruklick, 169 Ill. App. 3d at 1111*.

[*P33] As set forth in detail in the Background section of this order, the court gave the Boffa Group multiple opportunities to plead their claims but they failed to present a complaint sufficient to withstand *section 2-615* dismissal. When the court dismissed the antitrust claim and delineated the deficiencies of the complaint in a four-page written order, the Boffa Group never set **[***22]** forth any argument in their multiple motions to reconsider indicating they could amend the complaint to set forth facts showing the elements of that cause of action. Furthermore, concerning their tortious interference claim, the Boffa Group was allowed to amend their complaint to allege conduct by defendants directed towards a specific third party and, despite the circuit court granting them numerous continuances, failed to allege facts showing the elements of that cause of action. We find no abuse of discretion by the circuit court where the Boffa Group could not show that they could cure the deficiencies of their complaint.

[*P34] III. CONCLUSION

[*P35] We affirm the judgment of the circuit court dismissing plaintiffs' amended complaint under *section 2-615* of the Code for failure to plead a cause of action.

[*P36] Affirmed.

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UniStrip Techs., LLC v. LifeScan, Inc.

United States District Court for the Eastern District of Pennsylvania

December 28, 2015, Decided; December 28, 2015, Filed

CIVIL ACTION NO. 14-4518

Reporter
153 F. Supp. 3d 728 *; 2015 U.S. Dist. LEXIS 172392 **; 2016-1 Trade Reg. Rep. (CCH) P79,446

UNISTRIP TECHNOLOGIES, LLC, Plaintiff, v. LIFESCAN, INC and LIFESCAN SCOTLAND, LTD., Defendants.

Core Terms

strips, allegations, products, motion to dismiss, rebates, resellers, Sherman Act, competitor, bundling, meter, purchasers, discounts, contracts, anticompetitive, pricing, rule of reason, glucose, blood, tortious interference, exclusionary, asserts, Clayton Act, self-monitoring, compatible, contractual relationship, anti trust law, Defendants', price-cost, violations, monopoly

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Judges: JOEL H. SLOMSKY, J.

Opinion by: JOEL H. SLOMSKY

Opinion

[*733] Slomsky, J.

I. INTRODUCTION

Plaintiff UniStrip Technologies, Inc. ("UniStrip") brings this civil action against Defendants LifeScan, Inc. and LifeScan Scotland, Ltd. (collectively, "LifeScan") for various antitrust violations in connection with the market for blood glucose test strips that both parties manufacture and distribute. (Doc. No. 47.)

Before the Court is LifeScan's Motion to Dismiss Plaintiff's Second Amended Complaint ("SAC"), which was filed on May 1, **[*734]** 2015. (Doc. No. 54.) For the following reasons, the Court **[**2]** will deny LifeScan's Motion to Dismiss Counts I, II, III, IV, and VI of the Second Amended Complaint, and will grant LifeScan's Motion to Dismiss Count V.

II. BACKGROUND

LifeScan is a wholly owned subsidiary of Johnson & Johnson. It manufactures and sells blood glucose self-monitoring systems that allow individuals with diabetes to maintain healthy blood glucose levels. (Doc. No. 47 at 1, 7.) Blood glucose self-monitoring systems consist of disposable, single-use test strips that are read by an accompanying electrochemical meter. (Doc. No. 56 at 14.) The electronic meter can only read test strips that are designed to be compatible with it. (Id.) For this reason, the market for blood glucose self-monitoring systems consists of two sub-markets—one for electronic meters and one for accompanying test strips. (Id. at 14-15.)

In 2010, the United States market for blood glucose self-monitoring systems was valued at approximately $3.97 billion, with the test strip sub-market valued at $3.46 billion. (Doc. No. 47 at 1.) Four competitors in the United States market, including LifeScan, share more than 83% of the market. (Id. at 2.) Of these competitors, LifeScan vaunts that it is the leading manufacturer and seller **[**3]** of blood glucose self-monitoring systems with more than 30% of the United States market. (Id.)

Blood glucose monitoring system manufacturers make their products available on the market by selling them to distributors, wholesalers, mass merchandisers, pharmacies, and direct-to-patient managed mail order service providers. (Id. at 4.) LifeScan offers these resellers various rebates and discounts on its blood glucose self-monitoring products in order to lower the high cost of its products. (Id. at 9.) For example, LifeScan offers discounts that significantly depress the cost of its electronic meters, an enticement to many individuals to purchase them. (Id.) Once the patient acquires a LifeScan meter, that patient is locked into purchasing LifeScan meter-compatible test strips, which are used by many diabetics multiple times per day. (Id.) Because LifeScan previously was the only manufacturer of LifeScan meter-compatible test strips, LifeScan cornered the market on these test strips. (Id.) The entry of a competitor, such as UniStrip, into the market for LifeScan-compatible test strips therefore would disrupt LifeScan's market strategy.

LifeScan markets a monitoring system, OneTouch Ultra, which consists **[**4]** of an electronic meter and test strips that, until recently, were the only test strips available that were compatible with this meter. (Doc. No. 56 at 15.) Thus, LifeScan captured 100% of the market for those test strips. (Doc. No. 47 at 3.) In November 2013, however, the United State Food and Drug Administration approved a test strip, UniStrip1, which UniStrip developed to be compatible with—and thus usable in—OneTouch Ultra meters. (Id.) With this regulatory approval, UniStrip now was permitted to sell its lower-cost UniStrip1 and compete with LifeScan in the market for test strips that were compatible with the OneTouch Ultra meter. (Id.)

Following the entry into the market of UniStrip's generic alternative to LifeScan's test strip, LifeScan began entering into exclusivity contracts and agreements with its resellers. (Id. at 13.) According to Plaintiff, LifeScan would offer rebates and discounts to resellers on the condition that those resellers would not purchase any non-LifeScan products compatible with the OneTouch Ultra meter. (Id.) Should a reseller purchase a non-LifeScan product, such as the UniStrip1 test strip, LifeScan **[*735]** allegedly would reduce or terminate its offered rebates and discounts. **[**5]** (Id.) The reseller then would face steep price increases on LifeScan products. (Id.) UniStrip alleges that there are "exclusionary contracts with resellers [that] include terms or provisions that expressly or impliedly condition the payment of rebates, discounts, allowances and other financial incentives on the agreement and/or understanding that the customer not purchase sell [sic] non-LifeScan products." (Id.) UniStrip also asserts that "LifeScan has also made these threats in-person, over the phone, in e-mails and other written correspondences notwithstanding any express penalty term in the agreement with the reseller." (Id. at 13-14.) The exclusionary conditions, UniStrip asserts, have prevented resellers from purchasing UniStrip products due to the reseller's fear of losing the coveted rebates and discounts LifeScan offers. (Id.)

UniStrip alleges that these exclusivity agreements violate ***antitrust law*** because they impede competition by foreclosing the market to LifeScan's competitors. (Id. at 15.) UniStrip also contends that LifeScan's exclusionary strategy amounts to an illegal attempt to maintain its monopoly power over the test strip market. (Id.) Because LifeScan conditions rebates and discounts **[**6]** on all of its products and not only test strips, UniStrip asserts that this strategy is an illegal bundling scheme that violates ***antitrust law***. (Id.) UniStrip argues that LifeScan's conditions impermissibly allow it to terminate a discount on any of its products, such as that on the OneTouch Ultra meter, if the reseller purchases a UniStrip1 test strip. (Id.)

As a result of UniStrip's allegations of LifeScan's anticompetitive behavior, UniStrip brought this suit against LifeScan on July 29, 2014. (Doc. No. 1.) In its Complaint, UniStrip claims that LifeScan has violated *Sections 1* and *2* of the Sherman Act and *Section 3 of the Clayton Act*, and also has violated applicable state law by tortiously interfering with actual and prospective contracts. (Id.) UniStrip filed a First Amended Complaint on November 19, 2014. (Doc. No. 30.) LifeScan responded by filing a Motion to Dismiss on December 19, 2014. (Doc. No. 37.)

A hearing was held on LifeScan's Motion to Dismiss on February 19, 2015. (Doc. No. 46.) Following the hearing, UniStrip filed a Second Amended Complaint on March 30, 2015.[1] (Doc. No. 47.) LifeScan filed a Motion to Dismiss the Second Amended Complaint on May 1, 2015. (Doc. No. 54.) Plaintiff responded **[**7]** to LifeScan's Motion to Dismiss on June 2, 2015 (Doc. No. 56), and LifeScan replied on June 17, 2015 (Doc. No. 58). For the following reasons, the Court will deny LifeScan's Motion to Dismiss in part and will grant it in part.

III. STANDARDS OF REVIEW

A. Legal Standard for Motion To Dismiss

In deciding a motion to dismiss, the court "accept[s] as true all allegations in the complaint and all reasonable inferences that can be drawn therefrom, and views them in the light most favorable to the non-moving party." *DeBenedictis v. Merrill Lynch & Co., 492 F.3d 209, 215 (3d Cir. 2007)*. The motion to dismiss standard under *Federal Rule of Civil Procedure 12(b)(6)* establishes that "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements do not suffice" to defeat a *Rule 12(b)(6)* motion to dismiss. *Ashcroft v. Iqbal, 556 U.S. 662, 663, **[*736]** 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*; see also *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ethypharm S.A. France v. Abbott Labs., 707 F.3d 223, 231 n.14 (3d Cir. 2013)* (citing *Sheridan v. NGK Metals Corp., 609 F.3d 239, 262 n.27 (3d Cir. 2010)*). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable **[**8]** for the misconduct alleged." Id. Where "the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'shown'—'that the pleader is entitled to relief.'" *Iqbal, 556 U.S. at 679*. The "plausibility" determination is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Id.

B. Legal Standard for Exclusive Dealing

When a party asserts violations of antitrust laws based on allegations that "a business rival has priced its products in an unfair manner with an object to eliminate or retard competition and thereby gain and exercise control over prices in the relevant market," the court must determine which of two tests applies to that party's claims. *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993)*; see also *ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 268 (3d Cir. 2012)*. Specifically, if a Plaintiff alleges violations of *Sections 1* and *2* of the Sherman Act and *Section 3 of the Clayton Act* due to an exclusive dealing arrangement, the court will determine if it should apply the "price-cost test" or the "rule of reason." *Id. at 268-69*.[2] When a plaintiff's

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[1] In view of the filing of the SAC, the Motion to Dismiss the First Amended Complaint (Doc. No. 37) was denied without prejudice as moot. (Doc. No. 48.)

[2] "An exclusive dealing arrangement is an agreement in which a buyer agrees to purchase certain goods or services only from a particular seller for a certain period of time." *ZF Meritor, 696 F.3d at 270*.

claim of exclusive dealing by a competitor is based predominately on the allegation that the mechanism of exclusion is pricing practices—that is, pricing products below **[**9]** that competitor's cost of production—the price-cost test applies. Id. This test requires a plaintiff to demonstrate "that the defendant's prices are below an appropriate measure of the defendant's costs." *Id. at 269* (quoting *Brooke Grp., 509 U.S. at 222* (quotations omitted)). In contrast, when a plaintiff's allegations of exclusive dealing are not centered on pricing practices alone, the "rule of reason" test applies to determine if the arrangement will "foreclose on competition in such a substantial share of the relevant market so as to adversely affect competition." *Id. at 271*. In applying this test, the court can consider "a showing of significant market power by the defendant . . . , substantial foreclosure [of the market] . . . , contracts of sufficient duration to prevent meaningful competition by rivals . . . , and whether there is evidence that the dominant firm engaged in coercive behavior." *Id. at 271-72* (citations omitted).

IV. ANALYSIS

A. The Rule of Reason Applies in this Case

A fundamental disagreement between the parties here is whether the Court should apply **[**10]** the rule of reason or the price-cost test when evaluating UniStrip's allegations of exclusive dealing by LifeScan in violation of ***antitrust law***. According **[*737]** to LifeScan, UniStrip's allegations that LifeScan threatened to terminate rebates is only a pleading of aggressive price competition. (Doc. No. 54 at 15.) LifeScan argues that because UniStrip claims anticompetitive behavior based on predatory pricing, the price-cost test applies, which requires Plaintiff to allege that LifeScan has priced its test strips below cost in an attempt to eliminate competition. (Id. at 15-16.) LifeScan presses the Court to apply the price-cost test because UniStrip's allegations, in essence, are that pricing is the primary mechanism of LifeScan's exclusionary conduct. (Id. at 16.) Because UniStrip has not alleged that LifeScan's prices are below cost, LifeScan would have the Court dismiss this case pursuant to the price-cost test as outlined in Brooke Group. (Id.)

UniStrip, on the other hand, insists that the Court apply the rule of reason because UniStrip pleads nowhere in its SAC that price was LifeScan's mechanism of exclusion, but rather pleads that it engaged in anticompetitive, predatory conduct. (Doc. No. 56 at 23-24.) **[**11]** UniStrip contends that the exclusivity of the arrangements that LifeScan has imposed on resellers of its products prevents competitors from entering the market, not price competition. (Id. at 24.) As such, UniStrip asserts that the rule of reason applies and LifeScan simply mischaracterizes the claims made against it in an attempt to have the case dismissed. (Id.)

Here, viewing the allegations in the SAC in the light most favorable to Plaintiff UniStrip, it is clear that the claims made in its SAC plead anticompetitive behavior rather than merely competitive pricing. LifeScan's arguments that the price-cost test applies is therefore unpersuasive at this stage of the litigation.

In ZF Meritor, the Third Circuit examined a plaintiff's claims of exclusive dealing in connection with the market for heavy-duty truck transmissions. *696 F.3d at 263*. The facts of that case are quite similar to those presently before the Court. The plaintiff alleged violations of *Sections 1* and *2* of the Sherman Act and *Section 3 of the Clayton Act* because the defendant entered into agreements with purchasers of the transmissions that required the purchase of a specific quantity of the defendant's products, rather than those of a competitor, or else rebates **[**12]** offered to the purchasers would be terminated. *Id. at 265*. The Third Circuit acknowledged that generally, a claim that rebate programs "which condition the . . . rebate on the costumer's purchasing of" its products should be analyzed under the price-cost test. *Id. at 275*. Despite this acknowledgment, the Third Circuit applied the rule of reason because of the exclusionary nature of the agreements, finding that predatory pricing was not alleged to be the primary mechanism of exclusion. *Id. at 277*. Specifically, the several-year length of the contracts and the defendant's dominance in the market for a necessary product were the primary factors leading it to apply the rule of reason. Id. The Third Circuit also considered that, apart from the formal contracts, correspondence that threatened the termination of rebates warranted the application of the rule of reason because it amounted to exclusionary anticompetitive behavior and not predatory pricing. *Id. at 277-78*.

In this case, as in *ZF Meritor*, UniStrip alleges that rebates have been offered to purchasers of LifeScan's products on the condition that a competitor's products would not be purchased. UniStrip similarly alleges that these conditions extended for several years (Doc. **[**13]** No. 56 at 41), and were contained in contracts or were made as threats in correspondence between LifeScan and purchasers. UniStrip also points to **[*738]** LifeScan's dominance in the market for test strips that are compatible with LifeScan's meters. Given the similarities between this case and ZF Meritor, the rule of reason applies here based on the allegations in the SAC.[3]

B. Analysis of the Motion to Dismiss Each Count of the SAC

LifeScan has moved to dismiss the entirety of UniStrip's SAC for failure to state a claim for relief pursuant to *Federal Rule of Civil Procedure 12(b)(6)*. (Doc. No. 54 at 10.) Accordingly, the Court will evaluate each of UniStrip's six Counts seriatim to determine which will survive the Motion to Dismiss.

1. Count I (Exclusionary Arrangements in Violation of Section 3 of the Clayton Act) Will Not Be Dismissed

UniStrip first alleges in its SAC that LifeScan has violated Section 3 of the Clayton Act, *15 U.S.C. § 14*, by engaging in unlawful exclusionary agreements. (Doc. No. 47 at 16.) As noted, UniStrip asserts that LifeScan has threatened purchasers or potential purchasers of UniStrip's test strips not to buy **[**14]** them, or else LifeScan would terminate highly-valued rebates on its own products. According to UniStrip, LifeScan has engaged in such exclusive dealing arrangements with the purpose of eliminating competition from the market for LifeScan meter-compatible test strips. Though these agreements may not contain express exclusivity clauses in writing, UniStrip argues that the absence of such a clause does not preclude review of its allegations.

Under Section 3 of the Clayton Act, an entity may not "make a sale or contract for sale of goods . . . or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the . . . purchaser thereof shall not use or deal in the goods . . . of a competitor . . . where the effect . . . may be to substantially lessen competition or tend to create a monopoly" in the market for those goods. *15 U.S.C. § 14*. The Third Circuit has held that Section 3 Clayton Act violations are held to stricter standards than the less restrictive provisions of the Sherman Act. *Barr Labs, Inc. v. Abbott Labs, 978 F.2d 98, 110 (3d Cir. 1992)*. Under this stricter standard, when a court reviews the "legality of an exclusive dealing arrangement under the Clayton Act," it must determine "whether the competition foreclosed constitutes a substantial **[**15]** share of the relevant market." Id. The court need not limit its review of the exclusive dealing arrangement to an express exclusivity requirement in a contract. *LePage's Inc. v. 3M, 324 F.3d 141, 157 (3d Cir. 2003)* (citing *Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961))*.

UniStrip's Clayton Act claim set forth in Count I will not be dismissed. UniStrip has alleged that LifeScan engaged in anticompetitive behavior in the form of requiring purchasers of its products to commit to agreements in which those purchasers were influenced not to buy a competitor's products. UniStrip has identified the specific product and geographic markets that it alleges it is excluded from, as well as several actual and potential distributors in those markets that have been foreclosed from conducting business with UniStrip due to LifeScan's alleged exclusive dealing. UniStrip further alleges that this scheme was concocted for the purposes of chilling competition in the market and maintaining Defendants' monopoly. This allegation is **[*739]** squarely in line with the prohibitions found in Section 3 of the Clayton Act.

LifeScan provides the Court with a test to determine if a "substantial lessening of competition" exists under the rule of reason: a court should examine "(1) the extent of market foreclosure, **[**16]** (2) the duration of the allegedly anticompetitive arguments, (3) the nature of the anticompetitive conduct, and (4) any procompetitive justifications for defendants' conduct." (Doc. No. 54 at 24 (citing *ZF Meritor, 696 F.3d at 286-89*).) In ZF Meritor, the Third Circuit

[3] The Third Circuit has made clear that "above-cost prices [do not] render an otherwise unlawful exclusive dealing agreement lawful." *ZF Meritor, 696 F.3d at 278*.

considered these factors in weighing the sufficiency of the evidence that a jury considered at trial in evaluating plaintiff's claims under the rule of reason. At this stage of the litigation, however, the Court does not evaluate the sufficiency of the evidence. Rather, in applying the pertinent standard of review at the motion to dismiss stage, at which the litigation is currently, UniStrip has adequately pled in the SAC plausible allegations of a violation of Section 3 of the Clayton Act.

2. Count II (Contracts and Agreements in Violation of Section 1 of the Sherman Act) Will Not Be Dismissed

UniStrip next alleges that LifeScan has violated Section 1 of the Sherman Act, *15 U.S.C § 1*, by engaging in contracts and agreements that restrain competition to the detriment of consumers. (Doc. No. 47 at 20.) To reiterate, UniStrip asserts that LifeScan has entered into exclusivity contracts and agreements with resellers—who might potentially purchase UniStrip products—that specifically eliminate **[**17]** UniStrip from the relevant test strip market. These agreements, which predicate discounts on LifeScan products on the condition that UniStrip products are not purchased, restrain trade by excluding LifeScan's competitor from the market. Because UniStrip offers a potentially lower-priced alternative product, UniStrip asserts that consumers are disadvantaged and injured by LifeScan's scheme to jettison the competition from the market. UniStrip is also financially harmed by its inability to sell its product and grow in the market.

Section 1 of the Sherman Act makes it illegal to make a "contract [or] combination . . . , or conspiracy, in restraint of trade or commerce." *15 U.S.C. § 1*. As stated above, alleged Sherman Act violations are held to a less restrictive standard than those made under the Clayton Act. *Barr Labs., 978 F.2d at 110*. To establish a cognizable violation of Section 1 of the Sherman Act for unreasonable restraint of trade due to exclusive dealing, a plaintiff must show "(1) concerted action by the defendants; (2) that produced anti-competitive effects within the relevant product and geographic markets; (3) that the concerted action was illegal; and (4) that the plaintiff was injured as a proximate result of the concerted action." **[**18]** *Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 442 (3d Cir 1997)*. Under this test, Plaintiff's claims as set forth in Count II of the SAC are plausible and will not be dismissed.

To show concerted action, a plaintiff must reference a contract or agreement that demonstrates an unlawful arrangement. *Mathews v. Lancaster General Hosp., 87 F.3d 624, 639 (3d Cir. 1996)*. UniStrip has done so by repeatedly alleging that illegal exclusivity agreements exist. LifeScan even acknowledges these references to the agreements. (Doc. No. 58 at 5.) Moreover, to demonstrate anticompetitive effects within the relevant product and geographic markets in rule of reason cases, a plaintiff can satisfy this burden by proving the defendant's market power in the relevant market. *Orson, Inc. v. Miramax Film Corp., 79 F.3d 1358, 1367 (3d Cir. 1996)*. UniStrip could plausibly prove **[*740]** this factor, as it has pointed to LifeScan's dominance in the market for blood glucose self-monitoring systems—which LifeScan has admitted—as well as LifeScan's share of virtually the entire sub-market for LifeScan meter-compatible test strips. Finally, UniStrip has alleged that the exclusive dealing agreements are illegal, and that these agreements have deprived and will continue to deprive UniStrip of revenues, profits, and market growth, resulting in injury.

At the motion to dismiss stage, Plaintiff only must advance plausible claims. **[**19]** UniStrip's Section 1 Sherman Act allegations are plausible, and Defendants' Motion to Dismiss as to Count II of Plaintiff's SAC will be denied.

3. Count III (Attempted Monopolization in Violation of *Section 2* of the Sherman Act) Will Not Be Dismissed

Count III of UniStrip's SAC charges LifeScan with alleged violations of *Section 2* of the Sherman Act, *15 U.S.C. § 2*, for attempts to monopolize the test strip market. (Doc. No. 47 at 25.) UniStrip claims that by engaging in exclusionary and anticompetitive practices, LifeScan has schemed to preclude competitors of the OneTouch Ultra meter-compatible test strips from competing in the market. By such action, LifeScan has illegally attempted to maintain its monopoly over it. UniStrip asserts that given LifeScan's dominance in the market, there is a dangerous probability that LifeScan will maintain or even expand its monopoly in the relevant markets, allowing it to set prices, reduce output, and exclude competition from those markets. UniStrip alleges that LifeScan's anticompetitive and exclusionary practices were undertaken with the specific intent of monopolizing the market for test strips used in OneTouch Ultra meters.

Section 2 of the Sherman Act provides that an entity may not "monopolize, **[**20]** or attempt to monopolize, or combine or conspire . . . to monopolize any part of the trade or commerce among the several States." *15 U.S.C. § 2*. A defendant has violated *Section 2* of the Sherman Act when it "possesses monopoly power in the relevant market" and "willfully acquired or maintained that power." *LePage's Inc., 324 F.3d at 146* (citing *United States v. Grinnell Corp., 384 U.S. 563, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966))*. "Exclusive dealing arrangements are of special concern when imposed by a monopolist." *ZF Meritor, 696 F.3d at 271*; see also *United States v. Dentsply Int'l, Inc., 399 F.3d 181, 187 (3d Cir. 2005)* ("Behavior that otherwise might comply with ***antitrust law*** may be impermissibly exclusionary when practiced by a monopolist"). A monopolist can be found to have willfully maintained its monopolist power when it engages in exclusive dealing, especially where that exclusive agreement is alleged to be based on the bundling of rebates. *LePage's Inc., 324 F.3d at 147*.

Under these principles, UniStrip has pled a violation of *Section 2* of the Sherman Act sufficient to survive LifeScan's Motion to Dismiss. UniStrip has alleged—and LifeScan has conceded—that LifeScan is the leading manufacturer and seller of blood glucose self-monitoring systems, with a significant share of the market. UniStrip has also alleged that LifeScan controls virtually the entire market for test strips that are compatible with its OneTouch Ultra meters. These allegations **[**21]** are plausible to demonstrate LifeScan's monopolist power in the relevant market.

Furthermore, UniStrip repeatedly alleges in its SAC that LifeScan has engaged in exclusive dealing, in violation of several antitrust laws, and that this exclusive dealing consists of bundling schemes by which **[*741]** rebates are offered on the condition that multiple products from LifeScan are purchased. Viewing the allegations in the SAC in the light most favorable to Plaintiff, this claim is plausibly indicative of LifeScan's willful attempt to maintain its monopoly power in the market for test strips that are compatible with its meters. Applying LePage's Inc. and the plausibility standards for pleading at the motion to dismiss stage, then, UniStrip has adequately pled a violation of *Section 2* of the Sherman Act against LifeScan.

Therefore, Count III of Plaintiff's SAC will remain, and Defendant's Motion to Dismiss Count III will be denied.

4. Count IV (Bundling in Violation of Sections 1 and *2* of the Sherman Act and Section 3 of the Clayton Act) Will Not Be Dismissed

In Count IV of its SAC, UniStrip alleges that LifeScan engaged in an illegal bundling scheme, in violation of Section 3 of the Clayton Act, *15 U.S.C. § 14*, and Sections 1 and *2* of the Sherman Act, *15 U.S.C. §§ 1*, *2*. (Doc. No. **[**22]** 47 at 28.) Using the same factual scenarios set forth above, UniStrip claims that LifeScan offers discount and rebate programs to induce customers to purchase its OneTouch Ultra meters, and then lock those customers into purchasing LifeScan's accompanying test strips. Because LifeScan threatens to eliminate those discounts and rebates on the condition that resellers only purchase LifeScan products that are compatible with its products, rather than those of a competitor, UniStrip argues that this bundling scheme amounts to anticompetitive exclusive dealing. UniStrip asserts that this bundling scheme has the effect and intent of barring competition from entering or expanding in the market, as well as to maintain its monopoly in the market.

Bundling of rebates occurs when a producer of one product induces customers to purchase that product instead of a similar product produced by a competitor by offering the customer discounts on another one of its products that its rival does not produce. *LePage's Inc., 324 F.3d at 155*. This market strategy by a monopolist has the potential anticompetitive effect of "foreclos[ing] portions of the market to a potential competitor who does not manufacture an equally diverse group of products and **[**23]** who therefore cannot make a comparable offer." Id. To demonstrate the impermissibility of a bundling scheme under ***antitrust law***, a plaintiff must show that: 1) there is an "agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or [bundled]) product"; 2) that the "seller has sufficient economic power with respect to the [bundled] product to appreciably restrain competition"; and 3) that "interstate commerce is affected." *SmithKline Corp. v. Eli Lilly & Co., 575 F.2d*

1056, 1061 n.3 (3d Cir. 1976) (quotations omitted); see also LePage's Inc., 324 F.3d at 155. If these elements are shown, a defendant is potentially in violation of the Sherman and Clayton Acts.

UniStrip meets these requirements in its SAC, and for this reason, the Motion to Dismiss Count IV will be denied. Under the first requirement, UniStrip made several allegations of bundling contracts and agreements, both written and oral, between LifeScan and named third-party buyers. With specificity, UniStrip alleges that each agreement required the buyer to purchase LifeScan test strips—the bundled product—or else rebates and discounts on other LifeScan products, such as the meter, would be discontinued or reduced. As to the second requirement that Plaintiff demonstrate Defendants' **[**24]** economic power in the market for the bundled product, UniStrip has alleged that LifeScan control virtually the entire market for **[*742]** OneTouch Ultra meter-compatible test strips, and LifeScan admits to being the leader in the market for blood glucose self-monitoring systems. Finally, UniStrip meets the third requirement by averring that the alleged bundling arrangements affect interstate commerce. Accordingly, UniStrip has alleged a plausible and impermissible bundling scheme in violation of antitrust laws.

Having sufficiently pled a plausible claim against LifeScan with regard to the alleged illegal bundling arrangement, UniStrip may proceed on this claim. The Court will therefore deny LifeScan's Motion to Dismiss Count IV.

5. Count V (Tortious Interference with Prospective Contractual Relations) Will Be Dismissed

In Count V of the SAC, UniStrip claims that LifeScan tortiously interfered with prospective contractual relations between UniStrip and resellers. UniStrip alleges that potential resellers were discouraged from purchasing the UniStrip1 due to LifeScan's contracts with them that threaten to revoke rebates and discounts on LifeScan products should the UniStrip1 be purchased. LifeScan **[**25]** allegedly contacted UniStrip and informed it of these contracts, and that LifeScan would be enforcing them. Because LifeScan's intentional conduct is without any legitimate business justification, UniStrip pleads, LifeScan has caused UniStrip financial injury and has made it difficult for UniStrip to remain as a competitor on the market.

The parties agree that both the laws of Pennsylvania and North Carolina govern these claims, and that both laws are essentially the same. (Doc. No. 46 at 57; Doc. No. 54 at 30). Under Pennsylvania law, an action for tortious interference with prospective contractual relations requires the following elements:

> (1) the existence of a contractual, or prospective contractual relation between the complainant and a third party; (2) purposeful action on the part of the defendant, specifically intended to harm the existing relation, or to prevent a prospective relation from occurring; (3) the absence of privilege or justification on the part of the defendant; and (4) the occasioning of actual legal damage as a result of the defendant's conduct.

Maverick Steel Co. v. Dick Corp./Barton Malow, 2012 PA Super 173, 54 A.3d 352, 355 (Pa. Super. 2012). Regarding the first element—the existence of a prospective contractual relationship—there must be a demonstration of **[**26]** "something less than a contractual right, [but] something more than a mere hope," Thompson Coal Co. v. Pike Coal Co., 488 Pa. 198, 412 A.2d 466, 471 (Pa. 1979), and that there is "an objectively reasonable probability that such a contract would arise," Applied Tech. Intern., Ltd. v. Goldstein, Civ. No. 03-848, 2004 U.S. Dist. LEXIS 21219, 2004 WL 2360388, at *6 (E.D. Pa. Oct. 20, 2004). Under the law of North Carolina, a plaintiff in an action for tortious interference with prospective economic advantage "must allege facts to show that the defendants acted without justification in inducing a third party to refrain from entering into a contract with them which contract would have ensued but for the interference." Walker v. Sloan, 137 N.C. App. 387, 529 S.E.2d 236, 242 (N.C. Ct. App. 2000) (quotations omitted).

The essence of both states' laws require that the plaintiff must establish that a prospective contract likely would have been agreed to by the plaintiff and a third party in the absence of the defendant's alleged interference and that the defendant acted without a legitimate business justification. Given these requirements, UniStrip fails to make a plausible claim of interference with prospective contractual relations.

[*743] First, UniStrip has not plausibly pled that it was likely that a contractual relationship would have occurred in the absence of LifeScan's alleged tortious interference. UniStrip lists a number of resellers with which it potentially could have engaged **[**27]** in contractual relations,[4] but it does not plead that there were actual relations or potential contracts with those resellers that "would have ensued" beyond "a mere hope." There is no plausible allegation provided by UniStrip that there was any "objectively reasonable probability" that a contract would arise from the dealings with prospective buyers. See *Applied Tech. Intern., 2004 U.S. Dist. LEXIS 21219, 2004 WL 2360388 at *6*. UniStrip's allegations include unnamed prospective resellers, and there is meager information about its dealings with the prospective resellers it names. In short, the Court cannot identify "specific business relationships suffering as a result of the defendant's interference" that UniStrip is required to plead. Id.

Second, UniStrip merely claims that LifeScan improperly acted without justification, yet it fails to provide any reasoning that underlies this assertion. Merely reciting this element of the tort is not sufficient to reach the levels of a plausible claim.

[28]** Accordingly, given these insufficiencies, Count V of Plaintiff's claim will be dismissed.

6. Count VI (Tortious Interference with Actual Contractual Relations) Will Be Not Dismissed

UniStrip avers that LifeScan also is in violation of Pennsylvania and North Carolina law for tortious interference with actual contractual relations. UniStrip's only cognizable claim under Count VI is that LifeScan interfered with a contract with reseller Discount Drug Mart ("DDM"), an Ohio pharmacy. (Doc. No. 47 at 33.) UniStrip asserts that, after DDM had purchased the UniStrip1, LifeScan had "informed DDM that its contracts with Humana and Medicare beneficiaries would not pay rebates" on LifeScan products if it sold non-LifeScan products. (Id.) Afterwards, DDM requested that it return its purchase to UniStrip, and UniStrip accepted the request.

To claim tortious interference with actual contractual relations under Pennsylvania law, a plaintiff must prove the same elements as provided above for tortious interference with prospective contractual relations, except that an actual contract must be shown to have existed. *Maverick Steel Co., 54 A.3d at 355*. Under the law of North Carolina, the "tort of interference with contract has five elements: **[**29]** (1) a valid contract between the plaintiff and a third person which confers upon the plaintiff a contractual right against a third person; (2) the defendant knows of the contract; (3) the defendant intentionally induces the third person not to perform the contract; (4) and in doing so acts without justification; (5) resulting in actual damage to the plaintiff." *Austin Maint. & Constr., Inc. v. Crowder Constr. Co., 224 N.C. App. 401, 742 S.E.2d 535, 546 (N.C. Ct. App. 2012)*.

UniStrip alleges a plausible claim of the existence of actual contractual relations because it points to a stock order transaction in which it engaged with DDM. In addition, the other elements of this cause of action are properly alleged in the SAC. To counteract UniStrip's claim, LifeScan essentially argues that it was cloaked with a privilege in the course of competition to **[*744]** interfere with the relationship of a competitor selling a similar product. However, UniStrip has alleged wrongful antitrust conduct independent from the claim of tortious interference of actual contractual relations. Therefore, Count VI of Plaintiff's SAC will not be dismissed.

V. CONCLUSION

UniStrip has alleged plausible claims of antitrust violations and tortious interference with actual contractual relations against LifeScan. Accordingly, the Court will **[**30]** deny LifeScan's Motion to Dismiss Counts I, II, III, I V, and VI. LifeScan's Motion to Dismiss Count V, alleging tortious interference with prospective contractual relations, will be granted. An appropriate order follows.

[EDITOR'S NOTE: The following court-provided text does not appear at this cite in F. Supp. 3d.]

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[4] In its SAC, UniStrip names the following potential resellers: "Walgreen's, Burlington Drug, AmerisourceBergen, GEMCO Medical, NC Mutual Wholesale Drug, Arriva Medical, CCS Medical, and DDP Medical Supply." (Doc. No. 47 at 31.)

[*none] ORDER

AND NOW, this 28th day of December, 2015, upon consideration of Plaintiff's Second Amended Complaint (Doc. No. 47), Defendants' Motion to Dismiss (Doc. No. 54), Plaintiff's Response in Opposition to Defendant's Motion to Dismiss (Doc. No. 56), Defendants' Reply to Plaintiff's Response (Doc. No. 58), and Plaintiff's Notice of Supplemental Authority in Opposition to Defendants' Motion to Dismiss (Doc. No. 59), it is **ORDERED** in accordance with the Opinion issued by the Court on this day that Defendants' Motion to Dismiss is **GRANTED IN PART** and **DENIED IN PART**:

1. Count V of Plaintiff's Second Amended Complaint (Doc. No. 47) is **DISMISSED**.
2. Counts I, II, III, I V, and VI of Plaintiff's Second Amended Complaint (Doc. No. 47) will not be dismissed.

BY THE COURT:

/s/ Joel H. Slomsky

JOEL H. SLOMSKY, J.

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[Rivera-Nazario v. Corporacion Del Fondo Del Seguro Del Estado]

United States District Court for the District of Puerto Rico

December 29, 2015, Decided; December 29, 2015, Filed

CIVIL NO. 14-1533 (JAG)

Reporter

2015 U.S. Dist. LEXIS 173012 *; 2015-2 Trade Cas. (CCH) P79,418

DR. LUIS B. RIVERA-NAZARIO, et al., Plaintiffs, v. CORPORACION DEL FONDO DEL SEGURO DEL ESTADO, et al., Defendants.

Subsequent History: Reconsideration denied by *Rivera-Nazario v. Corp. Del Fondo Del Seguro Del Estado, 2016 U.S. Dist. LEXIS 206058, 2016 WL 11815752 (D.P.R., July 29, 2016)*

Prior History: *Rivera-Nazario v. Corporacion del Fondo del Seguro del Estado, 2015 U.S. Dist. LEXIS 121475, 2015 WL 6254417 (D.P.R., Sept. 9, 2015)*

Core Terms

supervision, immunity, Sherman Act, active market, chiropractors, workers' compensation, chiropractic, private interest, articulation, nonsovereign, anticompetitive conduct, patients, motion to dismiss, delegation, municipality, guidelines, anticompetitive, antitrust, employees, compete, state-action, holds, medical professional, new guidelines, rehabilitation, designation, appointed, referrals, effects, exempt

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Judges: JAY A. GARCIA-GREGORY, United States District Judge.

Opinion by: JAY A. GARCIA-GREGORY

Opinion

OPINION AND ORDER

GARCIA-GREGORY, D.J.

This matter is before the Court on Defendants' renewed Motion to Dismiss Plaintiffs' claims under the Sherman Antitrust Act ("Sherman Act") pursuant to *Fed. R. Civ. P. 12(b)(6)*. Docket No. 83. Plaintiffs timely opposed. Docket No. 84. Plaintiffs, a group of licensed chiropractors and chiropractic clinics, sued Defendants, the Corporacion del Fondo del Seguro del Estado ("CFSE") and several CFSE directors and officials,[1] alleging, *inter alia*, that Defendants violated *Section 1* and *Section 2* of the Sherman Act by illegally discriminating against chiropractors and taking steps to exclude them from the services provided by the CFSE. Docket No. 28.

There are two issues before the Court. The first issue is whether Plaintiffs' claims should be dismissed because Defendants are immune from Sherman Act liability under the doctrine of state-action antitrust immunity of *Parker v. Brown, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943)*. The second issue is whether Plaintiffs have failed to plead successful claims under *Sections 1* and *2* of the Sherman Act. The Court GRANTS Defendants' Motion to Dismiss and hereby dismisses Plaintiffs' Sherman Act claims *with prejudice* because Defendants are immune from Sherman Act liability under *Parker*. Since Defendants are immune, the Court does not address the second issue concerning the sufficiency of Plaintiffs' claims.

BACKGROUND

A. Factual [*4] Background[2]

The CFSE is a public corporation created by the Puerto Rico legislature for the purpose of carrying out the Puerto Rico Compensation System for Work-Related Accidents Act ("Worker's Compensation Act" or "Act"). *P.R. Laws Ann. tit. 11 §§ 1*, *1b*. Every employer covered by the Act is required to insure its workers through the CFSE, and CFSE compensation is the exclusive remedy available to an injured worker. *P.R. Laws Ann. tit. 11 §§ 19*, *21*. Private insurance companies are not allowed to offer worker's compensation insurance to employers in Puerto Rico, Docket No. 28, thus ensuring that the CFSE is the only provider of worker's compensation insurance in Puerto Rico. The CFSE is tasked with creating a worker's compensation system that complies with the policies stated under the Act, *P.R. Laws Ann. tit. 11 § 1b-3*, and it is empowered to establish a program to "achieve the physical as well as vocational rehabilitation" of injured employees, *P.R. Laws Ann. tit. 11 § 1b-1*. The Puerto Rico legislature empowered the CFSE with "all the necessary or convenient powers" to be able to accomplish its mission, including the authority to enter into contracts, among others. *Id.*

[*5] The CFSE is governed by a seven member Board of Directors ("BOD"). *P.R. Laws Ann. tit. 11 § 1b-2*. All seven members are appointed by the Governor of Puerto Rico and can be removed by the Governor for just cause. *Id.* Of the seven BOD members, one "shall be the Insurance Commissioner, who is a person of great technical competence in the insurance area; one shall be identified with the employers, another one . . . shall be identified

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[1] These officials are: Liza M. **[*3]** Estrada ("Estrada") in her official capacity as Administrator of CFSE; Sheila Rivera-Serrano ("Rivera-Serrano") in her personal and official capacity as Director of the CFSE Medical Area; Maria I. Lastra-Gonzalez ("Lastra-Gonzalez") in her personal and official capacity as Medical Director at the CFSE Bayamon Regional Office; Jose Colon-Grau ("Colon-Grau") in his personal and official capacity as an External Advisor; and Lorena Diaz-Trancon ("Diaz-Trancon") in her personal and official capacity as a Type VII Internal Medical Council of CFSE.

[2] For purposes of Defendants' Motion to Dismiss, all facts in Plaintiffs' Amended Complaint, Docket No. 28, are presumed to be true.

with the employees . . . and two (2) members shall be officials of the Departments of Labor and Human Resources, and Health . . . . The two (2) remaining members . . . shall be freely selected." *Id.* The CFSE also contains a seven member Industrial Medical Council (IMC), which consists of four (4) medical doctors, a Health Services Administrator, a professional nurse and a specialist in vocational rehabilitation. *P.R. Laws Ann. tit. 11 § 1c*. The IMC is tasked with designing guidelines for the adequate treatment of most medical conditions for employees who receive benefits from the CFSE. *Id.*

However, these guidelines must be ratified by the governing BOD. *Id.* Plaintiffs allege that Defendants have engaged in a pattern to discriminate against chiropractors and to exclude them from CFSE services from 2003 up to the present. Docket No. 28. According to the Amended Complaint, Defendants, in particular Defendant Lastra-Gonzalez, have denied contracts to several chiropractors, including Plaintiffs, without any reasonable cause. *Id.* Defendant Lastra-Gonzalez also sent an internal memo to the CFSE's regional medical directors instructing them to cease all referrals of new patients for chiropractic treatment during a three-week period. *Id.* Moreover, Defendant Lastra-Gonzalez began to spread the rumor that the CFSE was in the process of eliminating chiropractic care from the CFSE's compensated services due to its harmful side effects and the ineffectiveness of the treatment. *Id.* To this day, some physicians opt not to refer patients to chiropractors due to the dissemination of this information. Defendant Lastra-Gonzalez has denied referrals to chiropractors even after the patients' physicians approved the **[*6]** treatment. *Id.*

On August 9, 2013, the CFSE issued a letter concerning the adoption of new guidelines and policies regarding chiropractic services and patient referrals. *Id.* The letter discussed in an inflammatory and exaggerated manner the contraindications and side effects of chiropractic treatment. *Id.* This letter, which was signed by Defendant Rivera-Serrano, was sent to 9 regional directors and 310 occupational primary care physicians, as well as several patients. *Id.* Despite this, Defendants Rivera-Serrano and Colon-Grau have denied the existence of the letter and the new guidelines to Plaintiffs on various occasions. *Id.*

The new guidelines require a physician that wishes to refer an injured worker to a chiropractor to comply with several new onerous requirements that only apply to chiropractic services. *Id. T*he guidelines also reduced the maximum number of covered chiropractic treatments, and any extension must be authorized by the regional medical director. *Id.*

B. Procedural Background

The Court is evaluating Defendants' renewed Motion to Dismiss, which only concerns Plaintiffs' Sherman Act claims. Docket No. 83. Plaintiffs originally asserted against Defendants, *inter alia*, violations **[*7]** of the Sherman Act, *Due Process Clause*, *Equal Protection Clause*, *Contract Clause*, the *First Amendment*, and Puerto Rico law. Docket No. 28. Defendants filed two Motions to Dismiss all of Plaintiffs' claims. Docket Nos. 30 and 44. On September 9, 2015, this Court issued an Opinion and Order granting in part Defendants' motions and dismissing *with prejudice* Plaintiffs' *Due Process Clause*, *Equal Protection Clause*, and *Contract Clause* claims. Docket No. 77. The Court also dismissed *with prejudice* Plaintiffs' *First Amendment* claims only as to Defendants Lastra-Gonzalez, Diaz-Trancon, Rivera-Serrano, and Colon-Grau. *Id.* The Court denied Defendants' Motions to Dismiss as to Plaintiffs' *First Amendment* claims against the CFSE and Defendant Estrada; and Plaintiffs' Puerto Rico law claims. *Id.* Finally, the Court denied *without prejudice* Defendants' Motions to Dismiss as to Plaintiffs' Sherman Act claims. *Id.* The Court gave Defendants an opportunity to renew their motion only as to these claims because a key Supreme Court decision had come out after Defendants' original Motions to Dismiss and because the relevant issues were not briefed properly by either party. *Id.*

STANDARD OF REVIEW

A defendant may move to dismiss an action for failure to state a claim upon which relief can be granted pursuant to *Fed. R. Civ. P. 12(b)(6)*. To survive dismissal under this standard, a complaint **[*8]** must allege "a plausible entitlement to relief." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 1967, 167 L. Ed. 2d 929 (2007)*.

According to *Twombly*, the complaint must state enough facts to "nudge [the plaintiff's] claims across the line from conceivable to plausible." *Id. at 1974*. Therefore, to preclude dismissal pursuant to *Fed. R. Civ. P. 12(b)(6)*, the complaint must rest on factual allegations sufficient "to raise a right to relief above the speculative level." *Id. at 1965*.

At the motion to dismiss stage, courts accept all well-pleaded factual allegations as true, and draw all reasonable inferences in the plaintiff's favor. *See Correa-Martinez v. Arrillaga-Belendez, 903 F.2d 49, 51 (1st Cir. 1988)*. Thus, the plaintiff bears the burden of stating factual allegations regarding each element necessary to sustain recovery under some actionable theory. *Gooley v. Mobil Oil Corp., 851 F.2d 513, 514 (1st Cir. 1988)*. Courts need not address complaints supported only by "bald assertions, unsupportable conclusions, periphrastic circumlocutions, and the like." *Aulson v. Blanchard, 83 F.3d 1, 3 (1st Cir. 1996)*.

ANALYSIS

Defendants argue that Plaintiffs' Sherman Act claims should be dismissed for two reasons. Docket No. 83. First, Defendants contend that they are immune from Sherman Act liability under the state-action doctrine of *Parker v. Brown, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943)*. Docket No. 83 at 1-8. Second, Defendants assert that Plaintiffs have failed to state a claim under either *Section 1* or *Section 2* of the Sherman Act. *Id.* at 8-15.

The Court grants Defendants' **[*9]** Motion to Dismiss because Defendants' actions are immune from Sherman Act liability under *Parker* immunity. As a preliminary matter the Court determines that the CFSE is a nonsovereign actor and to qualify for *Parker* immunity, it must satisfy the two part test set forth in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105, 100 S. Ct. 937, 63 L. Ed. 2d 233 (1980)* to show that its anticompetitive conduct "result[s] from procedures that suffice to make it the State's own." *See N. Carolina State Bd. of Dental Examiners v. F.T.C., 135 S. Ct. 1101, 1111, 191 L. Ed. 2d 35 (2015)*. The Court holds that the Defendants have met *Midcal*'s first requirement, the clear articulation requirement, because each of Defendants' actions was either expressly authorized by the Puerto Rico legislature or was the foreseeable result of the legislature's delegation of authority. The Court also holds that Defendants were exempt from *Midcal*'s second requirement, the active supervision requirement, because the CFSE is a public subdivision of the State, not a private actor, and it does not pose a risk that active market participants will pursue private interests in restraining trade. Accordingly, all of Defendants' actions are immune from Sherman Act liability under *Parker* and all of Plaintiffs' Sherman Act claims against Defendants are dismissed.[3] Since Plaintiffs' claims are dismissed pursuant to the *Parker* ***[*10]*** state-action doctrine, the Court need not address whether Plaintiffs sufficiently pled their claims.

A. The State-Action Doctrine Generally

The state-action doctrine, commonly called *Parker* immunity, immunizes state efforts to displace competition with regulation from federal antitrust laws.[4] *See Parker v. Brown, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943)*. In *Parker*, the Supreme Court interpreted the Sherman Act to confer immunity on state anticompetitive conduct when a state acts in its sovereign capacity. *317 U.S. at 351-52 (1943)*; *see also Bd. of Dental Examiners, 135 S. Ct. at 1110*. "State legislation and 'decisions of a state supreme court, acting legislatively' . . . are an undoubted exercise

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[3] Even though Plaintiffs have sued CFSE officials in both their personal and individual capacity in addition to the CFSE, Plaintiffs are suing them based on their conduct as CFSE officials. Plaintiffs cannot circumvent the doctrine of *Parker* immunity by simply suing the state agency officials that engaged in the challenged activity, rather than the state agency itself. *See Fisichelli v. City Known as Town of Methuen, 956 F.2d 12, 15-16 (1st Cir. 1992)*. Accordingly, Plaintiffs' claims against the individual Defendants are also dismissed.

[4] The *Parker* state-action immunity doctrine should not be confused **[*11]** with the state-action doctrine under the *Fourteenth Amendment*. They are two completely different doctrines.

of state sovereign authority" and are thus automatically exempt from the Sherman Act. *Bd. of Dental Examiners, 135 S.Ct. at 1110* (quoting *Hoover v. Ronwin, 466 U.S. 558, 567-68, 104 S. Ct. 1989, 80 L. Ed. 2d 590 (1984))*.

While *Parker* antitrust immunity has been extended to state subdivisions (e.g., agencies and public corporations) and private parties that act pursuant to the sovereign power of the State, it is clear that these nonsovereign entities "do not receive all the federal deference of the States that create them." *City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 412-13, 98 S. Ct. 1123, 55 L. Ed. 2d 364 (1978)*. "[A] nonsovereign actor is one whose conduct does not automatically qualify as that of the sovereign State itself." *See Bd. of Dental Examiners, 135 S.Ct. at 1110-11*. In other words, it is an actor other than the state legislature, or the state supreme court, acting legislatively. The CFSE is neither one of these. It is a public corporation. Therefore, for purposes of *Parker* immunity there is no doubt that the CFSE is a nonsovereign actor.

For *Parker* immunity to be extended to a nonsovereign actor, the actor must show that its anticompetitive conduct "result[s] from procedures that suffice to make it the State's own." *Bd. of Dental Examiners, 135 S. Ct. at 1111*. To do this, a nonsovereign actor must meet two possible additional requirements set forth in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105, 100 S. Ct. 937, 63 L. Ed. 2d 233 (1980)*. First, all nonsovereign actors must show that the challenged restraint is one clearly articulated and affirmatively expressed as state **[*12]** policy. *See F.T.C. v. Phoebe Putney Health Sys., Inc., 133 S. Ct. 1003, 1010-11, 185 L. Ed. 2d 43 (2013)*. Second, some actors also must comply with the additional requirement that their actions be actively supervised by the State. *Id.* Since the CFSE is a nonsovereign actor, the Court evaluates whether its conduct meets this two part test.

B. The Clear Articulation Requirement

The Court holds that Defendants have satisfied the clear articulation requirement. Any nonsovereign actor seeking *Parker* immunity must show that its actions are undertaken "pursuant to a 'clearly articulated and affirmatively expressed' state policy to displace competition." *Phoebe Putney Health Sys., Inc., 133 S. Ct. at 1011 (2013)* (quoting *Community Communications Co. v. Boulder, 455 U.S. 40, 52, 102 S. Ct. 835, 70 L. Ed. 2d 810 (1982))*. In doing so, the actor need not "point to a specific, detailed legislative authorization," but rather, show that the "legislature contemplated the kind of action complained of." *Louisiana Power & Light, 435 U.S. at 415*; *see also Corey v. Look, 641 F.2d 32, 37 (1st Cir. 1981)*. This burden, also known as the "clear articulation" requirement, is met so long as the challenged action is a "foreseeable result" of the State's authorization. *Phoebe Putney Health Sys., Inc., 133 S. Ct. at 1011*. If the displacement of competition is the "inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature" then "the State must have foreseen and implicitly endorsed" the anticompetitive effects of its delegation. *Id. at 1012-13*.

It is unclear from **[*13]** Plaintiffs' Amended Complaint what actions Plaintiffs base their antitrust claims on. However, the Court is able to discern the following potential anticompetitive conduct that Plaintiffs allege Defendants engaged in: 1) refusing to enter into or to renew service agreements with chiropractors; 2) issuing new guidelines regarding chiropractic services which reduce the number of approved chiropractic visits for CFSE patients; 3) establishing extra requirements for CFSE approval of chiropractic services that are not required for other medical services; 4) denying or decreasing the number of referrals to chiropractors versus other medical professionals; 5) and communicating information to doctors about the negative effects of chiropractic services. Docket No. 28.

All of these alleged anticompetitive actions comply with the clear articulation requirement. Defendants' first two alleged anticompetitive acts — refusing or renewing service agreements (contracts) and issuing new guidelines concerning the chiropractic care approved by the CFSE—are specifically authorized by the Worker's Compensation Act. *See P.R. Laws Ann. tit. 11 § 1b-4* (authorizing the CFSE's administrator to award contracts to health professionals as may **[*14]** be necessary for the treatment of injured workers); *P.R. Laws Ann. tit. 11 § 1c* (authorizing the CFSE to design guidelines for the adequate treatment of the most common medical conditions suffered by employees, including a general description of the treatment, the frequency of medical appointments, and the maximum treatment period for a condition). Therefore, it is clear that the legislature contemplated the CFSE taking these actions. *See Louisiana Power & Light, 435 U.S. at 415*.

Defendants' other three alleged anticompetitive acts — establishing extra requirements for approving chiropractic services; denying or decreasing referrals to chiropractors; and communicating information about the adverse effects of chiropractic services—are all "inherent, logical, or ordinary" results of the legislature's delegation to the CFSE to establish treatment programs and procedures to be followed for worker's compensation patients. The Puerto Rico legislature created the CFSE to be the only worker's compensation insurance provider in Puerto Rico and to enforce the provisions of the Worker's Compensation Act. *See P.R. Laws Ann. tit. 11 §§ 1*, *1a*, *1b*, *1b-1*, *19*, *21*. In carrying out its responsibilities, the CFSE has the express authority to establish a program to "achieve the physical as well as vocational **[*15]** rehabilitation" of injured workers, *P.R. Laws Ann. tit. 11 § 1b-1*, and to design guidelines for the adequate treatment of common medical conditions, *P.R. Laws Ann. tit. 11 § 1c*. The inherent result of this delegation of authority is that the CFSE would evaluate the efficacy of competing medical professionals and services to establish the best rehabilitation program and treatment procedures. Inevitably, the CFSE would have to determine that certain services were better than others and for the services that the CFSE deemed inferior — in this case chiropractic services[5] — it is reasonable and logical for the CFSE to take the adverse actions that it has taken against chiropractors to best provide for the rehabilitation of injured employees. *See P.R. Laws Ann. tit. 11 § 1b-1*. Therefore, each of these challenged actions was a foreseeable result of the legislature's delegation of authority.

Plaintiffs argue that the CFSE does not meet the clear articulation requirement because Defendants have failed to show "that the Commonwealth itself supports the monopolization of spinal treatment to medical professionals other than chiropractors." Docket No. 84 at 5. However, Plaintiffs impose an overly difficult burden for Defendants to satisfy. Defendants must only show that the alleged anticompetitive acts the CFSE engaged in were the "inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature." *Phoebe Putney Health Sys., Inc., 133 S. Ct. at 1012-13*. Therefore, Defendants do not have to show that the Puerto Rico legislature specifically supports the removal of chiropractors from the worker's compensation market. It is sufficient that Defendants show that the legislature authorized the CFSE to determine which medical professionals will treat worker's compensation patients — which they have — because the logical result of this delegation is that the CFSE would exclude certain medical professionals over others. Thus, all of the CFSE's alleged anticompetitive actions are taken pursuant to clearly articulated state policy to displace **[*17]** competition, and the clear articulation requirement is met.

C. The Active Supervision Requirement

The Court holds that Defendants are exempt from complying with the active supervision requirement. The next step in the *Parker* immunity test requires some nonsovereign actors to prove that their anticompetitive conduct is "actively supervised by the State." *Phoebe Putney Health Sys., Inc., 133 S. Ct. at 1010-11*. This "active supervision" requirement serves the evidentiary function of "ensuring that the actor is engaging in the challenged conduct pursuant to state policy." *Town of Hallie v. City of Eau Claire, 471 U.S. 34, 46, 105 S. Ct. 1713, 85 L. Ed. 2d 24 (1985)*. However, "there are instances in which a [nonsovereign] actor can be excused from [the] active supervision requirement." *Bd.. of Dental Examiners, 135 S. Ct. at 1112*. Private parties seeking *Parker* immunity must always satisfy this requirement. *See Hallie, 471 U.S. at 46-47*. On the other hand, when the nonsovereign actor is a public subdivision of the State, a court must look at the risk that active market participants will use anticompetitive conduct to pursue private interests to determine if the requirement applies. *See Hallie, 471 U.S. at 46-47*; *Bd. of Dental Examiners, 135 S. Ct. at 1114*. In this case, the CFSE is a public corporation with a public mission and its board members are appointed by the Governor of Puerto Rico. *P.R. Laws Ann. tit. 11 §§ 1b*, *1b-2*. Therefore, the Court

[5] Plaintiffs refute the CFSE's judgment concerning the medical efficacy of chiropractic treatment. Docket No. 28. However, whether the CFSE's judgments are correct or medically sound is irrelevant. It is not for this Court to determine whether chiropractic services are an effective treatment for Puerto Rican injured workers' back injuries. The critical inquiry is whether the Puerto Rico legislature **[*16]** has authorized the CFSE to make those judgments — which it has.

will evaluate the CFSE as a public nonsovereign actor, **[*18]** not a private party, and thus the CFSE is not automatically required to comply with the active supervision requirement as private parties are.

Instead, to evaluate whether the CFSE is exempt from the active supervision requirement, this Court must evaluate whether the CFSE poses a risk that active market participants will pursue anticompetitive conduct in their own private interests. *See* *Hallie, 471 U.S. at 46-47*; *Bd. of Dental Examiners, 135 S. Ct. at 1114*. In *Hallie*, the Court held that municipalities did not have to satisfy the active supervision requirement because there was little or no risk that a municipality was engaged in private anticompetitive conduct. *471 U.S. at 46-47*. Until recently, courts had uniformly interpreted *Hallie* to mean that any state agency or subdivision did not have to satisfy the active supervision requirement. *See* Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law***: An Analysis of Antitrust Principles and Their Application 466 (2nd ed. 2000). However, the Supreme Court recently clarified that the applicability of the requirement does not turn on the formal designation given to the actor, but instead must turn on "the risk that active market participants will pursue private interests in restraining trade." *Bd. of Dental Examiners, 135 S. Ct. at 1114*.

In *Board of Dental Examiners* **[*19]** , the Supreme Court held "that a state board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates must satisfy [the] active supervision requirement" to invoke *Parker* immunity. *Id. at 1114*. The case concerned efforts by the North Carolina State Board of Dental Examiners (the "Board") to exclude nondentists from offering teeth whitening services. *Id. at 1108*. The Federal Trade Commission (FTC) sued the Board alleging violations of Federal ***antitrust law***. *Id. at 1108-09*. The Board moved to dismiss, alleging *Parker* state-action immunity. *Id. at 1109*.

The Board argued that since the State had designated the Board a state agency, *N.C. Gen. Stat. Ann. § 90-22*, that it was exempt from the active supervision requirement. *Bd. of Dental Examiners, 135 S. Ct. at 1113*. However, the Court rejected this formalistic approach and explained that "the need for supervision turns not on the formal designation given by states to regulators but on the risk that active market participants will pursue private interests in restraining trade." *Bd. of Dental Examiners, 135 S. Ct. at 1114*. The Court held that the active supervision test "is an essential prerequisite of *Parker* immunity for any nonsovereign entity—public or private — *controlled by active market participants*." *Id. at 1113* (emphasis added). The Court reasoned that state agencies controlled by active market participants who possess strong private interests "pose the very risk of self-dealing [the] supervision requirement was created to address." *Id. at 1114*. The Court distinguished *Hallie* because the entity there "was an electorally accountable municipality with general regulatory powers and no **[*20]** private price-fixing agenda." *Id. at 1114*.

This case is not controlled by the holding in *Board of Dental Examiners* and instead is more analogous to the situation in *Hallie*. There are two reasons why this case is different than *Board of Dental Examiners*. First, the CFSE is not controlled by active market participants as the Board was in *Board of Dental Examiners*. Second, even if *Board of Dental Examiners* is interpreted more broadly, the CFSE does not pose the risk that active market participants will pursue private interests that the Court was concerned with in *Board of Dental Examiners*. Instead, as in *Hallie*, the small risk that the CFSE will pursue its own specific interests rather than "more overriding state goals" is sufficiently mitigated by the clear articulation requirement.

Unlike the Board in *Bd. of Dental Examiners*, the CFSE is not controlled by active market participants. In *Bd. of Dental Examiners*, six of the Board's eight members had to be licensed practicing dentists who were elected by other licensed dentists in North Carolina and there was no mechanism for a public official to remove any of the Board's elected members. *135 S. Ct. at 1108*. These dentists clearly competed with nondentists in the market **[*21]** for teeth whitening services and had strong private interests to exclude nondentists from competition. Therefore, the need for state supervision was manifest. In contrast, the Governor of Puerto Rico appoints all seven members of the CFSE's governing Board of Directors ("BOD"). *P.R. Laws Ann. tit. 11 § 1b-2*. Of the seven members, one "shall be the Insurance Commissioner, who is a person of great technical competence in the insurance area; one shall be identified with the employers, another one . . . shall be identified with the employees . . . and two (2) members shall be officials of the Departments of Labor and Human Resources, and Health . . . . The two (2) remaining members . . . shall be freely selected." *Id.* Therefore, none of the CFSE's BOD's members are required to be active market participants that compete with chiropractors in the worker's compensation market.[6] At most, there could be two members—the freely selected members—out of the seven that might be active market participants, and even this seems unlikely given the Worker's Compensation Act's focus on having BOD members with expertise in insurance and labor matters, rather than medical expertise. *See id.* Thus the CFSE is not controlled by active **[*22]** market participants.[7]

Furthermore, the CFSE does not pose the risk that active market participants will use CFSE policy to pursue private interests that the Court was concerned with in *Board of Dental Examiners* for three reasons.

First, Plaintiffs have failed to plead that any CFSE officials **[*23]** are actually active market participants that compete with chiropractors in the worker's compensation market. Plaintiffs point out that four of the seven members of the CFSE's Industrial Medical Council ("IMC") must be medical doctors. Docket No. 84 at 6. They then make the conclusory statement that "in this case . . . a majority of the [IMC's members][8] are active market participants in the occupation." *Id.* However, the Worker's Compensation Act does not specify, nor do Plaintiffs indicate, the type of medical doctors that are IMC members. Thus these doctors could be gynecologists, neurologists, gastroenterologists, or many others that do not compete with chiropractors in the worker's compensation market. In addition, IMC members are prohibited from having any financial or professional relationship with the CFSE. *P.R. Laws Ann. tit. 11 § 1c*. Thus, even if IMC members are the types of medical doctors that could compete with chiropractors generally, they would not be competing for the specific patients that receive CFSE benefits because IMC members cannot receive patients from the CFSE. Thus, Plaintiffs have failed to plead that the doctors on the IMC are active market participants.

Second, even if we assume that the doctors on the IMC are active market participants, the IMC does not have sufficient authority to dictate CFSE policy. The IMC is responsible for, *inter alia*, designing guidelines for the adequate treatment of most medical conditions for employees who receive CFSE benefits. *P.R. Laws Ann. tit. 11 § 1c*. However, the BOD must ratify the guidelines for them to take effect. *Id.* Thus, even though the CFSE could take anticompetitive actions against chiropractors through these guidelines, only the BOD—which is not controlled by active market participants and does not present a risk of pursuing private interests, *see supra* at 15-16—has the authority to take these actions. This oversight by the BOD sufficiently cures any risk that the doctors on the IMC might use CFSE policy to further their own private interests.

Third, unlike in *Board of Dental Examiners* where Board members were elected by other dentists and were not removable by a public official, the CFSE's BOD's members are all elected by the Governor and the Governor has **[*25]** the power to remove them. *P.R. Laws Ann. tit. 11 § 1b-2*. This reduces the risk that BOD members would pursue private interests because the Governor should appoint individuals he believes will carry out state interests, and he can remove a member for failing to do so. Accordingly, there are sufficient measures in place to achieve the objective of the active supervision requirement of sufficiently ensuring that CFSE policy is indeed the policy of the State and that the CFSE is not furthering private interests. *See Hallie, 471 U.S. at 46-47*. Therefore, there is no need to impose the active supervision requirement on the CFSE.

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[6] Plaintiffs' complaint also fails to allege that any of the BOD's members are active market participants that compete with chiropractors.

[7] Plaintiffs argue that the CFSE is controlled by active market participants because four out of the seven members of the CFSE's Industrial Medical Council ("IMC") are medical doctors. Docket No. 84 at 6. However, Plaintiffs' argument is based on Plaintiffs' incorrect statement that the IMC is part of the governing BOD of the CFSE. *Id.* Had Plaintiffs read the Worker's Compensation Act, they would have realized that the IMC is a separate body from the BOD. ***P.R. Laws Ann. tit. 11 §§ 1b-2***, ***1c***. The BOD is the only governing body with decision making authority in the CFSE. ***P.R. Laws Ann. tit. 11 § 1b-2***. Any action taken by the IMC must first be submitted to the BOD for ratification. ***P.R. Laws Ann. tit. 11 § 1c***. Therefore, the fact that four IMC members are medical doctors does not warrant the conclusion that the CFSE is controlled by active market participants.

[8] Plaintiffs referred to the IMC **[*24]** members as decision makers. However, the Court has already pointed out that Plaintiffs were incorrect in deeming IMC members the decision makers of the CFSE. *See supra* note 7.

Notwithstanding *Bd. of Dental Examiners*, the current case is analogous to *Hallie*, where the Court held that the active supervision requirement was not needed for municipalities. *471 U.S. at 46*. In *Hallie*, the Court concluded that there was little or no danger that a municipality would engage in private anticompetitive conduct. *Id. at 47*. Instead the Court reasoned that "the only real danger is that [the municipality] will seek to further purely parochial public interests at the expense of more overriding state goals." *Id.* However, the Court concluded that the clear articulation requirement was sufficient to mitigate this danger. *Id.* ("Once **[*26]** it is clear that state authorization exists, there is no need to require the State to supervise actively the municipality's execution of what is a properly delegated function."). As the Court has already discussed, like the municipality in *Hallie*, there is little to no danger that the CFSE will engage in anticompetitive conduct to further private interests. *See supra* at 16-18. Instead the only danger would be that the CFSE would act to further the specific interests of the CFSE, rather than "more overriding state goals." *See id.* However, like in *Hallie*, this danger is sufficiently mitigated by the clear articulation requirement and therefore active supervision is not needed.

Thus for the reasons stated above, this Court holds that the CFSE is not required to show that it is actively supervised by the State to claim *Parker* immunity. Since the Court also holds that the CFSE has met the clear articulation requirement, *see supra* at 9-12, the CFSE's actions are hereby immune from Sherman Act liability under *Parker*. Thus all of Plaintiffs' Sherman Act claims are dismissed pursuant to the state-action doctrine. Accordingly, there is no need for the Court to consider whether Plaintiffs sufficiently pled their Sherman **[*27]** Act claims.

CONCLUSION

In view of the foregoing, Defendants' Motion to Dismiss is GRANTED. Plaintiffs' Sherman Act claims are hereby dismissed *with prejudice*. The only remaining claims in this case are Plaintiffs' *First Amendment* retaliation claims against Defendant the CFSE and Defendant Estrada; and Plaintiffs' Puerto Rico law claims against all Defendants.

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 29th day of December, 2015.

/s/ Jay A. Garcia-Gregory

JAY A. GARCIA-GREGORY

United States District Judge

Sprint Communs. Co. v. Bernsten

United States District Court for the Southern District of Iowa, Central Division

December 30, 2015, Filed

No. 11-cv-183-JAJ

Reporter

152 F. Supp. 3d 1144 *; 2015 U.S. Dist. LEXIS 174398 **

SPRINT COMMUNICATIONS COMPANY, Plaintiff, vs. ROBERT B. BERNSTEN, KRISTA TANNER, and DARRELL HANSON, in their official capacities as members of the Iowa Utilities Board, Defendants. vs. WINDSTREAM IOWA COMMUNICATIONS, INC., OFFICE OF CONSUMER ADVOCATE, Intervenors.

Subsequent History: Affirmed by Sprint Communs. Co., L.P. v. Lozier, 2017 U.S. App. LEXIS 11170 (8th Cir. Iowa, June 23, 2017)

Prior History: Sprint Communs. Co., L.P. v. Jacobs, 798 F.3d 705, 2015 U.S. App. LEXIS 14261 (8th Cir. Iowa, Aug. 14, 2015)

Core Terms

Telecommunications, carriers, intrastate, regulation, telephone, traffic, federal law, interstate, tariffs, information service, communications, providers, state regulation, state law, preempt, interexchange, preemption, telephone line, Internet, formatting, exemption, monopoly, parties, limits, summary judgment, long-distance, customer, enhanced, lines, rates

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Judges: JOHN A. JARVEY, Chief United States District Judge.

Opinion by: JOHN A. JARVEY

Opinion

[*1145] ORDER

Mediacom has historically offered its customers the ability to make telephone calls over the Internet. That technology **[**2]** is called "Voice over Internet Protocol," or VoIP. One difficulty with VoIP is that traffic sent over the internet is formatted differently than traffic sent over ordinary telephone lines.[1] Without something to convert Internet formatting to telephone formatting, Mediacom's customers could not call telephone users. Sprint Communications provided that conversion service. When a Mediacom customer placed a VoIP call, Mediacom passed that traffic to Sprint. Sprint changed its format, and then delivered it to telephone lines owned by Windstream Iowa Communications. Sprint paid Windstream to use the lines. It paid at rates set by a tariff that Windstream had filed with the Iowa Utilities Board, in accordance with Iowa law.

In 2009, Sprint stopped paying Windstream for that use, and started withholding **[*1146]** payments for other services. It argued that it had been overpaying Windstream: it should have been paying rates determined by federal law, because state law had been preempted. The Iowa Utilities Board heard the dispute, and found in Windstream's favor. It ordered Sprint to pay what **[**3]** it owed Windstream under state law. Sprint sued the Board's members in this Court, arguing that the Board's order was contrary to federal law and seeking declaratory and injunctive relief. Windstream and the Office of Consumer Advocate intervened as defendants, and all parties have agreed on the material facts and moved for summary judgment.

I. Legal and Historical Background

A. The Communications Act Era

Commercial telephone service in the United States. began as a monopoly: Alexander Graham Bell's telephone company held all the key patents. Peter W. Huber, et. al., *Federal Telecommunications Law*, § 1.3 (2d ed. Supp. 2011); *AT&T Corp. v. Iowa Utilities Bd., 525 U.S. 366, 402, 119 S. Ct. 721, 142 L. Ed. 2d 834 (1999)* (Thomas, J., concurring in part and dissenting in part). Even after the patents expired, the Bell company maintained its dominance by refusing to carry telephone traffic from independent telephone companies. Huber, *Federal Telecommunications*, at § 1.3; *AT&T Corp., 525 U.S. at 403* (Thomas, J., concurring in part and dissenting in part). The *Communications Act of 1934* enshrined the monopolistic approach, requiring telephone carriers to get permission from the new Federal Communications Commission before operating a new telephone line or acquiring an old one. *47 U.S.C. § 214(a)*; *see also* *F.C.C. v. RCA Communications, 346 U.S. 86, 92-93, 73 S. Ct. 998, 97 L. Ed. 1470 (1953)* (describing the extent of and reasons **[**4]** for the Act's limitations on competition). This system left Bell in control of the telephony market.[2] Huber, *Federal Telecommunications*, at § 1.3.4.

The Act gave the F.C.C. other regulatory powers, but limited its jurisdiction to "interstate and foreign communication." *47 U.S.C. § 152(a)*. The F.C.C. had no authority over "services... for or in connection with intrastate communication." *47 U.S.C. § 152(b)*; *see also* *Louisiana Public Service Com'n v. F.C.C., 476 U.S. 355, 360, 106 S. Ct. 1890, 90 L. Ed. 2d 369 (1986)* ("[T]he Act would seem to divide the world of domestic telephone service neatly into two hemispheres—one comprised of interstate service, over which the *F.C.C.* would have plenary authority, and the other made up of intrastate service, over which the States would retain exclusive jurisdiction.")

A communication was classified as either interstate or intrastate based on an "end-to-end" analysis. *In the Matter of Vonage Holdings Corporation, 19 F.C.C. Rcd. 22404, 22413 (2004)*. If a call both began and ended within a state, it was intrastate; if it ended in a different state or in a foreign country, it was interstate. *Id.* If a service enabled both

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[1] Internet traffic is in Internet Protocol format, while telephone traffic is in Time Division Multiplexing format.

[2] Although the monopoly system was referred to as the "Bell System," the company's name was American Telephone and Telegraph Company, and its corporate descendant is today known as "AT&T."

intra-and interstate calls, it was "jurisdictionally mixed." *Id.* Usually both **[**5]** the *F.C.C.* and the states regulated "mixed" services, the states regulating their intrastate components and the *F.C.C.* their interstate components. *Id.* But if the intrastate and interstate components could not be disentangled, the *F.C.C.* could preempt state regulation and regulate unilaterally. *Louisiana Public, 476 U.S. at 375 n.4*; *Public Service Com'n of Maryland v. F.C.C., 909 F.2d 1510, 1515, 285 U.S. App. D.C. 329 (D.C. Cir. 1990)*. That rule **[*1147]** was called the "impossibility exception." *People of State of Cal. v. F.C.C., 905 F.2d 1217, 1243 (9th Cir. 1990)*.

The impossibility exception is relevant to this case because it applied to some VoIP services. VoIP services come in two varieties: nomadic and fixed. *Minnesota Public Utilities Com'n v. F.C.C., 483 F.3d 570, 575 (8th Cir. 2007)*. Nomadic VoIP services can be used anywhere "in the universe" the user can get an Internet connection. *Id.* Fixed VoIP services require equipment installed at a specific location, like a cable connection, to work. *Id.* The *F.C.C.* decided to exercise exclusive jurisdiction over one nomadic VoIP service, because the end points of those calls could not be determined. *Vonage Holdings Corporation, 19 F.C.C. Rcd. 22404, 22424 (2004)*. The parties debate that decision's breadth.

B. Moving Beyond Bell

The Bell monopoly system was in tension with federal ***antitrust law***, and over the years Bell defended an increasing number of antitrust suits brought by both private plaintiffs and the federal government. *See, for example, Pastor v. American Tel. & T. Co., 76 F.Supp. 781 (S.D. N.Y. 1940)*; *Carter v. American Tel. & Tel. Co., 365 F.2d 486 (5th Cir. 1966)*; *Litton Systems, Inc. v. American Tel. and Tel. Co., 700 F.2d 785 (2nd Cir. 1983)*. Finally, in the mid-1980s, Bell settled **[**6]** one such suit through a massive divestiture. William J. Quirk and Fred A. Walters, *A Constitutional and Statutory History of the Telephone Business in South Carolina*, *51 S.C. L. Rev. 290, 336 (2000)*. The consent decree divided the country into "local access and transport areas," or "exchanges," and split Bell up into a number of local operating companies and one long distance carrier. Huber, *Federal Telecommunication*, at § 4.5.8.2. The local operating companies provided only local telephone service—service within the exchanges. Joseph D. Kearney, *From the Fall of the Bell System to the Telecommunications Act: Regulation of Telecommunications under Judge Greene*, *50 Hastings L.J. 1395, 1414 (1999)*. They were not allowed to provide inter-exchange (also called long-distance) service. *Id. at 1413 n.53*. Longdistance service providers (also called interexchange carriers) would provide services by paying the local companies for "equal access" to their telephone lines. *Id. at 1413*; *Great Lakes Communication Corp. v. Iowa Utilites Bd., No. C09-4085-DEO, 2009 U.S. Dist. LEXIS 104849, 2009 WL 3806176, at *1 (N.D. Iowa Nov. 10, 2009)* (equating "long-distance companies" with "interexchange carriers"). The payment amounts were set by either tariffs filed with the *F.C.C.*, for interstate traffic, or by the relevant state's law. *See* *47 U.S.C. § 203(a)*; Brief for the Federal Communications Commission as Amicus Curiae at 4, *Central Telephone Company of Virginia, Inc. v. Sprint Communications Co., 715 F.3d 501 (4th Cir. 2013), 2013 WL 146262, at *4* ("The access charges associated with interstate **[**7]** calls traditionally are specified in tariffs filed with the *F.C.C.*; access charges associated with intrastate calls traditionally are specified in tariffs filed with the state regulatory commissions."). This system assumed that the market for local telephone services was naturally monopolistic, but that the long-distance service market could be competitive. Huber, *Federal Telecommunications*, at § 4.5.7. The local monopolies were therefore permitted, but their influence over long-distance services limited. *Id.*; Kearney, *From the Fall of the Bell System, at 1417*.

The *F.C.C.* recognized one significant exception to the access charges system. Telecommunications law had already distinguished between services which transmit information and services which somehow modify that information. Huber, *Federal Telecommunications*, at § 12.1; **[*1148]** *In the Matter of Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities (Computer I), 28 F.C.C.2d 267, 267-68 n.3 (1971)* (distinguishing between communications services and "data processing services," defined to include "storing, retrieving, sorting, merging and calculating data"); *compare* *47 U.S.C. § 153(53)* (defining telecommunications service) *with* *47 U.S.C. § 153(24)* (defining information service). The former are called "basic services" or "telecommunications services," while the latter are referred to as "enhanced services" or "information services."[3] Huber, *Federal* ***[**8]*** *Telecommunications*, at §§ 12.2.1 & 12.2.2. Many information service providers, like interexchange carriers, need to purchase access to local telephone lines. In the 1980s, the *F.C.C.* exempted them from the tariffs that applied to interexchange carriers. *Connect America Fund, 26 F.C.C. Rcd. 17663, 18016 n. 1959 (2011)*. They could instead pay the same rate that the local telephone company charged other business subscribers. *Id. at 18016*. That arrangement was called the "ESP exemption." *Id. at 18016 n. 1959*.

C. The Telecommunications Act

Congress ended the local monopoly system in 1996, by passing the Telecommunications Act. *AT&T Corp., 525 U.S. at 371* ("Technological advances... have made competition among multiple providers of local service seem possible, and Congress recently ended the longstanding regime of state-sanctioned monopolies."). The local companies had monopoly power in part because **[**9]** they controlled the industry's physical infrastructure. Huber, *Federal Telecommunications*, at § 5.5. The Act therefore requires local telephone companies, now called "local exchange carriers," to allow competitors to use their infrastructure. *47 U.S.C. §§ 153(32)* & *251(b)*.

It also changes the way local exchange carriers are paid for access to their telephone lines. Instead of the old tariff system, *§ 251(b)(5)* requires local carriers to negotiate rates. *47 U.S.C. § 251(b)(5)*. But that change did not go into effect universally. *Section 251(g)* preserved part of the pre-Act regulatory framework until the *F.C.C.* "explicitly superseded" it. *47 U.S.C. § 251(g)*. Specifically, it required local exchange carriers to continue providing access to "interexchange carriers and information service providers" on the same terms as they had before the Act. *Id.* The *F.C.C.* did not "explicitly supersede[]" those arrangements until 2011. *See Connect America Fund, 26 F.C.C. Rcd. at 17923*.

The Act altered the division of power between the federal government and the states. The Telecommunications Act did not repeal the Communications Act; the statute still explicitly limits the F.C.C.'s jurisdiction to interstate communication. *47 U.S.C. § 152(b)*. But it also gives the *F.C.C.* authority "to carry out the provisions of this chapter," which now includes regulations **[**10]** on local carriers. *47 U.S.C. § 201(b)*; *AT&T Corp., 525 U.S. at 377-78*. The *F.C.C.* immediately interpreted the Act to give it authority over intrastate communications, and the Supreme Court agreed. *AT&T Corp.,* ***[*1149]*** *525 U.S. at 378*. "With regard to the matters addressed by the 1996 Act," Congress "unquestionably" took "the regulation of local telecommunications away from the states." *Id. at 378 n.6*.

At the same time, the Act preserved broad state authority. States can regulate "to further competition" as long as their regulations are consistent with the Act and with the F.C.C.'s regulations. *47 U.S.C. § 261*. The *F.C.C.* cannot abrogate state regulations that are consistent with the Act and with the F.C.C.'s implementation. *47 U.S.C. § 251(d)(3)*. And the Act delegates important responsibilities to the states: state commissions must approve access agreements, and can act as arbitrators and mediators when carriers' negotiations fail. *47 U.S.C. § 252*. The result is an "unusual regime of cooperative federalism." *Southern New England Telephone Co. v. Comcast Phone of Connecticut, Inc., 718 F.3d 53, 58 (2nd Cir. 2013)*; *AT&T Corp., 525 U.S. at 385 n.10* (describing the Telecommunications Act as a "decidedly novel" scheme involving both federal and state authority).

II. FACTUAL BACKGROUND

Windstream is a local exchange carrier serving an exchange in Iowa. At some point after the 1996 Telecommunications Act was passed, Sprint began purchasing access to Windstream's telephone **[**11]** lines. The

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[3] This opinion will treat "basic services" as a synonym for "telecommunications services" and "enhanced services" as equivalent to "information services," even though the terms have slightly different meanings. *See* Huber, *Federal Telecommunications*, at §§ 12.2.1 & 12.2.2; *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934*, F.C.C. Rcd. 21905, 21955-21956 (1996); *National Cable & Telecommunications Ass'n v. Brand X Internet Services, 545 U.S. 967, 992, 125 S. Ct. 2688, 162 L. Ed. 2d 820 (2005)*. The differences are not relevant to this case.

relevant part of the traffic Sprint sent to Windstream's lines was generated by VoIP calls placed in a different exchange within Iowa. Those calls traveled to their destination in three stages. First, an MCC Telephony of Iowa (here called "Mediacom," because it was a Mediacom affiliate) customer would place a call using Mediacom's VoIP service. That service was a fixed VoIP service. At this stage, the call would be formatted as internet traffic. In the second stage, Mediacom would pass the call to Sprint's telecommunications network. Sprint would convert the call to the formatting used by telephone lines, then send the call onto Windstream's lines. In the third stage, Windstream would deliver the call to its intended recipient.

From the beginning of this arrangement until 2009, Sprint paid Windstream at rates set in a tariff Windstream had filed with the Iowa Utilities Board, a tariff enforced by state law. But in June 2009, Sprint stopped paying, arguing that its VoIP traffic was not subject to access charges. Windstream was not the only company to have problems with Sprint during that period. A nationwide rash of litigation broke out in 2008 and 2009, with Sprint refusing **[**12]** to pay bills on a variety of rationales. *See* *Central Telephone Co. of Virginia v. Sprint Communications Co. of Virginia, Inc., 759 F.Supp.2d 789, 792, 797 (E.D. Vir. 2011)* (attributing Sprint's actions to a cost-cutting effort and finding that its reasons "frankly... defy credulity").[4] Windstream threatened to stop providing service to Sprint, and the parties took their dispute to the Iowa Utilities Board.

[*1150] III. PROCEDURAL HISTORY

Sprint asked the Iowa Utilities Board to protect its access to Windstream's lines, but argued that it did not have jurisdiction to resolve the underlying dispute: in Sprint's view, only the F.C.C. could decide what rates Sprint had to pay. The Board disagreed, and ordered Sprint to pay Windstream the amounts set by state law. Sprint sought review in Iowa district court and simultaneously **[**13]** filed suit with this Court, asking the Court to declare that the Board's decision violated federal law and to enjoin the Board's order. Windstream and Iowa's Office of Consumer Advocate intervened as defendants in this Court.

Since then, the Court has twice considered and granted motions to dismiss. It first deferred to the pending state-court proceeding, invoking *Younger v. Harris. 401 U.S. 37, 57, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971)*. The Supreme Court ultimately reversed that decision. *Sprint Communs., Inc. v. Jacobs, 134 S. Ct. 584, 588, 187 L. Ed. 2d 505 (2013)*. While those appeals proceeded, the Iowa District Court for Polk County upheld the Board's decision. *Sprint Comm'ns. Co. v. Jacobs*, No. 05771 CVCV008638, at *15 (Iowa D. Ct. Polk County September 16, 2013). When the case returned to this Court, the Court dismissed on issue preclusion grounds. The Eighth Circuit reversed and remanded. *Sprint Communications Co., L.P. v. Jacobs, 798 F.3d 705, 709 (8th Cir. 2015)*. The case is now once again before the Court, this time on the parties' cross-motions for summary judgment. The parties agree that there are no genuine disputes of material fact; they ask the Court to resolve the legal issues presented.

IV. STANDARD OF REVIEW

[4] *See also* *Centurytel of Chatham LLC v. Sprint Communications Co., LP, No. 09-CV-1951, 2010 U.S. Dist. LEXIS 140454, 2010 WL 5648871 (W.D. La. Dec. 15, 2010)*; *Line Systems, Inc. v. Sprint Nextel Corp., No. CIV.A. 11-6527, 2012 U.S. Dist. LEXIS 102518, 2012 WL 3024015 (E.D. Pa. July 24, 2012)*; *Minnesota Independent Equal Access Corp. v. Sprint Communications Co., L.P., No. CIV. 10-2550 MJD/SER, 2011 U.S. Dist. LEXIS 91197, 2011 WL 3610434 (D. Minn. Aug. 15, 2011)*; *North County Communications Corp. v. Sprint Communications Corp., No. 09-CV-02685 BEN, 2010 U.S. Dist. LEXIS 99914, 2010 WL 3767595 (S.D. Cal. Sept. 21, 2010)*; *Iowa Network Services, Inc. v. Sprint Communications Company, L.P., No. CIV.A. 09-2393-CM, 2009 U.S. Dist. LEXIS 97243, 2009 WL 3414835 (D. Kan. Oct. 20, 2009)*; *Brandenburg Telephone Company v. Spring[sic] Communications Co., L.P., No. 3:09-CV-00109, 2009 U.S. Dist. LEXIS 92953, 2009 WL 3172071 (W.D. Ky. Sept. 29, 2009)*; *Sprint Communications Co., L.P. v. Native American Telecom, LLC, No. CIV. 10-4110-KES, 2010 U.S. Dist. LEXIS 127013, 2010 WL 4973319 (D.S.D. Dec. 1, 2010)*.

"Summary judgment is proper where there is a question of law but no issue of facts." *Aho v. Erie Min. Co., 466 F.2d 539, 541 (8th Cir. 1971)*. Because there is no genuine dispute of fact in this case, the Court must determine which movant **[**14]** is entitled to judgment as a matter of law. *Fed. R. Civ. Pro. 56(a)*.

The Iowa Utilities Board has made legal determinations relevant to this case. While federal courts acknowledge state commissions' institutional competence, they do not defer to state agency applications of federal law. *See MCI Telecommunication Corp. v. Bell Atlantic Pennsylvania, 271 F.3d 491, 516 (3rd Cir. 2001)*; *Orthopaedic Hosp. v. Belshe, 103 F.3d 1491, 1496 (9th Cir. 1997)* ("A state agency's interpretation of federal statutes is not entitled to the deference afforded a federal agency's interpretation of its own statutes."). This Court therefore applies federal law *de novo*. *Qwest Corp. v. Minnesota Public Utilities Com'n, 684 F.3d 721, 725 (8th Cir. 2012)*.

V. Analysis

Sprint argues that the state tariffs were invalid because the *Telecommunications Act of 1996* preempted state regulation of payments to local exchange carriers. There are three kinds of preemption: express preemption, field preemption, and conflict preemption. *Cipollone v. Liggett Group, 505 U.S. 504, 516, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992)*. Express preemption occurs when a statute's language explicitly preempts state law. *Id.* Field preemption exists when "federal law so thoroughly occupies a legislative field... that Congress left no room for the States to supplement it." *Id.* (internal quotation omitted). And conflict preemption occurs when state law "actually conflicts" with federal law. *Id.* Neither express nor field preemption is at issue here. The Telecommunications Act does not explicitly **[**15]** preempt state law, and it does explicitly approve non-conflicting state regulation. *See 47 U.S.C. § 261*. **[*1151]** This case therefore turns on whether Iowa's tariff system conflicts with the Telecommunications Act's regulations on local exchange carriers.

A. Limits on Federal Jurisdiction

The defendants argue that the Telecommunications Act does not apply to the calls at issue in this case. Those calls were intrastate, and the defendants claim that the Act preserves state authority over intrastate communications. They point to *§ 251(d)(3)*, which limits F.C.C. regulation of state commissions, to support their argument. The Supreme Court has already soundly rejected that conclusion. *AT&T Corp., 525 U.S. at 378 n.6* ("[T]he question in these cases is not whether the Federal Government has taken the regulation of local telecommunications competition away from the States. With regard to the matters addressed by the 1996 Act, it unquestionably has."). And *§ 251(d)(3)* does not support the defendants' position, for two reasons. First, the provision on its face limits the F.C.C.'s authority. *47 U.S.C. § 251(d)(3)* ("[T]he Commission shall not preclude the enforcement of any regulation... of a State commission that [meets three criteria]."). This case is not about the F.C.C.'s authority; no party is arguing **[**16]** that an *F.C.C.* regulation preempted state law. The question is whether the Act itself—its plain text—overrode state regulation. Second, the provision only protects state regulations that are "consistent with the requirements of this section." *47 U.S.C. § 251(d)(3)(B)*. If the state law at issue here contradicted another of *§ 251*'s provisions, then *(d)(3)* did not protect it.

B. Applicable Federal Law

Once it is clear that federal law does apply to the traffic at issue here, the next question is what provision controls. On its face, *§ 251(b)(5)* applies. That provision requires local exchange carriers to negotiate compensation arrangements "for the transport and termination of telecommunications." Windstream was a local exchange carrier, and it was terminating telecommunications on Sprint's behalf, apparently putting it in *(b)(5)*'s purview. But *251(g)* limits *251(b)(5)*: if *251(g)* applies, then Windstream had the same "restrictions and obligations... that appl[ied]" before the Telecommunications Act took effect. *47 U.S.C. § 251(g)*. *§ 251(g)* covers local exchange carrier services if two requirements are met. First, the service must be "exchange access, information access, [or] exchange services." *Id.* Second, the service must be provided to "interexchange carriers **[**17]** [or] information service providers." *Id.*

The parties here agree that Windstream provided Sprint with "exchange access." And all parties concede the facts necessary to classify Sprint as an "interexchange carrier:" they agree that Sprint received traffic from one telephone exchange and transported it to a different exchange. Sprint argues that it was an "information services provider," because the traffic it carried came from an information service. Addressing that question is unnecessary. Using either classification, *251(g)* applied to the traffic at issue here. The question then becomes how this type of traffic was regulated before the 1996 Act.

C. Pre-Telecommunications Act Regulation

Before the Telecommunications Act was passed, federal law only controlled interstate communications. *47 U.S.C. § 152*. That implies that federal law cannot have preempted state regulation of intrastate communications, like those at issue here. Sprint makes two arguments against that conclusion. First, it claims both that VoIP is an information service and that the federal ESP exemption applied to all information **[*1152]** services (then called enhanced services), even when their communications were intrastate. Second, it argues **[**18]** that the impossibility exemption covered this VoIP traffic, giving the *F.C.C.* exclusive jurisdiction over the traffic.

1. Intrastate enhanced services were not federally regulated.

Sprint has not cited and this Court has not found any authority specifying that the ESP exemption covered both interstate and intrastate communications. The *F.C.C.* has in fact described the exemption as covering "providers of interstate services." *Amendments of Part 69*, *3 F.C.C. Rcd. 2631, 2631 (1988)*. That is unsurprising, because before 1996, the *F.C.C.* had no authority to regulate intrastate enhanced services. *47 U.S.C. §152(b)*; *People of State of Cal., 905 F.2d at 1240* (holding that intrastate enhanced services were "squarely within the regulatory domain of the states"). Sprint's first argument is therefore unpersuasive.

2. VoIP services were not all federally regulated.

In *Vonage Holding Corp.*, the *F.C.C.* applied the impossibility exception to one VoIP service, and said it would preempt state regulation of services with similar "basic characteristics." *Vonage Holdings Corp., 19 F.C.C. Rcd. at 22424*. But that VoIP service was nomadic; its users could call anyone from anywhere with Internet. *Id. at 22419*. It was "designed to overcome geography." *Id.* This case's service was fixed; the users could call Iowa locations from other Iowa locations. The *F.C.C.* **[**19]** has explicitly said that *Vonage*'s reasoning does not apply to providers "with the ability to track the jurisdictional confines of customer calls." *Universal Service, 21 F.C.C. Rcd. 7518, 7546 (2006)*. Such providers are "subject to state regulation." *Id.* Sprint's second argument therefore also fails.

VI. Conclusion

The Court holds that federal law did not preempt the state tariffs Sprint was charged under, because the tariffs did not conflict with federal law. In reaching that conclusion, the Court does not decide whether VoIP is an information service, or whether Sprint was an information service provider. Under any answer to those questions, Sprint's arrangement with Windstream was governed by *47 U.S.C. § 251(g)*, which in turn preserved state authority to regulate the arrangement.

For these reasons, Sprint's Motion for Summary Judgment is **DENIED** and Windstream's and the Iowa Utilities Board's members' Motions for Summary Judgment are **GRANTED**. The Court denies Sprint's requests for declaratory and injunctive relief. The Clerk shall enter judgment accordingly.

/s/ John A. Jarvey

JOHN A. JARVEY, Chief Judge

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF IOWA

LexisNexis

TMT Mgmt. Grp., LLC v. U.S. Bank N.A.

United States District Court for the District of Minnesota

January 4, 2016, Decided; January 4, 2016, Filed

Civ. No. 14-4692 (MJD/JSM)

Reporter

2016 U.S. Dist. LEXIS 23790 *; 2016 WL 730254

TMT MANAGEMENT GROUP, LLC, Plaintiff, v. U.S. BANK NATIONAL ASSOCIATION, et. al., Defendants.

Subsequent History: Adopted by, Motion granted by, in part, Motion denied by, in part, Dismissed by, in part, Without prejudice, in part *TMT Mgmt. Group, LLC v. U.S. Bank N.A., 2016 U.S. Dist. LEXIS 23060 (D. Minn., Feb. 24, 2016)*

Prior History: *TMT Mgmt. Grp., LLC v. U.S. Bank N.A., 2015 U.S. Dist. LEXIS 87950 (D. Minn., June 10, 2015)*

Core Terms

Portfolios, enterprise, bid, amended complaint, vanBrandwijk, competitors, bribes, pled, association-in-fact, statute of limitations, horizontal, motion to dismiss, Sherman Act, antitrust claim, rule of reason, misrepresentations, email, Counts, allegations, pattern of racketeering activity, racketeering, purchasers, bribery, restraint of trade, recommends, antitrust, anti trust law, predicate act, sales, district court

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For U.S. Bank National Association, Jacob Vanbrandwijk, Defendants: Brooks F Poley, Justin H Jenkins, Reid Golden, LEAD ATTORNEYS, Winthrop & Weinstine, PA, Mpls, MN.

Leonard Potillo, Defendant, Pro se, Orlando, FL.

For Richard Hartnack, Defendant: Brooks F Poley, Winthrop & Weinstine, PA, Mpls, MN.

Judges: JANIE S. MAYERON, United States Magistrate Judge.

Opinion by: JANIE S. MAYERON

Opinion

REPORT AND RECOMMENDATION

The above matter came before the undersigned on Defendants' U.S. Bank National Association, Jacob vanBrandwijk and Richard Hartnack (collectively, "U.S. Bank") Motion to Dismiss Counts One Through 10. [Docket No. 51]. Philip L. Guarino, Esq. and Michael Weidner, Esq. appeared on Plaintiff's behalf. Brooks F. Poley, Esq., Reid Golden, Esq. and Paige Fitzgerald, Esq. appeared on behalf of defendants U.S. Bank, Jacob Vanbrandwijk and Richard Hartnack. There was no appearance by or on behalf of defendants United Credit Recovery, LLC, Leonard Potillo, or Wilbur Tate, III.[1]

This matter has been referred to the undersigned Magistrate Judge for a Report and Recommendation by the District Court pursuant to 28 U.S.C. §636(b)(1)(A), (B), and Local Rule 72.1(c). [Docket No. 58].

I. BACKGROUND

A. Amended Complaint

Plaintiff TMT alleged that TMT was a customer of defendant U.S. Bank and is in the business of purchasing debt from vendors, then reselling the debt to third parties. Amended Complaint, ¶ 1 [Docket No. 22]. Pursuant to Federal regulations, U.S. Bank was required to "charge off" its delinquent Demand Deposit Accounts ("DDAs"). Id., ¶ 12. U.S. Bank would realize a loss on the accounts, but the consumer account holder had a continuing obligation to repay the DDA. Id., ¶ 13. To reduce its losses, U.S. Bank sold the DDAs to third-party debt purchasers and assigned them the right to collect on the charged-off accounts. Id., ¶ 14. Each sale involved hundreds to thousands of individual accounts, ("DDA Portfolios"), with the balance of the DDAs often being in the millions of dollars. Id., ¶ 15. Bids to purchase the debt were in cents on the dollar of the book value **[*4]** of the DDAs. Id., ¶ 16. The value of a DDA Portfolio depended on the number of attempts made to collect the debt by a collection agency. Id., ¶ 17. For example, "one-agency" DDAs were more valuable than "two-agency" DDAs because less effort had been made to collect the debts. Id. From as early as 2008, U.S. Bank sold DDA Portfolios to defendant UCR. Id., ¶ 18. Even though the DDA Portfolios were to be sold through an open bidding process, UCR was the only third party with which U.S. Bank did business between January, 2008, and September, 2011. Id. U.S. Bank sold the DDA Portfolios to UCR for less than four cents on the dollar. Id.

In September, 2009, TMT's banker with U.S. Bank, Todd Loosbrock, asked a U.S. Bank employee to pass along TMT's contact information to defendant Wilbur Tate, III, U.S. Bank's Assistant Vice President in Consumer Lending, Collections and Recovery. Id., ¶¶ 3, 19. Tate and defendant Jacob vanBrandwijk, a Senior Vice President and Director of U.S. Bank's Consumer Lending, Collections and Recovery office in Cincinnati, Ohio, were responsible for the DDA Portfolio bidding process and sales. Id., ¶¶ 4, 20. From September, 2009 through July, 2010, TMT repeatedly attempted **[*5]** to contact Tate to bid on DDA Portfolios, but Tate refused to respond. Id., ¶¶ 21, 22. Tate refused to consider TMT's purchase proposal, even though TMT was a U.S. Bank client (UCR was not) and U.S. Bank had a policy that supposedly favored bank clients. Id., ¶ 23.

In or around August, 2010, Tate told Loosbrook that UCR was bidding less on DDA Portfolios than TMT was offering. Id., ¶ 24. Tate finally told TMT that it could bid on the September, 2010, DDA Portfolio and represented that U.S. Bank would accept bids from TMT in the form of a certain number of cents per dollar of book value of the DDA. Id., ¶ 25. Tate told TMT that U.S. Bank employed an open bid process in connection with the DDA Portfolios.

[1] United Credit Recovery, LLC ("UCR") **[*2]** was served with the Amended Complaint on April 7, 2015. [Docket No. 29]. Leonard Potillo was served on April 9, 2015. [Docket No. 31]. Wilbur Tate, III was served on April 6, 2015, and has never answered. [Docket No. 33]. UCR and Potillo received an extension of time to answer. [Docket Nos. 44, 48]. Potillo answered the Amended Complaint on June 8, 2015. [Docket No. 65]. UCR filed a pro se answer on June 8, 2015. [Docket No. 66]. On June 10, 2015, this Court issued a Report and Recommendation recommending that UCR's answer be stricken because a corporation cannot appear pro se in this district. [Docket No. 67]. The District Court adopted this Report and Recommendation and struck UCR's answer. [Docket No. 86]. On June 18, 2015, Potillo moved to stay the lawsuit because he was being held without bond at the Orange County, Florida correctional facility and lacked financial and legal resources to participate in the lawsuit. [Docket No. 69]. U.S. Bank and TMT opposed the motion. [Docket Nos. 74, 81]. This Court denied Potillo's motion on July 6, 2015. [Docket No. 82]. As a result, UCR and Tate have not answered the Amended Complaint, nor did they respond to the instant motion. U.S. Bank **[*3]** moved to stay discovery pending the outcome of the instant motion to dismiss. [Docket No. 75]. This Court granted the motion. [Docket No. 88].

Id., ¶ 26. This representation was restated on April 15, 2011, and in May, 2011, by vanBrandwijk, and on May 9, 2011, by defendant Richard Hartnack, now-retired Vice Chairman of Small Business Banking for U.S. Bank. Id., ¶¶ 5, 26.

TMT submitted a bid of $0.055 for the September, 2010 DDA Portfolio. Id., ¶ 27. The bid was initially awarded to TMT but then was disallowed because, according to Tate, U.S. Bank did not have on file a non-disclosure agreement from TMT. Id., ¶ 28. Tate represented **[*6]** that this non-disclosure agreement was required as part of the bidding process — a representation reiterated by Tate and vanBrandwijk through March, 2012. Id. U. S. Bank had not previously told TMT that a non-disclosure agreement was a prerequisite for bidding. Id., ¶ 29.

TMT sent a non-disclosure agreement to U.S. Bank by e-mail on November 23, 2010, copying Loosbrock on its correspondence. Id., ¶ 31. TMT bid $0.055 for the November DDA Portfolio, but lost out to UCR. Id. ¶ 32. After this, TMT's principal learned that UCR was bribing Tate to ensure UCR's purchases of the DDA Portfolios. Id. ¶ 33. In January, 2011, TMT's principal phoned Tate to ask about the bribes, and Tate hung up. Id. ¶ 34. Tate resigned from U.S. Bank on February 1, 2011, and thereafter, U.S. Bank directed TMT to contact U.S. Bank Vice President Kirk Villaloboz regarding future bids. Id., ¶ 35.

At a meeting with Villaloboz, Loosbrock and TMT in March, 2011, Villaloboz agreed to enter into a five-year forward flow agreement[2] with TMT, which permitted TMT to purchase DDA Portfolios on a going forward basis at the rate of $0.055. Id., ¶ 36. At the meeting, U.S. Bank also agreed to sell to TMT that quarter's DDA Portfolio **[*7]** under those terms. Id., ¶ 37. About a week later, Villaloboz reneged on the agreement, stating that vanBrandwijk would not agree to the DDA Portfolio purchase or the forward flow agreement. Id., ¶ 38.

On April 11, 2011, TMT informed U.S. Bank by email that Potillo and UCR were engaging in bribery to purchase DDA Portfolios. Id., ¶ 39. At a meeting **[*8]** on April 15, 2011, TMT told Loosbrock, vanBrandwijk and Villaloboz that UCR was bribing Tate, to which vanBrandwijk responded that "although it may be wrong, it is not illegal." Id., ¶ 42. At this meeting, vanBrandwijk also stated that U.S. Bank did not allow forward flow DDA contracts, despite the fact that Villaloboz had earlier represented that it did, and TMT had heard from vanBrandwijk and another U.S. Bank representative that U.S. Bank had a forward flow agreement with UCR. Id., ¶ 43. Additionally, at this meeting, vanBrandwijk falsely stated that one of the reasons TMT had not won a bid was the lack of a non-disclosure agreement. Id., ¶ 45. vanBrandwijk directed TMT to deal with Villaloboz, and stated that TMT should lower its bid from $0.055 to $0.045 and if it did so, TMT would be awarded the April, 2011 DDA Portfolio. Id., ¶ 46. No one could understand why vanBrandwijk would want TMT to offer U.S. Bank less money. Id.

TMT bid $0.045 for the April, 2011 DDA Portfolio, but lost out to UCR. Id., ¶ 48. vanBrandwijk told TMT that its bid was the only one U.S. Bank received but nonetheless, UCR won the bid because it had a forward flow contact with U.S. Bank at a guaranteed price **[*9]** of $0.045. Id., ¶ 49. This contract had a 30-day exit clause, which vanBrandwijk had failed to timely invoke. Id. vanBrandwijk stated that TMT could bid on the next DDA Portolio. Id., ¶ 50. Villaloboz later confirmed that TMT's was the only bid received for the April, DDA Portfolio. Id., ¶ 51.

On May 6, 2011, TMT e-mailed Hartnack and copied Loosbrock on the email. Id.,¶ 52. TMT again raised concerns that UCR and Potillo had been bribing U.S. Bank officers for years to purchase DDA Portfolios. Id., ¶ 52. Hartnack

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[2] The Eleventh Circuit has described forward flow agreements in this context as follows:

> When a consumer is delinquent on a credit account, the company that provided the account begins by trying to collect the debt itself. After 180 days, however, the company normally sells the debt to a wholesale purchaser. Most sales of debt occur in large pools. Some of these pools are sold at auction. Others are sold pursuant to long-term contracts with large purchasers, so-called "forward-flow contracts." Forward-flow contracts are attractive to the seller because they provide a consistent and reliable way to get rid of debt. They are attractive to the wholesaler because they provide a reliable supply and also typically guarantee that the accounts are a representative sample of the company's debt pool and that none of the debtors are deceased or bankrupt.

S.E.C. v. Merch. Capital, LLC, 483 F.3d 747, 750 (11th Cir. 2007).

stated that he would look into the matter, but instead of investigating, concluded that the accusations were poorly documented and amounted to competitor disagreements. Id., ¶¶ 54, 56.

On May 13, 2011, vanBrandwijk told TMT that U.S. Bank offered DDA Portfolios for sale quarterly and it would include TMT in the bidding process, the bids would be open, and the terms of each sale confirmed before the deal was consummated. Id., ¶ 57. vanBrandwijk further stated that each bidder that completed a non-disclosure agreement would be offered a prospectus and an opportunity to examine the file before bidding closed. Id.

On July 11, 2011, TMT bid $0.045 for a DDA Portfolio of $30,000,000. **[*10]** Id., ¶ 58. Vincent Lorenzo, Outsourcing Manager for U.S. Bank, told TMT the bid was insufficient, so TMT increased its bid to $0.0525. Id. Even though TMT submitted the highest bid, TMT again lost out to UCR because UCR allegedly had a "first right of refusal" and met and exceeded TMT's bid. Id., ¶ 59. U.S. Bank told TMT that if it had stayed with its original numbers, it would have been awarded the purchase. Id. Yet TMT only lowered its bid based on U.S. Bank's advice.[3] Id. U.S. Bank had never previously disclosed that UCR had a right of first refusal. Id., ¶ 60. After losing this bid, TMT's banker, Loosbrock, e-mailed Hartnack to complain about U.S. Bank's treatment of TMT and noted that U.S. Bank had lost over $2.0 million on DDA Portfolio sales over the past four quarters by rejecting TMT's bids. Id., ¶¶ 62, 63. But what Loosbrock "undoubtedly" did not know was that UCR was paying U.S. Bank significantly more than the DDA Portfolios were worth, which UCR could afford to do because it was defrauding third-party purchasers by reselling the DDA as zero-agency paper when in reality it was two-agency paper. Thus, U.S. Bank was benefitting by selling its two-agency paper at a premium. **[*11]** Id., ¶ 64.

On September 14, 2011, TMT emailed vanBrandwijk and notified him of a personal relationship between Potillo, Tate and UCR and of the existence of a misleading affidavit signed by Tate. Id., ¶¶ 66, 67. TMT had previously provided vanBrandwijk with false affidavits by UCR and Tate. Id., ¶ 67.

In September, 2011, TMT successfully bid on what it believed was zero-agency debt for $0.0515. Id., ¶ 69. TMT also based its bid on vanBrandwijk's August 19, 2011 false representation that UCR's bid was in excess of $0.045 and U.S. Bank wanted to "shake some more out of the DDA agency returns." Id., ¶ 69. Almost immediately, UCR and Potillo retaliated by posting a comment in a public forum that TMT's recent purchase was of two-agency paper, while UCR had zero-agency paper. Id., ¶ 71. TMT shared its concerns about this posting with vanBrandwijk, who responded that "whomsoever posted the comment has a problem **[*12]** with the facts." Id., ¶ 72. TMT paid U.S. Bank the purchase price for the DDA Portfolio of $1,667,242 on October 3, 2011. Id., ¶ 74. The next day, Villaloboz informed TMT for the first time, and contrary to vanBradnwijk's representations, that the DDA Portfolio TMT had just purchased was two-agency paper. Id., ¶ 75. Much later, on May 21, 2012, Villaloboz sent another letter on U.S. Bank letterhead, retracting the statements he made in his October 4, 2011, letter and stating that he had lacked authority to send the letter. Id., ¶ 76. TMT pled on information and belief that the May 21, 2012, letter was fabricated and forged. Id.

In March, 2012, TMT successfully bid $0.0495 for U.S. Bank's first quarter DDA Portfolio — an overbid based on vanBrandwijk's August 19, 2011, false statement that UCR was bidding in excess of $0.045, and U.S. Bank was trying to increase the amount it realized from DDA Portfolio sales. Id., ¶ 77. In reality, UCR had been bidding much less than $0.040 on the dollar. Id. TMT paid the purchase price of $1,154,715 on March 26, 2012. Id., ¶ 79. Afterwards, TMT asked U.S. Bank to complete a seller survey. Id., ¶ 80. One of the survey questions asked U.S. Bank to state **[*13]** how many agencies had collected on the accounts "after your purchase." Id. U.S. Bank responded "[i]ndicated in Offering or additional declaration Document." Id. This response was false, as no offerings or additional documents were ever provided to TMT. Id.

In sum, TMT alleged that it bid on DDA Portfolios six times: (1) September, 2010 (unsuccessful, purportedly due to the lack of a non-disclosure agreement); (2) November, 2010 (unsuccessful, without explanation by U.S. Bank); (3) April, 2011 (unsuccessful because of the purported forward flow agreement between U.S. Bank and UCR); (4) July,

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[3] This statement is very confusing, because in paragraph 58 of the Amended Complaint TMT stated that it had raised, not lowered, its bid based on information from U.S. Bank's Outsourcing Manager, Vince Lorenzo. Perhaps, TMT is referencing its earlier bid of $0.055. Amended Complaint, ¶ 51.

2011 (unsuccessful because UCR had a "first right of refusal" and had met and exceeded TMT's bid); (5) September, 2011 (successful bid of $0.0515 for fourth quarter, 2011 Portfolios); (6) March, 2012 (successful bid of $0.0495). Id., ¶¶ 27-35, 47-51, 57-60, 68-80.

On May 8, 2013, U.S. Bank, through Kent Stone, a U.S. Bank Vice Chairman, agreed to sell TMT at least $200,000,000 of U.S. Bank DDA Portfolios for $0.03 cents on the dollar. Id., ¶¶ 84, 85. TMT arrange to sell the May, 2013 DDA Portfolio to a third party for $0.0775 cents on the dollar, but thereafter U.S. Bank failed to sell the DDA Portfolio to TMT. **[*14]** Id., ¶ 86. In July, 2014, vanBrandwijk left U.S. Bank. Id., ¶ 87.

Tate was arrested on February 27, 2013, and charged with conspiracy to commit bank bribery. Id., ¶ 88; Amended Complaint, Ex. A (Criminal Complaint against Tate in the United States District Court, District of Connecticut). The criminal complaint against Tate stated that he was in charge of outsourcing collection accounts to collection agencies, including Oxford Collection Agency ("Oxford"). Id., ¶ 87. Executives of Oxford pled guilty to conspiracy to commit wire fraud, bank fraud and money laundering in December, 2012, and told a Special Agent that they had been bribing Tate with $2,500 to $5,000 per month in cash. Id., ¶ 90. An Information was filed against Tate and a separate Information was filed against Oxford executives. Id., ¶ 91; Amended Complaint, Ex. B (Information filed against Tate). Tate pled guilty on November 22, 2013, and as detailed in the Information, Tate used both the mails and wires. Id., ¶¶ 93-95.

On June 4, 2014, Potillo was indicted in the U.S. District Court for the Middle District of Florida on 33 counts of wire fraud, bribery of a bank official and unlawful monetary transactions. Id., ¶ 96; Amended **[*15]** Complaint, Ex. C (Indictment against Potillo). As part of his scheme, Potillo represented to investors that they were purchasing zero-agency or one-agency debt that UCR had purchased from U.S. Bank, when, in fact, it was two-agency debt. Id., ¶ 99. Potillo created false affidavits from U.S. Bank officers falsely "confirming" the quality of the debt. Id., ¶ 99. Potillo paid Tate more than $1.0 million in bribes to enable UCR to purchase DDA Portfolios for $31.0 million, or less than four cents on the dollar. Id., ¶ 100. Potillo used wires and the mail to effectuate transfers of funds to purchase luxury vehicles, real estate and to bribe Tate. Id., ¶¶ 101-103. UCR continued bribing Tate after he left U.S. Bank on February 1, 2012, and the bribes continued well into 2012. Id., ¶ 104. The indictment stated that Tate received over $1.0 million in bribes when he was employed by U.S. Bank. Id., ¶ 103.

TMT alleged that as a result of this fraudulent scheme and U.S. Bank's misrepresentations as to the DDA being zero-agency paper, TMT overpaid for its purchases of DDA Portfolios in September, 2011 and March, 2012. Id., ¶ 105. Additionally, TMT was denied the opportunity of purchasing eleven U.S. **[*16]** Bank DDA Portfolios, which were sold to UCR as part of the fraudulent scheme. Id., ¶ 106. Absent the scheme, TMT was or would have been the highest bidder on the DDA Portfolios and could have resold them to third party purchasers. Id. Also as a result of the scheme and misrepresentations, the sale of U.S. Bank DDA Portfolios was suspended from the second quarter of 2012 through 2013 and TMT lost its ability to bid on, purchase, and resell DDA Portfolios during this time and lost over $9.0 million in profits. Id., ¶ 107. As a result of U.S. Bank's breach of its agreement to enter into a five-year forward flow agreement, TMT suffered damages in excess of $13.0 million. Id., ¶ 108. As a result of U.S. Bank's breach of its May 8, 2013 agreement to sell to TMT the DDA Portfolio, TMT suffered damages in excess of $9.0 million. Id., ¶ 109. In all, TMT claimed $70,000,000 in damages, of which it contended over $48,000,000 had to be trebled due to U.S. Bank's RICO and antitrust violations. Id., ¶ 110.

Based on these facts, TMT alleged the following causes of action.

In Counts One and Two, TMT alleged civil RICO claims and conspiracy to violate RICO under *18 U.S.C. § 1962(c)* and *(d)* against all defendants except Hartnack, **[*17]** and sought damages in excess of $48.0 million. Id., ¶¶ 111-166.

Count Three alleged that UCR and U.S. Bank violated Section One of the Sherman Act (*15 U.S.C. § 1*) by conspiring to fix the price at which U.S. Bank would sell DDA Portfolios to UCR and conspiring to assure that "no parties such as TMT would be able to successfully bid on U.S. Bank DDA Portfolios, thereby allocating the entire market of all U.S. Bank DDA Portfolio sales to UCR." Id., ¶¶ 168, 169. TMT alleged that such conduct by UCR and

U.S. Bank was a per se violation the Sherman Act, for which TMT sought in excess of $48.0 million actual damages. Id., ¶¶ 170, 171.

Count Four alleged that U.S. Bank and UCR violated Minnesota Chapter 325D (Restraint of Trade) by conspiring to fix the rate at which U.S. Bank DDA Portfolios would be sold to UCR and by refusing to deal with TMT and others seeking to purchase U.S. Bank DDA Portfolios, thereby diminishing competition. Id., ¶¶ 174-176. TMT sought in excess of $48.0 million actual damages. Id., ¶ 177.

Count Five alleged respondeat superior against U.S. Bank based on allegations that TMT had notified U.S. Bank employees Loosbrock, vanBrandwijk, Hartnack and Villaloboz that UCR was bribing Tate **[*18]** so UCR could purchase the DDA Portfolios. Id., ¶¶ 179-189. U.S Bank did nothing to stop its officers' wrongful actions and instead directed TMT to work with the "same corrupt individuals that U.S. Bank had knowingly entrusted with the sale of its DDA Portfolios." Id., ¶ 190. TMT alleged that U.S. Bank was vicariously liable for the wrongful conduct of its officers under the doctrine of respondeat superior, and for all damages for violations of the Clayton Act, Minnesota Chapter 325D and its state law claims. Id., ¶ 191.

Counts Six and Seven alleged intentional and negligent misrepresentation against U.S. Bank, Tate, vanBrandwijk and Hartnack, (id., ¶¶ 193-219), including eighteen specific examples of what TMT alleged were false representations made by U.S. Bank employees on U.S. Bank's behalf, including defendants Tate, vanBrandwijk and Hartnack. Id., ¶ 204. TMT alleged that U.S. Bank intended TMT to rely and TMT reasonably and justifiably relied on these statements, and was damaged in excess of $48.0 million. d., ¶¶ 205-213, 216, 219.

Count Eight alleged breach of contract against U.S. Bank based on two separate contracts. Id., ¶¶ 221-226. First, TMT alleged that on March 17, 2011, **[*19]** it entered into a five-year forward flow contract with U.S. Bank for the purchase of DDA Portfolios at the rate of $0.055. Id., ¶ 221. U.S. Bank breached this agreement when it did not allow TMT to purchase the 2011 second quarter DDA Portfolio at the rate of $0.055, and TMT was damaged in excess of $13.0 million. Id., ¶¶ 222, 223. Second, on May 8, 2013, U.S. Bank, through Stone, entered into an agreement for the purchase by TMT of $200,000,000 of U.S. Bank DDA Portfolio at $0.03 as a one-time transaction. Id., ¶ 224. TMT arranged to sell this Portfolio to a third party for $0.0775 on the dollar but then U.S. Bank breached its agreement and TMT was damaged in excess of $0.0 million. Id.

Count Nine alleged unjust enrichment against U.S. Bank and TMT sought damages in excess of $1.1 million. Id., ¶¶ 228-233. TMT claimed that it overpaid for what it believed was zero-agency debt (which was actually two-agency debt) and U.S. Bank knowingly received the benefit of TMT's overpayment. Id., ¶¶ 229, 230. Moreover, TMT paid more than fair value because U.S. Bank falsely told TMT that UCR was paying $0.045. Id., ¶ 229.

Count Ten alleged negligent supervision against U.S. Bank for which TMT sought **[*20]** damages in excess of $70.0 million. Id., ¶¶ 235-237. TMT alleged that U.S. Bank had a duty to use reasonable care to supervise the bank officers acting on its behalf and failed to exercise that reasonable care regarding Tate, vanBrandwijk, Hartnack and "others at U.S. Bank" knowing that the officers were in a position where they could harm TMT. Id., ¶ 236.[4]

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[4] TMT did not respond to U.S. Bank's argument in support of dismissing Count Ten. See TMT's Brief in Opposition to Motion to Dismiss ("TMT's Mem.") [Docket No. 63]. As a result, it waived its objections. *Njema v. Wells Fargo Bank, N.A., 124 F. Supp. 3d 852, Civ. No. 13-519 (PJS/JSM), 2015 U.S. Dist. LEXIS 108758, 2015 WL 5008940, at *12 (D. Minn. Aug. 18, 2015)* (failing to respond to defendant's statements in a motion for summary judgment regarding damages resulted in waiver of plaintiff's argument on that point) (citing *Salaimeh v. Messerli & Kramer, P.A., Civ. No. 13-3201 (DSD/HB), 2014 U.S. Dist. LEXIS 165386, 2014 WL 6684970, at *2, n. 2 (D. Minn. Nov. 25, 2014)* (noting that plaintiff did not address certain issues raised by defendant in her opposition to summary judgment and stating "[a]lthough this court considers those claims, it notes that they have been effectively waived.") (citing *Satcher v. University of Ark. at Pine Bluff Bd. Of Trs., 558 F.3d 731, 735 (8th Cir. 2009)* ("[F]ailure to oppose a basis for summary judgment constitutes waiver of that argument.")). At any rate, TMT agreed at the motion to dismiss hearing that this Court could recommend dismissal of Count Ten. As a result, the Court will not address Count Ten further **[*21]** in this Report and Recommendation except to recommend its dismissal with prejudice (the relief sought by U.S Bank and not opposed by TMT) to the District Court.

B. U.S. Bank's Motion to Dismiss and TMT's Response[5]

U.S. Bank, vanBrandwijk and Hartnack (hereafter collectively referred to as "U.S. Bank") moved to dismiss the Amended Complaint pursuant to *Rule 12(b)(6) of the Federal Rules of Civil Procedure* on numerous grounds. For starters, and before addressing the specific counts of the Amended Complaint, U.S. Bank argued that TMT pled no actionable facts regarding vanBrandwijk and Hartnack, and no facts to support any claim that U.S. Bank was aware of Tate's illegal activities while he was employed by U.S. Bank. U.S. Bank Memorandum in Support of Motion to Dismiss ("U.S. Bank Mem."), pp. 5-7 [Docket No. 55]. For example, the only statement regarding any alleged criminal activity by vanBrandwijk was contained in paragraph 134 of the Amended Complaint, which stated that he "conducted and/or participated, directly or indirectly, in the affairs of the RICO enterprise through a pattern of racketeering activity. He engaged in **[*22]** wire and mail fraud to further the scheme of fraud and to make false representations, and accepted bribes, all so as to prevent TMT from purchasing U.S. Bank DDA Portfolios and assure they would be sold to UCR." Amended Complaint, ¶ 134. According to U.S. Bank, this allegation was conclusory and unsupported by any facts that vanBrandwijk engaged in any criminal activity or that U.S. Bank had any knowledge of such activity. U.S. Bank Mem., p. 6.

Likewise, TMT alleged that Tate resigned on February 1, 2011, and that TMT did not inform U.S. Bank of his acts of bribery until months later. Id., pp. 6-7. Consequently, but for its conclusory claims of knowledge, TMT pled no facts to support any claims that U.S. Bank was aware of Tate's misconduct while he was employed at U.S. Bank. Id.,

Further, U.S. Bank contended that TMT alleged no actionable conduct by Hartnack. Id., p. 7. TMT's claims that it informed Hartnack on April 15, 2011, that it had been "mislead and totally blown off" by vanBrandwijk, (Amended Complaint, ¶ 53), even if true, neither constituted racketeering activity under RICO, nor was otherwise unlawful. Id. TMT also alleged no facts that it had apprised Hartnack of any mail or wire fraud or that **[*23]** it was accusing vanBrandwijk of fraud, bribery, or any other unlawful activity. Id. (citing Amended Complaint, ¶ 42; Ex. B at 2-3.).

Proceeding to the specific counts, U.S. Bank contended that TMT's RICO claims (Counts One and Two), must be dismissed because of numerous fatal pleading errors. First, TMT failed to distinguish between a RICO person and RICO enterprise and failed to plead a RICO enterprise distinct from the alleged pattern of racketeering activity. Id., pp. 8-10. Second, the four-year statute of limitations had run on TMT's RICO claims, based on an email from TMT's president, Mark Bugni, to U.S. Bank, which showed that TMT was aware of the alleged RICO violation over three years before the 4-year statute of limitations had begun to run. Id., pp. 10-13 (citing Affidavit of Brooks Poley in Support of Motion to Dismiss ("Poley Aff."), Ex. A). Third, to the extent that TMT was alleging a RICO claim in connection with the March, 2012, DDA Portfolio, the one-year contractual limitation in the purchase agreement barred TMT's action. Id., pp. 13-14. Fourth, the Amended Complaint failed to plead facts establishing U.S. Bank's participation in any purported RICO scheme. Id., pp. 14-16. Lastly, TMT's RICO conspiracy claim (Count Two) **[*24]** failed because its underlying RICO claims failed. Id., p. 16.

U.S. Bank asserted that the federal and state antitrust claims (Counts Three and Four) must be dismissed because TMT did not plead an actionable restraint of trade (e.g., price fixing or boycotting) and the alleged restraints of trade were permissible vertical agreements, which "are almost never illegal per se." Id., pp. 17-21. Moreover, TMT did not allege a viable violation of *Section 1* of the Sherman Act under the rule of reason. Id., pp. 22-24. As TMT's state law antitrust claim was factually identical with its federal antitrust claims and TMT had failed to plead a viable federal claim, its state law claim also had to be dismissed for failure to state a claim. Id., p. 25.

As to Count Five alleging respondeat superior, U.S. Bank contended that TMT failed to plead sufficient facts showing that U.S. Bank was responsible for the alleged actions of Tate and vanBrandwijk, including the factual predicates necessary to meet the high standards required for a finding of vicarious liability under RICO and a RICO conspiracy, and for any state law claims. Id., pp. 34-39. Besides, U.S. Bank could not be held liable for any statements Tate may have made after he was no longer a bank employee. Id., p. 36.

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[5] The parties' arguments in favor of and opposing dismissal of the federal claims are considered in more detail, infra.

U.S. Bank **[*25]** submitted that TMT's intentional and negligent misrepresentation claims (Counts Six and Seven) failed because TMT failed to allege facts to establish reliance or causation. Id., pp. 26-29. Additionally, U.S. Bank allegations regarding the September, 2011, DDA Portfolio were vague and "overstated," there were no actionable misrepresentations regarding the March, 2012 DDA Portfolio and, at any rate, any claims arising out of the March, 2012, DDA Portfolio purchase were barred by the one-year statute of limitations contained in the purchase agreement. Id., p. 29-34. U.S. Bank pointed to an email it claimed demonstrated that TMT was told the September, 2011 DDA Portfolio was two-agency debt before TMT's purchase. Id., p. 30 (citing Affidavit of Brooks Poley, Ex. E).[6]

U.S. Bank moved to dismiss Count Eight asserting a breach of contract claim, contending that as to the supposed March, 2011, oral agreement to enter into a five-year forward flow contract, this claim was barred by the statute of frauds because the contract could not be performed within one year. Id.. p. 40. Furthermore, TMT did not sufficiently allege that U.S. Bank and TMT formed a valid contract in May, 2013, for the sale of $200,000,000 worth of DDA Portfolios. Id., pp. 40-41. According to U.S. Bank, there was no agreement as to quantity or price and therefore, no enforceable agreement was ever formed. Id.

U.S. Bank moved to dismiss Count Nine asserting unjust enrichment, contending that TMT was not eligible for this equitable relief where it had also alleged that written contracts governed the parties' rights. Id., p. 41.

Finally, as to Counts One through Seven and Nine collectively, U.S. Bank argued that these counts were based on TMT's flawed theory that but for U.S. Bank's fraudulent scheme, it would have been able to purchase certain DDA portfolios; yet, TMT failed to allege sufficient factual content to permit the Court to infer that was the case. Id., p. 42. As a result, **[*27]** all claims based on this theory of "causation" had to be dismissed. Id., pp. 42-43.

TMT opposed the motion, arguing generally that it had properly pled its causes of action, and that U.S Bank was vicariously liable for the misconduct of its high-level officers because the it had written notice of Tate's criminal behavior, the officers' misrepresentations occurred during the scope of their employment, and the actions of the bank's high level officers benefitted the bank. TMT's Memorandum in Opposition to Motion to Dismiss ("TMT's Mem."), pp. 6-12 [Docket No. 63].

TMT rejected U.S. Bank's argument that it pled no actionable facts regarding vanBrandwijk and Hartnack, and no facts to support any claim that U.S. Bank was aware of Tate's illegal activities while he was employed by U.S. Bank. Id., pp. 23-26. According to TMT, it pled "scores" of specific facts showing that vanBrandwijk was involved in the "fraudulent scheme, pattern of racketeering activity and anti-competitive behavior of U.S. Bank." Id., p. 24 (citing Amended Complaint, ¶¶ 17, 38, 43, 46, 48, 66, 67, 75, 81, 82). The Amended Complaint stated that vanBrandwijk misrepresented the quality of the DDA Portfolios, the requirement for a non-disclosure agreement prior **[*28]** to bidding, U.S. Bank's failure to receive a non-disclosure agreement from TMT, the terms and conditions for the purchase of DDA Portfolios, the amount being bid by UCR for the DDA Portfolios, and the bidding process was fair and open. Id. (citing Amended Complaint, ¶ 149). TMT further argued that it had alleged that vanBrandwijk accepted bribes to prevent TMT from purchasing DDA Portfolios. Id., p. 25 (citing Amended Complaint, ¶¶ 127, 134). TMT told vanBrandwijk numerous times about the bribery and other fraudulent acts, yet vanBrandwijk did nothing, leading a reasonable finder of fact to conclude that he was also accepting bribes. Id., p. 25. As to Hartnack, TMT noted that Hartnack is not a RICO defendant, although he also misrepresented facts to TMT. Id. (citing Amended Complaint, ¶¶ 52-54, 196, 204).

As for its RICO claims, TMT asserted that it had properly alleged the requisite distinctions between a RICO enterprise and RICO persons, and between a RICO enterprise and a pattern of racketeering. Id., pp. 12-19.

[6] For the reasons described infra, the Court will not consider this exhibit. U.S. Bank stated that it was not offering the document in support of its motion and then did exactly that. U.S. Bank Mem., pp. 30-31. The Court also did not consider Exhibit F to the Poley Affidavit, which U.S. Bank stated it was submitting "for purposes of illustration only" and then relied on the exhibit to show that TMT's statement that it never received any offering materials regarding **[*26]** the March, 2012 DDA Portfolio was "patently false." Id., p. 32, n.18.

Regarding the former, TMT maintained that the "association-in-fact enterprise" consisted of "U.S. Bank, two of its high-level officers, an outside company (UCR) and its principal (Potillo). U.S. Bank is a **[*29]** separate legal entity distinct from the alleged association-in-fact enterprise, ..." Id., p. 13. Regarding the latter, TMT submitted that the "enterprise engaged in conduct distinct and apart from the predicate acts of racketeering" such as "acts necessary to close sales, obtain closing proceeds, and provide post-sale services (e.g. providing bills of sale, U.S. Bank affidavits of correctness/assignment, and records relating to loans sold [ ])," [7] and "undoubtedly engaged in certain legitimate sales of U.S. Bank DDA Portfolios outside of defendants' pattern of racketeering." Id., pp. 16-18 (citing Amended Complaint, ¶ 122 ("The enterprise and its members conducted other business wholly separate and apart from the pattern of racketeering activity")). In any event, TMT urged that "discovery undoubtedly will reveal that there were certain U.S. Bank DDA Portfolio sales where it was unnecessary to commit RICO predicate acts in order for UCR to be awarded the DDA Portfolios." TMT's Mem., p. 18. Alternatively, TMT claimed that "even if the association-in-fact enterprise were a wholly criminal association, . . . the facts alleged demonstrate that it had a distinct structure and an organizational pattern or system **[*30]** of authority and planning beyond that which was necessary to perpetrate the predicate crimes, including but not limited to a division of the gains reaped through the pattern of racketeering activity." Id., p. 19. Therefore, "an enterprise separate and distinct from the pattern of racketeering has been alleged." Id. (citing *United States v. Bledsoe, 674 F.2d 647, 665 (8th Cir. 1982)*, cert. denied, *459 U.S. 1040, 103 S. Ct. 456, 74 L. Ed. 2d 608 (1982))*.[8]

TMT denied that the statute of limitations had run on its RICO claims. Id., pp. 19-20. According to TMT, nothing in the April 11, 2011, email cited by U.S. Bank in support of this argument would have put TMT on notice that Potillo was bribing U.S. Bank years later. Id., p. 20. Nor would the fact that Tate had informed TMT in August of 2010, that "UCR was bidding substantially less for U.S. Bank DDA Portfolios than the $0.055 (on the dollar) that TMT was offering," (Amended Complaint, **[*31]** ¶ 24), have put TMT notice that Tate or others at U.S. Bank were being bribed. Id., pp. 20-21. Additionally, there was ample evidence to support tolling of the statute of limitations, because TMT had asked whether U.S. Bank officers were engaged in criminal conduct, and the bank had concealed the fact that it was occurring. Id., p. 21. TMT also rejected U.S. Bank's argument that the one-year statute of limitations in the DDA Portfolio purchase agreement had any bearing on its RICO claims. Id., p. 22. TMT noted that it was not asserting a claim for breach of the purchase agreement and, at any rate, TMT's RICO claims, were controlled by the four-year statute of limitations. Id.

Finally, TMT contended that as it had properly pled its RICO claim, there was no basis to dismiss its RICO conspiracy claim. Id., p. 23.

Regarding its antitrust claims, TMT submitted that U.S. Bank fixed bids so that all horizontal competition was destroyed, a per se violation of *Section 1* of the Sherman Act. Id., pp. 27-41. As for U.S. Bank's argument regarding the rule of reason, TMT argued that it should be permitted to amend its Amended Complaint to plead the illegality of U.S. Bank's conduct under a rule of reason analysis. Id., p. 41. In addition, TMT's antitrust claims were viable **[*32]** under *Minn. Stat. § 325D.53*, which makes it per se illegal to refuse to deal with another party, allocate markets, allocate customers or fix or control the price of commodities. Id., pp. 42-43.

Regarding its contract claims, TMT rejected U.S. Bank's statute of frauds argument, noting that the statute does not require that a contract be fully performed within a year; only that it be commenced within a year, as was the case here. Id., pp. 43-44. But even if the statute of frauds did apply, TMT contended that U.S. Bank should be estopped from asserting it where its dealings with TMT in connection with its contractual commitments were all "part and parcel" of U.S. Bank's pattern of racketeering activity. Id., pp. 44-45. Additionally, discovery may reveal the existence of a writing in U.S. Bank's possession that would satisfy the statute of frauds. Id., p. 45.

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[7] These facts were not pled in the Amended Complaint.

[8] In Bledsoe, the Eighth Circuit described the requirement for an ascertainable structure distinct from the pattern of racketeering activity in terms of criminal enterprises, such as a Mafia family or prostitution ring, both of which would have an organizational structure and system of authority beyond that necessary to perpetuate the predicate crimes. *674 F.2d at 665*.

As to the contract dated May 8, 2013, TMT contended that it was an enforceable oral agreement and contrary to U.S. Bank's position, agreement on the material terms of price ($0.03 cents on the dollar for every dollar of DDA) and quantity ($200,000,000) had been reached. Id., pp. 45-46 (citing Amended Complaint, ¶ 224).

As for U.S. Bank's arguments regarding causation and reliance, TMT asserted that each time a false misrepresentation **[*33]** was made regarding why it did not win a bid, TMT relied on that misrepresentation to continue bidding, working with U.S. Bank and "entering into broken contracts with U.S. Bank and suffering injury." Id., p. 47. Similarly, TMT countered U.S. Bank's argument that it did not change its position based on the misrepresentation by stating that it the misrepresentations caused TMT to continue dealing with U.S. Bank and the misrepresentations "contributed to" TMT not being awarded bids. Id. In response to U.S. Bank's challenge regarding how TMT could have reasonably relied on the false representation that it would be awarded a bid if it lowered its bid price, TMT submitted that in light of U.S. Bank's previous unfair treatment of it, a reasonable person might conclude that U.S. Bank was trying to "redeem" itself by telling TMT that it was bidding higher than necessary. Id., p. 48.

TMT rebuffed U.S. Bank's argument that TMT's intentional and negligent misrepresentation counts fail because it cannot show causation — i.e., that it would have been the successful bidder on the DDA Portfolios absent U.S. Bank's fraud, and that as a result, causation was lacking. Id., pp. 55-56. TMT submitted that the evidence on that point (who **[*34]** bid what at each sale) was in U.S. Bank's possession and would be disclosed in discovery. Id., p. 56. Additionally, TMT alleged that as to the November, 2010 DDA Portfolio sale, TMT's bid was not accepted because U.S. Bank accepted UCR's bid based on UCR's fraud. Id., p. 55-56. Regarding the DDA Portfolio sale on April 29, 2011, U.S. Bank falsely represented that TMT was not awarded the bid because UCR had a forward flow contract with a 30-day exit clause. Id., p. 56. Absent this false misrepresentation, TMT would have been the successful bidder. Id. Similarly, TMT would have been the successful bidder on the DDA Portfolio sale in July, 2011, but for U.S. Bank's fraudulent statement that UCR had a "right of first refusal." Id.

TMT also contended that its claims for intentional and negligent misrepresentation as to the September 2011 DDA Portfolio and March 2012 DDA Portfolio were pled with the particularity required by *Rule 9(b)*. Id., pp. 49-53. For example, TMT alleged that between August, 2011 and September 19, 2011, vanBrandwijk represented that the DDA Portfolios were zero-agency debt. Id., pp. 49-50. While U.S. Bank minimized VanBrandwijk's statement regarding whether the September, 2011 DDA Portfolio was a two-agency debt ("whomsoever posted the **[*35]** comment has a problem with the facts"), TMT contended that it was reasonable interpret vanBrandwijk's statement to mean that UCR's statement that the debt was two-agency debt was not accurate, but at any rate, the interpretation of vanBrandwijk's statement was a jury matter. Id., pp. 51-52.

TMT rejected U.S. Bank's argument that it never represented that the March, 2012, DDA Portfolio was zero-agency debt as a basis for dismissing this claim. Id. According to TMT, quality of the debt was not the basis of its misrepresentation claims; rather it had alleged a false representation by vanBrandwijk about UCR's bid price. Id., pp. 52-53. TMT also spurned U.S. Bank's argument regarding the one-year contractual limitations period, noting that it did not allege any breach of contract claims arising out of the March 2012, DDA Portfolio purchase agreement. Id., p. 53.

TMT contended that its unjust enrichment claim was adequately pled because the unjust enrichment complained of fell outside the scope of any contract and was, therefore, not covered by any contract provision. Id., pp. 54-55. TMT's unjust enrichment claim was premised on U.S. Bank's misrepresentations as to the quality of the DDA and the price at which UCR was bidding, which resulted **[*36]** in TMT overpaying for the DDA Portfolios. Id., p. 55.

In reply, U.S. Bank submitted that TMT failed to properly plead respondeat superior in connection with its RICO claim. U.S. Bank Reply Mem., pp. 1-2 [Docket No. 71]. TMT was required to plead that Tate's and vanBrandwijk's purported fraud and bribery served U.S. Bank's corporate policy goals and its failure to do so was fatal. Id. (citing *K & S P'ship v. Continental Bank, N.A., 127 F.R.D. 664, 670 (D. Neb. 1989))*. As to the state claims, vicarious liability for intentional torts requires foreseeability and TMT did not allege that Tate's or vanBrandwijk's conduct was foreseeable. Id., p. 1. Vicarious liability for negligent torts requires action within the scope of employment and bribery is not within the scope of employment, nor was the bribery foreseeable or authorized. Id., p. 2. As a result, U.S. Bank cannot be held liable under a theory of respondeat superior for the RICO claim or any of the state law claims. Id., p. 2.

U.S. Bank reiterated that TMT's RICO claims failed because TMT alleged that the RICO enterprise consisted solely of the defendants — a fatal error in pleading RICO claims. U.S. Bank's Reply Mem., p. 2. Additionally, TMT failed to allege an enterprise distinct from the racketeering activity — another incurable flaw. Id., pp. 2-3. U.S. **[*37]** Bank noted that TMT's effort to salvage its RICO claims by stating that the alleged RICO enterprise "undoubtedly" engaged in legitimate DDA sales must be rejected, as these facts were not pled in the Amended Complaint and the only allegations TMT cited in support of these unalleged facts was its conclusory claim of enterprise and pattern of racketeering activity distinctiveness at paragraph 122 of the Amended Complaint. Id., p. 3. As to TMT's argument that the statute of limitations on the RICO claims were subject to equitable tolling, U.S. Bank noted that TMT did not plead fraudulent concealment and cannot assert it at this point. Id., p. 4.

U.S. Bank also rejected TMT's contention that U.S. Bank knew of its "officers'" purported involvement in the RICO scheme, as the Amended Complaint, ¶¶ 184-189, only stated that TMT informed U.S. Bank of Tate's misconduct after he resigned, and there was no factual support for any allegation that vanBrandwijk accepted bribes. Id., pp. 4-5.

As to the antitrust claims, U.S. Bank noted that the only case cited by TMT in support of its argument that an agreement between a buyer and seller could be deemed horizontal if it affected competitors, *Cernuto v. United Cabinet Corp., 595 F.2d 164, 168 (3rd Cir. 1979)*, was rejected by the United States Supreme **[*38]** Court on this point in *Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 730, n. 4, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988)*. Id., pp. 6-7. TMT never alleged an agreement between U.S. Bank and a U.S. Bank competitor. Id., p. 7. Further, while TMT contended that U.S. Bank was in the same business as TMT, UCR and its competitors, (TMT's Mem., p. 37), TMT never pled that U.S. Bank was UCR or TMT's competitor. Id., p. 7, n. 5.

Because TMT failed to state a federal antitrust claim, its state law antitrust claims also failed. Id., pp. 7-8.

As for the contract claims, U.S. Bank contended that pursuant to *Wiebeler v. Milwaukee Mechanics' Mut. Ins. Co., 30 Minn. 464, 16 N.W. 363, 363 (Minn. 1883)*, a contract that can be fully performed and ended within one year falls outside the statute of frauds. Id., p. 8. Here, the five-year forward flow contract could not have been completed within a year. Id. To the extent TMT argued that U.S. Bank should be estopped from asserting the statute of frauds, U.S. Bank noted that TMT did not plead any of the elements of equitable estoppel described by *Lunning v. Land O'Lakes, 303 N.W.2d 452, 457 (Minn. 1980)*. Id. Further, TMT's argument that discovery "may well" reveal a writing that satisfied the statute of frauds was insufficient under the Twombly pleading standard. Id., p. 9.

Regarding TMT's misrepresentation claims, U.S. Bank stated that TMT failed to plead reliance on any misrepresentations. Id. For example, TMT did not allege that any misrepresentations resulted **[*39]** in its losing out at DDA Portfolio auctions. Id. Additionally, TMT claimed it lost auctions due to bribery, not due to reliance on alleged misrepresentations by U.S. Bank. Id.

As to the contractual limitations period reflected in the March, 2012 purchase agreement, U.S. Bank contended that, contrary to TMT's assertion that it only applied to breach of contract claims and was unenforceable due to fraud, the limitations period facially applied to all actions, "regardless of form." Id., p. 10 (citing Poley Aff., Ex. C at p. 12, Art. VIII, § G). As a result, any claims based on this purchase agreement must be dismissed. Id.

Finally, U.S. Bank argued that the unjust enrichment claim was based on the same alleged misrepresentations as its fraud and RICO claims. Id., p. 10. Because those claims constituted actions at law, the equitable claim of unjust enrichment had to be dismissed. Id.

II. STANDARD OF REVIEW

In considering a motion to dismiss under *Rule 12(b)(6)*, the pleadings are construed in the light most favorable to the nonmoving party, and the facts alleged in the complaint must be taken as true. *In re Operation of Mo. River Sys.*

Litig., 418 F.3d 915, 917 (8th Cir. 2005) (citations omitted); see also Hamm v. Groose, 15 F.3d 110, 112 (8th Cir. 1994). In addition, "the court must resolve any ambiguities concerning the sufficiency of the plaintiffs' **[*40]** claims in favor of the plaintiffs, and give the plaintiffs the benefit of every reasonable inference drawn from the well-pleaded facts and allegations in their complaint." Ossman v. Diana Corp., 825 F. Supp. 870, 880 (D. Minn. 1993) (internal quotation marks omitted) (quoting Retail Clerks Int'l Ass'n v. Schermerhorn, 373 U.S. 746, 753 n. 6, 83 S. Ct. 1461, 10 L. Ed. 2d 678 (1963)).

Litigants also must properly plead their claims under Rule 8 of the Federal Rules of Civil Procedure and meet the principles articulated by the United States Supreme Court in Bell Atlantic Atl. Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) and Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). To satisfy Rule 8, Twombly and Iqbal, "a complaint need not contain 'detailed factual allegations,' . . . ." United States ex rel. Raynor v. National Rural Utils. Coop. Fin., Corp., 690 F.3d 951, 955 (8th Cir. 2012) (quoting Twombly, 550 U.S. at 555). However, "it must contain facts with enough specificity 'to raise a right to relief above the speculative level.'" Id. (citation omitted). The court is not bound to accept as true "'[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements . . . or legal conclusions couched as factual allegations." McDonough v. Anoka Cty., 799 F.3d 931, 945 (8th Cir. 2015) (citing Papasan v. Allain, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986)). Accordingly, to "survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Iqbal, 556 U.S. at 678 (quoting Twombly, 550 U.S., at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. (quoting **[*41]** Twombly, 550 U.S. at 556).

"Asking for plausible grounds . . . does not impose a probability requirement at the pleading stage; it simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of" the claimed violations. Twombly, 550 U.S. at 556. "There is no requirement for direct evidence; the factual allegations may be circumstantial and 'need only be enough to nudge the claim 'across the line from conceivable to plausible.'" McDonough, 799 F3d at 945 (quoting Cardigan Mountain Sch. v. New Hampshire Ins. Co., 787 F.3d 82, 88 (1st Cir. 2015) (quoting Twombly, 550 U.S. at 556)). "Courts should consider whether there are lawful, 'obvious alternative explanation[s]' for the alleged conduct, because '[w]here a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief.'" Id. (quoting Iqbal, 556 U.S. at 678, 682 (quoting Twombly, 550 U.S. at 557, 567 (brackets omitted)) (internal quotation marks omitted). "If the alternative explanations are not sufficiently convincing, however, the complaint states a plausible claim for relief, because '[f]erreting out the most likely reason for the defendants' actions is not appropriate at the pleadings stage.'" Id. (citing Watson Carpet & Floor Covering, Inc. v. Mohawk Indus., Inc., 648 F.3d 452, 458 (6th Cir. 2011)).

As a general rule, the Court may not consider materials "outside the pleadings" on a motion to dismiss. However, "a court may consider the complaint, **[*42]** matters of public record, orders, materials embraced by the complaint, and exhibits attached to the complaint in deciding a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure." Wickner v. McComb, 2010 U.S. Dist. LEXIS 15304, 2010 WL 610913, at *5 (D. Minn. 2010) (citing Porous Media Corp. v. Pall Corp., 186 F.3d 1077, 1079 (8th Cir. 1999)).

III. DISCUSSION

Before addressing the merits of the motion to dismiss, the Court must first take up the six exhibits U.S. Bank submitted in support of its motion to dismiss. Poley Aff., Exs. A-F. [Docket No. 54] and letters sent to the Court by the parties following the briefing on this motion.

U.S. Bank stated that Exhibits A-D to the Poley Affidavit were "embraced by the pleadings," and submitted Exhibits E and F to the Poley affidavit "not . . . in support of its Motion" but "for purposes of illustration only." U.S. Bank Mem., pp. 30, 32, n.18. U.S. Bank contended that Exhibit E, an email regarding the September, 2011 DDA Portfolio, refuted TMT's allegations that U.S. Bank failed to disclose to TMT that the September, 2011 and March, 2012 DDA Portfolios were two-agency debt before TMT purchased the Portfolios. Id., p. 30. U.S. Bank submitted Exhibit F to show that TMT's allegation that it was not sent any offering materials on the March 8, 2012 DDA Portfolio was "patently false." Id., p. 32, n.18. TMT objected to Poley Aff., Ex. E and submitted the **[*43]** Affidavit of Mark Bugni, a TMT principal, to "provide at least minimal evidence to demonstrate the falsity of certain of U.S. Bank's arguments that purport to be supported by emails attached to the [Poley Affidavit]. TMT's Mem., pp. 3, n.1, p. 50; Affidavit of Mark Bugni [Docket No. 62].

Under the motion to dismiss standard, the Court accepts the allegations in the Amended Complaint as true. Therefore, the Court will not consider Exhibits E and F to the Poley Affidavit or the Bugni Affidavit submitted by TMT. These materials were submitted to challenge (and prove) the truth of the allegations alleged in the Amended Complaint. If the lawsuit proceeds, the parties will be entitled to conduct discovery on the issue of U.S. Bank's disclosures to TMT of the status of the DDA Portfolios and submit that issue, if warranted, on a motion for summary judgment. As to the Poley Affidavit Exhibits A-D, the Court has considered them because they were embraced by the pleadings.

On October 19, 2015, TMT's attorney wrote to this Court to inform the Court that Potillo had pled guilty to bribing Tate and conspiring to commit bribery. [Docket No. 89]. TMT attached to this letter a copy of Potillo's plea **[*44]** agreement in United States v. Potillo, Crim. No. 6:14-128-Orl-28GJK [Docket No 101], Magistrate Judge Gregory Kelly's Report and Recommendation to the District Court, Middle District of Florida, recommending that the plea be accepted [Docket No. 109], and the registration and a certificate from the Ohio Secretary of State's office regarding an Ohio LLC — Drake Tate Enterprises, LLC — that Tate apparently had established as part of the bribery scheme. Id. All of these documents appear to be part of the public record. However, TMT's counsel's letter to the Court enclosing these documents also contained additional, unauthorized argument opposing U.S. Bank's Motion to Dismiss and stated that "if need be" TMT would amend its Amended Complaint to incorporate some of the information from the plea agreement that TMT argued bolstered its RICO and antitrust claims. Id.

In response to TMT's letter, U.S. Bank wrote to the Court on October 22, 2015, and argued that the evidence TMT had submitted was not new or germane to the Court's decision on its Motion to Dismiss. [Docket No. 90]. U.S. Bank's letter also contained additional, unauthorized argument. Id.

Both letters constituted unauthorized briefs **[*45]** in violation of *Local Rule 7.1(i)*, which states "[e]xcept with the court's prior permission, a party must not file a memorandum of law except as expressly allowed under *LR 7.1*." The Court will take judicial notice of Potillo's plea agreement, the Magistrate Judge's Report and Recommendation, and the filing from the Ohio Secretary of State's Office, all of which are publicly filed documents and embraced by the facts as alleged by the Amended Complaint. See *Mattes v. ABC Plastics, Inc., 323 F.3d 695, 697, n.4 (8th Cir. 2003)* ("[I]n considering a motion to dismiss, the district court may sometimes consider materials outside the pleadings, such as materials that are necessarily embraced by the pleadings and exhibits attached to the complaint.") (citing *Porous Media Corp. v. Pall Corp., 186 F.3d 1077, 1079 (8th Cir. 1999))*; *Levy v. Ohl, 477 F.3d 988, 991 (8th Cir. 2007)* ("In reviewing a motion to dismiss under *Federal Rule of Civil Procedure 12(b)(6)* the court is not precluded in [its' review of the complaint from taking notice of items ion the public record.") (quotation and citation omitted). As for the arguments reflected in the parties' letters, the Court does not condone these filings. Nonetheless, it reviewed and considered them.

A. Civil RICO Claim (Counts One and Two Against U.S. Bank, UCR, Tate, Potillo, and vanBrandwijk)

The U.S Bank defendants moved to dismiss the civil RICO claims against U.S. Bank and vanBrandwijk, on the following **[*46]** grounds. First, U.S. Bank claimed that TMT failed to plead a RICO enterprise distinct from the defendants. U.S. Bank's Mem., pp. 8-9. Pursuant to *Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 161, 121 S. Ct. 2087, 150 L. Ed. 2d 198 (2001)*, a plaintiff must allege the existence of two distinct entities: (1) a "person" and (2) an "enterprise." Id., p. 8. Here, TMT alleged that Tate, Potillo, vanBrandwijk, UCR, and U.S. Bank were "RICO persons," and then alleged that these "RICO persons" associated as a "RICO enterprise." Amended Complaint, ¶¶ 112, 113. TMT failed to offer any facts to support the existence of a RICO enterprise separate from the U.S. Bank defendants and thus, failed to adequately plead a required element of a RICO claim. Id., p. 9.

Second, U.S. Bank asserted that a RICO claimant must assert the existence of an association-in-fact enterprise with "'an ascertainable structure distinct from the conduct of a pattern of racketeering.'" Id. (quoting *United States v. Lee, 374 F.3d 637, 647 (8th Cir. 2004))*. The test for distinctness is whether the enterprise would still exist without the predicate acts. Id. (citation omitted). Here, TMT stated only that "the enterprise did not exist solely to engage in the predicate acts and pattern of racketeering," (Amended Complaint, ¶ 122), a "formulaic recitation" that did not meet *Rule 8* pleading standards. **[*47]** Id., pp. 9-10. Similarly, TMT's conclusory statement that the enterprise "conducted other business wholly separate and apart from the pattern of racketeering activity" was unsupported by any facts. Id., p. 10.

Third, U.S. Bank argued that TMT's RICO claims were barred by the governing four-year statute of limitations. Id., p. 10. RICO claims accrue when the facts constituting fraud were or by reasonable diligence should have been discovered. Id. (citation omitted). According to U.S. Bank's calculations, TMT filed its initial complaint on November 7, 2014, and therefore, if it knew or should have known of its injury before November 7, 2010 (the "cutoff date"), then its entire RICO claim was time-barred. Id., p. 11. U.S. Bank pointed to two instances that established that TMT had notice of its RICO injury before the cutoff date. The first instance was Paragraph 39 of the Amended Complaint, which referenced an email from TMT's president, Mark Bugni, informing U.S. Bank that Potillo and UCR were engaged in bribery to purchase U.S. Bank DDA Portfolios. Id., p. 12. In this email dated April 11, 2011, Bugni stated:

> Also, as I have told Todd [Loosbrock] previously, Len Pontillo [sic] contacted my old boss 4 years ago at (IDT Carmel) trying to **[*48]** pay him off so that our old company would not bid on U.S. Bank DDA. Needless to say, we never got the bid?????. At that time, 4 years ago, our bid was 4 cents. I would be interested to see what the portfolio was going for then since we somehow did not get it. This bid price was verbally offered to Bill Tate, which I witnessed!

Poley Aff., Ex. A, p. 2. According to U.S. Bank, this statement by Bugni showed that TMT was aware of the RICO scheme in 2007 (i.e. by referencing "4 years ago"), over three years before the cutoff date. U.S. Bank's Mem., p. 12.

The second instance arose out of TMT's allegation that it learned in August, 2010 (three months before the statute of limitations cutoff date) that UCR was bidding substantially less than TMT for DDA. Id., p. 13 (citing Amended Complaint, ¶ 24). As a result, "a reasonable person in TMT's position would question why it was not winning the DDA auctions upon learning that it was 'substantially' outbidding the winning bidder, UCR." Id.

Fourth, U.S. Bank alleged that the portion of the RICO claim that was based on the March, 2012 purchase agreement was barred by the one-year statute of limitations in the agreement. Id. (citing Poley Aff., Ex. C (March **[*49]** 15, 2012 purchase agreement between U.S. Bank and TMT at Article VIII, ¶ G (stating "[n]o cause of action, regardless of form, shall be brought by either party more than one (1) year after the cause of action arises.")). Therefore, if any of TMT's claims relating to the March, 2012 transaction accrued on or before November 7, 2013, (the one-year contractual cutoff date), then those claims are time-barred. Id., p. 14. In support, U.S. Bank pointed to TMT's admission that it learned Tate was taking bribes from UCR shortly after November 23, 2010. Id. (citing Amended Complaint, ¶ 33). Additionally, TMT knew about the alleged RICO scheme as early as April, 2007 (based on Bugni's e-mail).

Fifth, TMT did not plead facts to support U.S. Bank's involvement in the RICO scheme. Id., pp. 14-16. Potillo's indictment, on which the RICO claim is primarily based, (Amended Complaint, Ex. C), did not implicate U.S. Bank or even mention vanBrandwijk. Id., p. 15. Moreover, to impose vicarious liability on U.S. Bank for Tate and vanBrandwijk's actions, TMT was required to allege that they were serving U.S. Bank's corporate policy goals, which it failed to do. Id. Additionally, TMT's allegation that it successfully purchased two DDA portfolios **[*50]** was inconsistent with its allegation that U.S. Bank was involved in a scheme to exclude other DDA buyers; likewise, TMT did not explain why U.S. Bank would use an open auction system to exclude other buyers, rather than a private sale to UCR. Id., p. 16.

Finally, U.S. Bank argued that the RICO conspiracy claim failed because its underlying RICO claim failed. Id. (citing *Jaworski v. Rollupspacovers, Civ. No. 11-1816 (DSD/JSM), 2012 U.S. Dist. LEXIS 46938, 2012 WL 1130684, at *3 (D. Minn. Apr. 3, 2012)* (dismissal of claim for conspiracy to violate RICO warranted when substantive RICO claim failed)).

TMT responded that the association-in-fact enterprise in the instant case was comprised of U.S. Bank, its two officers (vanBrandwijk and Tate), UCR and Potillo. TMT's Mem., p. 13. According to TMT, U.S. Bank's argument amounted to a legally unsupported position that a bank could never be a RICO person that conducted or participated in the affairs of an association-in-fact enterprise comprised of the bank, its officers and unrelated third parties, without violating the requirement that the RICO enterprise be distinct from the RICO person/defendant. Id., p. 14. TMT contended that U.S. Bank was a "separate legal entity" distinct from the association-in-fact enterprise and, therefore, it met the requirement for distinctiveness between RICO persons **[*51]** and the RICO enterprise. Id., pp. 12-14.

TMT acknowledged that an enterprise must exist separate from the pattern of racketeering activity. Id., p. 15. TMT argued that in this case, the enterprise engaged in conduct distinct from and apart from the predicate acts of racketeering in that it also existed to organize and oversee acts distinct from the pattern of racketeering, such as acts necessary to close sales, obtain closing proceeds, and provide post-sale services. Id., p. 17. TMT further claimed that the association-in-fact enterprise "undoubtedly" engaged in legitimate sales of DDA Portfolios. Id.

In sum, TMT argued that the association-in-fact enterprise was separate and distinct from the pattern of racketeering activity because U.S. Bank would have engaged in legitimate activity in connection with the DDA Portfolio sales as well as illegal activities, which were part of pattern of racketeering activities. According to TMT, it has described sufficient facts to raise a reasonable expectation that discovery will reveal evidence that the enterprise engaged in legitimate as well as illegal activity. Id., p. 18.

TMT denied that its claims were barred by the governing four-year statute of limitations, stating that the email on which **[*52]** U.S. Bank relied did not show that TMT was aware of the RICO scheme four years before filing the Complaint. Id., p. 20. The email merely showed that Potillo tried to bribe a competitor of the former employer of TMT's principal. Id. Nothing in the email indicated that TMT knew or had reason to know that Potillo was bribing a U.S. Bank officer years later. Id. As to U.S. Bank's argument regarding TMT's knowledge in August, 2010, that UCR was bidding substantially less for the DDA Portfolios that TMT's offers, TMT noted that it only learned of this through Tate. Id. In light of the fact that it was a U.S. Bank officer providing the information, there was no reason why TMT should have been tipped off that Tate and others were bring bribed. Id., pp. 20-21. Moreover, there are ample facts alleged to support equitable tolling of the statute of limitations, as there was evidence that U.S. Bank concealed its bribery from TMT by stringing it along with false explanations regarding why TMT was not being injured through its inability to succeed in its DDA Portfolio bids. Id., p. 21.

In reply, U.S. Bank reiterated that TMT's RICO claims failed because TMT alleged that the RICO enterprise consisted solely of the defendants — a fatal **[*53]** pleading error. U.S. Bank's Reply Mem., p. 2. Additionally, TMT failed to allege an enterprise distinct from the racketeering activity — another fatal error. Id., pp. 2-3. U.S. Bank noted that TMT's effort to salvage its RICO claims by stating that the alleged RICO enterprise "undoubtedly" engaged in legitimate DDA sales failed, as it was not pled in the Amended Complaint, and the only allegations TMT cited in support of these unalleged facts was its conclusory claim of enterprise and distinctiveness of pattern of racketeering activity at paragraph 122 of the Amended Complaint. Id., p. 3. As to TMT's argument that the statute of limitations on the RICO claims were subject to equitable tolling, U.S. Bank noted that TMT did not plead fraudulent concealment and cannot assert it at this point. Id., p. 4.

U.S. Bank rejected TMT's contention that U.S. Bank knew of its "officers" purported misconduct, as paragraphs 184-189 of the Amended Complaint only stated that TMT informed U.S. Bank of Tate's misconduct after he resigned, and there was no factual support for any allegation that vanBrandwijk accepted bribes. Id., p. 5.

In its unsolicited letter brief to the Court, TMT contended that the fact that Tate wired his bribe funds to **[*54]** the bank account of Drake Tate Enterprises, LLC was evidence that "the RICO enterprise would be separate and distinct from the RICO defendants because Drake Tate Enterprises, LLC — which we now know was an important member of the enterprise — is not a defendant." Letter to Court from TMT dated October 19, 2015, p. 2. TMT stated that "if need be," it would seek leave to amend to add these facts to a Second Amended Complaint, but also argued that there was no need to amend the Amended Complaint on this point because it had already alleged a RICO enterprise separate from the RICO defendants. Id., n.1. According to TMT, the fact that all defendants comprised the association-in-fact enterprise did not "detract from the fact that the enterprise can be a separate and distinct entity." Id. (citing *Securitron Magnalock Corp. v. Schnabolk, 65 F.3d 256 (2d Cir. 1995)*; *Shearin v. E.F. Hutton, 885 F.2d 1162 (3d Cir. 1989)*; *River City Markets v. Fleming, 960 F.2d 1458 (9th Cir. 1992))*.

U.S. Bank responded in its unsolicited letter brief to the Court that TMT should not be allowed to amend the Amended Complaint to add facts regarding Drake Tate, LLC because any such amendment would be futile. Letter to Court from U.S. Bank dated October 22, 2015, pp. 1-2. According to U.S Bank, Drake Tate Enterprises, LLC, which was organized eight days before Tate received his first bribe, **[*55]** would necessarily be deemed a RICO "person." Id., p. 2, n.2. Therefore, even if TMT named Drake Tate Enterprises, LLC as a member of the alleged RICO enterprise, there would still be no distinction between the alleged RICO persons and the RICO enterprise. Id. As for TMT's citation of Securitron Magnalock Corp., Shearin, and River City Markets in support of its positon that a RICO violation can be maintained even though the defendants and enterprise-in-fact are the same, U.S. Bank maintained that those cases pre-dated the Supreme Court's decision in *Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 121 S. Ct. 2087, 150 L. Ed. 2d 198 (2001)*, which set forth the requirement for distinction between RICO persons and the enterprise-in-fact. Id., p. 1, n.1.

1. Requisites of a Civil RICO Claim

The Racketeer Influenced and Corrupt Organizations Act ("RICO") prohibits persons "employed by or associated with any enterprise engaged in. . . interstate . . . commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." *18 U.S.C. § 1962(a) (2012)*. RICO "defines 'racketeering activity' as the commission of any of several predicate offenses." *Illinois Farmers Ins. Co. v. Mobile Diagnostic Imaging, Inc., Civ. No. 13-2820 (PJS/TNL), 2014 U.S. Dist. LEXIS 114745, 2014 WL 4104789, at *6 (D. Minn. Aug. 19, 2014)* (citing *18 U.S.C. § 1961(1)*). Mail fraud and wire fraud are predicate offenses. Id. (quoting *18 U.S.C. § 1341* (mail fraud statute), id. *§ 1343* (wire **[*56]** fraud statute)). RICO does not encompass all instances of wrongdoing, but "is a unique cause of action that is concerned with eradicating organized, long-term, habitual criminal activity." *Crest Constr. II, Inc. v. Doe, 660 F.3d 346, 353 (8th Cir. 2011)*. RICO provides a civil remedy for any person injured in his business or property by reason of a violation of the law's substantive provisions. See *18 U.S.C. § 1964(c)*.

To plead a viable RICO claim, a plaintiff must allege: "(1) the conduct, (2) of an enterprise, (3) through a pattern, (4) of racketeering activity." *Crest Constr. II, 660 F.3d at 353* (quotation omitted).

A RICO enterprise "'includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated, in fact, although not a legal entity.'" *Id. at 354* (quoting *18 U.S.C. § 1961(4)*). "An association-in-fact enterprise must have at least three structural features: a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose." *Boyle v. United States, 556 U.S. 938, 946, 129 S. Ct. 2237, 173 L. Ed. 2d 1265 (2009)* (finding that a jury instruction containing these three structural features was correct and adequate). "Under longstanding Eighth Circuit precedent, an alleged RICO enterprise must also have 'an ascertainable structure distinct from the conduct **[*57]** of a pattern of racketeering.'" *Ill. Farmers, 2014 U.S. Dist. LEXIS 114745, 2014 WL 4104789, at *14* (citing *Crest Constr. II, 660 F.3d at 354*, quoting *Lee, 374 F.3d at 647*).

TMT claimed that collectively, UCR, Potillo, U.S. Bank, Tate and vanBrandwijk comprised an association-in-fact enterprise "for the common purpose of overseeing and participating in the sale of U.S. Bank DDA Portfolios." Amended Complaint, ¶ 113. For the reasons described below, the Court has concluded that TMT did not adequately plead a RICO claim or a RICO conspiracy.

a. Person-Enterprise Distinction

TMT did not plead a RICO enterprise distinct from the defendants. The Amended Complaint described Tate, vanBrandwijk, Potillo and UCR as "RICO persons." Amended Complaint, ¶ 112. TMT also named U.S. Bank a "culpable RICO person given that Tate, vanBrandwijk and Hartnack were high-level officers of U.S. Bank," U.S. Bank acted through these individuals, and U.S. Bank acted with knowledge of the criminal conduct and scheme of fraud. Id. The Amended Complaint then defined the RICO enterprise as the "RICO persons" who "associated in fact as a RICO enterprise." Id., ¶ 113. Further, the RICO persons "associated in fact for the common purpose of overseeing and participating in the sale of U.S. Bank DDA Portfolios" and U.S. Bank and these individuals **[*58]** "associated together to cause U.S. Bank DDA Portfolios to be sold to UCR — and only UCR — so as to enrich all members of the enterprise." Id., ¶¶ 113, 120. Elsewhere in the Amended Complaint, TMT alleged that all of the RICO persons committed the predicate acts and engaged in racketeering activities, reinforcing the concept that the RICO persons and association-in-fact enterprise were identical. Under *Kushner*, these allegations do not meet the required distinction between RICO persons and the enterprise. *Zavala v. Wal-Mart Stores, Inc., 447 F. Supp. 2d 379, 383-84 (D. N.J. 2006)* (dismissing RICO claim with prejudice on a *Rule 12(b)(6)* motion for failure to plead distinction between RICO persons and RICO enterprise and noting that "[t]his pleading failure is not an omission that can be remedied by amendment; rather, it is woven into the fabric of the Second Amended Complaint, and could not be removed without restructuring the entire RICO theory." It was a "serious, fatal problem" to allege that the RICO person and RICO enterprise were the same); *Okaya (U.S.A.), Inc. v. Denne Indus., Inc., Civ. No. 00-1203, 2000 U.S. Dist. LEXIS 20352, 2000 WL 1727785, at *2, 4-5 (N.D. Ill. Nov. 20, 2000)* (dismissing civil RICO claims on a *Rule 12(b)(6)* motion for failure to plead RICO enterprise-person distinction and noting that the complaint stated that the defendants were both RICO persons and the RICO "association in fact" that made up the purported **[*59]** enterprise).

As a result of TMT's failure to plead a RICO person distinct from the RICO association-in-fact enterprise, its RICO claim fails.

b. RICO Enterprise-Pattern of Racketeering Activity Distinction

Even assuming that TMT had adequately pled the requisite distinction between the RICO association-in-fact enterprise and the RICO persons, its RICO claim fails for the alternative reason that TMT failed to allege a RICO enterprise separate and distinct from the pattern of racketeering activity. A RICO enterprise requires that the common activities of the enterprise extend beyond the minimal association necessary to sustain the pattern of racketeering. *Diamonds Plus, Inc. v. Kolber, 960 F.2d 765, 770 (8th Cir. 1992)* ("The focus of the inquiry is whether the enterprise encompasses more than what is necessary to commit the predicate RICO offense."). "[A]n enterprise cannot simply be the undertaking of the acts of racketeering, neither can it be the minimal association which surrounds these acts." *Stephens, Inc. v. Geldermann, Inc., 962 F.2d 808, 815 (8th Cir. 1992)* (citation omitted) (holding that plaintiff insufficiently pled a RICO enterprise because although "each member of th[e] group carried on other legitimate activities, these activities were not in furtherance of the common or shared purpose of the enterprise, and thus, **[*60]** were not acts of the enterprise"). That each member of a group carries on activities distinct from the pattern of racketeering is insufficient; the group as a whole must have a common link other than the racketeering activity. *McDonough v. National Home Ins. Co., 108 F.3d 174, 177 (8th Cir. 1997)* (citations omitted) (emphasis added). "Proof the enterprise conducts lawful activity unrelated to the pattern of racketeering will often serve to prove the enterprise is separate from the pattern of racketeering." *Diamonds Plus, Inc., 960 F.2d at 770, 770 n. 5* (citations omitted). "In deciding whether an alleged RICO enterprise has an ascertainable structure distinct from the pattern of racketeering activity," the court must "determine if the enterprise would still exist were the predicate acts removed from the equation." *Crest Constr. II, 660 F.3d at 354-55* (quoting *Handeen v. Lemaire, 112 F.3d 1339, 1352 (8th Cir. 1997))*. Here, the predicate acts alleged are the 60-plus examples of mail fraud and wire fraud alleged in the Amended Complaint. Amended Complaint, ¶ 154.

The Amended Complaint stated summarily, and without any factual support, that "the enterprise and its members conducted other business wholly separate and apart from the pattern of racketeering activity." Amended Complaint, ¶ 122. This allegation does not satisfy *Rule 8 of the Federal Rules of Civil Procedure*. In response to U.S. Bank's motion to dismiss, TMT stated (again, without **[*61]** any factual support in its Amended Complaint) that the association-in-fact enterprise conducted the commission of the predicate acts, but also "acts necessary to close sales, obtain closing proceeds, and provide post-sale services (e.g. providing bills of sale, U.S. Bank affidavits of correctness/assignment, and records relating to loans sold.)." TMT Mem., p. 17. Not only were these facts not pled, but most critically, even if they had been alleged, these activities would be construed as legitimate business activities of one member of the association-in-fact enterprise — U.S. Bank — but not the association-in-fact enterprise itself, which included Potillo and UCR.

As the Eighth Circuit noted in Crest Constr. II, where "the only common factor that linked" the individually named defendants "and defined them as a distinct group was their direct or indirect participation" in a scheme to defraud the plaintiff, plaintiff had not adequately pled a RICO enterprise. *660 F.3d at 355* (citing *Stephens, 962 F.2d at 815-16*).

In Stephens, the Eighth Circuit found that while each member of the alleged enterprise also carried on other legitimate activities, these other activities were not in furtherance of the common enterprise and were not, **[*62]** therefore, acts of the enterprise. *Id.* The same is true here. The only activities that allegedly brought U.S. Bank, vanBrandwijk, Tate, Potillo and UCR together was the commission of the predicate RICO acts. See, e.g., Amended Complaint, ¶¶ 124-128, 130-132, 147-154. The fact that U.S. Bank, vanBrandwijk and Tate may have carried on legitimate business separate activities from the alleged enterprise is inadequate to establish distinction between the enterprise and the pattern of racketeering. Absent the predicate acts of wire and mail fraud, the association-in-fact enterprise in this case had no structure and it conducted no other activities together as an enterprise-in-fact. For all of these reasons, the Court concludes that the Amended Complaint fails to plead the requisite distinction between the enterprise and the pattern of racketeering distinction. *Stephens, 962 F.2d at 816* (noting that absent the predicate acts of wire and mail fraud, the association-in-fact enterprise had no form or structure and if the predicate acts were removed "the alleged association-in-fact enterprise evaporates.").

2. Repleading to Add Drake Tate Enterprises, LLC

Repleading to add Drake Tate Enterprises, LLC, as suggested by TMT, **[*63]** does not solve the pleading defects in the RICO counts. Letter to Court dated October 19, 2015 from TMT, p. 2. The plea agreement stated that Potillo would pay Tate for information by making payments via wire transfer to the bank account of a company set up by Tate. Id., Ex. A, p. 26. The plea agreement does not identify this company as "Drake Tate Enterprises, LLC," but the Court accepted TMT's representation that this was the case for the purpose of its analysis. Letter to Court dated October 19, 2015, p. 2. TMT has not identified any purpose for this company other than to receive the bribe payments — as the Amended Complaint noted, the address of Drake Tate Enterprises, LLC was Tate's home address and Tate was listed as the statutory agent. Amended Complaint, ¶ 94. Even assuming that the company had some legitimate purpose (although none has been identified), what binds Drake Tate Enterprises, LLC to the already-named RICO defendants are the predicate acts of the RICO scheme, specifically, the wire transfer of the bribe payments from Potillo to Tate, which were routed to the bank account of Drake Tate Enterprises, LLC. Letter to Court dated October 19, 2015 from TMT, Ex. A, p. 26. **[*64]** Therefore, even if TMT amended its Amended Complaint to add Drake Tate Enterprises, LLC, there would still not be any distinction between the RICO association-in-fact enterprise and the pattern of racketeering activity, because Drake Tate Enterprises, LLC would merely be another member of the association-in-fact enterprise.

3. RICO Statute of Limitations

The Court rejected U.S. Bank's arguments in favor of dismissal based on the four-year statute of limitations. U.S. Bank Mem., pp. 12-13. Civil RICO claims are governed by a four-year statute of limitations. See *Association of Commonwealth Claimants v. Moylan, 71 F.3d 1398, 1402 (8th Cir. 1995)*. The statute of limitations can be tolled if the plaintiff is able to show that there was fraudulent concealment of the violation and that the plaintiff exercised due diligence to discover the claim. *Klehr v. A.O. Smith Corp., 521 U.S. 179, 194-95, 117 S. Ct. 1984, 138 L. Ed. 2d 373 (1997)*. The email from Bugni dated April 11, 2011, on which U.S. Bank relied, was insufficient to show that TMT was aware of Potillo's bribery of Tate more than four years before the Complaint was filed. See Poley Aff., Ex. A. The Amended Complaint alleged that TMT learned that Tate was accepting bribes from UCR after November 23, 2010, and the Complaint was filed on November 7, 2014, within the statute of limitations. All that the Bugni **[*65]** email showed was that TMT's President Bugni had reported to U.S. Bank that Potillo had contacted Bugni's former boss at IDT Carmel in 2007 "trying to pay him off" so that IDT Carmel would not bid on U.S. Bank DDA Portfolios. The email does not support U.S. Bank's statements that TMT was "aware of the alleged RICO scheme" over three years before the statute of limitations cutoff date. U.S. Bank Mem., p. 12; U.S. Bank Reply, p. 4.[9]

The Court rejects U.S. Bank's argument that TMT's allegation that it had learned in August 2010, three months before the date the 4-year statute of limitations began to run, that UCR was bidding substantially less for U.S. Bank DDA Portfolio than TMT, somehow triggered the running of the statute of limitations. U.S. Bank Mem., p. 13 (citing Amended Complaint, ¶ 24). While it is possible, as U.S. Bank argued, that a reasonable person in TMT's shoes may have questioned why UCR was winning bids based on lower bid amount, that is a far cry from knowing of an alleged RICO injury sufficient to prompt the running of the RICO statute of limitations.

4. One-Year Contractual Statute of Limitations

This Court rejects U.S. Bank's argument that TMT's claims based on the March, 2012 DDA Portfolio purchase agreement were barred by the one-year contractual limitation clause found **[*67]** in that agreement. U.S. Bank Mem., pp. 13-14. To begin with, the Amended Complaint (or any other claims, for that matter) do not allege a breach of contract related to its bid on the March, 2012 DDA Portfolio. Moreover, TMT asserted that it "had no such claims." TMT's Mem., p. 22. For those reasons, any suggestion by U.S. Bank that the contractual limitations period in the March, 2012, purchase agreement governs any RICO claim by TMT fails.

5. Conspiracy to Violate RICO

Having concluded that TMT failed to state a civil RICO claim against U.S Bank and vanBrandwijk, the Court recommends that Count Two, Conspiracy to Violate RICO (against all defendants except Hartnack), be dismissed against these defendants. See *Jaworski, 2012 U.S. Dist. LEXIS 46938, 2012 WL 1130684, at *3* (noting that although the Eighth Circuit has not directly addressed the issue, "other courts have determined that [a]ny claim under *section 1962(d)* based on conspiracy to violate the other subsections of *section 1962* necessarily must fail if the substantive claims are themselves deficient.") (citation omitted) (collecting cases).

6. Dismissal of the RICO Claims With Prejudice

"Ordinarily dismissal of a [pleading] for failure to comply with *Rule 8* should be with leave to amend." *Michaelis v. Nebraska State Bar Ass'n., 717 F.2d 437, 438-39 (8th Cir. 1983)*. Nonetheless, when a complaint is so **[*68]**

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[9] Having concluded that the RICO claims were timely (although insufficiently pled), the Court need not address TMT's argument that there was ample evidence to support tolling of the statute of limitations. TMT's Mem., p. 21. However, the Court does note that the case cited by U.S. Bank for the proposition that equitable tolling based on fraudulent concealment had to be pled with particularity in the complaint is distinguishable. U.S. Bank's Reply Mem., p. 4 (citing *Summerhill v. Terminix, 637 F.3d 877, 880 (8th Cir. 2011))*. In Summerhill, the claims were clearly time-barred and the court determined that it was plaintiff's burden to plead tolling based on fraudulent concealment with particularity. *637 F.3d at 880*. Normally, a statute of limitations is an affirmative defense, which it is a defendant's burden to plead and prove. **[*66]** *John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 128 S. Ct. 750, 753, 169 L. Ed. 2d 591 (2008)*. Therefore, the possible existence of a statute of limitations defense is not ordinarily a ground for dismissal under *Fed. R. Civ. P. 12(b)(6)*, "unless the complaint itself establishes the defense." *Jessie v. Potter, 516 F.3d 709, 715, n.2 (8th Cir. 2008)* (citing *Varner v. Peterson Farms, 371 F.3d 1011, 1017-18 (8th Cir. 2004))*. Here, there is nothing obvious about the facts alleged in the Amended Complaint that brings the RICO claims outside the statute of limitations.

deficient or defective that the court is convinced that its defects cannot be cured through re-pleading, dismissal with prejudice is appropriate. *Sellors v. Obama, Civ. No. 13-2484 (SRN/JSM), 2014 U.S. Dist. LEXIS 51829, 2014 WL 1607747, at *14 (D. Minn. April 15, 2014)* (Order overruling objections to Report and Recommendation that recommended dismissal of an amended complaint with prejudice due to incurable pleading defects); *McLean v. United States, 566 F.3d 391, 400-401 (4th Cir. 2009)* ("to the extent ... that a district court is truly unable to conceive of any set of facts under which a plaintiff would be entitled to relief, the district court would err in designating [a] dismissal to be without prejudice. Courts, including this one, have held that when a complaint is incurable through amendment, dismissal is properly rendered with prejudice and without leave to amend."); *McKesson HBOC, Inc. v. New York State Common Ret. Fund, Inc., 339 F.3d 1087, 1096 (9th Cir. 2003)* (dismissal with prejudice is appropriate where "deficiencies in [plaintiff's] claims cannot be cured by amendment").

Here, the allegedly offending conduct by U.S. Bank and vanBrandwijk did not amount to a violation of RICO. Consequently, even if TMT could plausibly allege acts constituting fraud by these defendants, it cannot plead, much less show, an enterprise with an ascertainable structure, different from that inherent in a pattern of racketeering activity. Therefore, any attempt to amend **[*69]** the Amended Complaint to assert a viable RICO claim is futile, and the Court recommends that U.S. Bank's motion to dismiss as to the RICO claim should be granted and the claim be dismissed with prejudice.

B. Antitrust Claim (Count Three Against UCR and U.S. Bank)

TMT alleged that UCR and U.S. Bank violated *§ 1* of the Sherman Act, *15 U.S.C. § 1*. Amended Complaint, ¶¶ 168-172. According to TMT, UCR and U.S. Bank's price fixing scheme was a per se violation of the Sherman Act. Id., ¶¶ 169-170.

"To demonstrate a violation of *section 1* of the Sherman Act, a plaintiff must provide proof of an illegal contract, combination, or conspiracy which results in an unreasonable restraint of trade." *Double D. Spotting Serv., Inc. v. Supervalu, Inc., 136 F.3d 554, 558 (8th Cir. 1998)*; *Regional Multiple Listing Serv. of Minn. v. Am. Home Realty Network, Inc., 960 F.Supp.2d 958, 979 (D. Minn. 2013)* ("To establish a claim under *Section 1* of the Sherman Act, a plaintiff must demonstrate (1) that there was a contract, combination, or conspiracy; (2) the agreement unreasonably restrained trade under either a per se rule of illegality or a rule of reason analysis; and (3) the restraint affected interstate commerce."). The United States Supreme Court has repeatedly recognized that by the language of the Sherman Act, "'Congress intended to outlaw only unreasonable restraints.'" *Texaco Inc. v. Dagher, 547 U.S. 1, 5, 126 S. Ct. 1276, 164 L. Ed. 2d 1 (2006)* (emphasis in original).

A violation of *§ 1* alone is insufficient **[*70]** to support a civil lawsuit for restraint of trade. The Clayton Act, *15 U.S.C. § 15*, defines the class of persons who may "maintain a private damage action under the antitrust laws." *Associated Gen. Contractors of Cal., Inv. v. California State Council of Carpenters, 459 U.S. 519, 529, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*. Pursuant to *§ 15(a)*, "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States." In Brunswick Corp. v. Pueblo Bowl—O—Mat, Inc., the Supreme Court held that *§ 15(a)* creates an additional element for a civil claim based upon an alleged antitrust violation. A plaintiff must prove more than injury causally linked to an illegal presence in the market. Instead, a plaintiff must prove antitrust injury — that is, an "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." *429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*; see also *Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 109-110, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986)* (summarizing Brunswick Corp.). "Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws." *Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 225, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993)*; see also *Associated Gen. Contractors of Cal. 459 U.S. at 537* (noting that an "allegation of improper motive, although **[*71]** it may support a plaintiff's damages under *§ 4* [of the Clayton Act] is not a panacea that will enable any complaint to withstand a motion to dismiss.").

Most antitrust claims are analyzed under the "rule of reason," where the fact finder determines whether the practice complained of is an unreasonable restraint on competition based on a number of factors, such as specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect. *State Oil v. Khan, 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997)* (citations omitted). Under the rule of reason analysis, "[t]he true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable." *Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 n.15, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977)* (citation omitted). The rule of reason is the presumptive or default standard and requires the antitrust plaintiff to "demonstrate that a particular contract or combination is **[*72]** in fact unreasonable and anticompetitive." *Dagher, 547 U.S. at 5*. To state a claim under the rule of reason, a plaintiff must allege concerted action intended to harm or unreasonably restrain competition and that actually injures competition. *Five Smiths, Inc. v. National Football Players Ass'n., 788 F. Supp. 1042, 1051 (D. Minn. 1992)*. A plaintiff must further allege a relevant market that has been adversely affected by the challenged restraint. Id. (citation omitted). The failure to adequately plead a relevant market is grounds for dismissal of a rule of reason claim. Id. (citations omitted).

TMT did not plead an antitrust violation under the rule of reason. Instead, TMT alleged that "UCR and U.S. Bank contracted, engaged in concerted action and conspired together in a manner which unreasonably restrained trade and restricted competition, all with an effect on interstate commerce" by conspiring to fix the price at which DDA Portfolios would be sold to UCR, fix UCR's bid prices and refuse to deal with TMT, and conspiring to ensure that "no parties such as TMT" could successfully bid on DDA Portfolios. Amended Complaint, ¶ 169. According to TMT, this conduct constituted a per se violation of the Sherman Act. Id., ¶ 170; TMT's Mem., p. 41.

"Some types of restraints . . . have such predictable and **[*73]** pernicious anticompetitive effect and such limited potential for procompetitive benefits, that they are deemed unlawful per se." *State Oil, 522 U.S. at 10* (citation omitted); *Regional Multiple Listing Serv. of Minn., 960 F. Supp. 2d at 983* ("Certain kinds of agreements, however, are considered unlawful per se because they are of a type that is so often harmful and so rarely justified that proof of anti-competitiveness is not required.") (quotation omitted). Such restraints "'are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.'" *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 289, 105 S. Ct. 2613, 86 L. Ed. 2d 202 (1985)* (quoting *Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958))*. Per se treatment is proper only "[o]nce experience with a particular kind of restraint enables the [c]ourt to predict with confidence that the rule of reason will condemn it." *Arizona v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332, 344, 102 S. Ct. 2466, 73 L. Ed. 2d 48 (1982)*. "[A] 'departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than . . . upon formalistic line drawing.'" *Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 887, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007)* (second alteration in original) (quoting *Continental T.V., Inc., 433 U.S. at 58-59*). To justify a per se violation, a challenged practice must have "manifestly anticompetitive" effects and lack "any redeeming virtue." *Id. at 886*. (internal quotation marks omitted). The Supreme Court has "'expressed reluctance to adopt per se rules where the economic impact of **[*74]** certain practices is not immediately obvious.'" *Dagher, 547 U.S. at 5* (quotation marks and ellipses omitted) (quoting *State Oil, 522 U.S. at 10*). Practices that have been found to be per se illegal include price-fixing, division of markets, group boycotts, and tying arrangements.[10] *Double D. Spotting, 136 F.3d at 558* (citations omitted).

To determine whether an alleged restraint is unreasonable, the court must decide initially whether it is per se illegal or whether it must be analyzed under the rule of reason. *Paladin Assocs., Inc. v. Mont. Power Co., 328 F.3d 1145, 1155 (9th Cir. 2003)*. The purpose of both analyses is to "form a judgment about the competitive significance of the

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[10] A tying arrangement is defined "as an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." *Northern Pac. Ry. Co., 356 U.S. at 5-6*.

restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry. Subject to exceptions defined by statute, that policy decision has been made by the Congress." *National Soc. of Professional Engineers v. United States, 435 U.S. 679, 692, 697, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978)*. "Under the Sherman Act the criterion to be used in judging the validity of a restraint on trade is its impact on competition." *National Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 104, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984)*. In other words, regardless of whether a plaintiff **[*75]** pleads an antitrust claim as a per se violation, or a violation under the rule of reason, the court must make a threshold determine that the alleged injury falls within the scope of the Sherman Act.

The Supreme Court had described a horizontal restraint of trade as a "naked restraint [ ] of trade with no purpose except stifling of competition." *United States v. Topco Assocs., 405 U.S. 596, 608, 92 S. Ct. 1126, 31 L. Ed. 2d 515 (1972)*. The classic horizontal restraint involves an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition. Id.; *Double D. Spotting, 136 F.3d at 558* ("Horizontal restraints of trade result when combinations of traders at one level of the market structure agree to exclude direct competitors from the same level of the market.") (citation omitted). Horizontal restraints are per se illegal. *Topco Assocs., 405 U.S. at 608* (citations omitted). A plaintiff alleging a horizontal restraint must "at least define the market and its participants." *Double D. Spotting, 136 F.3d at 559*. "If an alleged restraint falls within the category of restraints subject to per se analysis, a plaintiff need not prove its anticompetitive effects." *Flegel v. Christian Hosp., Ne.-Nw., 4 F.3d 682, 686 (8th Cir. 1993)*.

Vertical restraints of trade result from agreements among "combinations of persons at different levels of the market structure, e.g., manufacturers and distributors." **[*76]** *Topco Assocs., 405 U.S. at 608*. Vertical minimum price restrictions are generally per se antitrust violations. *Double D. Spotting, 136 F.3d at 559* (citation omitted).

In support of its contention that it properly pled a per se violation of the Sherman Act, TMT argued that U.S. Bank and UCR were engaged in a horizontal restraint of trade because UCR, through its bribery and bank fraud scheme cut TMT out of the market and also cut out all other potential UCR competitors. TMT's Mem., p. 31. TMT contended that UCR and U.S. Bank's relationship was only facially vertical. Id., p. 30. In fact, UCR controlled U.S. Bank's actions through bribery and "allocated its product ... between competing customers in a given horizontal market and effectively destroyed competition between them." Id., p. 34. TMT relied heavily on *American Motor Inns, Inc. v. Holiday Inns, Inc., 521 F.2d 1230 (3rd Cir. 1975)*, in support of its contention that although facially vertical, the relationship between U.S. Bank and URC was actually horizontal. TMT submitted that pursuant to American Motor Inns, where a party to a facially vertical relationship (there, Holiday Inns) allowed its franchisees to have veto power over granting new franchises to competitors, that was sufficient to infer a per se illegal horizontal restraint of trade. Id., p. 33. TMT argued that like American Motor Inns, U.S. **[*77]** Bank's decisions regarding sale of the DDA Portfolios was not independent, but was controlled by UCR and "allocated its product (DDA Portfolios) between competing customers in a given horizontal market and effectively eliminated all competition between them." Id.

After carefully reviewing the allegations in the Amended Complaint, as well as TMT's unsolicited letter brief and attachments, the Court recommends dismissal of Count Three with prejudice. The Court reached this determination for the following reasons.

First, as U.S. Bank argued, the Amended Complaint fails to state a claim under the Sherman Act because it alleged only an injury to TMT, not injury to competition in general. U.S. Bank Mem., p. 24. Without an injury to competition, there is no antitrust violation. *Brown Shoe Co. v. United States, 370 U.S. 294, 320, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)* (antitrust laws are "concern[ed] with the protection of competition, not competitors."); *Brunswick Corp., 429 U.S. at 489* (noting that an antitrust plaintiff must prove antitrust injury). In an antitrust action, the plaintiff must show an "injury of the type that the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *In re Canadian Import Antitrust Litig., 470 F.3d 785, 791 (8th Cir. 2006)* (quoting *Brunswick Corp., 429 U.S. at 489*). The Eighth Circuit has held that "antitrust injury is a threshold issue that **[*78]** plaintiffs must establish in order to have standing[11] to sue under the antitrust laws." *Fischer v. NWA, Inc., 883 F.2d 594, 597 n. 5 (8th Cir. 1989)*; accord *Midwest Commc'ns, Inc. v. Minn. Twins, Inc., 779 F.2d 444, 449 (8th Cir. 1985)*, cert denied, *476 U.S. 1163, 106 S. Ct. 2289, 90 L. Ed. 2d 730 (1986)* ("[A]ntitrust standing requirements go beyond injury in fact; the court must also determine whether the plaintiff, even if injured, is a proper party to bring the action."). Whether or not a plaintiff has suffered an antitrust injury may be dispositive. *Midwest Commc'ns, Inc., 779 F.2d at 450* ("[I]f there is no showing of injury, or if the injury alleged is not an 'antitrust injury,' the plaintiff does not have a claim cognizable under the antitrust laws.").

In a vague and conclusory **[*80]** fashion, the Amended Complaint stated that the scheme involved "a multitude of victims including third-party debt purchasers and purchasers of U.S. Bank debt;" the conduct complained of "assure[d] that no parties such as TMT" would be able to bid successfully on the DDA Portfolios; and UCR and U.S. Bank worked together in a way that "restricted competition" and that the Sherman Act violations by UCR and U.S. Bank "had the effect of decreasing competition." Id., ¶¶ 98, 169, 170. But TMT never named any of these supposed competitors. To the contrary, elsewhere in the Amended Complaint, TMT alleged that its bid on the April, 2011 DDA Portfolio was the only one U.S. Bank received, (Amended Complaint, ¶ 49), indicating that there were no competitors, at least for that DDA Portfolio. Additionally, TMT failed to reconcile its allegations that U.S. Bank reneged on its agreement to enter into a five-year forward flow agreement at a set price with TMT, (Id., ¶ 221), with the supposed anticompetitive effects of U.S. Bank's relationship with UCR. In other words, on the one hand, TMT asserted that UCR and U.S. Bank "unreasonably restricted trade" by virtue of their exclusive dealings, but then asserted **[*81]** that it has been injured because of U.S. Bank's refusal to enter into a similarly exclusive relationship through its own five-year forward flow agreement, albeit one not based on criminal activity. These facts undermine TMT's assertions regarding competitive injury. TMT responded that "the difference" was that it did not employ illegal means to obtain an exclusive relationship U.S. Bank. TMT's Mem., p. 27. Yet, as noted by U.S. Bank, the test for a violation of the ***antitrust law*** is whether otherwise legal conduct becomes illegal because it has anticompetitive effects. U.S. Bank Mem., p. 18, n.14; see also, *In re Cardizem CD Antitrust Litig., 332 F.3d 896, 914, n.19 (6th Cir. 2003)* (describing as a "basic premise" of ***antitrust law*** that "in many instances, an otherwise legal action — e.g. setting a price — becomes illegal if it is pursuant to an agreement with a competitor.").

Ultimately, the allegations in the Amended Complaint do not meet the minimal pleading requirement for a violation of *Section 1* of the Sherman Act. See *TheMLSonline.com, Inc., 840 F. Supp. 2d at 1182* (dismissing antitrust claims with prejudice because plaintiff only alleged that he was the victim of a conspiracy aimed at driving him out of

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[11] Some courts distinguish between the "injury to competition" requirement of a substantive Sherman Act claim and the requirements for standing to assert an antitrust claim. *TheMLSonline.com, Inc. v. Regional Multiple Listing Serv. of Minn., 840 F. Supp. 2d 1174, 1180 (D. Minn. 2012)* (citing *Angelico v. Lehigh Valley Hosp., Inc., 184 F.3d 268, 275 n.2 (3d Cir. 1999)* ("The District Court erred by incorporating the issue of anticompetitive market effect into its standing analysis, confusing antitrust injury with an element of a claim under *section 1* of the Sherman Act."); *Doctor's Hosp. of Jefferson, Inc. v. Southeast Med. Alliance, Inc., 123 F.3d 301, 305 (5th Cir.1997)* (distinguishing between "antitrust injury and injury to competition, the latter of which is often a component of substantive liability.")). As the court noted in TheMLSonline.com. Inc.: "[t]he two concepts are closely related, however, and the Eighth Circuit and decisions from this District largely conflate **[*79]** the two and incorporate an injury-to-competition requirement into the analysis of antitrust standing. E.g., *Midwest Commc'ns, 779 F.2d at 450* (noting in its discussion of antitrust injury for purposes of determining standing that "Congress enacted the antitrust laws to protect competition, not competitors"); *Fair Isaac Corp. v. Experian Info. Solutions Inc., 645 F.Supp.2d 734, 751 (D. Minn. 2009)* ("[M]erely showing that [defendant] targeted and caused injury to [plaintiff] is insufficient to show an antitrust injury necessary to establish antitrust standing.")." *840 F. Supp. 2d at 1180*. In *Minnesota Made Hockey, Inc. v. Minnesota Hockey, Inc., 789 F. Supp. 2d 1133, 1142-43 (8th Cir. 2011)* the Eighth Circuit distinguished between antitrust standing and antitrust injury, but then focused its standing analysis on whether plaintiff had adequately pled that it was the target of anticompetitive activity.

Neither party framed the issue of anticompetitive injury as a question of antitrust standing. Of course, the Court is entitled to "'examine standing sua sponte where standing has erroneously been assumed . . . .'" *Meuir v. Greene County Jail Employees, 487 F.3d 1115, 1119 (8th Cir. 2007)* (quoting *Adarand Const., Inc. v. Mineta, 534 U.S. 103, 109, 122 S. Ct. 511, 151 L. Ed. 2d 489 (2001))*. Even assuming that TMT did not need to show competitive injury to establish antitrust standing, it was required to do so to assert a substantive claim under the Sherman Act. *TheMLSonline.com, 840 F. Supp. 2d at 1180*. Therefore, the Court has focused its attention on TMT's failure to adequately plead a substantive Sherman Act claim.

business, which, even if true, did not establish an antitrust injury); *Fair Isaac Corp., 645 F. Supp. 2d at 750* ("[M]erely showing that VantageScore targeted **[*82]** and caused injury to Fair Isaac is insufficient to show an antitrust injury . . . nor does the fact that the alleged goal of the conspiracy was to 'eliminate' Fair Isaac from the credit scoring industry automatically establish injury of the type the antitrust laws are designed to prevent.") (citing *Richter Concrete Corp. v. Hilltop Concrete Corp., 691 F.2d 818, 823 (6th Cir. 1982)* ("Anticompetitive conduct is conduct designed to destroy competition, not just to eliminate a competitor.")); see also *Ehredt Underground, Inc. v. Commonwealth Edison Co., 90 F.3d 238, 240 (7th Cir. 1996)* ("Over and over, we stress that antitrust is designed to protect consumers from producers, not to protect producers from each other or to ensure that one firm gets more of the business.") (citations omitted); *Chicago Prof'l Sports Ltd. P'ship v. National Basketball Ass'n, 961 F.2d 667, 670 (7th Cir.1992)* (the antitrust injury doctrine "requires every plaintiff to show that its loss comes from acts that reduce output or raises prices to consumers.") (citations omitted); *AstraZeneca AB v. Glenmark Generics, Ltd., Civ. No. 14-665, 2014 U.S. Dist. LEXIS 151215, 2014 WL 5366050, at *1, n.1 (D. Del. Oct. 9, 2014)* (noting that the "Third Circuit has consistently held an individual plaintiff personally aggrieved . . . has not suffered an antitrust injury unless the activity has a wider impact on the competitive market.") (citation omitted); *In re Webkinz Antitrust Litig., 695 F. Supp. 2d 987, 996-997 (N.D. Cal. 2010)* (granting motion to dismiss based on finding that plaintiffs provided no specific factual allegations of an alleged injury suffered by competition generally); *Banasavich v. McLane Co., Civ. No. 07-702, 2008 U.S. Dist. LEXIS 89071, 2008 WL 4821320, at *4 (D. Conn. Oct. 31, 2008)* (dismissing **[*83]** antitrust claims because "the complaint set forth allegations supportive of an injury to plaintiff's business, but antitrust injury must represent an adverse effect on competition as a whole in the relevant market rather than to plaintiff.")

Second, TMT did not allege that UCR and U.S. Bank were at the same level of market structure — a requirement for a claim of a horizontal restraint of trade. *Double D. Spotting, 136 F.3d at 558*. Although TMT argued in briefing that this was so, (TMT's Mem., p. 37), that argument was unsupported by any facts and it was not pled in the Amended Complaint.

Third, as U.S. Bank argued, (U.S. Bank Reply, p. 6), TMT never pled the existence of a horizontal agreement between competitors, a requirement for pleading a per se illegal horizontal restraint of trade or illegal bid rigging scheme. *Business Elecs. v. Sharp Elecs. Corp., 485 U.S. 717, 730, n.4, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988)* ("[A] restraint is horizontal not because it has horizontal effects, but because it is the product of a horizontal agreement."); *Nitro Distrib., Inc. v. Alticor, Inc., 565 F.3d 417, 424 (8th Cir. 2009)* (affirming district court's grant of summary judgment based in part on the fact that appellants failed to show the existence of an agreement between competitors at the same level of the market to restrain competition); *United States v. Mobile Materials, Inc., 881 F.2d 866, 869 (10th Cir. 1989)*, cert. denied, *493 U.S. 1043, 110 S. Ct. 837, 107 L. Ed. 2d 833 (1990)* (defining "bid rigging" as: "any agreement **[*84]** between competitors pursuant to which contract offers are to be submitted [to] or withheld from a third party constitutes bid rigging per se violative of *15 U.S.C., section 1*.") (emphasis added).

Apparently in recognition of its failure to plead the existence of a horizontal agreement between competitors, TMT argued that U.S. Bank "was in the same business" as TMT and UCR and was, as a result, their competitor. TMT's Mem., p. 37. Not only were these alleged facts never pled, they are contrary to the facts that were alleged — that U.S. Bank is a national bank that sold its charged off DDA debt to third party debt purchasers, TMT is in the business of purchasing debt from vendors, and UCR is a limited liability company that purchases debt. Amended Complaint, ¶¶ 1, 2, 6, 18. Notwithstanding TMT's efforts to shore up its "horizontal restraint" argument by transforming U.S. Bank into a competitor of third party debt purchasers, it is obvious that the relationship between U.S. Bank, TMT and UCR was one of seller and purchaser, not competitor.

Significantly, the information reflected in Potillo's plea agreement supports this Court's conclusion that even accepting all of the allegations in the Amended Complaint **[*85]** as true, they do not describe a horizontal restraint of trade within the meaning of *15 U.S.C. § 1*. See Letter from TMT to Magistrate Judge dated October 19, 2015, Ex. A. Potillo's plea stated that Tate (described in the plea as "W.T.") would provide information to Potillo concerning the highest bids for the DDA Portfolios and the lowest minimum bid price U.S. Bank would accept. Id., ECF p. 25. Based on that information, Potillo would submit bids that were slightly higher than the next highest bid and also above the minimum bids deemed acceptable to U.S. Bank. Id. Potillo paid Tate for providing this information. Id.

Though TMT describes defendants' activities as "price-fixing" and "bid-rigging," (TMT's Mem., pp. 27, 28, 39; Amended Complaint, ¶ 169), two practices that are considered per se violations of *§ 1*, the conduct alleged in the Amended Complaint is neither price fixing nor bid rigging. Price fixing generally describes a "combination formed for the purpose of and with the effect of raising, depressing, fixing or stabilizing the price of a commodity." *Eureka Urethane, Inc. v. PBA, Inc., 746 F. Supp. 915, 932 (8th Cir. 1990)* (citation omitted). Bid-rigging has a more specialized meaning in ***antitrust law*** and is analogous to bid rotation. *United States v. Heffernan, 43 F.3d 1144, 1150 (7th Cir. 1994)* (noting that the "vast majority" **[*86]** of cases to consider the term "bid rigging" have treated it as synonymous with bid rotation). Bid rigging or bid rotation occurs when two or more competitors agree which of them should be the low bidder for a particular job, and the others submit higher bids to make sure the designated bidder wins. *Id. at 1146*. See also *United States v. Reicher, 983 F.2d 168, 170 (10th Cir. 1992)* (defining bid rigging in the context of the Sherman Act as "any agreement between competitors to which contract offers are to be submitted to or withheld from a third party.") (citation omitted).

As to price fixing, TMT alleged that Potillo and UCR conspired with Tate and U.S. Bank to obtain "inside information" to purchase the DDA Portfolios. Amended Complaint, ¶¶ 100, 125. This conduct is not price-fixing because there is no allegation that two competitors jointly set prices for their respective goods. *United States v. Socony—Vacuum Oil Co., 310 U.S. 150, 221, 60 S. Ct. 811, 84 L. Ed. 1129 (1940)* (describing horizontal price fixing as competitors who make an arrangement that interferes with the setting of prices by free market forces.). Nor was it vertical price fixing, which occurs when a supplier attempts to fix prices charged by those who resell its products. *Kingray, Inc. v. NBA, Inc., 188 F. Supp. 2d 1177, 1188 (S.D. Cal. 2002)* (citations omitted).

This alleged conduct is also not bid-rigging since there is no **[*87]** allegation that UCR and TMT (again, the only two competitors named in the Amended Complaint) agreed in advance of submitting their bids for the DDA Portfolios that one of them would offer a higher bid in order for the other to win the contracts. See *Heffernan, 43 F.3d at 1146*; *Reicher, 983 F.2d at 170*.

Because the Amended Complaint failed to allege a per se violation of *§ 1* and is otherwise devoid of any allegation that U.S. Bank's conduct restrained trade in a way prohibited by the antitrust laws, it fails to state an antitrust claim and Count Three should be dismissed.

TMT submitted that it should be allowed to replead its antitrust claim under a rule of reason. TMT's Mem., p. 41. TMT correctly noted that generally leave to amend a complaint should be granted in the absence of undue delay or bad faith and when an amendment would not be futile or unfairly prejudice a party. Id. (citations omitted).

To the extent TMT is actually moving for leave to amend, its request is not properly before the Court. See *Gomez v. Wells Fargo Bank, N.A., 676 F.3d 655, 665 (8th Cir. 2012)* ("'A district court does not abuse its discretion in failing to invite an amended complaint when plaintiff has not moved to amend and submitted a proposed amended pleading.'") (quoting *Drobnak v.. Andersen Corp., 561 F.3d 778, 787 (8th Cir. 2009))*; accord *Misischia v. St. John's Mercy Health Sys., 457 F.3d 800, 805 (8th Cir. 2006)* (district court did not abuse discretion **[*88]** in denying leave to amend where plaintiff requested leave "with a one line request in his brief opposing defendants' motion to dismiss," filed "no motion for leave to amend [,] and did not explain the substance of his proposed amendment"). However, even if this request to amend were properly before the Court, the Court nonetheless recommends dismissal of Count Three with prejudice because any proposed amendment by TMT is futile.

The Court is mindful that "courts are hesitant to dismiss antitrust actions before the parties have had an opportunity for discovery, because proof of illegal conduct lies largely in the hands of the alleged antitrust conspirators." *Double D. Spotting, 136 F.3d at 560*. That said, a court may dismiss claims with prejudice if repleading would be futile. *Sellors, 2014 U.S. Dist. LEXIS 51829, 2014 WL 1607747, at *14*; *Bernstein v. Extendicare Health Servs., Inc., 607 F. Supp. 2d 1027, 1032 (D. Minn. 2009)*. The Court has considered that TMT has proposed amending its Amended Complaint to allege an antitrust violation under the "rule of reason," (TMT's Mem., p. 41), and has stated that it was prepared to amend to allege the facts described in Potillo's plea agreement. Letter to Magistrate Judge from TMT dated October 19, 2015, p. 2. However, even if these amendments were allowed, the conduct TMT intends to plead still does not fall within the scope **[*89]** of *§ 1*. Indeed, after amending once, briefing its opposition to U.S. Bank's motion to dismiss and submitting an unsolicited post-hearing letter brief, TMT has still not adequately alleged or presented evidence that it could allege the injury that is at the heart of ***antitrust law*** — an injury to competition, not individual competitors. See *TheMLSonline.com, Inc., 840 F. Supp. 2d at 1182* (dismissing antitrust claims with prejudice where plaintiff failed to allege competitive injury). On this basis, the Court has concludes that any repleading is futile and, therefore, recommends dismissal of Count Three with prejudice. See *Five Smiths, 788 F. Supp. at 1051-1053* (dismissing antitrust claims with prejudice and without leave to amend because plaintiffs alleged only injury to themselves, not to competition, therefore, any rule of reason claim failed) (citing *Garshman v. Universal Resources Holding, Inc., 824 F.2d 223, 230-231 (3d Cir. 1987)* (affirming district court's dismissal of Sherman Act claim noting that "what was still missing" under a rule of reason analysis was "any allegation of an adverse effect on competition."); *Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1107 (7th Cir. 1984)* (stating that a rule of reason claim requires a plaintiff to "allege, not only an injury to himself, but an injury to the market as well"); *Caremark Homecare Inc. v. New England Critical Care, Inc., 700 F. Supp. 1033, 1036 (D. Minn. 1988)* (rule of reason claim requires plaintiff to plead "anticompetitive effect on the market as a whole."); **[*90]** *Schwartz v. Jamesway Corp., 660 F.Supp. 138, 141 (E.D. N.Y. 1987)* (dismissing antitrust claim pled under the rule of reason because plaintiff failed to allege competitive harm and noting "[p]laintiff merely states that he has been injured in his business. Such pleading does not state an antitrust claim because it does not allege an injury to competition among several competitors.") (citation omitted)).

C. State Law Claims

The Court concluded that TMT's federal claims based on RICO and the Sherman Act fail as a matter of law. These were the claims on which the subject matter jurisdiction of the Federal District Court was premised. Amended Complaint, ¶ 9. TMT invoked jurisdiction over the state law claims under the supplemental jurisdiction statute, *28 U.S.C. § 1367*, which provides jurisdiction over state law claims forming part of the same case or controversy as the federal claims. Hartnack is a Minnesota resident and TMT is a Minnesota Limited Liability Corporation. Amended Complaint, ¶¶ 1, 5. Therefore, the Court cannot maintain the case in federal court based on diversity.[12] "When the court dismisses federal claims, and there is no basis for diversity jurisdiction, the court no longer has original jurisdiction over the action and must consider whether to exercise supplemental **[*91]** jurisdiction over the state-law claims." *Walsh Bishop Assocs., Inc. v. O'Brien, Civ. No. 11-2673 (DSD/AJB), 2012 U.S. Dist. LEXIS 25219, 2012 WL 669069, at *8 (D. Minn. Feb. 28, 2012)* (citing *28 U.S.C. § 1367(c)(3)*; *Johnson v. City of Shorewood, 360 F.3d 810, 819 (8th Cir. 2004))*. "In the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine [judicial economy, convenience, fairness and comity -] will point toward declining to exercise jurisdiction over the remaining state-law claims." Id. (quoting *Johnson, 360 F.3d at 819*, quoting *Carnegie—Mellon Univ. v. Cohill, 484 U.S. 343, 350 n. 7, 108 S. Ct. 614, 98 L. Ed. 2d 720 (1988))*. Based on these factors, the Court finds that supplemental jurisdiction over TMT's state law claims against U.S. Bank (Counts Four (Violation of *Minn. Stat. Chapter 325F*), Five (Respondeat Superior), Eight (Breach of Contract) and Nine (Unjust Enrichment)), along with Counts Six (Intentional Misrepresentation) and Seven (Negligent Misrepresentation) against U.S. Bank and vanBranswijk and Hartnack, should not be undertaken. Therefore, the Court recommends that all state claims be dismissed without prejudice.

D. Dismissal of Federal Claims Against Remaining Defendants

The Court acknowledges that Tate, UCR and Potillo, who are named in Counts One (Civil RICO) and Two (Conspiracy **[*92]** to Violate RICO), and UCR, which is named in Count Three (Violation of *Section 1* of the Sherman Act), did not move for dismissal. In fact, neither Tate nor UCR have made an appearance in this case. Nonetheless, the Court recommends dismissal of these claims against these defendants with prejudice because, as set forth above, the claims fail as a matter of law. See, e.g. *Silverton v. Department of Treasury, 644 F.2d 1341,*

[12] At the motion hearing, U.S. Bank's counsel conceded that if the federal claims were dismissed, jurisdiction would be lacking over the state law claims.

1345 (9th Cir. 1981) ("A District Court may properly on its own motion dismiss an action as to defendants who have not moved to dismiss where such defendants are in a position similar to that of moving defendants or where claims against such defendants are integrally related.") (citations omitted); *Silva v. Federal Nat'l Mortg. Corp., Civ. No. 15-1514, 2015 U.S. Dist. LEXIS 171283, 2015 WL 9460559, at *5, n.2 (D. N.J. Dec. 23, 2015)* (granting moving defendants' motion to dismiss and noting that "[a] court dismissing claims against moving defendants may sua sponte dismiss identical claims against non-moving defendants.") (citation omitted); *Rose v. Arkansas Valley Envtl. & Util. Auth., 562 F. Supp. 1180, 1213, n.11 (W.D. Mo. 1983)* ("While only Rausch has moved for dismissal on this basis, it is clear that the same ruling would inevitably apply to each of the defendants. In these circumstances a court is empowered to act, sua sponte, to grant dismissal as to all defendants.") (emphasis in original) (citation omitted).

IV. RECOMMENDATION

For the reasons set forth above, it **[*93]** is recommended that U.S. Bank's Motion to Dismiss [Docket No. 51] be **GRANTED** in part and **DENIED** in part as follows:

1. Counts One (Civil RICO), Two (Conspiracy to Violate RICO), Three (Violation of *Section 1* of the Sherman Act) should be dismissed with prejudice as to all defendants.

2. Counts Four (Violation of *Minnesota Statute Chapter 325F*), Five (Respondeat Superior), Count Six (Intentional Misrepresentation (Fraud)), Seven (Negligent Misrepresentation), Eight (Breach of Contract) and Nine (Unjust Enrichment) should be dismissed without prejudice.

3. Count Ten (Negligent Supervision) should be dismissed with prejudice as to U.S. Bank.

Dated: January 4, 2016

/s/ Janie S. Mayeron

JANIE S. MAYERON

United States Magistrate Judge

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Neal v. Select Portfolio Servicing, Inc.

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

January 5, 2016, Decided; January 5, 2016, Filed

Case No. 5:15-cv-03212-EJD

Reporter
2016 U.S. Dist. LEXIS 772 *; 2016 WL 48124

RALPH NEAL, Plaintiff, v. SELECT PORTFOLIO SERVICING, INC., et al., Defendants.

Subsequent History: Related proceeding at, Motion denied by *Neal v. Select Portfolio Servicing, 2017 U.S. Dist. LEXIS 31563, 2017 WL 878380 (N.D. Cal., Mar. 6, 2017)*

Motion granted by, Dismissed by, Judgment entered by *Neal v. Select Portfolio Servicing, Inc., 2017 U.S. Dist. LEXIS 39938, 2017 WL 1065284 (N.D. Cal., Mar. 20, 2017)*

Related proceeding at *Neal v. Select Portfolio Servicing, Inc., 2018 U.S. Dist. LEXIS 26076, 2018 WL 905942 (N.D. Cal., Feb. 15, 2018)*

Related proceeding at *Neal v. Select Portfolio Servicing, Inc., 2021 U.S. Dist. LEXIS 35679 (N.D. Cal., Feb. 25, 2021)*

Core Terms

alleges, securitization, foreclosure, accounting, leave to amend, borrower, trust deed, promise, promissory estoppel, unjust enrichment, prevention, lack standing, homeowner, transfers, asserts, parties, pooling, terms, cause of action, quiet title, quasi-contract, modification, obligations, practices, mortgage, lender, motion to dismiss, violations, courts, modify

LexisNexis® Headnotes

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

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

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

Fed. R. Civ. P. 8(a) requires a plaintiff to plead each claim with sufficient specificity to give the defendant fair notice of what the claim is and the grounds upon which it rests. A complaint which falls short of the *Rule 8(a)* standard may be dismissed if it fails to state a claim upon which relief can be granted. *Fed. R. Civ. P. 12(b)(6)*. Dismissal under *Rule 12(b)(6)* is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory. Moreover, the factual allegations must be enough to raise a right to relief above the speculative level such that the claim is plausible on its face.

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

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

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

When deciding whether to grant a motion to dismiss, the court generally may not consider any material beyond the pleadings. However, the court may consider material submitted as part of the complaint or relied upon in the complaint, and may also consider material subject to judicial notice. In addition, the court must generally accept as true all well-pleaded factual allegations. The court must also construe the alleged facts in the light most favorable to the plaintiff. However, courts are not bound to accept as true a legal conclusion couched as a factual allegation.

Business & Corporate Compliance > ... > Types of Commercial Transactions > Negotiable Instruments > Transfer of Negotiable Instruments

Civil Procedure > ... > Justiciability > Standing > Third Party Standing

HN3[] **Negotiable Instruments, Transfer of Negotiable Instruments**

Third-party borrowers lack standing to assert problems in the assignment of the loan.

Civil Procedure > ... > Justiciability > Standing > Third Party Standing

Contracts Law > Third Parties > Beneficiaries > Claims & Enforcement

HN4[] **Standing, Third Party Standing**

Under California law, someone who is not a party to a contract has no standing to enforce it.

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

HN5[] **Amendment of Pleadings, Leave of Court**

A motion for leave to amend may be denied if it appears to be futile or legally insufficient.

Banking Law > ... > Banking & Finance > Consumer Protection > State Law

Real Property Law > Financing > Mortgages & Other Security Instruments > Mortgagor's Interests

HN6[] **Consumer Protection, State Law**

Even though a portion of the California Homeowner's *Bill of Rights* begins with "upon request from a borrower who requests a foreclosure prevention alternative," courts have been reluctant to interpret this phrase as requiring a homeowner to specifically request a single point of contact. Courts do, however, interpret the statute as requiring the borrower to request a foreclosure prevention alternative.

Business & Corporate Compliance > ... > Contract Formation > Consideration > Promissory Estoppel

HN7[] **Consideration, Promissory Estoppel**

A claim for promissory estoppel requires the establishment of the following four elements: (1) a promise that is clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) the reliance must be reasonable and foreseeable; and (4) the party asserting the estoppel must be injured by his or her reliance.

Business & Corporate Compliance > ... > Contract Formation > Consideration > Promissory Estoppel

HN8[] **Consideration, Promissory Estoppel**

A promise that is vague, general, or of indeterminate application is not enforceable through a claim for promissory estoppel. Where an alleged promise is conditional or subject to further negotiations, the clear and unambiguous requirement for promissory estoppel is not met.

Business & Corporate Compliance > ... > Contract Formation > Consideration > Promissory Estoppel

HN9[] **Consideration, Promissory Estoppel**

Promissory estoppel only binds a promissor when he should reasonably expect a substantial change of position, either by act or forbearance, in reliance on his promise, if injustice can be avoided only by its enforcement.

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

Contracts Law > Remedies > Restitution

HN10[] **Equitable Relief, Quantum Meruit**

In California, a standalone cause of action for "unjust enrichment," when synonymous with "restitution," does not exist. This is because unjust enrichment and restitution simply describe the theory underlying a claim that a defendant has been unjustly conferred a benefit through mistake, fraud, coercion, or request. The return of that benefit is the remedy that is typically sought in a quasi-contract cause of action. When a plaintiff asserts unjust enrichment, a court may construe the cause of action as a quasi-contract claim seeking restitution. Importantly, however, a claim for quasi-contract cannot lie where there exists between the parties a valid express contract covering the same subject matter.

Civil Procedure > Remedies > Equitable Accountings

HN11[] **Remedies, Equitable Accountings**

An accounting is generally an equitable remedy. In rare cases, an accounting can be a cause of action when a defendant has a fiduciary duty to a plaintiff which requires an accounting, and some balance is due to the plaintiff that can only be ascertained by a judicial accounting. Thus, two elements must be pled: (1) the relationship between a plaintiff and defendant, such as a fiduciary relationship, calls for an accounting, and (2) the defendant owes a balance to the plaintiff that is too complicated to calculate without an accounting from the court. An action for accounting is not available if the amount of debt can be made certain by calculation.

Civil Procedure > ... > Declaratory Judgments > Federal Declaratory Judgments > Scope of Declaratory Judgments

HN12[] **Federal Declaratory Judgments, Scope of Declaratory Judgments**

Under *28 U.S.C.S. § 2201*, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. However, such relief is limited by the express terms of the statute to cases "of actual controversy. *28 U.S.C.S. § 2201(a)*. Consequently, there must be a real controversy between the parties for a plaintiff to assert a claim for declaratory judgment.

Real Property Law > Title Quality > Adverse Claim Actions > Quiet Title Actions

HN13[] **Adverse Claim Actions, Quiet Title Actions**

A claim to quiet title must describe five elements: (1) a legal description of the property and its street address or common designation, (2) the title of the plaintiff and the basis of the title, (3) the adverse claims to the title of the plaintiff, (4) the date as of which the determination is sought and (5) a prayer for the determination of the title of the plaintiff against the adverse claims. *Cal. Civ. Proc. Code § 761.020*.

Real Property Law > Title Quality > Adverse Claim Actions > Quiet Title Actions

HN14[] **Adverse Claim Actions, Quiet Title Actions**

A basic requirement of an action to quiet title is an allegation that plaintiffs are the rightful owners of the property, i.e., that they have satisfied their obligations under the Deed of Trust. Indeed, the cloud upon title persists until the debt is paid, and the borrower cannot clear his title without satisfying his debt. Thus, under California law, a borrower may not assert an action to quiet title against a mortgagee without first paying the outstanding debt on the property.

Banking Law > ... > Business & Corporate Compliance > Banking & Finance > Federal Acts

Banking Law > ... > Banking & Finance > Consumer Protection > Unfair & Deceptive Credit Practices

HN15[] **Banking Law, Federal Acts**

There is no private right of action under the *Consumer Financial Protection Act of 2010*.

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

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

The Unfair Competition Law (UCL), Cal. Bus. & Prof. Code § 17200 proscribes three varieties of competition: acts or practices which are unlawful, or unfair, or fraudulent. "Unlawful" practices are forbidden by law, be it civil or criminal, federal, state, or municipal, statutory, regulatory, or court-made. "Unfair" practices constitute conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition. The "fraudulent" prong under the UCL requires a showing of actual or potential deception to some members of the public, or harm to the public interest. The UCL borrows violations of other laws and treats them as unfair business practices under the unlawful prong, and also makes clear that a practice may be deemed unfair even if not specifically proscribed by some other law.

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

HN17[] **Complaints, Requirements for Complaint**

A complaint containing naked assertions devoid of further factual enhancement will not suffice.

Counsel: **[*1]** Ralph Neal, Plaintiff, Pro se, San Jose, CA.

For Select Portfolio Servicing, Inc., Bank of America Corporation, N.A., Defendants: Bryan Lakeith Hawkins, Stoel Rives LLP, Sacramento, CA.

Judges: EDWARD J. DAVILA, United States District Judge.

Opinion by: EDWARD J. DAVILA

Opinion

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

Re: Dkt. No. 7

In this action, Plaintiff Ralph Neal ("Plaintiff") brings suit against Select Portfolio Servicing, Inc. ("SPS") and Bank of America, N.A. (collectively "Defendants") for claims related to a home loan he obtained from Washington Mutual Bank ("WAMU") in 2007. Presently before the court is Defendants' motion to dismiss the Complaint pursuant to *Federal Rule of Civil Procedure 12(b)(6)*. Dkt. No. 7. Plaintiff opposes the motion. Dkt. No. 15. Having carefully reviewed the relevant papers submitted by the parties, the Court GRANTS Defendants' Motion to Dismiss for the reasons explained below.

I. FACTUAL AND PROCEDURAL BACKGROUND

On May 25, 2007, Plaintiff obtained a home loan in the amount of $1,150,000 secured by a note and deed of trust ("DOT") encumbering his residence located at 1588 Calco Creek Drive in San Jose, California (the "Property"). Dkt. No. 8, at Ex. A.[1] The DOT was recorded with the Santa Clara County Recorder's Office **[*2]** on May 17, 2006, and

[1] Defendants' request for judicial notice is GRANTED. See *Fed. R. Evid. 201(b)* (the court "may judicially notice a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned"); see also *Reyn's Pasta Bella, LLC v. Visa USA, Inc., 442 F.3d 741, 746 n.6 (9th Cir. 2006)* (the court "may take judicial notice of court filings and other matters of public record").

identifies WAMU as lender and beneficiary on the loan, Plaintiff as its trustor, and California Reconveyance Company ("CRC") as the trustee. Id. at 6-7.

On November 4, 2010[2], JP Morgan Chase Bank ("Chase"), the successor-in-interest to WAMU, recorded an "Assignment of Deed of Trust" which purportedly transferred its interest to Bank of America. Id. at Ex. B. The Assignment identified Bank of America as the successor by merger to LaSalle Bank, which previously served as a trustee for WAMU Mortgage Pass-Through Certificate Series 2007-OA6. Id. The pertinent portion of the Assignment states:

> FOR VALUE RECEIVED, the undersigned hereby grants, assigns and transfers to Bank of America, National Association, successor by merger to LaSalle Bank NA as trustee for WaMu Mortgage Pass-Through Certificates Series 2007-OA6 Trust **[*3]** all beneficial interest under that certain Deed of Trust dated 05-17-2007 . . . .
> DATE: November 03, 2010

Id.

Plaintiff initiated this action in Santa Clara County Superior Court on June 1, 2015. He alleges that SPS now claims to be the current servicer of his loan. Dkt. No. 2 at ¶ 31. He further alleges that Defendants made "transfers" and "assignments" of the loan such that "it is now unknown and doubtful who is the current lender/beneficiary/assignee with legal authority and standing regarding the mortgage" on the Property. Id. at ¶ 12. Plaintiff also contends "upon information and belief" that Defendants used deceptive business models "with the purpose of immediately selling pools of loans to the securities market and with the fraudulent intent to foreclose rather than modifying or helping homeowners" which he asserts is "contrary to federal and state efforts to assist homeowners." Id. at ¶ 13. According to Plaintiff, Defendants are "engaged in the securitization of loans whereby they have been buying and selling mostly toxic loans as Trustees of a Securitized Trust with pooling and service agreements." **[*4]** Id. at ¶ 15.

Specific to his own loan, Plaintiff alleges Chase did not have authority to execute an assignment of the DOT to Bank of America because there was "no prior chain of assignment, recorded or unrecorded," to Chase from the original lender, WAMU. Id. at ¶ 28. Plaintiff also asserts that without an effective assignment, Defendants lack the requisite standing to initiate a foreclosure or execute a loan modification. Id. at ¶ 33. In addition, Plaintiff alleges his loan was assigned to a securitized trust after the trust's closing date, rendering the assignment void. Id. at ¶ 36. Furthermore, Plaintiff asserts that Defendants violated the California Homeowner's *Bill of Rights* ("CHBOR") by failing to provide a single point of contact ("SPOC") for a loan modification application. Id. at ¶ 54.

Procedurally, SPS removed this case to federal court on July 10, 2015. Defendants filed the instant motion on July 17, 2015, to which Plaintiff filed an opposition on September 14, 2015. Defendants filed a reply to the opposition on September 24, 2015.

II. LEGAL STANDARD

HN1[ ] *Federal Rule of Civil Procedure 8(a)* requires a plaintiff to plead each claim with sufficient specificity to "give the defendant fair notice of what the . . . claim is and the **[*5]** grounds upon which it rests." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (internal quotations omitted). A complaint which falls short of the *Rule 8(a)* standard may be dismissed if it fails to state a claim upon which relief can be granted. *Fed. R. Civ. P. 12(b)(6)*. "Dismissal under *Rule 12(b)(6)* is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory." *Mendiondo v. Centinela Hosp. Med. Ctr., 521 F.3d 1097, 1104 (9th Cir. 2008)*. Moreover, the factual allegations "must be enough to raise a right to relief above the speculative level" such that the claim "is plausible on its face." *Twombly, 550 U.S. at 556-57*.

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[2] On November 3, 2010 a Notice of Default was also recorded by CRC. Dkt. No. 8, at Ex. C.

HN2[] When deciding whether to grant a motion to dismiss, the court generally "may not consider any material beyond the pleadings." Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1555 n. 19 (9th Cir. 1990). However, the court may consider material submitted as part of the complaint or relied upon in the complaint, and may also consider material subject to judicial notice. See Lee v. City of Los Angeles, 250 F.3d 668, 688-69 (9th Cir. 2001).

In addition, the court must generally accept as true all "well-pleaded factual allegations." Ashcroft v. Iqbal, 556 U.S. 662, 664, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). The court must also construe the alleged facts in the light most favorable to the plaintiff. Love v. United States, 915 F.2d 1242, 1245 (9th Cir. 1988). However, "courts are not bound to accept as true a legal conclusion couched as a factual allegation." Iqbal, 556 U.S. at 678.

III. DISCUSSION

Plaintiff asserts the following claims: (1) Wrongful Assignment of Deed of Trust; (2) Lack of **[*6]** Legal Standing; (3) violation of the CHBOR; (4) Promissory Estoppel; (5) Unjust Enrichment; (6) Accounting; (7) Declaratory Relief; (8) Quiet Title; (9) violation of the Unfair Competition Law ("UCL"), California Business and Professions Code § 17200; and (10) violations of Consumer Financial Protection Act ("CFPA"). Defendants move to dismiss all ten claims, each of which is discussed below.

A. Wrongful Assignment of Deed of Trust and Lack of Legal Standing

In the first claim entitled "Wrongful Assignment of Deed of Trust," Plaintiff alleges that Chase "had no legal authority" to execute an assignment of the DOT to Bank of America because there was no "chain of assignment" from WAMU, his original lender, to Chase. Plaintiff further alleges that Defendants improperly securitized the DOT by assigning it to a trust after the closing date required by the trust's governing documents, commonly referred to as a Pooling and Servicing Agreement ("PSA"). Plaintiff makes similar allegations in his second claim entitled "Lack of Legal Standing."

In response to these claims, Defendants argue it is actually Plaintiff who lacks standing to challenge either the validity of the assignment or any irregularities in the securitization process. The court **[*7]** agrees. As to the assignment of the DOT from WAMU to Chase, both state and federal courts have held that HN3[] "third-party borrowers lack standing to assert problems in the assignment of the loan." Flores v. GMAC Mortg., LLC, No. C-12-794-SI, 2013 U.S. Dist. LEXIS 68606, 2013 WL 2049388, at *3 (N.D. Cal. May 14, 2013); Moran v. GMAC Mortg., LLC, No. 13-CV-04981-LHK, 2014 U.S. Dist. LEXIS 84411, 2014 WL 3853833, at *4 (N.D. Cal. Aug. 5, 2014); Simmons v. Aurora Bank, FSB, No. 13-CV-00482 HRL, 2013 U.S. Dist. LEXIS 142917, 2013 WL 5508136, at *2 (N.D. Cal. Sept. 30, 2013) ("Even if there were some defect in the assignment of the deed of trust, that assignment would not have changed plaintiff's payment obligations."); Fontenot v. Wells Fargo Bank, N.A., 198 Cal. App. 4th 256, 272, 129 Cal. Rptr. 3d 467 (2011) ("If MERS . . . lacked the authority to make the assignment, the true victim was not plaintiff but the original lender, which would have suffered the unauthorized loss of a $1 million promissory note"). This so because an alleged defect in the assignment chain does not invalidate or change the terms of the underlying loan. See Fontenot, 198 Cal. App. 4th at 272 (observing, in addressing a similar claim, that "an assignment merely substituted one creditor for another, without changing [plaintiff's] obligations under the note"). This means that Plaintiff remains obligated to make loan payments as required by his agreement with WAMU irrespective of the validity or invalidity of the DOT assignment. Indeed, as another court has observed, the "true victim" in **[*8]** this scenario is not Plaintiff, but the noteholder, because it "would have suffered the unauthorized loss of a $1 million promissory note." Id. Therefore, Plaintiff cannot assert a claim for "Wrongful Assignment of Deed of Trust."

The same is true of Plaintiff's challenge to any aspect of the securitization process as completed in violation of the trust's PSA. HN4[] Under California law, "someone who is not a party to [a] contract has no standing to enforce it." Jones v. Aetna Cas. & Sur. Co., 26 Cal. App. 4th 1717, 1722, 33 Cal. Rptr. 2d 291 (1994). To that end, the

California Court of Appeal held in *Jenkins v. JP Morgan Chase Bank, N.A., 216 Cal. App. 4th 497, 515, 156 Cal. Rptr. 3d 912 (2013)*, that:

> As an unrelated third party to the alleged securitization, and any other subsequent transfers of the beneficial interest under the promissory note, [plaintiff] lacks standing to enforce any agreements, including the investment trust's pooling servicing agreement, relating to such transactions . . . even if any subsequent transfers of the note were invalid, [plaintiff] is not the victim of such invalid transfers because [plaintiff's] obligations under the note remained unchanged. Instead, the true victim may be an entity or individual who believes it has a present beneficial interest in the promissory note and may suffer the unauthorized loss of their interest in the note. **[*9]**

Similarly, this court has dismissed as legally implausible analogous theories based on defects in the securitization process. See, e.g., *Sepehry-Fard v. Aurora Bank FSB, No. 5:12-cv-00871 EJD, 2013 U.S. Dist. LEXIS 12048, 2013 WL 597788, at *4 (N.D. Cal. Jan. 29, 2013)* (rejecting theories of liability based on securitization of the note and violation of the PSA).

Plaintiff relies on *Glaski v. Bank of America, N.A., 218 Cal. App. 4th 1079, 160 Cal. Rptr. 3d 449 (2013)*, to support his standing to challenge the securitization of his loan. In Glaski, the California Court of Appeal found that a plaintiff sufficiently stated a claim for wrongful foreclosure by alleging the DOT was transferred to a securitized trust after the pool's closing date. *218 Cal. App. 4th at 1097-98*. This court has previously observed, however, that Glaski represents a distinct minority view regarding a borrower's standing to enforce or assert claims based on alleged violations of a trust's PSA, and this district has uniformly rejected Glaski as persuasive authority. See *Miller v. JP Morgan Chase Bank, N.A., No. 5:13-CV-03192-EJD, 2014 U.S. Dist. LEXIS 110038, 2014 WL 3921361, at *4 (N.D. Cal. August 8, 2014)* ("The California Supreme Court has not ruled on whether borrowers may challenge the mortgage securitization process so as to reconcile Glaski with other California authority, but unpublished Court of Appeal opinions have characterized Glaski as the minority view."); see also *Khan v. ReconTrust Co., 81 F. Supp. 3d 867, 873 (N.D. Cal. 2014)* ("The court **[*10]** . . . concludes that plaintiffs lack standing to challenge noncompliance with a PSA in securitization unless they are parties to the PSA or third party beneficiaries of the PSA."); see also *Dahnken v. Wells Fargo Bank, N.A., No. C-13-2838-PJH, 2013 U.S. Dist. LEXIS 160686, 2013 WL 5979356, at *2 (N.D. Cal. Nov. 8, 2013)* ("[T]he court adopts the majority position of courts within this district, which is that plaintiffs lack standing to challenge noncompliance with a PSA in securitization unless they are parties to the PSA or third party beneficiaries of the PSA") (citations omitted); see also *McGough v. Wells Fargo Bank, N.A., No. C-12-0050-TEH, 2012 U.S. Dist. LEXIS 84327, 2012 WL 2277931, at *4 (N.D. Cal. June 18, 2012)* ("To the extent that Plaintiff bases her claims on the theory that Wells Fargo allegedly failed to comply with the terms of the PSA, the court finds that she lacks standing to do so because she is neither a party to, nor a third party beneficiary of, that agreement"); see also *Almutarreb v. Bank of New York Trust Co., N.A., No. C-12-3061-EMC, 2012 U.S. Dist. LEXIS 137202, 2012 WL 4371410, at *2 (N.D. Cal. Sept. 24, 2012)* (holding that plaintiffs "lack standing to challenge the validity of the securitization process, including whether the loan transfer occurred outside the temporal bounds prescribed by the PSA"). So has the Ninth Circuit Court of Appeals. *Davies v. Deutsche Bank Nat'l Trust Co. (In re Davies), 565 Fed. Appx. 630, 633 (9th Cir. 2014)* ("[Plaintiff] cannot challenge violations of the pooling and **[*11]** servicing agreement . . . . the weight of authority holds that debtors in [plaintiff's] shoes - who are not parties to the pooling and servicing agreements - cannot challenge them . . . .")

For these reasons, the court finds as a matter of law that Plaintiff lacks the requisite standing to challenge irregularities in either the assignment or the securitization of his home loan. Accordingly, the first and second claims will be dismissed without leave to amend since allowing for further amendment would be futile under these circumstances. *Miller v. Rykoff-Sexton, 845 F. 2d 209, 214 (9th Cir. 1988)* ("***HN5***[] A motion for leave to amend may be denied if it appears to be futile or legally insufficient.").

B. California Homeowner's *Bill of Rights*

In the third claim for violation of CHBOR, Plaintiff alleges "there were various document irregularities" within the purview of the statute. He further contends that Defendants denied him a "rightful opportunity" for a loan modification and instead chose to short sell or takeover the Property. Plaintiff also alleges that Defendants failed to provide him with a SPOC, which he argues is a requirement under the statute

Defendants argue that Plaintiff has not stated a claim under the CHBOR because a facial reading of the statute requires **[*12]** a homeowner to initiate a request for a SPOC. Defendants further assert that even if Plaintiff did specifically request a SPOC, the provision of such a contact is nonetheless dependent on a "request for a foreclosure prevention alternative" from the homeowner. According to Defendants, Plaintiff failed to allege such a request in his complaint.

The relevant portion of the CHBOR is contained in *California Civil Code § 2923.7(a)*. It reads as follows:

> Upon request from a borrower who requests a foreclosure prevention alternative, the mortgage servicer shall promptly establish a single point of contact and provide to the borrower one or more direct means of communication with the single point of contact

HN6[] Even though this portion of the CHBOR begins with "upon request from a borrower who requests a foreclosure prevention alternative," courts have been reluctant to interpret this phrase as requiring a homeowner to specifically request a SPOC. See *McFarland v. JP Morgan Chase Bank, No. 13-CV-01838-JGB, 2014 U.S. Dist. LEXIS 118240, 2014 WL 4119399, at *11 (C.D. Cal. Aug. 21, 2014)* (citing *Penermon v. Wells Fargo Bank, N.A., 47 F. Supp. 3d 982, 1000 (N.D. Cal. 2014))*. Courts do, however, interpret the statute as requiring the borrower to request a foreclosure prevention alternative. *Penermon, 47 F. Supp. 3d at 1000* ("A plain reading of the statute requires Wells Fargo to assign a SPOC when a borrower requests a foreclosure **[*13]** prevention alternative"). A request for a loan modification qualifies as a foreclosure prevention alternative. Id. ("Enrico contacted Wells Fargo to request a loan modification, which is a request for 'a foreclosure prevention alternative'"); see also *Tapia, 2015 U.S. Dist. LEXIS 102837, 2015 WL 4650066, at *3* ("Plaintiff alleges that he attempted to modify his mortgage with Defendant several times . . . . because Plaintiff alleges he requested a foreclosure prevention alternative and was not appointed a contact person, this series of facts is sufficient to both give notice to the Defendant and to plausibly suggest entitlement to relief").

Here, it is not clear from Plaintiff's allegations whether and when he requested a "foreclosure prevention alternative," such that the court can determine whether he was then wrongfully denied a SPOC. Although he argues in opposition that he had been "on many occasions . . . trying to seek modification of the loan even from the time when Chase was handling the servicing," this allegation is not contained in the Complaint. Even if it was, the phrase "trying to seek" is ambiguous; trying to request something is not the same as actually requesting it.

Based on the current allegations, Plaintiff has not stated **[*14]** a claim under the CHBOR. The third claim will be dismissed with leave to amend.

C. Promissory Estoppel

In support of a claim for promissory estoppel, Plaintiff alleges SPS agreed to modify his loan and that he relied on that promise to his detriment. Defendants respond to this claim by pointing out that Plaintiff failed to allege a "clear and unambiguous promise" or justifiable reliance on such a promise.

HN7[] A claim for promissory estoppel requires the establishment of the following four elements: (1) a promise that is clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) the reliance must be reasonable and foreseeable; and (4) the party asserting the estoppel must be injured by his or her reliance." *Cockrell v. Wells Fargo Bank, N.A., No. 13-cv-02072-SC, 2013 U.S. Dist. LEXIS 103050, 2013 WL 3830048, at *1 (N.D. Cal. July 23, 2013)*; see also *Boon Rawd Trading Int'l Co., Ltd. v. Paleewong Trading Co., Inc., 688 F. Supp. 2d 940, 953 (N.D. Cal. 2010)*.

Plaintiff has failed to state a claim for promissory estoppel. As to the first element, Plaintiff does not disclose anything beyond a terse and conclusory statement that an unidentified individual at SPS agreed to modify his loan, which he simultaneously concedes did not contain any specific terms. Such an allegation does not constitute a "clear and ambiguous" promise. See *Aguilar v. Int'l Longshoremen's Union Local #10, 966 F.2d 443, 446 (9th Cir. 1992)* **[*15]** (***HN8***[] "[A] promise that is 'vague, general or of indeterminate application' is not enforceable through a claim for promissory estoppel); *Aguinaldo v. Ocwen Loan Servicing, LLC, No. 5:12-CV-01393-EJD, 2012 U.S. Dist. LEXIS 125400, 2012 WL 3835080, at *4 (N.D. Cal. Sep. 4, 2012)* ("Where an alleged promise is conditional or subject to further negotiations, the 'clear and unambiguous' requirement for promissory estoppel is not met."). The case Plaintiff relies on for this claim, *Garcia v. World Savings, FSB, 183 Cal. App. 4th 1031, 107 Cal. Rptr. 3d 683 (2010)*, does not hold otherwise.

In addition, the current allegations do not establish the second and third elements, which together require justifiable reliance. ***HN9***[] Promissory estoppel only "binds a promissor 'when he should reasonably expect a substantial change of position, either by act or forbearance, in reliance on his promise, if injustice can be avoided only by its enforcement.'" *Jones v. Wachovia Bank, 230 Cal. App. 4th 935, 944, 179 Cal. Rptr. 3d 21 (2014)* (quoting *Garcia, 183 Cal. App. 4th at 1041*). Outside of a conclusion, Plaintiff did not plead what he did or did not do in reliance on SPS's alleges promise to modify his loan.

Due to these deficiencies, the third claim for promissory estoppel will be dismissed with leave to amend.

D. Unjust Enrichment

Within the claim for unjust enrichment, Plaintiff alleges that Defendants materially altered the total amount of his loan by **[*16]** charging exorbitant fees and hidden charges. Defendants argue that unjust enrichment is not a valid cause of action.

HN10[] In California, a standalone cause of action for "unjust enrichment," when synonymous with "restitution," does not exist. *Astiana v. Hain Celestial Grp., Inc., 783 F. 3d 753, 762 (9th Cir. 2015)*. This is because unjust enrichment and restitution simply describe the theory underlying a claim that a defendant has been unjustly conferred a benefit "through mistake, fraud, coercion, or request." Id. The return of that benefit is the remedy that is typically "sought in a quasi-contract cause of action." Id.

When a plaintiff asserts unjust enrichment, a court may "construe the cause of action as a quasi-contract claim seeking restitution." Id.; see *Jogani v. Super. Ct., 165 Cal. App. 4th 901, 911, 81 Cal. Rptr. 3d 503 (2008)* ("As Jogani concedes, however, unjust enrichment is not a cause of action. Rather, it is a general principle underlying various doctrines and remedies, including quasi-contract."). Importantly, however, a claim for quasi-contract "cannot lie where there exists between the parties a valid express contract covering the same subject matter." *Lance Camper Mfg. Corp. v. Republic Indemnity Co., 44 Cal. App. 4th 194, 203, 51 Cal. Rptr. 2d 622 (1996)*.

Here, Plaintiff's allegations reveal that this claim is rooted in the same subject matter covered by an express contract, namely the DOT he executed with his original **[*17]** lender. Plaintiff cannot, on the one hand, acknowledge this written contract and, on the other, maintain a claim for quasi-contract based on terms governed by that document. Id. (holding that, to maintain a claim for quasi-contract, the plaintiff "must allege that the express contract is void or was rescinded in order to proceed"). The fifth claim for unjust enrichment will therefore be dismissed with leave to amend.

E. Accounting

HN11[] An accounting is generally an equitable remedy. *Pantoja v. Countrywide Home Loans, Inc., 640 F. Supp. 2d 1177, 1187 (N.D. Cal. 2009)*. In rare cases, an accounting can be a cause of action when a defendant has a fiduciary duty to a plaintiff which requires an accounting, and some balance is due to the plaintiff that can only be ascertained by a judicial accounting. *Id. at 1191*. Thus, two elements must be pled: "(1) the relationship between a plaintiff and defendant, such as a fiduciary relationship, calls for an accounting, and (2) the defendant owes a balance to the plaintiff that is too complicated to calculate without an accounting from the Court." *Ford v. Lehman Bros. Bank, FSB, No. C 12-00842 CRB, 2012 U.S. Dist. LEXIS 85600, 2012 WL 2343898, at *14 (N.D. Cal. June*

20, 2012) (citing Teselle v. McLoughlin, 173 Cal. App. 4th 156, 179, 92 Cal. Rptr. 3d 696 (2009)). "An action for accounting is not available if the amount of debt can be made certain by calculation." Id.

Plaintiff's allegations fall far short from pleading a viable accounting claim for several **[*18]** reasons. First, Plaintiff admits there is no fiduciary relationship between himself and any Defendant, and despite his representation to the contrary, nothing in Arbuckle v. Clifford F. Reid, Inc., 118 Cal. App. 272, 4 P.2d 978 (1931), excuses that element. Second, Plaintiff has not plausibly alleged why anything about his loan is so complicated such that only a judicial accounting can sort it out. Vague allusion to unspecified "charges and fees" and reference to the monthly loan payment is not enough. Third, the validity of the DOT assignment is irrelevant to an accounting claim.

Due to these deficiencies, the sixth claim for accounting will be dismissed with leave to amend.

F. Declaratory Relief

HN12[] Under 28 U.S.C. § 2201, "any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." However, such relief is limited by the express terms of the statute to cases "of actual controversy." 28 U.S.C. 2201(a). Consequently, there must be a real controversy between the parties for a plaintiff to assert a claim for declaratory judgment. See Principal Life Ins. Co. v. Robinson, 394 F.3d 665, 669 (9th Cir. 2005) ("[W]e have long held that the district court must first inquire whether there is an actual case or **[*19]** controversy within its jurisdiction.").

Plaintiff has not cited to facts which raise an actual controversy between himself and any defendant. It appears this claim is based on a portion of the PSA entitled "Article II - Assumption of Liabilities." But as has been explained above, Plaintiff is not a party to the PSA and has no standing to either enforce or challenge it. Accordingly, he cannot base a claim for declaratory relief on the terms of that document. This claim will be dismissed with leave to amend.

G. Quiet Title

HN13[] A claim to quiet title must describe five elements: "(1) a legal description of the property and its street address or common designation, (2) the title of the plaintiff and the basis of the title, (3) the adverse claims to the title of the plaintiff, (4) the date as of which the determination is sought and (5) a prayer for the determination of the title of the plaintiff against the adverse claims." Janolkar v. Bank of Am., N.A., No. 5:12-cv-03693 EJD, 2012 U.S. Dist. LEXIS 174756, 2012 WL 6115629, at *3 (N.D. Cal. Dec. 10, 2012) (citing Cal. Civ. Proc. Code § 761.020).

Plaintiff's quiet title claim is particularly deficient on the second element because the allegations do not plausibly establish a basis for Plaintiff's entitlement to the Property. "***HN14***[] A basic requirement of an action to **[*20]** quiet title is an allegation that plaintiffs 'are the rightful owners of the property, i.e., that they have satisfied their obligations under the Deed of Trust.'" Santos v. Countrywide Home Loans, No. Civ. 2:09-02642, 2009 U.S. Dist. LEXIS 103453, 2009 WL 3756337, at *4 (E.D. Cal. Nov.6, 2009) (quoting Kelley v. Mortg. Elec. Reg. Sys., Inc., 642 F. Supp. 2d 1048, 1057 (N.D. Cal. 2009)). Indeed, "[t]he cloud upon title persists until the debt is paid," and the borrower "cannot clear his title without satisfying his debt." Aguilar v. Bocci, 39 Cal. App. 3d 475, 477-78, 114 Cal. Rptr. 91 (1974). Thus, "[u]nder California law, a borrower may not assert an action to quiet title against a mortgagee without first paying the outstanding debt on the property." Williams v. Bank of America Nat'l Assoc., No. 15-CV-00792-LHK, 2015 U.S. Dist. LEXIS 148337, 2015 WL 6602403, at *7 (N.D. Cal. Oct. 30, 2015).

Here, Plaintiff suggests a "legal and equitable interest" based on his position as trustor to the DOT. But the terms of the DOT also state that Plaintiff is obligated to make loan payments, and Plaintiff has not alleged the ability to satisfy the debt in order to quiet title. To the extent Plaintiff contends that an alleged void assignment relieves him of the contractual payment obligation, the court disagrees for reasons already explained. See Simmons, 2013 U.S.

*Dist. LEXIS 142917, 2013 WL 5508136, at *2*. The cases cited by Plaintiff, all of which are factually distinguishable because they discuss foreclosure sales, do not compel another conclusion.

Since Plaintiff has not described **[*21]** a plausible basis for ownership of the Property, the claim for quiet title will be dismissed with leave to amend.

H. Violation of the CFPA

In the Complaint, Plaintiff alleges "Defendants are in clear violation of the *Consumer Financial Protection Act of 2010*." However, ***HN15***[] there is no private right of action under the CFPA. *Nguyen v. Ridgewood Sav. Bank, No. 14-CV-1058-MKB, 2015 U.S. Dist. LEXIS 64301, 2015 WL 2354308, at *11 (E.D.N.Y. May 15, 2015)* ("Plaintiffs provide no statutory basis, and the Court can find none, for finding a private right of action under these provisions of the statute, which outline duties, authorities and enforcement powers . . . ."); see *Johnson v. J.P. Morgan Chase Nat'l Corp. Servs., Inc., No. 13-CV-678-MOC-DSC, 2014 U.S. Dist. LEXIS 122552, 2014 WL 4384023, at *5 (W.D.N.C. Aug. 5, 2014)* ("[T]here is no private right of action under the CFPA."). This claim will be dismissed without leave to amend because allowing a further amendment would be futile. *Miller, 845 F. 2d at 214*.

I. Violation of the UCL

HN16[] The UCL proscribes three varieties of competition: "acts or practices which are unlawful, or unfair, or fraudulent." *Khoury v. Maly's of California, Inc., 14 Cal. App. 4th 612, 618-19, 17 Cal. Rptr. 2d 708 (1993)*. "Unlawful" practices are "forbidden by law, be it civil or criminal, federal, state, or municipal, statutory, regulatory, or court-made." *Saunders v. Super. Ct., 27 Cal. App. 4th 832, 838, 33 Cal. Rptr. 2d 438 (1999)*. "Unfair" practices constitute "conduct that threatens an incipient violation of an ***antitrust law***, or violates **[*22]** the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Cal-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 20 Cal. 4th 163, 187, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)*. The "fraudulent" prong under the UCL requires a showing of actual or potential deception to some members of the public, or harm to the public interest. See *id. at 180*; see also *McKell v. Wash. Mut., Inc., 142 Cal. App. 4th 1457, 49 Cal. Rptr. 3d 227 (2006)*. The UCL 'borrows' violations of other laws and treats them as unfair business practices under the unlawful prong, and also "makes clear that a practice may be deemed unfair even if not specifically proscribed by some other law." *Cal-Tech, 20 Cal. 4th at 180*.

Plaintiff has not pled a plausible UCL claim. The claim fails to the extent it is based on any of his other dismissed claims. See *Franczak v. Suntrust Mortg. Inc., No. 5:12-cv-01453 EJD, 2013 U.S. Dist. LEXIS 126977, 2013 WL 4764327, at * (N.D. Cal. Sept. 5, 2013)*. In addition, neither the conclusory allegation that Defendants violated the UCL by "engag[ing] in deceptive business practices with respect to loan servicing" and "related foreclosure activities," nor the list of general practices which follow that allegation, are sufficient to satisfy the applicable pleading standard. See *Ashcroft, 556 U.S. at 678* (holding that ***HN17***[] a complaint containing "naked assertions devoid of further factual enhancement" **[*23]** will not suffice). The UCL claim will therefore be dismissed with leave to amend.

IV. CONCLUSION

For the reasons stated above, the Court GRANTS Defendants' Motion to Dismiss. The claims for "Wrongful Assignment of Deed of Trust" (Claim 1), "Lack of Legal Standing" (Claim 2), and Violation of the Consumer Financial Protection Act (Claim 10) are each DISMISSED WITHOUT LEAVE TO AMEND. All other claims are DISMISSED WITH LEAVE TO AMEND.

Any amended complaint must be filed on or before **January 26, 2016**, and must be consistent with the discussion above. Plaintiff is advised that, although leave to amend certain claims has been permitted, he may not add new claims or new parties to this action without first obtaining Defendants' consent or leave of court pursuant to *Federal Rule of Civil Procedure 15*.

In addition, Plaintiff is advised that the court may dismiss this action without further notice for failure to prosecute under *Federal Rule of Civil Procedure 41(b)* if an amended complaint is not filed by the deadline designated herein.

The court declines to set a case management schedule at this time given the dismissal of all claims.

IT IS SO ORDERED.

Dated: January 5, 2016

/s/ Edward J. Davila

EDWARD J. DAVILA

United States District Judge

Hemlock Semiconductor Corp. v. Kyocera Corp.

United States District Court for the Eastern District of Michigan, Northern Division

January 6, 2016, Decided; January 6, 2016, Filed

Case No. 15-cv-11236

Reporter
2016 U.S. Dist. LEXIS 915 *

HEMLOCK SEMICONDUCTOR CORPORATION, Plaintiff, v KYOCERA CORPORATION, Defendant.

Prior History: *Hemlock Semicondutor Corp. v. Kyocera Corp., 2015 U.S. Dist. LEXIS 138018 (E.D. Mich., Oct. 9, 2015)*

Core Terms

argues, advance payment, counterclaim, anti trust law, force majeure, parties, antitrust, solar, Buyer, polysilicon, promise, subpoenas, declaratory judgment, contracts, district court, discovery, motion to dismiss, pleadings, damages, manufacturing facility, unjust enrichment, allegations, non-party, contractual, schedules, HSC, market price, frustrated, bargained, courts

Counsel: **[*1]** For Hemlock Semiconductor Corporation, Plaintiff: Alvin Lee, Orrick, Herrington and Sutcliffe, New York, NY; Craig W. Horn, Braun, Kendrick, Saginaw, MI.

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For Hemlock Semiconductor Corporation, Counter Defendant: Craig W. Horn, Braun, Kendrick, Saginaw, MI.

Judges: Honorable THOMAS L. LUDINGTON, United States District Judge.

Opinion by: THOMAS L. LUDINGTON

Opinion

ORDER GRANTING PLAINTIFF'S MOTION TO DISMISS COUNTERCLAIMS, DISMISSING COUNTERCLAIMS, GRANTING PLAINTIFF'S MOTION TO STRIKE JAPANESE ANTITRUST DEFENSE, STRIKING JAPANESE ANTITRUST DEFENSE, DENYING WITHOUT PREJUDICE DEFENDANT'S MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS, GRANTING PLAINTIFF'S MOTION TO QUASH NON-PARTY SUBPOENAS, AND SCHEDULING *RULE 16(b)* SCHEDULING CONFERENCE

Plaintiff Hemlock Semiconductor ("Hemlock") and Defendant Kyocera are significant participants **[*2]** in the global solar energy industry. Their immediate dispute arises from a series of contracts for the sale of quantities of industrial-grade polycrystalline silicon by Hemlock to Kyocera. Following changes in global solar market conditions, Kyocera sought to excuse its performance under a force majeure provision in the parties' contracts. In response, Hemlock sought adequate assurances that Kyocera would perform its obligations under the agreements. When

Hemlock concluded that Kyocera had not provided adequate assurances that it would perform its contractual commitment, it initiated this suit.

Hemlock filed its initial complaint on April 1, 2015, and filed an amended complaint on April 29, 2015. ECF No. 4. Now before the Court are three motions filed by Hemlock on August 3, 2015: (1) Motion to Dismiss Defendant Kyocera Corporation's Counterclaims, ECF No. 21; (2) Motion to Strike Defendant Kyocera Japanese Antitrust Defense, ECF No. 22; and (3) Motion to Quash Non-Party Subpoenas Issued by Defendant Kyocera Corporation, ECF No. 24. Hemlock's motion to dismiss and motion to strike will be granted. Hemlock's motion to quash non-party subpoenas will be provisionally granted.

Also before **[*3]** the Court are two motions from Kyocera. ECF Nos. 38 and 45. Kyocera's motion for partial judgment on the pleadings will be denied without prejudice, and Kyocera's motion to compel discovery will be addressed at the Rule 16(b) conference.

I.

Hemlock, Plaintiff in this action, is a Michigan corporation involved in the manufacture and sale of polycrystalline silicon ("polysilicon") and photovoltaic solar cells and modules. ECF No. 4 at ¶¶ 1, 3, 7. The majority of the common stock of Hemlock is owned by Dow Corning Corporation. Shin-Etsu Handotai Co. Ltd. owns a significant minority interest in Hemlock. *See Joint Venture Partners*, HSCPOLY, *http://www.hscpoly.com/content/hsc_comp/ownership.aspx* . Shin-Etsu is described as "the largest chemical company in Japan." *See Top 100 Global Innovators*, THOMAS REUTERS, top100innovators.stateofinnovation.thomsonreuters.com/content/shin-etsu-chemical . Kyocera, Defendant in this action, is a Japanese corporation that describes itself as "one of the world's largest vertically-integrated producers and suppliers of solar energy panels." ECF No. 4 at ¶ 8.

A.

In considering Hemlock's motion to dismiss, the Court accepts the facts in a light most favorable to the nonmovant, Kyocera. *See Lambert v. Hartman, 517 F.3d 433, 439 (6th Cir. 2008)*. Beginning in 2005, in the face of **[*4]** a worldwide polysilicon shortage, Hemlock and Kyocera entered into four long-term polysilicon supply contracts. The first Long Term Supply Agreement ("Agreement I") is effective from August 30, 2005 to December 31, 2015. The second Long Term Supply Agreement ("Agreement II") is effective from July 21, 2006 to December 31, 2018. The third Long Term Supply Agreement ("Agreement III") is effective from July 18, 2007 to December 31, 2019. Finally, the fourth Long Term Supply Agreement ("Agreement IV") is effective from November 13, 2008 to December 31, 2020. Am. Compl. at ¶¶ 12-13. The agreements require Kyocera to make large initial payments to assist Hemlock's expansion of its existing polysilicon production facilities in the United States.

After the parties entered into the agreements, the global solar industry was affected by Chinese government intervention. Specifically, the Chinese government provided subsidies to Chinese solar-based companies and facilitated large-scale "dumping" of Chinese solar panels into the global market in order to increase Chinese market share in the solar industry. In response, in 2012 the United States government imposed anti-subsidy and anti-dumping import **[*5]** tariffs of 24-36 percent on Chinese solar components. These state actions caused the prices of both polysilicon and solar panels to drop precipitously.

In response to the falling market prices, the parties agreed to short-term contract modifications in 2011 and 2012 that lowered the gross price and the advance payment for those years. These modifications did not affect any other contract terms or future pricing schedules. While the short-term price amendments came to an end, the Chinese market saturation and resulting trade war did not. From mid-2014 to early 2015, Kyocera proposed additional price modifications, all of which Hemlock rejected.

B.

After failing to reach a modification agreement, Kyocera sent notice to Hemlock in February 2015 that it was exercising a contractually bargained-for right to invoke the force majeure provision of Agreement IV. Hemlock refused to recognize Kyocera's invocation of any force majeure rights, contending that the force majeure provision in Agreement IV did not excuse Kyocera from performance because of the changing solar-market conditions. Consequently, on February 13, 2015 Kyocera filed suit in Michigan state Court seeking a declaration that its **[*6]** contractual performance could be excused by Agreement IV's force majeure clause.

On June 16, 2015, the Michigan State trial court granted Hemlock's motion for summary disposition, finding that the change in market conditions did not implicate Agreement IV's force majeure clause. On December 3, 2015, the Michigan Court of Appeals affirmed, explaining that Kyocera had assumed the market risks that gave rise to the alleged liability and that "the plain language of the force majeure clause at issue does not permit relief to plaintiff on the grounds that the market for polysilicon has shifted, regardless of the cause of that shift." *Kyocera Corp. v. Hemlock Semiconductor, 15-025786-CK, 2015 Mich. App. LEXIS 2249, [WL] *2 (Mich. Ct. App. Dec. 3, 2015)*, ECF No. 58 Ex. A.

C.

On February 26, 2015 Hemlock sent Kyocera a demand for adequate assurances that it would perform under Agreements I-III pursuant to *MCLA § 440.2609*. Compl. ¶ 28. Kyocera sent Hemlock a response on March 26, 2015, arguing that Kyocera had no obligation to provide written assurances to Hemlock and that *MCLA § 440.2609* did not apply to the supply agreements. *Id.* at ¶ 29. Hemlock then initiated the instant suit on April 1, 2015 alleging that Kyocera had failed to provide Hemlock with adequate **[*7]** assurances that it would make purchases under the supply agreements in 2015. Am. Compl. ¶ 28. Two days later, on April 3, 2015, Kyocera filed a complaint against Hemlock in the Civil Division of Tokyo District Court in Japan. The Tokyo complaint alleges that Hemlock violated Japanese ***antitrust law*** by abusing a superior position of bargaining power in entering into the supply agreements. That case remains pending.

On July 7, 2015 Kyocera filed an answer to Hemlock's amended complaint, listing twenty-five affirmative defenses and seven counterclaims. ECF No. 9. Hemlock responded on August 3, 2015 by filing a motion to dismiss Kyocera's counterclaims, a motion to strike Kyocera's Japanese Antitrust Defense, and a Motion to quash non-party subpoenas. ECF Nos. 21-22, 24. Subsequently, on September 15, 2015 Kyocera filed a motion for partial judgment on the pleadings. ECF No. 38. Finally, on October 8, 2015, Kyocera filed a motion to compel discovery. ECF No. 45. Each of these pending motions will be addressed in turn.

II.

The Court first addresses Plaintiff Hemlock's motion to dismiss Defendant Kyocera's seven counterclaims. ECF No. 21. This Court may dismiss a pleading for "failure to state **[*8]** a claim upon which relief can be granted." *Fed. R. Civ. P. 12(b)(6)*. A pleading fails to state a claim if it does not contain allegations that support recovery under any recognizable legal theory. *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868, (2009)*. In considering a *Rule 12(b)(6)* motion, the Court construes the pleading in the non-movant's favor and accepts the allegations of facts therein as true. *See* *Lambert, 517 F.3d at 439*. The pleader need not have provided "detailed factual allegations" to survive dismissal, but the "obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. Furthermore, the legal effects of contractual clauses are questions of law that must be reviewed de novo. *Quality Products and Concepts Co. v. Nagel Precision, Inc., 469 Mich. 362, 369, 666 N.W.2d 251 (Mich. 2003)*. In essence, the pleading "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal, 556 U.S. at 678*, (quoting *Twombly, 550 U.S. at 570*).

Kyocera has brought the following seven counterclaims against Hemlock that Hemlock now moves to dismiss: (1) Declaratory Judgment of Impracticability/Impossibility; (2) Declaratory Judgment of Frustration of Purpose; (3) Declaratory Judgment of Force Majeure for Agreement III; (4) Declaratory Judgment that Agreements I-III are Void for **[*9]** Violations of Public Policy, Including Illegality; (5) Declaratory Judgment that Agreements I-III are Void for Mutual Mistake; (6) Unjust Enrichment; and (7) Breach of Agreements I-III. *See* ECF No. 9 47-60.

Five of the seven counterclaims seek declaratory judgments. Under the Declaratory Judgment Act, a district courts may "[i]n a case or controversy, within its jurisdiction ... declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." *28 U.S.C. § 2201(a) (2012)*. There is no clear rule addressing whether a declaratory judgment action meets the Article III case and controversy requirement, however, parties involved must have "adverse legal interests," and there must be an actual dispute that relates to the "legal relations[hip]" between them. *MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 127, 127, 127 S. Ct. 764, 166 L. Ed. 2d 604 (2007)*. The parties' dispute must be the kind that requires the "specific" and conclusive relief that a declaratory judgment offers. *Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240-41, 57 S. Ct. 461, 81 L. Ed. 617 (1937)*. The party seeking the declaratory judgment has the burden of demonstrating that an actual case or controversy exists.

A.

Kyocera's first counterclaim seeks a declaratory judgment that Kyocera is relieved from performance under Agreements I-III on a theory of impracticability/impossibility. **[*10]** Answer to Am. Compl. ¶¶ 71-81, ECF No. 9. Generally, under Michigan law, "[e]conomic unprofitableness [sic] is not the equivalent to impossibility of performance. Subsequent events which in the nature of things do not render performance impossible, but only render it more difficult, burdensome, or expensive, will not operate to relieve [a party of its contractual obligations]." *Chase, 217 N.W. at 567*. See, also *Milligan 295 N.W. at 563*, and *Sheldon* 29 N.W.2d at 835.

The Sixth Circuit considered a set of claims similar to those now before this Court in *Karl Wendt Farm Equipment Co., Inc. v. International Harvester Co., 931 F.2d 1112, 1117-18 (6th Cir. 1991)*. In holding that impracticability was an "inappropriate defense" in that case, the Court explained:

> The fact that [Defendant] experienced a dramatic downturn in the farm equipment market and decided to go out of the business does not excuse its unilateral termination of its dealership agreements due to impracticability. [Defendant] argues that while mere unprofitability should not excuse performance, the substantial losses and dramatic market shift in the farm equipment market between 1980 and 1985 warrant the special application of the defense in this case. [Defendant] cites losses of over $2,000,000.00 per day and a drop in the company's standing on the Fortune 500 list from 27 to 104.... [Defendant] also put on **[*11]** evidence that if it had not sold its farm equipment division, it might have had to declare bankruptcy. While the facts suggest that [Defendant] suffered severely from the downturn in the farm equipment market, neither market shifts nor the financial inability of one of the parties changes the basic assumptions of the contract such that it may be excused under the doctrine of impracticability.

Id.

Kyocera argues that *Karl Wendt* is inapplicable here. Specifically, Kyocera claims that *Karl Wendt* was limited to its particular facts and that the Court acknowledged the defense of impracticality/impossibility was available in other factual situations. Kyocera also argues that *Karl Wendt* is distinguishable in that it did not involve claims of "illegal or non-routine actions, much less concerted, continuous, and illegal series of acts to override free market forces, as was alleged here." ECF No. 34 at 15.

These arguments are without merit. The alleged illegal acts of the Chinese government have no bearing on whether Kyocera's performance has become impossible or impracticable. Rather, the alleged illegal acts have simply caused a market shift in pricing, making it unprofitable for Kyocera to continue **[*12]** to perform as promised. Regardless of the cause of the market shift, Kyocera's allegations amount only to claims of "economic unprofitableness," which are insufficient to give rise to claims of impossibility or impracticability. *See* *Chase, 217 N.W. at 567*. Kyocera's first counterclaim will thus be dismissed.

B.

Kyocera next seeks a declaratory judgment that it is relieved from performance under Agreements I-III on a theory of frustration of purpose. Answer to Am. Compl. ¶¶ 82-92. "Frustration of purpose is generally asserted where a change in circumstances makes one party's performance virtually worthless to the other...." *Liggett, 676 N.W.2d at 637* (internal citations and quotations omitted). Application of the doctrine of frustration is a question of law and not a question of fact. *See Restatement (Second) of Contracts, 310* (1979); *See also* *Columbian National Title Insurance Company v. Township Title Services, Inc., 659 F.Supp. 796 (D.Kan.1987)*.

For a party to avail itself of the defense of frustration of purpose under Michigan law it must prove the following conditions:

> (1) the contract must be at least partially executory; (2) the frustrated party's purpose in making the contract must have been known to both parties when the contract was made; (3) this purpose must have been basically frustrated by an event not reasonably foreseeable at the time the contract was made, **[*13]** the occurrence of which has not been due to the fault of the frustrated party and the risk of which was not assumed by him.

Molnar v. Molnar, 110 Mich. App. 622, 313 N.W.2d 171, 173 (Mich. Ct. App. 1981).

The first prong is satisfied, since all three agreements are executory. Under the first agreement, the parties are obligated to perform through the 2015 calendar year. Under the second and third agreements, the parties are obligated to perform through 2018 and 2019 respectively. Thus the parties have continuing performance obligations under all three agreements at issue.

The second prong turns on the primary purpose of the contract. According to the Restatement (Second) of Contracts, "It is not enough that he had in mind some specific object without which he would not have made the contract. The object must be so completely the basis of the contract that, as both parties understand, without it the transaction would make little sense." *Restatement (Second) of Contracts § 265*.

In its counterclaim, Kyocera alleges that the purpose of the contract was "to create a long-term agreement in which Kyocera would help Hemlock grow its manufacturing capabilities, and in which Hemlock would use that expanded production to provide Kyocera with a stable supply of polysilicon within a legally functioning market." ECF **[*14]** No. 9. Although all of the nonmovant's factual allegations must be accepted as true in reviewing a motion to dismiss, legal conclusions need not be taken as true. *See* *Lambert, 517 F.3d at 439*. To determine the intent of the parties, courts must enforce unambiguous contracts according to their terms. *See* *Quality Products, 469 Mich. at 370-71*. "[A]n unambiguous contractual provision is reflective of the parties' intent as a matter of law." *Id. at 375*.

Kyocera's contention regarding the primary purpose of the agreements goes too far. The unambiguous primary purpose of the agreements was for Hemlock to provide Kyocera with a stable supply of polysilicon at a predictable price. This is apparent by the preambles of the agreements, which provide, "...Buyer desires to purchase and [Hemlock] agrees to sell Products (herein defined) pursuant to the terms and conditions of this Agreement." *See* ECF No. 1, Exhibit 1 at 1, Exhibit 2 at 1, Exhibit 3 at 1. It is also apparent by the parties' choice to structure their relationship in the form of long-term requirement contracts in order to provide some stability in fluctuating markets. Any express or implied understanding that Hemlock would expand its production capabilities was collateral to this central purpose.

Under the **[*15]** third prong, the primary purpose must have been "basically frustrated by an event not reasonably foreseeable at the time the contract was made, the occurrence of which has not been due to the fault of the frustrated party and the risk of which was not assumed by him." *Molnar, 313 N.W.2d at 173*. In general, "[i]t is not enough that the transaction has become less profitable for the affected party or even that he will sustain a loss." *Seaboard Lumber Co. v. U.S., 41 Fed.Cl. 401, 417 (Fed.Cl.1998)*. "The frustration must be so severe that it is not fairly to be regarded as within the risks that he assumed under the contract." *Id.* (quoting *Restatement (second) of Contracts § 265* (1981)). "[A] lack of profit is generally insufficient to frustrate the purpose of a contract." *Seaboard Lumber, 41 Fed.Cl at 418*.

Regardless of any changes in the polysilicon market and regardless of the cause of those changes, Hemlock is still able to provide Kyocera with a stable supply of polysilicon at a predictable price. There is no allegation that Hemlock can no longer provide polysilicon to Kyocera, and there is no allegation that there is no longer an existing market for solar products. Kyocera simply claims that it can no longer act profitably in the international solar market if it must honor its supply agreements with Hemlock. A party's claim that it is unable **[*16]** to conduct business profitably is insufficient to state a claim of frustration of purpose.[1] As a matter of law, the primary purpose of the agreements between Hemlock and Kyocera has not been frustrated.

Kyocera argues that the illegal actions of a third party, the Chinese government, in manipulating the solar markets were unforeseeable. However, because the Chinese Government's actions did not have an effect on the principal purpose of the agreement — Hemlock providing Kyocera with a stable supply of polysilicon at a predictable price — whether those acts were foreseeable is not material. Under the doctrine of frustration of purpose, foreseeability is only relevant to the extent that it relates to an action that frustrates the primary purpose of **[*17]** a contract. *See Molnar, 313 N.W.2d at 173*.

Kyocera also argues that it should not have to bear the entire risk of harm resulting from China's illegal disruption of the solar market. ECF No. 34 at 11. However, Kyocera concedes that the agreements were initiated "[t]o combat the instability in the solar market." ECF No. 34 at 3. In setting forth long-term price and quantity schedules, both parties accepted a risk that future market developments would work against them. Hemlock accepted the risk that polysilicon prices would increase, requiring them to sell to Kyocera at below market prices. Kyocera accepted the risk that prices would decrease, requiring them to buy from Hemlock at above market prices. More likely than not one party to the contract would profit and one would lose based on changes in the market price. In this circumstance Kyocera ended up on the losing end of the equation.

C.

In its third counterclaim, Kyocera seeks a declaratory judgment that the force majeure provision of Agreement III excuses its performance. Answer to Am. Compl. ¶¶ 93-107. The effect of a force majeure clause is to excuse performance in the event an unforeseen circumstance occurs." *Melford Olsen Honey, Inc. v. Adee, 452 F.3d 956, 963 (8th Cir.2006)*. "The performance to be excused is determined by **[*18]** the language of the clause." *Id.* The "bargained for" force majeure clause found in Agreement III provides:

> HSC shall not be liable for delays or failures in performance of an order or default in the delivery arising out of or resulting from causes beyond its control. Such causes include, but are not limited to, acts of God, acts of Buyer, acts of the Government or the public enemy, fire, flood, epidemics, quarantine restrictions, strikes, freight embargoes, severe weather, equipment breakage or default of suppliers due to any of such causes. In

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[1] It is unclear whether the defense of frustration of purpose can even justify rescission of a contract under Michigan law. *See Liggett, 676 N.W.2d at 637*; *See also Klein Steel Services Inc. v. Sirius Protection, LLC, 2014 U.S. Dist. LEXIS 59054, 2014 WL 1685912 (E.D. Mich. 2014)*. Federal courts in Michigan have dismissed claims for rescission on this ground. *See, e.g. Klein Steel Services, 2014 U.S. Dist. LEXIS 59054, 2014 WL 1685912 at *4*. A party can, however, seek restitution under a theory of frustration of purpose if that party has conferred any benefits on the opposing party through partial performance. *See Jabero v. Haraji, 2004 Mich. App. LEXIS 1507, 2004 WL 1335896 at *3 (Mich.Ct.App. 2004)*.

> the event of any such delay of HSC's performance, Buyer shall honor its obligations hereunder as soon as HSC is able to perform.
>
> If HSC fails to deliver or Buyer fails to Purchase Product...and such failure occurs as the result of a Force Majeure Event, HSC may deliver and Buyer may purchase the deficient Product, (at the prevailing contract price which was in effect during the Force Majeure Event), within a reasonable time after resolution of the Force Majeure Event, (determined by mutual agreement of the parties). The term of this Agreement may be extended for a period not to exceed one (1) year so as to complete the purchase and delivery of **[*19]** deficient Product. HSC will provide Buyer notice of the deficient Product delivery schedule for the deficient Product prior to delivery as well as notice of its request to extend the Terms of the Agreement.
>
> In addition, if due to force majeure or any other cause, HSC is unable to produce sufficient goods to meet all demands from customers and internal uses, HSC shall have the right to allocate production among its customers and plants in any manner which HSC may determine to be equitable.

See Exhibit 3 § 19, ECF No. 28.

Force majeure is not a contract defense under Michigan Law, but it can be a bargained-for contract provision or protection. *See* *Hemlock Semiconductor Corp. v. Deutsche Solar GmbH, 116 F. Supp. 3d 818, 2015 U.S. Dist. LEXIS 97956, 2015 WL 4476327 (E.D. Mich. 2015)*. Numerous courts have refused to apply contractual force majeure clauses where "governmental action affects the profitability of a contract, but does not preclude a party's performance." *United Sugars Corp. v. U.S. Sugar Co., Inc., 2015 U.S. Dist. LEXIS 43573, 2015 WL 1529861 (D.C. Minn. 2015)*. *See also* *Seaboard Lumber Co. v. United States, 308 F.3d 1283, 1293-94 (Fed.Cir.2002)* (declining to apply the force majeure clause because the risk that market price will make performance unprofitable is inherent in fixed-price contracts); *In re Millers Cove Energy Co., 62 F.3d 155, 159 (6th Cir.1995)* (holding that "lack of economic feasibility" does not exclude contract performance under contract's force majeure clause absent specific language to that effect)*;* *Langham—Hill Petroleum, Inc. v. S. Fuels Co., 813 F.2d 1327, 1330 (4th Cir.1987)* (rejecting application of force majeure **[*20]** clause where foreign government acted to cause a collapse in world oil prices, making the contract unprofitable for one party); *N. Ind. Pub. Serv. Co. v. Carbon Cnty. Coal Co., 799 F.2d 265, 274-76 (7th Cir.1986)* (holding that the government's denial of a party's request to pass increased coal prices along to its customers did not excuse that party from a long-term contract to buy coal even though performance created economic hardship); *B.F. Goodrich Co. v. Vinyltech Corp.,* *711 F.Supp. 1513, 1519 (D.Ariz.1989)* (rejecting the argument that an unexpected drop in market price was within the scope of the contract's force majeure clause).

The most analogous case to the present case is *Langham-Hills*. There, following the collapse of the world crude oil market because of Saudi Arabian attempts to acquire market share, Southern Fuels attempted to invoke a force majeure clause in its fixed price petroleum supply contract with Langham-Hills. *Langham Hills, 813 F.2d at 1329*. Langham-Hills then brought suit against Southern Fuels in federal district court for breach of contract. *Id.* Declining to find a contractual force-majeure clause applicable, the district court granted Langham-Hills motion for summary judgment. The Fourth Circuit Court of Appeals affirmed, citing "the law of contracts and the realities of the business world." *Id.* The Fourth Circuit explained that "[i]f fixed-price **[*21]** contracts can be avoided due to fluctuations in price, then the entire purpose of fixed-price contracts, which is to protect both the buyer and the seller from the risks of the market, is defeated." *Id. at 1330*. The Court then quoted the Seventh Circuit:

> [the defendant] committed itself to paying a price at or above a fixed minimum and to taking a fixed quantity at that price. It was willing to make this commitment to secure an assured supply of [the product], but the risk it took was that the market price of [the product or substitutes] would fall. A force majeure clause is not intended to buffer a party against the normal risks of a contract. The normal risk of a fixed price contract is that the market price will change. If it rises, the buyer gains at the expense of the seller (except insofar as escalator provisions give the seller some protection); if it falls, as here, the seller gains at the expense of the buyer. The whole purpose of a fixed price contract is to allocate risks in this way. A force majeure clause interpreted to excuse the buyer from the consequences of the risk he expressly assumed would nullify a central term of the contract.

Id. (quoting [N. Ind. Pub. Serv., 799 F.2d at 275](#)). *See also* [In re Millers Cove Energy Co., Inc., 62 F.3d 155, 158 (6th Cir. 1995)](#) (adopting the Fourth **[*22]** Circuit's reasoning in *Langham-Hill*).

The "bargained for" force majeure provision in Agreement III does not excuse Kyocera from performing under the circumstances alleged. First, by its express terms the protections of the force majeure clause as written was to protect Hemlock from unanticipated events, not Kyocera. *See* Exhibit 3 § 19, ECF No. 28 ("[Hemlock] shall not be liable for delays or failures in performance of an order or default in the delivery arising out of or resulting from causes beyond its control"). Second, the contractual provision only addresses events that give rise to an actual, physical inability to perform, not those that only make performance inconvenient. *Id.* Third, the force majeure provision does not allow a total rescission of the contract or excuse from performance, but merely provides for a delay in performance. *Id.* ("In the event of any such delay of HSC's performance, Buyer shall honor its obligations hereunder as soon as [Hemlock] is able to perform"). Accordingly, Kyocera's claim that an unfavorable market fluctuation warrants excuse of performance under Agreement III's force majeure clause is without merit as a matter of law and will be dismissed.

D.

In its fourth **[*23]** counterclaim, Kyocera seeks a declaratory judgment that Agreements I-III are void for violations of public policy, including illegality. *See* Answer to Am. Compl. ¶¶ 108-115. Specifically, Kyocera argues that the Agreements violate Article 19 of Japanese Antimonopoly Law and Article 90 of the Japanese Civil Code, which prohibits contract provisions that are against the public order and morals. Hemlock moves to dismiss this counterclaim on the grounds that Kyocera has failed to plead any facts in support of its Japanese antitrust claim and Kyocera has not alleged that the Supply Agreements violate ***antitrust law*** on their face. In the alternative, Hemlock argues the claim should be dismissed in consideration of principles of international comity.

In its response to Hemlock's motion to dismiss, Kyocera asserts that its counterclaim for declaratory judgment under Japanese antitrust laws should not be dismissed because its Tokyo district court complaint has been incorporated into its answer and counterclaims. Kyocera further argues that its Japanese antitrust claim will be decided by a Japanese court, and so this Court will not need to consider any complex factual issues related to the claims. Kyocera concludes that comity considerations weigh **[*24]** in favor of allowing the Japanese court to determine if Hemlocks' agreements violate Japanese law before this Court determines if that illegality bars enforcement. Kyocera in effect argues that this Court should apply the doctrine of abstention, staying consideration of the present matter until the Tokyo courts have decided the Japanese antitrust issue. Kyocera then seeks to apply the principal of collateral estoppel to the Tokyo judgment in this Court.

Hemlock argues that Kyocera has failed to state a claim upon which relief may be granted. To raise a claim under [Federal Rule of Civil Procedure 8(a)](#), a pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief". *Id.* A pleading fails to state a claim if it does not contain allegations that support recovery under any recognizable legal theory. [Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868, (2009)](#). The "obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." [Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)](#). In essence, the pleading "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" [Iqbal, 556 U.S. at 678](#), (quoting [Twombly, 550 U.S. at 570](#)).

Kyocera does not identify any legal theory **[*25]** or claim beyond a conclusory assertion that the Agreements violate Japanese ***Antitrust law***. Kyocera states only that "the contracts are invalid because the contract clauses of the trading establish contract terms unilaterally disadvantageous to Kyocera and are against the public order and morals... in Japan." Answer to Am. Compl. ¶ 111. Kyocera then claims that it is "entitled to a declaration that the Agreements are void because, among other things, they are illegal under Japanese law, and it is not liable for delays in performance of its obligations under the agreements." *Id.* at ¶ 115. Kyocera has not provided this Court with a recitation of the elements of the cause of action, much less any explanation as to how the facts support such a theory of recovery. Because Kyocera has not provided any explanation as to how the Supply Agreements violate the public order and morals in Japan, Kyocera has not stated a claim upon which relief may be granted under Japanese ***antitrust law***. *See* *Oparaugo v. Watts, 884 A.2d 63, 72 (D.C. 2005)* (holding that the district court acted properly in refusing a plaintiff's request to apply foreign law where the plaintiff failed to provide any information regarding the elements of the foreign law or any **[*26]** information as to how the foreign law should be applied in assessing the sufficiency of his complaint).

Furthermore, in its response to Hemlock's motion for summary judgment, Kyocera states that "[t]he antitrust issues underlying Kyocera's claim will be decided by the Japanese Court. Kyocera is not asking this Court to consider any complex factual issues related to Kyocera's antitrust claims." Resp. to Mot. to Dismiss Counterclaims 27. Accordingly, despite styling its counterclaim as a motion for declaratory judgment, Kyocera does not appear to seek a declaration about the parties' rights or a decision concerning Kyocera's legal claim. Instead, it apparently seeks a declaratory judgment that any decision by the Tokyo district court in its favor has collateral estoppel effect. Kyocera has not only failed to state a claim upon which relief may be granted, but Kyocera has also failed to state a demand for the relief it actually seeks or any allegations in support of that relief. *See* *Fed. R. Civ. P. 8(a)(3)*.

Kyocera's claim that the antitrust issue will be decided by a Japanese court is problematic for an additional reason: the Supply Agreements contain both a forum selection clause and a choice-of-law provision that **[*27]** preclude this Court from recognizing any decision by a Japanese Court. The choice of forum provision states that the parties "submit to the exclusive jurisdiction and venue of the U.S. District Court for the Eastern District of Michigan for all disputes arising, directly or indirectly, under [the Supply Agreements]." Agreements I-III ¶ 21. The choice-of-law provision provides that the Supply Agreements "shall be governed and controlled in all respects by the laws of the State of Michigan, USA... and all disputes, including interpretation, enforceability, validity, and construction, shall be determined under the law of the State of Michigan, without regard to any conflict of law provision." *Id.* at ¶ 20. Michigan public policy "favors the enforcement of contractual forum-selection clauses and choice-of-law provisions." *Turcheck v. Amerifund Financial, Inc., 272 Mich. App. 341, 725 N.W.2d 684, 688 (Mich. Ct. App. 2006)*. Indeed, this point will be further discussed below in part III.B.

Because Kyocera has not stated a foreign antitrust counter-claim upon which relief may be granted and because this Court cannot grant Kyocera the relief it seeks — recognition of a Japanese district court judgment — Kyocera's fourth counterclaim will be dismissed.

E.

In its fifth counterclaim, Kyocera claims **[*28]** that Agreements I-III are voidable for mutual mistake. *See* Answer to Am. Compl. ¶¶ 116-22. Kyocera argues that the parties were mutually mistaken in assuming that the polysilicon market would continue to legally function. *Id.* at 118-19. Hemlock moves to dismiss this counterclaim, arguing that the doctrine of mutual mistake relates only to "fact[s] in existence at the time the contract is executed" and not to predictions as to occurrences or non-occurrences.

As explained by the Michigan Supreme Court, a mutual mistake excusing performance must relate to facts in existence at the time the contract is executed. *Lenawee Cty. Bd. of Health v. Messerly, 417 Mich. 17, 331 N.W.2d 203, 207 (Mich. 1982)*. In other words "the belief which is found to be in error may not be, in substance, a prediction as to a future occurrence or non-occurrence." *Id.* Mistaken expectations alone do not relate to a fact in existence at the time of the agreement. *Akahoshi v. S. Waste Servs., 181 F. Supp. 2d 711, 714 (E.D. Mich. 2001)*. "Moreover, rescission of a contract for mutual mistake is not available where the party seeking rescission has assumed the risk of loss in connection with the mistake." *Id.*

Kyocera's claim of mutual mistake amounts to an assertion that it was mistaken in its failure to anticipate future market disruptions. This allegation does not raise a claim of mutual mistake **[*29]** for two reasons. First, mistaken expectations about market behavior do not relate to a fact in existence at the time the Supply Agreements were executed. Second, in entering into the long-term supply agreements, Kyocera accepted the risk that the market prices for polysilicon would decrease, thereby rendering its performance unprofitable. *See* *Seaboard Lumber, 308 F.3d 1283, 1293-94* (holding that the risk that market price will make performance unprofitable is inherent in fixed-price contracts); *Langham Hills, 813 F.2d at 1330* (holding that the entire purpose of fixed-price contracts is to protect both the buyer and the seller from the risks of the market). Because Kyocera has failed to state a claim of mutual mistake, its fifth counterclaim will be dismissed.

F.

Kyocera next alleges that the large advanced payments it has paid to Hemlock constitute unjust enrichment and violate Japanese ***antitrust law***. *See* Answer to Am. Compl. ¶¶ 123-28. Hemlock argues this counterclaim should be dismissed because the advanced payments were expressly agreed to by the parties.

Unjust enrichment is a common law remedy whereby the law implies a contract in order to prevent unjust enrichment, specifically when one party inequitably receives and retains a benefit from another. **[*30]** *See Martin v. East Lansing School Dist., 193 Mich. App. 166, 483 N.W.2d 656 (Mich. Ct. App. 1992)*. To proceed on such a claim, a plaintiff must establish (1) the receipt of a benefit by defendant from plaintiff, and (2) an inequity resulting to plaintiff because of the retention of the benefit by defendant. *Barber v. SMH (US), Inc., 202 Mich. App. 366, 509 N.W.2d 791 (Mich. Ct. App. 1993)*. "However, a contract will be implied only if there is no express contract covering the same subject matter." *Belle Isle Grill Corp. v. Detroit, 256 Mich. App. 463, 666 N.W.2d 271 (Mich. Ct. App. 2003)*. In other words, the law will not imply a contract where there is an express contract between the same parties on the same subject matter. *Morris Pumps v. Centerline Piping, Inc., 273 Mich. App. 187, 729 N.W.2d 898 (Mich. Ct. App. 2006)* (quoting 42 CJS IMPLIED AND CONSTRUCTIVE CONTRACTS § 34, p. 33).

Here, Agreement I contains an advance payment clause, expressly providing:

> Non-Refundable Advance Payment. Buyer agrees to make a non-refundable, unconditional, irrevocable advance payment in the amount of $36,120,000.00 (the "Advance Payment"). Fifty percent (50%) of the Advance Payment shall be due on or before October 3, 2005 and the remaining fifty percent (50%) shall be due on or before October 2, 2006. Notwithstanding anything herein to the contrary, Buyer expressly acknowledges its understanding and agrees that, once this Agreement is executed, there are no circumstances or occurrences that will require [Hemolock] to refund to Buyer all or any portion of the Advance payment. The Advance Payment shall **[*31]** be applied as a credit against the price of the Products that Buyer is required to purchase under this Agreement at the times and amounts shown [in the schedules].

Agreement I ¶ 2. Agreement II contains the same clause, but requires a $48,000,000.00 advance payment to be paid in installments on or before October 4, 2006, October 4, 2007, and October 4, 2008. Agreement II ¶ 2.

Agreement III contains a similar clause, requiring a $84,915,000.00 advance payment to be paid in installments on or before October 4, 2007, October 4, 2008, and October 4, 2009. Agreement III ¶ 2. The clause differs from the previous two advance payment clauses in that it allows Kyocera to recover a portion of the advance payment if it sustains loss, damage, or injury resulting from Hemlock's failure to perform, specifically in situations involving a delay in Hemlock's completion of its expanded manufacturing facility. *Id.* at ¶¶ 2, 9, 15. Agreement III limits any such liability to the "remaining net balance of the advanced payment", and provides that, "[e]xcept for situations involving a delay in completion of the manufacturing facility... [Hemlock] shall not be liable for any loss, damage, or injury resulting from delay **[*32]** in delivery of the products, or for any failure to perform which is due to circumstances beyond its control." *Id.* ¶ 15 (original in all-caps).

Because the Supply Agreements expressly contemplate and govern Kyocera's non-refundable advance payments to Hemlock, Kyocera cannot recover its advance payments by implied contract. *See Belle Isle, 666 N.W.2d at 281* (concluding that a plaintiff could not recover costs of improvement by implied contract where his lease expressly provided for capital improvements in lieu of rent). *See also Liggett Restaurant Group, Inc. v. City of Pontiac, 260 Mich. App. 127, 676 N.W.2d 633, 639 (Mich. Ct. App. 2003)* (holding that the trial court properly dismissed the plaintiff's unjust enrichment claim where there was an express provision in the parties' contract contemplating the subject matter of the dispute); *Fodale v. Waste Mgmt. of Mich., Inc., 271 Mich. App. 11, 718 N.W.2d 827, 841 (2006)* (holding that a plaintiff was foreclosed from bringing an unjust enrichment claim where an express contract governed the parties' loan).

Kyocera argues that, despite the existence of express contracts governing the advance payments, it may still proceed on its unjust enrichment counterclaim because the Supply Agreements are invalid or unenforceable. In *H.J. Tucker and Associates, Inc. v. Allied Chucker and Engineering Co.*, the Michigan Court of Appeals held that a party could proceed on its **[*33]** unjust enrichment claim where an express oral contract existed, but where there was a material question as to the scope of the oral contract or whether the contract was still in force. *234 Mich. App. 550, 595 N.W.2d 176 (Mich. Ct. App. 1999)*. The court explained that the plaintiff could have recovered under its breach of contract claim for the period of time that the contract was in force, and could recover under its unjust enrichment claim for the period of time the contract was allegedly not effective. *Id.* In the alternative, the court explained, the trial court could find that recovery under unjust enrichment doctrine was appropriate if it found there was no contract between the parties due to the dispute regarding material contract terms.

Unlike in *H. J. Tucker*, here the Supply Agreements are express *written* agreements. Neither the scope nor the terms of the agreement are in dispute. Instead, Kyocera argues only that the Supply Agreements are not enforceable contracts due to violations of Japanese ***antitrust law*** and mutual mistake. However, because Kyocera cannot proceed on either theory as a matter law, *See* I.D. and I.E. *supra*, Kyocera cannot, as a matter of law, argue that the express contracts are unenforceable under either theory.

Kyocera argues that **[*34]** it should be allowed to proceed on its unjust enrichment counterclaim because it is not *in pari delicto* with Hemlock. Kyocera argues that if the Supply Agreements are found to be illegal agreements under Japanese ***antitrust law***, this Court should not simply leave the parties as it finds them (the proper course of action when the Court is asked to aid either party to an illegal agreement. *Jones v. Chennault, 323 Mich. 261, 267, 35 N.W.2d 256 (Mich. 1948))*. Instead, Kyocera argues, because any illegality under Japanese ***antitrust law*** would be the result of Hemlock's abuse of its superior bargaining power, the parties are not *in pari delicto* because Kyocera's payments were a product of that abuse. *Id.*

On the present facts, the argument is academic. Because Kyocera has failed to properly plead any claims under Japanese ***antitrust law***, Kyocera cannot allege in this action that the Supply Agreements are unenforceable under Japanese ***antitrust law***.

Finally, Kyocera argues that Hemlock will be unjustly enriched if it is allowed to retain the advance payments because Kyocera only committed to the advance payment arrangement based on Hemlock's promise that it would use the payments to expand its polysilicon production facilities. However, because express written **[*35]** agreements exist between the parties, Kyocera cannot challenge the fairness of the contract terms it agreed to or its performance under the express contract terms on a *quantum meruit* theory of unjust enrichment. If Kyocera seeks to challenge the fairness of the express contract terms, it must do so under claims of unconscionability, duress or fraud. Kyocera may only challenge Hemlock's performance under the express contract terms by asserting a breach of contract claim.

G.

In its seventh counterclaim Kyocera alleges that Hemlock has breached the ¶ 9 of the Supply Agreements by failing to maintain expanded manufacturing facilities. *See* Answer to Am. Compl. ¶¶ 129-134. Hemlock moves to dismiss that counterclaim, arguing that Kyocera has not alleged the breach of any express provision of the Supply Agreements.

To state a breach of contract claim under Michigan law, a plaintiff must plead "(1) that there was a contract, (2) that the other party breached the contract and, (3) that the party asserting breach of contract suffered damages as a result of the breach." *Dunn v. Bennett, 303 Mich. App. 767, 846 N.W.2d 75 (Mich.Ct.App.2013)*. The first prong requires an express promise, as "Michigan does not recognize a cause of action for breach of the implied covenant **[*36]** of good faith and fair dealing." *Fodale, 718 N.W.2d at 841*.

The disputed provision of the Supply Agreements, ¶ 9, provides: "Buyer acknowledges that [Hemlock] will be expanding its manufacturing facilities... in order to produce the Products to be supplied under this Agreement."

Agreements I-III ¶ 9. That paragraph further provides: "Buyer acknowledges the possibility of delays in completing the manufacturing facility and expressly agrees that, so long as production of Product commences by [June 30, 2008/June 30, 2009/June 30, 2010], [Hemlock] SHALL HAVE NO LIABILITY TO BUYER FOR ANY SUCH DELAY." *Id.* (emphasis in originals).

Kyocera argues that ¶ 9 amounts to an express promise by Hemlock to maintain expanded manufacturing capacities. Kyocera cites *Sexton v. Panel Processing, Inc.*, for the proposition that a promise is defined as "a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promise in understanding that a commitment has been made." *912 F. Supp. 2d 475, 478 (E.D. Mich. 2013) aff'd [754 F.3d 332, 334 (6th Cir)](), cert. Denied, 135 S. Ct. 677, 190 L. Ed. 2d 389 (2014)*. Kyocera argues that the language of ¶ 9 stating that Hemlock "will be expanding" is a manifestation of intention to act. Kyocera concludes that, viewing the facts in a light most favorable to Kyocera, ¶ 9 **[*37]** supports Kyocera's allegation of an express contract term and a subsequent breach. As a result of this alleged breach, Kyocera claims that it has suffered damages because it has not received what it bargained for in exchange for its advance payments.

Hemlock, in contrast, argues that ¶ 9 is not an express promise, but merely serves as an acknowledgment by Kyocera that Hemlock would be expending substantial capital improvements to expand its manufacturing capacity. Hemlock argues that the purpose of that acknowledgment was that Hemlock would eventually credit Kyocera's advance payments against Kyocera's take-or-pay obligations. Hemlock further argues that, because no provision in the agreement requires Hemlock to maintain expanded manufacturing facilities, Kyocera's breach of contract claim should be dismissed.

Viewing the facts in a light most favorable to Kyosera and assuming that ¶ 9 amounts to an express promise by Hemlock to expand its manufacturing facilities, there is nothing in the Supply Agreements that supports Kyocera's allegation that Hemlock agreed to *maintain* expanded manufacturing facilities. At most, the provision could amount to a promise by Hemlock to expand its manufacturing **[*38]** facilities to meet Kyocera's product demands under the Supply Agreements. Accordingly, Kyocera's claim will be dismissed to the extent that it suggests that Hemlock breached the Supply Agreements by failing to maintain expanded facilities.

Turning to Hemlock's alleged promise to expand, Kyocera admits in its answer that Hemlock's expanded production facility in Tennessee was completed, but notes that it was permanently closed in December 2014. Answer to Am. Compl. ¶ 20. Kyocera also alleges that Hemlock did not expand other facilities to the extent contemplated by the parties. *Id.* at ¶ 133. In this way, Kyocera argues, Hemlock has breached a promise to perform.

It is not enough for Kyocera to allege that Hemlock breached a promise to perform. Under Michigan law, Kyocera must also allege that it "suffered damages as a result of the breach." *[Dunn, 846 N.W.2d at 75]()*. Kyocera makes no allegation that Hemlock has been unable to meet its obligation to fulfill Kyocera's demands for polysilicon under the Supply Agreements — indeed, the basis of this lawsuit is Kyocera's suggestions that it no longer has any demand whatsoever for Hemlock's polysilicon at the agreed upon prices. Kyocera thus does not allege damages **[*39]** in the form of Hemlock's failure to meet its product demands.

Kyocera does allege that it was damaged by not receiving what it bargained for in exchange for its advance payments. Kyocera argues that because it agreed to the advanced payments for the purpose of allowing Hemlock to expand its manufacturing facilities, it has been injured as a result of Hemlock's failure to sufficiently expand its facilities. However, by the very terms of the advanced payment provision, Kyocera agreed "to make a non-refundable, unconditional, irrevocable advance payment" and expressly acknowledged its understanding and agreed that, "once this Agreement is executed, there are no circumstances or occurrences that will require [Hemolock] to refund to [Kyocera] all or any portion of the Advance Payment." Agreements I-III ¶ 2. Nothing in the Supply Agreements suggests that the advanced payments were in consideration for the expanded facilities. Instead, all three contracts are clear that the advanced payments were "non-refundable, unconditional, [and] irrevocable." *Id.* at ¶ 9. The Supply Agreements further explain that the only circumstance or occurrence requiring Hemlock to refund a portion of the advance **[*40]** payment is if, as a result of Hemlock's delay in completing its expanded manufacturing facility, Kyocera suffered loss, damage or injury resulting from (1) Hemlock's delay in delivery or (2) Hemlock's "failure to perform which is due to circumstances beyond its control." *Id.* at ¶ 15. Because

Kyocera has not pled any loss, damage, or injury in either form, it has not stated an injury under the Supply Agreements or under Michigan law. At the time of the agreements, Kyocera agreed to the non-refundable, unconditional, and irrevocable advanced payments. It cannot now, with the benefit of hindsight, recast the nature of those advanced payments.

Furthermore, Kyocera's advanced payments to Hemlock are to be "applied as a credit against the price of the Products that Buyer is required to purchase under this Agreement at the times and amounts shown [in the schedules]." Accordingly, any damages that Kyocera suffers relating to the advanced payment is a result of its decision to cease performance under the agreed upon terms of the Supply Agreements. If Kyocera continued to perform as promised, then the advance payments would continue to be credited against Kyocera's subsequent purchases.

In conclusion, **[*41]** even assuming that Hemlock promised to expand its manufacturing facilities, Kyocera has not pled any actionable damages resulting from any breach of that promise. Kyocera's seventh counterclaim will thus be dismissed.

III.

Also before the Court is Hemlock's Motion to strike Kyocera's tenth affirmative defense, relating to violations of Japanese ***antitrust law***. Mot. to Strike, ECF No. 24. Hemlock argues that Supreme Court precedent, as well as this Court's recent decision in *Hemlock Semiconductor Corp. v. Deutsche Solar GmbH, 116 F. Supp. 3d 818, 2015 U.S. Dist. LEXIS 97956, 2015 WL 4476327 (E.D.Mich. May 7, 2015)* support its motion. In response Kyocera argues that this case is distinguishable from *Deutsche Solar* because Kyocera is not asking the Court to adjudicate any foreign antitrust claim, but is instead asking the Court to "respect a Japanese court's adjudication of a pending Japanese antitrust claim." Resp. to Mot. to Strike 1, ECF No. 33.

A "court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." *Fed. R. Civ. P. 12(f)*. A defense is insufficient "if as a matter of law, the defense cannot succeed under any circumstances." *Hahn v. Best Recovery Servs., LLC, 2010 U.S. Dist. LEXIS 116136, 2010 WL 4483375, *2 (E.D. Mich. Nov.1, 2010)* (internal quotation marks and citations omitted). A *Rule 12(f)* motion is also proper "if it aids in eliminating spurious issues before trial, thereby streamlining **[*42]** the litigation." *Id.* (internal quotation marks and citation omitted). "Generally, however, a *Rule 12(f)* motion should not be granted if the insufficiency of the defense is not clearly apparent, or if it raises factual issues that should be determined on a hearing on the merits." *Id.* (internal quotation marks and citation omitted). Motions seeking to strike an affirmative defense are disfavored and should be used sparingly. As observed by the Sixth Circuit, a motion to strike "is a drastic remedy to be resorted to only when required for purposes of justice. The motion to strike should be granted only when the pleading to be stricken has no possible relation to the controversy." *Brown & Williamson Tobacco Corp. v. United States, 201 F.2d 819, 822 (6th Cir. 1953)* (internal quotation marks and citations omitted).

A.

The Supreme Court has twice addressed the question of when a contract's illegality under antitrust laws and regulations can serve as an affirmative defense in a contract-enforcement action. *See* *Kelly v. Kosuga, 358 U.S. 516, 79 S. Ct. 429, 3 L. Ed. 2d 475 (1959)*, and *Kaiser Steel Corp. v. Mullins, 455 U.S. 72, 102 S. Ct. 851, 70 L. Ed. 2d 833 (1982)*. Under those opinions, a party can usually raise a claim of illegality under ***antitrust law*** in a contract dispute only where a provision is patently illegal and not severable from the sued-upon provision. *See* *Hemlock Semiconductor Corp. v. Deutsche Solar GmbH, 116 F. Supp. 3d 818, 2015 U.S. Dist. LEXIS 97956, 2015 WL 4476327 (May 7, 2015)*. Here, there is no patent illegality in the supply agreements. **[*43]** Rather, Kyocera argues that the Supply Agreements violate Japanese ***antitrust law*** if Hemlock abused a position of bargaining power in arriving at the agreements.

i.

The District of Columbia Circuit addressed an affirmative antitrust defense that did not allege patent antitrust illegality in *National Souvenir Center, Inc. v. Historic Figures, Inc., 728 F.2d 503, 234 U.S. App. D.C. 222 (D.C. Cir. 1984)*. *National Souvenir* arose out of "a series of pre-trial rulings by the district court in three consolidated anti-trust cases involving wax museums[.]" *Id. at 506*. After a wax museum in Washington D.C. began franchising museums throughout the United States, the franchisees sued, claiming that the agreements violated the Sherman Act because they impermissibly tied a certain supplier's figures to the museum franchise. *Id.* The franchisor and owners responded by asserting a breach of contract counterclaim, to which the franchises defended by alleging that the agreements were illegal tying agreements under the Sherman Act. In dismissing the defense, the district court concluded that the defense could not be sustained under *Kaiser Steel* because "the promise being sued on is not itself illegal under the antitrust laws, [and so] *Kaiser* did not require recognition of the defense." *Id. at 508* (quoting opinion below) (internal quotation **[*44]** marks omitted).

In reviewing the district court opinion, the District of Colombia Circuit Court noted that "*Kosuga* was generally viewed as permitting antitrust defenses only in a very narrow class of contract suits, courts being understandably hesitant to interpose complex antitrust issues in a simple suit for breach of contract." *Id.* The circuit court then read *Kosuga* to limit antitrust defenses to situations where "the requested enforcement was of agreements not to compete or other direct market restrictions, that made 'the court . . . a party to an anticompetitive scheme.'" *Id.* (quoting *Mullins v. Kaiser Steel Corp., 642 F.2d 1302, 206 U.S. App. D.C. 334 (D.C. Cir. 1980))*. The circuit court noted that the Supreme Court in *Kaiser Steel* "opened the window only a notch to antitrust defenses, i.e., it refused to enforce a promise to pay that was itself a mechanism to police anticompetitive conduct." *Id.* In distilling the two cases, the circuit court determined the relevant inquiries are (1) whether the agreement to be enforced is facially illegal under federal antitrust laws (the *Kosuga* question) and (2) whether the agreement to be enforced is itself a mechanism to enforce a collateral agreement or provision that facially violates federal antitrust laws.

In the case before **[*45]** it, the District of Columbia Circuit determined that "the promises to pay franchise fees in this case do not appear on their face to be primarily means to enforce the allegedly illegal tie-ins between the wax figures and start-up services." *Id.* Rather, they appeared to be merely consideration for goods and services, or nothing more than an inoffensive market transaction. *Id.* Importantly, the court held:

> To transform the contracts here into illegal tie-ins would require complex proof of monopoly power in the tying market and leverage of that power in the tied market. Even then, their vice would extend only to the amount that the agreed prices exceeded the fair value of the goods and services received and consumed—the portion of the prices that could be traced to the illegal practice. The complexity of proof and speculative nature of appellants' defenses seem to us to place them outside of the [*Kaiser Steel*] exception and clearly within the ambit of disfavor for such defenses articulated in *Kosuga*.

Id. at 515-16. Stated differently, not only was the promise the court was asked to enforce not patently illegal, but fulfilling the promise did not force the franchisees to comply with another portion of **[*46]** the agreement that was patently illegal. Any illegality under a collateral provision of the agreement would only arise under the presence of specific market conditions external to the agreement and upon which the agreement does not rely.

ii.

Here, Kyocera does not challenge any specific provision of the Supply Agreements as patently illegal under Japanese ***Antitrust law***. Instead, Kyocera argues that the Supply Agreements are wholly invalid and unenforceable under Japanese ***Antitrust law*** because "Hemlock abused its superior bargaining position to obtain punitive terms from Kyocera in violation of Japan's Anti-Monopoly Act ("AMA"). Resp. to Mot. to Strike 5. Kyocera argues that, although Hemlock's market dominance is probative, it is not required under Japanese ***antitrust law***, and that Kyocera's claim does not need to allege any market-control thresholds or any particular market share. *Id.* at 6.

Kyocera makes no allegation that the Supply Agreements either (1) facially violate Japanese ***Antitrust law*** or (2) serve as a mechanism to facially violate Japanese ***Antitrust law***. As such, Kyocera's claim of wholesale unenforceability under a broad and amorphous provision of Japanese ***antitrust law*** is not a defense **[*47]** in this breach of contract case.

Kyocera attempts to distinguish this case from *Kaiser Steel* and *Kosuga* by arguing that those cases involved situations where one party had already received the property of another and the complaining party sought to avoid paying for the delivered goods. In contrast, Kyocera argues that there are no delivered goods in the present case and that it is being forced to pay for goods that it has not received. First, the decision to cease acceptance of goods under the Supply Agreements is Kyocera's. If Kyocera honored the terms and schedules that it agreed to in the Supply Agreements, then its advance payments would continue to be credited against its future purchases. Second, and more importantly, this is not a material distinction and has no bearing on the question of whether it is appropriate for this Court to entertain a foreign anti-trust defense as part of a Michigan breach of contract case.

Kyocera also argues that, like in *Kaiser Steel*, the Supply Agreements require Kyocera to pay a penalty if it selects any supplier other than Hemlock. Kyocera cites to no provision of the Supply Agreements supporting such an argument, and there is in fact no provision **[*48]** of the Supply Agreements requiring Kyocera to pay a penalty if it uses polysilicon suppliers other than Hemlock. Furthermore, Kyocera provides no explanation as to how any such provision would violate *Japanese* ***antitrust law*** — the law that Kyocera attempts to raise in its defense. The fact that such conduct was found to facially violate United States ***antitrust law*** in *Kaiser Steel* is irrelevant where Kyocera has not pled as a defense any violations of United States ***antitrust law***.

B.

Kyocera also attempts to distinguish this case from *Deutsche Solar* by arguing that this Court should *not in fact adjudicate* any Japanese antitrust issues. *Id.* at 7. Kyocera instead argues that this Court should apply the doctrine of abstention and, if and when the Japanese court issues a final and valid judgment on the antitrust issue, review the Japanese court's findings and determine whether the decision renders Hemlock's contract unenforceable in the United States. *Id.*

Abstention from the exercise of federal jurisdiction is a "narrow exception to the duty of a District Court to adjudicate a controversy properly before it." *Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 813, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976)*. It is "the exception, not the rule." *Id. Colorado River* instructed courts to consider several **[*49]** factors in determining whether to abstain in favor of a parallel proceeding in the courts of another sovereign, the most important factor being whether there exists a "clear federal policy evinc[ing] ... the avoidance of piecemeal adjudication." *Id.* Additional factors include how far the parallel proceeding has advanced in the other sovereign's courts, the number of defendants and complexity of the proceeding, the convenience of the parties, and whether a sovereign government is participating in the suit. *See Answers in Genesis of Kentucky, Inc. v. Creation Ministries Intern., Ltd., 556 F.3d 459, 467 (6th Cir. 2009)*.

As to breach of contract cases, there is no clear federal policy evincing the avoidance of piecemeal adjudication. There is, however, a clear federal policy in favor of enforcing bargained for forum selection clauses. *E. & J. Gallo Winery v. Andina Licores S.A., 446 F.3d 984, 991-92 (9th Cir. 2006)*. American courts will generally only recognize foreign judgments that are both final and valid. *See Pilkington Bros. P.L.C. v. AFG Industries Inc., 581 F.Supp. 1039, 1045 (D. Del. 1984)*. Even where a party obtains a final and valid foreign judgment, a court may refuse to recognize the judgment "where the proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be determined otherwise than by proceedings in that foreign court." 2005 Recognition Act § 4(c)(5); 1962 Recognition Act § 4(b)(5). In *Bremen v. Zapata* ***[*50]*** *Off-Shore Co.*, the United States Supreme Court held that, where a choice of forum was made "in an arm's-length negotiation by experienced and sophisticated businessmen... absent some compelling and countervailing reason it should be honored by the parties and enforced by the courts." *407 U.S. 1, 11, 92 S. Ct. 1907, 32 L. Ed. 2d 513 (1972)*. In order to overcome this presumption a party must show that the provision in question was affected by "fraud, undue influence, or overweening bargaining power." *Id. at 12*. The Court concluded that, "in the light of present-day commercial realities and expanding international trade we conclude that the forum clause should control absent a strong showing that it should be set aside." *Id. at 15*. Circuit Courts have applied this *Bremen* test to choice of law provisions as well as choice of forum provisions. *See* *Lipcon v. Underwriters at Lloyd's, London, 148 F.3d 1285, 1292 (11th Cir. 1998)*.

The Supply Agreements contain a choice of forum provision stating that the parties "submit to the exclusive jurisdiction and venue of the U.S. District Court for the Eastern District of Michigan for all disputes arising, directly or indirectly, under [the Supply Agreements]." Agreements I-III ¶ 21. The Supply Agreements also contain a choice of law provision, providing that the Supply Agreements "shall be governed **[*51]** and controlled in all respects by the laws of the State of Michigan, USA... and all disputes, including interpretation, enforceability, validity, and construction, shall be determined under the law of the State of Michigan, without regard to any conflict of law provision." *Id.* at ¶ 20. Michigan public policy "favors the enforcement of contractual forum-selection clauses and choice-of-law provisions." *Turcheck v. Amerifund Financial, Inc., 272 Mich. App. 341, 725 N.W.2d 684, 688 (Mich. Ct. App. 2006)*. Importantly, Kyocera has not challenged the enforceability of either provision in its pleadings or responses.

Kyocera's antitrust defense will be stricken; first, because it does not meet the requirements of *Kaiser Steele* and *Kosuga* to be proper for this Court's determination as part of this breach of contract action, and second, because even if Kyocera obtained a final judgment from the Tokyo District court, the Supply Agreements' forum selection provision and choice of law provision would preclude this Court from recognizing the foreign judgment.

IV.

The final substantive motion before the Court at this time is Kyocera's motion for partial judgment on the pleadings. ECF No. 38. *Federal Rule of Civil Procedure 12(c)* provides that "[a]fter the pleadings are closed—but early enough not to delay trial—a party may move for judgment **[*52]** on the pleadings." The standard of review for a motion for judgment on the pleadings is the same as that applied to motions to dismiss under *Rule 12(b)(6)*. *See, e.g.,* *Lindsay v. Yates, 498 F.3d 434, 438 (6th Cir.2007)*; *Morgan v. Church's Fried Chicken, 829 F.2d 10, 11 (6th Cir.1987)* (noting that where a *Rule 12(b)(6)* defense of failure to state a claim upon which relief can be granted is raised by a *Rule 12(c)* motion for judgment on the pleadings, the Court must apply the standard for a *Rule 12(b)(6)* motion). Accordingly, "[f]or purposes of a motion for judgment on the pleadings, all well-pleaded material allegations of the pleadings of the opposing party must be taken as true, and the motion may be granted only if the moving party is nevertheless clearly entitled to judgment." *JPMorgan Chase Bank, N.A. v. Winget, 510 F.3d 577, 581 (6th Cir.2007)* (internal citations and quotation marks omitted).

In its *Rule 12(c)* motion, Kyocera requests that the Court dismiss Hemlock's claim for accelerated damages. Kyocera argues that the accelerated damages provisions in the Supply Agreements do not approximate Hemlock's actual damages but instead serve as unenforceable penalties. Hemlock responds that it is not in fact seeking accelerated termination damages in this litigation. Resp. to Mot. for J. on Pleadings, ECF No. 48.

Because Hemlock is not seeking accelerated damages at this time, and because this Court's jurisdiction extends only **[*53]** to actual cases and controversies, Kyocera's motion for judgment on the pleadings will be denied. If and when Hemlock seeks accelerated damages, Kyocera may renew its challenge to the accelerated damage provisions.

V.

Also before the Court is Hemlock's motion to quash non-party subpoenas issued by Kyocera. The scope of discovery is governed by Federal *Rule 26(b)(1)*, which as of December 1, 2015 provides:

> Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

Fed. R. Civ. P. 26(b)(1). The 2015 Committee notes explain that "[t]he parties and the court have a collective responsibility to consider the proportionality of all discovery and consider **[*54]** it in resolving discovery disputes." *Rule 26(b)(2)(C)* provides additional limitations on the scope of discovery, explaining that the Court must limit the extent of discovery if it determines that "the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;".

Under Federal *Rule 45(d)(3)*, upon a timely motion, the Court must quash or modify a subpoena that "requires disclosure of privileged or other protected matter, if no exception or waiver applies" or a subpoena that "subjects a person to an undue burden." *Rule 45(d)(3)(A)(iii)-(iv)*. The Court may quash or modify a subpoena that requires disclosing trade secrets or other confidential information. *Rule 45(d)(3)(B)*.

Hemlock moves to quash non-party subpoenas served on the following attorneys in companion cases: (1) Daniel Malone, the attorney for Deutsche Solar GmbH in *Deutsche Solar* and attorney for both Green Energy Technology, Inc. and Tatung Co. in *Hemlock Semiconductor Corporation v. Green Energy Technology Inc., et al.*, No. 13-020593 (Mich. Cir. Ct. Saginaw Cnty. 2013); (2) Larry Elliot, attorney for Deutsche Solar in *Deutsche Solar*; and (3) David Tsai, attorney for both Green Energy and Tatung **[*55]** in *Green Energy*. Hemlock argues that the documents Kyocera seeks are subject to protective orders entered by the Courts in both *Deutsche Solar* and *Green Energy*, and that Hemlock has a privilege and proprietary interest in the documents. Hemlock further argues that the subpoenas should be quashed under *Rule 45(d)(3)*, since Hemlock is in possession of all of the documents and depositions sought by Kyocera and because Kyocera has already requested the exact same documents from Hemlock pursuant to *Rule 34*. In opposition to Hemlock's motion, Kyocera argues that its third-party requests are proper because the documents have already been gathered and produced and because Hemlock has indicated that it will force Kyocera to engage in motion practice before it will produce the materials in question.

A.

"[A] party generally has no standing to seek to quash a subpoena directed to a non-party." *Systems Products and Solutions, Inc. v. Scramlin, 2014 U.S. Dist. LEXIS 109389, 2014 WL 3894385 *7 (E.D. Mich. August 8, 2014)* (internal quotations and citation omitted). A party establishes standing if it carries its burden of persuading the court that it has a claim of personal interest or privilege in the material sought by the third-party subpoenas. *Id.* Here, because the relevant documents relate to lawsuits in which Hemlock was a party and are **[*56]** covered by protective orders, Hemlock has shown privilege conferring standing.

B.

At this time, Kyocera's non-party subpoenas will be provisionally quashed for two reasons: First, because the information it seeks from the non-parties is covered by protective orders, thus making it privileged material under *Rule 26(b)(1)*; second, because the subpoenas are unreasonably cumulative or duplicative under *Rule 26(b)(2)(C)* and Kyocera is able to obtain the same material directly from Hemlock. If Hemlock makes the discovery process unduly expensive, inconvenient or burdensome, then this order will be revisited and Kyocera may be allowed to reissue subpoenas to the non-parties.

VI.

The final motion currently before this Court is Kyocera's motion to compel discovery. This motion will be addressed during the *Rule 16(b)* scheduling conference scheduled below.

VII.

Accordingly, it is **ORDERED** that Plaintiff Hemlock's motion to dismiss Defendant Kyocera's counterclaims, ECF No. 21, is **GRANTED**.

It is further **ORDERED** that Defendant Kyocera's counterclaims Nos. I-VII are **DISMISSED**.

It is further **ORDERED** that Plaintiff Hemlock's motion to strike Defendant Kyocera's Japanese antitrust defense, ECF No. 22, is **GRANTED**.

It is further **ORDERED** that Defendant **[*57]** Kyocera's Japanese antitrust defense, Affirmative Defense No. 10, is **STRICKEN**.

It is further **ORDERED** that Defendant Kyocera's motion for partial judgment on the pleadings, ECF No. 38, is **DENIED without prejudice**.

It is further **ORDERED** that Plaintiff Hemlock's motion to quash non-party subpoenas, ECF No. 24, is **PROVISIONALLY GRANTED**.

It is further **ORDERED** that the non-party subpoenas issued to Attorneys Daniel Malone, Larry Elliott, and David Tsai are **QUASHED**.

It is further **ORDERED** that a *Rule 16(b)* scheduling conference is **SCHEDULED** for **March 9, 2016 at 4:00 PM** at the United States Courthouse, 1000 Washington Avenue, Bay City, Michigan, 48708.

/s/ Thomas L. Ludington

THOMAS L. LUDINGTON

United States District Judge

Dated: January 6, 2016

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In re Am. Express Anti-Steering Rules Antitrust Litig.

United States District Court for the Eastern District of New York

January 7, 2016, Decided; January 7, 2016, Filed

11-MD-2221 (NGG) (RER); 08-CV-2315 (NGG) (RER); 08-CV-2316 (NGG) (RER); 08-CV-2317 (NGG) (RER); 08-CV-2380 (NGG) (RER); 08-CV-2406 (NGG) (RER); 11-CV-0337 (NGG) (RER); 11-CV-0338 (NGG) (RER)

Reporter

2016 U.S. Dist. LEXIS 3332 *; 2016-1 Trade Cas. (CCH) P79,457; 2016 WL 748089

IN RE: AMERICAN EXPRESS ANTI-STEERING RULES ANTITRUST LITIGATION. This Document Relates to: All Individual Merchant Plaintiff Actions, 08-CV-2315 (NGG) (RER), 08-CV-2316 (NGG) (RER), 08-CV-2317 (NGG) (RER), 08-CV-2380 (NGG) (RER), 08-CV-2406 (NGG) (RER), 11-CV-0337 (NGG) (RER), 11-CV-0338 (NGG) (RER)

Subsequent History: Motion granted by, Motion denied by, Without prejudice *In re Am. Express Anti-Steering Rules Antitrust Litig., 343 F. Supp. 3d 94, 2018 U.S. Dist. LEXIS 165924, 2018 WL 4623052 (E.D.N.Y., Sept. 26, 2018)*

Motion granted by, Dismissed by, in part *In re Am. Express Anti-Steering Rules Antitrust Litig., 433 F. Supp. 3d 395, 2020 U.S. Dist. LEXIS 7095, 2020 WL 227425 (E.D.N.Y., Jan. 14, 2020)*

Prior History: *Rite-Aid Corp. v. Am. Express Travel Related Servs. Co., 2008 U.S. Dist. LEXIS 59545 (E.D.N.Y., Aug. 4, 2008)*

Core Terms

merchant, collateral estoppel, damages, statute of limitations, summary judgment, laches defense, summary judgment motion, no-surcharge, four-year, purchaser, insurer, laches, continuing violation, speculative, antitrust, parties, overcharges, prices, application of collateral estoppel, speculative damages, discount rate, overt act, Plaintiffs', Injunction, estimated, motions, DENIES, equitable relief, four year, effective

LexisNexis® Headnotes

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

Civil Procedure > Pretrial Matters > Conferences > Pretrial Orders

HN1[] **Amendment of Pleadings, Leave of Court**

Although *Fed. R. Civ. P. 15* provides that a court should freely grant leave to amend when justice so requires, *Fed. R. Civ. P. 15(a)(2)*, *Fed. R. Civ. P. 16* further provides that a pre-trial scheduling order may be modified only for good cause and with the judge's consent, *Fed. R. Civ. P. 16(b)(4)*. Good cause depends in part on the diligence of the moving party. In addition, the court may, in its discretion, consider other relevant factors including, in particular, whether allowing the amendment of the pleading at the stage of the litigation will prejudice defendants. In addition, even where the movant shows good cause under *Rule 16*, it must also show that the amendment would comply with Rule 15—in other words, that amendment is not futile, is not the product of undue delay or bad faith, and would not overly prejudice the non-movant.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

HN2[] **Estoppel, Collateral Estoppel**

The doctrine of non-mutual offensive collateral estoppel allows a plaintiff who was not a party to a prior judgment to use that judgment offensively to prevent a defendant from relitigating issues resolved in the earlier proceeding. Issue preclusion may only apply where: (1) the issues in both proceedings are identical; (2) the issue in the prior proceeding was actually litigated and actually decided; (3) there was full and fair opportunity to litigate in the prior proceeding; and (4) the issue previously litigated was necessary to support a valid and final judgment on the merits. The specific legal claims asserted in the second action need not be identical to those asserted in the prior action for collateral estoppel to apply. With respect to the fourth element, an issue is necessary to a prior judgment for issue preclusion purposes if its disposition was the basis for the holding with respect to the issue and not mere dictum.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

HN3[] **Estoppel, Collateral Estoppel**

In the Second Circuit, each of two alternative, independent grounds for a prior holding is given effect for collateral estoppel purposes. However, if an appeal is taken and the appellate court affirms on one ground and disregards the other, there is no collateral estoppel as to the unreviewed ground. In addition, in the Second Circuit, a lower court judgment is final for purposes of collateral estoppel even while an appeal of that judgment is pending.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

HN4[] **Estoppel, Collateral Estoppel**

A trial court has broad discretion in determining whether collateral estoppel should apply, and it should not apply the doctrine where doing so would be unfair to a defendant. For example, application of collateral estoppel may be unfair where the defendant did not have incentive to litigate the issue(s) in the first action vigorously or could not foresee follow-on actions, where the resolution of the first action is inconsistent with other previous decisions, or where procedural opportunities available to the defendant in the second action were unavailable in the first action and may have led to a different result. Finally, where collateral estoppel does apply, a plaintiff may use its application as a basis for seeking summary judgment in full or in part.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

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

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

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

HN5[] **Summary Judgment, Evidentiary Considerations**

Summary judgment must be granted when there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). A fact is material if it might affect the outcome of the suit under the governing law. No genuine dispute of material fact exists if the record taken as a whole could not lead a rational trier of fact to find for the non-moving party. In evaluating a motion for summary judgment, the court is required to construe the evidence in the light most favorable to the non-moving party and to draw all reasonable inferences in its favor.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Absence of Essential Element

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

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

HN6[] **Burdens of Proof, Absence of Essential Element**

A party moving for summary judgment bears the initial burden to show an absence of genuine factual dispute. Summary judgment will be granted if the opposing party then fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. To defeat summary judgment, the opposing party must do more than demonstrate some metaphysical doubt as to the material facts, and may not rely on conclusory allegations.

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

Antitrust & Trade Law > Sherman Act > Defenses

HN7[] **Actual Monopolization, Claims**

The date on which a monopolization claim accrues depends on the relationship that the plaintiff has with the defendant as either a competitor or as a purchaser of the defendant's products and services. A purchaser plaintiff's cause of action accrues when he or she actually pays an overcharge.

Antitrust & Trade Law > Clayton Act > Defenses

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Laches

HN8[] **Clayton Act, Defenses**

After the laches period based on a statute of limitations expires, a court may, in its discretion, allow an action for equitable relief to go forward if it determines: (1) that sufficient reasons cognizable in equity excuse the delay; or (2) that the delay caused defendants no prejudice.

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Laches

HN9[] **Affirmative Defenses, Laches**

A defendant has been prejudiced by a delay when the assertion of a claim available some time ago would be inequitable in light of the delay in bringing that claim. Specifically, prejudice ensues when a defendant has changed his position in a way that would not have occurred if the plaintiff had not delayed.

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For Ahold U.S.A. Inc., Plaintiff (1:11md2221): David P. Germaine, Vanek Vickers & Masini, P.C., Chicago, IL USA; Douglas H. Patton, Kenny Nachwalter, P.A., Miami, FL USA; James Almon, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL USA; Kenny Nachwalter, Miami, FL USA; Paul E. Slater, Sperling Slater & Spitz, Chicago, IL USA; Richard A. Arnold, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL USA; William Jay Blechman, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL USA.

For Albertson's Llc, Plaintiff **[*15]** (1:11md2221): David P. Germaine, Vanek Vickers & Masini, P.C., Chicago, IL USA; Douglas H. Patton, Kenny Nachwalter, P.A., Miami, FL USA; James Almon, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL USA; Kenny Nachwalter, Miami, FL USA; Paul E. Slater, Sperling Slater & Spitz, Chicago, IL USA; Richard A. Arnold, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL USA; William Jay Blechman, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL USA.

For Hy-Vee, Inc., Plaintiff (1:11md2221): David P. Germaine, Vanek Vickers & Masini, P.C., Chicago, IL USA; Douglas H. Patton, Kenny Nachwalter, P.A., Miami, FL USA; James Almon, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL USA; Kenny Nachwalter, Miami, FL USA; Paul E. Slater, Sperling Slater & Spitz, Chicago, IL USA; Richard A. Arnold, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL USA; William Jay Blechman, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL USA.

For The Great Atlantic & Pacific Tea Company Inc., Plaintiff (1:11md2221): David P. Germaine, Vanek Vickers & Masini, P.C., Chicago, IL USA; James Almon, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL USA; Kenny Nachwalter, Miami, FL USA; Paul E. Slater, Sperling Slater & Spitz, Chicago, **[*16]** IL USA; Richard A. Arnold, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL USA; William Jay Blechman, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL USA.

For Treehouse, Inc., Plaintiff (1:11md2221): Brian G. Weber, Johns, Flaherty & Collins, S.C., La Crosse, WI; Jason S. Kilene, PRO HAC VICE, Gustafson Gluek PLLC, Minneapolis, MN USA; Joseph G. Veenstra, Johns, Flaherty & Collins, S.C., La Crosse, WI USA.

For Il Forno, Inc., Plaintiff (1:11md2221): Gary B. Friedman, LEAD ATTORNEY, Friedman Law Group LLP, New York, NY USA; Mark Reinhardt, LEAD ATTORNEY, Reinhardt Wendorf & Blanchfield, St. Paul, MN USA; Benjamin D. Brown, PRO HAC VICE, Cohen, Milstein, Sellers & Toll, P.L.L.C, Washington, DC USA; David A. Young, PRO HAC VICE, Cohen Milstein Sellers & Toll PLLC, Washington, DC USA; J. Douglas Richards, Cohen Milstein Sellers and Toll PLLC, New York, NY USA; R. Alexander Saveri, Saveri & Saveri, Inc., San Francisco, CA USA; Robert

Winslow Cohen, Robert W Cohen, APC Law Offices, Los Angeles, CA USA; Scott H. Levy, Cohen Milstein Sellers & Toll PLLC, New York, NY USA; Tracey L. Kitzman, Cohen Milstein Sellers & Toll PLLC, New York, NY USA.

For National Supermarkets Association, Inc., on behalf **[*17]** of its membership, and all other similarly situated persons, Plaintiff (1:11md2221): Benjamin D. Brown, PRO HAC VICE, Cohen, Milstein, Sellers & Toll, P.L.L.C, Washington, DC USA; David A. Young, PRO HAC VICE, Cohen Milstein Sellers & Toll PLLC, Washington, DC USA; Gary B. Friedman, Friedman Law Group LLP, New York, NY USA; J. Douglas Richards, Cohen Milstein Sellers and Toll PLLC, New York, NY USA; Noah Shube, New York, NY USA; Tracey L. Kitzman, Cohen Milstein Sellers & Toll PLLC, New York, NY USA.

For Plaintiffs, All Class Plaintiffs, Plaintiff (1:11md2221): Bernard Persky, Labaton Sucharow LLP, New York, NY USA; David P. Germaine, PRO HAC VICE, Vanek Vickers & Masini, P.C., Chicago, IL USA; Jason S. Kilene, PRO HAC VICE, Gustafson Gluek PLLC, Minneapolis, MN USA; Rachel Kopp, Spector Roseman Kodroff & Willis PC, Philadelphia, PA USA; Steven J. Greenfogel, Lite DePalma Greenberg LLC, Philadelphia, PA USA.

For The Marcus Corporation, Plaintiff (1:11md2221): Mark Reinhardt, LEAD ATTORNEY, Reinhardt Wendorf & Blanchfield, St. Paul, MN USA; Christopher William Hellmich, PRO HAC VICE, Hellmich Law Offices, Costa Mesa, CA USA; Dean Martin Solomon, Levitt & Kaizer, New York, NY USA; Gary **[*18]** B. Friedman, Friedman Law Group LLP, New York, NY USA; Joe R. Whatley, Jr., Whatley Drake & Kallas LLC, New York, NY USA; Read K. McCaffrey, The Law Offices of Marc Seldin Rosen, Baltimore, MD USA; Richard P. Rouco, Quinn Connor Weaver Davies & Rouco, Birmingham, AL USA; Tracey L. Kitzman, Cohen Milstein Sellers & Toll PLLC, New York, NY USA.

For Bill Mccauley, Plaintiff (1:11md2221), Pro se.

For Read Mccaffrey, Plaintiff (1:11md2221), Pro se.

For Hillary Jaynes, Plaintiff (1:11md2221): Joseph J. Tabacco, Jr., LEAD ATTORNEY, BERMAN DEVALERIO, San Francisco, CA USA.

For Anthony Oliver, Plaintiff (1:11md2221): Joseph J. Tabacco, Jr., LEAD ATTORNEY, BERMAN DEVALERIO, San Francisco, CA USA.

For Bernadette Martin, Plaintiff (1:11md2221): Joseph J. Tabacco, Jr., LEAD ATTORNEY, BERMAN DEVALERIO, San Francisco, CA USA.

For Bryan Huey, Plaintiff (1:11md2221): Joseph J. Tabacco, Jr., LEAD ATTORNEY, BERMAN DEVALERIO, San Francisco, CA USA.

For James Eaton, Plaintiff (1:11md2221): Joseph J. Tabacco, Jr., LEAD ATTORNEY, BERMAN DEVALERIO, San Francisco, CA USA.

For Paul Kashishian, Plaintiff (1:11md2221): Joseph J. Tabacco, Jr., LEAD ATTORNEY, BERMAN DEVALERIO, San Francisco, CA USA.

For Gianna Valdes, Plaintiff **[*19]** (1:11md2221): Joseph J. Tabacco, Jr., LEAD ATTORNEY, BERMAN DEVALERIO, San Francisco, CA USA.

For Chad Tintrow, Plaintiff (1:11md2221): Joseph J. Tabacco, Jr., LEAD ATTORNEY, BERMAN DEVALERIO, San Francisco, CA USA.

For Matthew Moriarty, Plaintiff (1:11md2221): Joseph J. Tabacco, Jr., LEAD ATTORNEY, BERMAN DEVALERIO, San Francisco, CA USA.

For Andrew Amend, Plaintiff (1:11md2221): Kim Elaine Miller, LEAD ATTORNEY, Kahn Gauthier Swick, LLC, New York, NY USA; Melinda Ann Nicholson, LEAD ATTORNEY, Kahn Swick & Foti, LLC, Madisonville, LA USA.

For Igor Gelman, Plaintiff (1:11md2221): Kim Elaine Miller, LEAD ATTORNEY, Kahn Gauthier Swick, LLC, New York, NY USA; Melinda Ann Nicholson, LEAD ATTORNEY, Kahn Swick & Foti, LLC, Madisonville, LA USA.

For Zachary Draper, Plaintiff (1:11md2221): Kim Elaine Miller, LEAD ATTORNEY, Kahn Gauthier Swick, LLC, New York, NY USA; Melinda Ann Nicholson, LEAD ATTORNEY, Kahn Swick & Foti, LLC, Madisonville, LA USA.

For Shawn O'Keefe, Plaintiff (1:11md2221): Joseph J. Tabacco, Jr., LEAD ATTORNEY, BERMAN DEVALERIO, San Francisco, CA USA.

For Francisco Robleto, Jr., Plaintiff (1:11md2221): Joseph J. Tabacco, Jr., LEAD ATTORNEY, BERMAN DEVALERIO, San Francisco, CA USA. **[*20]**

For Michael Thomas Reid, Plaintiff (1:11md2221): Joseph J. Tabacco, Jr., LEAD ATTORNEY, BERMAN DEVALERIO, San Francisco, CA USA.

For Plymouth Oil Corp., Plaintiff (1:11md2221): Scott Allan Martin, Hausfeld LLP, New York, NY USA.

For American Express Travel Related Services Company, Inc, Defendant (1:11md2221): Peter T. Barbur, LEAD ATTORNEY, Cravath Swaine Moore LLP, Ny, NY USA; Alanna Rutherford, Boies, Schiller & Flexner LLP, New York, NY USA; Athena N. Cheng, Cravath, Swaine & Moore LLP, New York, NY USA; Damien Jerome Marshall, Boies, Schiller & Flexner, LLP(NYC), New York, NY USA; Daniel Ryan, Hinshaw & Culbertson Llp, Chicago, IL USA; David John Hanus, Hinshaw & Culbertson, LLP, Milwaukee, WI USA; Donald L. Flexner, PRO HAC VICE, Boies, Schiller & Flexner LLP, New York, NY USA; Elizabeth L. Grayer, Cravath, Swaine & Moore LLP, New York, NY USA; Eric Brenner, Boies, Schiller & Flexner LLP, New York, NY USA; Evan R. Chesler, Cravath, Swaine & Moore, New York, NY USA; John Francis LaSalle, Boies Schiller & Flexner LLP, New York, NY USA; Kevin J Orsini, Cravath, Swaine & Moore LLP, New York, NY USA; Matthew S. Tripolitsiotis, Boies Schiller & Flexner LLP, Armonk, NY USA; Philip M. Bowman, **[*21]** Boies, Schiller & Flexner LLP, New York, NY USA; Philip C. Korologos, Boies, Schiller & Flexner LLP, New York, NY USA; Robert M. Cooper, Boies, Schiller & Flexner LLP, Washington, DC USA; Tamara Rubb, PRO HAC VICE, Cravath, Swaine & Moore LLP, New York, NY USA; William T. Thomas, Boies Schiller & Flexner, Fort Lauderdale, FL USA.

For American Express Company, Defendant (1:11md2221): Peter T. Barbur, LEAD ATTORNEY, Cravath Swaine Moore LLP, Ny, NY USA; Alanna Rutherford, Boies, Schiller & Flexner LLP, New York, NY USA; Athena N. Cheng, Cravath, Swaine & Moore LLP, New York, NY USA; Damien Jerome Marshall, Boies, Schiller & Flexner, LLP(NYC), New York, NY USA; Daniel Ryan, Hinshaw & Culbertson Llp, Chicago, IL USA; David John Hanus, Hinshaw & Culbertson, LLP, Milwaukee, WI USA; Donald L. Flexner, PRO HAC VICE, Boies, Schiller & Flexner LLP, New York, NY USA; Elizabeth L. Grayer, Cravath, Swaine & Moore LLP, New York, NY USA; Eric Brenner, Boies, Schiller & Flexner LLP, New York, NY USA; Evan R. Chesler, Cravath, Swaine & Moore, New York, NY USA; John Francis LaSalle, Boies Schiller & Flexner LLP, New York, NY USA; Kevin J Orsini, Cravath, Swaine & Moore LLP, New York, NY USA; Matthew **[*22]** S. Tripolitsiotis, Boies Schiller & Flexner LLP, Armonk, NY USA; Philip M. Bowman, Boies, Schiller & Flexner LLP, New York, NY USA; Philip C. Korologos, Boies, Schiller & Flexner LLP, New York, NY USA; Robert M. Cooper, Boies, Schiller & Flexner LLP, Washington, DC USA; Tamara Rubb, PRO HAC VICE, Cravath, Swaine & Moore LLP, New York, NY USA; William T. Thomas, Boies Schiller & Flexner, Fort Lauderdale, FL USA.

For Susan Burdette, Defendant (1:11md2221): Kim Elaine Miller, LEAD ATTORNEY, Kahn Gauthier Swick, LLC, New York, NY USA; Melinda Ann Nicholson, LEAD ATTORNEY, Kahn Swick & Foti, LLC, Madisonville, LA USA.

For Government Plaintiffs in 10-Cv-4496, Interested Party (1:11md2221): Anne E. Schneider, Attorney General of Missouri, Jefferson City, MO USA; Mark Hamer, Department of Justice, Washington, DC USA.

For Target Corporation, Interested Party (1:11md2221): Alycia Nadine Broz, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA; Gregory Alan Clarick, Clarick Gueron Reisbaum LLP, New York, NY USA; Michael J. Canter, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA; Robert N. Webner, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA.

For Staples, Inc., Interested Party (1:11md2221): **[*23]** Alycia Nadine Broz, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA; Gregory Alan Clarick, Clarick Gueron Reisbaum LLP, New York, NY USA; Michael J. Canter, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA; Robert N. Webner, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA.

For The Bon-Ton Stores, Inc., Interested Party (1:11md2221): Alycia Nadine Broz, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA; Gregory Alan Clarick, Clarick Gueron Reisbaum LLP, New York, NY USA;

Michael J. Canter, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA; Robert N. Webner, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA.

For Willkie Farr & Gallagher Llp, Interested Party (1:11md2221): Robert J. Jossen, LEAD ATTORNEY, Dechert LLP, New York, NY USA.

For Gary Friedman, Interested Party (1:11md2221): Samuel Issacharoff, Samuel Issacharoff, Esq., New York, NY USA; Theresa Trzaskoma, Brune & Richard LLP, New York, NY USA.

For Dfs Services Llc, Interested Party (1:11md2221): Jennifer M. Selendy, LEAD ATTORNEY, Kirkland & Ellis, New York, NY USA.

For Discover Home Loans, Inc., Interested Party (1:11md2221): Jennifer M. Selendy, LEAD ATTORNEY, Kirkland & Ellis, New York, NY USA.

For **[*24]** Discover Bank, Interested Party (1:11md2221): Jennifer M. Selendy, LEAD ATTORNEY, Kirkland & Ellis, New York, NY USA.

For Squire Patton Boggs (Us) Llp, Interested Party (1:11md2221): Mitchell Rand Berger, LEAD ATTORNEY, Squire Patton Boggs (US) LLP, Washington, DC USA; Thomas Michael Guiffre, LEAD ATTORNEY, Patton Boggs LLP, Washington, DC USA.

For Hausfeld, Llp, Interested Party (1:11md2221): Michael D. Hausfeld, LEAD ATTORNEY, PRO HAC VICE, Hausfeld LLP, Washington, DC USA; Scott Allan Martin, LEAD ATTORNEY, Hausfeld LLP, New York, NY USA.

For Prof. Myriam Gilles, Interested Party (1:11md2221): Noah Shube, New York, NY USA.

For 7-Eleven, Inc., Objector (1:11md2221): Adam Owen Glist, Constantine Cannon LLP, New York, NY USA; David Alan Scupp, Constantine Cannon LLP, New York, NY USA; Gary J. Malone, Constantine Cannon LLP, New York, NY USA; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Academy, Ltd., Objector (1:11md2221): Adam Owen Glist, Constantine Cannon LLP, New York, NY USA; David Alan Scupp, Constantine Cannon LLP, New York, NY USA; Gary J. Malone, Constantine Cannon LLP, New York, NY USA; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For **[*25]** Affiliated Foods Midwest Cooperative, Objector (1:11md2221): Adam Owen Glist, Constantine Cannon LLP, New York, NY USA; David Alan Scupp, Constantine Cannon LLP, New York, NY USA; Gary J. Malone, Constantine Cannon LLP, New York, NY USA; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Aldo US Inc., Objector (1:11md2221): Adam Owen Glist, Constantine Cannon LLP, New York, NY USA; David Alan Scupp, Constantine Cannon LLP, New York, NY USA; Gary J. Malone, Constantine Cannon LLP, New York, NY USA; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For American Eagle Outfitters, Inc., Objector (1:11md2221): Adam Owen Glist, Constantine Cannon LLP, New York, NY USA; David Alan Scupp, Constantine Cannon LLP, New York, NY USA; Gary J. Malone, Constantine Cannon LLP, New York, NY USA; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Barnes & Noble, Inc., Objector (1:11md2221): Adam Owen Glist, Constantine Cannon LLP, New York, NY USA; David Alan Scupp, Constantine Cannon LLP, New York, NY USA; Gary J. Malone, Constantine Cannon LLP, New York, NY USA; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Barnes & Noble College **[*26]** Booksellers, Llc, Objector (1:11md2221): Adam Owen Glist, Constantine Cannon LLP, New York, NY USA; David Alan Scupp, Constantine Cannon LLP, New York, NY USA; Gary J. Malone, Constantine Cannon LLP, New York, NY USA; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Bealls, Inc., Objector (1:11md2221): Adam Owen Glist, Constantine Cannon LLP, New York, NY USA; David Alan Scupp, Constantine Cannon LLP, New York, NY USA; Gary J. Malone, Constantine Cannon LLP, New York, NY USA; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Best Buy Stores, L.P., Objector (1:11md2221): Adam Owen Glist, Constantine Cannon LLP, New York, NY USA; David Alan Scupp, Constantine Cannon LLP, New York, NY USA; Gary J. Malone, Constantine Cannon LLP, New York, NY USA; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Boscovs, Inc., Objector (1:11md2221): Adam Owen Glist, Constantine Cannon LLP, New York, NY USA; David Alan Scupp, Constantine Cannon LLP, New York, NY USA; Gary J. Malone, Constantine Cannon LLP, New York, NY USA; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Brookshire Grocery Company, Objector (1:11md2221): Adam Owen **[*27]** Glist, Constantine Cannon LLP, New York, NY USA; David Alan Scupp, Constantine Cannon LLP, New York, NY USA; Gary J. Malone, Constantine Cannon LLP, New York, NY USA; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Buc-Ees Ltd., Objector (1:11md2221): Adam Owen Glist, Constantine Cannon LLP, New York, NY USA; David Alan Scupp, Constantine Cannon LLP, New York, NY USA; Gary J. Malone, Constantine Cannon LLP, New York, NY USA; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For The Buckle, Inc., Objector (1:11md2221): Adam Owen Glist, Constantine Cannon LLP, New York, NY USA; David Alan Scupp, Constantine Cannon LLP, New York, NY USA; Gary J. Malone, Constantine Cannon LLP, New York, NY USA; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Dillards, Inc., Objector (1:11md2221): Adam Owen Glist, Constantine Cannon LLP, New York, NY USA; David Alan Scupp, Constantine Cannon LLP, New York, NY USA; Gary J. Malone, Constantine Cannon LLP, New York, NY USA; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Coborns Incorporated, Objector (1:11md2221): Adam Owen Glist, Constantine Cannon LLP, New York, NY USA; David Alan **[*28]** Scupp, Constantine Cannon LLP, New York, NY USA; Gary J. Malone, Constantine Cannon LLP, New York, NY USA; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Dagostino Supermarkets, Inc., Objector (1:11md2221): Adam Owen Glist, Constantine Cannon LLP, New York, NY USA; David Alan Scupp, Constantine Cannon LLP, New York, NY USA; Gary J. Malone, Constantine Cannon LLP, New York, NY USA; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Drury Hotels Company, Llc, Objector (1:11md2221): Adam Owen Glist, Constantine Cannon LLP, New York, NY USA; David Alan Scupp, Constantine Cannon LLP, New York, NY USA; Gary J. Malone, Constantine Cannon LLP, New York, NY USA; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Euromarket Designs, Inc., Objector (1:11md2221): Adam Owen Glist, Constantine Cannon LLP, New York, NY USA; David Alan Scupp, Constantine Cannon LLP, New York, NY USA; Gary J. Malone, Constantine Cannon LLP, New York, NY USA; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Meadowbrook, L.L.C., Objector (1:11md2221): Adam Owen Glist, Constantine Cannon LLP, New York, NY USA; David Alan Scupp, Constantine Cannon **[*29]** LLP, New York, NY USA; Gary J. Malone, Constantine Cannon LLP, New York, NY USA; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Express, Llc, Objector (1:11md2221): Adam Owen Glist, Constantine Cannon LLP, New York, NY USA; David Alan Scupp, Constantine Cannon LLP, New York, NY USA; Gary J. Malone, Constantine Cannon LLP, New York, NY USA; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Hmshost Corporation, Objector (1:11md2221): Adam Owen Glist, Constantine Cannon LLP, New York, NY USA; David Alan Scupp, Constantine Cannon LLP, New York, NY USA; Gary J. Malone, Constantine Cannon LLP, New York, NY USA; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Ikea North America Services, Llc, Objector (1:11md2221): Adam Owen Glist, Constantine Cannon LLP, New York, NY USA; David Alan Scupp, Constantine Cannon LLP, New York, NY USA; Gary J. Malone, Constantine Cannon LLP, New York, NY USA; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Lowes Companies, Inc., Objector (1:11md2221): Adam Owen Glist, Constantine Cannon LLP, New York, NY USA; David Alan Scupp, Constantine Cannon LLP, New York, NY USA; Gary J. Malone, **[*30]** Constantine Cannon LLP, New York, NY USA; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Martins Super Markets, Inc., Objector (1:11md2221): Adam Owen Glist, Constantine Cannon LLP, New York, NY USA; David Alan Scupp, Constantine Cannon LLP, New York, NY USA; Gary J. Malone, Constantine Cannon LLP, New York, NY USA; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For National Grocers Association, Objector (1:11md2221): Adam Owen Glist, Constantine Cannon LLP, New York, NY USA; David Alan Scupp, Constantine Cannon LLP, New York, NY USA; Gary J. Malone, Constantine Cannon LLP, New York, NY USA; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Petsmart, Inc., Objector (1:11md2221): Adam Owen Glist, Constantine Cannon LLP, New York, NY USA; David Alan Scupp, Constantine Cannon LLP, New York, NY USA; Gary J. Malone, Constantine Cannon LLP, New York, NY USA; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Recreational Equipment, Inc., Objector (1:11md2221): Adam Owen Glist, Constantine Cannon LLP, New York, NY USA; David Alan Scupp, Constantine Cannon LLP, New York, NY USA; Gary J. Malone, Constantine Cannon LLP, **[*31]** New York, NY USA; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Republic Services, Inc., Objector (1:11md2221): Adam Owen Glist, Constantine Cannon LLP, New York, NY USA; David Alan Scupp, Constantine Cannon LLP, New York, NY USA; Gary J. Malone, Constantine Cannon LLP, New York, NY USA; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Urban Outfitters, Inc., Objector (1:11md2221): Adam Owen Glist, Constantine Cannon LLP, New York, NY USA; David Alan Scupp, Constantine Cannon LLP, New York, NY USA; Gary J. Malone, Constantine Cannon LLP, New York, NY USA; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Wal-Mart Stores, Inc., Objector (1:11md2221): Adam Owen Glist, Constantine Cannon LLP, New York, NY USA; David Alan Scupp, Constantine Cannon LLP, New York, NY USA; Gary J. Malone, Constantine Cannon LLP, New York, NY USA; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Whole Foods Market Group, Inc., Objector (1:11md2221): Adam Owen Glist, Constantine Cannon LLP, New York, NY USA; David Alan Scupp, Constantine Cannon LLP, New York, NY USA; Gary J. Malone, Constantine Cannon LLP, New York, NY USA; Jeffrey **[*32]** Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Whole Foods Market Rocky Mountain/Southwest, L.P., Objector (1:11md2221): Adam Owen Glist, Constantine Cannon LLP, New York, NY USA; David Alan Scupp, Constantine Cannon LLP, New York, NY USA; Gary J. Malone, Constantine Cannon LLP, New York, NY USA; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Whole Foods Market California, Inc., Objector (1:11md2221): Adam Owen Glist, Constantine Cannon LLP, New York, NY USA; David Alan Scupp, Constantine Cannon LLP, New York, NY USA; Gary J. Malone, Constantine Cannon LLP, New York, NY USA; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Mrs. Goochs Natural Food Markets, Inc., Objector (1:11md2221): Adam Owen Glist, Constantine Cannon LLP, New York, NY USA; David Alan Scupp, Constantine Cannon LLP, New York, NY USA; Gary J. Malone, Constantine Cannon LLP, New York, NY USA; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Whole Food Company, Objector (1:11md2221): Adam Owen Glist, Constantine Cannon LLP, New York, NY USA; David Alan Scupp, Constantine Cannon LLP, New York, NY USA; Gary J. Malone, Constantine Cannon LLP, New York, **[*33]** NY USA; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Whole Foods Market Pacific Northwest, Inc., Objector (1:11md2221): Adam Owen Glist, Constantine Cannon LLP, New York, NY USA; David Alan Scupp, Constantine Cannon LLP, New York, NY USA; Gary J. Malone, Constantine Cannon LLP, New York, NY USA; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Wfm-Wo, Inc., Objector (1:11md2221): Adam Owen Glist, Constantine Cannon LLP, New York, NY USA; David Alan Scupp, Constantine Cannon LLP, New York, NY USA; Gary J. Malone, Constantine Cannon LLP, New York, NY USA; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Wfm Northern Nevada, Inc., Objector (1:11md2221): Adam Owen Glist, Constantine Cannon LLP, New York, NY USA; David Alan Scupp, Constantine Cannon LLP, New York, NY USA; Gary J. Malone, Constantine Cannon LLP, New York, NY USA; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Wfm Hawaii, Inc., Objector (1:11md2221): Adam Owen Glist, Constantine Cannon LLP, New York, NY USA; David Alan Scupp, Constantine Cannon LLP, New York, NY USA; Gary J. Malone, Constantine Cannon LLP, New York, NY USA; Jeffrey Isaac Shinder, **[*34]** Constantine Cannon LLP, New York, NY USA.

For Wfm Southern Nevada, Inc., Objector (1:11md2221): Adam Owen Glist, Constantine Cannon LLP, New York, NY USA; David Alan Scupp, Constantine Cannon LLP, New York, NY USA; Gary J. Malone, Constantine Cannon LLP, New York, NY USA; Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Macy's Inc., Objector (1:11md2221): Alycia Nadine Broz, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA; Gregory Alan Clarick, Clarick Gueron Reisbaum LLP, New York, NY USA; Michael J. Canter, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA; Robert N. Webner, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA.

For Kohl's Corporation, Objector (1:11md2221): Alycia Nadine Broz, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA; Gregory Alan Clarick, Clarick Gueron Reisbaum LLP, New York, NY USA; Michael J. Canter, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA; Robert N. Webner, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA.

For The Tjx Companies, Inc., Objector (1:11md2221): Alycia Nadine Broz, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA; Gregory Alan Clarick, Clarick Gueron Reisbaum LLP, New York, NY USA; Michael **[*35]** J. Canter, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA; Robert N. Webner, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA.

For J.C. Penney Corporation, Inc., Objector (1:11md2221): Alycia Nadine Broz, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA; Gregory Alan Clarick, Clarick Gueron Reisbaum LLP, New York, NY USA; Michael J. Canter, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA; Robert N. Webner, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA.

For Office Depot, Inc., Objector (1:11md2221): Alycia Nadine Broz, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA; Gregory Alan Clarick, Clarick Gueron Reisbaum LLP, New York, NY USA; Michael J. Canter, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA; Robert N. Webner, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA.

For L Brands, Inc., Objector (1:11md2221): Alycia Nadine Broz, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA; Gregory Alan Clarick, Clarick Gueron Reisbaum LLP, New York, NY USA; Michael J. Canter, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA; Robert N. Webner, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA.

For Big Lots Stores, Inc., Objector (1:11md2221): **[*36]** Alycia Nadine Broz, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA; Gregory Alan Clarick, Clarick Gueron Reisbaum LLP, New York, NY USA; Michael J. Canter, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA; Robert N. Webner, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA.

For Pns Stores, Inc., Objector (1:11md2221): Alycia Nadine Broz, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA; Gregory Alan Clarick, Clarick Gueron Reisbaum LLP, New York, NY USA; Michael J. Canter, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA; Robert N. Webner, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA.

For C.S. Ross Company, Objector (1:11md2221): Alycia Nadine Broz, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA; Gregory Alan Clarick, Clarick Gueron Reisbaum LLP, New York, NY USA; Michael J. Canter, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA; Robert N. Webner, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA.

For Closeout Distribution, Inc., Objector (1:11md2221): Alycia Nadine Broz, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA; Gregory Alan Clarick, Clarick Gueron Reisbaum LLP, New York, NY USA; Michael J. Canter, Vorys, Sater, Seymour **[*37]** and Pease LLP, Columbus, OH USA; Robert N. Webner, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA.

For Acena Retail Group, Inc., Objector (1:11md2221): Alycia Nadine Broz, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA; Gregory Alan Clarick, Clarick Gueron Reisbaum LLP, New York, NY USA; Michael J. Canter, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA; Robert N. Webner, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA.

For Abercrombie & Fitch Co., Objector (1:11md2221): Alycia Nadine Broz, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA; Gregory Alan Clarick, Clarick Gueron Reisbaum LLP, New York, NY USA; Michael J. Canter, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA; Robert N. Webner, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA.

For Officemax Incorporated, Objector (1:11md2221): Alycia Nadine Broz, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA; Gregory Alan Clarick, Clarick Gueron Reisbaum LLP, New York, NY USA; Michael J. Canter, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA; Robert N. Webner, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA.

For Saks Incorporated, Objector (1:11md2221): Alycia Nadine Broz, Vorys, **[*38]** Sater, Seymour and Pease LLP, Columbus, OH USA; Gregory Alan Clarick, Clarick Gueron Reisbaum LLP, New York, NY USA; Michael J. Canter, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA; Robert N. Webner, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA.

For Chico's Fas, Inc., Objector (1:11md2221): Alycia Nadine Broz, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA; Gregory Alan Clarick, Clarick Gueron Reisbaum LLP, New York, NY USA; Michael J. Canter, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA; Robert N. Webner, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA.

For Luxottica U.S. Holdings Corp., Objector (1:11md2221): Alycia Nadine Broz, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA; Gregory Alan Clarick, Clarick Gueron Reisbaum LLP, New York, NY USA; Michael J. Canter, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA; Robert N. Webner, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA.

For American Signature, Inc., Objector (1:11md2221): Alycia Nadine Broz, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA; Gregory Alan Clarick, Clarick Gueron Reisbaum LLP, New York, NY USA; Michael J. Canter, Vorys, Sater, Seymour and Pease LLP, **[*39]** Columbus, OH USA; Robert N. Webner, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA.

For National Retail Federation, Objector (1:11md2221): Alycia Nadine Broz, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA; Gregory Alan Clarick, Clarick Gueron Reisbaum LLP, New York, NY USA; Michael J. Canter, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA; Robert N. Webner, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA.

For Kevin S. Scheunemann, Objector (1:11md2221), Pro se, Kewaskum, WI USA.

For Home Depot U.S.A., Inc., Objector (1:11md2221): Alison Berkowitz Prout, PRO HAC VICE, Bondurant Mixson & Elmore, LLP, Atlanta, GA USA; Frank M. Lowrey, PRO HAC VICE, Bondurant Mixson & Elmore, LLP, Atlanta, GA USA.

For The Buckeye Institute For Public Policy Solutions, Objector (1:11md2221): Adam E. Schulman, LEAD ATTORNEY, PRO HAC VICE, Competitive Enterprise Institute, Washingion, DC USA.

For Brenda Howell, Objector (1:11md2221): Denise H. Gibbon, LEAD ATTORNEY, PRO HAC VICE, Attorney at Law, New York, NY USA.

For Blue Cross Blue Shield Entities, Objector (1:11md2221): Adam P. Feinberg, LEAD ATTORNEY, Miller & Chevalier Chartered, Washington, DC USA; Anthony F. Shelley, LEAD ATTORNEY, **[*40]** Miller & Chevalier Chartered, Washington, DC USA.

For Wellpoint, Inc., Objector (1:11md2221): Adam P. Feinberg, LEAD ATTORNEY, Miller & Chevalier Chartered, Washington, DC USA; Anthony F. Shelley, LEAD ATTORNEY, Miller & Chevalier Chartered, Washington, DC USA.

For Unlimited Vacations And Cruises, Inc., Objector (1:11md2221): John Jacob Pentz, III, LEAD ATTORNEY, PRO HAC VICE, John J. Pentz, Esq., Sudbury, MA USA.

For Lasko Enterprises, Inc., Objector (1:11md2221): John Jacob Pentz, III, LEAD ATTORNEY, PRO HAC VICE, John J. Pentz, Esq., Sudbury, MA USA.

For Annamarie Falvo, Objector (1:11md2221): John Jacob Pentz, III, LEAD ATTORNEY, PRO HAC VICE, John J. Pentz, Esq., Sudbury, MA USA.

For Alaska Airlines, Inc., Objector (1:11md2221): David P. Germaine, Vanek Vickers & Masini, P.C., Chicago, IL USA; Jason A. Zweig, Hagens Berman Sobol Shapiro LLP, New York, NY USA; Joseph Michael Vanek, Vanek, Vickers & Masini, P.C., Chicago, IL USA; Paul E. Slater, Sperling Slater & Spitz, Chicago, IL USA.

For Southwest Airlines, Inc., Objector (1:11md2221): David P. Germaine, Vanek Vickers & Masini, P.C., Chicago, IL USA; Jason A. Zweig, Hagens Berman Sobol Shapiro LLP, New York, NY USA; Joseph Michael **[*41]** Vanek, Vanek, Vickers & Masini, P.C., Chicago, IL USA; Paul E. Slater, Sperling Slater & Spitz, Chicago, IL USA.

For Restoration Hardware, Inc., Objector (1:11md2221): Joe V. Demarco, DeVore & DeMarco LLP, New York, NY USA.

For Lord & Taylor Acquisitions, Inc., Objector (1:11md2221): Gregory Alan Clarick, LEAD ATTORNEY, Clarick Gueron Reisbaum LLP, New York, NY USA; Alycia Nadine Broz, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA; Michael J. Canter, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA; Robert N. Webner, Vorys, Sater, Seymour and Pease LLP, Columbus, OH USA.

For United States of America, Objector (1:11md2221): Gregg I. Malawer, Department of Justice, Antitrust Division, Washington, DC USA.

For Amazon.Com, Inc., Objector (1:11md2221): Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Ashley Furniture Industries Inc., Objector (1:11md2221): Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Costco Wholesale Corp., Objector (1:11md2221): Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Footlocker, Inc., Objector (1:11md2221): Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For The Gap, Inc., Objector **[*42]** (1:11md2221): Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Marathon Petroleum Company LP, Objector (1:11md2221): Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Michaels Stores, Inc., Objector (1:11md2221): Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For National Association of Convenience Stores, Objector (1:11md2221): Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Panda Restaurant Group, Inc., Objector (1:11md2221): Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Panera, Llc, Objector (1:11md2221): Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Racetrac Petroleum, Inc., Objector (1:11md2221): Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Retail Industry Leaders Association, Objector (1:11md2221): Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Roundy's Supermarkets, Inc., Objector (1:11md2221): Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Sears Holdings Corporation, Objector (1:11md2221): Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Speedway Llc, Objector (1:11md2221): Jeffrey **[*43]** Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Starbucks Corporation, Objector (1:11md2221): Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Stein Mart, Inc., Objector (1:11md2221): Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For The Wet Seal, Inc., Objector (1:11md2221): Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Yum! Brands, Inc., Objector (1:11md2221): Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Mills Motor, Inc., Objector (1:11md2221): Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Mills Auto Enterprises, Inc., Objector (1:11md2221): Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Willmar Motors, L.L.C., Objector (1:11md2221): Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Mills Auto Center, Inc., Objector (1:11md2221): Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Fleet And Farm of Alexandria, Inc., Objector (1:11md2221): Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Fleet Wholesale Supply of Fergus Falls, Inc., Objector (1:11md2221): Jeffrey Isaac Shinder, Constantine Cannon **[*44]** LLP, New York, NY USA.

For Fleet And Farm of Green Bay, Inc., Objector (1:11md2221): Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Fleet And Farm of Menomonie, Inc., Objector (1:11md2221): Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Mills Fleet Farm Inc., Objector (1:11md2221): Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Fleet And Farm of Manitowoc, Inc., Objector (1:11md2221): Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Fleet And Farm of Plymouth, Inc., Objector (1:11md2221): Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Fleet And Farm Supply Co. of West Bend, Inc., Objector (1:11md2221): Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Fleet And Farm of Waupaca, Inc., Objector (1:11md2221): Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Mills E-Commerce Enterprises, Inc., Objector (1:11md2221): Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Brainerd Lively Auto, L.L.C., Objector (1:11md2221): Jeffrey Isaac Shinder, Constantine Cannon LLP, New York, NY USA.

For Newegg, Inc., Objector (1:11md2221): David P. Germaine, **[*45]** Vanek Vickers & Masini, P.C., Chicago, IL USA; Jason A. Zweig, Hagens Berman Sobol Shapiro LLP, New York, NY USA; Joseph Michael Vanek, Vanek, Vickers & Masini, P.C., Chicago, IL USA; Paul E. Slater, Sperling Slater & Spitz, Chicago, IL USA.

For Airtran Airways, Inc., Objector (1:11md2221): David P. Germaine, Vanek Vickers & Masini, P.C., Chicago, IL USA; Jason A. Zweig, Hagens Berman Sobol Shapiro LLP, New York, NY USA; Joseph Michael Vanek, Vanek, Vickers & Masini, P.C., Chicago, IL USA; Paul E. Slater, Sperling Slater & Spitz, Chicago, IL USA.

For Dsw Inc., Objector (1:11md2221): David P. Germaine, Vanek Vickers & Masini, P.C., Chicago, IL USA; Jason A. Zweig, Hagens Berman Sobol Shapiro LLP, New York, NY USA; Joseph Michael Vanek, Vanek, Vickers & Masini, P.C., Chicago, IL USA; Paul E. Slater, Sperling Slater & Spitz, Chicago, IL USA.

For Assistech Special Needs, Objector (1:11md2221), Pro se, Tucson, AZ USA.

For Les Petits Bisous! Llc, Objector (1:11md2221), Pro se, Havre De Grace, MD USA.

For Bailey H. Squier Associates, Objector (1:11md2221), Pro se, Burleson, TX USA.

For The Crow Hill Company, Inc., Objector (1:11md2221), Pro se, Highland, NY USA.

For Sales Growth Specialists, Objector **[*46]** (1:11md2221), Pro se, Long Lake, MN USA.

For Sports Coverage, Inc., Objector (1:11md2221), Pro se, Dallas, TX USA.

For Sigmapac, Objector (1:11md2221), Pro se, Fairfax, VA USA.

For The Fuel Foundation, Objector (1:11md2221), Pro se, Fairfax, VA USA.

For Ports Petroleum Company Inc., doing business as Fuel Mart, Objector (1:11md2221), Pro se, Wooster, OH USA.

For Brooks Brothers Group, Inc., Objector (1:11md2221), Pro se, New York, NY USA.

For Rue21, Inc., Objector (1:11md2221), Pro se, Warrendale, PA USA.

For The Estee Lauder Companies, Inc., Objector (1:11md2221), Pro se, New York, NY USA.

For New Vista,Llc, Objector (1:11md2221), Pro se, North Little Rock, AR USA.

For Sigma, Objector (1:11md2221), Pro se, Fairfax, VA USA.

For Diamond State Oil, Llc, Objector (1:11md2221), Pro se, North Little Rock, AR USA.

For Coulson Oil Company, Inc., Objector (1:11md2221), Pro se, North Little Rock, AR USA.

For New Neptune, Llc, Objector (1:11md2221), Pro se, North Little Rock, AR USA.

For Cumberland Farms, Inc., Objector (1:11md2221), Pro se, Framingham, MA USA.

For Gulf Oil Limited Partnership, Objector (1:11md2221), Pro se, Framingham, MA USA.

For Rr #1 Tx, Llc, Objector (1:11md2221), Pro se, North Little **[*47]** Rock, AR USA.

For Port Cities Oil, Llc, Objector (1:11md2221), Pro se, North Little Rock, AR USA.

For Cracker Barrel Old Country Store, Inc., Objector (1:11md2221), Pro se, Lebanon, TN USA.

For Petroplus, Llc, Objector (1:11md2221), Pro se, North Little Rock, AR USA.

For New Mercury, Llc, Objector (1:11md2221), Pro se, North Little Rock, AR USA.

For Superstop Stores, Llc, Objector (1:11md2221), Pro se, North Little Rock, AR USA.

For O'Reilly Automotive, Inc., Objector (1:11md2221), Pro se, Springfield, MO USA.

For Autozone, Inc., Objector (1:11md2221), Pro se, Memphis, TN USA.

For Spirit Airlines, Inc., Objector (1:11md2221), Pro se, Miramar, FL USA.

For Bluegalaxy Digital, Objector (1:11md2221), Pro se, Beavercreek, OH USA.

For The Comic King, Objector (1:11md2221), Pro se, Melrose, MA USA.

For Dairy Queen, Objector (1:11md2221), Pro se, Kewaskum, WI USA.

For Hot Topic, Inc., Objector (1:11md2221), Pro se, City Of Industry, CA USA.

For Erich Neumann, Objector (1:11md2221), Pro se, Miami, FL USA.

For Skeeter's Automotive Repair, Objector (1:11md2221), Pro se, Santa Ana, CA USA.

For Pacific Sunwear of California, Inc., Objector (1:11md2221), Pro se, Anaheim, CA USA.

For Prestigiousbullion/Coppercapowns, **[*48]** Objector (1:11md2221), Pro se, Millsboro, DE USA.

For Kathy Goodhart-Walker, Objector (1:11md2221), Pro se, Benson, AZ USA.

For Christopher & Banks Corporation, Objector (1:11md2221), Pro se, Plymouth, MN USA.

For Fl Snyder And Son Inc., Objector (1:11md2221), Pro se, Albany, OR USA.

For The Children's Place Retail Stores, Inc., Objector (1:11md2221), Pro se, Secaucus, NJ USA.

For Akamaru Japanese Restaurant, Objector (1:11md2221), Pro se, Visalia, CA USA.

For Family Express Corporation, Objector (1:11md2221), Pro se, Valparaiso, IN USA.

For Incredible Creations, Objector (1:11md2221), Pro se, Buford, GA USA.

For The Water Brewerey, Inc., Objector (1:11md2221), Pro se, Costa Mesa, CA USA.

For The Water Brewerey, Inc., Objector (1:11md2221): Scott A. Kron, LEAD ATTORNEY, PRO HAC VICE, Kron & Card LLP, Laguna Hills, CA USA.

For Belk, Inc., Objector (1:11md2221), Pro se, Charlotte, NC USA.

For Andersson Technologies Llc, Objector (1:11md2221), Pro se, Phoenixville, PA USA.

For Ntt Corporation, Objector (1:11md2221), Pro se, Los Angeles, CA USA.

For Swarovski North America Limited, Objector (1:11md2221), Pro se, Cranston, RI USA.

For Shabakas, Objector (1:11md2221), Pro se, Clinton, MS USA.

For Tiffany **[*49]** And Company, Objector (1:11md2221), Pro se, New York, NY USA.

For I.L. "lonnie" Morris, Cpa & Company, Objector (1:11md2221), Pro se, Plano, TX USA.

For Siringo Optometry Associates, Pllc, Objector (1:11md2221), Pro se, Denver, CO USA.

For Arthur Howard, Ph.D., Objector (1:11md2221), Pro se, Hemet, CA USA.

For Rite Aid Corporation, Plaintiff (1:08cv2315): Steve D. Shadowen, LEAD ATTORNEY, Hangley Aronchick Segal & Pudlin, Harrisburg, PA USA; Eric Bloom, Hangley Aronchick Segal & Pudlin, Harrisburg, PA USA; Jason L. Reimer, PRO HAC VICE, Hangley Aronchick Segal & Pudlin, Harrisburg, PA USA; Linda P. Nussbaum, Grant & Eisenhofer P.A., New York, NY USA.

For Rite Aid Hdqtrs.Corp., Plaintiff (1:08cv2315): Steve D. Shadowen, LEAD ATTORNEY, Hangley Aronchick Segal & Pudlin, Harrisburg, PA USA; Hangley Aronchick Segal & Pudlin, Harrisburg, PA USA; Jason L. Reimer, PRO HAC VICE, Hangley Aronchick Segal & Pudlin, Harrisburg, PA USA; Linda P. Nussbaum, Grant & Eisenhofer P.A., New York, NY USA.

For Walgreen Co, Plaintiff (1:08cv2315): James Almon, Kenny Nachwalter, P.A., Miami, FL USA.

For American Express Travel Related Services Company, Inc., Defendant (1:08cv2315): Evan R. Chesler, LEAD ATTORNEY, **[*50]** Cravath, Swaine & Moore, New York, NY USA; Philip M. Bowman, LEAD ATTORNEY, Boies, Schiller & Flexner LLP, New York, NY USA; Philip C. Korologos, LEAD ATTORNEY, Boies, Schiller & Flexner LLP, New York, NY USA; Eric Brenner, Boies, Schiller & Flexner LLP, New York, NY USA; Kevin J Orsini, Cravath, Swaine & Moore LLP, New York, NY USA.

For American Express Company, Defendant (1:08cv2315): Evan R. Chesler, LEAD ATTORNEY, Cravath, Swaine & Moore, New York, NY USA; Philip M. Bowman, LEAD ATTORNEY, Boies, Schiller & Flexner LLP, New York, NY USA; Philip C. Korologos, LEAD ATTORNEY, Boies, Schiller & Flexner LLP, New York, NY USA; Eric Brenner, Boies, Schiller & Flexner LLP, New York, NY USA; Kevin J Orsini, Cravath, Swaine & Moore LLP, New York, NY USA.

For Cvs Pharmacy, Inc., Plaintiff (1:08cv2316): Linda P. Nussbaum, LEAD ATTORNEY, Grant & Eisenhofer P.A., New York, NY USA; Mitchell H. Macknin, LEAD ATTORNEY, Sperling & Slater, P.C., Chicago, IL USA; Paul E. Slater, LEAD ATTORNEY, Sperling Slater & Spitz, Chicago, IL USA; Robert N. Kaplan, LEAD ATTORNEY, Kaplan, Kilsheimer & Fox, LLP, New York, NY USA; David P. Germaine, PRO HAC VICE, Vanek Vickers & Masini, P.C., Chicago, IL USA; Joseph **[*51]** Michael Vanek, PRO HAC VICE, Vanek, Vickers & Masini, P.C., Chicago, IL USA.

For American Express Travel Related Services Company, Inc., Defendant (1:08cv2316):: Philip M. Bowman, LEAD ATTORNEY, Boies, Schiller & Flexner LLP, New York, NY USA; Philip C. Korologos, LEAD ATTORNEY, Boies, Schiller & Flexner LLP, New York, NY USA; Eric Brenner, Boies, Schiller & Flexner LLP, New York, NY USA.

For American Express Company, Defendant (1:08cv2316):: Philip M. Bowman, LEAD ATTORNEY, Boies, Schiller & Flexner LLP, New York, NY USA; Philip C. Korologos, LEAD ATTORNEY, Boies, Schiller & Flexner LLP, New York, NY USA; Eric Brenner, Boies, Schiller & Flexner LLP, New York, NY USA.

For Walgreen Co., Plaintiff (1:08cv2317): Douglas H. Patton, LEAD ATTORNEY, Kenny Nachwalter, P.A., Miami, FL USA; Kenny Nachwalter, LEAD ATTORNEY, Miami, FL USA; William Jay Blechman, LEAD ATTORNEY, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL USA; James Almon, Kenny Nachwalter, P.A., Miami, FL USA; Linda P. Nussbaum, Grant & Eisenhofer P.A., New York, NY USA; Richard A. Arnold, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL USA.

For American Express Travel Related Services Company, Inc., Defendant (1:08cv2317): Philip **[*52]** M. Bowman, LEAD ATTORNEY, Boies, Schiller & Flexner LLP, New York, NY USA; Philip C. Korologos, LEAD ATTORNEY, Boies, Schiller & Flexner LLP, New York, NY USA; Eric Brenner, Boies, Schiller & Flexner LLP, New York, NY USA.

For American Express Company, Defendant (1:08cv2317): Philip M. Bowman, LEAD ATTORNEY, Boies, Schiller & Flexner LLP, New York, NY USA; Philip C. Korologos, LEAD ATTORNEY, Boies, Schiller & Flexner LLP, New York, NY USA; Eric Brenner, Boies, Schiller & Flexner LLP, New York, NY USA.

For Bi-Lo, Llc, Plaintiff (1:08cv2380): Steve D. Shadowen, LEAD ATTORNEY, Hangley Aronchick Segal & Pudlin, Harrisburg, PA USA; Eric Bloom, Hangley Aronchick Segal & Pudlin, Harrisburg, PA USA; Jason L. Reimer, PRO HAC VICE, Hangley Aronchick Segal & Pudlin, Harrisburg, PA USA; Linda P. Nussbaum, Grant & Eisenhofer P.A., New York, NY USA.

For American Express Travel Related Services Company, Inc., Defendant (1:08cv2380): Philip M. Bowman, LEAD ATTORNEY, Boies, Schiller & Flexner LLP, New York, NY USA; Philip C. Korologos, LEAD ATTORNEY, Boies, Schiller & Flexner LLP, New York, NY USA; Eric Brenner, Boies, Schiller & Flexner LLP, New York, NY USA.

For American Express Company, Defendant (1:08cv2380): **[*53]** Philip M. Bowman, LEAD ATTORNEY, Boies, Schiller & Flexner LLP, New York, NY USA; Philip C. Korologos, LEAD ATTORNEY, Boies, Schiller & Flexner LLP, New York, NY USA; Eric Brenner, Boies, Schiller & Flexner LLP, New York, NY USA.

For H.E. Butt Grocery Company, Plaintiff (1:08cv2406): Douglas H. Patton, LEAD ATTORNEY, Kenny Nachwalter, P.A., Miami, FL USA; William Jay Blechman, LEAD ATTORNEY, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL USA; Brian K. O'Bleness, Stinson Morrison Hecker LLP, Kansas City, MO USA; David E. Everson, PRO HAC VICE, Stinson Morrison Hecker LLP, Kansas City, MO USA; James Almon, Kenny Nachwalter, P.A., Miami, FL USA; Linda P. Nussbaum, Grant & Eisenhofer P.A., New York, NY USA; Richard A. Arnold, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL USA.

For American Express Travel Related Services Company, Inc., Defendant (1:08cv2406): Philip M. Bowman, LEAD ATTORNEY, Boies, Schiller & Flexner LLP, New York, NY USA; Philip C. Korologos, LEAD ATTORNEY, Boies, Schiller & Flexner LLP, New York, NY USA; Eric Brenner, Boies, Schiller & Flexner LLP, New York, NY USA.

For American Express Company, Defendant (1:08cv2406): Philip M. Bowman, LEAD ATTORNEY, Boies, Schiller **[*54]** & Flexner LLP, New York, NY USA; Philip C. Korologos, LEAD ATTORNEY, Boies, Schiller & Flexner LLP, New York, NY USA; Eric Brenner, Boies, Schiller & Flexner LLP, New York, NY USA.

For The Kroger Co., Plaintiff (2:11cv337): Douglas H. Patton, Kenny Nachwalter, P.A., Miami, FL USA; James Almon, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL USA; Kenny Nachwalter, Miami, FL USA; Richard A. Arnold, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL USA; William Jay Blechman, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL USA.

For Safeway Inc., Plaintiff (2:11cv337): Douglas H. Patton, Kenny Nachwalter, P.A., Miami, FL USA; James Almon, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL USA; Kenny Nachwalter, Miami, FL USA; Richard A. Arnold, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL USA; William Jay Blechman, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL USA.

For Ahold U.S.A., Inc., Plaintiff (2:11cv337): Douglas H. Patton, Kenny Nachwalter, P.A., Miami, FL USA; James Almon, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL USA; Kenny Nachwalter, Miami, FL USA; Richard A. Arnold, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL USA; William Jay Blechman, PRO HAC VICE, Kenny Nachwalter, **[*55]** P.A., Miami, FL USA.

For Albertson's Llc, Plaintiff (2:11cv337): Douglas H. Patton, Kenny Nachwalter, P.A., Miami, FL USA; James Almon, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL USA; Kenny Nachwalter, Miami, FL USA; Richard A. Arnold, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL USA; William Jay Blechman, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL USA.

For Hy-Vee, Inc., Plaintiff (2:11cv337): Douglas H. Patton, Kenny Nachwalter, P.A., Miami, FL USA; James Almon, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL USA; Kenny Nachwalter, Miami, FL USA; Richard A. Arnold, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL USA; William Jay Blechman, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL USA.

For The Great Atlantic & Pacific Tea Company, Inc., Plaintiff (2:11cv337): Douglas H. Patton, Kenny Nachwalter, P.A., Miami, FL USA; James Almon, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL USA; Kenny Nachwalter, Miami, FL USA; Richard A. Arnold, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL USA; William Jay Blechman, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL USA.

For American Express Travel Related Services Company, Inc., Defendant (2:11cv337): Donald L. Flexner, Boies, Schiller **[*56]** & Flexner LLP, New York, NY USA; Eric Brenner, Boies, Schiller & Flexner LLP, New York, NY USA.

For American Express Company, Defendant (2:11cv337): Donald L. Flexner, Boies, Schiller & Flexner LLP, New York, NY USA; Eric Brenner, Boies, Schiller & Flexner LLP, New York, NY USA.

For Meijer, Inc., Plaintiff (2:11cv338): David P. Germaine, PRO HAC VICE, Vanek Vickers & Masini, P.C., Chicago, IL USA; Joseph Michael Vanek, PRO HAC VICE, Vanek, Vickers & Masini, P.C., Chicago, IL USA; Linda P. Nussbaum, Grant & Eisenhofer P.A., New York, NY USA; Mitchell H. Macknin, Sperling & Slater, P.C., Chicago, IL USA; Paul E. Slater, Sperling Slater & Spitz, Chicago, IL USA; Susan R. Schwaiger, Grant & Eisenhofer, PA., New York, NY USA.

For Publix Super Markets, Inc., Plaintiff (2:11cv338): David P. Germaine, PRO HAC VICE, Vanek Vickers & Masini, P.C., Chicago, IL USA; Joseph Michael Vanek, PRO HAC VICE, Vanek, Vickers & Masini, P.C., Chicago, IL USA; Linda P. Nussbaum, Grant & Eisenhofer P.A., New York, NY USA; Mitchell H. Macknin, Sperling & Slater, P.C., Chicago, IL USA; Paul E. Slater, Sperling Slater & Spitz, Chicago, IL USA; Susan R. Schwaiger, Grant & Eisenhofer, PA., New York, NY USA.

For Raley's, **[*57]** Plaintiff (2:11cv338): David P. Germaine, PRO HAC VICE, Vanek Vickers & Masini, P.C., Chicago, IL USA; Joseph Michael Vanek, PRO HAC VICE, Vanek, Vickers & Masini, P.C., Chicago, IL USA; Linda P. Nussbaum, Grant & Eisenhofer P.A., New York, NY USA; Mitchell H. Macknin, Sperling & Slater, P.C., Chicago, IL USA; Paul E. Slater, Sperling Slater & Spitz, Chicago, IL USA; Susan R. Schwaiger, Grant & Eisenhofer, PA., New York, NY USA.

For Supervalu Inc., Plaintiff (2:11cv338): David P. Germaine, PRO HAC VICE, Vanek Vickers & Masini, P.C., Chicago, IL USA; Joseph Michael Vanek, PRO HAC VICE, Vanek, Vickers & Masini, P.C., Chicago, IL USA; Linda P. Nussbaum, Grant & Eisenhofer P.A., New York, NY USA; Mitchell H. Macknin, Sperling & Slater, P.C., Chicago, IL USA; Paul E. Slater, Sperling Slater & Spitz, Chicago, IL USA; Susan R. Schwaiger, Grant & Eisenhofer, PA., New York, NY USA.

For American Express Travel Related Services Company, Inc., Defendant (2:11cv338): Eric Brenner, Boies, Schiller & Flexner LLP, New York, NY USA.

For American Express Company, Defendant (2:11cv338): Eric Brenner, Boies, Schiller & Flexner LLP, New York, NY USA.

Judges: NICHOLAS G. GARAUFIS, United States District Judge.

Opinion by: NICHOLAS **[*58]** G. GARAUFIS

Opinion

MEMORANDUM & ORDER

NICHOLAS G. GARAUFIS, United States District Judge.

In this set of consolidated antitrust actions (the "MP Actions"), Merchant Plaintiffs (the "MPs")[1] challenge under *Sections 1* and *2* of the Sherman Antitrust Act the contracts that they have entered into with Defendants American Express Travel Related Services Company, Inc. and American Express Company (together, "Amex" or "Defendants"). Specifically, the MPs challenge Defendants' anti-steering rules, referred to as the Non-Discrimination Provisions ("NDPs"), which are contained in merchant agreements entered into between Amex and each MP. The MPs seek an order enjoining Amex from enforcing the NDPs, as well as treble damages for the injuries the MPs allege they have sustained on account of the NDPs.

Pending before the court are the parties' cross-motions for summary judgment, as well as the MPs' **[*59]** motions for leave to modify the Scheduling Order and amend the operative pleadings, and motion for the application of collateral estoppel. For the reasons discussed below, the MPs' motion to modify the Scheduling Order and for leave to amend is DENIED WITHOUT PREJUDICE, the MPs' motion for the application of collateral estoppel is DENIED WITHOUT PREJUDICE, and the MPs' motion for partial summary judgment is DENIED WITHOUT PREJUDICE. The court DENIES Amex's motion for summary judgment with respect to the no-surcharge rule and Amex's statute of limitations and laches defenses, and RESERVES JUDGMENT on Amex's motion for summary judgment with respect to the existence of an Amex-only market.

I. BACKGROUND AND RELEVANT PROCEDURAL HISTORY

[1] The MPs are Ahold U.S.A., Inc.; Albertson's LLC; BI-LO, LLC; CVS Pharmacy, Inc.; The Great Atlantic & Pacific Tea Company, Inc.; H.E. Butt Grocery Co.; Hy-Vee, Inc.; The Kroger Co.; Meijer, Inc.; Publix Super Markets, Inc.; Raley's Inc.; Rite Aid Corporation; Rite Aid HDQTRS Corp.; Safeway Inc.; SuperValu Inc.; and Walgreen Co.

The MP Actions comprise part of a multi-district litigation ("MDL") pending before the court, and the court addresses the parties' motions with the benefit of having presided over the coordinated litigation for several years,[2] as well as the seven-week bench trial in the related case captioned United States, et al. v. American Express Co., et al., No. 10-CV-4496 (E.D.N.Y.) (NGG) (RER), appeal docketed, No. 15-1672-CV (2d Cir.) (the "Government Action"). See **[*60]** *Rite Aid Corp. v. Am. Express Travel Related Servs. Co., 708 F. Supp. 2d 257 (E.D.N.Y. 2010)* (the "SOL Decision") (denying Defendants' motion for judgment on the pleadings in the MP Actions); *United States v. Am. Express Co., 88 F. Supp. 3d 143 (E.D.N.Y. 2015)* (the "Government Decision") (findings of fact and conclusions of law in the Government Action); *United States v. Am. Express Co., No. 10-CV-4496 (NGG) (RER), 2015 U.S. Dist. LEXIS 56945, 2015 WL 1966362 (E.D.N.Y. Apr. 30, 2015)* (setting forth reasoning behind terms of Permanent Injunction in the Government Action).

In order to describe and address the parties' pending motions, the court first must provide a brief outline of the procedural history of the MP Actions. In 2008, certain of the MPs filed antitrust actions against Amex in this court.[3] After answering each Complaint, Amex moved for judgment on the pleadings, arguing that all of the MPs' claims are barred by the *Sherman Act's* four-year statute of limitations. On March 3, 2010, the court denied the motion, holding that the MPs alleged facts that, if true, would allow both their *Section 1* and *2* claims to proceed under exceptions to the *Sherman Act's* four-year statute of limitations. See generally SOL Decision, *708 F. Supp. 2d at 264-72*; see also infra Part III.B.3 (addressing Amex's motion for summary **[*61]** judgment on its statute of limitations and laches defenses).

In October 2010, the Department of Justice and the attorneys general of eighteen states filed the Government Action against Amex, MasterCard, and Visa. In 2011, several new MPs filed antitrust actions against Amex, asserting claims similar to those alleged by the original MPs.[4] The MP Actions (including those actions filed in 2008 and those filed in 2011) and the Government Action against Amex[5] proceeded to coordinated discovery.

In late 2013, Amex moved for summary judgment in both the Government Action and the MP Actions, and moved to consolidate the actions for trial. (See Not. of Mot. for Summ. J. (Dkt. 276)[6]; Not. of Mot. to Consolidate for the Purpose of Trial (Dkt. 279); Not. of Mot. for Summ. J. (Dkt. 281 in Gov't Action).) In the MP Actions, Amex argued that: (1) the MPs' alleged Amex-only market fails as a matter of law; (2) the MPs' claims related to Amex's NDP prohibiting differential surcharging (the "no-surcharge rule") should be dismissed; and (3) the evidentiary record reflects that no exceptions to the four-year statute of limitations apply, and the claims of all MPs except Albertson's LLC ("Albertsons") are therefore time-barred.[7] (See Mem. of Law in Supp. of Defs.' Mot. for Summ. J. ("Defs.' Original Mem.") (Dkt. 277-1) (filed under seal); Reply Mem. of Law in Further Supp. of Defs.' Mot. for Summ. **[*63]** J. ("Defs.' Original Reply") (Dkt. 308-1) (filed under seal).) The MPs opposed Amex's motion, but they did not cross-

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[2] Although they comprise part of the MDL, the MP Actions were originally filed in this court and therefore will also proceed to trial in this jurisdiction.

[3] See Rite Aid Corp., et al. v. American Express Travel Related Services Co., Inc., et al., No. 08-CV-2315 (NGG) (RER) (E.D.N.Y.); CVS Pharmacy, Inc. v. American Express Travel Related Services Co., Inc., et al., No. 08-CV-2316 (NGG) (RER) (E.D.N.Y.); Walgreen Co. v. American Express Travel Related Services Co., Inc., et al., No. 08-CV-2317 (NGG) (RER) (E.D.N.Y.); BI-LO, LLC v. American Express Travel Related Services Co., Inc., et al., No. 08-CV-2380 (NGG) (RER) (E.D.N.Y.); H.E. Butt Grocery Co, v. American Express Travel Related Services Co., Inc., et al., No. 08-CV-2406 (NGG) (RER) (E.D.N.Y.).

[4] See The Kroger Co., et al. v. American Express Travel Related Services Co., Inc., et al., No. 11-CV-337 (NGG) **[*62]** (RER) (E.D.N.Y.); Meijer, Inc., et al. v. American Express Travel Related Services Co., Inc., et al., No. 11-CV-338 (NGG) (RER) (E.D.N.Y.).

[5] Visa and MasterCard entered into consent decrees with the Government on the same day that the Government Action was initiated. Only Amex remained as a defendant.

[6] Unless otherwise noted, citations to docket numbers refer to entries made in In re American Express Anti-Steering Rules Antitrust Litigation, No. 11-MD-2221 (NGG) (RER) (E.D.N.Y.).

[7] The parties agree that Albertsons has timely asserted its antitrust claims.

move for summary judgment at that time. (MPs' Opp'n to Defs.' Mot. for Summ. J. ("MPs' Original Mem.") (Dkt. 287-1) (filed under seal); MPs' Sur-Reply in Opp'n to Defs.' Mot. for Summ. J. (Dkt. 324).) In connection with Amex's motion, the parties filed voluminous factual materials and 56.1 statements, which the court has reviewed.

On March 19, 2014, the court held oral argument on Amex's motions for summary judgment in the Government Action and the MP Actions. (See Mar. 20, 2014, Min. Entry.) The court denied Amex's motion for summary judgment in the Government Action in May 2014. (See May 7, 2014, Mem. & Order (Dkt. 369 in Gov't Action).) Separately, the court denied Amex's motion to consolidate the actions for the purpose of trial (see generally Feb. 11, 2014, Order (Dkt. 335)), and stayed the MP Actions during the **[*64]** pendency of a motion for final settlement approval in consolidated class actions that comprise part of the MDL and in which the MPs are putative class members[8] (see Class Settlement Preliminary Approval Order (Dkt. 333)). At that time, the court reserved judgment on Amex's motion for summary judgment in the MP Actions.

The Government Action proceeded to trial before the court during the summer of 2014. On February 19, 2015, the court issued the Government Decision, see *88 F. Supp. 3d at 143*, finding by a preponderance of the evidence that the specific NDPs challenged by the Government[9] violate *Section 1*.[10] After receiving additional briefing from the parties to the Government Action, as well as other interested parties including the MPs, the court issued a Permanent Injunction on April **[*65]** 30, 2015 (see Order Entering Permanent Injunction as to the American Express Defs. (Dkt. 638 in Gov't Action)), as well as a Memorandum setting forth its reasoning concerning the scope of the Permanent Injunction, see *Am. Express Co., 2015 U.S. Dist. LEXIS 56945, 2015 WL 1966362*.

Amex subsequently moved to stay the implementation of the Permanent Injunction pending its appeal of the Government Decision; the court denied the motion on May 19, 2015, holding, among other things, that Amex could not show that there was a substantial possibility that it would prevail on the merits of its appeal. (See May **[*66]** 19, 2015, Order (Dkt. 663 in Gov't Action).) Amex thereafter filed a notice of appeal (Not. of Appeal (Dkt. 664 in Gov't Action)), and sought a stay pending appeal from the Second Circuit. On June 16, 2015, a three-judge panel of the Second Circuit denied the motion. (See June 16, 2015, Order of U.S. Court of Appeals (Dkt. 687 in Gov't Action).)

During a status conference on July 7, 2015, the court lifted the stay of the MP Actions and set a trial date; the court also granted the MPs leave to file a motion to amend the operative pleadings and a cross-motion for summary judgment on the basis of collateral estoppel. (See July 7, 2015, Min. Entry.) Accordingly, the following motions are now pending before the court: (1) Amex's motion for summary judgment (filed in the fall of 2013 and discussed above); (2) the MPs' motion for leave to amend the operative pleadings (see MPs' Mot. to Suppl. or Amend Compls. (Dkt. 667)); (3) the MPs' motion for collateral estoppel (see MPs' Mot. for Collateral Estoppel (Dkt. 663)); and (4) the MPs' motions for partial summary judgment on liability under *Sections 1* and *2* (see Albertson's LLC's Mot. for Partial Summ. J. on Liability under *§ 1* (Dkt. 664); MPs' Mot. for Partial **[*67]** Summ. J. under *§ 1* (Dkt. 665); MPs' Mot. for Partial Summ. J. on Liability under *§ 2* (Dkt. 666)).[11] With respect to the MPs' motions, the parties have

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[8] On August 4, 2015, the court ultimately denied the joint motion of class plaintiffs and Amex for final approval of their proposed class action settlement. See *In re Am. Express Anti-Steering Rules Antitrust Litig., No. 11-MD-2221 (NGG) (RER), 2015 U.S. Dist. LEXIS 102714, 2015 WL 4645240 (E.D.N.Y. Aug. 4, 2015)*. Various class actions related to Amex's NDPs, as well as a related class action captioned Marcus Corp. v. American Express Co., No. 13-CV-7355 (E.D.N.Y.) (NGG) (RER), remain pending before the court.

[9] The MPs challenge the same NDPs at issue in the Government Action, as well as two additional provisions contained in the NDPs that the Government did not challenge: (1) the no-surcharge rule, a provision prohibiting merchants from imposing a fee for the use of an Amex card that is not imposed equally on all other payment products (i.e., prohibiting merchants from differentially surcharging Amex cards vis-a-vis its competitors' cards), and (2) a provision prohibiting merchants from mischaracterizing Amex cards or engaging in activities that harm Amex's business or brand. See Government Decision, *88 F. Supp. 3d at 163*.

[10] The Government Action included only a *Section 1* claim, and did not include a *Section 2* claim.

filed consolidated briefs discussing the impact of the Government Action as well as the factual record developed in the MP Actions. (See MPs' Omnibus Mem. ("MPs' Suppl. Mem.") (Dkt. 668-1) (filed under seal); Defs.' Mem. of Law in Further Supp. of Defs.' Mot. for Summ. J. and in Opp'n to MPs' Mots. ("Defs.' Suppl. Mem.") (Dkt. 687-1) (filed under seal); MPs' Reply Br. in Supp. of Mots. (Dkt. 694-1) (filed under seal).) On November 12, 2015, the court heard oral argument on the pending motions in the MP Actions. (See Nov. 13, 2015, Min. Entry.)

On December 17, 2015, a panel of the Second Circuit held oral argument on Amex's appeal of the Government Decision. On December 18, 2015, the panel entered on its own motion a temporary stay of the Permanent Injunction and a temporary stay of the Government Action in this court. (See Dec. 18, 2015, Order of U.S. Court of Appeals (Dkt. 697 in Gov't Action).) As of the entry **[*68]** of this Memorandum and Order, the Second Circuit has not issued a decision in the appeal of the Government Action.[12]

II. MPs' MOTIONS BASED ON GOVERNMENT DECISION

The court first addresses the MPs' motions for leave to amend the pleadings and for the application of collateral estoppel in each of the MP Actions. For the reasons discussed below, the motions are DENIED WITHOUT PREJUDICE.

A. Legal Standards

1. Leave to Amend

HN1[] Although *Federal Rule of Civil Procedure 15* provides that a court "should freely grant leave when justice so requires," *Fed. R. Civ. P. 15(a)(2)*, *Rule 16* further provides that a pre-trial scheduling order "may be modified only for good cause and with the judge's consent," *Fed. R. Civ. P. 16(b)(4)*. See also *Parker v. Columbia Pictures Indus., 204 F.3d 326, 340 (2d Cir. 2000)* (discussing the interaction between *Rule 15* and *Rule 16* and "holding that despite the lenient standard of *Rule 15(a)*, a district court does not abuse its discretion in denying leave to amend the pleadings after the deadline set in the scheduling order where the moving party has failed to establish good cause"). In Parker, the Second Circuit explained that good **[*69]** cause depends in part on the diligence of the moving party. *204 F.3d at 340*. In addition, the court may, in its discretion, "consider other relevant factors including, in particular, whether allowing the amendment of the pleading at this stage of the litigation will prejudice defendants." *Kassner v. 2nd Ave. Delicatessen Inc., 496 F.3d 229, 244 (2d Cir. 2007)*.

In addition, even where the movant shows good cause under *Rule 16*, it must also show that the amendment would comply with *Rule 15*—in other words, that amendment is not futile, is not the product of undue delay or bad faith, and would not overly prejudice the non-movant.[13] See, e.g., *Joinnides v. Floral Park-Bellerose Union Sch. Dist., No. 12-CV-5682 (JS) (AKT), 2015 U.S. Dist. LEXIS 42933, 2015 WL 1476422, at *15 (E.D.N.Y. Mar. 31, 2015)* ("If the party seeking the amendment satisfies the 'good cause' standard of *Rule 16(b)*, the court then determines whether the movant also meets the liberal standards of *Rule 15(a)*." (citing *Kassner, 496 F.3d at 244*)).

2. Collateral Estoppel

[11] Also pending before the court are four fully briefed motions in limine, which the court does not address in this Memorandum and Order.

[12] The court does not construe the panel's December 18, 2015, Order as having any jurisdictional effect on the MP Actions, which were separately filed from the Government Action and are not currently before the Second Circuit.

[13] In the context of an amendment to a pleading, certain of the typical *Rule 15* inquiries merge, in effect, with the *Rule 16* inquiry, such as prejudice to the non-movant. Others, however, do not, including whether the amendment is futile even if the movant shows good cause to modify the scheduling order.

HN2[] The doctrine of non-mutual offensive collateral estoppel allows a plaintiff who was not **[*70]** a party to a prior judgment to "use that judgment 'offensively' to prevent a defendant from relitigating issues resolved in the earlier proceeding." *Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326, 99 S. Ct. 645, 58 L. Ed. 2d 552 (1979)*; see also *Montana v. United States, 440 U.S. 147, 153, 99 S. Ct. 970, 59 L. Ed. 2d 210 (1979)* ("Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation."). Issue preclusion may only apply where: "(1) the issues in both proceedings are identical, (2) the issue in the prior proceeding was actually litigated and actually decided, (3) there was full and fair opportunity to litigate in the prior proceeding, and (4) the issue previously litigated was necessary to support a valid and final judgment on the merits." *In re PCH Assocs., 949 F.2d 585, 593 (2d Cir. 1991)*.[14] The specific legal claims asserted in the second action need not be identical to those asserted in the prior action for collateral estoppel to apply. See *Parklane Hosiery, 439 U.S. at 326 n.5* ("Under the doctrine of collateral estoppel . . ., the second action is upon a different cause of action and the judgment in the prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action."). With respect to the fourth **[*71]** element, "[a]n issue is necessary to a prior judgment for issue preclusion purposes if its disposition was the basis for the holding with respect to the issue and not mere dictum." *MTS, Inc. v. 200 E. 87th St. Assocs., 899 F. Supp. 1180, 1184 (S.D.N.Y. 1995)* (internal quotation marks and citations omitted); see also *RX Data Corp. v. Dep't of Soc. Servs., 684 F.2d 192, 197 (2d Cir. 1982)* (explaining that collateral estoppel applies if the prior determination was "necessary and essential to the judgment in that action"); *Restatement (Second) of Judgements § 27 cmt. j* ("The appropriate question, then, is whether the issue was actually recognized by the parties as important and by the trier as necessary to the first judgment.").

HN3[] In the Second Circuit, "each of two alternative, independent grounds for a prior holding is given effect for collateral estoppel purposes."[15] *Purdy v. Zeldes, 337 F.3d 253, 258 n.6 (2d Cir. 2003)*; see also *Gelb v. Royal Globe Ins. Co., 798 F.2d 38, 45 (2d Cir. 1986)*; *Irving Nat'l Bank v. Law, 10 F.2d 721, 724 (2d Cir. 1926)* (Hand, J.). "However, if an appeal is taken and the appellate court affirms on one ground and disregards the other, there is no collateral **[*73]** estoppel as to the unreviewed ground." *Gelb, 798 F.2d at 45*. In addition, in the Second Circuit, a lower court judgment is "final" for purposes of collateral estoppel even while an appeal of that judgment is pending. See *United States v. Int'l Bhd. of Teamsters, 905 F.2d 610, 620-21 (2d Cir. 1990)*.

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[14] The MPs argue that the Supreme Court's recent decision in *B&B Hardware Inc. v. Hargis Industries Inc., 135 S. Ct. 1293, 191 L. Ed. 2d 222 (2015)*, broadened the identicality standard into an inquiry concerning whether the two issues in the two actions are not "materially unlike." (See. e.g., MPs' Suppl. Mem. at 22 ("The question is whether steering by discounting is 'materially unlike' steering by surcharging in a manner that has 'legal significance' . . . .").)

The court is not convinced that the Supreme Court's decision in B&B Hardware went so far. There, in holding that findings from a registration challenge to a trademark in the Trademark Trial and Appeal Board ("TTAB") could apply to a later infringement action brought in federal court, **[*72]** the Court noted that if the same usage of a trademark is at issue in the registration proceeding and the district court proceeding, then the "issues" to be decided in the context of the likelihood of confusion test are likely identical, but that if "a mark owner [later] uses its mark in ways that are materially unlike the usages in its [previous TTAB] application, then the TTAB is not deciding the same issue" as presented in the later federal action based on the later use of the mark. *B&B Hardware, 135 S. Ct. at 1308*. Nothing in the Court's analysis indicates that its use of the "materially unlike" framework applies outside of the factual context of the case—i.e., whether determinations made about a usage of a mark in the first action apply to a similar analysis of a materially similar usage of a mark in the second action. Cf. id. ("A fortiori, if the TTAB considers a different mark altogether, issue preclusion would not apply.").

[15] This differs from the approach of other circuits, see, e.g., *Turney v. O'Toole, 898 F.2d 1470, 1472 n.1 (10th Cir. 1990)* ("Because either proposed reason would have been a sufficient ground for granting the writ, it cannot be said that either issue was actually and necessarily decided."), as well as the Restatement of Judgments, see *Restatement (Second) of Judgements § 27 cmt. i* ("If a judgment of a court of first instance is based on determinations of two issues, either of which standing independently would be sufficient to support the result, the judgment is not conclusive with respect to either issue standing alone.").

HN4[] A trial court has broad discretion in determining whether collateral estoppel should apply, and it should not apply the doctrine where doing so would be unfair to a defendant. *Parklane Hosiery, 439 U.S. at 331*; see also, e.g., *PenneCom B.V. v. Merrill Lynch & Co., 372 F.3d 488, 493 (2d Cir. 2004)* ("[C]ollateral estoppel is an equitable doctrine—not a matter of absolute right. Its invocation is influenced by considerations of fairness in the individual case."); *Remington Rand Corp. v. Amsterdam-Rotterdam Bank, N.V., 68 F.3d 1478, 1486 (2d Cir. 1995)* ("Despite the economies achieved by use of collateral estoppel, it is not to be mechanically applied, for it is capable of **[*74]** producing extraordinarily harsh and unfair results."). For example, application of collateral estoppel may be unfair where the defendant did not have incentive to litigate the issue(s) in the first action vigorously or could not foresee follow-on actions, where the resolution of the first action is inconsistent with other previous decisions, or where procedural opportunities available to the defendant in the second action were unavailable in the first action and may have led to a different result. *Parklane Hosiery, 439 U.S. at 331-32*.

Finally, where collateral estoppel does apply, a plaintiff may use its application as a basis for seeking summary judgment in full or in part. See, e.g., *id. at 324* (affirming grant of partial summary judgment through application of non-mutual offensive collateral estoppel); *Discover Fin. Servs. v. Visa U.S.A. Inc., 598 F. Supp. 2d 394, 397 (S.D.N.Y. 2008)* (granting in part and denying in part the plaintiffs motion for partial summary judgment on the basis of collateral estoppel).

B. Discussion

The MPs only seek leave to amend their alleged market definition to conform to the Government Action in the event that the court finds it appropriate to give preclusive effect to that issue. Accordingly, the court first turns to the MPs' motion for collateral estoppel.

The parties offer widely **[*75]** diverging views on the appropriateness of applying collateral estoppel in this action. Under the MPs' approach, collateral estoppel would allow the court to enter summary judgment in their favor on their claims under both *Sections 1* and *2*, including claims related to the no-surcharge rule, leaving as the only triable issues of fact Amex's statute of limitations defense and damages. According to Defendants, the MPs' attempt to apply broadly the findings from the Government Action to the MP Actions is improper, and, given the number of issues that cannot be resolved by the application of collateral estoppel, there would be no efficiency gained by a more limited application.

The court first notes that the application of collateral estoppel is not uncommon in the context of private antitrust actions that follow a successful government enforcement action. See, e.g., *Univac Dental Co. v. Dentsply Intl, Inc., 702 F. Supp. 2d 465, 491 (M.D. Pa. 2010)* (adopting report and recommendation) ("These principles apply with particular force to a case such as this, where many of the questions raised in this private antitrust action arise out of the precise business practices which have been thoroughly, comprehensively and fairly litigated in the prior case brought by the United States. In such **[*76]** instances, the use of the offensive issue preclusion doctrine to resolve fully litigated issues as a matter of law has been expressly endorsed by the courts." (citations omitted)); *Discover, 598 F. Supp. 2d at 397-401* (applying collateral estoppel to certain core antitrust issues following the Second Circuit's affirmance of the Government's action against Visa and MasterCard).

However, considering the current posture of the Government Decision and the court's discretion in determining whether to apply collateral estoppel, the court defers a resolution of the MPs' motion for collateral estoppel until after the Second Circuit reaches a decision in the appeal of the Government Action. The MPs have not identified any case, nor is the court aware of any case, in which a district court gave preclusive effect to such a significant set of antitrust issues during the pendency of a merits appeal of the first-decided action. To apply collateral estoppel under such circumstances—even assuming each of the four elements were met as to each issue—would be unfair to Defendants. In addition, depending on the Second Circuit's resolution of the appeal of the Government Action, the application of collateral estoppel at this stage in the **[*77]** proceeding could, in fact, create inefficiencies. Accordingly, the court DENIES WITHOUT PREJUDICE the MPs' motion for collateral estoppel, with leave to renew the application following the Second Circuit's decision in the Government Action.

Because the court denies the MPs' motion for collateral estoppel, it need not determine whether there is good cause to amend the Scheduling Order under *Rule 16*, or whether leave to amend should be granted under *Rule 15*. Accordingly, the court DENIES WITHOUT PREJUDICE the MPs' motions for leave to amend the Scheduling Order and to amend the operative pleadings' alleged product market, with leave to renew the motions following the Second Circuit's decision in the Government Action.

III. CROSS-MOTIONS FOR SUMMARY JUDGMENT

The MPs move for summary judgment on the basis of collateral estoppel and, for certain issues, collateral estoppel combined with record evidence. Because the court declines to apply collateral estoppel at this stage of the proceeding, see supra Part II.B, the MPs' motion for summary judgment is DENIED WITHOUT PREJUDICE, with leave to renew their application following the Second Circuit's decision in the Government Action and in advance of trial.

Amex **[*78]** moves for summary judgment on three distinct issues: (1) the alleged Amex-only market, (2) the MPs' claims related to the no-surcharge rule, and (3) Amex's statute of limitations and laches defenses as to all MPs except Albertsons. For the reasons discussed below, the court (1) RESERVES JUDGMENT on Amex's motion for summary judgment on the Amex-only market until after the Second Circuit's resolution of the appeal of the Government Action, (2) DENIES summary judgment as to the no-surcharge rule, and (3) DENIES summary judgment as to Amex's statute of limitations and laches defenses.

A. Legal Standards

1. Summary Judgment

HN5[] Summary judgment must be granted when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(c)*. A fact is material if it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. No genuine dispute of material fact exists if "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*. In evaluating a motion for summary judgment, the court "is required to construe the evidence in the light most favorable to the non-moving party and to draw all reasonable inferences **[*79]** in its favor." *Trammell v. Keane, 338 F.3d 155, 161 (2d Cir. 2003)*; see also *Anderson, 477 U.S. at 255* ("The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.").

HN6[] The moving party bears the initial burden to show an absence of genuine factual dispute. See *Adickes v. S. H. Kress & Co., 398 U.S. 144, 157, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970)*. Summary judgment will be granted if the opposing party then "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. To defeat summary judgment, the opposing party must do more than demonstrate "some metaphysical doubt as to the material facts," *Matsushita, 475 U.S. at 586*, and may not rely on "conclusory allegations," *Twin Labs., Inc. v. Weider Health & Fitness, 900 F.2d 566, 568 (2d Cir. 1990)*.

2. Statute of Limitations and Laches

In the SOL Decision, the court set forth the standards governing the statute of limitations and the relevant exceptions, see *708 F. Supp. 2d at 257*, which the court again outlines below.

a. Section 2 Claim

With respect to the MPs' Section 2 claim, the court explained that *HN7*[] "[t]he date on which a section two monopolization claim accrues depends on the relationship that the plaintiff has with the defendant as either a competitor or as a purchaser of the defendant's products and services." SOL Decision, *708 F. Supp. 2d at 264* (citing *Berkey Photo v. Eastman Kodak Co., 603 F.2d 263, 295-96 (2d Cir. 1979))*. "A purchaser plaintiff's cause of action [such as the MPs'] **[*80]** accrues when he or she actually pays an overcharge." Id. Accordingly, the court held, "[u]nder Berkey's purchaser rule, Plaintiffs' section two overcharge claims accrued when they paid Amex a supracompetitive merchant discount fee. The statute of limitations in this context only bars Plaintiffs' claims based on overcharges outside of the limitations period—i.e. overcharges paid more than four years before filing suit." *Id. at 265*.

b. Section 1 Claim

With respect to the MPs' *Section 1* claim, the court first explained that "[u]nder Zenith's general accrual rule, any section one cause of action arising out Amex's merchant agreements accrued on the date that Plaintiffs' merchant agreements took effect." *Id. at 265* (citing *Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 338, 91 S. Ct. 795, 28 L. Ed. 2d 77 (1971))*. Because all MPs other than Albertsons filed suit more than four years after their respective merchant agreements took effect, the court considered whether the speculative damages exception and/or the continuing violation exception could apply to the MPs' *Section 1* claim as alleged. *Id. at 266-72*.

First, the court concluded that the MPs adequately alleged that at the time they signed their merchant acceptance agreements with Amex, damages caused by Amex's alleged overcharges were speculative, since they could not have been reasonably estimated. **[*81]** *Id. at 266*. In other words, the speculative damages exception, first announced in *Zenith, 401 U.S. at 339*, "applies in this circuit if the fact of damage is uncertain or if the nature and amount of damages cannot be reasonably estimated." Id. The court explained that at the time each MP signed its merchant agreement, "the amount of Plaintiffs' damages arising from Amex's supracompetitive discount fees could not have been reasonably estimated," since "[t]he merchant agreements did not specify the payment schedule or the quantity of Plaintiffs' purchases of Amex payment services: when, how large, and how many Amex retail transactions Plaintiffs would process." *Id. at 266-67*. Moreover, the court explained, "[e]ven if these terms could have been estimated when Plaintiffs executed the merchant agreements, Amex retained the ability to unilaterally change the discount fee after the agreements' initial terms." *Id. at 267*.

Here, the court noted that Amex could present evidence following discovery showing that future damages could have been reasonably estimated, and addressed the potential interplay between the speculative damages exception and the purchaser-accrual rule under *Section 2*:

> Following discovery, Amex may introduce evidence showing that future damages flowing **[*82]** from Plaintiffs' merchant agreements could have been reasonably estimated when they became effective. If future damages were not speculative when the agreements became effective, the cause of action to collect them would also have accrued at that time. If damages were not speculative, Plaintiffs' section two claims may also be time-barred. As discussed above, Berkey's purchaser accrual rule is based on the rationale that a purchaser's damages for paying overcharges are "entirely speculative" until the purchaser actually pays the overcharge. If damages from Amex's overcharges could have been reasonably estimated based on the terms contained in the merchant agreements, the justification for the purchaser accrual rule may not apply.

Id. at 267.

Next, the court concluded that the MPs also adequately alleged that the continuing violation exception applied. *Id. at 267-72*. The court explained that "[i]n cases challenging illegal contracts made effective before the limitations period and that remain effective during the limitations period, the continuing-violation question is whether acts within the limitations period toll the cause of action challenging the underlying contract." *Id. at 268*. Again noting the alleged speculative **[*83]** nature of the MPs' damages, the court surveyed the relevant case law and held that contractual performance can qualify as an "overt act" for purposes of restarting the four-year statute of limitations where damages are otherwise speculative; here, as alleged, Amex's mere collection of discount fee payments could not qualify as an overt act as a matter of law, since such an act is not new and independent, but Amex's alleged unilateral increases to its merchant discount fee during the contractual period could qualify as an overt act, and therefore restart the statute of limitations. *Id. at 268-72*. Thus, the court held, "[u]nder the continuing violation exception, Plaintiffs' section one claims are not barred to the extent that they seek damages based on fee adjustments that Amex implemented within four years before Plaintiffs filed suit." *Id. at 272*.

c. Claims for Equitable Relief

Finally, with respect to the MPs' claims for equitable relief, the court explained that the *Clayton Act's* four-year statute of limitations does not apply to claims for equitable relief, but that a four-year period of laches does apply to such claims. *Id. at 272*. "After the four-year laches period expires, a court may, in its discretion, allow an action **[*84]** for equitable relief to go forward if it determines '(1) that sufficient reasons cognizable in equity excuse the delay or (2) that the delay caused defendants no prejudice.'" Id. (quoting *Argus Inc. v. Eastman Kodak Co., 552 F. Supp. 589, 599 (S.D.N.Y. 1982))*. Because the parties had not specifically addressed the applicability of the laches defense in their briefing, the court declined to reach the issue in the SOL Decision. See id.

B. Discussion

1. Amex-only Market

Amex continues to press its argument that a reasonable jury could not find that there is an Amex-only product market, and argues that the findings made against Amex in the Government Decision only reinforce this argument. Considering the analytical significance of the alleged product market to the MPs' claims, and that the MPs may ultimately renew their motions for leave to amend the pleadings and for the application of collateral estoppel following the Second Circuit's decision, the court RESERVES JUDGMENT on this ground.

2. No-surcharge Rule

Defendants argue that a reasonable jury could not find that the no-surcharge rule is an antitrust violation. The court disagrees. There is ample evidence in the record in the MP Actions from which a reasonable jury could find that for purposes of *Section 1*, the no-surcharge **[*85]** rule has an adverse effect on competition and that the procompetitive justifications of the no-surcharge rule do not outweigh any anticompetitive effects, or that for purposes of *Section 2*, the no-surcharge rule is a form of maintaining monopoly power, and that there is not a valid business reason for it.[16] The court again notes that the Government Action did not include a challenge to the no-surcharge rule; however, should the Second Circuit's decision in the Government Action affect the analysis of the no-surcharge rule, Defendants may seek leave to renew their motion for summary judgment on this ground in advance of trial, or move for judgment as a matter of law during or after trial.

First, contrary to Defendants' arguments, the cases they cite do not establish that, as a matter of law, the no-surcharge rule is not an unreasonable restraint and/or is pro-competitive. (See Defs.' Original Mem. at 21-24; Defs.' Original Reply at 22-23; Defs.' Suppl. Mem. at 26-28 (all discussing *Tennessean Truckstop, Inc. v. NTS, Inc., 875 F.2d 86, 90 (6th Cir. 1989)* and *Kartell v. Blue Shield of Massachusetts, 749 F.2d 922 (1st Cir. 1984)* (Breyer J.)).)

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[16] Because the court finds that summary judgment is inappropriate even if the no-surcharge rule is analyzed unbundled from the rest of the NDPs, it need not reach the MPs' argument that consideration of the no-surcharge rule in isolation is legally impermissible. (See MPs' Original Mem. at 38-40 (arguing that principles set forth in *Continental v. Union Carbide & Carbon Corp., 370 U.S. 690, 82 S. Ct. 1404, 8 L. Ed. 2d 777 (1962)*, preclude consideration of one alleged restraint without consideration of the others); Defs.' Original Reply at 23-24 (arguing that consideration of the no-surcharge rule in isolation **[*86]** is appropriate because regulators and Congress have elected to treat discounting and surcharging differently).)

In *Tennessean Truckstop*, the Sixth Circuit held that a merchant challenging a network services provider's contractual provision prohibiting it from imposing a surcharge over 5% of the price of the good failed to allege antitrust injury. *875 F.2d at 87-88*. According to the Sixth Circuit, the merchant's complaint failed to allege an injury to competition and merely alleged that it lost profits due to the network services provider's conduct. *Id. at 88*. Here, however, the MPs allege (and have offered evidence tending to show) that the no-surcharge rule prevents Amex-accepting merchants from imposing a surcharge on any credit card transaction, thereby eliminating any incentive for network services providers to compete horizontally on price. *Tennessean Truckstop* is therefore distinguishable **[*87]** on at least this ground.

In *Kartell*, doctors challenged a health insurer's program in which the insurer agreed to pay participating doctors a pre-set, capped price as payment in full for medical services rendered to insureds, but under which the doctors could not raise the price or surcharge insureds above the price the insurer agreed to pay. *749 F.2d at 923-24*. Writing for the panel, and noting the uniqueness of the health insurance industry, then-Judge Breyer explained that the program was not an unlawful restraint in violation of *Section 1*, since the insurer "in essence 'buys' medical services for the account of others," and merely "obtained prices [on behalf of the insureds] that reflected its market power." *Id. at 925, 928*. In other words, the conduct at issue was simply an agreement between a buyer (the insurer) and a seller (the doctors) regarding price—"[w]hether or not that price bargain is, in fact, reasonable is, legally speaking, beside the point." *Id. at 928*. Indeed, the court noted that "the prices at issue here are low prices, not high prices," and "the Congress that enacted the *Sherman Act* saw it as a way of protecting consumers against prices that were too high, not too low." *Id. at 930-31* (emphasis in original).

Here, however, the MPs have **[*88]** offered evidence tending to show that they, the purchasers of Amex's services, are paying higher prices as a result of the NDPs' inhibition on horizontal price competition, including through the no-surcharge rule. In addition, the MPs have also offered evidence tending to show that because merchants pass the costs of network services through to consumers, those consumers who pay with forms of payment other than Amex cards pay a higher price for those goods, "effectively subsidiz[ing] the purchases made by customers who use higher-cost Amex cards." (MPs' Original Mem. at 42.) And again, like Tennessean Truckstop, Kartell lacked any allegation by the plaintiff that the insurance program eliminated horizontal competition across the entire product market.

The facts of *Kartell* also differ from this case in an important way. As another district court has observed, the holding in Kartell flowed in large part from "the First Circuit's reliance on the concept that [the insurer] was acting as a purchaser when it purchased, on behalf of its enrollees, services from doctors at the lowest possible prices." *United States v. Delta Dental of R.I., 943 F. Supp. 2d 172, 177 (D.R.I. 1996)* (adopting report and recommendation); cf. *Drug Mart Pharmacy Corp. v. Am. Home Prods. Corp., 472 F. Supp. 2d 385, 401 (E.D.N.Y. 2007)* ("In short, a chorus of judicial opinion has proclaimed that **[*89]** when insurers purchase health services and pharmaceuticals for the benefit of their members, they are treated like purchasers under the antitrust laws." (emphasis in original) (footnote omitted)). But Amex does not purchase goods and services from merchants on behalf of its cardholders; rather, it provides card-payment services to cardholders and card-acceptance services to merchants as a way of facilitating a transaction between cardholder and merchant, and in doing so, collects a fee from the merchant. The MPs allege that in this capacity, and through the NDPs, Amex prohibits the merchant from expressing any preference (through a surcharge or otherwise) for any other "facilitator" (such as Visa or MasterCard) that may charge the merchant a lesser fee to facilitate the very same transaction between merchant and cardholder. Cf. *Kartell, 749 F.2d at 925-26* (limiting its analysis to "contracts in which those who directly provide goods or services to insureds have agreed to cap or forego completely additional charges to those insureds in return for direct payment by the insurer"). Amex does not "cap" the prices that merchants charge to its cardholders for goods or services—in other words, nothing in the NDPs prohibits **[*90]** a merchant from raising the price of each of the goods it offers by $2 or 2% to account for rising costs of network services and then passing that cost through to Amex cardholders.[17]

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[17] Of course, Amex does not make the parallel argument that the NM's' prohibition on merchant discounting (as opposed to surcharging) ensures lower prices for its cardholders. A discount offered by a merchant for the cardholder's use of an Amex card would, in fact, result in lower prices for Amex cardholders. But the NDPs prevent such conduct by merchants.

Second, Defendants present a public policy argument, focusing primarily on the fact that some states, including New York, have enacted statutes prohibiting merchant surcharging but no other forms of steering; indeed, New York's statute was recently upheld by the Second Circuit following a *First Amendment* challenge by merchants, see *Expressions Hair Design v. Schneiderman, 803 F.3d 94, 2015 WL 8537667, at *1 (2d Cir. 2015)* (am. opinion).[18] However, while this public policy argument may be relevant, it cannot establish whether, for antitrust purposes, a parallel contractual restraint imposed by a market participant with market or monopoly power survives *Sherman Act* scrutiny. Even Defendants acknowledge that their public policy arguments cannot "immunize" their conduct, **[*91]** but rather, only serve to "reinforce the holdings of the relevant appellate case law," which the court has distinguished above. (See Defs.' Original Reply at 24.)

3. Statute of Limitations and Laches Defenses

Finally, the court denies Defendants' motion for summary judgment with respect to each of their statute of limitations and laches defenses.

a. Section 2

With respect to the Section 2 claim, the parties dispute the meaning and intent of the court's SOL Decision. According to the MPs, "Amex's limitations defense only defines the time period for which the MPs can seek damages on [their] Section 2 claims, and cannot preclude Amex's liability." (MPs' Suppl. Mem. at 35-36.) Amex counters that the court's SOL Decision left open the possibility that the timeliness of the Section 2 claim "could turn on the factual record concerning whether damages were speculative." (Defs.' Suppl. Mem. at 17.)

Although the court previously stated in its discussion of the MPs' *Section 1* claim that a showing **[*92]** by Amex that the MPs' *Section 1* damages were not speculative may also render the purchaser-accrual rule inapplicable to the MPs' *Section 2* claims, the court remains unconvinced that, as a matter of law, a defendant who successfully challenges an antitrust plaintiff's assertion of the *Section 1* speculative damages exception thereby defeats the plaintiff's assertion of the *Section 2* purchaser-accrual doctrine. Although Berkey's discussion of the *Section 2* purchaser-accrual exception does invoke language from Zenith addressing speculative damages under *Section 1*, see *Berkey, 603 F.2d at 295* ("Plainly, at the time a monopolist commits anticompetitive conduct it is entirely speculative how much damage that action will cause its purchasers in the future."), Berkey also makes clear that "[s]o long as a monopolist continues to use the power it has gained illicitly to overcharge its customers, it has no claim on the repose that a statute of limitations is intended to provide," id. See also *id. at 296* ("The taint of an impure origin does not dissipate after four years if a monopolist continues to extract excessive prices because of it."). The core holding of *Berkey* applies here, and Defendants have cited nothing to the contrary: "[A] purchaser suing a monopolist for overcharges paid **[*93]** within the previous four years may satisfy the conduct prerequisite to recovery by pointing to anticompetitive actions taken before the limitations period." Id. Accordingly, assuming the MPs can establish *Section 2* liability, they may, at a minimum, recover all *Section 2* damages caused within four years of the filing of each MP Action, or within four years of the commencement of the tolling of their Section 2 claims.[19]

b. Section 1

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[18] But see, e.g., *Dana's R.R. v. Attorney Gen., No. 14-14426, 807 F.3d 1235, 1239, 1247 n.9 (11th Cir. 2015)* (distinguishing Expressions Hair Design and explaining that "[t]autologically speaking, surcharges and discounts are nothing more than two sides of the same coin; a surcharge is simply a 'negative' discount, and a discount is a 'negative' surcharge").

[19] Even if Amex was correct that, as a legal matter, a sufficient showing by a defendant that *Section 1* damages were not speculative could defeat the application of the purchaser-accrual exception under *Section 2*, summary judgment on the Section 2 claim would not be appropriate in this case because there are genuine issues of material fact with respect to whether the MPs' *Section 1* damages were or were not speculative. See infra Part III.B.3.b.

Turning to the MPs' *Section 1* claim, the court concludes that there are genuine issues of material fact that must be resolved by a jury as to both the speculative damages and continuing violation exceptions.

With respect to the speculative damages exception, the MPs have adduced evidence from which a reasonable jury could infer that as of 2002, the MPs' then-future damages were speculative.[20] In particular, **[*94]** there exist factual disputes concerning the ability of the MPs to estimate, as of 2002, critical elements of their alleged damages, such as future Amex charge volume and the future discount fees or other charges that would be imposed by Amex for that charge volume. In addition, it is undisputed that Defendants possessed the unilateral right to raise the discount rate throughout the contractual period. Viewed in the light most favorable to the MPs, these were no ordinary contracts; rather, they were long-term agreements under which the MPs had no ability to estimate accurately the core variables of any damages projection, including charge volume (dependent upon third-parties' use of the Amex card at the point-of-sale and in turn dependent on Amex's success at card issuance) and overall discount rate (dependent upon Amex's ability to change the base discount rate and effective discount rate throughout the term of the contract). Cf., e.g., *Charlotte Telecasters, Inc. v. Jefferson-Pilot Corp., 546 F.2d 570, 573 (4th Cir. 1976)* (affirming grant of summary judgment where, before entering into contract, plaintiff included in application to defendant its projections of total subscribers and gross receipts, and later "introduced no proof that cast doubt on its projections or **[*95]** indicated that they were speculative"); *Tex. Utils. Co. v. Santa Fe Indus., Inc., 627 F. Supp. 44, 48-49 (D.N.M. 1985)* (denying motion for summary judgment where plaintiffs offered evidence "that the prices they had to pay for coal under the contracts were indeterminable at the time these contracts were made" because, inter alia, ultimate payments under the contracts fluctuated due to yearly changes in government-calculated "implicit price deflator," based on the gross national product for each calendar year); *In re N.M. Nat. Gas Antitrust Litig., MDL No. 403 (HCB), 1982 U.S. Dist. LEXIS 9452, 1982 WL 1827, at *14 (D.N.M. Jan. 26, 1982)* (denying motion for summary judgment on statute of limitations defense and explaining that "[t]his is not a case where the [pre-limitations contract] finalized the rights and liabilities of the parties by fixing the price, quantity, and delivery or payment schedules so that any subsequent acts were but unabated inertial consequences of some pre-limitations action" (internal quotation marks and citations omitted)).

With respect to the continuing violation exception, genuine issues of material fact again preclude summary judgment. Defendants reference the court's statement in the SOL Decision that the MPs could ultimately prove an alleged continuing violation because "Amex's unilateral increases to its merchant discount fee do constitute overt acts." SOL Decision, *708 F. Supp. 2d at 271* (emphasis added). According to Amex, the evidentiary record now shows that "the merchant discount fees have been constant—or dropped—for each Plaintiff." (Defs.' Original Mem.

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[20] The parties appear to agree that a purported class action challenging the NDPs filed on April 18, 2006, tolled the statute of limitations pursuant to *American Pipe Construction Co. v. Utah, 414 U.S. 538, 94 S. Ct. 756, 38 L. Ed. 2d 713 (1974)*, through the present. (See Defs.' Original Mem. at 3 & n.2; MPs' Original Mem. at 24 n. 11.) Accordingly, for purposes of the speculative damages exception and summary judgment, the relevant inquiry **[*96]** is whether a reasonable jury could find that the MPs' future damages were speculative as of the beginning of May 2002. If a reasonable jury would be compelled to find that damages were reasonably estimable as of May 2002, then, based on the effective dates of each merchant agreement, each MP's *Section 1* claim (except Albertsons) would have necessarily expired before May 2006, no claims would be tolled pursuant to American Pipe, and the MP Actions (filed in 2008 and 2011) would be time-barred.

In other words, the parties appear to agree that damages that may have occurred in January 2002 are time-barred. Even if they were speculative as of the signing of the merchant agreement (for example, in 1996), these damages would have actually occurred (and were no longer speculative) at the very latest upon Amex actually imposing a supracompetitive discount fee for that particular month, and the MPs were therefore required to file suit for January 2002 damages by January 2006, before American Pipe tolling applied. The MPs did not file suit by January 2006, and claims related to January 2002 damages expired in January 2006. Claims related to damages that occurred in June 2002 would have similarly expired **[*97]** in June 2006, but American Pipe tolled the expiration of the claim for June 2002 damages through 2008 and 2011, when the MPs filed suit.

The court notes, in addition, that the filing of the Government Action in October 2010 also tolled any of the MPs' live claims as of that date. See *15 U.S.C. § 16(i)*. However, because the Government Action was filed many years after the May 2006, class action, it is the 2006 date and American Pipe tolling that provides the MPs with the longest period of tolling and the relevant date of May 2002 for purposes of the speculative damages exception.

at 19 (footnote omitted).) The MPs respond that Amex's "hyper-technical view" of the merchant discount rate focuses **[*98]** solely on the base discount rate, ignoring other unilateral changes imposed by Amex that affected the net price paid (the effective discount rate) by merchants to Amex for its services during the contractual period. (See MPs' Original Mem. at 31.)

The court recognizes that a narrow reading of the SOL Decision—which was based only on the court's understanding of the allegations in the original complaints in the MP Actions—could support Defendants' argument that summary judgment should be granted on the continuing violation exception due to the MPs' failure to rebut Defendants' evidence that they did not unilaterally raise base discount rates during the contractual period. However, the evidence offered by the MPs at this stage of the proceeding raises a genuine issue of material fact concerning whether Amex's other unilateral changes to the effective discount rate (such as changes to significant rebate and incentive programs) were overt acts sufficient to restart the limitations period with respect to damages caused by those acts. Indeed, the MPs have offered evidence tending to show that Amex officials viewed these changes as relevant to the effective rate paid by merchants to Amex for **[*99]** its services.[21]

Defendants are correct, however, that if the MPs rely solely **[*101]** on the continuing violation exception at trial, they can only recover damages caused by Amex's overt acts. See *Klehr v. A.O. Smith Corp., 521 U.S. 179, 189, 117 S. Ct. 1984, 138 L. Ed. 2d 373 (1997)* ("[T]he commission of a separate new overt act generally does not permit the plaintiff to recover for the injury caused by old overt acts outside the limitations period."); see also *Zenith, 401 U.S. at 338* ("[E]ach time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and . . ., as to those damages, the statute of limitations runs from the commission of the act."); *Bankers Trust Co. v. Rhoades, 859 F.2d 1096, 1104 (2d Cir. 1988)* ("An action for the injury must be brought within four years, plus any additional period during which the statute of limitations may be tolled. In the context of a continuing antitrust violation with continuing injuries, this has usually been understood to mean that each time plaintiff suffers an injury caused by an illegal act of defendants, a cause of action accrues to plaintiff to recover damages based on that injury." (emphasis added) (internal citations omitted)).

c. Claims for Equitable Relief

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[21] With respect to a minority of the MPs, the parties dispute whether agreements entered from 2002 through 2005, which appear to have amended each of the particular MPs' operative card acceptance agreements in order to create new, higher fuel discount rates as opposed to the pre-existing and otherwise generally applicable supermarket discount rates, constitute overt acts that inflicted new injury under the continuing violation doctrine. Amex argues that the increased fuel discount rates merely remedied a windfall that the MPs were receiving for fuel that they sold, since fuel discount rates for other fuel retailers were historically higher than supermarket discount rates. (See Defs.' Original Reply at 20-21.) In addition, Amex argues that the agreements setting forth the fuel discount rates constitute agreed-upon contracts between it and the MPs, and therefore cannot qualify as a "unilateral" increase in the discount rate. (Id. at 20.) The MPs counter that the new fuel discount rates were exactly the type of act that qualifies as an overt act inflicting new injury under the continuing violation doctrine: whereas before, the MPs did not pay Amex a premium for fuel transactions, they **[*100]** did after the change.

The court concludes that genuine issues of material fact preclude the entry of summary judgment on this sub-issue. If the agreements containing the new fuel discount rates are, in fact, "new" and independent agreements between the MPs and Amex, then the court's discussion in the SOL Decision regarding when performance under a long-term contract can qualify as an overt act (e.g., a unilateral increase in the discount fee) becomes irrelevant, because a new claim for damages would have accrued at that time with respect to that particular contract and any resulting damages. If, on the other hand, the rise in fuel discount rates occurred pursuant to the original merchant agreements, the MPs have raised a genuine issue of material fact regarding whether the new rate is more than a mere "reaffirmation" of a previous act, and instead qualifies as an overt act that allows them to recover damages stemming from that act. Cf., e.g., *Madison Square Garden, L.P. v. Nat'l Hockey League, No. 07-CV-8455 (LAP), 2008 U.S. Dist. LEXIS 80475, 2008 WL 4547518, at *10 (S.D.N.Y. Oct. 10, 2008)* (holding that the renewal of policy that does not include any substantive changes in the plaintiff's rights constitutes a reaffirmation of the prior act and not a new and independent act).

Finally, Amex argues that the laches defense warrants summary judgment in its favor on the MPs' claims for injunctive relief. (See Defs.' Original Mem. at 18; Defs.' Original **[*102]** Reply at 21.) The MPs respond by arguing that (1) exceptions to the statute of limitations, including both the speculative damages and continuing violation exceptions, also serve as exceptions to the laches defense, and (2) even if the exceptions do not apply, Amex has failed to show the prejudice required for the laches doctrine to apply. (See MPs' Original Mem. at 33-35.)

As the court explained in the SOL Decision, the *Clayton Act's* four-year statute of limitations only applies to a damages action, whereas the defense of laches applies to actions in equity. See SOL Decision, *708 F. Supp. 2d at 272*. Many courts use the applicable statute of limitations as a starting point to analyzing a parallel laches defense. See, e.g., *Conopco, Inc. v. Campbell Soup Co., 95 F.3d 187, 191 (2d Cir. 1996)* (explaining, in equity action under the *Lanham Act*, that "[a]lthough laches is an equitable defense, employed instead of a statutory time-bar, analogous statutes of limitation remain an important determinant in the application of a laches defense"); *Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc., 677 F.2d 1045, 1057 (5th Cir. 1982)* ("[I]f the plaintiff's claim is brought outside the analogous limitations period, the bare fact of delay creates a rebuttable presumption of prejudice to the defendant." (internal quotation marks and citation omitted)); *Int'l Tel. & Tel. Corp. v. Gen. Tel. & Elecs. Corp., 518 F.2d 913, 926 (9th Cir. 1975)* (using *Clayton Act's* four-year statute of limitations **[*103]** as "a guideline for computation of the laches period in suits" seeking equitable relief), overruled on other grounds by *California v. Am. Stores Co., 495 U.S. 271, 283, 110 S. Ct. 1853, 109 L. Ed. 2d 240 (1990)*.

HN8[] "After the four-year laches period expires, a court may, in its discretion, allow an action for equitable relief to go forward if it determines (1) that sufficient reasons cognizable in equity excuse the delay or (2) that the delay caused defendants no prejudice." SOL Decision, *708 F. Supp. 2d at 272* (internal quotation marks and citation omitted); see also, e.g., *Argus, 552 F. Supp. at 600* (denying motion for summary judgment where the defendants failed to establish the absence of genuine issue of material fact with respect to whether the plaintiffs' delay caused any prejudice).

Few decisions within the Second Circuit have analyzed the applicability of the laches defense in an antitrust action where an exception to the four-year statute of limitations for damages actions tolls the damages claims, and the court did not have occasion to do so in the SOL Decision. The MPs and Defendants each point to *Madison Square Garden, L.P. v. National Hockey League, No. 07-CV-8455 (LAP), 2008 U.S. Dist. LEXIS 80475, 2008 WL 4547518 (S.D.N.Y. Oct. 10, 2008)*. There, in finding the antitrust claim seeking an equitable remedy barred by laches, the court did consider the plaintiff's argument that the continuing violation **[*104]** exception should apply and toll the claim, but rejected the argument on the merits, as the plaintiff failed to allege an actionable overt act. See *2008 U.S. Dist. LEXIS 80475, [WL] at *10*; see also, e.g., *Int'l Tel. & Tel., 518 F.2d at 928-29* (analyzing laches doctrine and considering both the court's equitable discretion and otherwise applicable exceptions to four-year statute of limitations, such as the continuing violation doctrine).

As laches is an equitable doctrine that the court applies in its discretion, there is limited analytical value to determining whether categorical "exceptions" to the four-year period of laches do or do not apply. But suffice it to say, here, the court already has held that there are genuine issues of material fact with respect to whether the speculative damages and continuing violation exceptions save the MPs' otherwise untimely damages claims. This determination is sufficient, at this stage of the proceeding, to support a parallel determination that genuine issues of material fact preclude the entry of summary judgment on Amex's laches defense.[22]

Moreover, there are genuine issues of material fact with respect to whether there is any excuse for the MPs' delay in bringing suit or whether that delay caused any prejudice to Defendants. ***HN9***[] "A defendant has been prejudiced by a delay when the assertion of a claim available some time ago would be inequitable in light of the delay in bringing that claim. Specifically, prejudice ensues when a defendant has changed his position in a way that

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[22] The court notes, as Amex points out, that there may be little reason to apply the speculative damages exception to the laches defense, as the reason justifying the exception—that the plaintiff **[*105]** could not have known the extent of its monetary damages at the time of the unlawful act—does not apply where the plaintiff could have brought suit seeking prospective injunctive relief to stop both the unlawful act and the further accumulation of unknown and speculative damages.

would not have occurred if the plaintiff had not delayed." Conopco, 95 F.3d at 192 (internal quotation marks and citations omitted) (discussing laches defense in context of Lanham Act). Here, the only equitable relief sought by the MPs is prospective in nature; they do not seek, for example, divestiture or to unwind a transaction, such as a merger. See 2 Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** ¶ 320, at 374 (4th ed. 2014) ("A stricter limitation is especially appropriate and should be **[*106]** absolute where equity relief is retroactive in character, such as divestiture or illegally acquired assets. It is less true where the requested relief is merely prospective."); see also, e.g., *Midwestern Mach. Co. v. Nw. Airlines, Inc., 392 F.3d 265, 277 (8th Cir. 2004)* (finding that defendant would be prejudiced where plaintiff's equitable action was filed eleven years after allegedly anticompetitive merger, and shareholders who invested in company seven years after the merger had no reason to believe that the original merger could still be the basis for an antitrust suit). Where, as here, a plaintiff seeks only an injunction, "the right to engage in ongoing anticompetitive conduct should not ordinarily be acquired by prescription." Areeda & Hovenkamp, ***Antitrust Law*** ¶ 320, at 374.

Defendants counter that they have "suffered obvious prejudice," as they "spent years operating, and investing in, a business model that relies on the NDPs that Plaintiffs now say are illegal." (Defs.' Original Mem. at 18.) But, since the initial signing of the merchant agreements, Amex has merely continued its longstanding practice of imposing NDPs on merchants, and has not, in fact, changed course or position in any significant way. The mere continuation of the very conduct challenged **[*107]** by the plaintiff is not the type of activity or investment by a defendant that the laches doctrine is designed to protect in equity. Cf. *Conopco, 95 F.3d at 192-93* (focusing prejudice analysis on fact that during the plaintiff's delay in bringing suit targeting defendant's marketing strategy, defendant lost opportunity to adopt alternative marketing strategies that were adopted by rival brands in the interim).

Accordingly, the court denies Defendants' motion for summary judgment on the laches defense. At trial, the parties may offer any relevant evidence addressing the MPs' delay in bringing suit or any prejudice to American Express, but the court cannot enter summary judgment on this basis.

IV. CONCLUSION

For the reasons discussed above, the MPs' motion to modify the Scheduling Order and for leave to amend is DENIED WITHOUT PREJUDICE, the MPs' motion for the application of collateral estoppel is DENIED WITHOUT PREJUDICE, the MPs' motion for partial summary judgment is DENIED WITHOUT PREJUDICE. The court DENIES Amex's motion for summary judgment with respect to the no-surcharge rule and Amex's statute of limitations and laches defenses, and RESERVES JUDGMENT on Amex's motion for summary judgment with respect to **[*108]** the existence of an Amex-only market.

In addition, as noted above, the Government Action remains pending before the Second Circuit, and the merits panel has entered a stay of the Permanent Injunction entered in that case. Accordingly, the court postpones the May 2, 2016, trial date in the MP Actions, and stays all upcoming deadlines in the parties' pre-trial schedule. (See July 21, 2015, Order (Dkt. 642).) Within fourteen (14) days of the date of entry of the mandate following the Second Circuit's disposition of the appeal in the Government Action, the parties shall confer regarding potential trial dates and file a joint letter setting forth their availability.

SO ORDERED.

/s/ Nicholas G. Garaufis

NICHOLAS G. GARAUFIS

United States District Judge

Dated: Brooklyn, New York

January 7, 2016

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In re TFT-LCD Flat Panel Antitrust Litig.

United States Court of Appeals for the Ninth Circuit

December 11, 2015, Argued and Submitted, San Francisco, California; January 7, 2016, Filed

No. 13-17408, No. 13-17618, No. 14-16144

Reporter
637 Fed. Appx. 981 *; 2016 U.S. App. LEXIS 519 **; 2016-1 Trade Reg. Rep. (CCH) P79,450

In re: TFT-LCD (FLAT PANEL) ANTITRUST LITIGATION, BEST BUY CO., INC.; et al., Plaintiffs - Appellees, v. HANNSTAR DISPLAY CORPORATION, Defendant - Appellant.In re: TFT-LCD (FLAT PANEL) ANTITRUST LITIGATION, BEST BUY CO., INC.; et al., Plaintiffs - Appellants, v. HANNSTAR DISPLAY CORPORATION, Defendant - Appellee. In re: TFT-LCD, (Flat Panel) Antitrust Litigation, BEST BUY CO., INC.; et al. Plaintiffs - Appellants, v. HANNSTAR DISPLAY CORPORATION, Defendant - Appellee.

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

Prior History: [1]** Appeals from the United States District Court for the Northern District of California. D.C. Nos. 3:10-cv-04572-SI, 3:07-md-01827-SI. Susan Illston, Senior District Judge, Presiding.

Best Buy v. AU Optronics Corp. (In re TFT-LCD Antitrust Litig.), 2013 U.S. Dist. LEXIS 168561 (N.D. Cal., Nov. 20, 2013)

Disposition: AFFIRMED.

Core Terms

district court, commerce, damages, attorney's fees, pass-through, antitrust, indirect, import, motion for judgment as a matter of law, substantial evidence, anti trust law, subsidiaries, reasonably foreseeable, expert witness fees, purchaser's claim, foreign nation, award damages, co-conspirators, duplicative, experienced, conspiracy, purchaser, awarding, appeals, costs

LexisNexis® Headnotes

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

Civil Procedure > Trials > Judgment as Matter of Law > Postverdict Judgment

Civil Procedure > ... > Standards of Review > Substantial Evidence > Sufficiency of Evidence

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

An appellate court reviews de novo a district court's denial of judgment as a matter of law. The appellate court reviews the verdict for substantial evidence, which is evidence adequate to support the jury's conclusion, even if it is also possible to draw a contrary conclusion.

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

HN2[] **International Aspects, Foreign Trade Antitrust Improvements Act**

The Foreign Trade Antitrust Improvements Act of 1982, *15 U.S.C.S. § 6a*, lays down a general rule placing all nonimport activity involving foreign commerce outside the Sherman Act's reach. It permits the Sherman Act to reach conduct with a direct, substantial, and reasonably foreseeable effect on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations. *§ 6a(1)*.

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

HN3[] **Purchasers, Indirect Purchasers**

The Minnesota ***Antitrust Law*** authorizes the court in any subsequent action to take any steps necessary to avoid duplicative recovery against a defendant. *Minn. Stat. § 325D.57*. The Minnesota Supreme Court has construed this provision to restore Minnesota ***antitrust law*** to its previous contours, which made available a pass-through defense to indirect purchaser claims.

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > Clayton Act

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

HN4[] **Costs & Attorney Fees, Clayton Act**

Limited results at trial is a permissible basis on which to reduce an award of fees under *15 U.S.C.S. § 15*. The award is therefore reviewed for abuse of discretion.

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > State Regulation

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Erie Doctrine

Civil Procedure > ... > Costs > Costs Recoverable > Witnesses

HN5[] **Costs & Attorney Fees, State Regulation**

The statutory title and equivocal case law do not contain an express indication that *Minn. Stat. § 325D.57* creates a substantive entitlement to expert witness fees as an element of damages under Minnesota law. Rather, *§ 325D.57* is a state procedural expert witness cost provision, and so it is trumped by federal procedural law.

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Judges: Before: GRABER and WARDLAW, Circuit Judges, and MÁRQUEZ,[**] District Judge.

Opinion

[*983] MEMORANDUM[*]

After a six-week trial, a jury found HannStar Display Corp. ("HannStar") liable to Best Buy Co., Inc. and several of its subsidiaries (collectively, "Best Buy") for antitrust violations under federal and Minnesota law, and awarded damages, fees, and costs.[1] HannStar appeals the district court's denial of its post-trial motion for judgment as a matter of law. Best Buy cross-appeals the district court's partial **[*984]** summary judgment allowing HannStar **[**3]** to present a pass-through defense to its indirect purchaser claim under Minnesota law. Best Buy also appeals the district court's order awarding attorney's fees and costs. We affirm in all respects.

1. HannStar contends the special verdict did not set forth factual findings that would bring HannStar's foreign conduct within the reach of American ***antitrust law***, and even if it did, these findings are not supported by substantial evidence. We disagree. ***HN1***[] We review de novo the district court's denial of judgment as a matter of law. *Harper v. City of Los Angeles, 533 F.3d 1010, 1021 (9th Cir. 2008)*. We review the verdict for substantial evidence, which is "evidence adequate to support the jury's conclusion, even if it is also possible to draw a contrary conclusion." *Id.* (internal quotation marks omitted).

HN2[] The Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA"), *15 U.S.C. § 6a*, "lays down a general rule placing *all* (nonimport) activity involving foreign commerce outside the Sherman Act's reach." *F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 162, 124 S. Ct. 2359, 159 L. Ed. 2d 226 (2004)*. It permits the Sherman Act to reach conduct with a "direct, substantial, and reasonably foreseeable effect" on "trade or commerce which is not trade or commerce with foreign nations, **[**4]** or on import trade or import commerce with foreign nations." *15 U.S.C. § 6a(1)*.

[**] The Honorable Rosemary Márquez, District Judge for the U.S. District Court for the District of Arizona, sitting by designation.

[*] This disposition is not appropriate for publication and is not precedent except as provided by *9th Cir. R. 36-3*.

[1] We consolidate Appeals No. 13-17408, 13-17618, and 14-16144 for purposes of disposition.

We read the special verdict form completed by the jury to include a finding that HannStar's foreign conduct had a direct, substantial, and reasonably foreseeable effect on import commerce.[2] The jury found that HannStar participated in a conspiracy involving "TFT-LCD panels and/or finished products . . . imported into the United States," and that this conspiracy "produced substantial intended effects in the United States."[3] The jury necessarily found that this conduct had a "direct" effect when it awarded damages based on special verdict questions 8 and 9 and the corresponding instructions, which allowed it to compensate Best Buy for only that injury that was "a direct result or likely consequence of the conduct that you have found to be unlawful." The jury's findings were supported by substantial evidence, including the testimony of Best Buy executive Wendy Fritz and economic expert Douglas Bernheim, and the plea agreements and supporting documents from the prior criminal proceedings against HannStar and its co-conspirators. Thus, the district court did not err in denying HannStar's motion for judgment as a matter of law.

2. HannStar also argues that the judgment should be set aside because the Best Buy entities did not present individualized evidence of antitrust injury-in-fact. Although the trial evidence of injury and damages did not distinguish between the parent corporation and its subsidiaries, any error attributable to the failure to apportion injury and damages was harmless. The antitrust injury experienced by the subsidiaries was necessarily experienced **[*985]** by the parent, and the apportionment of injury among the plaintiffs **[**6]** did not affect the amount or availability of relief. The district court did not err in denying HannStar's motion for judgment as a matter of law on this ground. *See* *Fed. R. Civ. P. 61*; *see also* *28 U.S.C. § 2111*.

3. The district court did not err in permitting HannStar to assert a pass-through defense to Best Buy's indirect purchaser claim under Minnesota law. ***HN3***[] The Minnesota ***Antitrust Law*** authorizes the court "[i]n any subsequent action" to "take any steps necessary to avoid duplicative recovery against a defendant." *Minn. Stat. § 325D.57*. The Minnesota Supreme Court has construed this provision to "restore Minnesota ***antitrust law*** to its pre-*Illinois Brick [Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)]* contours," which made available a pass-through defense to indirect purchaser claims. *Lorix v. Crompton Corp., 736 N.W.2d 619, 634 (Minn. 2007)* (citing *Alaska v. Standard Oil Co. of Cal. (In re W. Liquid Asphalt Cases), 487 F.2d 191, 194-95, 200 (9th Cir. 1973))*. The Minnesota cases on which Best Buy relies are distinguishable, as they concerned standing rather than the measure of damages. Under the circumstances presented, the district court properly permitted HannStar to assert a pass-through defense. Without it, there would have been a significant risk of duplicative recovery among Best Buy and other downstream indirect purchasers that sued or could sue HannStar.

4. The district court did not improperly consider Best Buy's prior settlements with HannStar's **[**7]** co-conspirators in awarding attorney's fees to Best Buy under *15 U.S.C. § 15*. The record makes clear that the district court, which adopted the analysis and calculations of the special master, reduced Best Buy's requested attorney's fees by approximately 80% based on the limited results Best Buy obtained at trial. ***HN4***[] This is a permissible basis on which to reduce an award of fees under *15 U.S.C. § 15*. *Twentieth Century Fox Film Corp. v. Goldwyn, 328 F.2d 190, 221 (9th Cir. 1964)*. The award is therefore reviewed for abuse of discretion. *Azizian v. Federated Dep't Stores, Inc., 499 F.3d 950, 955 (9th Cir. 2007)*. Because Best Buy sought nearly $800 million in damages from HannStar, but the jury awarded it only $7.47 million before trebling and offset, the district court did not abuse its discretion in reducing the award of attorney's fees.

5. The district court correctly ruled that Best Buy could recover no more than the federal limit of $40 per day per witness in expert witness fees. *See* *28 U.S.C. § 1821*. ***HN5***[] The statutory title and equivocal case law advanced

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[2] **[**5]** Thus, it is not necessary to reach Best Buy's arguments that the judgment may be affirmed on the alternative grounds that HannStar's conduct satisfied the import commerce exclusion to the FTAIA, or that the FTAIA does not apply to claims under Minnesota law.

[3] Although the jury also found that the conspiracy did not involve conduct with a "direct, substantial and reasonably foreseeable effect on trade or commerce in the United States," this does not speak to the jury's findings regarding effects on import commerce. In light of the jury instructions, the most natural understanding of "in the United States" is "wholly within the United States," i.e., in nonimport domestic commerce.

by Best Buy do not contain an "express indication" that *Minnesota Statutes section 325D.57* creates a substantive entitlement to expert witness fees as an element of damages under Minnesota law. *Clausen v. M/V New Carissa, 339 F.3d 1049, 1065-66 (9th Cir. 2003)*. Rather, *section 325D.57* is a state procedural "expert witness cost provision[]," and so it is trumped by federal procedural law in this action. *Clausen, 339 F.3d at 1064-65* (citing *Aceves v. Allstate Ins. Co., 68 F.3d 1160, 1168 (9th Cir. 1995))*. Therefore, the district court **[**8]** did not err in adopting the special master's recommended award of expert fees, which applied the federal limit set forth by *28 U.S.C. § 1821*. *See Clausen, 339 F.3d at 1064-65*.

AFFIRMED.

In re Zinc Antitrust Litig.

United States District Court for the Southern District of New York

January 7, 2016, Decided; January 7, 2016, Filed

14-cv-3728 (KBF) and related actions

Reporter

155 F. Supp. 3d 337 *; 2016 U.S. Dist. LEXIS 1650 **; 2016-1 Trade Reg. Rep. (CCH) P79,441

IN RE: ZINC ANTITRUST LITIGATION

Subsequent History: Motion granted by, in part, Motion denied by, in part, Dismissed by, in part *In re Zinc Antitrust Litig., 2016 U.S. Dist. LEXIS 73192 (S.D.N.Y., June 6, 2016)*

Settled by *In re Zinc Antitrust Litig., 2021 U.S. Dist. LEXIS 190415 (S.D.N.Y., Aug. 18, 2021)*

Settled by *In re Zinc Antitrust Litig., 2021 U.S. Dist. LEXIS 190406, 2021 WL 4304716 (S.D.N.Y., Aug. 18, 2021)*

Core Terms

zinc, warehouses, allegations, plaintiffs', monopolization, metal, Aluminum, antitrust, Queue, defendants', Premium, trading, conspiracy, warehousing, anticompetitive, cancellations, entities, affiliates, prices, competitors, load-out, monopoly, anti trust law, purchasers, conspired, warrants, markets, stored, monopoly power, customers

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Judges: KATHERINE B. FORREST, United States District Judge.

Opinion by: KATHERINE B. FORREST

Opinion

[*343] OPINION & ORDER

KATHERINE B. FORREST, District Judge:

Pending before the Court are four motions to dismiss claims brought by purchasers of primary zinc under *Sections 1* and *2 of the Sherman Act*. Plaintiffs allege, inter alia, that defendants, which consist of trading and metals warehouse operating affiliates of Glencore plc, The Goldman Sachs Group, Inc. ("Goldman Sachs"), and JPMorgan Chase & Company ("JPMorgan"), have engaged in a conspiracy to monopolize and otherwise restrain trade in the market of services for zinc stored in warehouses licensed by the London Metal Exchange ("LME") in the United States, North America, and/or the world, with the intended effect of manipulating the market **[**5]** for special high grade zinc or the market for selling such zinc. Essentially, plaintiffs allege that the purpose and effect of defendants' anticompetitive activity in the market for LME warehouse services was to manipulate the price of zinc premiums, and thus the price of physical zinc.

According to plaintiffs, since May 2010 defendants have engaged in anticompetitive conduct designed to ensure lengthy metals queues at LME-licensed warehouses, creating a supply constraint and artificially high prices in the market for physical **[*344]** zinc. These actions included, inter alia, manipulation of LME rules, strategic warrant cancellations, shuttling zinc between LME-licensed warehouses, hording zinc in warehouses, agreeing to a particular order of the load out of zinc from defendants' warehouses, and falsifying shipping records.

At first glance, the basic storyline and allegations in this case strongly resemble those in the aluminum antitrust multidistrict litigation currently pending before this Court. See In re Aluminum Warehousing Antitrust Litigation ("Aluminum"), 13-md-2481 (S.D.N.Y.). Indeed, counsel are largely overlapping for both plaintiffs and defendants; and while the plaintiffs are different **[**6]** between the actions, the defendants are not. Under these circumstances, it is perhaps unsurprising that plaintiffs have piggybacked on an early complaint and judicial opinions in Aluminum.[1]

Both actions involve allegations that these same defendants entered into anticompetitive agreements to increase load-out queues for metal stored at LME-licensed warehouses in order to drive up the price of premiums that comprise part of the formula used to create global benchmarks for physical **[**7]** contracts for the delivery of those metals. Plaintiffs here are in an analogous market position to the first level purchaser and direct purchaser plaintiffs in Aluminum, and essentially allege the same sort of injury in fact. As was the case in *Aluminum*, plaintiffs are not themselves zinc producers, traders or warehouse owners; in other words, they are not competitors of defendants in any market. Nor are they consumers of defendants' products (that is, warrants or trading instruments with regard to the traders) or services (warehouse storage with regard to the warehouse operators). In both cases, they are purchasers at the first level of the supply/distribution chain of physical zinc.

While there are certainly many similarities between this case and Aluminum, the allegations differ in important ways that justify different outcomes as to certain claims. One significant distinction is that, in *Aluminum*, plaintiffs plausibly alleged that Goldman Sachs and Metro needed and used conspirators to assist in their scheme; this led to a plausible series of interconnections, with the following webbed structure:

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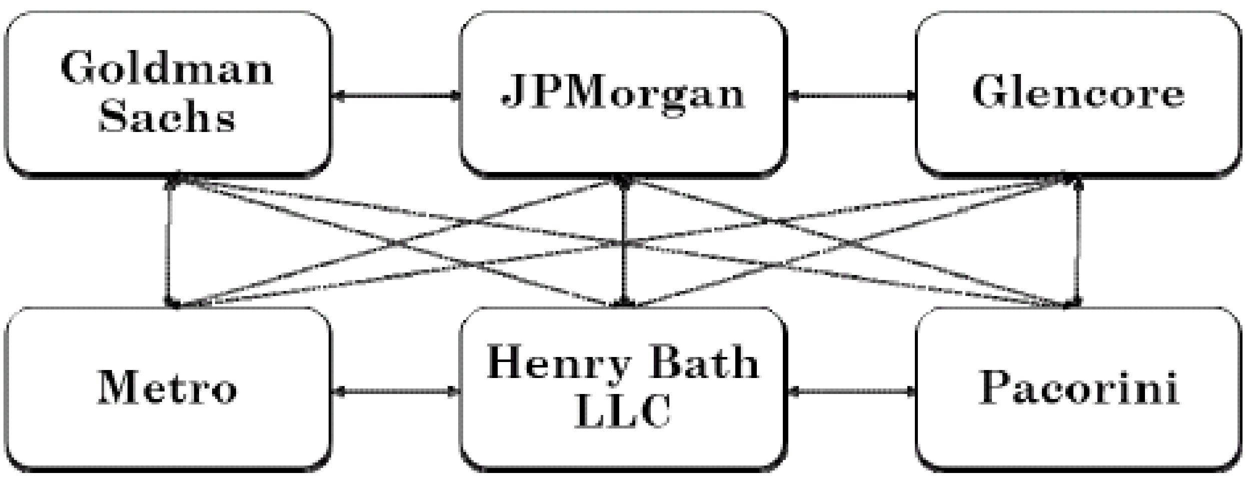

Here, in contrast, plaintiffs do not plausibly explain why, given Glencore and/or Pacorini's **[**8]** alleged dominance in physical zinc, they needed outside conspirators to assist in the alleged anticompetitive scheme, or, why outside conspirators would want to assist them. An equally significant distinction is that plaintiffs here have far less specific and non-conclusory allegations supporting an inference of anticompetitive agreement. Plaintiffs do not present the

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[1] The parties heavily cite, and assume substantial familiarity with, this Court's two principal decisions in Aluminum in their filings in relation to the pending motions. In the first decision, this Court dismissed an initial set of complaints and granted certain plaintiffs leave to amend. *In re Aluminum Warehousing Antitrust Litig. ("Aluminum I"), No. 13-MD-2481 KBF, 2014 U.S. Dist. LEXIS 121435, 2014 WL 4277510 (S.D.N.Y. Aug. 29, 2014)*. In the second decision, this Court allowed the Section 1 claims of certain plaintiffs to survive the various defendants' *Rule 12(b)(6)* motions, but dismissed all *Section 2* claims. *In re Aluminum Warehousing Antitrust Litig. ("Aluminum II"), 95 F. Supp. 3d 419 (S.D.N.Y. 2015)*. The parties here devote a great deal of attention to comparing and contrasting plaintiffs' pleadings to those at issue in Aluminum I and Aluminum II.

specificity of allegations in terms of communications between various defendants that the plaintiffs presented in *Aluminum II*. In addressing plaintiffs' Section 1 claim in particular, the Court explains these differences and why they lead to a determination that plaintiffs' allegations are insufficient to plausibly state a claim, whereas the allegations were sufficient in Aluminum II.

Turning back to the pending motions, defendants primarily raise common issues including antitrust standing and the plausibility of allegations supporting claims for violations of *Sections 1* and *2 of the Sherman Act*. Individual motions also articulate reasons why certain defendants should be dismissed for reasons that are specific to those defendants.

The Court has expended significant time considering the pending motions. In addition to the parties' thorough **[**9]** briefing of the issues raised in this complex action, the Court had the benefit of nearly four hours of oral argument in which the parties addressed specific issues that the Court had raised prior to argument. In resolving these motions, the Court has considered all of the briefing as well as the parties' oral presentations.

For the reasons set forth below, the Court GRANTS defendants' motions to dismiss all four claims in plaintiffs' Consolidated Amended Complaint. While plaintiffs' opposition brief has "curb appeal" on a first review (at least with respect to certain claims), closer reading reveals that their arguments are not backed up by the allegations. Digging into the substance of the allegations (both on an individual basis and when viewed in the aggregate), reveals numerous flaws in plaintiffs' pleadings. Put otherwise, if one reads only plaintiffs' opposition brief or the transcript of their presentation at oral argument, without actual reference to the complaint, their claims appear stronger than is actually the case. In reaching its conclusions set forth herein, the Court takes no position on whether defendants' conduct was in fact legitimate—it remains possible that shenanigans **[**10]** drove up the price of physical zinc. But, at long last, plaintiffs have not adequately alleged that such price movement was due to a plausible antitrust violation, as opposed to parallel, unilateral conduct **[*346]** beyond the reach of that statutory scheme.

Plaintiffs have requested leave to amend. Although plaintiffs had considerable opportunity to learn from this Court's decisions in Aluminum when they drafted the operative complaint (a lengthy schedule was designed to that end), and they have not explained how they would seek to supplement their pleadings, the Court will, as discussed below, allow plaintiffs one additional opportunity to re-plead their most promising *Section 2* claims for monopolization and attempted monopolization against defendants Glencore Ltd. and Pacorini Metals USA, LLC.[2] In contrast, any attempt by plaintiffs to re-plead their Section 1 claim and *Section 2* conspiracy claim would be futile, and those claims are therefore dismissed with prejudice.

I. PROCEDURAL BACKGROUND

Plaintiff Duncan Galvanizing Corporation commenced this action by filing a class action complaint on May 23, **[**11]** 2014, alleging antitrust conspiracy and monopolization claims against the London Metal Exchange Limited, LME Holdings Limited, Hong Kong Exchanges & Clearing Limited, Glencore Xstrata plc, Glencore Ltd., Pacorini Metals USA, LLC, The Goldman Sachs Group, Inc., Metro International Trade Services LLC, and JPMorgan Chase & Company. (14-cv-3728, ECF No. 2.)[3] Plaintiffs Oklahoma Steel and Wire Co., Inc., Iowa Steel and Wire Co., and Southwestern Wire, Inc., subsequently filed a complaint on June 13, 2014 (14-cv-4290, ECF No. 2), and plaintiff Galvanizers Company filed on July 8, 2014 (14-cv-5066, ECF No. 1), each making similar allegations to those made in Duncan Galvanizing's initial complaint. The Court held a joint initial pre-trial conference for all three actions on July 23, 2014, and directed plaintiffs to file a consolidated amended complaint no later than September 30, 2014. (ECF No. 74.)

After the Court granted several extensions to allow plaintiffs time to frame their consolidated amended complaint in response to the Court's decision on the second round of motions regarding the then-proposed **[**12]** amended

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[2] The Court notes recent Second Circuit case law suggesting this is the appropriate course for the Court to follow. See *Loreley Fin. (Jersey) No. 3 Ltd. v. Wells Fargo Sec., LLC, 797 F.3d 160, 191 (2d Cir. 2015)*.

[3] Unless otherwise noted, citations to the record refer to the lead docket in this case, 14-cv-3728.

complaint in Aluminum (see ECF Nos. 78, 84, 101), plaintiffs filed their consolidated amended complaint on June 17, 2015 (ECF No. 106).[4] That complaint dropped a number of defendants from this action based on the Court's decisions in Aluminum. (CAC at 13 n.4.) The CAC asserts one cause of action under *Section 1 of the Sherman Act* for combination and conspiracy in restraint of trade against all defendants, and three causes of action under *Section 2* of the Sherman Act—one claim for conspiracy to monopolize against all defendants, and claims for monopolization and attempted monopolization against defendants Glencore Ltd. and Pacorini Metals USA, LLC. (CAC ¶¶ 264-90.)

Defendants collectively filed a total of four motions to dismiss the CAC under **[*347]** *Fed. R. Civ. P. 12(b)(6)*. (ECF Nos. 122, 124, 127, **[**13]** 130.) With leave of Court, plaintiffs filed one omnibus opposition brief in response to defendants' motions on September 17, 2015. (ECF No. 136; see ECF No. 135.) The motions became fully briefed on October 19, 2015. (ECF Nos. 143, 144, 146, 147.) The Court held oral argument on the motions on October 30, 2015. On the day prior to oral argument, the Court issued three Orders informing the parties of a number of issues and questions of particular interest to the Court. (ECF Nos. 149, 150, 151.) The Court appreciates the parties' thoughtful presentations and responses to the Court's questions, and has carefully considered the parties' elaborations of their positions at oral argument in resolving the pending motions.

II. FACTUAL ALLEGATIONS

On these motions to dismiss, the Court accepts the factual allegations in the complaint as true. *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. The Court does not credit "mere conclusory statements" or "threadbare recitals of the elements of a cause of action," id., nor will it give effect to "legal conclusions couched as factual allegations," *Anderson News, L.L.C. v. Am. Media, Inc., 680 F.3d 162, 185 (2d Cir. 2012)*.

In deciding a *Rule 12(b)(6)* motion, the Court may consider facts alleged in the complaint and documents attached to it or incorporated in it by reference, *DiFolco v. MSNBC Cable L.L.C., 622 F.3d 104, 111 (2d Cir. 2010)*, as well **[**14]** as documents that are integral to the complaint and relied upon in it, even if not attached or incorporated by reference, *Roth v. Jennings, 489 F.3d 499, 509 (2d Cir. 2007)*. The Court may also properly consider matters of public record of which it may take judicial notice. *Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322, 127 S. Ct. 2499, 168 L. Ed. 2d 179 (2007)* (court may consider "matters of which a court may take judicial notice" on a *Rule 12(b)(6)* motion to dismiss); *Global Network Commc'ns, Inc. v. City of New York, 458 F.3d 150, 157 (2d Cir. 2006)*.

A. The Zinc Industry

Zinc is the twenty-third most abundant element in the earth's crust and is the world's fourth most produced metal in terms of tonnage, trailing only iron, aluminum and copper. (CAC ¶ 91.) The world's largest zinc producer is Nyrstar. (CAC ¶ 95.) More than 13 million tons of zinc are mined and produced annually worldwide. (CAC ¶ 96.) Zinc uses range from metal products to rubber and medicines, but corrosion resistant zinc plating of iron is its major application. (CAC ¶¶ 91, 94.) Commercially pure zinc is known as Special High Grade ("SHG") zinc and is 99.995% pure. (CAC ¶ 95.) Primary zinc, which is produced from mining ore, is sold to two broad categories of customers who directly compete with each other for the same supply of metal: (1) manufacturers, processors, and brokers in physical zinc that use zinc in industrial processes and/or fabricate **[**15]** finished products, and (2) traders, speculators, and holders of zinc stocks who buy and sell zinc for profit. (CAC ¶ 97.)

Plaintiffs allege that several government regulators, including the Commodities Futures Trading Commission, the U.S. Department of Justice, the U.S. Senate Banking Committee, the Permanent Subcommittee on Investigations

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[4] On September 28, 2015, plaintiffs filed—and the Court accepted—a Corrected Consolidated Amended Complaint that fixed several numerical errors. (Corrected Consolidated Amended Complaint ("CAC"), ECF No. 138; see ECF No. 141.) Plaintiffs also filed a corrected omnibus brief in opposition to defendants' motions to dismiss that reflected those corrections. (ECF No. 139.) The Court will refer only to those corrected filings in the remainder of this decision.

of the U.S. Senate, and the European Commission, have, since 2012, conducted investigations regarding industrial metals, including zinc. (CAC ¶¶ 221-43.)

[*348] B. London Metal Exchange[5]

The London Metal Exchange Limited ("LME") is the world center for trading industrial metals; about 85% of all non-ferrous **[**16]** metals futures business is transacted on the LME's trading platforms. (CAC ¶ 99.)[6] By the end of 2013, the LME market share of global exchange-traded metals futures reached 84.2%, including 89.4% for zinc. (CAC ¶ 107.) The LME's role is to bring together industrial and financial participants to create a market for buyers and sellers, and it serves to provide producers and consumers of metals with a physical market of last resort and the ability to hedge against the risk of volatile metal prices. (CAC ¶ 99.) The purchase of zinc on the LME operates through the use of warrants, which serve as documents of title to metal stored in LME-approved warehouses around the world. (CAC ¶ 204 n.103.) When an LME forward contract matures, delivery of warrants for metal in a LME-certified warehouse must be made by sellers who have not liquidated (i.e. traded out of their contract) to buyers who have not liquidated. (CAC ¶ 204 n.103.) Each warrant represents a specific, non-interchangeable physical lot, tonnage, and brand in a specific LME warehouse. (CAC ¶ 204 n.103.)

The LME was sold to Hong Kong Exchanges & Clearing Ltd. ("HKEx") in December 2012. (CAC ¶ 130.) Prior to the sale, Goldman Sachs owned approximately 9.5% of the LME and JPMorgan owned approximately 11%; they subsequently remained Class B shareholders and their affiliates remained a Category 2 member and Category 1 member of the LME, respectively. (CAC ¶ 130.) An affiliate of Glencore plc serves as a category 5 member of the LME. (CAC ¶ 130.)[7]

As mentioned above, the **[**18]** LME also licenses and certifies an international network of warehouses for metals, including zinc in the United States. (CAC ¶ 99.) There are over 700 LME-licensed warehouses globally, approximately 200 of which are located in the United States. (CAC ¶ 102.) These warehouses must meet certain requirements relating to proximity to highways, railroads, and/or waterways, and must have the capacity to offload a specified daily minimum tonnage of metal. (CAC ¶ 104.) Defendants Metro International Trade Services, LLC ("Metro"), Henry Bath LLC ("Henry Bath"), and Pacorini Metals USA, LLC ("Pacorini"), collectively own and operate more than 80% **[*349]** of the LME-certified warehouses in the United States and throughout the world. (CAC ¶ 102.) Metro operates warehouses in Detroit, Toledo, Chicago, Mobile and New Orleans. (CAC ¶ 103.) Pacorini operates warehouses in Detroit, Baltimore, Chicago, New Orleans, Mobile and Los Angeles. (CAC ¶ 103.) Henry Bath operates warehouses in Baltimore, Chicago and New Orleans. (CAC ¶ 103.)

Only LME-registered warehouses deal in LME-warrants, which are the receipts for all LME-traded metals. (CAC ¶ 102.) SHG zinc warranted to LME specifications is stored in LME warehouses. **[**19]** (CAC ¶ 116.) About 65-70%

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[5] The Court notes that while plaintiffs appear to have used the complaints filed in Aluminum as a template in drafting the CAC and seem to assume a great deal of familiarity with the operation of the LME and metals markets in general, the CAC does not clearly explain what, if any, differences exist between the operation of the zinc and aluminum markets. The CAC largely assumes that zinc pricing operates similarly to that for aluminum, and does not explain the mechanics of the market to the same degree that the plaintiffs in Aluminum did in their latest pleadings.

[6] According to the LME's website, the non-ferrous metals transacted on the LME include, inter alia, zinc, aluminum alloy, aluminum, copper, **[**17]** lead, nickel, tin and NASAAC (North American Special Aluminum Alloy Contract). Non-ferrous Metals, LME Website (Nov. 20, 2015), *https://www.lme.com/metals/non-ferrous/* . Plaintiffs repeatedly cite the LME's website in the CAC, and it is therefore incorporated by reference. (E.g., CAC ¶¶ 101 n.19, 102 n.20, 106 n.22, 107 n.23, 108 n.28.)

[7] Category 1 members consist primarily of investment banks that are members of the open-outcry "Ring", which, as discussed below, is the process by which physical base metals are traded. (CAC ¶ 100.) Category 2 members are associated broker clearing members and have all the privileges of Category 1 members except that they may not openly trade in the Ring. (CAC ¶ 100.) Category 5 members are primarily mining companies. (CAC ¶ 100.)

of zinc stored in LME-certified warehouses is located in New Orleans, Louisiana. (CAC ¶¶ 103, 249.) Approximately 12% of zinc stored in LME warehouses is located in Detroit, Michigan. (CAC ¶ 105.)

C. Zinc Pricing

Plaintiffs allege that "[n]early all industrial contracts for the physical delivery of [SHG] Zinc express the price for zinc using a formula with at least two standardized components," the "LME Settlement Price" and a "regional premium" such as the Platts Midwest Special High Grade Zinc Premium ("MW SHG Premium"). (CAC ¶ 128.) Together, these components are generally referred to as the "all-in" price for physical delivery of SHG zinc. (CAC ¶¶ 115, 129.)

The LME Official Price serves as the global reference for physical base metal contracts and the LME Official Settlement Price is the price at which all LME futures are settled. (CAC ¶ 101.) LME prices for physical base metal contracts, including zinc, are arrived at through a live open-outcry process in London in what is called the "Ring." (CAC ¶ 101.)[8] The cost of purchasing physical zinc in satisfaction of an LME forward contract long position is the LME Official Settlement Price, plus any warrant trading costs, **[**20]** plus the costs to the owner to move the zinc from the LME warehouse to its factory or facility. (CAC ¶ 114.) This method of purchasing zinc is small in volume relative to the market as a whole, but it serves as an important price discipline and check on prices in the remainder of the physical zinc market. (CAC ¶ 114.)

The remainder of physical zinc is purchased at the MW SHG Premium plus the LME price, or another "all-in" price. (CAC ¶ 115.) Regional premiums, such as the MW SHG Premium, are compiled based on reporting of the preponderance of physical transactions between buyers and sellers of spot zinc on a given day for delivery to relevant geographic points. (CAC ¶ 129.) The premiums reflect current offers for immediately available zinc for delivery from United States and foreign producers, traders, and holders of warehoused zinc, and these offers in turn incorporate the fluctuating delivery, storage, finance, and insurance costs incurred by these competing suppliers of **[**21]** zinc. (CAC ¶ 129.) Regional premiums are published by private companies, including Platts, a division of McGraw-Hill Financial, and Metal Bulletin. (CAC ¶¶ 19, 129.)

D. Parties

1. Plaintiffs

The named plaintiffs are five companies in the business of producing galvanized metal products coated with a protective **[*350]** layer of zinc. (CAC ¶¶ 32, 39, 46, 53, 60.) Plaintiffs allege that they purchased physical zinc for delivery in the United States between May 24, 2010 and the present (the "Class Period") and were the first in the chain of distribution to pay prices that incorporated the MW SHG Premium on such zinc or directly purchased physical zinc from a defendant, or both. (CAC ¶¶ 22, 29-31, 36-38, 43-45, 50-52, 57-59.) Plaintiffs claim they suffered injury in fact as well as antitrust injury by having to pay a higher premium than they otherwise would have paid but for defendants' alleged conduct. (CAC ¶¶ 33, 40, 47, 54, 61.) Plaintiffs define their putative plaintiff class as "All persons [with certain exclusions] who, or entities which, purchased LME U.S. Zinc and paid the Platts Zinc MW SHG Premium or similar price premium in the United States from a primary zinc producer or a Defendant from **[**22]** May 24, 2010 to the present." (CAC ¶¶ 255-56.)

2. Defendants[9]

Defendants include three operators of LME-certified warehouses that store zinc (among other metals)—Pacorini, Metro, and Henry Bath—and a number of their corporate affiliates that consist of financial entities with commodities trading units that, during the Class Period, traded financial instruments whose price was predicated on the underlying cost of physical zinc and its storage. (CAC ¶¶ 62-89.) Plaintiffs allege that these defendants collectively

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[8] "The LME Official Price is the last bid and offer price quoted during the second Ring session and the LME Official Settlement Price is the last cash offer price." LME Official Price, LME Website (Nov. 20, 2015), *https://www.lme.com/en-gb/pricing-and-data/pricing/official-price/* .

[9] As discussed below, plaintiffs improperly apply generic names to corporate affiliates throughout the CAC, making it difficult at various points for the Court to determine which specific defendant(s) to whom plaintiffs intend to refer.

own 54 of 56 LME-approved warehouses in New Orleans, Pacorini owns 55 of 60 LME-approved warehouses in Vlissingen, Netherlands, "Metro dominates warehousing in Detroit", and defendants own 15 of 20 LME-approved warehouses in Johor, Malaysia. (CAC ¶ 218.) In conclusory terms, plaintiffs allege that defendants agreed to a market allocation to Metro of aluminum in Detroit and to Pacorini of aluminum in Vlissingen and zinc in New Orleans. (CAC ¶ 241.) Plaintiffs **[**23]** do not allege that any market was allocated to Henry Bath.

Pacorini has been owned, and its operations controlled by, defendant Glencore Ltd. since it was acquired for $209 million in September 2010. (CAC ¶¶ 67, 108.) It owns 34 of the 56 LME-approved warehouses in New Orleans. (CAC ¶ 218.) Glencore Ltd.'s ultimate parent is Glencore plc, which was formerly known as Glencore Xstrata plc. (CAC ¶ 62.) When Glencore plc merged with Xstrata in 2013, it became the world's largest commodities trading company. (CAC ¶ 140.) The CAC alleges that no player was or is as dominant in the zinc market as Glencore and its affiliates. (CAC ¶ 140.)

Until it was sold to Reuben Brothers, a Swiss private equity firm, in December 2014, Metro was wholly-owned directly by defendant Mitsi Holdings LLC ("Mitsi") and operated as a subsidiary of The Goldman Sachs Group, Inc. ("Goldman Sachs"). (CAC ¶¶ 74, 229.) The CAC alleges that Metro stores zinc at 14 LME-approved warehouses located in and around New Orleans and owns a total of 15 LME-approved warehouses in the city. (CAC ¶¶ 81, 218.) Metro was acquired by Goldman Sachs's wholly-owned subsidiaries for a deal worth purportedly $550 million in February 2010. **[**24]** (CAC ¶¶ 75, 108.) Mitsi is owned by defendants GS Power Holdings LLC ("GS Power Holdings") and MCEPF Metro I, Inc. ("MCEPF Metro I"), both of which are wholly-owned subsidiaries of Goldman Sachs. (CAC ¶¶ 71-72, 74.) Defendant Goldman Sachs International ("GSI") is a "significant subsidiary" of **[*351]** Goldman Sachs and is the affiliate of Goldman Sachs that serves as a member of the LME. (CAC ¶ 70.)

Henry Bath is a subsidiary of Henry Bath & Son, Ltd., which was acquired by defendant JPMorgan Ventures Energy Corporation ("JPMorgan Ventures") as part of the purchase of the commodities business of RBS Sempra in 2010 for approximately $1.7 billion. (CAC ¶¶ 84, 108.) Henry Bath owns 5 LME-approved warehouses in New Orleans. (CAC ¶ 218.) JPMorgan Ventures is the commodities division of JPMorgan Chase & Co. ("JPMorgan"). Defendant JPMorgan Securities plc ("JPMorgan Securities") provides securities brokerage services for its ultimate parent, JPMorgan, and was a Category 1 ring dealing member of the LME. (CAC ¶ 83.) The CAC alleges that JPMorgan Securities transacted directly with Metro regarding zinc storage in the United States. (CAC ¶ 83.) Henry Bath and its warehousing business was sold by JPMorgan-affiliated **[**25]** entities to Mercuria, a Swiss commodities firm, in a transaction that closed on or about October 3, 2014. (CAC ¶¶ 86, 228.)

E. Defendants' Allegedly Unlawful Conduct

1. Conspiracy Allegations

Plaintiffs allege a conspiracy prohibited by both *Sections 1* and *2 of the Sherman Act*. In their Section 1 claim, plaintiffs assert that defendants "shared a conscious commitment to a common scheme designed to achieve the unlawful objective of artificially fixing, depressing, raising, pegging, maintaining, stabilizing, and otherwise manipulating the supply of physical zinc available for delivery from LME warehouses." (CAC ¶ 267.) In their conspiracy to monopolize claim under *Section 2*, they assert that defendants "by and through the LME, and, on information and belief, with each other have conspired to monopolize the market for the LME Zinc Warehouse Services Market." (CAC ¶ 272.)

Both claims depend on the same alleged scheme, summarized as follows: at least by the start of the Class Period, defendants "owned the largest LME warehouses in the world, were on the rules committee for recommending storage fees and minimum delivery requirements for those warehouses, and traded in zinc as well as financial instruments tied to the price **[**26]** of zinc," enabling them to "conspire with each other to manipulate the LME warehousing system and its rules to, inter alia, maximize profits from rental income and trading." (CAC ¶ 109.) Plaintiffs' support for this alleged conspiracy includes allegations of, inter alia, manipulation of LME load-out rules, Pacorini's falsification of bills of lading, an agreement to organize warrant cancellations in Pacorini's warehouses, Pacorini's and Metro's provision of financial incentives for storing zinc, and the use of shadow warehousing and delisting of warehouses.

In this regard, plaintiffs allege that, as members of the LME Warehousing Committee and by their influence of and membership on various other LME committees, defendants combined and conspired to treat as a maximum the LME's minimum load-out requirement of 1,500 tons (increased to 3,000 tons during the Class Period) of metal per city per day. (CAC ¶¶ 132, 138.) This minimum applied on a city-wide basis (i.e. no minimum percentage-per-warehouse was required) and it applied to all metals as a whole. (CAC ¶ 132.) Plaintiffs further allege that this arrangement allowed defendants to "net" incoming shipments and "shuttle" shipments between **[**27]** warehouses that would count against the daily quota without requiring warehouse operators to actually **[*352]** release zinc from storage into the market. (CAC ¶¶ 132-33.) Plaintiffs then assert that by virtue of their ownership of and rulemaking role in the LME, defendants have controlled the supply of zinc and thereby dictated the price of premiums incorporated into zinc prices in the United States. (CAC ¶ 139.)

Plaintiffs allege that in late summer or fall of 2012, during a meeting with Pacorini CFO Lisa Loeffler and Assistant General Manager Deborah Bressie, plaintiffs' Confidential Witness 1 ("CW1"), who worked in management for Pacorini and had oversight for the LME warranting side of Pacorini's business during the Class Period, was told that Pacorini was going to engage in high volume transfers of canceled LME metals between its warehouses in New Orleans. (CAC ¶ 179.) CW1 was ordered to create falsified bills of lading for Pacorini to mask the high volume movements of zinc so that Pacorini could manipulate the daily reports sent to the LME without being detected. (CAC ¶¶ 180, 185.) CW1 was instructed that these bills of lading were to falsely state that the zinc was to be delivered to a **[**28]** customer location when in actuality it was either not being moved at all or was being redirected to another Pacorini warehouse; these documents also contained false signatures and, at times, incorrect tonnage amounts. (CAC ¶ 180.) CW1 recalls that warehouses not owned by Pacorini, but owned by third parties such as Metro and Henry Bath, were also sometimes falsely listed as delivery locations in the forged bills of lading. (CAC ¶ 181.)[10] There are no allegations that any defendant other than Pacorini engaged in these practices.

Plaintiffs' Confidential Witness 2 ("CW2"), who worked as a shipping and receiving/LME clerk for Pacorini during the Class Period, corroborates that Pacorini altered bills of lading to make it appear as if zinc and other metals moved from warehouse to warehouse when in fact the metals were **[**29]** not moving at all; CW2 also recalls that many of the falsified bills of lading listed a Metro warehouse as a delivery location. (CAC ¶ 184.) Plaintiffs allege that, "[o]n its own, Pacorini's efforts to hide the implementation of defendants' scheme from the LME through false bills of lading and non-existent ghost transactions had the effect of further increasing warehouse queues." (CAC ¶ 188.) The CAC does not allege that any entity unaffiliated with Pacorini engaged in a practice of falsifying bills of lading.

Plaintiffs further allege that, according to CW1, in the fall of 2012 defendants "agreed to a 'synchronized' and 'highly coordinated' schedule of warrant cancellations at Pacorini's warehouses." (CAC ¶ 189.) Plaintiffs allege that CW1 attended a meeting with Pacorini management in which Pacorini CEO Mario Casciano informed CW1 and others that certain of Pacorini's preferred customers, which mostly consisted of "big trading companies", had recently met and agreed on the load-out queue order and tonnage amounts at Pacorini's warehouses. (CAC ¶ 189.) It was explained to CW1 that representatives of Glencore, Goldman Sachs, JPMorgan, Henry Bath and metals trader Noble Americas Corp. ("Noble") **[**30]** entered into an agreement (the "Queue Order Agreement") that zinc would be the first metal to be released from Pacorini's warehouse load-out queue and that these customers **[*353]** were going to get their zinc tonnage released first and in a certain agreed upon order. (CAC ¶ 189.) Plaintiffs allege that CW1 was informed that defendants agreed that Noble would have its zinc removed first, followed by Goldman Sachs, and then JPMorgan. (CAC ¶ 190.)

Plaintiffs allege that "many warrants were canceled at once" by each of these "preferred customers" pursuant to the agreed upon order and no two companies involved in setting the queue order canceled warrants at the same time. (CAC ¶ 190.) According to CW1, it was not uncommon, prior to this agreement, for warrant cancellations by warrant holders to overlap at times. (CAC ¶ 190.) In addition to their agreed upon schedule of warrant cancellations,

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[10] The CAC does not provide any indication that Metro or Henry Bath would have had to be complicit in (or even have knowledge of) Pacorini's false listing of their warehouses as delivery locations. If the falsified deliveries to Metro and Henry Bath warehouses were entirely fabricated, the Court doesn't see why Pacorini would need Metro or Henry Bath's cooperation or involvement.

Pacorini also provided these preferred customers with special rates on both rent and the cost to ship the metal out of a warehouse if they canceled warrants on a certain amount of metal. (CAC ¶ 193.)

To monitor and manage the implementation of the Queue Order Agreement, Pacorini created a "Queue Manager" spreadsheet—first **[**31]** "rolled out" in fall 2012—listing all of Pacorini's warehouse customers in line in the queue for each day and month. (CAC ¶ 194.)[11] Plaintiffs allege that Pacorini held weekly internal meetings to discuss the Queue Manager spreadsheet, and that Loeffler directed CW1 to enter information into the spreadsheet and specifically informed CW1 that Casciano was directing the spreadsheet activities. (CAC ¶ 195.) After implementing the spreadsheet, Pacorini officials knew exactly when cancellations were going to occur prior to the warrants being officially canceled through the LME. (CAC ¶ 195.) According to CW1, the Queue Manager spreadsheet was a strictly "in-house" (Pacorini) project that contained certain information, such as tonnage, that differed from what Pacorini reported to the LME in daily reports. (CAC ¶ 196.) Plaintiffs allege that, according to CW1 and CW2, wait times for customers to get metal out of the queue were significantly lengthened after implementation of the Queue Manager spreadsheet. (CAC ¶¶ 197, 198.) According to one trader in October 2012, "zinc and aluminum cancellations [we]re being carried out on what appear[ed] to be a friendly basis by two warehousing firms in particular, creating **[**32]** a queue for material and allowing the market to be bid as a result." (CAC ¶ 249.)

Plaintiffs also allege that defendants engaged in certain other anticompetitive practices to manipulate the volume of zinc maintained in warehouses, including that Pacorini and Metro provided ever increasing financial incentives to metals producers and traders to store zinc in their warehouses. This practice, according to plaintiffs, resulted in defendants amassing even greater stockpiles of zinc and inflating zinc premiums. (CAC ¶¶ 201-04.) Plaintiffs allege, in particular, that Pacorini paid incentives exceeding the price premium that producers could obtain by selling their zinc on the open market. (CAC ¶ 202.) Plaintiffs also **[**33]** allege that "defendants" engaged in "shadow warehousing", which is the practice of moving metal from LME-approved warehouses to areas not registered as LME warehouses because such locations **[*354]** are unregulated and don't disclose their holdings, allowing defendants to manipulate the inventories reported to the LME. (CAC ¶ 205.) However, these allegations are (again) factually limited to Pacorini. Plaintiffs allege that, with the LME's permission, "Glencore"—which is defined in the CAC as Glencore Ltd. and Pacorini—has also delisted LME warehouses to increase its ability to manipulate market conditions. (CAC ¶ 207; see CAC ¶ 68.)

Plaintiffs allege that "defendants"—which are identified only in the aggregate and in general terms—have profited in numerous ways from their anticompetitive agreements in light of their positions in the market. They allege that defendants profited from increased storage fees and higher zinc premiums by taking long positions in zinc and selling it into the market at a higher premium than at which they purchased it. (CAC ¶ 210.) Plaintiffs also allege that defendants created conditions that allowed a market "contango" to persist during the Class Period, meaning that **[**34]** the spot or cash price for zinc was lower than the futures price; the contango reflected purchasers' willingness to pay more for zinc at a future date than at the current spot or cash price. (CAC ¶ 211.) The contango allowed investors, such as defendants, to take advantage of historically low interest rates to enter into warehouse financing deals in which they purchased zinc at depressed spot prices, incurred carrying and storage costs, and still profited from the difference between the costs incurred and the increased futures price. (CAC ¶¶ 212, 244.) Plaintiffs allege that Goldman Sachs or J. Aron[12] traded in zinc and zinc derivatives and stood to benefit from increases in the zinc premium. (CAC ¶ 242.) The CAC contains no allegation specifically identifying any other defendant by name as having traded in financial instruments involving zinc premiums.

2. Monopolization Allegations

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[11] According to the Report of the Permanent Subcommittee on Investigations of the U.S. Senate, Metro's Vice President of Marketing, Mark Askew, sent an email in December 2010 to Metro CEO Chris Wibbelman expressing reservations about "Q Management" in light of a conversation with "Paco" (i.e. Pacorini) a few weeks prior. (CAC ¶ 240.) The CAC contains no allegations describing what this email relates to or whether it has any relation to zinc or to Pacorini's New Orleans warehouses.

[12] The CAC does not define or elsewhere reference "J. Aron." The Court presumes that plaintiffs mean to refer to J. Aron & Company, which the plaintiffs in Aluminum alleged was a trading division of Goldman Sachs. See *Aluminum II, 95 F. Supp. 3d at 445 n.28*.

Plaintiffs also allege that Glencore Ltd. and/or Pacorini had monopoly power, or attempted to **[**35]** acquire monopoly power, in the market for LME-licensed zinc warehousing services in violation of *Section 2* of the Sherman Act.[13] (CAC ¶¶ 277-90.) Plaintiffs allege two relevant markets: (1) the market of "services for zinc stored in LME warehouses" (which plaintiffs refer to as the "LME Zinc Warehouse Services Market") in the United States, North America, and/or the world, and (2) the "market for Special High Grade Zinc or the market for selling such zinc" in North America (which plaintiffs refer to as the "LME U.S. Zinc Market"), and/or the world (which plaintiffs refer to as the "Zinc Market"). (CAC ¶ 113.)

Plaintiffs allege that the "LME Zinc Warehouse Services Market" provides and controls the release of physical zinc to owners that have taken delivery in satisfaction of an LME zinc forward contract long position. (CAC ¶ 114.) Count III alleges that Glencore "willfully acquired and maintained monopoly power in the market for LME Zinc Warehouse Services in the United States" by owning a substantial majority of warehouses in New Orleans, where most LME-licensed **[**36]** warehouses are located. (CAC ¶¶ 278-79.) Count IV alleges, in the alternative, that Glencore specifically intended to obtain a monopoly in the "market for LME-licensed zinc warehousing **[*355]** in the United States" and had a dangerous probability of success in doing so. (CAC ¶¶ 285-86.)

Plaintiffs allege that there are no reasonable substitutes for LME zinc warehouse services because LME warrants are considered first class collateral, and the only zinc sources of such first class collateral is zinc deliverable on the LME. (CAC ¶ 118.) Plaintiffs also allege that there are no reasonable substitutes for SHG zinc, which is of specific quality and has specific industrial uses, including galvanizing steel. (CAC ¶ 119.) Finally, plaintiffs allege that demand for primary zinc is "relatively price inelastic." (CAC ¶ 123.)

In the physical zinc market, plaintiffs allege that "no player was or is as dominant as Glencore and its affiliates." (CAC ¶ 140.) After Glencore plc's merger with Xstrata, it became the world's largest zinc miner, with 24 mines producing around 1.5 million metric tons of contained zinc in 2012 out of total global production of 13 million metric tons. (CAC ¶ 142.) Glencore plc also **[**37]** operates seven zinc smelters with a capacity of around 1.2 million metric tons per year of zinc metal, sells 100% of primary zinc produced in the United States, trades 60% of the world's zinc, and owns or has exclusive rights to 35% of the output of the world's zinc mines, including 100% of all U.S. output of primary zinc. (CAC ¶¶ 124, 142, 160, 163, 166.) Plaintiffs allege that even where it does not own a mine, Glencore and its affiliates partially own or have marketing or "off take" agreements with miners providing it with exclusive rights to sell a zinc mine's output. (CAC ¶¶ 124, 161.) Glencore and its affiliates recognized more than $7.7 billion of revenue from zinc assets in 2014. (CAC ¶ 171.)

Beyond its dominant position in the United States, plaintiffs allege that Glencore "has a dominant position in zinc distribution worldwide"; "[s]ince 2009, its control over LME warehouse stocks of zinc is estimated to have grown to more than 90% of all LME warehouse stocks of zinc." (CAC ¶ 143.) Plaintiffs allege that in the months preceding Glencore's takeover of Pacorini, extraordinary volumes of zinc thought to be from Glencore and its affiliates in Spain were delivered to New Orleans warehouses, **[**38]** resulting in a 25% jump in the MW SHG Premium. (CAC ¶¶ 146, 149.) Within a week after Glencore's August 2010 announcement that it was acquiring Pacorini, warrants for more than 50,000 tons of zinc in New Orleans warehouses were canceled in a single day. (CAC ¶¶ 155, 157.) Plaintiffs allege that after Glencore completed its acquisition of Pacorini on September 14, 2010, it moved zinc to New Orleans to create lengthy warehouse queues. (CAC ¶ 160.)

F. Alleged Effects on the Physical Zinc Market

As detailed below, plaintiffs allege that defendants' anticompetitive conduct had numerous effects on the zinc market, including increasing the MW SHG Premium, the trading volume of zinc futures contracts, the level of zinc inventories, the number of canceled warrants, and the length of load-out queues at LME warehouses. Notably, plaintiffs' own allegations indicate that several of these trends began prior to the start of the Class Period and prior to much of the anticompetitive conduct alleged.

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[13] As discussed above, plaintiffs also allege that all of the defendants conspired to monopolize that market in violation of *Section 2*. (CAC ¶¶ 271-76.)

The first and primary competitive effect was allegedly price related. Plaintiffs assert that during the Class Period, price premiums for physical zinc (based on the MW SHG Premium) nearly tripled from 3.50 **[**39]** cents per pound to 9.25 cents per pound (CAC ¶¶ 7, 143, 250-51), and that these changes were "causally related" to "changes in the estimated zinc load-out **[*356]** queue from the Pacorini LME warehouses located in New Orleans and to changes in the Herfindahl index of concentration of zinc stocks in LME warehouses worldwide." (CAC ¶ 144.)[14] Notably, however, the MW SHG Premium increased by almost 50% from 3.25 cents per pound to 4.75 per pound in the roughly four months prior to Glencore's acquisition of Pacorini in 2010. (CAC ¶ 250.) The CAC also states that between 2009 (prior to defendants' warehouse acquisitions) and 2013, the volume of zinc futures nearly doubled, and that there was significant volume growth in the one-and-a-half years prior to the start of the Class Period. (CAC ¶ 245.) Plaintiffs allege that in May 2010 (again, prior to certain defendants' warehouse acquisitions), zinc inventories reached a five-year high, and reached a seventeen-year high by July 2012; notably, though, zinc inventories roughly doubled in the year prior to the start of the Class Period. (CAC ¶¶ 151, 174.) Plaintiffs also allege that by July 2011, canceled warrants in New Orleans reached 105,650 metric tons, **[**40]** extending the maximum queue to withdraw material to 70 working days. (CAC ¶ 176.)

Plaintiffs allege that there have been long backlogs of zinc (and other metals) at LME-certified warehouses due to LME rules that allow warehouse operators to release much less material per day than they take in, raising premiums. (CAC ¶¶ 246-47.) Of the 71% of total LME warehouse stocks of zinc stored in New Orleans in October 2012, plaintiffs allege that 45% of that inventory was waiting in queue to be delivered out. (CAC ¶ 249.) This represented a tripling of the outbound delivery queue from that in late 2011. (CAC ¶ 249.) By November 2012, purchasers of zinc had to wait months and sometimes more than a year to get deliveries of zinc. (CAC ¶ 249.) Load-out delays had a substantial effect on metals stored in LME warehouses under warrants because canceled warrants on zinc have consistently exceeded the daily load-out rate throughout the Class Period, leading to increases in the rents paid to defendants. (CAC ¶ 134.)[15] During the Class Period, the LME agreed to increase storage rates by **[**41]** 20%; the storage rental rate per ton per day increased from $0.40 in 2010 to $0.41 in 2011, to $0.45 in 2012, and finally to $0.48 in 2013. (CAC ¶ 135.)

III. MOTION TO DISMISS STANDARD

To survive a *Rule 12(b)(6)* motion to dismiss, the factual allegations in a complaint must raise the plaintiffs' right to relief above the speculative level. *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. In other words, a complaint must allege enough facts to "state a claim to relief that is plausible on its face." *Iqbal, 556 U.S. at 678* (quoting *Twombly, 550 U.S. at 570*). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id. at 678*. In applying that standard, a court accepts as true all well-pleaded factual allegations, but does not credit "mere conclusory statements" or "threadbare recitals of the elements of a cause of action." Id. Similarly, a court need not accept "legal conclusions couched as factual allegations." *Anderson News, 680 F.3d at 185*.

[*357] If the Court can infer no more than "the mere possibility of misconduct" from the factual averments—that **[**42]** is, if the well-pleaded allegations of the complaint have not "nudged [plaintiffs'] claims . . . across the line from conceivable to plausible"—dismissal is appropriate. *Iqbal, 556 U.S. at 679-80* (quoting *Twombly, 550 U.S. at 570*).

The "plausibility" requirement should not, however, be misunderstood as a "probability" standard. *Twombly, 550 U.S. at 556*; *Anderson News, 680 F.3d at 184*. "Because plausibility is a standard lower than probability, a given set of actions may well be subject to diverging interpretations, each of which is plausible." *Anderson News, 680 F.3d at 184*. On a *Rule 12(b)(6)* motion, the Court may not choose between two plausible inferences that may both be drawn from the factual allegations. *Id. at 185*. This is so even if a court finds one of the two versions more plausible. Id.

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[14] The Herfindahl index is a standard measure of concentration used in industrial organization analysis. (CAC ¶ 144 n.51.)

[15] When a warrant is "canceled", the canceled metal is added to the load-out queue but the owner continues to pay daily rent until the metal exits the facility. (CAC ¶ 134.)

IV. ANTITRUST STANDING[16]

In an antitrust case, a plaintiff must have constitutional standing under Article III, as well as antitrust standing. See *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters ("AGC"), 459 U.S. 519, 535 n.31, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*; see also *Port Dock & Stone Corp. v. Oldcastle Ne., Inc., 507 F.3d 117, 121 (2d Cir. 2007)*. Plaintiffs' Article III standing is not in dispute. Defendants do, however, contest that plaintiffs have or could plead antitrust standing as to both their Section 1 and *2* claims.

Antitrust standing is "a threshold, pleading-stage inquiry and when a complaint by its terms fails to establish this requirement [the court] must dismiss it as a matter of law." *Gatt Commc'ns Inc. v. PMC Assocs. L.L.C., 711 F.3d 68, 75 (2d Cir. 2013)* (quoting *NicSand, Inc. v. 3M Co., 507 F.3d 442, 450 (6th Cir. 2007)* (en banc)); see also *Paycom Billing Servs., Inc. v. MasterCard Int'l, Inc., 467 F.3d 283, 290-95 (2d Cir. 2006)* (dismissing a complaint under *Rule 12(b)(6)* for lack of antitrust standing). A court must answer three separate questions to determine if plaintiffs have antitrust standing: have plaintiffs alleged injury in fact; have they alleged antitrust injury, and are they efficient enforcers of the antitrust laws? See *AGC, 459 U.S. at 535 n.31*; *Port Dock, 507 F.3d at 121*.

Plaintiffs allege that **[**44]** they have paid higher prices for zinc than they would have paid in the absence of defendants' actions. (See CAC ¶¶ 24, 33, 40, 47, 54, 61.) Because plaintiffs' alleged injury is concrete, particularized, and actual, plaintiffs have sufficiently alleged that they suffered injury in fact as to their claims under *Sections 1* and *2*. See *Lujan v. Defs. of Wildlife, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)*.[17]

[*358] The Court next turns to the questions of whether plaintiffs adequately allege antitrust injury and have shown that they would be efficient enforcers of the antitrust laws, first in relation to their Section 1 claim, and then with respect to their *Section 2* claims.

To establish antitrust injury, a plaintiff **[**45]** must allege plausible facts that he suffered "injury 'of the type the antitrust laws were intended to prevent and that flows from that which makes [the] defendants' acts unlawful.'" *Gatt, 711 F.3d at 78* (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977))*. Thus, although causally related to an antitrust violation, injury does not constitute "antitrust injury" unless it is "attributable to an anti-competitive aspect of the practice under scrutiny." *Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)*. The antitrust injury requirement is derived from the principle that the antitrust laws were enacted for "'the protection of competition, not competitors.'" *Paycom Billing, 467 F.3d at 290* (quoting *Brunswick Corp., 429 U.S. at 488*); see also *Gatt, 711 F.3d at 75* ("Absent such boundaries, the potent private enforcement tool that is an action for treble damages could be invoked without service to—and potentially in disservice of—the purpose of the antitrust laws: to protect competition."). The Second Circuit employs a three-step analysis to determine whether a plaintiff has sufficiently alleged antitrust injury arising from an anticompetitive practice. First, a court must determine whether the party asserting that it has been injured by an illegal competitive practice has identified the practice complained of and the reasons such a practice is or might be anticompetitive. *Gatt, 711 F.3d at 76*. Second, **[**46]** a court must "identify the actual injury the plaintiff

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[16] Neither *§ 1* nor *§ 2* of the Sherman Act provides for a private right of action. That is accomplished by *§§ 4* and *16 of the Clayton Act*. *Section 4* provides for a treble damages action and states that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws" may sue for treble damages. *15 U.S.C. § 15*. *Section 16* provides for an action for injunctive relief and states that "[a]ny person, firm, corporation, or association shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by **[**43]** a violation of the antitrust laws . . . ." *15 U.S.C. § 26*. Plaintiffs must establish antitrust standing with respect to each antitrust claim pursued. See *Daniel v. Am. Bd. of Emergency Med., 428 F.3d 408, 436-38 (2d Cir. 2005)* (antitrust standing inquiry is injury-specific). Accordingly, the Court reviews standing with regard to plaintiffs' §§ 1 and *2* claims separately.

[17] That plaintiffs do not allege that their zinc was stuck in the load-out queue at Pacorini's New Orleans warehouses behind that of Pacorini's allegedly "preferred customers" does not mean that they fail to allege injury in fact. Plaintiffs' allegations that they paid higher prices as a result of defendants' conduct, even if causation is attenuated, are sufficient to plead injury in fact. Defendants' arguments relating to the indirectness of plaintiffs' alleged injury are more appropriately directed at the question of antitrust injury and efficient enforcer prongs of the standing analysis.

alleges." Id. (quotation marks omitted). Third, a court compares the "anticompetitive effect of the specific practice at issue to the actual injury the plaintiff alleges." Id. (quotation marks omitted).

The questions of antitrust injury and whether a plaintiff is an efficient enforcer of the antitrust laws are often analyzed together. The Court is guided by the Supreme Court's decision in AGC, in which it concluded that a union lacked standing to redress alleged antitrust violations on behalf of its members. *AGC, 459 U.S. at 520*. In AGC, the Supreme Court identified several factors a court should consider in determining whether a plaintiff has antitrust standing: (1) the causal connection between the violation and the harm, (2) the presence of an improper motive, (3) the type of injury and whether it was one Congress sought to address, (4) the directness of the injury, (5) the speculative nature of the damages, and (6) the risk of duplicative recovery or complex damage apportionment. *Id. at 537-44*. Applying these factors, the Court concluded that the plaintiff union lacked antitrust standing because: (1) the causal chain consisted of several "somewhat vaguely defined" **[**47]** links, (2) motive was not a significant issue in the case, (3) the type of injury was not one Congress sought to address because the union was "neither a consumer nor a competitor in the market in which trade was restrained", **[*359]** (4) the union's alleged injury was too indirect; (5) the injury was speculative because the effects of the conspiracy were indirect and could have been caused by independent factors, and (6) there was an alternative class of plaintiffs better situated to pursue the claims, which created a risk of duplicative damages. *Id. at 539-45 & n.37*.

The Second Circuit has "distilled" these factors "into two imperatives": first, that a plaintiff plausibly allege facts supporting antitrust injury, and, second, that he plausibly allege facts supporting his suitability as a plaintiff to pursue the alleged antitrust violation—and that he would therefore be an "efficient enforcer" of the antitrust laws. *Gatt, 711 F.3d at 76*; see also *Port Dock, 507 F.3d at 121*; *Daniel, 428 F.3d at 443*. Whether a plaintiff is an efficient enforcer of the antitrust laws depends on a balancing of the following factors:

> (1) the directness or indirectness of the asserted injury; (2) the existence of an identifiable class of persons whose self-interest would normally motivate them **[**48]** to vindicate the public interest in antitrust enforcement; (3) the speculativeness of the alleged injury; and (4) the difficulty of identifying damages and apportioning them among direct and indirect victims so as to avoid duplicative recoveries.

Gatt, 711 F.3d at 76 (quoting *Paycom Billing, 467 F.3d at 290-91*); see also *Port Dock, 507 F.3d at 121*; *Daniel, 428 F.3d at 443*.

To determine if a pleading adequately alleges antitrust injury as well as whether each plaintiff is an efficient enforcer of the antitrust laws, a court must analyze whether a plaintiff's alleged injury constitutes injury to the competitive process, and not just injury to a competitor. Understanding where plaintiffs have positioned themselves in the competitive landscape is the most logical starting point for this question. The Court asks whether plaintiffs are consumers of a product, and therefore injured when sellers engage in price fixing, allocating markets, or dividing customers, etc., because those actions have increased the prices paid? Or, whether plaintiffs allege that they are competitors of a defendant, and injured when, for instance, they are deprived of customers as a result of an unlawful bargain struck between the defendants? The Court must, finally, ask whether plaintiffs allege that they are neither **[**49]** consumers nor competitors but nonetheless have suffered an injury of the type the antitrust laws are intended to address?

In answering this third question, the Court is also guided by the Supreme Court's decision in *Blue Shield of Virginia v. McCready ("McCready"), 457 U.S. 465, 102 S. Ct. 2540, 73 L. Ed. 2d 149 (1982)*, a case decided in the term immediately prior to the term in which AGC was decided. In McCready, a case arising under *Section 1 of the Sherman Act*, the Supreme Court held that while the plaintiff was not a competitor of the alleged conspirators, she had nevertheless suffered antitrust injury because "the injury she suffered was inextricably intertwined with the injury the conspirators sought to inflict." *Id. at 484*. McCready had alleged that her health insurer, Blue Shield of Virginia, and an organization of psychiatrists conspired to exclude psychologists from eligibility for compensation under Blue Shield's insurance plans. *Id. at 469-70*. McCready alleged that she suffered injury when she sought reimbursement from Blue Shield for treatment by a psychologist and was denied because Blue Shield only allowed her and other subscribers to choose between "visiting a psychologist and forfeiting reimbursement, or **[*360]** receiving reimbursement by forgoing treatment **[**50]** of a provider of their choice." *Id. at 467-69, 483*. The Court found that McCready's injury "flow[ed] from that which makes defendants' acts unlawful" under the antitrust laws, and accordingly there was no persuasive rationale to deny McCready redress. *Id. at 484-85*. Although not frequently relied upon, lower courts have, subsequent to McCready, cited its inextricably intertwined analysis. See, e.g., *Crimpers Promotions Inc. v. Home Box Office, Inc., 724 F.2d 290, 294 (2d Cir. 1983)* (Friendly, J.) (plaintiff was trade show organizer, not direct participant in relevant market, but had antitrust standing); *Province v. Cleveland Press Publ'g Co., 787 F.2d 1047, 1052 (6th Cir. 1986)* (plaintiffs who are not "direct participants in the relevant market" can establish standing by showing that their injury is "inextricably intertwined" with the injury inflicted on the relevant market). "To be inextricably intertwined with the injury to competition, the plaintiffs must have been 'manipulated or utilized by [d]efendant as a fulcrum, conduit or market force to injure competitors or participants in the relevant product and geographical market.'" *Province, 787 F.2d at 1052* (quoting *Southaven Land Co. v. Malone & Hyde, Inc., 715 F.2d 1079, 1086 (6th Cir. 1983))*.[18]

A. Standing for the Section 1 Claim

At least with respect to the issue **[**51]** of antitrust standing for their § 1 claim, plaintiffs are situated much like the first level purchaser plaintiffs in Aluminum. As in Aluminum, plaintiffs are not competitors of any of the defendants or consumers of their products or services: they do not operate warehouses, do not have commodities trading arms, and do not allege that they directly consume any of defendants' trading products or zinc warehouse-related products or services. See *Aluminum II, 95 F. Supp. 3d at 442*.[19] Rather, as was true for the first level purchasers in Aluminum, the core of plaintiffs' claims is that they have suffered necessary yet collateral damage from defendants' scheme by having to pay artificially inflated prices for primary zinc in the physical market. Plaintiffs allege that they are the real world users whose demand for zinc creates the market for zinc sales. (CAC ¶¶ 32, 39, 46, 53, 60.) Were it not for entities like plaintiffs, who need to use zinc for their galvanizing processes, defendants' trading arms would not be able to trade zinc futures as a commodity, and their warehousing arms would not have need to store the metal. (CAC ¶ 26.) Plaintiffs allege that they are thus central to—or the fulcrum of—the creation of the market opportunity **[**52]** underlying both metal storage and warrant trading for zinc. (CAC ¶ 26.) As the entities that were the first purchasers to pay the MW SHG Premium, they were closest to the anticompetitive effects of defendants' alleged conduct and are necessarily directly impacted by defendants' alleged manipulation of the price of that premium. That is, their purchases are inextricably intertwined with the competitive landscape in which defendants' alleged scheme ultimately played out. Plaintiffs argue that, at the very least, they therefore fall within the scope of antitrust injury contemplated by *McCready*. The Court agrees.

[*361] The heart of defendants' argument is that as plaintiffs are neither direct consumers nor competitors of defendants, they cannot have experienced a competition reducing impact of defendants' conduct. But plaintiffs' theory of antitrust injury depends not on any single act, but rather on the aggregate impact of the acts. McCready makes clear that the antitrust laws do not require a plaintiff to fit neatly into a box of competitor **[**53]** or consumer, so long as "the injury [they] suffered was inextricably intertwined with the injury the conspirators sought to inflict." *457 U.S. at 484*. Defendants also contend that plaintiffs lack antitrust standing because they do not allege that they owned or stored zinc in any Pacoriniowned or other LME-approved warehouse such that defendants' alleged agreement would have delayed their ability to load their zinc out of Pacorini's warehouses. Plaintiffs' lack of direct participation in warehouse operations and services or the trading of zinc warrants is, here, not dispositive as it might well be in some cases. Given the totality of the factual allegations here, plaintiffs' participation in the separate but related market of purchasing zinc, the price of which is allegedly directly impacted by defendants' conduct, is sufficient to allege antitrust injury for purposes of their Section 1 claim. See, e.g., *Loeb Indus. Inc. v. Sumitomo Corp., 306 F.3d 469, 481 (7th Cir. 2002)* ("McCready . . . recognizes that different injuries in distinct markets may

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[18] The term "fulcrum" is defined as "the support about which a lever turns," or alternatively, "one that supplies capability for action." Fulcrum, Merriam-Webster, *http://www.merriam-webster.com/dictionary/fulcrum* (last visited Nov. 17, 2015).

[19] The sole arguable exception is that plaintiff Jasper Materials, Inc., alleges that it purchased zinc directly from Glencore during the Class Period. (CAC ¶ 56.)

be inflicted by a single antitrust conspiracy, and thus . . . differently situated plaintiffs might be able to raise claims.").

The Court recognizes that, like *Aluminum*, this case does not fit into any traditional box and these are **[**54]** unusual facts for an antitrust case, but *McCready* dictates that this Court examine whether plaintiffs have alleged facts that call for the application of analogous principles. Plaintiffs have done so here. If defendants have engaged in a conspiracy that caused dysfunction in the price-setting process and drove prices higher, and plaintiffs paid those higher prices, then, so long as McCready remains good law, plaintiffs have suffered an injury of the type that the McCready Court stated the antitrust laws were designed to prevent.

Defendants also argue that even if plaintiffs are able to allege injury to the competitive process, they have not alleged sufficient facts to demonstrate that they are efficient enforcers of the antitrust laws. Based on the facts as alleged, the Court must find otherwise. As was the case with the first level purchaser and direct purchaser plaintiffs in *Aluminum*, the facts supporting the existence of antitrust injury also demonstrate that plaintiffs are efficient enforcers for *Section 1* purposes.

First, each plaintiff is alleged to buy zinc directly from a zinc producer (and, in the case of Jasper Materials, Inc., directly from Glencore), and the contracts between the **[**55]** producer-seller and plaintiff-buyer allegedly contain provisions tying the contract prices to the MW SHG Premium. (CAC ¶¶ 28-30, 35-37, 42-44, 49-51, 56-58.) Plaintiffs also allege that, due to industry standards, they had no choice but to purchase zinc at a price that included the MW SHG Premium. (CAC ¶ 19.) Second, according to plaintiffs, no buyer of primary zinc higher up or more direct in their respective distribution chains paid prices that included the MW SHG Premium. (CAC ¶¶ 31, 38, 45, 52, 59.) Third, plaintiffs' allegations support nonspeculative damages, as they define damages by the amount by which the MW SHG Premium was inflated. (CAC ¶¶ 2, 24, 145-47, 203, 250-53.) At the motion to dismiss stage, this is sufficient. See *Gatt, 711 F.3d at 76* **[*362]** (whether plaintiff is efficient enforcer is based in part on a prospective analysis of the difficulty of identifying and apportioning damages); *Paycom Billing, 467 F.3d at 291* (same). Applying the Gatt factors, these allegations show that (1) plaintiffs' injuries were directly caused by defendants' alleged misconduct, (2) their damages are not speculative, (3) there are no issues regarding duplicative recovery or complex apportionment of damages given that plaintiffs were the first **[**56]** in the chain of distribution to pay a price incorporating the MW SHG Premium, and (4) there are no more direct victims of defendants' misconduct. See *Gatt, 711 F.3d at 76*.[20] Based on the facts alleged—that they are the first level of purchasers to pay, and thus be harmed by—inflated prices of zinc, plaintiffs have sufficiently positioned themselves as efficient enforcers of the antitrust laws to pass muster at the pleading stage.

B. Standing for the *Section 2* Claims

On the other hand, as was the case in *Aluminum*, plaintiffs **[**57]** do not fare as well in asserting antitrust standing with respect to their *Section 2* claims. The CAC alleges two relevant product markets: the market of "services for zinc stored in LME warehouses" and the "market for Special High Grade Zinc or the market for selling such zinc." (CAC ¶ 113.) The only market for which they allege that monopoly power was obtained or dangerously close to being acquired (and the market which plaintiffs allege defendants conspired to monopolize), however, is the "LME Zinc Warehouse Services Market", which, as previously noted plaintiffs define as the market of "services for zinc stored in LME warehouses." (CAC ¶¶ 272, 278-79, 285-86.) As set forth below, plaintiffs do not adequately allege an antitrust injury based on antitrust conduct in this market, and in any event have not adequately alleged they are efficient enforcers as to their *Section 2* claims.

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[20] Defendants counter that plaintiffs are not efficient enforcers because their injuries are at best indirect and speculative, and at worst nonexistent. Defendants contend that warrant holders whose metal was possibly stuck in the queue at Pacorini's New Orleans warehouses behind that of Pacorini's "preferred customers" were more directly harmed by defendants' alleged agreement. At this stage, that argument cannot alter the outcome on this element. Injury to such entities (such as inflated rents and warehousing fees, or delayed load-outs) could well be entirely different from the injury alleged by plaintiffs here (namely, paying inflated prices for primary zinc due to increases in the MW SHG Premium).

While plaintiffs allege that they were participants in the "market for Special High Grade Zinc or the market for selling such zinc" (and suffered injury in that market due to defendants' conduct), they do not allege that they were purchasers of LME warehousing services or participants in the "LME Zinc Warehouse Services Market." **[**58]** As noted above, however, the "LME Zinc Warehouse Services Market" is the only market in which plaintiffs allege that defendants conspired to obtain, and Glencore had obtained or attempted to acquire, a monopoly position. (CAC ¶¶ 272, 278-79, 285-86.)[21] As a result, **[*363]** plaintiffs' antitrust standing for *Section 2* purposes would have to arise solely from injuries they sustained in connection with Glencore Ltd.'s and/or Pacorini's monopoly (or near-monopoly) position in that market.[22] But, as was the case with respect to the similarly situated plaintiffs in Aluminum, plaintiffs' allegations do not support such an injury. As cast, plaintiffs' injury does not come from actions in the "LME Zinc Warehouse Services Market" alone because plaintiffs themselves have not paid higher warehouse rent or storage fees. Instead, plaintiffs' claim is drafted around injury from a combination of load-out delays, warrant trading and price increases.

The injury resulting from monopolization (or attempted monopolization) is higher prices for output or reduced output; the "output" here is "LME Zinc Warehouse Services." "Higher prices" would reference prices for such services; restrictions in output would relate to restrictions in availability of such services. Plaintiffs' claim is quite different: that they purchase the good that is stored and pay higher prices for that good—the physical zinc—itself. It is easy to see that the injury arising from monopolization of a service would be to buyers and sellers of that service. And plaintiffs were neither. For the same reason, plaintiffs would not be efficient enforcers—the efficient enforcers would be participants in that market.

The fundamental difference between this *Section 2* claims and the Section 1 claim is that *Section 2* is aimed at conduct within a single market. *Section 1*, in contrast, allows for the flexibility to allege a result (e.g. higher prices) derived from conspiratorial behavior between two or more actors, who need not be within the same market, to achieve that end.

Plaintiffs attempt to distinguish their *Section 2* claims from those in **[**61]** Aluminum (as to which this Court concluded that the plaintiffs lacked antitrust standing, *Aluminum II, 95 F. Supp. 3d at 456*), arguing that their allegations of the two inextricably intertwined markets for LME zinc warehouse services and for SHG zinc may support an antitrust injury under McCready and Crimpers. The Court is unconvinced. First, it is incorrect to say that the plaintiffs in Aluminum did not allege two inextricably intertwined markets. Such allegations were tried, and this Court considered and rejected the same argument that plaintiffs make here. See *Aluminum II, 95 F. Supp. 3d at 456*. Second, although the Court agrees that the two markets are, as alleged, inextricably intertwined for *Section 1* purposes, *McCready's* concept of inextricably intertwined markets does not extend to the claims brought under *Section 2* here; whether there is some conceivable *Section 2* case where it may apply is not a question this Court need resolve here. McCready was a *Section 1* case, **[*364]** *McCready, 457 U.S. at 469-70*, and there is nothing in that decision to suggest that its logic extends to the type of *Section 2* monopolization claim pled here

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[21] At oral argument, plaintiffs asserted that because Counts II-IV incorporate all of the CAC's preceding allegations, those claims may be fairly read as alleging monopoly power in both markets. (October 30, 2015 Oral Arg. Tr. ("Oral Arg. Tr.") at 102:24-103:20, ECF No. 153; see **[**59]** CAC ¶¶ 271, 277, 284.) This, however, is not a fair characterization of the CAC, which specifically alleges monopoly power only over the warehousing services market and the relevant counts make no reference to the market for the sale of primary zinc. (See CAC ¶¶ 271-90.) As discussed below, to the extent that plaintiffs seek to amend their complaint to attempt to state a monopoly claim as to both markets, the Court grants them leave to amend to do so.

[22] Plaintiffs cite *In re Crude Oil Commodity Futures Litigation, 913 F. Supp. 2d 41 (S.D.N.Y. 2012)*, for the proposition that paying supra-competitive prices as a result of a defendant's monopoly power is a "quintessential antitrust injury" for *Section 2* purposes. *Id. at 57*. In Crude Oil, the court noted the lack of authority "for the proposition that an antitrust injury cannot extend beyond the bounds of the monopolized market," and went on to conclude that plaintiffs sufficiently alleged antitrust injury because their losses were "of the type that the antitrust laws were intended to prevent." Id. While the paying of higher prices due to monopoly power is at the very core of what *Section 2* is intended to prevent, as explained below, *Section 2* is designed to protect against the raising of prices or restricting of output in the particular, defined market **[**60]** for which the defendant has monopoly power, not in an entirely separate market.

(notwithstanding that much of the discussion in McCready was directed at *Section 4 of the Clayton Act*, the remedial provision which applies to claims brought under both *Sections 1* and *2 of the Sherman Act*). While a **[**62]** number of subsequent lower court decisions, including from the Second Circuit, have cited McCready's inextricably intertwined language, plaintiffs have not cited a single case in which a court grappled with—or even had presented to it—the rather thorny issue of whether and how that language might apply to a *Section 2* claim alleging the sort of indirect harm asserted here.[23]

Because *Section 2* is concerned with the monopolization of a particular market that raises prices or restricts output in that market, see, e.g., *PepsiCo, Inc. v. Coca-Cola Co., 315 F.3d 101, 107 (2d Cir. 2002)* ("The core element of a monopolization claim is market power, which is defined as "the ability to raise price by restricting output." (quotation marks omitted)); see also *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 459, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993)* ("We hold that petitioners may not be liable for attempted monopolization under *§ 2* of the Sherman Act absent proof of a dangerous probability that they would monopolize a particular market and specific intent to monopolize." (emphasis added)), it makes perfect sense to limit McCready's broader approach to antitrust injury to the *Section 1* context. The Supreme Court itself has stated that "[c]oncerted activity subject to *§ 1* is judged more sternly than unilateral activity under *§ 2*." *Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 768, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)*. Thus, plaintiffs' alleged injury in a different market **[**64]** than that in which defendants allegedly conspired to obtain, obtained, or came close to obtaining a monopoly is not "of the type that *[Section 2* was] intended to prevent." *Brunswick Corp., 429 U.S. at 489*. In the absence of binding authority to the contrary, and in light of the harms sought to be prevented by *Section 2*, there is good reason to limit the inextricably intertwined test to the *Section 1* context.

Even if McCready's inextricably intertwined test does extend to *Section 2* claims such that plaintiffs have adequately alleged an antitrust injury as to those claims, plaintiffs nonetheless fail the efficient enforcer test under the same logic as this Court relied on in *Aluminum*. As in **[*365]** Aluminum, it is only the combination of the coordinated actions of many different participants that spells out how plaintiffs' injury can be inextricably intertwined with defendants' alleged monopolistic conduct. Analyzed on its own, as injury based solely on the monopolization of the market for LME zinc warehouse services, plaintiffs are not efficient enforcers. As was the case with respect to the first level purchaser and direct purchaser plaintiffs in Aluminum, there are others, such as entities that stored their metal at Pacorini's New Orleans warehouses and whose **[**65]** metal was stuck behind that of Pacorini's allegedly "preferred customers" in the load-out queue, who are more appropriately situated to pursue a monopoly claim in the LME zinc warehouse services market. Plaintiffs are simply too remote from that market to have antitrust standing to pursue a *Section 2* claim based on anticompetitive conduct in that market, and thus, based on their current pleadings, they fail the fourth *Gatt* factor.

V. SECTION 1 CONSPIRACY

Section 1 of the Sherman Act prohibits "[e]very contract, combination . . . or conspiracy, in restraint of trade . . . ." *15 U.S.C. § 1*. Since all contracts necessarily restrain trade to some extent, this provision cannot be read literally: only "unreasonable" restraints of trade are unlawful. *Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 723,*

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[23] In Crimpers, the Second Circuit applied McCready's inextricably intertwined concept where the plaintiff alleged claims under both *Sections 1* and *2*, but the Court's analysis was focused on the Section 1 conspiracy claim (and actually questioned whether plaintiff's *Section 2* monopolization claim was in fact one of oligopoly under *Section 1*, see *Crimpers, 724 F.2d at 291 n.1*); it did not specifically address whether and how the inextricably intertwined concept might apply to *Section 2*, see *id. at 294-95*. The Second Circuit again cited McCready's inextricably intertwined language in a case involving a *Section 2* claim in *In re DDAVP Direct Purchaser Antitrust Litigation, 585 F.3d 677 (2d Cir. 2009)*, although in that case the plaintiffs alleged that they were direct purchasers of the drugs as to which the defendants were alleged to have unlawfully maintained a monopoly, *id. at 683*. Given the absence of discussion of there being multiple markets at issue, it is far from clear that In re DDAVP was intended to endorse **[**63]** the application of McCready to a situation in which plaintiffs allege injury in one market caused by defendants' monopoly in another market. Plaintiffs point to no lower court decision citing McCready's inextricably intertwined language that discussed the interaction of two different markets where the alleged monopolistic conduct in one market caused damage in another market.

108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988); see also In re Publ'n Paper Antitrust Litig., 690 F.3d 51, 61 (2d Cir. 2012). To run afoul of Section 1, the unreasonable restraint must result from an agreement between two or more entities. See Twombly, 550 U.S. at 553-54; Theatre Enters., Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 540, 74 S. Ct. 257, 98 L. Ed. 273 (1954); Anderson News, 680 F.3d at 182. As a matter of law, only separate entities can conspire in violation of the antitrust laws; thus, a corporate parent and its wholly owned subsidiary are incapable of conspiring in violation of Section 1 of the Sherman Act as a matter of law. Copperweld, 467 U.S. at 767, 771; Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc., 996 F.2d 537, 542 (2d Cir. 1993).[24] A unilateral business decision by a single entity—typically including parents and their wholly owned subsidiaries—is not a violation **[**66]** of Section 1. Copperweld, 467 U.S. at 775. "The crucial question in a Section 1 case is . . . whether the challenged conduct stems from independent decision or from an agreement, tacit or express." Mayor & City Council of Balt., Md. v. Citigroup, Inc., 709 F.3d 129, 135 (2d Cir. 2013) (quotation marks omitted).

The primary substantive issue that defendants raise in their motions with respect to plaintiffs' Section 1 claim is that the allegations do not plausibly support an inference of anticompetitive agreement or concerted action. Although plaintiffs advance several theories of a conspiracy in the CAC and in **[**67]** opposition to defendants' motions, the Court agrees that plaintiffs **[*366]** have failed to plead a plausible unlawful agreement.

Before turning to the issue of the adequacy of plaintiffs' allegations of an agreement, the Court briefly pauses to again note the markets that plaintiffs allege were manipulated by defendants' alleged anticompetitive agreement. The CAC identifies and defines two markets: the market of "services for zinc stored in LME warehouses" and the "market for Special High Grade Zinc or the market for selling such zinc." (CAC ¶¶ 113-14.) Geographically, both markets are alleged to cover the United States, North America, and/or the world. (CAC ¶ 113.) It is these markets as to which the Court must determine if plaintiffs plausibly plead an anticompetitive agreement.

In order for plaintiffs to plausibly allege coordinated conduct running afoul of Section 1, they must plausibly allege concerted action. Allegations merely consistent with unilateral action are insufficient. See Twombly, 550 U.S. at 556-57; Copperweld, 467 U.S. at 768; Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984); Anderson News, 680 F.3d at 183. "[T]here is a basic distinction between concerted and independent action . . . ." Monsanto, 465 U.S. at 761. Allegations must support a unity of purpose, common design and understanding, or a meeting of the minds in an unlawful agreement. **[**68]** Am. Tobacco Co. v. United States, 328 U.S. 781, 810, 66 S. Ct. 1125, 90 L. Ed. 1575 (1946); Int'l Distribution Centers, Inc. v. Walsh Trucking Co., 812 F.2d 786, 793 (2d Cir. 1987).

"Allegations of direct evidence of an agreement, if sufficiently detailed, are independently adequate." In re Insurance Brokerage Antitrust Litig., 618 F.3d 300, 323 (2d Cir. 2010) (citing Twombly, 550 U.S. at 564). Plaintiffs need not, however, plead direct evidence of conspiracy. See Anderson News, 680 F.3d at 183. Conspiracies are rarely evidenced by explicit agreements—they must nearly always be proven through "'inferences that may fairly be drawn from the behavior of the alleged conspirators.'" Id. (quoting Michelman v. Clark-Schwebel Fiber Glass Corp., 534 F.2d 1036, 1043 (2d Cir. 1976)); see also Mayor & City Council of Balt., 709 F.3d at 136-37 (in many antitrust cases, "smoking gun" evidence can be hard to come by, and thus a complaint must set forth sufficient circumstantial facts supporting an inference of conspiracy).

At the pleading stage, plaintiffs must allege sufficient facts to support (not "prove" or even "demonstrate") a plausible inference that defendants reached an agreement; a complaint merely alleging parallel conduct alone is not sustainable. Twombly, 550 U.S. at 556; see also Mayor & City Council of Balt., 709 F.3d at 135-36 ("[A]lleging parallel conduct alone is insufficient, even at the pleading stage."); Anderson News, 680 F.3d at 184. In cases in

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[24] Although certain sets of defendants are affiliated with one another, defendants have for the most part not argued that plaintiffs' Section 1 claim is deficient for failure to allege an agreement between separate entities (although defendants vigorously contest whether any alleged agreement has otherwise been sufficiently pled). Because the CAC alleges agreements between a number of entities from different corporate families, plaintiffs' Section 1 claim does not fail under Copperweld's separate entities requirement. That being said, to the extent that plaintiffs' Section 1 claim remains viable only as to defendants that are part of the same corporate family (such as Glencore Ltd. and Pacorini), plaintiffs' allegations run into Copperweld issues.

which there is obvious parallel conduct and the question is whether it is the product of coordinated or unilateral decision making, a plaintiff must allege additional facts that point toward a meeting of the minds. *Twombly, 550 U.S. at 557*.

Even conscious parallelism in pricing among competitors is not **[**69]** itself unlawful. *Id. at 553-54*; *In re Publ'n Paper, 690 F.3d at 62*. By engaging in conscious parallelism, firms in a concentrated market may lawfully recognize shared economic interests and, in effect, lawfully exercise their leverage to set prices at a profit maximizing—and even a supra-competitive—level. *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 227-28,* **[*367]** *113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993)*. "Plus-factors" may provide the additional circumstances necessary to permit a fact-finder to infer a conspiracy. Examples of plus-factors are a common motive to conspire, actions taken against economic self-interest, and a high level of inter-firm communications. *In re Publ'n Paper, 690 F.3d at 62*; see also *Apex Oil Co. v. DiMauro, 822 F.2d 246, 253-54 (2d Cir. 1987)* (suggesting that allegations that are consistent only with market actors who are aware of and anticipate similar actions by competitors would be insufficient to support the existence of a tacit agreement).[25]

Several overlapping theories of a conspiratorial agreement among defendants may be read into the CAC. Some are quite explicitly made and apparent from a first reading of the CAC, while others have been identified by the Court only upon a careful parsing of plaintiffs' allegations and arguments when viewed in their totality. Broadly construed, the CAC appears to assert the following anticompetitive agreements: (1) a broad horizontal agreement extending over the entire duration of the Class Period to restrain the supply of zinc, with the Queue Order Agreement serving as a brief "window" into a larger, far-reaching and pre-existing agreement among defendants, (2) the Queue Order Agreement as a stand-alone conspiracy beginning in fall 2012 and extending until the end of the Class Period, (3) a market allocation across multiple metals (including zinc and aluminum) and geographic areas, and (4) a hub-and-spoke type conspiracy with Glencore Ltd./Pacorini at the "hub" and the other defendants acting as "spokes." Below, the Court addresses each of these alternatives in turn and concludes **[**72]** that none are sufficiently plausible under the standards of *Twombly* and *Iqbal* to withstand defendants' motions.

Plaintiffs' first theory, and the one that at first glance most closely parallels the theory of a Section 1 conspiracy alleged in Aluminum II, is that JPMorgan, Goldman Sachs and Glencore each acquired LME-certified warehouse operators in 2010 and subsequently (through certain commodities trading and warehouse operating affiliates) **[*368]** engaged in a broad range of concerted activity to drive up the price of zinc (and thereby reap profits through trading activity and increased warehouse rent and metal storage fees) by artificially restraining the supply of zinc through choreographed load-out delays. The CAC does not clearly identify who precisely made this agreement, when it was made, where it was made, or its terms, but rather lists a number of alleged anticompetitive means used

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[25] In Mayor & City Council of Baltimore v. Citigroup, Inc., the Second Circuit reviewed whether allegations of certain parallel conduct in the auction rate securities market were sufficient to support a § 1 conspiracy. Plaintiffs alleged that defendant banks conspired with each other to simultaneously stop buying auction rate securities for their own proprietary accounts, causing auctions to fail and the market to collapse. *709 F.3d at 131-32*. The Court found that the allegations **[**70]** supported only parallel conduct. *Id. at 138*.

The Court began by noting that the crucial question in a § 1 case is whether the challenged conduct stems from an agreement, and that the existence of such an agreement is a legal conclusion to be determined by the court—and not a factual allegation. *Id. at 135-36* (citing *Starr v. Sony BMG Music Entm't, 592 F.3d 314, 319 n.2 (2d Cir. 2010)*). The Court further stated that plaintiffs must allege additional circumstances supporting an inference of conspiracy; merely alleging that parallel conduct occurred is insufficient to overcome a motion to dismiss because it would "risk propelling defendants into expensive antitrust discovery on the basis of acts that could just as easily turn out to have been rational business behavior as they could a proscribed antitrust conspiracy." *Id. at 136-37*. The Court found that defendants' alleged actions—an en masse flight from a collapsing market in which they had significant downside exposure—made perfect sense in light of their business interests. *Id. at 138*. This distinguished the case from Starr, in which specific allegations supporting an inference that defendants' parallel conduct was against their own economic self-interest led the Second Circuit to conclude that plaintiffs had plausibly alleged an antitrust conspiracy. **[**71]** See *id. at 138-39* (citing *Starr, 592 F.3d at 327*). Accordingly, the Court affirmed the district court's grant of defendants' motion to dismiss. *Id. at 140*.

to execute it. Somewhat similar to the scheme described in Aluminum, this alleged conspiracy would have to involve a web of horizontal and vertical agreements. For instance, this zinc scheme would require horizontal agreements between the trading affiliates of Goldman Sachs, Glencore, and JPMorgan (each with each **[**73]** other), and between their respective warehousing affiliates Metro, Pacorini and Henry Bath, as well as separate vertical agreements between each of the trading defendants and each of the warehouse operator defendants.

Plaintiffs argue that the CAC contains both sufficient direct evidence and parallel conduct with plus factors, to support the existence of this web-like scheme. This Court disagrees.

At oral argument, in an effort to sum up what appears to be the crux of plaintiffs' theory as to how their sprawling allegations fit together, the Court posited that the CAC could be read as alleging what would otherwise be parallel conduct beginning in 2010 and occurring at different moments in time, followed by the Queue Order Agreement in 2012—which provided a momentary "window" into the scheme. (See Oral Arg. Tr. at 20:15-21:7.) Plaintiffs agreed that the conspiracy they alleged could be conceived this way. (See Oral Arg. Tr. at 72:18-21.) Below, the Court sets out the allegations that support this theory and explains why, even when those allegations are considered as a whole, they still fail to plausibly support a Section 1 claim.

The Court first addresses plaintiffs' alleged direct evidence, which **[**74]** consists of the testimony of two confidential witnesses (both of whom are former employees of Pacorini) relating to the Queue Order Agreement between defendants and nonparty Noble, as well as Pacorini's practice of falsifying metal shipping records and transactional documents. According to CW1, defendants and Noble met in the fall of 2012 and entered into the Queue Order Agreement, the terms of which were that: (1) zinc would be the first metal loaded out of Pacorini's New Orleans warehouses, (2) defendants' and Noble's zinc would be prioritized for load out ahead of other customers' zinc, and (3) defendants would sequence and time their warrant cancellations in an agreed upon order such that those cancellations would not overlap with each another. (CAC ¶¶ 189-90.) Plaintiffs allege that wait times for customers to load zinc out of Pacorini's warehouses increased after defendants entered into this agreement, although they do not state with detail how long load-out queues were at various times within the Class Period. (See CAC ¶¶ 197-98.) Plaintiffs allege that both confidential witnesses also testified that Pacorini engaged in a practice of falsifying bills of lading and other documents **[**75]** concerning warrant cancellations and metal transfers in order to manipulate the load-out numbers that Pacorini reported to the LME. (CAC ¶¶ 180-86.) As explained below, none of this direct evidence, however, makes plausible the claim that the array of defendants sued as co-conspirators here participated in this broad unlawful anticompetitive agreement spanning from 2010 until the present.

First, as to the Queue Order Agreement, it is simply too thin a branch to support **[*369]** this theory; it is too isolated, as it is described as unilateral, private action by Pacorini. The allegations of the CAC—stripped of the rhetoric painting the Queue Order Agreement as nefarious—amount to no more than one agreement to prioritize and organize the loading out of zinc from Pacorini's New Orleans warehouses.[26] That is, placing zinc of one warrant holder in front of the zinc of another. Accordingly, the type of agreement is—as alleged—output neutral (or even enhancing), and it happens only once during a multi-year conspiracy. Plaintiffs fail to explain why an agreement in which no two participants would cancel their warrants at the same time would lead to longer load-out queues; if anything, such an agreement **[**76]** suggests that queues would be more limited because there would be a more ordered outflow and less buildup. This agreement was, furthermore, allegedly made sometime in the middle of the duration of the alleged conspiracy. If it is a window, it is showing sunny, not cloudy skies—and for only one point in time. This cannot support the broad scheme alleged. Put otherwise, the scheme alleged is so broad with so many participants over so much time, this is just too little to push this conspiracy over the line into plausibility.[27] See *Ross v. Am. Exp. Co., 35 F. Supp. 3d 407, 452 (S.D.N.Y. 2014)* (stating that court would not

[26] To the extent that plaintiffs point to the "Queue Manager" spreadsheet as further evidence of an unlawful agreement, the CAC describes the spreadsheet as something that Pacorini used as a "very private" and "strictly 'in-house'" project; it is thus unclear how evidence relating to the spreadsheet could meaningfully contribute to plaintiffs' claim that this collection of defendants engaged in a broad five-year conspiracy. (CAC ¶ 196.)

"read evidence of a benign agreement as evidence of a separate, illegal agreement"), aff'd sub nom. *Ross v. Citigroup, Inc., Nos. 14-1610(L), 14-1616(Con), 630 Fed. Appx. 79, 2015 U.S. App. LEXIS 20025, 2015 WL 7292176 (2d Cir. Nov. 24, 2015)*.

But there is more. Even assuming that the Queue Order Agreement could serve as a window into a larger, pre-existing conspiracy, it can only plausibly occupy that role to the extent that the larger conspiracy is similar in kind. Acquisition of warehouse companies and the other activities that defendants allegedly engaged in to restrain the supply of zinc (which the Court describes below) go much further and are simply too different from the type of coordination contemplated by the alleged Queue Order Agreement to be able to infer those activities from it.

Next, as to plaintiffs' evidence of the falsification of bills of lading and other metal shipping documents, their allegations relate solely to Pacorini and not any other defendant. To the extent that plaintiffs contend that the falsification of shipping documents is further evidence of unlawful aims of the Queue Order Agreement, there is no logical relationship between these activities, and, at least based on **[**78]** the allegations in the CAC, plaintiffs' confidential witnesses do not draw any connection between the two practices. While plaintiffs' allegations that Pacorini falsified bills of lading may tend to show that Pacorini was engaged in fraudulent or otherwise unlawful conduct, those allegations—which do not demonstrate any activity related to any other defendant—do little to support the existence of an unlawful anticompetitive agreement **[*370]** among the various competitor defendants. Thus, even when accepting plaintiffs' allegations regarding their confidential witnesses as true at this stage, see *Hinds Cnty., Miss. v. Wachovia Bank N.A., 700 F. Supp. 2d 378, 396 n.5 (S.D.N.Y. 2010)*, plaintiffs' alleged direct evidence does not support a broad conspiracy to restrain the supply of zinc stretching from 2010 (when Glencore, Goldman Sachs and JPMorgan acquired Pacorini, Metro and Henry Bath, respectively) up until Goldman Sachs and JPMorgan sold off their warehouse affiliates in 2014.

In addition to their purported direct evidence, plaintiffs also argue that they have plausibly alleged a broad five-year conspiracy through a combination of allegations of parallel conduct, circumstantial evidence, and recognized "plus" factors. The Court addresses each set of allegations in turn, detailing **[**79]** why, even when viewed collectively, they are insufficient to support a plausible inference of concerted action under the standards set forth in *Twombly* and *Iqbal*. While the Court addresses each of plaintiffs' relevant allegations individually, the Court considers, as it must at this stage, the allegations in their totality to determine if, taken as a whole, they create a plausible inference of the alleged anticompetitive agreement.[28] See *H.L. Hayden Co. of New York v. Siemens Med. Sys., Inc., 879 F.2d 1005, 1012 (2d Cir. 1989)* (citing *Cont'l Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699, 82 S. Ct. 1404, 8 L. Ed. 2d 777 (1962))*.

Starting with parallel conduct, the CAC alleges that JPMorgan, Goldman Sachs and Glencore engaged in parallel conduct when they acquired significant influence over the LME by each acquiring a major metal warehousing operator (Henry Bath, Metro, and Pacorini, respectively) between February and September 2010. (CAC ¶ 108.)[29] The CAC alleges that Goldman Sachs and JPMorgan respectively **[**80]** held equity interests of 9.5% and 11% in the LME until the HKEx acquired it in December 2012 (less than halfway into the Class Period) and continue to hold class B shares; it also alleges that JPMorgan, Goldman Sachs and Glencore served as and continue to serve as members of the LME and have positions on the LME's Lead and Zinc Committee, the LME Warehousing Committee, and the LME Executive Committee. (CAC ¶¶ 80, 130.) The CAC alleges that defendants were able to

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[27] The Court separately considers below (in addressing **[**77]** what the Court refers to as plaintiffs' second theory) whether the allegations relating to the Queue Order Agreement may nonetheless support a plausible inference of a narrower (both temporally and in scope) conspiracy under *§ 1*.

[28] The Court incorporates by reference its prior discussion of the flaws with plaintiffs' direct evidence relating to the alleged Queue Order Agreement and Pacorini's practice of falsifying bills of lading, and notes that it considers all of that evidence collectively with plaintiffs' other allegations to determine whether plaintiffs have pled a plausible § 1 conspiracy.

[29] The CAC alleges that Glencore did not acquire Pacorini until September 2010, approximately four months after the start of the Class **[**81]** Period. (CAC ¶ 108.) Notably, the CAC does not allege that defendants made an agreement that each would acquire a LME-certified warehousing services provider.

use these positions to make warehousing-related policy recommendations to the LME, including with respect to issues such as setting minimum load-out rules and the maximum storage rental rate in LME-certified warehouses. (CAC ¶¶ 138-39.) The CAC alleges, in particular, that defendants' membership on the LME Warehousing Committee allowed them to establish rules in which they could treat the LME's minimum daily metal load-out requirement as a maximum and could net incoming shipments and shuttle zinc between their warehouses to meet the minimum without having to reduce load-out queues. (CAC ¶¶ 132-33.)

The CAC further alleges other parallel conduct less directly tied to defendants' **[*371]** positions in the LME, including that Pacorini and Metro paid incentives to market participants to store zinc in their warehouses and that Pacorini's incentives exceeded the price premium that producers could obtain by selling metal on the open market. (CAC ¶¶ 202-03.) Such incentives are, however, equally consistent with competitive behavior; the CAC itself alleges that the incentives offered were affordable because defendants would "recoup the premium outlay on the rent." (CAC ¶ 202.)[30] Finally, plaintiffs also allege that defendants engaged in the practices of shadow warehousing, in which metal is moved from LME warehouses to areas not registered as LME warehouses, and strategic delisting of LME warehouses (citing specific instances in Vlissingen). Even on the face of the CAC, however, these practices are equally consistent with rational economic decision-makers acting independently. In short, if you own a warehouse, it makes sense to try to get as **[**82]** much metal into that warehouse and keep it there for as long as possible. And, of course, there is nothing inherently problematic or suspect about moving metal off-warrant. Notably, plaintiffs do not allege that these practices were carried out pursuant to any specific agreement—just that there must have been one. (CAC ¶¶ 205-09.)

While certain of this conduct, if true, is problematic and—to say the least—does not enhance the promotion of a fair market, as this Court held in Aluminum, these sort of allegations do not lead to a plausible inference of unlawful communication or coordination between defendants. *Aluminum I, 2014 U.S. Dist. LEXIS 121435, 2014 WL 4277510, at *31-34*. The CAC itself alleges that a bank would have an edge when trading commodities by independently acquiring a warehouse operator (CAC ¶ 109), and plaintiffs fail to show why a rational economic actor would not independently take any of the subsequent alleged actions, including influencing LME policy, that leverage a combined trading firm/warehouse operator's position for its own **[**83]** self-interest. It hardly seems remarkable to have commodities traders decide—if they can afford it—to buy and hold the commodity to drive up the price. While this may violate LME rules, financial regulations, or even market expectations, that alone does not render such conduct a violation of the antitrust laws.

Plaintiffs, of course, do not purport to rely solely on the alleged parallel conduct described above. They also cite purported circumstantial evidence of an anticompetitive agreement, which consists primarily of data showing changes in the zinc market during the Class Period, and anecdotal evidence of unusual and irregular warrant cancellation activity. Plaintiffs' circumstantial evidence includes data that the stock of warehoused zinc rose to an all-time high of more than 1.2 million tons by 2013 (compared to 300 thousand tons in 2009) (CAC ¶ 174), New Orleans warehouse outbound delivery queues tripled by the end of 2011 and sometimes exceeded a year by November 2012 (CAC ¶ 249), the MW SHG Premium nearly tripled during the Class Period (CAC ¶¶ 250-51), and the volume of zinc futures trading on the LME nearly doubled between 2009 and 2013 during a period of a "contango" in the **[**84]** market (CAC ¶ 245).

Plaintiffs cannot adequately plead their broad, five-year conspiracy simply by noting developments in the zinc market, particularly when many of those developments occurred at vastly different times over the Class Period such that the possibility of **[*372]** causation is hard to assess. Plaintiffs allege that the rise of the MW SHG Premium began prior to Glencore's acquisition of Pacorini (CAC ¶¶ 250-51), but that Pacorini's zinc queue did not increase significantly until 2012 when the Queue Manager spreadsheet was initiated (see CAC ¶ 197).

Plaintiffs' other allegations equally support the inference that Glencore and its affiliates occupied such a dominant position in the various facets of the zinc market that it is hard to contemplate why Glencore would find it necessary

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[30] Furthermore, even if these allegations contributed some support to an inference of an anticompetitive agreement, the CAC does not allege that JPMorgan or Henry Bath provided any similar incentive payments.

or desirable to involve outside third parties in any plan to drive up the price of zinc. Specifically, plaintiffs allege that Glencore and its affiliates have a dominant zinc operation "breathtaking in scope and scale" that accounts for 60% of trading of the world's zinc, ownership and control of 35% of the output of the world's zinc mines, and control over 90% of all LME warehouse stocks of zinc. (CAC ¶¶ **[**85]** 140-43.) Glencore's alleged position in the zinc market far exceeds the dominance that Goldman Sachs and its affiliates allegedly had in the aluminum market, rendering it less probable here than in Aluminum that Glencore would gain much from involving unaffiliated entities in an anticompetitive scheme. Plaintiffs' *Section 2* monopolization and attempted monopolization claims are, in this sense, incompatible with their conspiracy claims.

As noted above, plaintiffs' circumstantial evidence also includes alleged irregular and unexplained warrant cancellation activity. This alleged activity mostly occurred around the time that Glencore announced that it was taking over Pacorini in September 2012, and the CAC also cites trader statements later in 2012 that "two warehousing firms in particular" appeared to be carrying out warrant cancellations on a "friendly basis." (CAC ¶¶ 157-58, 249.) As with the Queue Order Agreement (which, based on the timing, might serve as the underlying explanation of the latter instances of irregular warrant cancellations), plaintiffs' allegations relating to warrant cancellations in 2012 do not support an agreement that violates the antitrust laws. Purportedly irregular **[**86]** warrant activity engaged in by unnamed or unknown entities during a limited period in the middle of the Class Period cannot render plausible plaintiffs' allegations of a complex, far-reaching, five-year anticompetitive agreement among various entities, some of whom are not alleged to have taken part in the alleged irregular warrant cancellation activity at all.

Plaintiffs, finally, also rely on purported plus factors to support the existence of an unlawful anticompetitive agreement, some of which have already been addressed above. The alleged plus factors not previously discussed include the existence of various government investigations concerning metals warehousing practices (CAC ¶¶ 221-43), a market concentration and structure conducive to collusion (e.g., CAC ¶ 218), and that defendants acted against their own self-interest by allowing massive queues to build up in their warehouses. Plaintiffs also allege that defendants had an opportunity to conspire through their involvement in the LME (CAC ¶¶ 130-32), and a profit motive to do so (e.g., CAC ¶¶ 210-12).

These factors are, by and large, the same factors that the plaintiffs sought to rely on in Aluminum I, and the Court rejects these **[**87]** allegations as not pushing plaintiffs' conspiracy claim across the line from conceivable to plausible for the same reasons it rejected them in that case. Plaintiffs rely on defendants' alleged opportunity and motive to conspire through their involvement with the LME, but this Court rejected the very same allegations in Aluminum. *Aluminum I, 2014 U.S. Dist. LEXIS 121435, 2014 WL 4277510, at *33-34* **[*373]** (citing *Capital Imaging Assocs., 996 F.2d at 545*). This Court also concluded in Aluminum I that allegations that defendants acted against their own self-interest by allowing massive queues to build up in their warehouses (which appeared to be economically incorrect in Aluminum, and similarly illogical here), and that various government entities commenced investigations concerning warehousing practices, did not render the plaintiffs' broad conspiracy allegations plausible. *Aluminum I, 2014 U.S. Dist. LEXIS 121435, 2014 WL 4277510, at *32-33*. To the extent that plaintiffs now argue that defendants' alleged involvement in a related aluminum conspiracy also serves as a plus factor, that allegation carries little weight without any finding of liability having been made in that case. See *Ross, 35 F. Supp. 3d at 450*.

Plaintiffs counter that their conspiracy allegations are at least as strong, if not stronger, than the allegations this Court deemed sufficient in the Third Amended Complaint and Joint Amended **[**88]** Complaint in Aluminum II. Plaintiffs assert that their allegations are sufficient because they rely on the same documents and communications alleged in Aluminum II and because they have also added allegations relating to the Queue Order Agreement. The Court disagrees with plaintiffs' characterization of the relative strength of their claim. As discussed above, most of plaintiffs' allegations mirror the vague and conclusory allegations that this Court rejected in Aluminum I, and many of their most specific allegations relate solely to Glencore and/or Pacorini. In contrast, the two complaints that survived the defendants' *Rule 12(b)(6)* motions in Aluminum II included allegations that were far more specific and detailed than those pled here, including allegations of various discussions and arrangements among the various defendants and citation to emails and documents that plausibly supported the existence of those agreements. See

Aluminum II, 95 F. Supp. 3d at 434-35, 452. The CAC is devoid of the type of specific allegations that nudged the surviving claims in Aluminum II across the line from conceivable to plausible.

In weighing the allegations and alleged plus factors, the Court recognizes that plaintiffs' allegations must not be compartmentalized **[**89]** and that the Court must evaluate the CAC as a whole and consider the combined character and effect of plaintiffs' alleged conspiracy. See H.L. Hayden, 879 F.2d at 1012. But even viewing the allegations in their totality and in the light most favorable to plaintiffs, the Court concludes that the allegations more closely resemble those rejected by this Court in Aluminum I, rather than those found sufficient in Aluminum II.[31]

Even if the CAC does not adequately allege the broad, far-reaching five-year conspiracy that plaintiffs seek to show, it would nonetheless be theoretically possible for the allegations to be sufficient to allege a different conspiracy. Reviewing the CAC for the strongest claim that it may potentially state, plaintiffs' allegations may be fairly read as asserting a theory of **[**90]** conspiracy narrower in duration and scope—namely, that the Queue Order Agreement was a stand-alone anticompetitive agreement that began in the fall of 2012. Under this theory, defendants and non-party Noble **[*374]** made an agreement that zinc would be the first metal to be loaded out of Pacorini's New Orleans warehouses, and that their zinc would be prioritized ahead of other customers and would be loaded out in an agreed upon order. (CAC ¶¶ 189-90.) Although such alleged concerted action is far more limited in scope than that asserted under plaintiffs' first theory, this theory has some appeal because plaintiffs have at least plausibly shown that such an agreement existed based on the direct evidence provided by CW1. Even standing alone, however, the Queue Order Agreement continues to suffer from a fatal flaw: it is output neutral (or even enhancing). Plaintiffs do not plausibly show that this agreement harmed them—both because it resulted in metal moving out of the warehouses, not staying in, as well as because no allegations connect this agreement to an effect on the MW SHG Premium.

The allegations of a load-out agreement are consistent with a routine logistics arrangement governing the **[**91]** order in which a series of warehouse customers arrange to pick up their metal. While plaintiffs could potentially show harm if they stored zinc (or some other metal) at Pacorini's warehouses and alleged that they paid increased rent or other storage fees as a result of the Queue Order Agreement, plaintiffs here do not include such allegations. Thus, even if such a claim were plausible, plaintiffs lack antitrust standing to pursue that claim because they neither suffered an antitrust injury nor are efficient enforcers. Gatt, 711 F.3d at 77-79.

To the extent that plaintiffs argue that defendants also pre-agreed on the number of warrants to be cancelled by each defendant, the CAC does not allege that the total volume of cancellations was gerrymandered. That is, that fewer or more warrants in the aggregate were cancelled. Thus, the Queue Order Agreement is merely one of ordering. In any event, the allegations that defendants pre-agreed on the number of warrants are not attributed to plaintiffs' confidential witness, and instead are wholly conclusory. (See CAC ¶ 190.) Plaintiffs allege only that the agreement provided "certainty" as to the "timing and amount" of defendants' warrant cancellations. (CAC ¶ 190.) **[**92]** These allegations, taken as a whole, do not plausibly support an anticompetitive agreement as to which plaintiffs have standing to bring a Section 1 claim.

Plaintiffs' third theory of conspiracy (the "Market Allocation Agreement"), which extends beyond the zinc market itself (and was not fully explained until plaintiffs' presentation at oral argument), is that the Glencore-affiliated entities and the Goldman Sachs-affiliated entities entered into an anticompetitive agreement to allocate the markets for zinc and aluminum, with Pacorini getting control over the zinc market in New Orleans and the aluminum market in Vlissingen, and Metro getting control of the aluminum market in Detroit. (CAC ¶ 241.)[32] "[A] horizontal agreement

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[31] Plaintiffs argue that the alleged agreement to restrain supply in the zinc warehousing market constitutes a per se violation of Section 1. The Court need not resolve whether the purported conspiracy should be viewed as a per se violation or whether it must be reviewed under a rule of reason analysis because plaintiffs have not plausibly pled the existence of concerted action that could give rise to a Section 1 violation in the first instance.

[32] Noticeably absent from plaintiffs' market allocation theory is any mention of the JPMorgan-affiliated **[**93]** entities. (See CAC ¶¶ 241-43.) Thus, even if the Market Allocation Agreement was sufficiently pled against the other defendants, the JPMorgan

among competitors to eliminate competition by allocating markets is a per se violation" of *Section 1*. *New York ex rel. Spitzer v. Saint Francis Hosp., 94 F. Supp. 2d 399, 414 (S.D.N.Y. 2000)* (citing *United States v. Topco Assocs., Inc., 405 U.S. 596, 608, 92 S. Ct. 1126, 31 L. Ed. 2d 515 (1972))*. Market allocation agreements are "anticompetitive regardless of whether **[*375]** the parties split a market within which both do business or whether they merely reserve one market for one and another for the other." *Palmer v. BRG of Georgia, Inc., 498 U.S. 46, 49-50, 111 S. Ct. 401, 112 L. Ed. 2d 349 (1990)*. Courts do not accept conclusory allegations of an agreement as true. *Starr, 592 F.3d at 319 n.2*.

Plaintiffs' market allocation allegations consist, in their totality, of the following. Plaintiffs allege that defendants dominate LME-certified warehousing services in four significant geographic markets, including in New Orleans (where Glencore entities owns 34 of 56 warehouses and Goldman Sachs and JPMorgan entities collectively own another 20), Detroit (where Metro "dominates"), Vlissingen (where Pacorini owns 55 of 60 warehouses) and Johor (where defendants own 15 of 20 warehouses). (CAC ¶ 218.) The CAC further alleges that "there was market allocation to Metro of aluminum in Detroit and to Pacorini of aluminum in Vlissingen and zinc in New Orleans." (CAC ¶ 241.) It also alleges that Glencore stored aluminum in Metro's Detroit warehouses instead of in its own warehouses, and that Goldman Sachs stored zinc in Glencore's New Orleans warehouses instead **[**94]** of in its own. (CAC ¶ 241.) As further support, plaintiffs also cite a December 2010 Metro email referencing "Q management" and mentioning a conversation with "Paco" (i.e. Pacorini) (CAC ¶ 240), and another email in which a Metro employee "referr[ed] to Pacorini and Glencore not 'nitpick[ing] them in Detroit due to concerns regarding retaliation elsewhere'" (CAC ¶ 243). Plaintiffs allege that they do not actually know what either of these emails refer to and do not allege that these communications include any reference to zinc or to New Orleans.[33]

These allegations, taken together, are insufficient because they do not raise a plausible inference of the international market allocation scheme that plaintiffs claim. There are simply not enough dots to connect to draw a plausible picture of an agreement. The emails that plaintiffs cite are vague and their meaning and relevance to the zinc market is wholly speculative. Plaintiffs, moreover, do not directly allege that defendants agreed to allocate the markets for zinc and aluminum and to split up their dominance geographically. Instead, **[**95]** they allege only that "there was market allocation." (CAC ¶ 241.) The allegations are equally consistent with the inference—supported by other allegations in the CAC—that Pacorini and Metro's alleged conduct is "indicative of no more than a natural and independent desire to avoid a turf war and preserve the profits guaranteed by regional dominance." *Erie Cnty., Ohio v. Morton Salt, Inc., 702 F.3d 860, 871 (6th Cir. 2012)*. Ultimately, the market allocation allegations are an insufficient basis for plaintiffs to rest their entire Section 1 claim.

The fourth theory of an unlawful anticompetitive agreement that may be gleaned from the CAC is that there was a hub-and-spoke type conspiracy with Pacorini (and Glencore) at the hub, and the Goldman Sachs and JPMorgan trading defendants at the spokes. This theory proceeds along the following lines: Pacorini (and Glencore Ltd.) made an agreement with Goldman Sachs and JPMorgan's commodities trading affiliates to allow slower load-outs in Pacorini's warehouses to maintain the contango in the market (or other advantageous trading positions).[34] While **[*376]** plaintiffs did not expressly raise a hub-and-spoke theory either in their complaint or in their opposition brief to defendants' motions, the Court nonetheless considers it and, for **[**96]** the reasons set forth below, finds that the allegations are insufficient to support this theory even if it were expressly pled.[35]

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entities and Henry Bath would be entitled to dismissal of this claim because the CAC does not plausibly allege that they were allocated any market or had any involvement in this alleged scheme.

[33] The Court notes that the plaintiffs in Aluminum relied on these same emails and argued they were about the aluminum market. See *Aluminum II, 95 F. Supp. 3d at 435*.

[34] Under this theory, the other warehouse operating defendants, Metro and Henry Bath, are not involved in the unlawful agreement. Thus, if this theory was the only basis upon which plaintiffs stated a plausible Section 1 claim, both of these defendants would be entitled to dismissal.

[35] While the CAC does not expressly include the language of a hub-and-spoke theory, the Court addresses it because at this stage the complaint need only give full notice of the circumstances giving rise to the plaintiffs' claim for relief and need not also

Agreements that fall within the scope of *Section 1* are characterized as either "horizontal" or "vertical." See *Topco Assocs., 405 U.S. at 608*; *Anderson News, 680 F.3d at 182*. A horizontal agreement is an "agreement between competitors at the same level **[**97]** of the market structure," while a vertical agreement is a "combination[] of persons at different levels of the market structure." *Topco Assocs., 405 U.S. at 608*. "[C]ourts have long recognized the existence of 'hub-and-spoke' conspiracies in which an entity at one level of the market structure, the 'hub,' coordinates an agreement among competitors at a different level, the 'spokes.'" United States v. Apple, Inc., *791 F.3d 290, 314 (2d Cir. 2015)* (quoting *Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc., 602 F.3d 237, 255 (3d Cir. 2010))*. "These arrangements consist of both vertical agreements between the hub and each spoke and a horizontal agreement among the spokes 'to adhere to the [hub's] terms,' often because the spokes 'would not have gone along with [the vertical agreements] except on the understanding that the other [spokes] were agreeing to the same thing.'" Id. (quoting VI Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** ¶ 1402c (3d ed. 2010)). Existing case law makes clear that a hub-and-spoke theory is cognizable under *Section 1* only if there are both vertical agreements between the hub and each spoke, and also a horizontal agreement among the various spokes with each other. Id.; see also *Dickson v. Microsoft Corp., 309 F.3d 193, 203-04 (4th Cir. 2002)*; *Toys "R" Us, Inc. v. FTC, 221 F.3d 928, 934-36 (7th Cir. 2000)*.

In order for plaintiffs to plead a cognizable hub-and-spoke conspiracy, they must allege not only a vertical agreement between the hub (Glencore/Pacorini) and **[**98]** the spokes (the Goldman Sachs and JPMorgan affiliates), but also a horizontal agreement among the competitors that form the spokes. Plaintiffs fail to do so for essentially the same reasons that this Court rejected their first theory of a broad, five-year conspiracy. As discussed above, many of the allegations do not support an inference of concerted action, and a great deal of the most probative conduct consists solely of actions taken by Glencore and/or Pacorini, including the falsification of bills of lading. Very little of the relevant conduct involves the JPMorgan entities and, to the extent it does, it is speculative to believe that the allegations show anything more than bilateral arrangements between Pacorini and its preferred customers. The only allegations that do actually tend to support a horizontal agreement among the defendants who make up the "spokes" are those **[*377]** relating to the Queue Order Agreement, although, as set forth above, plaintiffs do not plausibly show that such an agreement was unlawful or that it could have caused harm, let alone antitrust injury, to these plaintiffs. Plaintiffs, therefore, do not plausibly state a hub-and-spoke theory.

As plaintiffs have failed **[**99]** to plausibly allege unlawful concerted action or an anticompetitive agreement, their Section 1 conspiracy claim must be dismissed.

VI. SECTION 2 CLAIMS

Although, as discussed above, plaintiffs lack antitrust standing to pursue their *Section 2* claims as currently pled, the Court also addresses whether plaintiffs' *Section 2* claims pass muster at this stage on the merits, and concludes that they do not.

Section 2 provides, in pertinent part: "[e]very person who shall monopolize, or attempt to monopolize . . . any part of the trade or commerce among the several States . . . shall be deemed guilty of a felony." *15 U.S.C. § 2*. A violator of *Section 2* may be held civilly liable to any party suffering "injur[y] in his business or property" as a result of such a violation. *15 U.S.C. § 15*. Under *Section 2*, both the actions of a single firm to monopolize or to attempt to monopolize and conspiracies and combinations to monopolize or attempt to monopolize are unlawful. *Spectrum Sports, 506 U.S. at 454*.

Plaintiffs here assert three *Section 2* claims: Count II alleges a conspiracy to monopolize the market for LME zinc warehousing services against all defendants, and Counts III and IV allege monopolization and attempted monopolization of that market by "Glencore" (defined in the CAC as defendants Glencore Ltd. and Pacorini, collectively). (CAC ¶¶ 271-90; **[**100]** see CAC ¶ 68.) The Court first addresses plaintiffs' monopolization and

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correctly plead the legal theory or theories supporting the claim. *Simonton v. Runyon, 232 F.3d 33, 36-37 (2d Cir. 2000)*. The Court raised the possibility of a hub-and-spoke theory in the questions that it provided the parties the day before oral argument (ECF No. 149), and the parties had the opportunity to address—and did address—this theory at oral argument (Oral Arg. Tr. at 17:25-20:14, 49:7-49:22, 115:7-115:18).

attempted monopolization claims against Glencore Ltd. and Pacorini, and then considers plaintiffs' conspiracy to monopolize claim against all defendants.

A. Monopolization

To state any claim under *Section 2*, a plaintiff must allege plausible facts that a defendant possesses market power (sometimes referred to as "monopoly power") in a relevant market, and willfully acquired or maintained such power as "distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*; see also *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)*; *Heerwagen v. Clear Channel Commc'ns, 435 F.3d 219, 226 (2d Cir. 2006)*; *PepsiCo, Inc. v. Coca-Cola Co., 315 F.3d 101, 105 (2d Cir. 2002)*. A firm possesses market power when it has the ability to raise price by restricting output. *PepsiCo., 315 F.3d at 107*. To state a claim under *Section 2*, a plaintiff must also allege facts that the defendant has engaged in "'improper conduct that has or is likely to have the effect of controlling prices or excluding competition, thus creating or maintaining market power.'" *Heerwagen, 435 F.3d at 227* (quoting *PepsiCo, 315 F.3d at 108*).

Market power may be proven directly by evidence of the control of prices or the exclusion of competition. *PepsiCo, 315 F.3d at 107*; *Todd v. Exxon Corp., 275 F.3d 191, 206 (2d Cir. 2001)* ("If a plaintiff can show that a defendant's conduct exerted an actual adverse effect on competition, this is a strong indicator of market **[**101]** power."); *Tops Mkts., Inc. v. Quality Mkts., Inc., 142 F.3d 90, 98 (2d Cir. 1998)*. However, in most cases this type of direct evidence is absent, in which case the plaintiff **[*378]** must rely on indirect proof. "Indirect proof of market power, that is, proof that the defendant has a large share of the relevant market, is a surrogate for direct proof of market power." *Heerwagen, 435 F.3d at 227* (internal quotation marks omitted); see also *PepsiCo, 315 F.3d at 107*; *Tops Mkts., 142 F.3d at 98*. "'In resolving market or 'monopoly' power issues, the courts have typically relied heavily on market definition and on the defendant firm's share of the market thus defined.'" *Heerwagen, 435 F.3d at 227* (quoting 2A Phillip E. Areeda, Herbert Hovenkamp & John L. Solow, ***Antitrust Law*** ¶ 515, at 114 (2d ed. 2002)). For instance, "a market share of over 70 percent is usually strong evidence of monopoly power." *Tops Mkts., 142 F.3d at 99* (internal quotation marks omitted). A showing of market power is a substantive element of a monopolization claim, and "plaintiff cannot escape proving her claims with reference to a particular market even if she intends to proffer direct evidence of controlling prices or excluding competition." *Heerwagen, 435 F.3d at 229*.

The relevant market is the "area of effective competition," which is determined by defining relevant product and geographic markets. *PepsiCo, 315 F.3d at 105, 108*; *AD/SAT v. Associated Press, 181 F.3d 216, 226 (2d Cir. 1999)*. A relevant product market consists of "products **[**102]** that have reasonable interchangeability for the purposes for which they are produced—price, use and qualities considered." *United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 404, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)*; *Todd, 275 F.3d at 200-01* (same). Products are considered reasonably interchangeable if consumers treat them as acceptable substitutes. *PepsiCo, 315 F.3d at 105*. Cases are subject to dismissal when plaintiff fails to allege a plausible explanation as to why a market should be limited in a particular way. See *Todd, 275 F.3d at 200* nn.3-4 (collecting cases).

The court must also determine the boundaries of a relevant geographic market. *Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1967)*; *United States v. Eastman Kodak Co., 63 F.3d 95, 104 (2d Cir. 1995)*. The geographic market encompasses the geographic area in which purchasers of the product can practicably turn for alternative sources of the product. *Tampa Elec., 365 U.S. at 327*. A geographic market is determined by "how far consumers will go to obtain the product or its substitute in response to a given price increase and how likely it is that a price increase for the product in a particular location will induce outside suppliers to enter that market and increase supply-side competition in that location." *Heerwagen, 435 F.3d at 227*. Factors relevant to geographic scope of a market "may include barriers to transactions between buyers and sellers of different locations, such as transportation costs to a particular location, as well as the relative preferences **[**103]** of consumers with respect to travel and price." *Id. at 228*. The geographic market for "goods sold nationwide is often the entire United States, though it need not be if purchasers cannot practicably turn to areas outside their own area for supply of the relevant product." Id. (citing *Standard Oil Co. v. United States, 337 U.S. 293, 299 n.5, 69 S. Ct. 1051, 93 L. Ed. 1371 (1949))*.

Here, plaintiffs allege that "Glencore willfully acquired and maintained monopoly power in the market for LME Zinc Warehouse Services in the United States in violation of *Section 2*." (CAC ¶ 278.) The CAC states that this market "provides and controls the release of the physical zinc to owners that have taken delivery in satisfaction of an LME forward contract long position." (CAC ¶ 114.) The CAC further **[*379]** alleges that "Glencore dominates the LME Zinc Warehouse Services Market, with a substantial majority of warehouses in New Orleans, where 50-70% of all LME-licensed warehouses are located, including as much [as] 80% or more of those located in the U.S." and that Glencore's alleged conduct (which the Court detailed in addressing plaintiffs' Section 1 claim) "has caused substantial anticompetitive effects, including the inflation of the prices and price premiums of LME Physical Zinc to supra-competitive levels." (CAC ¶ 279.)

Elsewhere **[**104]** in the CAC, plaintiffs include additional allegations that speak to Glencore's significant influence in various facets of the zinc trade, including, inter alia, that "Glencore Ltd. and affiliates dominate the zinc trade, both up and down the zinc supply chain in the United States", "Glencore Ltd. and affiliates trade physical zinc and zinc derivatives, smelt and refine zinc, and mine and produce zinc concentrate", "Glencore Ltd. sells primary zinc produced in the United States, and its ultimate parent, Glencore plc, trades 60% of the world's zinc, and owns and controls 35% of the output of the world's zinc mines, including 100% of all U.S. output", and "Glencore sells more than 55% of the primary zinc in the United States." (CAC ¶ 64.) While these allegations support an inference that Glencore has substantial influence in certain aspects of the zinc trade, plaintiffs seek to tether Glencore's alleged market power in one market (the LME zinc warehousing services market) to anticompetitive effects and injury (i.e. inflated prices) in another market (the market for physical zinc). For the reasons set forth below, as pled such a claim is not viable.

The only market as to which the CAC alleges **[**105]** that "Glencore" has monopoly power is the LME Zinc Warehouse Services Market. It is therefore the sufficiency of allegations of Glencore Ltd. and/or Pacorini's position in that market that determines the viability of plaintiffs' monopolization claim.[36] Although plaintiffs' monopolization allegations largely mirror those that this Court rejected in Aluminum II (except that plaintiffs' swap Glencore/Pacorini in place of Goldman Sachs/Metro), they seek to distinguish their monopolization claim by conflating the two purported relevant markets in their arguments. But their claim, as currently pled, fails for many of the same reasons that the *Section 2* monopolization claim failed in *Aluminum II*.

It is inherent in the concept of a claim brought under *Section 2* that the monopolist has the power over price and competition in the market it purportedly monopolizes. Plaintiffs cite no authority for the proposition that *Section 2* makes cognizable a theory that a company has an unlawful monopoly in a market in which it does not control price or competition because its conduct in that market has some indirect **[*380]** impact on the prices charged in another market. As such, Glencore Ltd.'s alleged domination of certain aspects of the physical zinc market is irrelevant to a claim that it and/or Pacorini monopolize **[**107]** the market for LME zinc warehousing services. This cuts to a core distinction between claims brought under *Sections 1* and *2*. The Supreme Court has indicated that a *Section 2* claim may not arise from monopoly power in one market causing competitive harm in a second market unless the plaintiff shows that there is a dangerous probability of success or actual monopoly in the second market. *Trinko, 540 U.S. at 415 n.4* ("To the extent the Court of Appeals dispensed with a requirement that there be a

[36] At oral argument, plaintiffs argued—for the first time—that by incorporating all of the CAC's prior allegations into their *Section 2* claims (see CAC ¶¶ 271, 277, 284), those claims may be fairly read as alleging monopolization of the LME Zinc Warehouse Services Market and "the market for the physical price of zinc." (Oral Arg. Tr. at 102:24-103:20). As currently pled, the CAC does not plausibly allege monopoly power in the market for the sale of primary zinc. For instance, none of the *Section 2* counts make any direct reference **[**106]** to that market and the allegations in the CAC taken as a whole do not connect the dots to plausibly show that Glencore Ltd. and/or Pacorini have monopoly power in that market. If plaintiffs seek to assert that Glencore's activity in the physical zinc market created a monopoly position or was dangerously close to doing so, they must make that allegation more directly than they have done thus far. As set forth in the Leave to Amend section below, the Court will allow plaintiffs another opportunity to re-plead their monopolization and attempted monopolization claims in a way that addresses both markets.

'dangerous probability of success' in monopolizing a second market, it erred." (quoting *Spectrum Sports, 506 U.S. at 459*)). The CAC does not adequately allege that Glencore Ltd.'s position in the physical zinc market gave it a unilateral ability to create zinc queues at Pacorini's New Orleans warehouses such that it or Pacorini could control prices in the warehousing services market, attain monopoly power in that market, or create significant barriers to entry that blocked other warehousing companies from entering that market.

Construing the allegations in light of this understanding of *Section 2*, plaintiffs have failed to allege a plausible claim. Because the market allegedly monopolized is the market for LME zinc warehouse services, the only price that Pacorini can (even arguably) **[**108]** set in that market is the cost of storage and related services. See *Aluminum II, 95 F. Supp. 3d at 456*. That is the market in which Pacorini is alleged to have a monopoly position. Raising the price in this market would be raising the price for these services; restricting output would be restricting the availability of these services by, for example, excluding competition in this market. That, however, is not the injury that plaintiffs claim to have suffered. Plaintiffs' injury consists of having paid more for physical zinc due to an inflated MW SHG Premium, which was, in turn, allegedly caused by an interaction between warehouse services and trading firm conduct.[37] Thus, plaintiffs' alleged injury does not arise directly from Pacorini's dominance of the market allegedly monopolized.[38]

Plaintiffs' monopolization claim also fails for the additional reason that the CAC does not actually allege that defendants engaged in conduct constituting monopoly maintenance. The conduct alleged to be primarily responsible for increased load-out delays from Pacorini's New Orleans warehouses (and, indirectly, responsible for an elevated MW SHG Premium) is increased warrant cancellation activity. But the decision whether to cancel an LME warrant is made by the warrant holder, not by the warehouse operator. Pacorini is not alleged to have "itself controlled **[*381]** the warrants and futures contracts that determined when [zinc] went into and took a place in line to get out of its warehouses." *Aluminum I, 2014 U.S. Dist. LEXIS 121435, 2014 WL 4277510, at *36*. Pacorini therefore lacked control **[**110]** over the very activity alleged to have caused plaintiffs' injury, and its alleged dominance over the provision of LME-warehousing services in New Orleans does not translate into a power to raise the MW SHG Premium.[39]

Furthermore, even if the CAC plausibly stated a monopolization claim against Pacorini, Glencore Ltd. is independently entitled to dismissal of this claim as to it. While plaintiffs assert monopolization and attempted monopolization claims against "Glencore", which the CAC defines collectively as both Glencore Ltd. and Pacorini (CAC ¶ 68), there are no plausible allegations that Glencore Ltd., a trading company, directly owns any LME warehouses or actually competes in the market for LME **[**111]** zinc warehouse services (CAC ¶¶ 62-64, see CAC ¶ 69). The CAC does not allege any facts to show that Glencore Ltd. is able to control the price for LME storage at any warehouses. "[I]t is axiomatic that a firm cannot monopolize a market in which it does not compete." *Discon, Inc. v. NYNEX Corp., 93 F.3d 1055, 1062 (2d Cir. 1996)* vacated on other grounds, *525 U.S. 128, 119 S. Ct. 493, 142 L. Ed. 2d 510 (1998)*; see also *Olde Monmouth Stock Transfer Co. v. Depository Trust & Clearing Corp., 485 F. Supp. 2d 387, 392 (S.D.N.Y. 2007)* (same). In the absence of allegations that Glencore Ltd. failed to comply with corporate formalities vis-à-vis Pacorini such that it would be appropriate to pierce the corporate veil, Glencore Ltd.

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[37] As was the case in Aluminum II, plaintiffs' *§ 2* claim is also incompatible with their § 1 claim. In Aluminum II, this Court stated that the first level purchasers' monopolization claim was undermined by the plausible and conflicting allegations that Goldman Sachs and Metro needed and used conspirators in areas outside Detroit to assist in their scheme. See *Aluminum II, 95 F. Supp. 3d at 455-56*. Plaintiffs' monopolization claim here is similarly incompatible with their allegations **[**109]** that Glencore Ltd. and/or Pacorini needed and used third parties to effect the scheme, although the Court notes that, in this case, Glencore appears to have a more dominant position in the zinc market than Goldman Sachs/Metro had with respect to aluminum.

[38] Defendants also contend that the CAC does not contain the necessary facts to support a plausible product or geographic market. Because the Court grants defendants' motions on other grounds, it need not reach this argument.

[39] Plaintiffs' allegations that Glencore affiliates were responsible for cancelling large volumes of zinc are wholly conclusory and are insufficient to show monopoly power in the physical zinc market. (See CAC ¶¶ 146-50, 157). The Court does recognize, however, that the allegations here do suggest that Glencore and its affiliates occupy a more dominant and influential position in the zinc market than Goldman Sachs and its affiliates occupied with respect to the aluminum market. (E.g., CAC ¶ 64.)

may not be held liable under Section 2 simply by virtue of its ownership of Pacorini. See Concord Assocs., L.P. v. Entm't Properties Trust, No. 12 CIV. 1667 ER, 2013 U.S. Dist. LEXIS 186964, 2014 WL 1396524, at *26-27 (S.D.N.Y. Apr. 9, 2014) (citing United States v. Bestfoods, 524 U.S. 51, 69, 118 S. Ct. 1876, 141 L. Ed. 2d 43 (1998)); Invamed, Inc. v. Barr Labs., Inc., 22 F. Supp. 2d 210, 219 (S.D.N.Y. 1998). Thus, to the extent that Counts III and IV arise solely from monopolization and/or attempted monopolization of the LME zinc warehousing services market, these claims are independently subject to dismissal against Glencore Ltd.

B. Attempted Monopolization

To state an attempted monopolization claim, a plaintiff must allege plausible facts supporting that the defendant has engaged in predatory or anticompetitive conduct, with a specific intent to monopolize a particular and defined market, and a dangerous probability of success. See Spectrum Sports, 506 U.S. at 456; PepsiCo., 315 F.3d at 105; Tops Mkts., 142 F.3d at 99-100. A plaintiff must also **[**112]** allege that anticompetitive conduct occurring in connection with obtaining or retaining a monopoly position is proximately related to plaintiffs' injuries. See Litton Sys., Inc. v. Am. Tel. & Tel. Co., 700 F.2d 785, 802-03 (2d Cir. 1983) (proximate cause required to establish monopolization charge); see also Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 1390, 188 L. Ed. 2d 392 (2014) (a court should generally presume that a statutory cause of action is limited **[*382]** to plaintiffs whose injuries are proximately caused by violations of that statute).

Plaintiffs' attempted monopolization claim mirrors their actual monopolization claim, except that it asserts that "Glencore" specifically intended to obtain a monopoly over the LME zinc warehouse services market and had a dangerous probability of doing so, rather than actually acquiring and maintaining monopoly power. (Compare CAC ¶¶ 278-79 with CAC ¶¶ 285-86.) This claim fails for the same reasons as plaintiffs' actual monopolization claim. As discussed above, the fatal flaw in plaintiffs' actual monopolization claim is that Glencore's alleged monopoly power in the LME zinc warehouse services market is disconnected from plaintiffs' alleged injuries, which occurred in the different market for the sale of primary zinc. In other words, plaintiffs' alleged injury was suffered due to anticompetitive **[**113]** effects that Glencore's alleged warehousing services monopoly conduct had in the separate market for the price of physical zinc. That disconnect poses no less of an issue in the context of plaintiffs' attempted monopolization claim, which is not saved by the lesser requirement that a plaintiff need only plausibly allege that a defendant came dangerously close to achieving monopoly power, rather than actual monopoly power, in a certain market.

C. Conspiracy to Monopolize

A conspiracy claim under Section 2 must allege "(1) concerted action, (2) overt acts in furtherance of the conspiracy, and (3) specific intent to monopolize." Elecs. Commc'ns Corp. v. Toshiba Am. Consumer Products, Inc., 129 F.3d 240, 246 (2d Cir. 1997). The specific intent to monopolize, rather than the power to exclude competitors, is the key element of a conspiracy to monopolize claim. United States v. Consol. Laundries Corp., 291 F.2d 563, 573 (2d Cir. 1961). "[W]hile rigorous proof of a relevant market and of a dangerous probability of achieving monopoly power are not, in this Circuit, essential elements of conspiracy to monopolize, the relevant market and the likelihood of its monopolization may have a significant bearing on whether the requisite specific intent to monopolize is present." Emigra Grp., LLC v. Fragomen, Del Rey, Bernsen & Loewy, LLP, 612 F. Supp. 2d 330, 340 (S.D.N.Y. 2009) (citing Hudson Valley Asbestos Corp. v. Tougher Heating & Plumbing Co., 510 F.2d 1140, 1144 (2d Cir. 1975)).

The CAC does not allege that defendants conspired to confer monopoly power on any single entity; **[**114]** plaintiffs instead assert that defendants collectively sought to dominate the LME zinc warehousing services market. (CAC ¶¶ 271-76; see CAC ¶¶ 6, 218.) The Second Circuit has stated that a shared monopoly theory may not support a monopolization or attempted monopolization claim under Section 2, H.L. Hayden, 879 F.2d at 1018, and numerous district courts, including this Court in Aluminum I, have repeatedly rejected the viability of a Section 2 conspiracy claim based on a shared monopoly theory. Aluminum I, 2014 U.S. Dist. LEXIS 121435, 2014 WL 4277510, at *36; see also RxUSA Wholesale, Inc. v. Alcon Labs., Inc., 661 F. Supp. 2d 218, 235 (E.D.N.Y. 2009), aff'd sub nom. RxUSA Wholesale Inc. v. Alcon Labs., 391 F. App'x 59 (2d Cir. 2010); Oxbow Carbon & Minerals LLC v. Union Pac. R. Co., 926 F. Supp. 2d 36, 46 (D.D.C. 2013); Standfacts Credit Servs., Inc. v. Experian Info.

Sols., Inc., 405 F. Supp. 2d 1141, 1152 (C.D. Cal. 2005), aff'd in part sub nom. Standfacts Credit Servs. v. Experian Info. Sols., Inc., 294 F. App'x 271 (9th Cir. 2008).

In the face of the weight of authority, plaintiffs argue that at least some courts "have suggested that a shared monopoly **[*383]** theory may be viable if the aim of the conspiracy is to form a single entity to possess the illegal market power, or where two or more competitors seek to allocate a market and exclude competitors, even if they do not form a single corporate entity." *In re Credit Default Swaps Antitrust Litig., No. 13md2476 (DLC), 2014 U.S. Dist. LEXIS 123784, 2014 WL 4379112, at *14 (S.D.N.Y. Sept. 4, 2014)* (quoting *Arista Records LLC v. Lime Grp. LLC, 532 F. Supp. 2d 556, 580 (S.D.N.Y. 2007))*. Plaintiffs, however, do not allege that defendants conspired to form a single entity to possess illegal market power, and cite no case in which a court has actually sustained a *Section 2* conspiracy claim based on an allocation of markets. The Court need not **[**115]** decide here whether allegations of an allocation of markets could ever support a *Section 2* conspiracy because, as this Court has already concluded in addressing plaintiffs' Section 1 claim, the CAC does not plausibly support the existence of an unlawful market allocation agreement.

Further, even if *Section 2* could otherwise support a conspiracy claim based on a shared monopoly, this claim also fails because plaintiffs do not plausibly allege concerted action. The specific intent necessary to establish a conspiracy to monopolize is the intent to enable or maintain a monopoly position in the relevant market. It is not sufficient to merely allege the intent to raise the prices that plaintiffs must pay or to increase the value of defendants' trading positions. As with plaintiffs' other *Section 2* claims, the relevant market is the market for LME zinc warehouse services, and the claim arises from defendants' ownership of a substantial majority of the LME warehouses in New Orleans and elsewhere. (See CAC ¶ 272.) Again, as with the other *Section 2* claims, plaintiffs' conspiracy claim also lacks any explicit reference to the market for the sale of SHG zinc.

Finally, the Court has, in addressing plaintiffs' Section 1 claim, already exhaustively considered **[**116]** and found insufficient plaintiffs' allegations of an unlawful conspiratorial agreement.[40] Plaintiffs rely on the same allegations and theories of an unlawful agreement to support their *Section 2* conspiracy claim, but do not explain how any of those theories would further a monopoly in LME warehousing services (or even in the market for physical zinc). Specifically, plaintiffs do not plausibly show how an agreement to load zinc out of Pacorini's New Orleans warehouses first and to load out certain preferred customers' metal in an agreed upon order at the head of the queue would enable defendants to acquire or maintain a monopoly position in either zinc warehousing services or the market for physical zinc. To the extent that plaintiffs rely on a hub-and-spoke agreement to support their *Section 2* conspiracy claim, the Court has already explained why the CAC does not sufficiently allege a horizontal agreement between the entities that make up the spokes; as stated above, this is a necessary element to assert a hub-and-spoke theory. E.g., *Apple, 791 F.3d at 314*.

VII. GROUP PLEADING

Rule 8 provides that a defendant is entitled to notice of the claims brought **[*384]** against him; Twombly makes clear that at the pleading stage in this antitrust case, that means that each defendant is entitled to know how he is alleged to have conspired, with whom and for what purpose. See *Twombly, 550 U.S. at 557-58*. Mere generalizations as to any particular defendant—or even defendants as a group—are insufficient. See *id. at 555-56*. The fact that two separate legal entities may have a corporate affiliation—perhaps owned by the same holding company—does not alter this pleading requirement. Nor is it sufficient for plaintiffs to simply state in conclusory terms that separate legal entities are "sometimes collectively referred to" by a shared generic name. See *Capmark Fin. Grp. Inc. v. Goldman Sachs Credit Partners L.P., 491 B.R. 335, 347 (S.D.N.Y. 2013)* ("'[D]isregard of the

[40] There appears to be a great deal of redundancy between conspiracy claims brought under *Sections 1* and *2*. At least one court in this district has stated that "[a]ny *section 2* conspiracy to monopolize **[**117]** must be covered under the broader umbrella of a section 1 conspiracy in restraint of trade." *H.L. Hayden Co. of New York v. Siemens Med. Sys., Inc., 672 F. Supp. 724, 741 n.21 (S.D.N.Y. 1987)* aff'd, *879 F.2d 1005 (2d Cir. 1989)*. There is nothing in the case law to suggest that the plausibility threshold is lower to state a conspiracy to monopolize claim under *Section 2* than for a claim alleging a conspiracy in restraint of trade under *Section 1*.

corporate form is warranted only in extraordinary circumstances, and conclusory allegations of dominance and control will not suffice to defeat a motion to **[**118]** dismiss.'" (quoting *Société d'Assurance de l'Est SPRL v. Citigroup Inc., No. 10 CIV. 4754 JGK, 2011 U.S. Dist. LEXIS 103375, 2011 WL 4056306, at *5 (S.D.N.Y. Sept. 13, 2011)*)). In the absence of allegations that corporate formalities have been ignored, courts appropriately and routinely adhere to legal separateness. See, e.g., *De Letelier v. Republic of Chile, 748 F.2d 790, 794-95 (2d Cir. 1984)*.

Here, this means that grouping multiple defendants who are affiliated together with a single name (e.g. "Goldman", "JPMorgan" or "Glencore" to encompass affiliated trading and warehouse operations (see CAC ¶¶ 68, 75, 88)) for pleading purposes does not resolve this larger issue. Plaintiffs must be able to separately state a claim against each and every defendant joined in this lawsuit. In Aluminum I, this Court specifically admonished the plaintiffs for circumventing this pleading requirement by resorting to corporate or group pleading, see *Aluminum I, 2014 U.S. Dist. LEXIS 121435, 2014 WL 4277510, at *38-39*, and subsequently dismissed certain defendants where the plaintiffs claims' as to those defendants were based solely on corporate proximity, see *In re Aluminum Warehousing Antitrust Litig., No. 13-md-2481 (KBF), 2015 U.S. Dist. LEXIS 26412, 2015 WL 1344429, at *3 (S.D.N.Y. Mar. 23, 2015)*.

Plaintiffs have clearly failed to separately state a claim against each and every defendant joined in this lawsuit. Plaintiffs' allegations as to **[**119]** a number of defendants, including, without limitation, JPMorgan Ventures Energy Corporation, GS Power Holdings LLC, MCEPF Metro I, and Mitsi Holdings LLC, are sparse to the point of near non-existence or are grouped together with specific allegations relating to their affiliated but legally separate entities. JPMVEC, in particular, has moved to dismiss on the basis that, as to it, plaintiffs' claims fail for lack of any allegations of conspiratorial activity. The Court agrees, and concludes that the claims against JPMVEC are independently subject to dismissal. The Court furthermore believes that, as to GS Power Holdings LLC, MCEPF Metro I, and Mitsi Holdings LLC, there is a strong basis to dismiss these defendants for lack of specific allegations against them; at oral argument, plaintiffs conceded that the sole basis for identifying these entities as defendants was that they were in the chain of custody of ownership of Metro. (See Oral Arg. Tr. at 61:21-64:11.)

VIII. LEAVE TO REPLEAD

Leave to amend should be granted freely when justice so requires. *Fed. R. Civ. P. 15(a)(2)*; *Cruz v. TD Bank, N.A., 742 F.3d 520, 523 (2d Cir. 2013)*. If an amendment would be futile, a court may properly deny leave to amend. *Loreley Fin. (Jersey) No. 3 Ltd. v. Wells Fargo Sec., LLC, 797 F.3d 160, 190 (2d Cir. 2015)*. **[*385]** Amendment is futile when a proposed amendment would not **[**120]** cure any deficiencies and would also fail to state a claim. See *Hayden v. Cnty. of Nassau, 180 F.3d 42, 53-54 (2d Cir. 1999)* ("[W]here the plaintiff is unable to demonstrate that he would be able to amend his complaint in a manner that would survive dismissal, opportunity to replead is rightfully denied."). The adequacy of a proposed amended complaint should be assessed using the same standards as those governing the adequacy of a pleading. *Ricciuti v. N.Y.C. Transit Auth., 941 F.2d 119, 123 (2d Cir. 1991)*. A court should generally not deem a request for leave to amend insufficient on the basis of the informality of the request alone. *Loreley, 797 F.3d at 190*.

In the conclusion section of their opposition brief, plaintiffs request leave to file a second consolidated amended complaint to redress whatever pleading deficiencies this Court identifies, but they do not specifically indicate what, if any, changes they would or could make to their complaint. (Plaintiffs' Omnibus Opposition Br. at 82, ECF No. 139.) Plaintiffs restated their request for leave to amend (if the Court chose to dismiss any claims) at oral argument. (Oral Arg. Tr. at 121:5-9.) Plaintiffs suggested only one substantive change that they would make to their pleadings at oral argument, which would be to more explicitly assert their *Section 2* claims based on both the market for LME **[**121]** zinc warehousing services and the market for the sale of primary zinc in the United States. (See Oral Arg. Tr. at 102:24-103:6.)

Although plaintiffs have already had ample opportunity to plead their strongest possible claims by drafting the CAC with the benefit of this Court's decisions in Aluminum I and Aluminum II as a roadmap, and the Court warned plaintiffs that it "intend[ed] to issue written rulings once on the pleadings in this case" and that plaintiffs should take their "best shot" at stating their claims in the then yet to be filed CAC (July 23, 2014 Status Conf. Tr. at 26:3-8, ECF

No. 131), the Court deems it appropriate to allow plaintiffs one more attempt to re-plead their monopolization and attempted monopolization claims. The Court's decision is based on its view that a claim arising from Glencore Ltd.'s monopolization of the market for the price of physical zinc, or from a combined monopolization of the LME zinc warehouse services market by Pacorini and the market for the price of physical zinc by Glencore Ltd., appears to present new issues not addressed in the pending motions or in those at issue in Aluminum I and Aluminum II. In light of the allegations in the CAC showing that **[**122]** Glencore and its affiliates occupy a more powerful position in various aspects of the zinc trade than any of the defendants did in Aluminum, the Court cannot at this time determine whether any effort to recast Counts III and IV would be futile.

The Court notes, however, that while it is allowing plaintiffs' leave to re-plead Counts III and IV, the Court has no sense at this time as to the likelihood of success of any amendments, and will not be able to make that determination until it has the new allegations in front of it. Plaintiffs will still have hurdles to overcome, including demonstrating that they have antitrust standing and making plausible any claim that Glencore Ltd. and/or Pacorini had obtained or were dangerously close to acquiring a monopoly in the physical zinc market, or combined monopoly in both relevant markets.[41] The Court observes only **[*386]** that if plaintiffs do hope to successfully re-plead these claims, they will have to do significantly more than add conclusory references to the "LME U.S. Zinc Market" to the existing allegations in paragraphs 277-290; they will have to plausibly show that Glencore Ltd. and/or Pacorini have monopoly power (or came dangerously close to **[**123]** obtaining it) in that market.

As to Counts I and II (the Section 1 claim and *Section 2* conspiracy claim, respectively), however, plaintiffs have not identified any amendment that they would make if given an opportunity, nor have they have given the Court any basis to conclude that there is any likelihood that they could overcome the fatal defects identified by the Court in this decision. Plaintiffs have had ample opportunity to construct their pleadings in accordance with the teachings of this Court's decisions in Aluminum I and Aluminum II, which thoroughly considered and addressed conspiracy allegations of a similar sort to those that the Court rejects here. Despite being guided by Aluminum II as to what would be necessary to state a plausible Section 1 claim, plaintiffs were still unable to push their conspiracy allegations across the line from conceivable to plausible. Plaintiffs also had the benefit of prior notice in the Court's three October 29, 2015 Orders of the issues that were **[**124]** of particular concern to the Court (ECF Nos. 149, 150, 151), yet at oral argument they gave no indication as to what amendments they could or would be able to make to strengthen their conspiracy claims. Although this case certainly presents complex issues, given plaintiffs' express reliance on Aluminum II, it is not the sort of situation in which plaintiffs' pleading defects were "latent, and easily missed or misperceived without full briefing and judicial resolution." *Loreley, 797 F.3d at 191*. Because there is no reasonable prospect that plaintiffs could do any more to strengthen these claims, leave to replead is denied as to Counts I and II.

IX. CONCLUSION[42]

For the reasons set forth above, defendants' motions to dismiss are GRANTED. Counts I and II of the Consolidated Amended Complaint are hereby dismissed with prejudice, while Counts III and IV are dismissed without prejudice. As a result, plaintiffs may attempt to re-plead Counts III and IV against Glencore Ltd. and/or Pacorini, but may not assert any amended claims against any of the other defendants. Should plaintiffs choose to replead Counts III and IV, **[**125]** they must file any amendment, redlined against the CAC, within **21 days** of the filing of this Opinion & Order.

The Clerk of Court is directed to close the motions at ECF Nos. 122, 124, 127, and 130.

SO ORDERED.

Dated: New York, New York

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[41] The Court notes that plaintiffs would be advised to more clearly differentiate the roles played by Glencore Ltd. and Pacorini, instead of using the generic term "Glencore", throughout any second consolidated amended complaint.

[42] The Court has considered plaintiffs' other arguments, and has determined that they are without merit.

January 7, 2016

/s/ Katherine B. Forrest

KATHERINE B. FORREST

United States District Judge

Reed Constr. Data Inc. v. McGraw-Hill Cos.

United States Court of Appeals for the Second Circuit

January 7, 2016, Decided

No. 14-4022-cv

Reporter

638 Fed. Appx. 43 *; 2016 U.S. App. LEXIS 111 **; 2016-1 Trade Reg. Rep. (CCH) P79,442

REED CONSTRUCTION DATA INC., Plaintiff-Appellant, v. McGRAW-HILL COMPANIES, INC., Defendant-Appellee.

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

Prior History: [1]** Appeal from judgment of the United States District Court for the Southern District of New York (J. Paul Oetken, Judge).

Reed Constr. Data Inc. v. McGraw-Hill Cos., 49 F. Supp. 3d 385, 2014 U.S. Dist. LEXIS 134830 (S.D.N.Y., 2014)

Core Terms

customer, district court, advertising, misleading, literally, tortious interference, consumers

LexisNexis® Headnotes

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

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

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

The appellate court reviews an award of summary judgment de novo, construing the evidence in the light most favorable to the nonmoving party and drawing all reasonable inferences in his favor.

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

HN2[] **False Advertising, Lanham Act**

Section 43(a) (*15 U.S.C.S. § 1125(a)(1)*) of the Lanham Act, *15 U.S.C.S. § 1051 et seq.*, provides a cause of action against any person who uses in commerce any false or misleading description or misleading representation of fact, which in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities. *§ 1125(a)(1)*.

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

HN3[] **False Advertising, Lanham Act**

A plaintiff can recover under § 43(a) (*15 U.S.C.S. § 1125(a)(1)*) of the Lanham Act, *15 U.S.C.S. § 1051 et seq.*, under either of two theories: First, the plaintiff can demonstrate that the challenged advertisement is literally false, i.e., false on its face. When an advertisement is shown to be literally or facially false, consumer deception is presumed, and the court may grant relief without reference to the advertisement's actual impact on the buying public. This is because the plaintiffs alleging a literal falsehood are claiming that a statement, on its face, conflicts with reality, a claim that is best supported by comparing the statement itself with the reality it purports to describe. Alternatively, a plaintiff can show that the advertisement, while not literally false, is nevertheless likely to mislead or confuse consumers. The plaintiffs alleging an implied falsehood are claiming that a statement, whatever its literal truth, has left an impression on the listener or viewer that conflicts with reality--a claim that invites a comparison of the impression, rather than the statement, with the truth. Therefore, whereas the plaintiffs seeking to establish a literal falsehood must generally show the substance of what is conveyed, a district court must rely on extrinsic evidence of consumer deception or confusion to support a finding of an implicitly false message.

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

HN4[] **False Advertising, Lanham Act**

Under either theory for a claim under § 43(a) (*15 U.S.C.S. § 1125(a)(1)*) of the Lanham Act, *15 U.S.C.S. § 1051 et seq.*, the plaintiff must demonstrate that the false or misleading representation involved an inherent or material quality of the product. This inquiry is essentially one of materiality, a term explicitly used in other circuits.

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

HN5[] **False Advertising, Lanham Act**

Where an expensive product is sold by personal contacts, misleading claims in a sales brochure may not have a tendency to deceive or influence purchasing decisions and hence not be a violation of § 43(a) (*15 U.S.C.S. § 1125(a)(1)*) of the Lanham Act, *15 U.S.C.S. § 1051 et seq.*

Antitrust & Trade Law > Sherman Act > Claims

Evidence > Inferences & Presumptions > Presumptions > Particular Presumptions

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

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

Evidence > Inferences & Presumptions > Presumptions > Rebuttal of Presumptions

HN6[] **Sherman Act, Claims**

A plaintiff's failure to establish materiality with regard to its Lanham Act, *15 U.S.C.S. § 1051 et seq.*, claim a fortiori defeats its Sherman Act, *15 U.S.C.S. § 1 et seq.*, claim. A plaintiff asserting a monopolization claim based on misleading advertising must overcome a presumption that the effect on competition of such a practice was de minimis. A plaintiff may overcome the de minimis presumption by cumulative proof that the representations were: (1) clearly false, (2) clearly material, (3) clearly likely to induce reasonable reliance, (4) made to buyers without knowledge of the subject matter, (5) continued for prolonged periods, and (6) not readily susceptible of neutralization or other offset by rivals.

Civil Procedure > Appeals > Standards of Review

HN7[] **Appeals, Standards of Review**

The appellate court is free to affirm a district court decision on any grounds supported by the record.

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > Significant Relationships

HN8[] **Choice of Law, Significant Relationships**

Under New York choice of law principles, where the solicited customer and the aggrieved plaintiff are both within a given state, that state has the greatest interest in regulating the behavior at issue, even if the allegedly tortious solicitation originates in a different state.

Evidence > Judicial Notice > Adjudicative Facts > Verifiable Facts

HN9[] **Adjudicative Facts, Verifiable Facts**

The appellate court may take judicial notice at any stage of the proceedings, including on appeal, of a fact that is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. *Fed. R. Evid. 201(b)(2)*.

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Judges: PRESENT: RALPH K. WINTER, REENA RAGGI, CHRISTOPHER F. DRONEY, Circuit Judges.

Opinion

[*44] SUMMARY ORDER

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment entered on October 21, 2014, is AFFIRMED.

Plaintiff Reed Construction Data, Inc. ("Reed") appeals from the award of summary judgment to defendant McGraw-Hill Companies, Inc. ("McGraw-Hill") on Reed's claims under the Lanham Act, 60 Stat. 427, Pub. L. No. 79-489,, codified at *15 U.S.C. §§ 1051 et seq.*, the Sherman Antitrust Act, 26 Stat. 209,, codified at *15 U.S.C. §§ 1-*

7, and state law in connection with a McGraw-Hill advertising campaign **[*45]** making allegedly false or misleading comparisons between the quantity of construction project data offered by Reed and by McGraw Hill. ***HN1***[] "We review an award of summary judgment de novo, construing the evidence in the light most favorable to the nonmoving party and drawing all reasonable **[**2]** inferences in his favor." *McElwee v. County of Orange, 700 F.3d 635, 640 (2d Cir. 2012)*. We assume the parties' familiarity with the facts and the record of prior proceedings, which we reference only as necessary to explain our decision to affirm for largely the reasons stated in the district court's thorough and well-reasoned opinion.

1. Lanham Act

HN2[] Section 43(a) of the Lanham Act provides a cause of action against "[a]ny person who . . . uses in commerce any . . . false or misleading description . . . or misleading representation of fact, which . . . in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities." *15 U.S.C. § 1125(a)(1)*. ***HN3***[] Reed can recover under § 43(a) under either of two theories:

> First, the plaintiff can demonstrate that the challenged advertisement is literally false, i.e., false on its face. When an advertisement is shown to be literally or facially false, consumer deception is presumed, and the court may grant relief without reference to the advertisement's actual impact on the buying public. This is because plaintiffs alleging a literal falsehood are claiming that a statement, on its face, conflicts with reality, a claim that is best supported **[**3]** by comparing the statement itself with the reality it purports to describe.
>
> Alternatively, a plaintiff can show that the advertisement, while not literally false, is nevertheless likely to mislead or confuse consumers. Plaintiffs alleging an implied falsehood are claiming that a statement, whatever its literal truth, has left an impression on the listener or viewer that conflicts with reality—a claim that invites a comparison of the impression, rather than the statement, with the truth. Therefore, whereas plaintiffs seeking to establish a literal falsehood must generally show the substance of what is conveyed, a district court must rely on extrinsic evidence of consumer deception or confusion to support a finding of an implicitly false message.

Time Warner Cable, Inc. v. DIRECTV, Inc., 497 F.3d 144, 153 (2d Cir. 2007) (brackets, citations, ellipsis, footnote, and internal quotation marks omitted). ***HN4***[] "Under either theory, the plaintiff must also demonstrate that the false or misleading representation involved an inherent or material quality of the product." *Id. at 153 n.3*. This inquiry is "essentially one of materiality, a term explicitly used in other circuits." *National Basketball Ass'n v. Motorola, Inc., 105 F.3d 841, 855 (2d Cir. 1997)* (collecting cases analyzing effect on customers' buying decisions).

The district court found certain of McGraw-Hill's **[**4]** statements to be arguably literally false, and certain others only to be arguably misleading. See *Reed Constr. Data Inc. v. McGraw-Hill Cos., 49 F. Supp. 3d 385, 412-15 (S.D.N.Y. 2014)*. Yet the district court found that none of the statements, individually or in the aggregate, was material. See *id. at 417-19*. We agree. Discovery revealed only one customer who arguably relied upon McGraw-Hill's advertising in deciding between Reed and McGraw-Hill, while numerous other customers testified that they discounted the companies' representations as to their own products and conducted **[*46]** independent evaluations. Although McGraw-Hill's internal correspondence among its marketing professionals professed great enthusiasm for the advertising campaign at issue, the evidence from consumers makes clear that the market of sophisticated consumers relying largely on face-to-face sales was unmoved. Cf. 5 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 27:35 (4th ed. rev. 2015) ***HN5***[] ("Where an expensive product is sold by personal contacts, misleading claims in a sales brochure may not have a tendency to deceive or influence purchasing decisions and hence not be a violation of *§ 43(a)*."). Given the overwhelming testimonial evidence from customers, no reasonable jury could have concluded that any false **[**5]** or misleading statements were material to customers' purchasing decisions. Reed's Lanham Act claim therefore fails.[1]

[1] Because the district court excluded the report of Reed's expert, Dr. Warren-Boulton, only on the issue of damages, we need not reach Reed's challenge to that decision because the materiality defect in Reed's Lanham Act and Sherman Act claims causes them to fail in any event.

2. Sherman Act

HN6[] Reed's failure to establish materiality with regard to its Lanham Act claim a fortiori defeats its Sherman Act claim. "[A] plaintiff asserting a monopolization claim based on misleading advertising must 'overcome a presumption that the effect on competition of such a practice was de minimis.'" *National Ass'n of Pharma. Mfrs. v. Ayerst Labs., 850 F.2d 904, 916 (2d Cir. 1988)* (quoting *Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 288 n.41 (2d Cir. 1979))*.

> [A] plaintiff may overcome the de minimis presumption "by cumulative proof that the representations were (1) clearly false, (2) clearly material, (3) clearly likely to induce reasonable reliance, (4) made to buyers without knowledge of the subject matter, (5) continued for prolonged periods, and (6) not readily susceptible of neutralization or other offset by rivals."

Id. (quoting 3 Phillip E. Areeda & Donald F. Turner, ***Antitrust Law*** ¶ 738(a), at 279 (1978)). Because McGraw-Hill's statements **[**6]** were insufficiently material to influence customer decisions, they cannot support Reed's monopolization claims.

3. Tortious Interference with Prospective Economic Advantage

Insofar as Reed sued under state law for tortious interference with prospective economic advantage, the district court noted a choice-of-law question between New York, where McGraw-Hill is domiciled, and Georgia, where Reed is domiciled. See *Reed Constr. Data Inc. v. McGraw-Hill Cos., 49 F. Supp. 3d at 425 n.20, 427*. Reed conceded that if Georgia law applied, its tortious interference claim would be preempted by the Georgia Trade Secrets Act, *Ga. Code Ann. §§ 10-1-760 et seq.* See *Reed Constr. Data Inc. v. McGraw-Hill Cos., 49 F. Supp. 3d at 427*; App'x 480. The district court did not decide the choice of law question, concluding instead that Reed's tort claim failed at the causation element. **HN7**[] We are free, however to affirm a district court decision on any grounds supported by the record. See *Gmurzynska v. Hutton, 355 F.3d 206, 210 (2d Cir. 2004)*. Because we conclude that the choice of law question supports affirmance, we need not address causation.

As the district court correctly found, Reed's failure to demonstrate material nationwide deception reduced his tortious interference claim to a single customer, J & J Industries. This customer was **[*47]** domiciled in Georgia.[2] **HN8**[] Applying New York choice of law principles, where the solicited customer and **[**7]** the aggrieved plaintiff are both within a given state, that state has the greatest interest in regulating the behavior at issue, even if the allegedly tortious solicitation originates in a different state. See *White Plains Coat & Apron Co. v. Cintas Corp., 460 F.3d 281, 284 (2d Cir. 2006)* ("[B]ecause the alleged tort substantially occurred in New York, where the vast majority of the customers are located, and because the vast majority of the alleged harm occurred in New York (as [plaintiff] is a New York company headquartered in New York), we conclude that New York has the greatest interest in regulating the conduct in question and that the district court was correct to apply New York law."). Here, that straightforward choice-of-law analysis demands the application of Georgia law. Accordingly, as plaintiff has conceded that its tortious interference claim would be preempted under Georgia law, we affirm the district court's grant of summary judgment on that claim.

4. Conclusion

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[2] **HN9**[] We may take judicial notice at any stage of the proceedings, including on appeal, of a fact that is "'capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.'" *Hotel Emps. & Rest. Emps. Union v. City of N.Y. Dep't of Parks & Recreation, 311 F.3d 534, 540 n.1 (2d Cir. 2002)* (quoting *Fed. R. Evid. 201(b)(2)*). The public records contained on the Georgia Secretary of State's website make clear **[**8]** that J & J Industries is incorporated and headquartered in Georgia, a fact confirmed by the location indicated by the McCoy declaration. See *Swindol v. Aurora Flight Scis. Corp., 805 F.3d 516, 519 (5th Cir. 2015)* (examining "public records contained on the Mississippi Secretary of State's and the Virginia State Corporation Commission's websites" to determine jurisdiction of appellate court and concluding "that the accuracy of these public records . . . cannot reasonably be questioned").

We have considered Reed's remaining arguments and conclude that they are without merit. Accordingly, the judgment of the district court is AFFIRMED.

Clary v. State Farm

Fourteenth Judicial District Court of Louisiana, Calcasieu Parish

January 12, 2016, Filed

No. 2015-2657

Reporter
2016 La. Dist. LEXIS 10574 *

MICHAEL CLARY, et al vs. STATE FARM, et al

Subsequent History: Decision reached on appeal by *Clary v. State Farm Mut. Auto. Ins. Co., 204 So. 3d 1102, 2016 La. App. LEXIS 2148 (La.App. 3 Cir., Nov. 23, 2016)*

Core Terms

no cause of action, theory of recovery, cause of action, item of damage

Judges: **[*1]** HONORABLE G. MICHAEL CANADAY, JUDGE

Opinion by: G. MICHAEL CANADAY

Opinion

EXHIBIT A

JUDGMENT

These matters came before the Court on Wednesday, December 16, 2015, for hearing and oral argument on State Farm's Exception of No Cause of Action and Gene and David Haymon's Exception of No Cause of Action.

After reviewing the facts and relevant case law, the Court finds as follows:

If all alleged facts are taken as true, the Petition states all the necessary elements of a violation of both the Louisiana ***antitrust law*** and the Louisiana Unfair Trade Practices Act.

Therefore, Plaintiffs' Petition states a cause of action.

While the Court does believe the Plaintiffs have stated a cause of action for both alleged violations, the Court also notes *Everything on Wheels Subaru, Inc. v. Subaru S, Inc.,* "if there are two or more items of damages or theories of recovery which arise out of the operative facts of a single transaction or occurrence, a partial judgment on an exception of no cause of action should not be rendered to dismiss one item of damages or theory of recovery." *616 So. 2d 1234 (La. 1993)*.

THEREFORE IT IS HEREBY ORDERED that State Farm's Exception of No Cause of Action is DENIED.

THEREFORE IT IS HEREBY FURTHER ORDERED that Gene Haymon and **[*2]** David Haymon's Exception of No Cause of Action is DENIED.

JUDGMENT RENDERED, the 12th day of January, 2016, Lake Charles, Louisiana.

JUDGMENT SIGNED this 12th day of January 2016. Lake Charles,

/s/ [Signature]

HONORABLE G. MICHAEL CANADAY

JUDGE, FOURTEENTH JUDICIAL DISTRICT COURT

Park Irmat Drug Corp. v. OptumRx, Inc.

United States District Court for the Southern District of New York

January 12, 2016, Decided; January 12, 2016, Filed

15 Civ. 8930 (JSR)

Reporter

152 F. Supp. 3d 127 *; 2016 U.S. Dist. LEXIS 3714 **

PARK IRMAT DRUG CORP., Plaintiff, -v- OPTUMRX, INC., Defendant.

Core Terms

pharmacy, network, mail-order, termination, retail, hardships, parties, argues, mail, participating, merits, restrains, patients, likelihood of success, prescriptions, preliminary injunction, quotation, dispense, Payor, business relationship, filling, notice, Chain, bind, tip, tortious interference, prescription drug, irreparable harm, mail order, credentialing

Counsel: **[**1]** For Park Irmat Drug Corporation, Plaintiff: Matthew L. Cantor, LEAD ATTORNEY, David Alan Scupp, Hamsa Ananthi Mahendranathan, Constantine Cannon, LLP, New York, NY.

For OptumRX, Inc., Defendant: John T Seybert, Michael H Bernstein, Sedgwick LLP (NY), New York, NY.

Judges: JED S. RAKOFF, UNITED STATES DISTRICT JUDGE.

Opinion by: JED S. RAKOFF

Opinion

[*130] By "bottom-line" order dated December 15, 2015, this Court denied plaintiff's motion for a temporary restraining order and preliminary injunction enjoining defendant from terminating plaintiff from defendant's retail pharmacy network during the pendency of this litigation. This Opinion explains the reasons for that ruling.

Plaintiff Park Irmat Drug Corp. ("Irmat") is a pharmacy located in midtown Manhattan. Defendant OptumRx, Inc. ("Optum") is one of the largest Pharmacy Benefit Managers ("PBMs") in the United States, providing coverage for prescription drugs to over 65 million members. By way of general background on the workings of the industry, PBMs such as Optum are third-party administrators of prescription drug programs, responsible for managing the pharmacy benefits for health plans, negotiating drug discounts with drug manufacturers, developing lists of approved **[**2]** drugs for reimbursement, and processing pharmacies' and patients' prescription drug claims. In this capacity, PBMs build networks of pharmacies through which their members can purchase prescription medications at "covered" (*i.e.*, discounted) rates. In order to gain access to a PBM's pharmacy network, pharmacies often contract with third-party Pharmacy Services Administrative Organizations ("PSAOs") that serve as a single point of contact for the PBMs and negotiate and contract with PBMs on the pharmacies' behalf.

Optum administers two types of pharmacy networks, a "retail" pharmacy network (which consists of some 65,000 pharmacies) and a "mail-order" pharmacy network. To participate in Optum's mail-order network, pharmacies must meet a specialized set of requirements, including being accredited by the Utilization Review Accreditation Commission as a mail service pharmacy, as well as by the National Association of Boards of Pharmacy as a

Verified Internet Pharmacy Practice Site. Optum contends that it requires these accreditations to ensure that mail-order pharmacies have the appropriate controls and processes in place to safely dispense medication to patients by mail. Optum also owns **[**3]** and operates its own mail-order pharmacy.

Irmat has been a member of Optum's pharmacy network since at least 2006. Complaint ("Compl") ¶ 4, ECF No. 7. In July 2012, however, Irmat entered into an agreement with the PSAO AccessHealth (the "Irmat/AccessHealth Agreement") in order to gain continued access to over 100 third-party payor networks, including Optum's, from which Irmat's customers receive prescription drug coverage. At that time, AccessHealth had a pharmacy network agreement in place with Optum (the "Prescription Drug Services Agreement") to which Irmat became subject. The parties appear to agree that the Prescription Drug Services Agreement did not prohibit the provision of mail-order pharmacy services except with respect to Medicare Part D patients -- to whom Irmat did not provide such services "as a general matter." *Id.* ¶ 39.

Beginning in 2011, Irmat began developing a niche practice in dermatology and, over the next several years, expanded this practice by participating in programs sponsored by certain dermatological drug manufacturers, under which such manufacturers would cover some or all of customers' co-pays. *See* Affidavit of Victor Falah dated Nov. 12, 2015 ("Falah Aff.") **[**4]** ¶¶ 15-16, ECF No. 17. As a result, Irmat's business grew substantially and, in 2013, it began filling prescriptions via mail order. **[*131]** Irmat's revenue from Optum members has increased from approximately $2 million in 2012 to a projected $33 million in 2015. *See* Affidavit of Christopher O'Keefe dated Nov. 12, 2015 ("O'Keefe Aff.") ¶ 7, ECF No. 18. At the time of the filing of its motion, mail orders represented 80% of Irmat's business, *see* Falah Aff. ¶ 16, and sales to Optum members accounted for 27% of Irmat's sales overall, *see* O'Keefe Aff. ¶ 5.

In February 2015, AccessHealth and Optum entered into a new pharmacy network agreement (the "2015 Agreement"), with AccessHealth purporting to act on behalf of its participating pharmacies in its capacity as their agent. *See* Falah Aff., Ex. 3. Section 3.10 of the 2015 Agreement prohibits such pharmacies from engaging in mail-order fulfillment except upon advance written approval of Optum, and § 5.2.4 of the 2015 Agreement authorizes Optum to "terminate, suspend or revoke any Pharmacy location from participating under this Agreement immediately upon written notice to Company and Pharmacy if . . . (v) Pharmacy engages in mail fulfillment in violation of Section 3.10 without Administrator's **[**5]** written authorization."

In apparent contravention of its separate agreement with Irmat, AccessHealth never furnished Irmat a written summary of the terms and conditions of the 2015 Agreement. *See* Falah Aff. ¶¶ 19-20. As a result, Irmat contends, it had no knowledge of the terms of the Agreement until it was advised by Optum by letter dated August 10, 2015 that Irmat was filling mail-order prescriptions in violation of the 2015 Agreement. *See* Falah Aff., Ex. 4; Falah Aff. ¶ 24. Optum requested that Irmat confirm within ten business days that it would cease the prohibited activity. In response, by letter dated August 17, 2015, Irmat requested "a 90-day delay in any action by Optum" and argued that it and its patients "would be irreparably harmed if termination occurs." *Id.*, Ex. 5. On September 16, 2015, Optum advised Irmat via email that while Irmat must "remain in compliance with the retail agreement, including the no mail prohibition," nonetheless, if it wished to avoid termination, it could apply to Optum's mail-order pharmacy network. *Id.*, Ex. 6. Irmat, in turn, requested that Optum allow it to continue dispensing medication by mail while it applied for the necessary accreditations **[**6]** to join Optum's mail-order pharmacy network. *Id.*, Ex. 7. By letter dated September 28, 2015, Optum advised Irmat that it would be terminating Irmat for cause, effective November 30, 2015. *Id.*, Ex. 8.

On November 12, 2015, Irmat tiled a complaint against upturn in New York State Supreme Court for breach of contract, equitable estoppel, tortious interference with business relations, and antitrust violations under New York's Donnelly Act. *See* Declaration of Michael H. Bernstein dated Nov. 24, 2015 at ¶ 3, ECF No. 24. On November 13, 2015, Irmat filed the instant motion. *Id.* ¶¶ 4-5. That same day, Optum filed a notice of removal on diversity grounds pursuant to *28 U.S.C. § 1446* and the action was assigned to this Court. Ultimately, on consent of the parties, the Court issued a scheduling order setting a briefing schedule on plaintiff's motion and staying the termination of Irmat from Optum's pharmacy network until a hearing was held. Order dated Nov. 23, 2015, ECF No. 22.

A court may issue a preliminary injunction and temporary restraining order pursuant to *Rule 65 of the Federal Rules of Civil Procedure*. "[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries **[**7]** the burden of persuasion." *Mazurek v. Armstrong, 520 U.S. 968, 972, 117 S. Ct. 1865, 138 L. Ed. 2d 162 (1997)* (per **[*132]** curiam) (internal quotation mark omitted). A party seeking a preliminary injunction must show "(a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief." *Citigroup Glob. Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd., 598 F.3d 30, 35 (2d Cir. 2010)* (internal quotation marks omitted). In addition, the court must ensure that the public, interest would not be disserved' by the issuance of a preliminary injunction." *Salinger v. Colting, 607 F.3d 68, 80 (2d Cir. 2010)* (quoting *eBay* *Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391, 126 S. Ct. 1837, 164 L. Ed. 2d 641 (2006))*. A preliminary injunction is "never awarded as of right," *Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 24, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008)*, and whether to grant such relief "rests in the sound discretion of the district court," *JSG Trading Corp. v. Tray-Wrap, Inc., 917 F. 2d 75, 79 (2d Cir. 1990)*. "In deciding a motion for preliminary injunction, a court may consider the entire record including affidavits and other hearsay evidence." *Johnson v. Newport Lorillard, 2003 U.S. Dist. LEXIS 939, 2003 WL 169797, at *1 (S.D.N.Y. Jan. 23, 2003)*.[1]

"To establish irreparable harm, the movant must demonstrate an injury that is neither remote nor speculative, but actual and imminent and that cannot be remedied by an award of monetary damages." *Shapiro v. Cadman Towers, Inc., 51 F.3d 328, 332 (2d Cir. 1995)* (internal quotation **[**8]** marks omitted); *Brenntag Int'l Chems., Inc. v. Bank of India, 175 F.3d 245, 249 (2d Cir. 1999)* (irreparable harm exists "where, but for the grant of equitable relief, there is a substantial chance that upon final resolution of the action the parties cannot be returned to the positions they previously occupied").

Irmat makes a facially compelling case that Optum's termination of it from its pharmacy network represents an existential threat to its business. Irmat contends that losing the ability to service Optum members (who account for 27% of Irmat's sales overall) will have spill-over effects on the rest of its business. According to Irmat, most dermatologists -- not wanting to bother with determining which pharmacies can fill which prescriptions for which patients -- do not make referrals to particular pharmacies based on a patient's coverage, but rather refer their patients to one or two pharmacies that accept all major insurance providers. *See* O'Keefe Aff. ¶ 11. Thus, Irmat submits that most dermatologists will simply stop referring patients to Irmat altogether if Irmat is terminated from Optum's network. These losses, Irmat contends, are not quantifiable and will not be easily recaptured even if Irmat ultimately prevails in this litigation, since referring **[**9]** dermatologists will have moved on to other pharmacies.[2]

Optum responds that any losses Irmat might suffer are quantifiable, pointing to **[*133]** the fact that Irmat, in its papers, calculates the amount of revenues it derives from Optum members and the percentage of prescriptions from its top physician referrers that were made out for Optum members. But being able to break down actual revenues and referrals is a much simpler task than assessing the extent to which termination from Optum will affect Irmat's non-Optum business. And Optum does not attempt to rebut Irmat's assertion that **[**10]** termination from Optum's network will result in dermatologists opting not to refer to Irmat altogether. As such, given the significant difficulties inherent in attempting to quantify the impact that termination from Optum's network will have on Irmat's business, the Court finds that Irmat has met its burden of showing an actual and imminent injury for which it lacks

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[1] "The standard for granting a temporary restraining order and a preliminary injunction pursuant to *Rule 65 of the Federal Rules of Procedure* are identical." *Spencer Trask Software & Info. Servs., LLC v. RPost Int'l Ltd., 190 F. Supp. 2d 577, 580 (S.D.N.Y. 2002)*.

[2] In support of this proposition, Irmat points to its recent experience with customers from the state of Georgia. Because of a new Georgia state licensing requirement, Irmat briefly ceased providing mail-order services to customers in Georgia in June 2015. *See* O'Keefe Aff. ¶¶ 14-15. As a result, dermatologists in Georgia found alternative pharmacies to refer patients to. *Id.* ¶ 16. Though Irmat resumed the provision of such services in August 2015, "the vast majority of dermatologists that had previously referred patients to Irmat did not revert back to doing so." Plaintiff's Opening Brief ("Pl. Br.") at 10, ECF No. 15.

an adequate remedy at law. *See* Salinger, 607 F.3d at 81 ("Harm might be irremediable, or irreparable, for many reasons, including that a loss is difficult to replace or difficult to measure . . . .").

Turning to the merits, however, the Court finds that plaintiff has failed to show a likelihood of success on the merits on any of its claims. Plaintiff's first cause of auction is for breach of contract. Rather than argue that Optum has breached any of the written contracts between the parties discussed above, Irmat argues that the parties entered into an implied-in-fact contract, as evidenced through their conduct, by which Irmat would provide pharmacy services to Optum's members and, in return, Optum would reimburse Irmat for the drugs that it dispenses to those members. Under this supposed implied-in-fact contract, Irmat was not prohibited from **[**11]** providing mail-order pharmacy services to Optum members and never agreed that doing so would constitute grounds for termination. "A contract cannot be implied in fact where there is an express contract covering the subject matter involved." *Julien J. Studley, Inc. v. New York News, Inc., 70 N.Y.2d 628, 629, 512 N.E.2d 300, 518 N.Y.S.2d 779 (1987)*. Thus, as part and parcel of its breach-of-contract argument, Irmat argues that it is not bound by the terms of the 2015 Agreement between Optum and its agent AccessHealth -- which made it a terminable offense for a "retail" pharmacy to provide mail-order services to Optum members -- because it had no notice of it and did not ratify it.

Irmat's argument that it is not bound by the 2015 Agreement ultimately fails. But before progressing any further in the analysis of the 2015 Agreement, the Court must address an oddity with respect to that agreement that emerged after briefing and oral argument on the instant motion. In the 2015 Agreement, AccessHealth "warrants that it has the authority to enter into th[e] Agreement as the agent for and on behalf of each Pharmacy identified on Exhibit A" and that "that each Pharmacy identified on Exhibit A has agreed to be bound by and comply with all of the terms and conditions of this Agreement." Falah Aff., Ex. 3, **[**12]** § 3. Exhibit A, however, by defendant's own admission, was not attached to the contract and perhaps never existed. *See* Declaration of Jake McCreary dated Dec. 15, 2015 ("McCreary Decl.") ¶ 3. According to McCreary, a supervisor of pharmacy network operations at Optum who assists in the administration or the 2015 Agreement, "it has been the practice or the parties throughout their relationship to rely on data sent to OptumRx by AccessHealth to identify the pharmacies enrolled in the AccessHealth PSAO and participating in the OptumRx pharmacy network pursuant to the Contract." *Id.* AccessHealth has identified Irmat as such a pharmacy throughout the relevant period. *Id.* ¶¶ 4-9.

The Court finds that the missing exhibit does not render the 2015 Agreement fatally indefinite for three independent and alternative **[*134]** reasons. *First*, while AccessHealth purports in § 3 of the Agreement to act on behalf of the pharmacies listed on Exhibit A, its description of whom it represents is not so limited elsewhere in the Agreement. Indeed, the 2015 Agreement "is made and entered into by and between [Optum] . . . and [AccessHealth] *as attorney-in-fact on behalf of its Participating Pharmacies*." Falah Aff., Ex. **[**13]** 3, at 1 (emphasis added). AccessHealth similarly represented in the Recitals section of the Agreement that it "has the authority to enter into this Agreement as the agent for and on behalf of its Participating Pharmacies." *Id.*, Recital D. "Pharmacy" and "Pharmacies," in turn, are defined to mean "each or all the eligible pharmacy or pharmacies, pharmacy chains and/or pharmacy locations participating in [Optum's] network in accordance with the Agreement, addenda, exhibits, subsequent amendments, etc. and as specified on Exhibit A." *Id.* ¶ 1.30.[3]

At first glance, it is unclear whether "and as specified on Exhibit A" is intended to characterize the pharmacies described in the preceding language or is, rather, intended to represent one of several sets of pharmacies that constitute a "Pharmacy" (and, in turn, a "Participating Pharmacy") under the 2015 Agreement. But to adopt the former interpretation (such that "Pharmacies" refers only to those pharmacies specified on Exhibit A) would read the language "participating in [Optum's] network in accordance with the Agreement, addenda, exhibits, subsequent amendments, etc." out **[**14]** of the definition. To give those words effect, a pharmacy not listed on Exhibit A must at least be capable of qualifying as a Pharmacy under the Agreement; otherwise, the definition could have referred simply to "eligible pharmacy or pharmacies, pharmacy chains and/or pharmacy locations, as specified on Exhibit A," and left it at that. *See* *Olin Corp. v. Am. Home Assurance Co., 704 F.3d 89, 99 (2d Cir. 2012)* (under New York law, "[a]ny interpretation of a contract that has the effect of rendering at least one clause superfluous or meaningless . . . is not preferred and will be avoided if possible" (internal quotation marks omitted)).

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[3] "Participating Pharmacies" is not a defined term in the 2015 Agreement.

Notably, on the signature page of the 2015 Agreement, immediately above the signature of the signatory for AccessHealth, the "Chain Codes" 605 and 630 are listed. Plainly then, Chain Code 605, of which Irmat is a member, *see* McCreary Decl. ¶ 4, is an "eligible . . . pharmacy chain[] . . . participating in [Optum]'s network in accordance with the Agreement." As such, regardless of the absence of Exhibit A, AccessHealth entered into the 2015 Agreement in its capacity as Irmat's agent (among many other pharmacies). Such an interpretation is particularly warranted in light of the well-settled principle that a "contract must be interpreted **[**15]** so as to give effect to, not nullify, its general or primary purpose." *Smith v. City of Buffalo, 120 A.D.3d 1588, 1589, 992 N.Y.S.2d 816 (N.Y. App. Div. 4th Dep't. 2014)* (internal quotation mark omitted).

Second, and alternatively, even if the 2015 Agreement could be read to have intended to bind only those Pharmacies identified on Exhibit A, the absence of Exhibit A would not in and of itself render the Agreement invalid. Rather, "[b]efore rejecting an agreement as indefinite, a court must be satisfied that the agreement cannot be rendered reasonably certain by reference to an extrinsic standard that makes its meaning clear. The conclusion that a party's promise should be ignored as meaningless is at best a last resort." *Cobble Hill Nursing Home, Inc. v. Henry & Warren Corp., 74 N.Y.2d 475, 483, 548 N.E.2d 203, 548 **[*135]** N.Y.S.2d 920, (1989)* (citation and internal quotation marks omitted); *see also* *166 Mamaroneck Ave. Corp. v. 151 E. Post Rd. Corp., 78 N.Y.2d 88, 91, 575 N.E.2d 104, 571 N.Y.S.2d 686 (1991)* ("[W]here it is clear from the language of an agreement that the parties intended to be bound and there exists an objective method for supplying a missing term, the court should endeavor to hold the parties to their bargain."); *Matter of Wallace v. 600 Partners Co., 86 N.Y.2d 543, 547-48, 658 N.E.2d 715, 634 N.Y.S.2d 669 (1995)* ("[C]ourts may as a matter of interpretation carry out the intention of a contract by transposing, rejecting, or supplying words to make the meaning of the contract more clear . . . in those limited instances where some absurdity has been identified or the contract would otherwise be unenforceable either **[**16]** in whole or in part."). While these principles are generally applied to supply, for example, a missing price term or, in the case of the *Wallace* doctrine, to correct an absurd scrivener's error, the principles are equally applicable to the situation at bar where the contracting parties failed to attach an important exhibit. Here, the reference to Chain Codes 605 and 630 on the signature page of the 2015 Agreement supplies the "extrinsic standard" or "objective method" by which the Court can hold the parties to the bargain they struck. In other words, rather than toss the 2015 Agreement as meaningless -- "a last resort" -- the Court may properly under New York law interpret the references to "Exhibit A" in the Agreement to refer to those pharmacies (such as Irmat) in Chain Codes 605 and 630.

Third, and finally, even if the 2015 Agreement were interpreted to bind no Pharmacies at the time of execution because of the missing exhibit, the 2015 Agreement explicitly contemplates that pharmacies will be added to the Optum network *subsequent to* the execution of the 2015 Agreement. *See* Falah Aff., Ex. 3, § 3.4.3 ("[AccessHealth] shall provide [Optum] with at least fifteen (15) days written notice prior **[**17]** to adding a new Pharmacy Location for use in providing Covered Prescription Services to Members, which new Pharmacy location shall satisfy and comply with all terms and conditions of this Agreement . . . . On a monthly basis [AccessHealth] will provide a complete list of Pharmacies as of the end of the month as well as a summary list of new and former Pharmacies processed during the previous calendar month."). The fact that that mechanism is in place, and that Optum treated Irmat as an active pharmacy under the 2015 Agreement by virtue of the information provided to it by AccessHealth, see McCreary Decl. ¶¶ 5-9, further undermines any argument that Irmat cannot be bound by the 2015 Agreement simply because Exhibit A was not attached to the Agreement.

Returning to the arguments made in the briefing, Irmat's argument that it is not bound by the 2015 Agreement because it had no notice of it and did not ratify it is unpersuasive. Under black-letter agency law, a principal need not have notice to be bound by his agent. "It is well-settled that the principal is bound by notice to or knowledge of his agent in all matters within the scope of his agency although in fact the information may never **[**18]** actually have been communicated to the principal." *Farr v. Newman, 14 N.Y.2d 183, 187, 199 N.E.2d 369, 250 N.Y.S.2d 272 (1964)*; *Minskoff v. Am. Express Travel Related Servs. Co., 98 F.3d 703, 708 (2d Cir. 1996)* ("Under general principles of agency, the authority of an agent 'is the power of the agent to do an act or to conduct a transaction on account of the principal which, with respect to the principal, he is privileged to do because of the principal's manifestations to him.'"). Here, Irmat's agreement with AccessHealth **[*136]** provides that "[AccessHealth] shall have the authority to negotiate and enter into prospective Payor Agreements for the provision of Covered Pharmacy

Services to Covered Persons. [Irmat] agrees that [AccessHealth] has the sole and exclusive right to bind [Irmat] to [Payor Plans], provided that [Irmat] may . . . opt out of Payor Plans as described in Section 5.2." Falah Aff., Ex. 1, § 5.1. Section 5.2 of the Agreement, in turn, contemplates that Irmat may "opt out of Payor Agreements available within the network selected by [Irmat]," although it will initially be "automatically enrolled in all Payor Agreements available under [said] network." *Id.* § 5.2. As such, Irmat, by the plain language of its own contract with AccessHealth, agreed to be bound to agreements entered into by AccessHealth on Irmat's behalf unless it opted out of such agreements, regardless **[**19]** of whether Irmat would have agreed to those terms in the first instance. *See* *Hidden Brook Air, Inc. v. Thabet Aviation Int'l Inc., 241 F. Supp. 2d 246, 260 (S.D.N.Y. 2002)* ("It is black letter law that an agent binds his principal when he enters into a contract within the scope of his authority."); *E. River Sav. Bank v. Samuels, 284 N.Y. 470, 480, 31 N.E.2d 906 (1940)* ("When an agent contracts in the name of his principal, the principal contracts and is bound . . . .") .

Though it would appear that Irmat's authorization of AccessHealth to bind it could not be clearer, Irmat argues that AccessHealth did not have "*carte blanche* to bind Irmat to agreements as AccessHealth saw fit," Plaintiff's Reply Brief ("Pl. Reply Br.") at 5 (ECF No. 29), seizing on a provision of the Irmat/AccessHealth Agreement that requires AccessHealth to "furnish [Irmat] a written summary of the terms and conditions of each Payor Agreement for which [AccessHealth] *proposes* that [Irmat] participate." Falah Aff., Ex. 1, § 2.1 (emphasis added). But the word "proposes" cannot bear the weight plaintiff assigns to it in light of § 5 of the Agreement. An obligation to furnish a summary of terms is not tantamount to a requirement that Irmat ratify those terms for an agreement to be effective. The absence of any ratification procedure in the Irmat/AccessHealth Agreement defeats such an **[**20]** interpretation, for if the parties intended such a limitation on AccessHealth's ability to bind Irmat, they almost certainly would have provided for one explicitly. And given that the Agreement allows for Irmat to opt out of Payor Agreements that it does not wish to participate in, the use of the word "proposes" in § 2.1 is not remotely inconsistent with the framework established by § 5.[4] That AccessHealth allegedly failed to furnish Irmat with a written summary of the terms and conditions of the 2015 Agreement, in apparent contravention of § 2.1 of their agreement, may very well provide-Irmat with a viable breach-of-contract claim against AccessHealth. But it does not provide Irmat with a breach-of-contract claim against Optum.[5]

Irmat also argues that Optum waived any contractual right to terminate **[*137]** Irmat for providing mail-order pharmacy services, in light of the fact that Optum reimbursed Irmat for over 200,000 prescriptions throughout the country from February 2013 through October 2015, without objection until August 2015. See O'Keefe Aff. ¶ 7. Noting that claims submitted by Irmat reflect less than two hundredths of one percent of the claims processed by Optum during that period, Optum responds that it did not know that Irmat was filling mail orders in violation of the 2015 Agreement until it conducted an investigation in mid-2015. But the Court need not wade into this factual dispute because the 2015 Agreement explicitly provides that "[t]he failure of any party to insist in any one or more instances upon performance of any terms or conditions of this Agreement shall not be construed as a waiver . . . and the obligations **[**22]** of such party with respect thereto shall continue in full force and effect." Falah Aff., Ex. 3, § 11.3. Such "[n]o-waiver clauses are valid and enforceable" under New York law, and therefore Irmat's waiver argument fails. *Am. Movie Classics Co. v. Time Warner Entm't, L.P., 10 Misc. 3d 1062[A], 814 N.Y.S.2d 559, 2005 NY Slip Op 52081[U], 2005 WL 3487852, at *12 (N.Y. Sup. Ct. 2005)*. Irmat argues that the 2015 Agreement's no-waiver provision is inapplicable for the same reasons it argues that it is not bound by the 2015 Agreement generally, but that argument fails for the same reasons stated above.

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[4] Because the Court finds that AccessHealth had actual authority to bind Irmat, it need not reach the issue of whether, in the absence of such actual authority, Irmat would still be bound by the 2015 Agreement on a theory of apparent authority.

[5] Irmat argues that Optum's 2015 Pharmacy Manual (which describes the necessary accreditations for mail-order pharmacies), and Optum's prohibition on providing mail-order pharmacy services, were not clearly incorporated by reference into **[**21]** Irmat's own separate agreement with AccessHealth. This argument is a red herring that the Court need not reach. The dispositive point, for purposes of plaintiff's breach-of-contract claim, is that the *2015 Agreement* entered into on Irmat's behalf by AccessHealth is a valid contract that binds Irmat.

Finally, Irmat claims that Optum acted in violation of the implied covenant of good faith and fair dealing by (1) prohibiting the provision of mail-order pharmacy services without notifying Irmat directly or seeking its consent; (2) demanding that Irmat cease providing mail-order services within 10 days or face termination; and (3) deciding to terminate Irmat despite Irmat's willingness to apply to Optum's mail-order pharmacy network. While "even an explicitly discretionary contract right may not be exercised in bad faith so as to frustrate the other party's right to the benefit under the agreement," *Richbell Info. Servs., Inc. v. Jupiter Partners, L.P., 309 A.D.2d 288, 302, 765 N.Y.S.2d 575 (N.Y. App. Div. 1st Dep't. 2003)*, "[t]o sustain a breach of the implied covenant claim, the claimant must allege and show that the other party exercised a [contractual] right malevolently, for its **[**23]** own gain as a part of a purposeful scheme designed to deprive [claimant] of the benefits under the contract," *Wilmington Trust Co. v. Strauss, 13 Misc. 3d 1231[A], 831 N.Y.S.2d 357, 2006 NY Slip Op 52080[U], 2006 WL 3076611, at *8 (N.Y. Sup. Ct. 2006)* (internal quotation marks omitted).

Irmat has failed to show that it is likely to be able to demonstrate that Optum acted with the requisite bad faith to support such a theory of breach. Again, plaintiff's effort to pin its agent's failure to notify it of the 2015 Agreement on Optum is not well-taken. As for Optum's decision to terminate Irmat from its network, it was Irmat's choice to continue breaching the 2015 Agreement upon being notified of its breach rather than to cease filling mail-order prescriptions from Optum members while its application to Optum's mail-order pharmacy network remained pending. While Optum perhaps has not acted with the greatest generosity toward Irmat under the circumstances, it cannot be the case that Optum's decision to act on its contractual right to terminate Optum in the face of Irmat's continued breach constitutes bad faith. Although Irmat suggests that Optum pursued such termination in an effort to squash competition, these allegations are conclusory and are further undermined by the undisputed fact that Optum invited Irmat to apply to its **[**24]** mail-order pharmacy network as part of the parties' correspondence. *Ferguson v. Lion Holding, Inc., 478 F. Supp. 2d 455, 469 (S.D.N.Y. 2007)* ("[C]onclusory allegations **[*138]** of a party's failure to act in good faith alone are insufficient . . . .").[6]

At bottom, Irmat is seeking to replace the written agreement between the parties with an unwritten, implied-in-fact contract with terms more favorable to Irmat. That it cannot do. As such, plaintiff has failed to show a likelihood of success on its breach-of-contract claim.

With its second cause of action, Irmat argues that Optum is precluded by the doctrine of equitable estoppel from terminating Irmat from its network. Here, too, Irmat fails to show a likelihood of success on the merits. "Under New York law, the elements of equitable estoppel are with respect to the party estopped: (1) conduct which amounts to a false representation or concealment of material facts; (2) intention that such conduct will be acted upon by the other party; and (3) knowledge of the real facts. **[**25]** The parties asserting estoppel must show with respect to themselves: (1) lack of knowledge and of the means of knowledge of the true facts; (2) reliance upon the conduct of the party to be estopped; and (3) prejudicial changes in their positions." *In re Vebeliunas, 332 F.3d 85, 93-94 (2d Cir. 2003)* (citation omitted). The "doctrine is to be invoked sparingly and only under exceptional circumstances." *LoCiciro v. Metro. Transp. Auth., 288 A.D.2d 353, 355, 733 N.Y.S.2d 477 (N.Y. App. Div. 2d Dep't 2001)* (internal quotation marks omitted).

Irmat argues that it is likely to succeed on this claim because it relied to its detriment on Optum's reimbursement of its mail-order sales to Optum members from 2013 to 2015, substantially expanding its business from 20 to 208 employees and spending millions of dollars to expand its operations. Optum argues that equitable estoppel is unavailable because Irmat has a contractual relationship with Optum that governs the parties' relationship. *See Kopelowitz & Co. v. Mann, 23 Misc. 3d 1112[A], 886 N.Y.S.2d 67, 2009 NY Slip Op 50712[U], 2009 WL 1037734, at *11 (N.Y. Sup. Ct. 2009)* ("Claims for equitable estoppel that are duplicative of dismissed breach of contract claims are properly dismissed."). Irmat appears to concede the point on reply, assuming that the Court finds an enforceable contract between Optum and Irmat. *See* Pl. Reply Br. at 8 n.16. But, in any case, Irmat has failed to demonstrate that it is likely to be able to show (1) **[**26]** that Optum concealed anything from Irmat; (2) that Optum

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[6] Plaintiff's implied covenant theory faces another hurdle that renders its success unlikely, *viz.*, "New York law requires dismissal of an implied covenant claim where the claim derives from the same set of facts as a breach of contract claim," as it does here. *FCOF UB Sec. LLC v. MorEquity, Inc., 663 F. Supp. 2d 224, 231 (S.D.N.Y. 2009)*.

intended Irmat to act on any such concealment or misrepresentation, or (3) that Irmat lacked "the means of knowledge of the true facts." To the contrary, Irmat knew it was in Optum's pharmacy network and knew that it was obligated under the Irmat/AccessHealth agreement to "comply with the policies and procedures" of Optum. Falah Aff., Ex. 1, Recitals; *id.* ¶ 8.1. Irmat does not even plead that it lacked the means to know the true facts -- an understandable omission given that its own agent executed the agreement at issue.

Nor has Irmat met its burden of showing a likelihood of success on its third cause of action for tortious interference with business relations. "To prevail on a claim for tortious interference with business relations in New York, a party must prove (1) that it had a business relationship with a third party; (2) that the defendant knew of that relationship and intentionally interfered with it; (3) that the defendant acted solely out of malice or used improper or illegal means that amounted to a crime or independent tort; **[*139]** and (4) that the defendant's interference caused injury to the relationship with the third **[**27]** party." *Amaranth LLC v. J. P. Morgan Chase & Co., 71 A.D.3d 40, 47, 888 N.Y.S.2d 489 (N.Y. App. Div. 1st Dep't 2009)*. Irmat argues that Optum's termination of Irmat from its pharmacy network will interfere with its business relationships with customers, dermatologists, and drug manufacturers. It further contends, summarily, that "Optum's termination of Irmat is not in its member's [sic] interests . . . or in pursuit of legitimate business objectives" and that the purpose of the termination is "to el[i]minate a competitor in violation of ***antitrust law***." Plaintiff's Opening Brief ("Pl. Br.") at 16, ECF No. 15. Optum responds that it simply has chosen to terminate Irmat from its network because Irmat refused to stop breaching the governing network agreement. While a violation of New York's Donnelly Act (assuming *arguendo* that one has occurred) would constitute a crime under New York law, the New York Court of Appeals has emphasized that "conduct constituting tortious interference with business relations is, by definition, conduct directed not at the plaintiff itself, but at the party with which the plaintiff has or seeks to have a relationship." *Carvel Corp. v. Noonan, 3 N.Y.3d 182, 192, 818 N.E.2d 1100, 785 N.Y.S.2d 359 (2004)*. Irmat has not pled nor argued that Optum's conduct is directed at parties other than Irmat itself, so its claim is defective in this regard. *See* *Valley Lane Indus. Co. v. Victoria's Secret Direct Brand Mgmt., L.L.C., 455 F. App'x 102, 106-07 (2d Cir. 2012)* (affirming **[**28]** dismissal of tortious interference with business relations claim because defendant's allegedly wrongful conduct "was directed at [plaintiff], rather than [the third party]," such that plaintiff's "allegations could not satisfy the wrongful means element even if they did sufficiently allege tortious conduct"). And Irmat's allegation that Optum acted "with the sole purpose of harming Irmat" is conclusory. Compl. ¶ 86. In any case, in order to show a likelihood of success on the merits of its tortious interference claim, plaintiff would need to show a likelihood of success on the merits of its antitrust claims, which, as explained below, plaintiff has failed to do.

Turning to those claims, the Donnelly Act tracks the federal Sherman Act, prohibiting "[e]very contract, agreement, arrangement or combination whereby [a] monopoly . . . is or may be established or maintained, or whereby [c]ompetition or the free exercise of any activity in the conduct of any business, trade or commerce or in the furnishing of any service . . . is or may be restrained." *N.Y. Gen. Bus. Law § 340(1)*; *see also* *Anheuser-Busch, Inc. v. Abrams, 71 N.Y.2d 327, 335, 520 N.E.2d 535, 525 N.Y.S.2d 816 (1988)* (the Donnelly Act "should generally be construed in light of Federal precedent"). Irmat argues that the 2015 Agreement violates the Donnelly Act in **[**29]** two ways: (1) by "negatively" tying retail pharmacy services to mail-order pharmacy services; and (2) as an unreasonable restraint on trade.

The elements of an illegal *per se* tying claim are: "(1) that the tying arrangement affects a substantial amount of interstate commerce; (2) the two products are distinct; (3) the defendant actually tied the sale of the two products; and (4) the seller has appreciable market power in the tying market." *In re Visa Check/MasterMoney Antitrust Litig., 280 F.3d 124, 133 n.5 (2d Cir. 2001)*, *overruled on other grounds,* *In re Initial Pub. Offering Sec. Litig., 471 F.3d 24 (2d Cir. 2006)*. As an initial matter, though Optum does not brief the viability of a "negative tying" theory in general, such a theory is far from well-established. A few courts have recognized that "[i]n addition to outlawing 'positive' ties likely to restrain competition, *Section 1* **[*140]** [of the Sherman Act] also forbids 'negative' ties -- arrangements conditioning the sale of one product on an agreement *not* to purchase a second product from competing suppliers." *Data Gen. Corp. v. Grumman Sys. Support Corp., 36 F.3d 1147, 1178 (1st Cir. 1994)*, *abrogated on other grounds by* *Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 130 S. Ct. 1237, 176 L. Ed. 2d 18 (2010)*. But plaintiff fails to cite a case in the Second Circuit or a decision of a New York state court that has accepted or applied the theory. *See* *Posa, Inc. v. Miller Brewing Co., 642 F. Supp. 1198, 1209 (E.D.N.Y. 1986)* (noting that plaintiffs had failed to "cite[]

any case authority for the proposition that such a negative tie is **[**30]** unlawful"). And Irmat cites no case in which a practice like defendant's has been found to constitute tying. Indeed, at a minimum, "tying" is an awkward fit on these facts since Optum is not offering products in the traditional sense of the word, or preventing Irmat from purchasing the "tied" product from a competitor. Rather, on plaintiff's theory, Optum is unlawfully forcing Irmat to choose between Optum's own pharmacy networks.

The Court need not resolve the viability of plaintiff's negative tying theory on this motion, because even assuming the theory would be viable on the facts pled, the theory is based on a mistaken factual premise. According to Optum, Irmat's contention that "Optum has forced its pharmacies that participate in Optum's 'retail' pharmacy network to refrain from providing mail order pharmacy services" is factually incorrect. Defendant's Brief ("Def. Br.") at 22 (quoting Pl. Br. at 17), ECF No. 25. To the contrary, Optum explains:

> A pharmacy that meets the credentialing reguirements of both the retail and mail networks is welcome to participate in both. It does not have to choose one or the other. If the pharmacy meets the credentialing reguirements of the retail **[**31]** network, it may dispense in the retail setting. If it meets the additional requirements of the mail network, it can dispense in both retail and mail settings.

Id.; see also Declaration of Kerri Tanner dated Nov. 24, 2015 ("Tanner Decl.") ¶ 8 ("Optum [] permits pharmacies in its mail pharmacy network to also dispense medications when they are face-to-face with their customers. Thus, a pharmacy in the mail pharmacy network is effectively a participant in both the retail and mail pharmacy networks."), ECF No. 23.

In response, Irmat points to the 2015 Pharmacy Manual, which provides that "Mail Order Pharmacies do not qualify for participation in the Administrator Retail Pharmacy networks as a Retail Pharmacy." Tanner Decl., Ex. D at 109. While it is difficult (albeit not impossible[7]) to reconcile that provision with Optum's representations to the Court, Optum's position in this litigation is unequivocal: "There is no prohibition against a properly credentialed pharmacy participating in both the mail-order and retail pharmacy networks." Def. Br. at 10 n.6. Even if it were the case that a pharmacy could not *technically* belong to both networks, Optum's substantive point that a pharmacy in its **[**32]** mail-order network is not prevented from dispensing medication face-to-face in a retail capacity remains unrebutted. Irmat fails to identify any action that a pharmacy in Optum's retail pharmacy network can take that a pharmacy in Optum's mail-order pharmacy network cannot. Put differently, Irmat appears unlikely to be able to show that **[*141]** Optum is negatively tying membership in the retail network to membership in the mail-order network because a properly credentialed pharmacy can dispense medication both by mail and in a retail capacity (i.e., in-store). This is borne out by the fact that Irmat is desperately trying to gain admission to Optum's mail-order network and has not indicated anywhere in its papers that it believes that obtaining such admission will have any negative effect whatsoever on its retail operations. Because the Court finds that plaintiff has failed to show a likelihood of success on the merits on its tying claim on this ground, the Court need not reach defendant's arguments as to antitrust standing and market definition.

Irmat's claim that Optum and AccessHealth have restrained competition in violation of the Donnelly Act by entering into the 2015 Agreement appears similarly weak. Under the Sherman Act (which the parties look to), to make out such a claim "plaintiff must demonstrate: (1) a combination or some form of concerted action between at least two legally distinct economic entities that (2) unreasonably restrains trade." *Geneva Pharms. Tech. Corp. v. Barr Labs, Inc., 386 F.3d 485, 506 (2d Cir. 2004)*. Irmat argues that the 2015 Agreement unreasonably restrains trade in the market for mail-order pharmacy services to Optum members by allowing Optum to terminate retail pharmacies for providing mail-order pharmacy services. Given that the 2015 Agreement was entered into *on behalf of* Irmat by its agent AccessHealth, Irmat is placing itself in the position of arguing that an agreement to which it is a party unreasonably restrains trade, i.e., Irmat is essentially accusing itself of violating the Donnelly Act. While the parties fail to brief this issue, the Court is skeptical that Irmat will be able **[**34]** to prevail on such a claim given this

[7] The relevant provision in the 2015 Pharmacy Manual could be reasonably read to mean that a mail-order pharmacy does not qualify for participation **[**33]** in Optum's retail pharmacy network merely by virtue of being a mail-order pharmacy, rather than as completely foreclosing the possibility of a pharmacy participating in both networks.

posture. Nor has plaintiff demonstrated that it is likely to be able to show that the Agreement *unreasonably* restrains trade or "that the challenged action has had an *actual* adverse effect on competition as a whole in the relevant market," rather than merely an adverse effect on plaintiff's balance sheet. *Capital Imaging Assocs. v. Mohawk Valley Med. Assocs., 996 F.2d 537, 543 (2d Cir. 1993)*.[8]

Irmat has thus failed to show a likelihood of success on the merits on any of its claims. However, under this Circuit's case law, if the balance of hardships tipped decidedly in plaintiff's favor, injunctive relief would be warranted if plaintiff could make the lesser showing of "sufficiently serious questions going to the merits to make them a fair ground for litigation." *Citigroup Glob. Mkts., Inc., 598 F.3d at 35*. Though the Court indicated in its December 15 bottom-line order that the balance of hardships tips in plaintiff's favor, on reflection it finds that **[**35]** the balance of hardships do not tip *decidedly* in plaintiff's favor. With respect to this factor, Irmat argues that while it "will suffer irreparable harm without an injunction, Optum will suffer none." Pl. Reply Br. at 10. However, the "balance of hardships" requirement would be superfluous if it could be met simply by virtue of making the already-required showing of irreparable harm. *See* *Buffalo Courier-Express , Inc. v. Buffalo Evening News, Inc., 601 F.2d 48, 58 (2d Cir. 1979)* ("A 'balance of hardships tipping decidedly toward the party requesting the preliminary relief must mean real hardship from the denial of relief Pendente lite not merely the showing of difficulty of measurement **[*142]** which may suffice to constitute 'irreparable damage' where a plaintiff shows probable success."). While plaintiff faces a significant hardship in the form of potentially irreparable harm to its business upon termination, the requested injunction would impose some hardship on Optum insofar as it would force Optum to bear risks related to Irmat acting as a mail-order pharmacy without the accreditations required by Optum for the purported purpose of patient safety. Tanner Decl. ¶ 7; Transcript of Proceedings held on Dec. 11, 2015 at 15 ("Optum doesn't have any reassurance that Irmat is qualified **[**36]** and is not going to do something that could potentially be a danger to patient care that Optum may ultimately be responsible for not doing proper credentialing."), ECF No. 37.[9]

Perhaps more significantly, to a large extent the hardship Irmat faces is one of its own making. Though Irmat was purportedly unaware of the 2015 Agreement prior to being notified by Optum that it was in breach of it, Irmat continued to breach the 2015 Agreement months after being advised that it would face termination if it did not cure its breach. Significantly, Optum did not simply advise Irmat that it was terminating it. Rather, Optum gave Irmat the opportunity to cure its breach and, on September 16, 2015, advised Irmat that it could apply to Optum's mail-order pharmacy network if it wanted to continue filling mail orders from Optum members. At that time, Irmat had a choice: (1) it could continue breaching the 2015 Agreement (to the extent it was bound by that agreement) while it obtained the required credentials and hope that Optum would change its mind in the course of negotiations or that it **[**37]** would succeed in obtaining injunctive relief in litigation; or (2) it could cease filling mail-order prescriptions from Optum members while its application to Optum's mail-order pharmacy network remained pending (thereby obviating the need for this litigation), but otherwise continue to be a member of Optum's retail pharmacy network. While that choice may not have been an attractive one for Irmat -- indeed, the second option surely would have been disruptive to Irmat's mail-order business (though presumably not as disruptive as full-scale termination) -- it was a choice nonetheless. Irmat chose to continue breaching, and, under the circumstances, the Court does not see how the balance of hardships could be said to tip *decidedly* in plaintiff's favor. *Columbus Rose Ltd. v. New Millennium Press, 2002 U.S. Dist. LEXIS 9130, 2002 WL 1033560, at *10 (S.D.N.Y. May 20, 2002)* (where party had "deliberately sailed in harm's way" and "the hardship of which it complains [was] significantly of its own making," hardship argument was not credited); *Warner Bros. Entm't v. Glob. Asylum, Inc., 2012 U.S. Dist. LEXIS 185695, 2012 WL 6951315, at *22 (CD. Cal. Dec. 10, 2012)* (where "hardship" was one of defendant's "own making," such hardship "carrie[d] little weight with the Court" in the balance of hardships analysis). Even if the balance of

[8] Irmat asserts in a footnote, without any explanation, that the 2015 Agreement constitutes a per se illegal "group boycott," but Irmat fails to explain who is boycotting what. Pl. Br. at 19 n.7. The word "boycott" does not even appears in its complaint. This argument is made far too summarily to warrant the Court's consideration.

[9] While Irmat dismisses these justifications as pretextual, this contention, at present, lacks evidentiary support.

hardships did tip decidedly in plaintiff's favor, however, the Court would still find that plaintiff had **[**38]** not raised sufficiently serious questions going to the merits to warrant injunctive relief.[10]

[*143] In sum, for the foregoing reasons, the Court, in its December 15, 2015 Order, denied plaintiff's **[**39]** motion for a temporary restraining order and preliminary injunction.

Dated: New York, NY

January 12, 2016

/s/ Jeld S. Rakoff

JELD S. RAKOFF, U.S.D.J.

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[10] A court assessing a motion for a preliminary injunction must "ensure that the 'public interest would not be disserved' by the issuance" of such an injunction. *Salinger, 607 F.3d at 80*. Here, plaintiff has failed to show that an injunction is warranted and, as such, the Court need not address the public interest. However, to the extent the issue has not been entirely obviated, the Court finds the public interest to be a neutral factor. On the one hand, termination will result in the disruption of medical services to many of Irmat's customers. On the other hand, at present, Irmat lacks the accreditations as a mail-order pharmacy that Optum contends it requires to ensure that "pharmacies in its mail pharmacy network have the appropriate controls and processes in place to safely and effectively dispense medications by mail." Tanner Decl. ¶ 7. The public has an interest in uninterrupted *and* safe medical care and, as such, the public interest would not clearly be served or disserved by the issuance of the requested injunction.

In re Pre-filled Tank Antitrust Litig.

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

January 13, 2016, Decided; January 13, 2016, Filed

MDL NO. 2567; Master Case No. 14-02567-MD-W-GAF

Reporter

2016 U.S. Dist. LEXIS 194545 *; 2016 WL 6963059

IN RE: PRE-FILLED PROPANE TANK ANTITRUST LITIGATION ALL ACTIONS

Prior History: *In re Pre-filled Propane Tank Antitrust Litig., 2015 U.S. Dist. LEXIS 179684 (W.D. Mo., Oct. 2, 2015)*

Core Terms

Plaintiffs', propane, first amended complaint, tanks, injury in fact, injunction, pleadings, fill, prices, antitrust, consent order, tolling, injunctive relief, statute of limitations, Purchaser, supra-competitive, redressability, quotation, pound, doctrine of laches, co-packing, interlocutory appeal, decrease, laches, Amend, causal connection, entry of judgment, final judgment, lack standing, limitations

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Judges: GARY A. FENNER, UNITED STATES DISTRICT JUDGE.

Opinion by: GARY A. FENNER

Opinion

ORDER

Presently before the Court is Defendants Ferrellgas Partners, L.P.; Ferrellgas, L.P.; AmeriGas Partners, LP's (collectively "Defendants") Motion for Judgment on the Pleadings. (Doc. # 210). Plaintiffs Mario Ortiz, Steven Tseffos, Stephen Morrison, Troy Winters, Thomas Gane, Mark I. Stevens, Richard Paradowski, John Gilbert, Gary Snow, William S. Vincent, Jr., Nicholas Pulli, Gary Sage, Kevin Dougherty, Josh Bartholow, and Allan Disbrow (collectively "Plaintiffs") oppose. (Doc. # 222). Also before the Court is Defendants' Motion to Strike portions of Plaintiffs' First Amended Complaint. (Doc. # 204). Plaintiffs oppose. (Doc. # 221). Finally before the Court is Plaintiffs' Motion for Entry of Judgment. (Doc. # 201). Defendants oppose. (Doc. # 218). For the reasons stated below, Defendants' Motion for Judgment on the Pleadings is GRANTED in part and DENIED in part, Defendants' Motion to Strike is GRANTED, and Plaintiffs' Motion for Entry of Judgment is DENIED. **[*4]**

DISCUSSION

I. FACTS

Defendants are the leading distributors of pre-filled propane exchange tanks. (Plaintiffs' First Amended Complaint ("Plaintiffs' FAC") ¶ 1). Beginning in 2006, Defendants entered into co-packing agreements wherein each company agreed to refurbish and refill propane tanks for the other company. (*Id.* ¶ 40). Before 2008, the tanks were filled with seventeen pounds of propane. (*Id.* ¶ 4). However, propane costs spiked in 2008. (*Id.*). In the summer of 2008, Defendants reduced the fill level of the tanks from seventeen to fifteen pounds of propane per tank while maintaining the same price per tank. (*Id.* ¶¶ 4-6).

In 2009, a group of plaintiffs filed suit against Ferrellgas and AmeriGas alleging that they had acted in concert to reduce the amount of propane contained within the tanks and thus, artificially increase the price of the tanks[1]. (Case No. 09-02086-MD-W-GAF, Amended Complaint ¶¶ 1-4). The 2009 plaintiffs alleged that the actions of Ferrellgas and AmeriGas were in violation of *Section 1* of the Sherman Act and state antitrust and consumer protection laws. (*Id.*). On December 8, 2009, the plaintiffs moved for preliminary approval of settlement agreements. (*Id.*, Doc. # 37). The settlement **[*5]** agreements were granted final approval on October 6, 2010. (*Id.*, Doc. # 166).

On March 27, 2014, the Federal Trade Commission (the "FTC") issued a complaint against Defendants (the "FTC Action") alleging that Defendants had restrained price competition because of their 2008 decision to decrease the fill level of the propane tanks. (Plaintiffs' FAC ¶¶ 167-68). The FTC Action resulted in Consent Orders wherein Defendants agreed to cease and desist from any conspiracy between them to raise, fix, stabilize, or maintain prices of the tanks through any means. (*See* Docs. ## 211-1, 211-2, FTC Consent Orders, p. 4). Defendants also agreed

[1] This 2009 action will be referred to as *In re Propane I*.

to refrain from communicating competitively sensitive information to any competitor with some limited exceptions for propane refilling agreements. (*Id.*).

Shortly thereafter, Plaintiffs filed the present suit. (*See* Docket Sheet). Plaintiffs allege that the 2008 reduction in fill level was due to improper collusion between Defendants who conspired to force sellers of propane to accept the fill reduction and agreed not to compete with one another. (Plaintiffs' FAC, ¶¶ 4-9). Plaintiffs allege that this was a violation of *Section 1* of the Sherman Act and state **[*6]** ***antitrust law***. (*See id.*).

On July 2, 2015, this Court granted in part Defendants' Motion to Dismiss Plaintiffs' Complaint. (Doc. # 162). This Court determined that Plaintiffs' antitrust claims were barred by the four-year federal antitrust statute of limitations. (*Id.* at 22). However, this Court determined that Plaintiffs' injunctive relief claim, as a claim in equity, was not governed by the statute of limitations and was instead governed by the doctrine of laches. (*Id.* at 23). This Court concluded that Defendants failed to meet their burden under the doctrine of laches because they failed to establish the existence of prejudice. (*Id.* at 24). In October of 2015, Plaintiffs were given leave to amend their Complaint to add state law antitrust claims in three states: Maine, Vermont, and Wisconsin. (Doc. # 197, p. 12). This amendment was allowed because those states have a six-year statute of limitations for antitrust actions. (*Id.* at 7-8). Thus, the only causes of action remaining in Plaintiffs' First Amended Complaint are a claim under *Section 1* of the Sherman Act for injunctive relief (Count I) and claims that Defendants' actions violated Maine, Vermont, and Wisconsin's antitrust laws (Count II).

II. LEGAL STANDARD

Under *Federal Rule of Civil Procedure 12*, "a party **[*7]** may move for judgment on the pleadings" after the pleadings are closed. *Fed. R. Civ. P. 12(c)*. Judgment on the pleadings is only appropriate "'where no material issue of fact remains to be resolved and the movant is entitled to judgment as a matter of law.'" *Poehl v. Countrywide Home Loans, Inc., 528 F.3d 1093, 1096 (8th Cir. 2008)* (quoting *Faibisch v. Univ. of Minn., 304 F.3d 797, 803 (8th Cir. 2002))*. In deciding a motion for judgment on the pleadings, a court may consider materials that are necessarily embraced by the pleadings or are part of the public record that do not contradict the complaint. *Porous Media Corp. v. Pall Corp., 186 F.3d 1077, 1079 (8th Cir. 1999)*. A court views "all facts pleaded by the nonmoving party as true and grant[s] all reasonable inferences in favor of that party." *Poehl, 528 F.3d at 1096* (citation omitted). Generally, a *Rule 12(c)* motion for judgment on the pleadings is reviewed under the same standard as a *Rule 12(b)(6)* motion to dismiss. *Ginsburg v. InBev NV/SA, 623 F.3d 1229, 1233 n.3 (8th Cir. 2010)*.

III. ANALYSIS

A. Count I

1. Standing

In Count I of Plaintiffs' First Amended Complaint, Plaintiffs seek injunctive relief for Defendants' alleged violation of *Section 1* of the Sherman Act. (Plaintiffs' FAC, Count I). Defendants first argue that Count I should be denied because Plaintiffs lack standing to bring this claim. (Doc. # 211, p. 5). The requirement of standing is "an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)*. It contains three elements. *Id.* ***[*8]*** "First, the plaintiff must have suffered an injury in fact . . . . Second, there must be a causal connection between the injury and the conduct complained of . . . . Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id. at 560-61* (internal citations and quotation marks omitted). Defendants argue that Plaintiffs lack both the first and third elements of standing. (Doc. # 211, p. 5).

i. Element One — Injury in Fact

An injury in fact is "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan, 504 U.S. at 560* (internal citations and quotations omitted). Defendants allege that no injury in fact is present in this case because Plaintiffs have alleged no ongoing or future injury, only the 2008 decision to reduce the fill level of the tanks. (Doc. # 211, p. 6). Plaintiffs contend that the continued sale of the propane tanks filled to only fifteen pounds without a corresponding decrease in price constitutes an ongoing injury in fact. (Doc. # 222, p. 3). This Court has already determined that such sales of the tanks at a stable but allegedly supra-competitive price **[*9]** do not constitute an overt act for the purposes of the continuing violations tolling theory. (*See* Doc. # 162, p. 11). However, the issue of whether such a sale constitutes an injury in fact for the purposes of standing has yet to be decided. *See Moseke v. Miller & Smith, Inc., 202 F. Supp. 2d 492, 494 (E.D. Va. 2002)* (indicating such issues are separate questions and finding an injury in fact present despite the lack of an overt act for the purposes of the continuing violation theory).

"Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief." *O'Shea v. Littleton, 414 U.S. 488, 495, 94 S. Ct. 669, 38 L. Ed. 2d 674 (1974)*. Thus, Defendants' allegedly anti-competitive actions in 2008 are alone insufficient to establish a present injury in fact, entitling Plaintiffs to injunctive relief. However, such past exposure is sufficient if it is accompanied by "continuing, present adverse effects." *Id. at 496*. Paying a supra-competitive price as a result of past anti-competitive behavior is a continuing effect, sufficient to establish an injury in fact. *See Campos v. Ticketmaster Corp., 140 F.3d 1166, 1172 (8th Cir. 1998)* ("In this case, the pleadings establish anti-trust standing to seek injunctive relief. All of the plaintiffs claim to have purchased tickets from Ticketmaster and claim to have paid the monopolistic service fees. The payment of those fees **[*10]** establishes standing to pursue a claim for injunctive relief."); *In re Suboxone (Buprenorphine Hydrochloride & Naloxone) Antitrust Litig., 64 F. Supp. 3d 665, 711 (E.D. Pa. 2014)* ("continuing to pay artificially inflated prices" constitutes an ongoing injury).

Defendants argue that *In re Nifedipine Antitrust Litigation, 335 F. Supp. 2d 6 (D.D.C. 2004)*, comes to a contrary conclusion. (Doc. # 211, p. 7). In *In re Nifedipine*, the court determined that "lingering monetary injury, without any ongoing threat of recurrent violations, is not sufficient to confer standing to seek an injunction." *335 F. Supp. at 19*. However, in that case the allegedly inflated prices had already decreased, competition had arisen on the market, and the plaintiffs failed to even allege that the prices were currently inflated. *Id. at 18-19*. The court ultimately determined standing was not present "based on the absence of facts alleged in the [c]omplaints and the speculative nature of the plaintiffs' remaining arguments regarding present and future damages." *Id. at 19*. Thus, the issue was not whether sales at supra-competitive prices were injuries in fact, but whether a supra-competitive price had been sufficiently alleged.

Accordingly, the question becomes whether Plaintiffs sufficiently alleged the existence of a supra-competitive price. Defendants cite to *In re New Motor Vehicles Canadian Exp. Antitrust Litig., 522 F.3d 6 (1st Cir. 2008)* in support of their argument that Plaintiffs failed to sufficiently plead **[*11]** an injury in fact. (Doc. # 211, p. 8). In *In re New Motor Vehicles*, the plaintiffs alleged that between 2001 and 2003 the exchange rate between the United States and Canada created gray market opportunities to sell lower-priced Canadian cars in the United States. *522 F.3d at 9*. The plaintiffs alleged that in response to these opportunities, the defendants, automobile manufacturers, engaged in anti-competitive behavior to prevent Canadian cars from entering the United States. *Id. at 10*. The plaintiffs sued for an injunction. *See, generally id.* The First Circuit determined that standing was lacking because plaintiffs failed to establish the existence of an injury in fact. *Id. at 14*. The court so decided because the circumstances that created these opportunities — namely the favorable exchange rate — no longer existed and it would be purely speculation to determine that it would one day return. *Id. at 14-15*. The court determined that it would also be speculative to determine whether a potential plaintiff would have bought a Canadian car, had favorable circumstances existed. *Id. at 15*. The First Circuit ultimately decided that standing was lacking because it "was contingent on several events which may or may not happen." *Id.* (quotation omitted).

This case **[*12]** is unlike both *In re Nifedipine* and *In re New Motor Vehicles*. Unlike in *In re Nifedipine*, Plaintiffs' First Amended Complaint makes no mention of a decrease in price or an increase in competition since Defendants' allegedly anti-competitive actions in 2008. (Plaintiffs' FAC). Additionally, Plaintiffs allege that the price per pound of propane has stayed inflated since 2008. (*Id.* at ¶¶ 100, 180). Unlike in *In re New Motor Vehicles*, Plaintiffs' injury is not contingent on several events which may or may not happen. Instead, Plaintiffs allege that they are injured with every sale of propane because it has remained at an inflated price. (*Id.*). Further, in motions for judgment on the pleadings, a court views "all facts pleaded by the nonmoving party as true and grant[s] all reasonable inferences in favor of that party." *Poehl, 528 F.3d at 1096* (citation omitted). While a court need not "accept as true a legal conclusion couched as a factual allegation," *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (citation omitted), the allegation that Defendants colluded to raise prices and the allegation that the prices have remained inflated are not legal conclusions but factual assertions. Accordingly, this Court appropriately accepts them as true and finds that Plaintiffs **[*13]** have alleged a sufficient injury in fact.

Defendants allege that even if the payment of a stable but allegedly supra-competitive price is an injury in fact in general, it is not an injury in fact in this case because of the FTC Consent Orders. (Doc. # 211, p. 8). A valid injury in fact for the purposes of Article III may be one that a plaintiff "has sustained or is immediately in danger of sustaining." *City of Los Angeles v. Lyons, 461 U.S. 95, 102, 103 S. Ct. 1660, 75 L. Ed. 2d 675 (1983)* (quotation omitted). An injunction may be sought to prevent a future injury which a plaintiff is immediately in danger of sustaining when "the threat of injury is real and immediate, and not conjectural or hypothetical." *In re Nifedipine, 335 F. Supp. 2d at 16* (quotation marks and citation omitted). Some courts have determined that the presence of an FTC consent order that mirrors the requested injunction, without an established need for cumulative relief, defeats a claim of future injury. *See id at 16-19*; *In re Ductile Iron Pipe Fittings (DIPF) Indirect Purchaser Antitrust Litig., No. 12-169, 2013 U.S. Dist. LEXIS 142466, 2013 WL 5503308, at *7 (D.N.J. Oct. 2, 2013)*; *In re Plavix Indirect Purchaser Antitrust Litig., No. 1:06-CV-226, 2011 U.S. Dist. LEXIS 8940, 2011 WL 335034, at *3-4 (S.D. Ohio Jan. 31, 2011)*. However, in this case Plaintiffs' injury in fact is not based on a claimed future injury. Instead, Plaintiffs have established the existence of a present injury in fact — the price per pound of propane. Thus, any discussion regarding whether the FTC Consent Orders **[*14]** prevent a claim of future injury is inapposite.

ii. Element Three — Redressability

Redressability requires that it "be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan, 504 U.S. at 561* (internal quotation marks and citation omitted). Defendants argue that redressability is lacking in this case because the challenged conduct is already precluded by the FTC Consent Orders. "[T]he mere existence of [a consent order] does not preclude private injunctive relief. *See* *Sam Fox Publishing Co. v. United States, 366 U.S. 683, 689, 81 S. Ct. 1309, 6 L. Ed. 2d 604 (1961)*. Indeed, in antitrust cases, private and governmental claims for injunctive relief were designed to be cumulative, not mutually exclusive." *In re Nifedipine, 335 F. Supp. 2d at 17* (citations omitted); *Sam Fox Publishing Co., 366 U.S. at 689*. "However, the party seeking the injunction nonetheless has the burden of establishing that such cumulative relief is needed." *Id.* "[A] number of courts have found no risk of irreparable harm when a plaintiff seeks an injunction that mirrors a consent decree absent some showing that the consent decree is insufficient." *In re Ductile Iron Pipe Fittings, 2013 U.S. Dist. LEXIS 142466, 2013 WL 5503308, at *7*. Thus the relevant question is whether the requested injunctive relief mirrors the FTC Consent Orders.

Plaintiffs request injunctive relief requiring Defendants to: (1) refrain from allocating market share; (2) void **[*15]** any existing co-packing agreements, refrain from making new co-packing agreements, and refrain from sharing pricing information or information regarding tank fill levels; and (3) increase the fill levels of the tanks to seventeen pounds of propane. (Plaintiffs' FAC ¶ 187). Defendants allege these requests are adequately covered by the FTC Consent Orders' prohibition from raising, fixing, stabilizing, or maintaining prices of the tanks through any means.

Plaintiffs first allege that a prohibition on market share allocation is necessary because market share allocation agreements are *per se* improper and can be independent from price fixing agreements. (Doc. # 222, pp. 9-10). Plaintiffs are correct that market allocation agreements are *per se* improper. *United States v. Topco Associates,* Inc., 405 U.S. 596, 608, 92 S. Ct. 1126, 31 L. Ed. 2d 515 (1972). However, in this case, Plaintiffs do not allege the existence of a market share allocation agreement divorced from any allegations of price fixing. Instead, Plaintiffs' claim that Defendants allocated markets in furtherance of their price fixing agreement. (Plaintiffs' FAC ¶¶ 94-95). To meet the requirements of standing, it is not enough that some potential injury may be redressed by a favorable decision. Instead, the claimed injury in **[*16]** fact in the case at hand must be redressable by the requested relief. *See* Vt. Agency of Natural Res. v. U.S. ex rel. Stevens, 529 U.S. 765, 771 (2000). In this case, market allocation was allegedly being used as a means of raising and fixing prices. Thus, the FTC Consent Orders' prohibitions from raising, fixing, stabilizing, or maintaining prices of the tanks through any means are sufficient to cover Plaintiffs' first requested injunction.

In Plaintiffs' second requested injunction, Plaintiffs seek an injunction preventing any co-packing agreements between Defendants. (Plaintiffs' FAC, ¶ 187). Plaintiffs contend such agreements give Defendants "ample opportunities for conspiratorial communications" as well as facilitate the exchange of pricing information. (*Id.*, ¶¶ 40, 42). However, the FTC Consent Orders prohibit the communication of competitively sensitive information. (*See* Docs. ## 211-1, 211-2, FTC Consent Orders, p. 4). Plaintiffs are correct that Defendants are allowed to exchange competitively sensitive information as necessary to serve their co-packing agreements; however, they are prohibited from communicating any information regarding pricing, pricing strategies, fill level changes, fill level strategies, revenues, or business and strategic plans. **[*17]** (*Id.*). Thus, Plaintiffs' stated concern, the exchange of pricing information, is already expressly prohibited by the FTC Consent Orders.

Additionally, as explained above, Plaintiffs' claimed injury in fact is the allegedly supra-competitive prices. Thus, Plaintiffs allege that the co-packing agreements were used as a means of raising and fixing prices. In addition to the direct prohibition of communication of competitively sensitive information, Defendants are also prohibited from raising, fixing, stabilizing, or maintaining prices of the tanks through any means. (*Id.*). Thus, the FTC Consent Orders are sufficient to cover Plaintiffs' second requested injunction.

As to their third requested injunction, Plaintiffs correctly argue that the FTC Consent Orders do not force Defendants to return to pre-conspiracy fill levels. (Doc. # 222, p. 12). However, the price per pound of propane is dependent on two variables: the price of the tank and the amount of propane the tank contains. Plaintiffs and Defendants both agree that mandating an increase in the amount of propane in the tanks without a mandate regarding price would not decrease the price per pound of propane tanks. (Doc. # 227, p. 10; **[*18]** Doc. # 222, p. 12). This is problematic because Plaintiffs' injury in fact is the payment of a supra-competitive price per pound of propane. Thus, increasing the amount of propane in the tanks does not create a "substantial likelihood that the requested relief will remedy the alleged injury in fact." Vt. Agency of Natural Res., 529 U.S. at 771 (internal quotation marks omitted). Accordingly, Plaintiffs' third requested injunction does not meet the requirement of redressability.

Further, this Court has concerns about the wisdom of a court setting product fill levels for private companies. As the Supreme Court has long recognized, "[t]he establishment of a rate is the making of a rule for the future, and therefore is an act legislative, not judicial." Prentis v. Atl. Coast Line Co., 211 U.S. 210, 226, 29 S. Ct. 67, 53 L. Ed. 150 (1908). Such an act is better handled by the legislature because the legislature "looks to the future and changes existing conditions by making [ ] new rule[s], to be applied thereafter to all or some part of those subject to its power" while courts "investigate[ ], declare[ ], and enforce[ ] liabilities as they stand on present or past facts and under laws supposed already to exist." *Id.* While the requested injunction would not establish a rate, the rationale for the Supreme Court's prohibition **[*19]** on setting a rate is equally applicable here. It is a court's job to review and determine whether conduct conforms to the law. Setting a required fill level for the tanks goes beyond this goal and makes a new rule which Defendants must follow in the future. Doing so requires this Court to anticipate future market conditions and would prevent Defendants from making business decisions in response to ever changing markets. Given that free enterprise is a fundamental national value, *see* F.T.C. v. Phoebe Putney Health Sys., Inc., 568 U.S. 216, 225, 133 S. Ct. 1003, 1010 (2013), an injunction that would prevent a business from making legal, non-prohibited decisions, such as how much propane to put in its tanks, should be disfavored. This is especially true where, as here, such an injunction fails to remedy the alleged harm. Thus, all three of Plaintiffs' requested injunctions fail for lack of redressability, and Plaintiffs lack standing to proceed under Count I.

2. Laches

Even if Plaintiffs had standing to proceed, the doctrine of laches would act as an independent bar to Count I. "The doctrine of laches is an equitable defense . . . . For the application of the doctrine of laches to bar a lawsuit, the plaintiff must be guilty of unreasonable and inexcusable delay that has resulted **[*20]** in prejudice to the defendant." *Goodman v. McDonnell Douglas Corp., 606 F.2d 800, 804 (8th Cir. 1979)*. "Laches is considered an affirmative defense, and generally the burden of persuasion on an affirmative defense rests with the defendant." *Id. at 806* (internal citation omitted). Previously, the Court ruled Defendants had failed to meet their burden to establish the existence of laches as an affirmative defense. (Doc. # 162, p. 24).

In determining whether to bar an action based on the doctrine of laches, a court should consider whether an analogous statute of limitations has run, "the length of the delay, the reasons therefor, how the delay affected the defendant, and the overall fairness of permitting the assertion of the claim." *Goodman, 606 F.2d at 804, 806*. As this Court previously determined, the analogous statute of limitations had run, which weighs in favor of applying the doctrine. (Doc. # 162, p. 23). While, because of tolling theories, Plaintiffs only missed the limitations period by three months (*see* Doc. # 162), in total Plaintiffs delayed over six years between the challenged conduct and the filing of the present suit. (*See* Plaintiffs' FAC). This delay is particularly troubling considering the same attorneys involved in this case timely filed *In re Propane I*, which challenged **[*21]** the same conduct, in 2009. Further, Plaintiffs admit that they have provided no reason for their delay. (Doc. # 222, p. 14 n. 17). Thus, Plaintiffs' delay also weighs in favor of applying the doctrine.

Previously, despite these circumstances, this Court determined that Defendants failed to meet their burden because they failed to sufficiently allege that they had been prejudiced as a result of Plaintiffs' delay. (*See* Doc. # 162). "Not all prejudice to a defendant will be recognized as supporting a defense of laches." *Goodman, 606 F.2d at 808 n.17*. "There are two kinds of prejudice which might support a defense of laches: (1) the delay has resulted in the loss of the evidence . . .; or (2) the defendant has changed his position in a way that would not have occurred if the plaintiff had not delayed." *Id.* (quoting *Tobacco Workers Int'l Union Local 317 v. Lorillard Corp., 448 F.2d 949, 958 (4th Cir. 1971))*. Defendants now allege that evidence has been lost because key employees, such as former presidents and vice-presidents, are no longer employed by the companies. (Doc. # 211, p. 15). They further allege that twenty-five employees identified by Plaintiffs as having information relevant to the case are now gone from the company. (*Id.*). Such specifically identified prejudice is the type required to support **[*22]** application of laches.

Additionally, Defendants now argue that they changed their position in a way they would not have had Plaintiffs not delayed in seeking an injunction. (*Id.*). Prejudice for laches purposes exists when the challenged action could have been confronted sooner, is now completely implemented, and would be expensive to change. *See* *Citizens & Landowners Against the Miles City/New Underwood Powerline v. Sec'y, U.S. Dep't of Energy, 683 F.2d 1171, 1177 (8th Cir. 1982)*. In this case, Plaintiffs knew of the decrease in fill level and co-packing agreements much earlier than they filed the present suit. Plaintiffs could have filed the present claim for an injunction in conjunction with *In re Propane I*, but chose not to do so. Currently, the decrease in fill level and co-packing agreements are fully implemented and would be costly to change. (*See* Doc. # 211). Thus, Defendants have sufficiently established the existence of prejudice, and the doctrine of laches is also an independent bar to Count I.[2]

B. Count II

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[2] Plaintiffs' main argument against application of the doctrine of laches is that laches should not be applied at this stage of the proceedings. (Doc. # 222, p. 14). However, the doctrine of laches has often been applied at the pleadings stage. *See* *Goodman, 606 F.2d at 809*; *Wolfchild v. Redwood Cty., 91 F. Supp. 3d 1093, 1105 (D. Minn. 2015)*; *Little Rock Cardiology Clinic, P.A. v. Baptist Health, 573 F. Supp. 2d 1125, 1152 (E.D. Ark. 2008)* *aff'd sub nom.* *Little Rock Cardiology Clinic PA v. Baptist Health, 591 F.3d 591 (8th Cir. 2009)*.

1. Statute of Limitations

In Count II of their First Amended Complaint, Plaintiffs argue that Defendants' actions violated the antitrust laws of three states: Maine, Vermont, and Wisconsin. (Plaintiffs' FAC, Count II). Plaintiffs were previously given leave to add antitrust claims under the **[*23]** laws of these states because they have a six-year statute of limitations period for antitrust violations. (Doc. # 197, pp. 6-7). The challenged conduct occurred by August 1, 2008 (*See* Plaintiffs' FAC ¶ 70), thus, under a six-year statute of limitations period, the claim must have been filed by August 1, 2014. The first indirect purchaser complaint was filed on May 30, 2014 by Plaintiffs Mario Ortiz, Stephen Morrison, and Steven Tseffos (collectively the "Ortiz Plaintiffs").[3] Now that the First Amended Complaint has been filed, Defendants raise additional timeliness challenges to Count II.

i. Standing

Defendants first allege that the filing of the Ortiz Complaint was insufficient for statute of limitations purposes because none of the Ortiz Plaintiffs had standing to bring claims under the laws of Maine, Vermont, or Wisconsin. (Doc. # 211, p. 18). Thus, Defendants contend that the statute of limitations period was not tolled until Plaintiffs filed their First Amended Complaint, which included residents of Maine, Vermont, and Wisconsin. (*Id.*). The First Amended Complaint was not filed until October 16, 2015, more than six years after the conduct occurred. Thus, if Defendants are correct, **[*24]** Count II is not timely absent a tolling theory.

"[N]amed plaintiffs lack standing to assert claims under the laws of the states in which they do not reside or in which they suffered no injury." *In re Packaged Ice Antitrust Litig., 779 F. Supp. 2d 642, 657 (E.D. Mich. 2011)*; *see also* *Anthony v. Stodola, 329 F. App'x 693, 694 (8th Cir. 2009)*; *McGuire v. BMW of N. Am., LLC, No. CIV.A. 13-7356 JLL, 2014 U.S. Dist. LEXIS 77009, 2014 WL 2566132, at *6 (D.N.J. June 6, 2014)*; *In re Refrigerant Compressors Antitrust Litig., No. 2:09-MD-02042, 2012 U.S. Dist. LEXIS 98827, 2012 WL 2917365, at *7 (E.D. Mich. July 17, 2012)*; *In re Wellbutrin XL Antitrust Litig., 260 F.R.D. 143, 155 (E.D. Pa. 2009)*. Neither the Ortiz Plaintiffs nor any of the plaintiffs named in the Consolidated Class Action Complaint were residents of or made purchases in Maine, Vermont, or Wisconsin.

Plaintiffs argue that despite this fact, Maine, Vermont, and Wisconsin's antitrust statutes do not contain an express limitation as to residency. Plaintiffs are correct that the states' statutes contain no such express limitations. *See* *Maine Rev. Stat. Ann. 10 §§ 1101 et seq.*; *Vt. Stat. Ann. 9 §§ 2451 et seq.*; *Wis. Stat. Ann. §§ 133.01 et seq.* However, none of these states expressly permit antitrust actions based on commerce in other states. *Id.* Where the statutes fail to authorize "antitrust actions based on commerce in other states" and the named plaintiffs suffered no injury nor resided in the states, antitrust standing is lacking. *In re Terazosin Hydrochloride Antitrust Litig., 160 F. Supp. 2d 1365, 1371 (S.D. Fla. 2001)*. Specifically, *In re Terazosin Hydrochloride* found that Maine's antitrust **[*25]** laws did not provide a cause of action for nonresidents who were not injured within the state. *Id. In re Packaged Ice* found the same for the antitrust laws in Maine, Vermont, and Wisconsin. *779 F. Supp. 2d at 657*. Thus, the Ortiz Plaintiffs lacked standing to assert antitrust violations in Maine, Vermont, or Wisconsin.

ii. American Pipe

Defendants argue that this lack of standing means that the statute of limitations was not tolled until the First Amended Complaint was filed on October 16, 2015, which was past the deadline. Even if the filing of the Ortiz Complaint failed to toll the statute of limitations, Count II is still timely under *American Pipe*. The Supreme Court in *American Pipe* held that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." *414 U.S. at 504*.

[3] This action will be known as the Ortiz Complaint

In its previous Order, this Court extensively discussed the availability of *American Pipe* tolling as a result of *In re Propane I*. (*See* Doc. # 162). This Court concluded that *In re Propane I* triggered *American Pipe* tolling until December 8, 2009. (*Id.*). Thus, Plaintiffs had six years from that date to file their present complaint. Even **[*26]** assuming the filing of the Ortiz Complaint was insufficient, Plaintiffs filed their First Amended Complaint on October 16, 2015, less than six years after the tolling from *In re Propane I* concluded.

Defendants only argument against application of *American Pipe* tolling as a result of *In re Propane I* is that doing so would be prudentially unwise. (Doc. # 226, p. 3, 22). As the Supreme Court has warned, it is important to make certain that *American Pipe* tolling is not abused. *Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 355, 103 S. Ct. 2392, 76 L. Ed. 2d 628 (1983)* (Powell, J., concurring). While this Court agrees that *American Pipe* is an expansive doctrine with high potential for abuse, the law on this issue, as discussed previously, is clear. (*See* Doc. # 162). As the law stands today, *In re Propane I* tolled the statute of limitations and makes Count II timely filed.

2. Standing

Defendants also argue that Count II is improper because Plaintiffs lack standing to bring this claim. (Doc. # 211, p. 24). Specifically, Defendants argue that Plaintiffs lack both an injury in fact and a causal connection between the alleged harm and the challenged conduct. (*Id.*). As explained above, sales at supra-competitive prices are injuries in fact, and such sales were sufficiently alleged in the **[*27]** First Amended Complaint. Accordingly, Plaintiffs for Count II meet the first element of standing.

The second element of standing, a causal connection between the injury and the conduct complained of requires the injury to be "'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.'" *Lujan, 504 U.S. at 560* (alterations in original) (quoting *Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 41-42, 96 S. Ct. 1917, 48 L. Ed. 2d 450 (1976))*. "At the pleading stage, general factual allegations . . . may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" *Wieland v. U.S. Dep't of Health & Human Servs., 793 F.3d 949, 954 (8th Cir. 2015)* (alteration in original) (quoting *Lujan, 504 U.S. at 561*). Plaintiffs pled that the supra-competitive prices were the result of Defendants' 2008 collective decision to reduce fill levels. (Plaintiffs' FAC ¶¶ 4-10).

Defendants argue these allegations were insufficient to establish a causal connection because the alleged conduct occurred in 2008, years before any allegations of injury from these Plaintiffs. (Doc. # 211, p. 24). However, although a relevant factor, "passage of time alone does not automatically negate a causal connection." *Karelitz v. Damson Oil Corp., 820 F.2d 529, 532 (1st Cir. 1987)*. This is especially true absent supporting **[*28]** facts. *See id.* Taking the pleadings as true, there are no facts that would indicate the injury is the result of some other party or factor as opposed to the actions of Defendants. Accordingly, at this juncture, a causal connection is present and Plaintiffs possess the necessary standing to proceed.

3. Sufficiency of the Pleadings

Defendants next argue that Count II is insufficiently pled because it does not allege a plausible agreement to raise prices. (Doc. # 211, p. 25). To state an antitrust claim, "an allegation of parallel conduct and a bare assertion of conspiracy will not suffice." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. However, parallel conduct gets a complaint "close to stating a claim." *Id. at 557*. Thus, if Plaintiffs' First Amended Complaint merely asserted that Defendants all lowered the fill level in the propane tanks and then concluded that such action was the result of a conspiracy, the First Amended Complaint would be insufficient. However, that is not the case here. Plaintiffs do allege parallel action, but their First Amended Complaint does not stop there. Instead, the First Amended Complaint alleges facts that support a plausible agreement between the parties. (Plaintiffs' FAC ¶¶ 51-93). Thus, Count II sufficiently **[*29]** states a claim.[4]

Defendants also allege that Plaintiffs failed to sufficiently plead their claim of market allocation. (Doc. # 211, p. 25). A plaintiff must plead facts sufficient to state a claim "that is plausible on its face" and would entitle the party to the relief requested. *Twombly, 550 U.S. at 570*. Legal conclusions will not suffice. *See Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. Plaintiffs point to paragraphs 94-97 of their First Amended Complaint as a sufficient statement of their claim. (Doc. # 222, p. 30). Paragraph 94 states a legal conclusion that Defendants agreed to allocate markets, and thus is unhelpful. Accordingly, only three paragraphs of Plaintiffs' thirty-four page First Amended Complaint speak to market allocation.

While the pleadings on this claim may be lackluster, the Court does not believe that they are legally insufficient at this juncture. Plaintiffs allege how the market was allocated and how the allocation was enforced and monitored. (Plaintiffs' FAC ¶¶ 95-97). Defendants fail to provide any specific law indicating these facts are insufficient or that more facts must be alleged in a market allocation claim. (*See* Doc. # 211). Accordingly, Defendants' argument fails.

C. Defendants' Motion to Strike

In their **[*30]** Motion to Amend, Plaintiffs attached a proposed first amended complaint that added what is now Count II and included Plaintiffs Mario Ortiz, Stephen Morrison, Steven Tseffos, Troy Winters, Thomas Gane, Gary Snow, Nicholas Pulli, Josh Bartholow, and Allan Disbrow (collectively the "Originally Included Plaintiffs"). (Doc. # 173-1). Their Motion was granted. (Doc. # 197). When Plaintiffs filed their First Amended Complaint, six additional plaintiffs were added that had not been mentioned previously: Mark I. Stevens, Richard Paradowski, John Gilbert, William S. Vincent, Jr., Gary Sage, and Kevin Dougherty (collectively the "Six New Plaintiffs"). (Plaintiffs' FAC).

The addition of the Six New Plaintiffs is notable because of *In re Propane I*. As this Court extensively discussed in its Dismissal Order, the settlement agreements from *In re Propane I* contained release provisions which bind all individuals who purchased a tank from AmeriGas before November 30, 2009 and from Ferrellgas before October 13, 2011. (Doc. # 162, p. 5). The Originally Included Plaintiffs did not contain an allegation of when their first propane purchase was; however, the Six New Plaintiffs all allege they first purchased **[*31]** propane after 2011. (*Compare* Doc. # 173-1 *with* Plaintiffs' FAC ¶¶ 104-131). This indicates the Originally Included Plaintiffs may have been included in the release provision of *In re Propane I*, while the Six New Plaintiffs were not.[5] Defendants ask this Court to strike the Six New Plaintiffs from Plaintiffs' First Amended Complaint. (Doc. # 205, p. 1).

Under *Federal Rule of Civil Procedure 12(f)*, a court may strike a matter from a pleading that is redundant, immaterial, impertinent, or scandalous. District courts enjoy great discretion when considering a motion to strike. *Stanbury Law Firm, P.A. v. Internal Revenue Serv., 221 F.3d 1059, 1063 (8th Cir. 2000)*. "'Filing an amendment to a complaint without seeking leave of court or written consent of the parties is a nullity.'" *Morgan Distrib. Co. v. Unidynamic Corp., 868 F.2d 992, 995 (8th Cir. 1989)* (quoting *Friedman v. Village of Skokie, 763 F.2d 236, 239 (7th Cir. 1985))*; *see also Fed. Beef Processors, Inc. v. CBS Inc., 858 F. Supp. 125, 126 (D.S.D. 1994)* ("a party must seek leave of the court in order to amend"). When a complaint is amended without first seeking leave from the court, it is appropriate to strike that amendment because "to hold otherwise would be to essentially ignore *Fed. R. Civ. P. 15(a)* and the requirement that a plaintiff seek leave before amending its complaint." *U.F.C.W. Local 56*

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[4] Defendants also argue that Plaintiffs' First Amended Complaint is insufficient because it fails to allege facts that tend to exclude the existence of independent action. (Doc. # 211, p. 25). However, this is a requirement at the summary judgment, not the motion to dismiss stage. *See Twombly, 550 U.S. 544 at 554, 127 S. Ct. 1955, 167 L. Ed. 2d 929*; *see also Erie Cty., Ohio v. Morton Salt, Inc., 702 F.3d 860, 869 (6th Cir. 2012)*.

[5] As discussed in the Order of Dismissal, at this stage, this Court must accept the factual allegations as true and may not consider outside evidence. (Doc. # 162, p. 5). Thus, at this juncture, the Court is not capable of deciding whether any Plaintiffs were included in the release provisions of *In re Propane I*.

Health & Welfare Fund v. J.D.'s Mkt., 240 F.R.D. 149, 154 (D.N.J. 2007); *see also* Strid v. Square D Co., Inc., No. 05-4371-CV-C-NKL, 2006 U.S. Dist. LEXIS 27872, 2006 WL 1194810, at *1 (W.D. Mo. Apr. 28, 2006).

In this case, Plaintiffs failed to include the Six New Plaintiffs into their proposed first amended complaint. (*See* Doc. **[*32]** # 173-1). Because they were not included in Plaintiffs' request to amend, this Court did not grant leave for Plaintiffs to add those parties. Accordingly, the inclusion of those parties was improper and it is appropriate to strike them from the First Amended Complaint.

D. Plaintiffs' Motion for Entry of Judgment

Plaintiffs move for entry of judgment pursuant to Federal Rule of Civil Procedure 54(b). Under Rule 54(b), "[w]hen an action presents more than one claim for relief . . ., the court may direct entry of a final judgment as to one or more . . . claims . . . only if the court expressly determines that there is no just reason for delay." "[A]ppeals under Rule 54(b) are generally disfavored." Clark v. Baka, 593 F.3d 712, 714 (8th Cir. 2010) (quotation omitted). "[I]t is only the special case that warrants an immediate appeal from a partial resolution of the lawsuit." Interstate Power Co. v. Kansas City Power & Light Co., 992 F.2d 804, 807 (8th Cir. 1993) (quotation omitted). The Eighth Circuit stated it will not assume jurisdiction under Rule 54(b) "unless there is some danger of hardship or injustice which an immediate appeal would alleviate." Taco John's of Huron, Inc. v. Bix Produce Co., LLC, 569 F.3d 401, 402 (8th Cir. 2009).

In its July 2, 2015 Order, this Court granted Defendants' Motion to Dismiss all of the Direct Purchaser Plaintiffs' claims as well as all of Plaintiffs' claims, except for its injunctive relief claim, on the basis of the statute of limitations. **[*33]** (*See* Doc. # 162). Following that Order, this Court, pursuant to the Supreme Court's opinion in Gelboim v. Bank of Am. Corp., U.S. , 135 S. Ct. 897, 190 L. Ed. 2d 789 (2015), entered final judgment against the Direct Purchaser Plaintiffs. (Doc. # 165). The Direct Purchaser Plaintiffs subsequently appealed the Order of Dismissal to the Eighth Circuit; that appeal is currently pending. (Doc. # 167). Plaintiffs argue final judgment should be entered on their dismissed claims so that they may appeal the Dismissal Order along with the Direct Purchaser Plaintiffs. (Doc. # 202). Plaintiffs also seek a final judgment on behalf of the claims they sought to add in their Motion to Amend, but were denied. (*Id.*).

For a Rule 54(b) Motion to be granted, there must be both a final judgment and no just reason for delay of appeal. Curtiss-Wright Corp. v. Gen. Elec. Co., 446 U.S. 1, 7-8, 100 S. Ct. 1460, 64 L. Ed. 2d 1 (1980). In this case, just reason to delay exists. Avoidance of piecemeal litigation and preservation of judicial economy are just reasons for delay. *See* Clark, 593 F.3d at 715. Plaintiffs argue that entering final judgment preserves judicial economy because it will allow the Eighth Circuit to consider the statute of limitations issues along with the Direct Purchaser Plaintiffs. However, the Direct Purchaser Plaintiffs appealed five and a half months ago. (Doc. # 167). Much of the briefing **[*34]** has already been completed. Thus, even if the present Motion was granted, Plaintiffs' appeal would be on a different timeline with separate briefing from the Direct Purchaser Plaintiffs. Granting the present Motion could thus result in the Eighth Circuit hearing this case three times if the appeal were not consolidated with the Direct Purchaser Plaintiffs' appeal, and if another appeal is made once the remaining issues in this case are resolved, which this Court believes is likely.

Accordingly, the question is whether judicial economy is best served by the Eighth Circuit hearing all of the issues surrounding Plaintiffs' claims together or by potentially hearing some of the statute of limitations issues together, and then separately hearing any remaining issues on Plaintiffs' claims. While the Order of Dismissal dismissed both Plaintiffs' and Direct Purchaser Plaintiffs' claims on statutes of limitations grounds, different analysis applied to each group of plaintiffs. (*See* Doc. # 162). Further, the facts surrounding each group of plaintiffs are at least partially individualized. Additionally, even in this Order, new statute of limitations issues were raised regarding Plaintiffs' claims, **[*35]** thus precluding consideration of all statute of limitations issues at one time. Thus, this Court believes that it is preferable to avoid piecemeal litigation of Plaintiffs' claims and instead hear any challenges Plaintiffs may have together. Further, Plaintiffs are in no danger of hardship or injustice. Plaintiffs will have their opportunity to appeal their claims' dismissal. Accordingly, entry of judgment is inappropriate in this case.

Plaintiffs also move for certification of an interlocutory appeal. (Doc. # 202, p. 6). An interlocutory appeal should be certified when a district court determines that an order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." *28 U.S.C. § 1292(b)*. Such motions "must be granted sparingly, and the movant bears the heavy burden of demonstrating that the case is an exceptional one in which immediate appeal is warranted." *White v. Nix, 43 F.3d 374, 376 (8th Cir. 1994)*. Plaintiffs seek an interlocutory appeal on both this Court's Dismissal Order and its denial of their Motion to Amend. (Doc. # 202, p. 6).

As an initial matter, Plaintiffs did not identify **[*36]** a controlling question of law until they filed their reply brief. (*See* Docs. ## 202, 225). In their initial brief, Plaintiffs simply allege that an interlocutory appeal should be granted based on the statute of limitations issues in the Court's previous Orders. (Doc. # 202, pp. 6-7). Failure to state a controlling question of law is grounds for denial of the Motion. *See* *Day v. Minnesota, No. 05-2675 MJD/RLE, 2006 U.S. Dist. LEXIS 67093, 2006 WL 2670142, at *1 (D. Minn. Sept. 18, 2006)*.

Additionally, this Court does not agree that there are substantial grounds for a difference of opinion as to its decision. Plaintiffs simply repeat their previously made and rejected arguments. The fact that Plaintiffs disagree with this Court's analysis and application of the case law does not create substantial grounds for a difference of opinion. *See* *Anderson v. Gen. Motors Corp., No. CIV. A. 96-2090-GTV, 1997 U.S. Dist. LEXIS 11843, 1997 WL 457712, at *2 (D. Kan. July 25, 1997)*. All of the in-circuit case law discussed by Plaintiffs has been extensively considered and discussed previously. (*See* Docs. ## 162, 197). Any new out-of-circuit case law is irrelevant in light of the Eighth Circuit's decisions on this issue. *See* *In re Miedzianowski, 735 F.3d 383, 384 (6th Cir. 2013)*. Accordingly, an interlocutory appeal is not warranted in this case.

CONCLUSION

Defendants moved for Judgment on the Pleadings. As to Count I, Defendants **[*37]** argued that Plaintiffs lacked standing. While Plaintiffs suffered an injury in fact each time they bought propane exchange tanks at an allegedly elevated price, Plaintiffs' injury in fact is not redressable by the requested relief because it duplicates the FTC's Consent Orders. Additionally, further briefing on the issue shows that Count I is barred by the doctrine of laches. Defendants also argued that Count II was barred by the statute of limitations; however, Count II is timely pursuant to *American Pipe* tolling. Further, Plaintiffs, under Count II, possess the requisite standing and sufficiently pled their claims. Accordingly, for these reasons and the reasons stated above, Defendants' Motion for Judgment on the Pleadings is GRANTED as to Count I and DENIED as to Count II.

Defendants also moved to strike the six additional plaintiffs that Plaintiffs included in their First Amended Complaint but did not include in their Motion to Amend. Parties must seek and receive leave of the Court before pleadings are amended. Plaintiffs did not seek leave to add the six additional plaintiffs, and thus, they were improperly included in Plaintiffs' First Amended Complaint. Accordingly, for these **[*38]** reasons and the reasons stated above, Defendants' Motion to Strike is GRANTED.

Plaintiffs moved for an entry of judgment. Because just reason exists to delay an appeal on the requested issues, Plaintiffs' Motion is DENIED. Plaintiffs also moved for certification of an interlocutory appeal. Because there are not substantial grounds for a difference of opinion, Plaintiffs' Motion for Interlocutory Appeal is also DENIED.

IT IS SO ORDERED.

/s/ Gary A. Fenner

GARY A. FENNER, JUDGE

UNITED STATES DISTRICT COURT

DATED: January 13, 2016

Dial Corp. v. News Corp.

United States District Court for the Southern District of New York

January 15, 2016, Decided; January 15, 2016, Filed

13cv6802

Reporter

165 F. Supp. 3d 25 *; 2016 U.S. Dist. LEXIS 5668 **; 2016-1 Trade Cas. (CCH) P79,467; 2016 WL 462515

DIAL CORPORATION, et al., Plaintiffs, -against- NEWS CORPORATION, et al., Defendants.

Prior History: Dial Corp. v. News Corp., 2015 U.S. Dist. LEXIS 79608 (S.D.N.Y., May 19, 2015)

Core Terms

retailers, third-party, contracts, damages, products, summary judgment, competitors, benchmark, foreclose, in-store, exclusive contract, Marketing, staggered, contends, promotions, anticompetitive conduct, monopoly power, exclusionary, antitrust, consumers, firms, anticompetitive, calculating, monopolist, monopoly, prices, rivals, expert testimony, anti trust law, advertising

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Judges: WILLIAM H. PAULEY, III, UNITED STATES DISTRICT JUDGE.

Opinion by: WILLIAM H. PAULEY, III

Opinion

[*28] MEMORANDUM & ORDER

WILLIAM H. PAULEY III, District Judge:

Defendants News Corporation, News America Inc., News America Marketing FSI L.L.C., and News America Marketing In-Store Services L.L.C. (collectively, "News Corp.") move for summary judgment dismissing this antitrust action. News Corp. also moves in limine to exclude the testimony of Dr. Jeffrey MacKie-Mason and Dr. Paul Farris. For the **[**8]** following reasons, News Corp.'s motions are denied.

BACKGROUND

On June 18, 2015, this Court certified a class of non-retailer consumer packaged goods firms ("CPGs") residing in the United States that have directly purchased in-store promotions from News Corp. at any time on or after April 5, 2008. See *Dial Corp., et al. v. News Corp, et al., 13 Civ. 6802, 314 F.R.D. 108, 2015 U.S. Dist. LEXIS 79686, 2015 WL 4104624 (S.D.N.Y. June 18, 2015)*. The Dial Corporation, Henkel Consumer Goods Inc., H.J. Heinz Company, Foster Poultry Farms, Smithfield Foods, Inc., HP Hood LLC, and BEF Foods, Inc. (collectively, "Plaintiffs") represent a class of CPGs who manufacture food and other consumer products. Defendant News Corp. sells in-store promotions ("ISP") like at-shelf signage, coupon distribution, and sampling products. The nuances of the business are described at length in this Court's prior memorandum and order granting class certification and are not repeated here. See *Dial Corp., et al., 2015 U.S. Dist. LEXIS 79686, 2015 WL 4104624*.

At various times over the last 15 years, News Corp. has competed with Floorgraphics, Insignia, and Valassis in the third-party ISP market. By 2009, News Coip. had a 90.5% share of the revenue generated in that market. In 2014, News Corp.'s sole remaining competitor, Valassis, abandoned its third-party ISP business. **[**9]**

Plaintiffs contend that News Corp. engages in exclusive dealing, and acquired and maintained a monopoly over the third-party ISP market in violation of *Sections One* and *Two of the Sherman Act*, *Section Three of the Clayton Act*, the New York Donnelly Act, and the Michigan Antitrust Reform Act.

I. NEWS CORP'S MOTION FOR SUMMARY JUDGMENT

Summary judgment is warranted when a moving party shows that "there is no genuine dispute as to any material fact" and that the party "is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*; *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*; *De Sole v. Knoedler Gallery, LLC, 12 Civ. 2313, 139*

F. Supp. 3d 618, 2015 U.S. Dist. LEXIS 138729, 2015 WL 5918458, at *13 (S.D.N.Y. Oct. 9, 2015). "A dispute about a 'genuine issue' exists for summary judgment purposes where the evidence is such that a reasonable jury could decide in the non-movant's favor." Beyer v. Cnty. of Nassau, **[*29]** 524 F.3d 160, 163 (2d Cir. 2008) (citing Guilbert v. Gardner, 480 F.3d 140, 145 (2d Cir. 2007)). [W]here the non[-] moving party will bear the burden of proof at trial, Rule 56 permits the moving party to point to an absence of evidence to support an essential element of the party's claim.'" Lesavoy v. Lane, 02 Civ. 10162, 2008 U.S. Dist. LEXIS 52559, 2008 WL 2704393, at *7 (S.D.N.Y. July 10, 2008) (quoting Bay v. Times Mirror Magazines. Inc., 936 F.2d 112 , 116 (2d Cir. 1991)).

In the context of antitrust cases, summary judgment may be appropriate because protracted litigation chills pro-competitive market forces. PepsiCo. Inc. v. Coca-Cola Co., 315 F.3d 101, 104 (2d Cir. 2002). All inferences drawn in favor of the non-movant "must be reasonable in light of competing inferences of acceptable conduct." See Tops Mkts., Inc. v. Quality Mkts., Inc., 142 F.3d 90, 95 (2d Cir. 1995).

DISCUSSION

[10]** A. New Corp.'s Exclusive Contracts with Retailers

An exclusive dealing arrangement is unlawful under Section One of the Sherman Act if its "probable effect" is to substantially lessen competition in the relevant market. Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327-29, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961). Exclusive dealing arrangements are often entered for entirely pro-competitive reasons, generally posing little threat to competition. ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 270 (3d Cir. 2012). But "[e]xclusive dealing can have adverse economic consequences by allowing one supplier of goods or services unreasonably to deprive other suppliers of a market for their goods[.]" Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 45, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984) (O'Connor, J., concurring), abrogated on other grounds by Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28, 126 S. Ct. 1281, 164 L. Ed. 2d 26 (2006).

It is undisputed that the majority of News Corp.'s contracts with retailers provide News Corp. with the exclusive right to be the in-store third-party provider of ISP products. (News Corp. 56.1 ¶¶ 7, 16, 17.) Payments to retailers under these contracts are often guaranteed on a quarterly or yearly basis. (News Corp. 56.1 ¶ 19.) Plaintiffs present evidence that News Corp.'s exclusive deals locked up at least 73% of participating retail stores during the damages period. (Pl. 56.1 Opp. ¶ 134.) And among grocers, Plaintiffs contend News Corp. had more than 80% of the participating retail store volume under exclusive **[**11]** contract. (Pl. 56.1 Opp. ¶ 134.)

Plaintiffs highlight three aspects of News Corp.'s contracts with retailers as anticompetitive: (1) the length of the exclusive agreements; (2) the "staggered" expiration dates of the exclusive agreements; and (3) the guarantees News Corp. paid for access to retailers' stores. Plaintiffs argue that News Corp. deploys these three structural features to deter competition. As former News America Marketing CEO Paul Carlucci noted in 2004, it is "also an incredible deterrent, both the length of the contract, the fact that we can stagger the contracts at our own discretion and the payment they would have to come [up with], [for] a competitor to really get back into the marketplace." (Caughey Decl. Ex. 169, at 20.) News Corp. counters that the undisputed facts negate a finding that any of these three challenged features of its agreements substantially lessen competition in the market.

i. Length of Retailer Contracts

The parties spar over the average length of retailer contracts during the damages period and both sides rummage through **[*30]** the data. Under News Corp.'s analysis, the average term length of its retailer contracts was 2.7 years during the damages period. **[**12]** (News Corp. Ex. 3, Murphy Rpt. ¶ 14; Ex. 8.) News Corp. argues that where, as here, opportunities exist to bid on exclusive contracts at the end of their terms, exclusivity periods of three years' duration or less "do not foreclose competition and are not anticompetitive as a matter of law." Spinelli v. Nat'l Football League, LLC, 96 F. Supp. 3d 81, 117 (S.D.N.Y. 2015).

But Spinelli is not dispositive because that case dealt with licensing agreements having durations no longer than three years. *Spinelli, 96 F. Supp. 3d at 117*. Here, News Corp. entered into exclusivity agreements with retailers that were far longer. For instance, News Corp. had five-year agreements with Albertson's, Winn Dixie, Food Lion, Ahold, and Schnucks. None of those agreements were included in News Corp.'s calculation of its 2.7 year average. (See PL 56.1 Opp. ¶ 144.)

Plaintiffs challenge News Corp.'s analysis, and calculate the average contract length at 3.9 years across the entire market, and even higher—at 5.1 years—when medium and large grocery stores are considered. (Pl. 56.1 Opp. ¶ 143.)[1] Plaintiffs point out that News Corp. omits its ten-year contract with Safeway from its 2.7 year average calculation. (News Corp. Ex. 3, Murphy Rpt., Ex. 8 n.1 (Safeway and News Corp. entered into a contract on 7/17/2004 with a ten-year **[**13]** term, which was omitted from this analysis).) News Corp. also excludes its seven-year contract with Kroger. (Plaintiffs' Ex. 106 (noting that the effective date of the Kroger contract was 2/1/2006).)[2] In 2012, Safeway and Kroger accounted for 10.5% of the total retail volume of all grocery, drug, and mass retailers in the country. (News Corp. 56.1 ¶¶ 43, 53.) And together, their third-party ISP contracts represented nearly 19% of existing contracts during the damages period. (News Corp. 56.1 ¶¶ 43, 53.)

News Corp. also argues that the Safeway and Kroger contracts came up for re-bid during the damages period. But Plaintiffs respond that News Corp.'s only remaining competitor—Valassis—had already exited the third-party ISP business when the Safeway contract came up in 2014. (See Oral Arg. Tr. 46-48.) And that News Corp. negotiated an extension of the Kroger contract before a request for proposal was ever issued. (Caughey Decl. Exs. 126, 136; Oral Arg. Tr. 46-48.)

News Corp. also relies on *Ticketmaster Corp. v. Tickets.com , Inc., 99 Civ. 7654, 2003 U.S. Dist. LEXIS 6484, 2003 WL 21397701 (C.D. Cal. Mar. 7, 2003)*, aff'd, *127 Fed. Appx. 346 (9th Cir. 2005)*, where the district judge granted summary judgment dismissing Sherman Act claims involving exclusive contracts ranging from three to ten years in duration. But News Corp.'s primary competitor in Ticketmaster had the "opportunity to bid for the **[*31]** contracts" and "did so." *Ticketmaster Corp., 2003 U.S. Dist. LEXIS 6484, 2003 WL 21397701, at *7*. By contrast, Plaintiffs offer evidence that News Corp.'s competitors were not afforded the opportunity to compete for significant contracts. (See, e.g., Caughey Decl. Ex. 56, Dial Purchasing Manager, Karen Welch, Deposition Tr. at 239:7-17 ("Q: Have you ever done . . **[**15]** . an RFP for in-store services? A: No. . . . Because . . . when I look at in-store services, there's—aside from News America, there's nobody else that I could put in side-by-side against News America and run an effective auction.").)

ii. Contract Expiration Dates

With respect to the expiration dates of News Corp.'s retailer contracts, the parties, yet again, have differing views of the evidence. News Corp. contends that approximately 40% of its retail network, on average, expired each year during the damages period. Further, contracts covering 98% of retailer volume expired over the whole period. (News Corp. 56.1 ¶¶ 60, 63.) As a matter of law, News Corp. argues that these exclusive retailer contracts do not substantially foreclose competition. See, e.g., *Ticketmaster Corp., 2003 U.S. Dist. LEXIS 6484, 2003 WL 21397701, at *5* (granting summary judgment for defendant on Sherman Act Section One and Two claims where exclusive contracts came up for bid at a rate of "about 20% per year"). And when Valassis entered the third-party ISP business, it won exclusive contracts with several significant retailers including SuperValu, Redner's, Winn Dixie, Family Dollar, Rite Aid, and Roundy's. (News Corp. 56.1 ¶¶ 21, 27-29, 60.)

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[1] Plaintiffs' economist, MacKie-Mason, did not dispute News Corp.'s 2.7 year average in his expert reports. He also offered no opinion or analysis that the average contract length was different or longer than News Corp.'s estimation. (See News Corp. Ex. 24, MacKie-Mason Dep. Tr. 67:13-19.) For the first time during briefing of this motion, Plaintiffs' submit a declaration from MacKie-Mason in which he performs a new analysis to rebut News Corp.'s 2.7 year average. (See Pl. Ex. 3, Declaration of Jeffery MacKie-Mason in Support of Opposition to Summary Judgment.)

[2] Plaintiffs contend that News Corp.'s average excludes contracts entered into before 2008 but ran during the damages period. (Caughey **[**14]** Decl. Ex. 3, Declaration of Jeffrey MacKie-Mason in Support of Opposition to Summary Judgment at ¶ 19.)

Plaintiffs slice the data differently to **[**16]** focus on medium and large-sized food retailers—specifically, the top 28. From that perspective, the number of retailer contracts available to News Corp.'s competitors drops to less than 25% in each year from 2008 through 2012, and falls as low as 18.7%. (News Corp. Ex. 48, MacKie-Mason Rpt. at 41; Pl. 56.1 Opp. ¶ 182.) Plaintiffs argue that focusing on the largest customers is necessary because "capturing nothing but the small retailers is not a viable entry strategy[.]" (News Corp. Ex. 48, MacKie-Mason Rpt. at 41.) And as News America Marketing's former CEO, Marty Garofalo noted, "[a] big part of being successful with the package goods clients is having the critical mass to deliver promotions that move volume." (Caughey Decl. Exs. 21, 169.) Further, although the average of News Corp.'s retail network up for renewal on a yearly basis was 40%, News Corp.'s own analysis reveals that the rate ranged from 28% to 46% over the class period. (News Corp. 56.1 ¶ 61.) And by 2014, News Corp.'s only remaining competitor, Valassis, lost its key contracts and exited the third-party ISP business. (Pl. 56.1 Opp. ¶ 210.)

Plaintiffs also offer evidence that News Corp. intentionally staggered the end dates of key contracts to prevent competitors **[**17]** from acquiring a "critical mass" of retail distribution. (Pl. 56.1 Opp. ¶¶ 149, 152, 153, 155, 156, 157.) See *Insignia Sys. v. News America Marketing In-Store, 661 F. Supp. 2d 1039, 1064-65 (D. Minn. 2009)* (denying motion for summary judgment in view of "staggering" allegations); see also *Sunbeam Television v. Nielsen Media Research, 763 F. Supp. 2d 1341, 1346 (S.D. Fla. 2011)*, aff'd, *711 F.3d 1264 (11th Cir. 2013)* ("A policy or practice of intentionally staggering contract terms may, under some circumstances, constitute anticompetitive conduct. .. ."). According to Marty Garofalo:

> Th[e] winning formula . . . starts with staggered retail deals . . . ***News America Marketing intentionally staggers the time of major retail deals to minimize the risk of losing a major number [*32] of stores in any short time period . . . . [T]his strategy serves as a deterrent to other major companies from joining the In-Store fray***—because they know that it will be a long—hard fought drawn out process to develop the critical mass necessary to be successful in this arena.

(Pl. 56.1 Opp. ¶¶ 150) (emphasis added).

iii. Guarantees to Retailers

News Corp. contends that its guarantees to retailers do not foreclose competition as a matter of law under the "price-cost" test enumerated in *Weyerhaeuser Co v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 127 S. Ct. 1069, 166 L. Ed. 2d 911 (2007)*. To succeed on a challenge to a defendant's input pricing practices under the "price-cost" test, a plaintiff must prove "that the [defendant's] prices are **[**18]** below an appropriate measure of [the defendant's] costs." *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993)*. News Corp. contends that Plaintiffs fail to satisfy the "price-cost" test for predatory bidding. Plaintiffs identify only one contract—the KMART contract—on which News Corp. lost money. While News Corp. lost $4.3 million on that contract in 2013 (Pl. 56.1 Opp. ¶ 170), its third-party ISP business has been profitable every year from 1999 to the present (News Corp. 56.1 ¶ 68).

Nevertheless, relying on *ZF Meritor, LLC, 696 F.3d at 268-69*, Plaintiffs contend that the "price-cost" test is not dispositive of exclusive dealing claims. In contrast to Weyerhauser, where pricing operated as the lone exclusionary tool, see *ZF Meritor, 696 F.3d at 276-77*, the prices paid by News Corp. in their contracts with retailers are not the clearly predominant method of exclusion. Rather, the length of the exclusive contracts and their staggered terms may also foreclose competition. See *ZF Meritor, LLC, 696 F.3d at 277*.

Further, Plaintiffs offer evidence suggesting that News Corp. pays retailers fixed commissions that "guarantee revenue even if the activity does not support it." (Pl. 56.1 Opp. ¶ 159.) And those commissions increased dramatically when Valassis entered the third-party ISP market. (Pl. 56.1 Opp. ¶ 159.) In early 2009, News Corp. **[**19]** and Valassis competed for KMART's retailer network. (Pl. 56.1 Opp. ¶ 164.) In response to each of Valassis' bids, News Corp. countered with increasingly larger guarantees—finally offering $4,615 per store, approximately $6 million overall, and a $1.1 million signing bonus in exchange for a three-year renewal. (Pl. 56.1 Opp. ¶ 167.) In choosing News Corp. over Valassis, KMART noted that News Corp. was trying to "send Valassis a message" with its "over-the-top" offer. (Pl. 56.1 Opp. ¶ 168.) As Larry Berg of Valassis testified:

> [News Corp. was] sending a strong message that no more growth [sic], because at that point we started to grow our footprint. . . . News [Corp.] was trying to send a message to Valassis that they are not going to let us secure, not only KMART, but also send a pretty strong message to us across the board.

(Pl. 56.1 Opp. ¶ 169.)

B. Exclusive Dealing Under Section One of the Sherman Act

While there is no precise formula for evaluating the legality of an exclusive dealing agreement, ***antitrust law*** generally requires: "substantial foreclosure" from the relevant market, *Tampa Elec. Co., 365 U.S. at 327-29*; *United States v. Microsoft Corp., 253 F.3d 34, 69, 346 U.S. App. D.C. 330 (D.C. Cir. 2001)*; contracts of sufficient duration to prevent meaningful competition by rivals, *CDC Techs., Inc. v. IDEXX* **[*33]** *Labs., Inc., 186 F.3d 74, 81 (2d Cir. 1999)*; *Omega Envt'l., Inc. v. Gilbarco, Inc., 127 F.3d 1157, 1163 (9th Cir. 1997)*; and an analysis of **[**20]** likely or actual anticompetitive effects considered in light of any pro-competitive effects, *ZF Meritor, LLC, 696 F.3d at 271-72*.

Contracts that foreclose competition in a "substantial share" of the market may be unlawful under *Section One of the Sherman Act*. See *Tampa Elec. Co., 365 U.S. at 327*; see also *Stop & Shop Supermarket Co. v. Blue Cross Blue Shield, 373 F.3d 57, 68 (1st Cir. 2004)* (noting that foreclosure levels "are unlikely to be of concern where they are less than 30 or 40 percent."). Plaintiffs present evidence that only 18.7% to 25% of News Corp.'s total volume became available for bid each year between 2008 and 2012. (Pl. 56.1 Opp. ¶ 182.) Coupled with the broad market coverage of News Corp.'s retailer contracts—upwards of 73%—and the guarantees offered to retailers like KMART, a significant portion of the market may have been foreclosed to competitors. Viewing the duration of the contracts, their staggered end dates, and the guarantees as a whole, plaintiffs raise material questions of fact as to whether the effect of these contracts was to "substantially foreclose" rivals from obtaining a toehold in the third-party ISP marketplace. Such questions should be resolved by a jury. See *Insignia Sys., Inc., 661 F. Supp. 2d at 1064-65* (noting that Insignia's evidence that News Corp. has substantially foreclosed competition was sufficient to withstand summary judgment given **[**21]** that News Corp.'s retailer contracts foreclosed competitors' abilities to contract with retailers in 80 to 90 percent of grocery store opportunities, as well as the duration of News Corp.'s contracts, and News Corp.'s strategy to stagger its contracts).

Indeed, News Corp.'s dealings with competitors like Valassis raise questions about whether News Corp.'s contracts foreclosed competition in a substantial share of the market. Plaintiffs assert that while Valassis entered into several retailer agreements (Pl. 56.1 Opp. ¶ 204), it never had the opportunity to bid on key retailers such as Safeway and Kroger (Pl. 56.1 Opp. ¶¶ 206, 208), and finally gave up trying to compete in the third-party ISP business. (Pl. 56.1 Opp. ¶ 210.)[3] Within months, News Corp. was able to re-sign the retailers it lost to Valassis (Pl. 56.1 Opp. ¶ 210), and it currently faces no significant competition in the third-party ISP market (Pl. 56.1 Opp. ¶ 212). See *Interface Grp. v. Mass Port Auth., 816 F.2d 9, 11 (1st Cir. 1987)* (Breyer, J.) ("Exclusive dealing arrangements may sometimes be found unreasonable under the antitrust laws because they may place enough outlets . . . in the hands of a single firm . . . to make it difficult for new, potentially competing firms to penetrate **[**22]** the market. . . [T]he arrangements may 'foreclose' outlets or supplies to potential entrants, thereby raising entry barriers."); see Areeda & Hovenkamp, ***Antitrust Law*** 1802(c), at 64 (2d ed. 2002) (noting that a dominant firm may be able to foreclose rival suppliers from a large enough portion of the market to deprive such rivals of the opportunity to achieve the minimum economies of scale necessary to compete).

News Corp. contends that its exclusive contracts are procompetitive because CPGs benefit from retail exclusivity. However, on the current record, this Court cannot conclude as a matter of law that the procompetitive benefits of the exclusive **[*34]** contracts are outweighed by the harm to competition. Accordingly, News Corp.'s motion for summary judgment as to *Section One of the Sherman Act* is denied.[4]

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[3] News Corp. disagrees and contends that Valassis failed because of its own strategy. But that is a fact question for the jury.

[4] The proscriptions of *Section One of the Sherman Act* are narrower than *Section Three of the Clayton Act*. See *Tampa Elec. Co., 365 U.S. at 335* ("We need not discuss the respondents' further contention that the contract also violates *s 1* and *s 2 of the*

C. Monopolization Under Section Two of the Sherman Act

Section Two of the Sherman Act makes it illegal for any person "to monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states." *15 U.S.C. § 2*. To prevail, Plaintiffs must prove: (1) News Corp.'s possession of monopoly power in the third-party ISP market; and (2) the "willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*; *LePage's Inc. v. 3M, 324 F.3d 141, 147 (3d Cir. 2003)* ("A monopolist willfully acquires or maintains monopoly power when it competes on some basis other than the merits."),

i. Relevant Product Market

As a threshold matter, this Court must assess whether a genuine issue of fact exists as to the relevant product market News Corp. is allegedly monopolizing. News Corp. **[**24]** contends that the evidence in the record is insufficient to support Plaintiffs' narrowly drawn product market definition. Plaintiffs' "pre-checkout" "third-party" product market includes "print and electronic signage, end-of-aisle displays, freezer displays, floor signage, and cart advertising." (Fourth Amended Complaint ¶¶ 54-55.) Their product market excludes "trade promotion arrangements where individual CPGs have contracts with individual retailers to promote their products[,]" all forms of out-of-store and digital marketing and product promotion, as well as promotional products offered at checkout. (Fourth Amended Complaint ¶¶ 56.)

A properly defined market includes "all products that have reasonable interchangeability for the purposes for which they are produced—price, use, and qualities considered." *United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 404, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)*. "In economists' terms, two products or services are reasonably interchangeable where there is sufficient cross-elasticity of demand. Cross-elasticity of demand exists if consumers would respond to a slight increase in the price of one product by switching to another product." *AD/SAT, Div. of Skylight. Inc. v. Assoc. Press, 181 F.3d 216, 227 (2d Cir. 1999)*.

Market definition "is a highly factual one best allocated to the trier of fact." *Meredith Corp. v. SESAC LLC, 1 F. Supp. 3d 180, 219 (S.D.N.Y. 2014)*; see ABA Section on ***Antitrust*** **[**25]** ***Law***, ***Antitrust Law*** Developments 620 (6th ed. 2007) ("Definition of the relevant market is generally considered a question for the trier of fact. . . . The jury may accept the market definition proposed by either party or may develop its own definition based upon the evidence."); see also *Lewis v. Philip Morris Inc., 355 F.3d 515, 533 (6th Cir.* ***[*35]*** *2004)* ("defining the product market. . . is a factual inquiry for the jury; the court may not weigh evidence or judge witness credibility.") (internal quotations marks and citations omitted). Considering the evidence in the light most favorable to Plaintiffs, a jury could adopt Plaintiffs' third-party ISP market definition—and that is all that is required to survive summary judgment. See *Meredith Corp., 1 F. Supp. 3d at 219*.

Indeed, Plaintiffs point to evidence that their proposed product market—that is, in-store, shelf-based, advertisements provided by a third-party—demonstrate unique functions and uses that distinguish them from substitute products. For instance, Plaintiffs highlight documents and testimony suggesting that CPGs consider the third-party ISP market to be distinct. (Pl. 56.1 Opp. ¶ 218). CPGs use third-party ISPs, as opposed to trade promotions or out-of-store tactics, because it is their last chance to communicate with consumers **[**26]** about their brands when they select the product off the shelf, at the "moment of truth." (Pl. 56.1 Opp. ¶¶ 108, 219). News Corp. advertises its products as allowing CPGs to speak to consumers at the "moment of truth" when they select products (Pl. 56.1 Opp. ¶ 220), as opposed to TV, radio, magazines, and billboards, that do not confront consumers at the time of purchase. (Pl. 56.1 Opp. ¶ 221). And News Corp. markets itself as providing a different service than coupon providers. (Pl. 56.1 Opp. ¶ 225). Indeed, the court in Insignia Sys., Inc. v. News Am. Marketing In-Store, Inc. held that a nearly identical product market was sufficient to withstand summary judgment. *661 F. Supp. 2d 1039, 1059*

Sherman Act, for if it does not fall within the broader **[**23]** proscription of *s 3 of the Clayton Act* it follows that it is not forbidden by those of the former."). Because News Corp.'s motion is denied with respect to Plaintiffs' Sherman Act Section One claims, News Corp.'s motion is also denied under *Section Three of the Clayton Act*.

(D. Minn. 2009) (noting that Insignia had brought forth "substantial evidence highlighting the claimed unique nature of an in-store, at-shelf, third-party advertising market" to generate a genuine issue of fact).

Plaintiffs' market definition is also supported by MacKie-Mason's economic analysis. MacKie-Mason analyzed whether third-party ISP constitutes a distinct market by employing the "SSNIP" (small but significant and non-transitory increase in price) test, which asks how a buyer would respond to a hypothetical monopolist's imposition **[**27]** of a small price increase. *Meredith Corp., 1 F. Supp. 3d at 218*. Applying such a test, MacKie-Mason used "critical loss analysis" to analyze demand elasticity to measure the loss in quantity demanded of all third-party ISP sold in the hypothetical relevant market if the pricing of the promotions were raised. (News Corp Ex. 4, Dr. MacKie-Mason Rpt. at 46-50.) MacKie-Mason concluded that the third-party ISP market alone composes the relevant product market.

News Corp.'s reliance on *Menasha Corp. v. News America Marketing In-Store, Inc., 354 F.3d 661 (7th Cir. 2004)* is misplaced. In Menasha, Judge Easterbrook found that plaintiff did not meet its burden of proving that the relevant market consisted of News Corp.'s at shelf-coupon dispensers. Judge Easterbrook found that plaintiff offered only "a potpourri of survey research and armchair economics" in place of econometric analysis. *354 F.3d at 664*. In this case, Plaintiffs offer enough to survive summary judgment. Together, Plaintiffs' evidence supplies an "ample factual basis" on which a jury could conclude that the relevant product market consists of pre-checkout third-party ISP. See *Meredith Corp., 1 F. Supp. 3d 180, 218 (S.D.N.Y. 2014)*. This evidence is further confirmed by MacKie-Mason's SSNIP test, which was absent in Menasha.

ii. News Corp.'s Monopoly Power

Plaintiffs contend that News Corp. possesses monopoly power in the third-party **[*36]** ISP market. **[**28]** By 2009, Plaintiffs argue that News Corp. had a 90.5% share of the third-party ISP market. (Pl. 56.1 Opp. ¶ 242.) By comparison, during that same time, Valassis had a 2.8% market share and Insignia had a 6.7% market share. (Pl. Ex. 4, MacKie-Mason Rpt. at Ex. 59.) While News Corp.'s share of the third-party ISP market dropped to its lowest level—79.4%—in 2013, its market share today has rebounded. (News Corp. Ex. 4, Dr. MacKie Mason Rep. at Ex. 59.) This Court can infer the existence of monopoly power from a predominant share of the market, *Grinnell, 384 U.S. at 571*, and the size of that share is a primary factor in determining whether monopoly power exists. See *Dentsply Int'l, Inc., 399 F.3d at 187*. "A share above 70% is usually strong evidence of monopoly power[.]" *In re EVIC Class Action Litig., 00 Civ. 3811, 2002 U.S. Dist. LEXIS 14049, 2002 WL 1766554, at *14 (S.D.N.Y. July 31, 2002)*.

iii. News Corp.'s Anticompetitive Conduct

Under the antitrust laws, an overwhelmingly large market share alone—even one as large as 90.5%—does not equal an antitrust violation. The Supreme Court has defined anticompetitive conduct under *Section Two* in the following way:

> The question whether [a defendant's] conduct may properly be characterized as exclusionary cannot be answered by simply considering its effect on [a plaintiff]. In addition, **[**29]** it is relevant to consider its impact on consumers and whether it has impaired competition in an unnecessarily restrictive way. If a firm has been "attempting to exclude rivals on some basis other than efficiency," it is fair to characterize its behavior as predatory.

Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 605, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985) (internal citation omitted).

Courts should condemn aggressive, exclusionary conduct by a monopolist, but encourage aggressive, competitive conduct. As Judge Easterbrook has noted, there is only one problem: "competitive and exclusionary conduct look alike." On Identifying Exclusionary Conduct, *61 Notre Dame L. Rev. 972, 972 (1986)*. And as one court of appeals has stated: "'Anticompetitive conduct' can come in too many different forms, and is too dependent upon context, for any court or commentator ever to have enumerated all the varieties." *Caribbean Broad. Sys., Ltd. v. Cable & Wireless PLC, 148 F.3d 1080, 1087, 331 U.S. App. D.C. 226 (D.C. Cir. 1998)*.

To prove unlawful exclusive dealing under *Section Two*, Plaintiffs need to show that the probable effect of News Corp.'s conduct is to harm the competitive process. See *Microsoft, 253 F.3d at 58*. The standard for exclusive dealing under *Section Two of the Sherman Act* is lower than under *Section One*. See *Microsoft, 253 F.3d at 70* (noting that a monopolist's use of exclusive dealing may give rise to a Section Two violation even without a level of foreclosure that could **[**30]** support a Section One claim). Plaintiffs allege that News Corp.'s exclusive contracts closed a substantial percentage of the available opportunities for competitors in the third-party ISP business. This Court concludes that evidence of News Corp.'s exclusive contracts with retailers, as described above, raises a genuine issue of fact as to whether News Corp.'s conduct excluded competition in an effort to acquire and maintain monopoly power.

Moreover, "evidence of intent" may be relevant "to the question of whether the challenged conduct is fairly characterized as 'exclusionary' or 'anticompetitive.'" **[*37]** See *Aspen Skiing, 472 U.S. at 602*. And Plaintiffs present ample evidence that News Corp. intended to use their exclusive retailer contracts to do just that—to exclude rivals. (See] Caughey Decl. Ex. 83 ("[W]e have a proven strategy in place when it comes to our retail network. Our strategy is to secure long term retail deals . . . . We also stagger the deals to prevent a large percentage of the network from being vulnerable at any specific point in time .. . This method allows us to concentrate on our key negotiations. It also means that any competitor who wants to develop critical mass for their network would have to **[**31]** dedicate a lot of money over a considerable amount of time in order to break into the in-store game in any significant way"); Caughey Decl. Ex. 172 ("What we do know is that our network of stores is over 50,000 strong, most of them are under long-term agreements with us, and the renewal dates of those agreements are staggered so we are well-prepared to weather . . . competitive challenges.").)

Plaintiffs seek to bolster their Section Two claim by presenting evidence that News Corp. acquired and maintained its monopoly through a series of exclusionary acts, including, inter alia, that News Corp. hacked into Floorgraphics computer systems (Pl. 56.1 Opp. ¶ 185), News Corp. defaced Floorgraphics products in retailers and used the photographs of the defaced products in sales pitches to retailers (Pl. 56.1 Opp. ¶ 189), News Corp. obtained Insignia's confidential information and used it to compete against Insignia (Pl. 56.1 Opp. ¶ 191), and News Corp. retained former Valassis Employee, Larry Mortimer, as its "black knight" to dislodge Valassis from retailer Winn Dixie (Pl. 56.1 Opp. ¶ 207).

"The Sherman Act is not a panacea for all evils that may affect business life." *Berkey Photo, Inc. v. Eastman Kodak. Co., 603 F.2d 263, 288 n.41 (2d Cir. 1979)*. It is well settled **[**32]** that "employing tactics that undermine one's competitors—even unfairly—does not violate the antitrust laws." *S.W.B. New England, Inc. v. R.A.B. Food Grp., LLC, No. 06 Civ. 15357, 2008 U.S. Dist. LEXIS 14892, 2008 WL 540091, at *6 (S.D.N.Y. Feb. 27, 2008)*. Moreover, false and misleading statements are presumed to have a de minimis effect on competition for purposes of the Sherman Act. See *Reed Const. Data Inc. v. McGraw-Hill Cos., Inc., 49 F. Supp. 3d 385, 420 (S.D.N.Y. 2014)*.

However, in conjunction with News Corp.'s exclusive contracts with retailers, Plaintiffs present evidence sufficient to withstand summary judgment that News Corp.'s exclusionary acts may be anticompetitive. See, e.g.. *Conwood Co., L.P. v. U.S. Tobacco Co., 290 F.3d 768, 783 (6th Cir. 2002)*, cert. denied, *537 U.S. 1148, 123 S. Ct. 876, 154 L. Ed. 2d 850 (2003)* (holding evidence of defendant's exclusionary conduct sufficient to support a *Section 2* violation where defendant: (1) removed and destroyed or discarded racks that displayed defendant's products from stores; (2) trained its operatives to take advantage of inattentive store clerks with various 'ruses'; (3) provided misleading information to retailers in an effort to dupe them into carrying defendant's products; and (4) entered into exclusive agreements with retailers in an effort to exclude rivals' products).

Further, News Corp. contends that most of Plaintiffs' identified tortious conduct occurred before 2008—the beginning of the damages period—and **[**33]** is therefore irrelevant. But a monopoly which is "maintained" during the damages period would need to be created before the damages period, and anticompetitive conduct before the limitations period may be material to a showing that Plaintiffs were injured during the damages period. See, e.g., *Berkey **[*38]** Photo, 603 F.2d at 296* ("The taint of an impure origin does not dissipate after four years if a monopolist continues to extract excessive prices because of it.").

D. Injury and Damages

News Corp. contends that summary judgment should be granted for the independent reason that Plaintiffs cannot prove injury or damages. "[C]ourts have allowed antitrust plaintiffs considerable latitude in proving the amount of damages. Proof of amount of damages thus need not conform to a particular theory or model[.]" *U.S. Football League v. Nat'l Football League, 842 F.2d 1335, 1378 (2d Cir. 1988)*. However, damages awards must be, to some degree, traceable to unlawful acts. See *U.S. Football League, 842 F.2d at 1378-79* ("A plaintiffs proof of amount of damages thus must provide the jury with a reasonable basis upon which to estimate the amount of its losses caused by other factors, such as management problems, a general recession or lawful factors.").

Citing Berkey Photo, News Corp. argues that Plaintiffs' benchmark model calculates generalized monopoly profits, **[**34]** not damages directly flowing from anticompetitive conduct, as required by law. The defendant in Berkey Photo had acquired monopoly power in significant part through its skill and foresight rather than through illegal activities. In light of that determination, the Second Circuit found that Plaintiffs may "recover only for the price increment that 'flows from' the distortion of the market caused by the monopolist's anticompetitive conduct." See *Berkey Photo, 603 F.2d at 297-98* ("But the Sherman Act does, as we have said, tolerate the lawfully acquired and maintained monopoly. This principle would be undercut if a monopolist whose position has for the most part been attained legitimately is required to forfeit all fruits of its success because its power has merely been supplemented by improper conduct.").

Plaintiffs' economist, MacKie-Mason, concludes that the generalized monopoly profits obtained by News Corp. are a result of—and "flow from"—its exclusive deals with retailers and other tactics which form the basis of News Corp.'s alleged anticompetitive conduct. Plaintiffs will need to prove this at trial. Indeed, whether some, all, or none of News Corp.'s conduct is anticompetitive is precisely the question of fact **[**35]** that a jury will decide. And it will be Plaintiffs' burden to demonstrate to the jury that its requested damages flow from conduct the jury finds anticompetitive.

News Corp. also argues that Plaintiffs' benchmark model is deficient because the model "can't sort out" the effects of any particular form of allegedly anticompetitive conduct. See Areeda & Hovenkamp, ***Antitrust Law*** ¶ 657b1 (3d ed. 2008) ("If the plaintiffs expert's damage study cannot segregate lawful from unlawful practices, then no damages may be awarded on the basis of that study."). But calculating damages in antitrust cases is not an exact science. See, e.g., *Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264, 66 S. Ct. 574, 90 L. Ed. 652 (1946)* ("An antitrust plaintiff must thus provide only sufficient evidence to support a 'just and reasonable estimate' of damages."). And if a jury were to find News Corp.'s actions taken as a whole to be a violation of *Section Two of the Sherman Act*, disaggregating the monopolist's lawful actions from its unlawful actions for the purpose of calculating damages may be "unnecessary, if not impossible." See *LePage's, 324 F.3d at 166*.

E. State Law Claims

Plaintiffs assert state law claims under the New York Donnelly Act and the Michigan Antitrust Reform Act for exclusive **[*39]** dealing and monopolization. **[**36]** The relevant state law provisions are interpreted in the same manner as their federal counterparts. See *Eatoni Ergonomics, Inc. v. Research in Motion Corp., 826 F. Supp. 2d 705, 708 (S.D.N.Y. 2011)*; *Little Caesar Enters., Inc. v. Smith, 895 F. Supp. 884, 898 (E.D. Mich. 1995)*. Thus, News Corp.'s motion for summary judgment is also denied with respect to the state law claims.

II. NEWS CORP.'S MOTIONS IN LIMINE

Rule 702 of the Federal Rules of Evidence governs the admissibility of expert and other scientific or technical expert testimony, and states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon

sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

In determining whether expert testimony is admissible, the Court must assume a gatekeeper function to determine whether "the expert's testimony both rests on a reliable foundation and is relevant to the task at hand." *Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 597, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)*; accord *Campbell v. Metro. Prop. & Cas. Ins. Co., 239 F.3d 179, 184 (2d Cir. 2001)*. Although the Daubert analysis was initially developed to examine scientific testimony, Daubert applies with equal **[**37]** force to other types of expert testimony including that of economists. *Kumho Tire Co. v. Carmichael, 526 U.S. 137, 147, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999)*. The proponent of the testimony must establish admissibility by a preponderance of the evidence. *Bourjaily v. United States, 483 U.S. 171, 175-76, 107 S. Ct. 2775, 97 L. Ed. 2d 144 (1988)*. And this Court has broad discretion in determining whether to admit expert testimony. *Amorgianos v. AMTRAK, 303 F.3d 256, 265 (2d Cir. 2002)*.

DISCUSSION

A. News Corp.'s Motion to Exclude the Testimony of Dr. Paul Farris

News Corp. moves to exclude the testimony of Plaintiffs' industry expert, Dr. Paul Farris. Farris is the Landmark Communications Professor at the University of Virginia's Darden School of Business Administration, where he has taught since 1980. Farris was retained by Plaintiffs to opine on: (1) how CPGs use third-party ISP sold by News Corp.; (2) whether other marketing, advertising, or promotional tactics are competitive substitutes to third-party ISP; and (3) the degree to which third-party ISP complement other forms of advertising and promotion services. (Michael Decl. Ex. 79.) Farris identified five criteria to assess the substitutability of third-party ISP for other advertising methods, such as traditional out-of-store consumer promotions.

News Corp. contends that Farris' opinions are not supported by academic literature, are undermined by the record **[**38]** in this case, and are at odds with his prior testimony in other actions. But in his report, Farris presents a table identifying sufficient support for his methodology in academic literature and practitioner studies. (Michael Decl. Ex. 79, Farris Rpt. at Table 1.) That no published study has used the same five criteria employed by Farris is not fatal to the admissibility of his opinion. *Amorgianos v. AMTRAK, **[*40]** 303 F.3d 256, 266-67 (2d Cir. 2002)*. ("This is not to suggest that an expert must back his or her opinion with published studies that unequivocally support his or her conclusions."). Whether the documentary evidence is inconsistent with Farris' opinion, or whether Farris' testimony in prior litigation is at odds with his current testimony, are matters for cross-examination at trial.

Further, News Corp. contends that Farris' opinions are irrelevant because they do not address the appropriate product market inquiry, namely, what products are "reasonably interchangeable." But Farris' opinions concerning the key criteria considered by CPGs when selecting promotional tactics—and the substitutability of those tactics—are relevant to that issue. A jury may consider the testimony of industry experts regarding product substitutability. Accord ABA **[**39]** Model Jury Instructions in Civil Antitrust Cases (2005), at C-7 ("In evaluating whether various products are reasonably interchangeable or are reasonable substitutes for each other, you may also consider . . . the perceptions of either industry or the public as to whether the products are in separate markets.").

As Plaintiffs point out, Farris does not opine on the ultimate conclusion of the relevant product market definition. On the contrary, his testimony is but "one piece" —along with MacKie-Mason's critical loss analysis and other evidence—supporting Plaintiffs' definition of the relevant product market. (Pl. Opp. Br. at 20.)

B. News Corp.'s Motion to Exclude Portions of the Testimony of Dr. Jeffery MacKie-Mason

News Corp. also moves to exclude portions of the testimony of Plaintiffs' economist, Dr. Jeffrey MacKie-Mason. In particular, News Corp. argues that: (1) MacKie-Mason's damages "benchmark" model is inadequate; (2) MacKie-Mason's opinions on liability are inappropriately based on News Corp.'s "intent" to harm competitors; and (3) MacKie-Mason's relevant product market definition is not supported by the "Lerner Index."

In its class certification decision, this Court rejected **[**40]** News Corp.'s argument that MacKie-Mason's damages "benchmark" model is inadequate because of his selection of benchmark firms. As this Court explained:

> Because News Corp. has allegedly maintained a monopoly in the market for ISPs since at least 2000, creating a benchmark using News Corp.'s prices during a time of 'robust competition' is not feasible. (MacKie-Mason Rebuttal at 29.) And as Plaintiffs point out, the selection of perfectly comparable benchmark firms aside from News Corp. is impossible where News Corp.'s alleged monopoly prevents comparable firms from operating within the market. Indeed, the twenty benchmark firms selected by Dr. MacKie-Mason were not chosen arbitrarily: he chose the firms based on their capital intensity, growth, and size. (See MacKie-Mason Rebuttal Rpt. at 29-31.)

*Dial Corp., 2015 U.S. Dist. LEXIS 79686, 2015 WL 4104624, at *10*. News Corp. presents nothing new in its motion in limine to persuade this Court to revisit its earlier ruling. And once again, it is not dispositive that MacKie-Mason's benchmark model has not been cited in peer reviewed economic literature. See *Astra Aktiebolag v. Andrx Pharms., Inc., 222 F. Supp. 2d 423, 489 (S.D.N.Y. 2002)* (" [T]he mere fact that an expert's findings have not been peer-reviewed or published is not a sufficient reason to exclude it."). News further contends that MacKie-Mason should have used Catalina Marketing ("Catalina"), **[**41]** a company which sells coupons **[*41]** distributed at checkout counters (see News Corp. 56.1 ¶ 94), as a benchmark firm. But Plaintiffs counter that Catalina went private in 2007 and ended public disclosure of its financial results. Thus, MacKie-Mason could not have used Catalina as a benchmark. (See Benz Decl. Ex. 9.)[5]

Additionally, News Corp. objects to MacKie-Mason's decision to average the margins of his benchmark firms, and his failure to control for differences between the benchmark firms and News Corp. But MacKie-Mason testified that "the average is an unbiased estimator" where, as here, he did not have any reason to think that there was "bias in the draw." (See Benz Decl. Ex. 8, MacKie-Mason Tr. at 211:13-212:7); see also *In re Wellbutrin XL Antitrust Litig., 282 F.R.D. 126, 144 (E.D. Pa. 2011)* ("The use of averages in this case does not mask meaningful variations in overcharges, and it provides a reliable method to provide a reasonable estimate of the damages based on relevant purchase data.").

News Corp. also argues that MacKie-Mason's opinions with respect to **[**42]** liability are improperly based on his findings that News Corp. acted with anticompetitive "intent." Plaintiffs dispute this characterization and point out that MacKie-Mason's opinion rests on an economic analysis of News Corp.'s market domination and how it foreclosed competition. (See Michael Decl. Ex. 4 MacKie-Mason Rpt. at 56-72, 75-91.) And there is nothing inadmissible about MacKie-Mason's reliance on evidence of News Corp.'s statements regarding its strategies. See, e.g., *United States v. Mulder, 273 F. 3d 91, 102 (2d Cir. 2001)* (permitting expert testimony that "bore on the issue of intent"). Indeed, MacKie-Mason's testimony is distinguishable from other cases in which expert testimony is plainly untethered to any economic analysis. Cf. *In re Rezulin Prods. Liab. Litig., 309 F. Supp. 2d 531, 546-47 & n.40 (S.D.N.Y. 2004)* (precluding expert testimony on intent where expert admitted that "he ha[d] no factual or scientific basis for his views regarding intent, motive or state of mind[.]").

News Corp. objects to MacKie-Mason's use of "critical loss analysis" in defining the relevant product market. Plaintiffs contend that MacKie-Mason employs an approach to the product market definition, the SSNIP test, advocated "by the DOJ Guidelines." (Michael Decl. Ex. 4, MacKie-Mason Rpt. at 30-31 (citing DOJ and FTC, Horizontal Merger Guidelines (2010)). To implement this test, MacKie-Mason employs **[**43]** a critical loss analysis, developed in Joseph Farrell and Carl Shapiro, Improving Critical Loss Analysis. The Antitrust Source 4 (Feb. 2008). The parties disagree over the proper application of this critical loss analysis. News Corp. contends that MacKie-Mason should have calculated the actual loss as part of the analysis. In lieu of calculating actual loss, which Plaintiffs contend would have been impossible, MacKie-Mason employs a critical loss analysis involving the estimation News Corp.'s margin above marginal cost and the aggregate diversion ratio (the fraction of the reduction

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[5] Plaintiffs also point out that MacKie-Mason presents an "alternative benchmark" consisting of firms that the "data vendor Capital IQ identified as "similar to News [Corp.]." (Michael Decl. Ex 48, MacKie-Mason Rebuttal Rpt. at 54.)

in demand for News Corp.'s brand of in-store promotions in response to an increase in News Corp.'s prices that would be captured by other third-party ISP providers). (Michael Decl. Ex. 4, MacKie-Mason Rpt. at 47.)

Finally, News Corp. objects to Plaintiffs' use of the "Lerner Index," which MacKie-Mason uses to determine the margin variable **[*42]** in his critical loss analysis. News Corp.'s contention that the Second Circuit rejected the "Lerner Index" in all circumstances overstates *United States v. Eastman Kodak Co., 63 F. 3d 95, 109 (2d Cir. 1995)*. There, the Second Circuit rejected use of the "Lerner Index" under the particular facts of that case. See *Eastman Kodak, 63 F.3d at 109* ("[T]he contention that Kodak film is differentiated **[**44]** from the film sold by its rivals is directly contradicted by the district court's findings . . . . Accordingly, we believe that the use of the Lerner index in this manner rests on unwarranted factual assumptions.").[6]

Ultimately, the parties' many disagreements over MacKie-Mason's methodologies go to the weight, not admissibility of MacKie-Mason's testimony. See, e.g., *In re Vitamin C Antitrust Litig., 06 MD 1738, 2012 U.S. Dist. LEXIS 181158, 2012 WL 6675117, at *8* ("[Movants'] motion asks the Court to take sides in a dispute between experts about the intricacies of economic modeling. That is not the proper function of a Daubert motion. This is not a case in which an expert is unable to articulate a rationale for his methodology; nor is it a case where the proffered rationale is patently flawed or unreasonable."). Where, as here, MacKie-Mason's **[**45]** methodologies are not clearly unsound or unreasonable, this Court declines to exclude his testimony on a Daubert motion.

CONCLUSION

For the foregoing reasons, Defendants News Corporation, News America Inc., News America Marketing FSI L.L.C., and News America Marketing In-Store Services L.L.C.'s motion for summary judgment dismissing this antitrust action is denied. In addition, Defendants' motions in limine to exclude portions of the testimony of Dr. Jeffrey MacKie-Mason, and all of the testimony of Dr. Paul Farris, are denied.

The Clerk of Court is directed to terminate the motions pending at ECF Nos. 282, 285, and 286.

Dated: January 15, 2016

New York, New York

SO ORDERED:

/s/ William H. Pauley, III

WILLIAM H. PAULEY, III

U.S.D.J.

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[6] News Corp. also challenges the portions of MacKie-Mason's testimony in which he suggests that News Corp.'s high profit margins necessarily indicate market power. But, as Plaintiffs point out, MacKie-Mason opines that News Corp.'s "persistently high" profit margins are but one indicator of market power. (Michael Decl. Ex. 4, MacKie-Mason Rpt. at 71). This testimony is admissible. See, e.g., *MacDermid Printing Solutions, Inc. v. Cortron Corp., No. 08 Civ. 1649, 2014 U.S. Dist. LEXIS 79941, 2014 WL 2615361, at *5 (D. Conn. June 12, 2014)* (noting that profit margins may "indirectly" speak to market definition).

Conn. Ironworkers Emplrs. Assoc. v. New Eng. Reg'l Council of Carpenters

United States District Court for the District of Connecticut

January 20, 2016, Decided; January 20, 2016, Filed

No. 3:10-cv-165 (SRU)

Reporter
157 F. Supp. 3d 173 *; 2016 U.S. Dist. LEXIS 6230 **; 205 L.R.R.M. 3308; 2016-1 Trade Cas. (CCH) P79,478

CONNECTICUT IRONWORKERS EMPLOYERS ASSOC., ET AL., Plaintiffs, v. NEW ENGLAND REGIONAL COUNCIL OF CARPENTERS, Defendant.

Subsequent History: Vacated by, Remanded by, in part, Affirmed by, in part *Conn. Ironworkers Emplrs. Ass'n v. New Eng. Reg'l Council of Carpenters, 2017 U.S. App. LEXIS 16142 (2d Cir., Aug. 23, 2017)*

Prior History: *Conn. Ironworkers Emplrs. Assoc. v. New Eng. Reg'l Council of Carpenters, 2012 U.S. Dist. LEXIS 37523 (D. Conn., Mar. 20, 2012)*

Core Terms

Carpenters, subcontracting, construction industry, proviso, contractor, exemption, signatory, construction manager, subcontractor, antitrust, collective bargaining agreement, collective bargaining, summary judgment, non-statutory, clauses, hire, parties, general contractor, labor organization, anti trust law, manufacturer, assigned, alleges, unfair labor practice, provisions, genuine, agrees, cases, site, summary judgment motion

Counsel: **[**1]** For Connecticut Ironworkers Employers Assoc Inc, CT corp & assoc of employers, Associated Sheet Metal & Roofing Contractors of CT Inc, CT corp & assoc of employers, MRS Ent Inc, CT corp, Barrett Inc, CT corp, Ernest Peterson Inc, CT corp, Berlin Steel Construction Co., CT corp, Plaintiffs: George J. Kelly, Jr., LEAD ATTORNEY, Siegel, O'Connor, O'Donnell & Beck, P.C.-Htfd, Hartford, CT; Paul C Hetterman, LEAD ATTORNEY, Bartley Goffstein, LLC, St. Louis, MO; Richard D. O'Connor, LEAD ATTORNEY, Siegel, O'Connor, Zangari, O'Donnell & Beck, Hartford, CT; Ronald C. Gladney, LEAD ATTORNEY, PRO HAC VICE, Hartnett Gladney Hetterman, LLC, St. Louis, MO.

For Iron Workers Local No 15, Intl Assoc of Bridge, Structural, Ornamental & Reinforcing, unincorporated assoc, labor organization, Iron Workers Local 37, Intl Assoc of Bridge, Structural, Ornamental & Reinforcing, unincorporated, labor organization, Iron Workers Local 424, Intl assoc of bridge, structural, ornamental & reinforcing, unincorporated labor organization, Sheet Metal Workers Local 38, Unincorporated assoc & labor organization, Sheet Metal Workers' Local No 40, Unincorporated assoc & labor organization, International Union of Painters **[**2]** & Allied Trades District Council 11, AFL-CIO, CLC, unincorporated assoc & labor organization, Intl Union of Painters, Allied Trades Local Unions, Glaziers Local Union Nos 1333 & 1274, Glaziers Union No 1333, Uninc assoc & labor organization, Glaziers Union Local No 1274, Uninc assoc & labor organization, Plaintiffs: Paul C Hetterman, LEAD ATTORNEY, Bartley Goffstein, LLC, St. Louis, MO; Ronald C. Gladney, LEAD ATTORNEY, PRO HAC VICE, Hartnett Gladney Hetterman, LLC, St. Louis, MO; Thomas W. Meiklejohn, LEAD ATTORNEY, Livingston, Adler, Pulda, Meiklejohn & Kelly, Hartford, CT.

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Judges: Stefan R. Underhill, United States District Judge.

Opinion by: Stefan R. Underhill

Opinion

[*175] **MEMORANDUM OF DECISION AND ORDER**

This case arises out of the negotiation and **[**3]** enforcement of a subcontracting clause in the New England Regional Council of Carpenters (the "Carpenters") collective bargaining agreements ("CBAs") with non-party construction companies and construction managers. Plaintiffs allege that the Carpenters have used the subcontracting clause of their CBAs to expand the scope of work assigned to Carpenters to include work traditionally assigned to plaintiff organizations. Plaintiffs contend that this conduct constitutes anticompetitive behavior, in violation of sections 1 and *2* of the Sherman Act, *15 U.S.C. §§ 1* and *2* (Count I), and unfair labor practices, in violation of *29 U.S.C. § 187* (Count II).

The Carpenters move for summary judgment on both counts. With respect to Count I, the Carpenters argue that the non-statutory labor exemption and the "construction industry proviso" provided in Section 8(e) of the National Labor Relations Board Act ("NLRA"), *29 U.S.C. § 158(e)*, shield their actions from antitrust scrutiny. The Carpenters also contend that they are not liable under Count II because, if shielded by the construction industry proviso, their conduct does not violate the NLRA.

I agree. The Carpenters have demonstrated that the construction industry proviso and non-statutory labor exemption apply to shield **[**4]** their conduct arising out of lawful collective bargaining relationships. Plaintiffs fail to adduce evidence sufficient to raise a material dispute with respect to whether such agreements in fact arose as part of lawful collective bargaining relationships. Accordingly, the Carpenters' summary judgment motion (doc. # 85) is granted.

I. STANDARD OF REVIEW

Summary judgment is appropriate when the record demonstrates that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*; *see also* *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)* (plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgment). A district court applies the same standard "whether summary judgment is granted on the merits or on an affirmative defense such as the statute of limitations." *Giordano v. Mkt. Am., Inc., 599 F.3d 87, 93 (2d Cir. 2009)* (citing *Buttry v. Gen. Signal Corp., 68 F.3d 1488, 1492 (2d Cir. 1995))*.

[*176] When ruling on a summary judgment motion, the court must construe the facts of record in the light most favorable to the nonmoving party and must resolve all ambiguities and draw all reasonable inferences against the moving party. *Anderson, 477 U.S. at 255*; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*; *Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-59, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970)*; *see also* *Aldrich v. Randolph Cent. Sch. Dist., 963 F.2d. 520, 523 (2d Cir.)*, *cert. denied*, *506 U.S. 965, 113 S. Ct. 440, 121 L. Ed. 2d 359 (1992)* (court is required to "resolve all ambiguities and draw all inferences in favor of the nonmoving party"). When **[**5]** a motion for summary judgment is properly supported by documentary and testimonial evidence, however, the nonmoving party may not rest upon the mere allegations or denials of his pleadings, but must present sufficient probative evidence to establish a genuine issue of material fact. *Celotex Corp. v. Catrett, 477 U.S. 317, 327, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*; *Colon v. Coughlin, 58 F.3d 865, 872 (2d Cir. 1995)*.

"Only when reasonable minds could not differ as to the import of the evidence is summary judgment proper." Bryant v. Maffucci, 923 F.2d 979, 982 (2d Cir. 1991); *see also* Suburban Propane v. Proctor Gas, Inc., 953 F.2d 780, 788 (2d Cir. 1992). If the nonmoving party submits evidence that is "merely colorable," or is not "significantly probative," summary judgment may be granted. Anderson, 477 U.S. at 249-50.

> The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact. As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.

Id. at 247-48. To present a "genuine" issue of material fact, there must be contradictory evidence "such that a reasonable jury could return a verdict for **[**6]** the non-moving party." Id. at 248.

If the nonmoving party has failed to make a sufficient showing on an essential element of his case with respect to which he has the burden of proof at trial, then summary judgment is appropriate. Celotex, 477 U.S. at 322. In such a situation, "there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Id. at 322-23; *accord* Goenaga v. March of Dimes Birth Defects Found., 51 F.3d 14, 18 (2d Cir. 1995) (movant's burden satisfied if he can point to an absence of evidence to support an essential element of nonmoving party's claim). In short, if there is no genuine issue of material fact, summary judgment may enter. Celotex, 477 U.S. at 323.

II. BACKGROUND[1]

A more detailed recitation of the facts is set forth in my ruling on the Carpenters' motion to dismiss (doc. # 17). *See* Conn. **[*177]** Ironworkers Emplrs. Assoc. v. New Eng. Reg'l Council of Carpenters, No. 3:10-cv-165 (SRU), 2012 U.S. Dist. LEXIS 37523, 2012 WL 951793, at *2-6 (D. Conn. Mar. 20, 2012). Plaintiffs ("Ironworkers") are a district council, seven locals affiliated with construction trade unions, four construction contractors, and two trade organizations. Defendant (the "Carpenters") **[**7]** is a labor organization that operates throughout New England. Ironworkers allege that the Carpenters have used their subcontracting agreements in order to expand the scope of work that is assigned to them by construction managers who are signatories to their CBAs. Ironworkers contend that such a practice violates section 1 and 2 of the Sherman Act and section 8(b)(4) of the NLRA.

A. Relevant Work and Market Area

The "relevant work" at issue in the case includes: exterior building enclosure systems such as exterior metal panels, composite wall panels, foam panels, and insulated panel systems; exterior panelized window systems, punched windows, curtain wall, store fronts; and metal roofing systems and related components. The relevant work has been the subject of a series of jurisdictional disputes between the parties. Def.'s Local Rule ("D.L.R.") 56(a)(1) Stmt. ¶ 68.

The "relevant market area" for Ironworkers' purposes is Connecticut, Rhode Island and Western Massachusetts. There were 8,030 construction projects built in that area between 2009 and 2014.

B. The Claims

Ironworkers' claims concern the enforcement of subcontracting provisions in the Carpenters' CBAs. The subcontracting clause in certain CBAs bars signatories from **[**8]** subcontracting work to any firm that is not also a signatory to the Carpenters' CBAs. D.L.R. ¶¶ 29, 31, 33. The Carpenters argue that those provisions are commonplace in the construction industry, and point to similar provisions in CBAs to which Ironworkers are signatories. *See* D.L.R. ¶¶ 51, 55, 56. Ironworkers argue that the Carpenters used the subcontracting clause of the CBAs to act in concert with various non-party general contractors and construction managers to prevent plaintiff

[1] The following facts are drawn from the parties' Local Rule 56(a) Statements and are undisputed unless otherwise indicated.

labor organizations from performing, bidding on, or benefitting from the performance of relevant work. Ironworkers contend that enforcement of these subcontracting clauses conflicts with the traditional industry practice and permits them to obtain work traditionally performed by Iron Workers, Sheet Metal Workers, and Glaziers. Prior to 2009, the Carpenters had never sought to bid on or perform the relevant work. Since 2008, however, the Carpenters have worked to ensure that bids for relevant work are submitted only by employers, contractors and subcontractors who are signatory to the Carpenters' agreement. Ironworkers allege that the above-described conduct is aimed at forcing plaintiff employers and **[**9]** signatories of plaintiff labor organizations to enter into CBAs with Carpenters, which would extend the representative base of Carpenters and freeze plaintiff labor organizations and their members off job sites.

Ironworkers' allegations included seven examples of projects for which the Carpenters entered into an agreement with a construction manager allegedly in violation of the antitrust or labor laws. The non-party construction companies and their associated projects are as follows: (1) Suffolk Construction Company ("Suffolk"), 360 State Street Project, New Haven, Connecticut; (2) Dimeo Construction ("Dimeo"), New Rowe Residences, New Haven, Connecticut; (3) Turner Construction ("Turner"), St. Francis Hospital, Hartford, Connecticut; (4) Bond Brothers ("Bond"), **[*178]** Bryant University Project, Smithfield, Rhode Island; (5) E. Turgeon ("Turgeon"), Immaculate Conception Catholic Regional School, Cranston, Rhode Island; (6) Berry & Sons ("Berry"), Bay State Medical Center Hospital Project, Springfield, Massachusetts; and (7) Fusco, Inc. ("Fusco"), Schools Project, New London, Connecticut.

A fuller statement of the agreements associated with the above projects is laid out in my ruling on the **[**10]** motion to dismiss (doc. # 17). *See* *Conn. Ironworkers, 2012 U.S. Dist. LEXIS 37523, 2012 WL 951793, at *4-6*. Each project involved an agreement between the construction manager and the Carpenters to assign relevant work to Carpenters' signatories in accordance with the CBA. Ironworkers claim that such agreements violate *sections 1* and *2* of the Sherman Act, *15 U.S.C. §§ 1* and *2* (Count I).

In Count II, plaintiff M.R.S. Enterprises ("MRS") alleges that Carpenters violated *29 U.S.C. § 187* by forcing Turgeon to cancel MRS's contract. Turgeon cancelled MRS's contract because MRS intended to hire plaintiff union members and not Carpenters' signatories. MRS alleges that Turgeon's actions were caused by Carpenters' threat to enforce their subcontracting agreement with Turgeon, which required the relevant work to be performed by Carpenters' union members.

III. DISCUSSION

As a general rule, agreements to refrain from dealing with others, such as the union signatory subcontracting clause at issue here, are "vulnerable to challenge under federal antitrust laws unless they are protected by both the construction industry proviso and by an exemption from antitrust scrutiny." *Local 210, Laborer's Intern. Union of North America v. Labor Relations Division Assoc. General Contractors of America, N.Y.S. Chapter, Inc., 844 F.2d 69, 73 (2d Cir. 1988)*. The Carpenters contend that the "construction industry proviso" of *section 8(e) of the NLRA* and the non-statutory labor exemption to the antitrust laws permit them to enter **[**11]** into the challenged union signatory subcontracting clause. Pls.' Opp'n to Def.'s Mot. Summ. J. at 12, 22. The Carpenters further claim that, if their conduct falls within the above exceptions to antitrust and labor laws, they are also exempt from liability for any alleged violations of *29 U.S.C. § 187*.

If a defendant can introduce evidence sufficient to establish an affirmative defense, a plaintiff may only avoid summary judgment by introducing evidence to counter that assertion. *Eagleston v. Guido, 41 F.3d 865, 873 (2d Cir. 1994)* (affirming grant of summary judgment on qualified immunity defense because undisputed evidence showed that officer's conduct was objectively reasonable); *see also Angevine v. State Farm Fire & Cas. Co., 189 F.3d 460 (2d Cir. 1999)* (unreported) (affirming grant of summary judgment in favor of defendant when plaintiff failed to introduce evidence tending to show that insurance company's affirmative defense did not apply). In order to defeat a motion for summary judgment based on a well-supported affirmative defense, a plaintiff must "adduce[] evidence . . . sufficient to create a genuine issue of material fact" with respect to whether the affirmative defense applies. *La*

*Barbera v. R. Rio Trucking, No. 03CV1508 (SLT) (AKT), 2007 U.S. Dist. LEXIS 54739, 2007 WL 2177063, at *4 (E.D.N.Y. July 27, 2007)*; *In re Cardtronics ATM Fee Notice Litig., 874 F. Supp. 2d 916, 923 (S.D. Cal. 2012)*, *aff'd*, *559 Fed. Appx. 633 (9th Cir. 2014)* (summary judgment in favor of defendant proper when plaintiffs failed **[**12]** to offer evidence to rebut defendant's establishment of affirmative defense).

[*179] Because I conclude that the construction industry proviso and non-statutory labor exemption to the antitrust laws apply to shield the Carpenters' conduct, I do not reach the substance of Ironworkers' antitrust allegations. Furthermore, because the construction industry proviso countenances Carpenters' conduct that is the subject of MRS' unfair labor practices claim, I hold that MRS will be unable to establish a *section 187* violation. Ironworkers have failed to raise a material dispute of fact with respect to those issues. Accordingly, the proviso and non-statutory labor exemption shield the defendant from liability and warrant a grant of the Carpenters' motion for summary judgment on all counts.

A. Antitrust Claims (Count I)

The Carpenters contend that the construction industry proviso of *section 8(e)* of the NLRA and the non-statutory labor exemption to the antitrust laws permit Carpenters to enter into the challenged subcontracting clauses.

1. "Construction Industry Proviso"

The Carpenters' subcontracting agreements with the named construction managers will be subject to antitrust scrutiny unless they fall within the construction industry proviso of *NLRA section 8(e)* **[**13]** . In 1959, Congress enacted the Landrum-Griffin amendments to the NLRA. The amendments included *section 8(e)*, which is commonly referred to as the "hot-cargo" provision. It provides:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: ***Provided*****, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work**: *Provided further*, That for the purposes of this subsection and subsection *(b)(4)(B)* of this section the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", **[**14]** "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.

29 U.S.C. § 158(e) (emphasis in bold added). The language in bold is commonly referred to as the "construction industry proviso" and generally exempts those in the construction industry from the prohibitions of *section 8(e)*. The Carpenters contend that Ironworkers' antitrust claims fail because the union signatory subcontracting clause with the construction employers is lawful under the proviso.

Plainly read, the construction industry proviso applies to agreements (1) between **[*180]** a labor organization and an employer in the construction industry; (2) relating to the contracting or subcontracting of work; (3) to be done at the site of construction. *29 U.S.C. § 158(e)*. However, a court is required to read *section 8(e)* light of its "statutory setting and the circumstances surrounding its enactment." *Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 628, 95 S. Ct. 1830, 44 L. Ed. 2d 418 (1975)*. In *Connell*, the Court held that, even though Congress expressly permitted labor organizations and employers in the construction industry to enter into agreements otherwise prohibited, Congress intended the proviso **[**15]** to apply principally to agreements in the context of a collective-bargaining relationship. *Id. at 629-33*. Moreover, the Second Circuit has held that, in order to adequately conduct such an analysis, the court must also determine whether the practice is consistent with "Congress' perceptions regarding the status quo in the construction industry [in 1959]." Local 210, 844 F.2d at 75-76 (citing Woelke & Romero Framing, Inc. v. N.L.R.B., 456 U.S. 645, 657, 102 S. Ct. 2071, 72 L. Ed. 2d 398 (1982)) (internal quotation marks omitted). Thus, the final inquiry requires a court to consider whether the agreements were obtained in the context of a collective-bargaining relationship of the type that was contemplated at the time of section 8(e)'s enactment.

The Carpenters contend that the subcontracting clauses fall within the construction industry proviso because they satisfy all prongs of the test, including that the agreements containing the clauses were obtained in the context of a collective bargaining relationship.

Ironworkers counter that the construction industry proviso does not apply here because the defendant has not shown that: (1) the parties with whom the Carpenters entered into a CBA were "employers within the construction industry"; (2) that the conduct occurred within the context of a collective bargaining agreement; and (3) the conduct **[**16]** at issue is consistent with Congress' perception of practices in the construction industry in 1959. Each of the Ironworkers' three objections relies on a strained interpretation of the construction industry proviso that is unsupported by legal authority. None of the Ironworkers' objections raises a dispute of material fact with respect to the proviso.

a. Employers within the Construction Industry

Ironworkers argue that the construction industry proviso requires that the employers must not only be "within the construction industry," but that the employers must be an employer "within the construction industry, *with respect to a particular project*." Pls.' Opp'n to Def.'s Mot. Summ. J. at 18. Ironworkers point to the fact that, in some instances, a construction manager would award a subcontract to Carpenters, even though there were no carpenters employed on the job. Ironworkers argue that the failure to employ carpenters on a specific job is evidence that the subcontracting agreements are outside the scope of the construction industry proviso.

Ironworkers cite no support for that argument. A plain reading of the statute indicates that the term "employer in the construction industry" is just **[**17]** that, an employer in the construction industry—no more and no less. The fact that a construction manager might be "employed in a managerial capacity and will not employ its own workers on the Project does not remove it from the category of 'construction employer.'" Albany Specialties, Inc. v. Board of Educ., No. 99-CV-1462 (TJM), 1999 U.S. Dist. LEXIS 21040, 1999 WL 1215291, at *8 (N.D.N.Y. Oct. 1, 1999). Moreover, Ironworkers' argument was specifically rejected **[*181]** in A.L. Adams Constr. Co. v. Georgia Power Co., 733 F.2d 853, 858 (11th Cir. 1984) (rejecting plaintiff's argument that general contractor who subcontracted out all of its work did not qualify as an "employer in the construction industry").

b. In the Context of a Collective Bargaining Agreement

Courts interpreting the construction industry proviso have held that the "mere existence of a labor agreement that was entered into before employees were hired and before the union had demonstrated that it represented a majority of the workforce (a prehire agreement), demonstrates a sufficient collective bargaining relationship to invoke the protection of the Construction Industry Proviso under *Connell*." Albany Specialties, 1999 U.S. Dist. LEXIS 21040, 1999 WL 1215291, at *6 (citing Bldg. & Constr. Trades Council v. Associated Builders and Contractors of Mass./R.I., Inc. (Boston Harbor), 507 U.S. 218, 229, 113 S. Ct. 1190, 122 L. Ed. 2d 565 (1993)) (internal footnotes omitted). That is because prehire agreements are seen as "the very means by which unions and employers typically initiate a bargaining relationship in the construction industry." A.L. Adams Constr., 733 F.2d at 856.

In the denial of the Carpenters' motion to **[**18]** dismiss, I held that the Carpenters could only seek protection under the construction industry proviso if they could establish that the subcontracting agreements were sought or negotiated in the context of a collective bargaining relationship. *See* Conn. Ironworkers Emplrs. Assoc. v. New Eng.

Reg'l Council of Carpenters, No. 3:10-cv-165 (SRU), 2012 U.S. Dist. LEXIS 37523, 2012 WL 951793, at *9 (D. Conn. Mar. 20, 2012). The Carpenters could do so by showing that the subcontracting clause at issue was part of a valid CBA.

In support of the instant motion, the Carpenters came forward with evidence demonstrating that each of the subcontracting clauses at issue was part and parcel of an existing CBA. D.L.R. ¶¶ 29-34; Def.'s Mot. Summ. J. Br. at 15. Ironworkers did not introduce any evidence that raised a material dispute with respect to that fact.

Rather, Ironworkers countered by asserting that the subcontracting clauses at issue, though part and parcel of an existing CBA, were being enforced in a manner outside the scope of the CBA. Pls.' Opp'n to Def.'s Mot. Summ. J. 24. In support of their claim, Ironworkers argued that the subcontracting clauses in the CBAs did not apply any time the construction projects were subject to a project labor agreement ("PLA"). **[**19]** Mot. Summ. J. Hr'g Tr. at 43. Thus, the argument goes, in a project covered by a PLA, any attempt to enforce such clauses was an attempt to enforce an agreement outside the scope of a collective bargaining relationship.

Ironworkers falter in their effort to show that the CBAs did not apply to projects governed by a PLA. At oral argument on this motion, I asked Ironworkers to provide legal support for their assertion. Ironworkers could not do so. Rather, Ironworkers relied solely on the language of the PLA to raise an inference that it wholly replaced the existing CBA's subcontracting clause. For example, Ironworkers pointed to the PLA that governed the *Bay State Medical Center Hospital Project*. Under that PLA, the construction manager, Berry, was given the discretion to hire "any qualified contractor." Def.'s Ex. 70, at 3. Ironworkers argued that the PLA's grant of discretion is in conflict with Berry's CBA with the Carpenters, which provided that the construction manager must use Carpenters-approved subcontractors. Mot. Summ. J. Hr'g Tr. at 30-31.

Ironworkers' argument is mistaken. None of the above evidence indicates that **[*182]** the CBA and PLA were in conflict. The PLA gave Berry the discretion **[**20]** to hire "any qualified contractor." Berry used its discretion to hire a Carpenters' signatory contractor. The fact that his decision was based on a prior CBA agreement with Carpenters does not negate the fact that it was Berry's decision. There would only be a conflict between the PLA and the CBA if, as a result of the CBA, Berry was forced to hire an unqualified contractor. That would violate the PLA's authorization to hire "any qualified contractor." However, Ironworkers fail to show that the Carpenters' signatory contractor was not qualified. Accordingly, Ironworkers fail to introduce sufficient evidence to raise a material dispute regarding whether the two agreements are in conflict.[2]

Ironworkers also attempted to point to the PLA associated with the 360 State Street Project in order to show a conflict between it and the Carpenters' subcontracting agreement. The PLA contains language indicating that the subcontractor, not Carpenters, retained "full and exclusive authority for the management of its operations(s) . . . including the hiring . . . of its employees." Def.'s Ex. 88, Art. V., Section 1. That clause, on its face, looks like it is in direct conflict with Carpenters' subcontracting agreement with Suffolk, which required certain subcontractors to hire Carpenters' labor. However, a closer look at the PLA indicates that the purported "full and exclusive authority" was actually subject to—and thus subordinate to—the existing CBA. Def.'s Ex. 88, Art. V., Section 1 (subcontractors retained full and exclusive authority, "[e]xcept as expressly limited by other provisions of this Agreement," including a provision indicating that "all Subcontractors recognize the Unions signatory hereto as the sole and exclusive collective-bargaining **[**22]** representative of its craft hourly wage employees employed on the Project . . . [and] [t]he Local collective bargaining Agreement(s) will be adhered to . . . ." Def.'s Ex. 88, Section 2(a), Section V. Thus, Ironworkers again fail in their attempt to raise a material dispute regarding an alleged conflict between a PLA and

[2] I should note that there is also some evidence indicating that the CBA was incorporated into the PLA. Each PLA at issue stated that its provisions were subject to the existing Schedules A. Although neither party could procure a list of the Schedules A listed in the PLAs, a plain reading of the PLAs suggests that the Schedules A were a list of CBAs to be incorporated into the PLAs. *See* Def.'s Ex. 70, at 4. I gave Ironworkers the opportunity to dispute this inference through post-hearing supplemental **[**21]** memorandum, but they have failed to do so. Furthermore, Ironworkers could not point to any legal authority indicating that CBAs were legally outside the scope of the PLAs.

any of the CBAs at issue.[3] Because no conflict has been established, Ironworkers fail in their effort to provide evidence that the challenged subcontracting clauses are being enforced outside the scope of lawful CBAs.

The record demonstrates, as a matter of law, that each of the subcontracting agreements was entered into as part of an existing, valid CBA, and thus necessarily arose in the context of a collective **[**23]** bargaining relationship. Ironworkers have failed to raise a material dispute with respect to the issue and have failed to cite any legal authority compelling a contrary conclusion.

[*183] *c. Construction Industry Practice in 1959*

Finally, Ironworkers argue that they do not object to the subcontracting clauses themselves, but how they are being enforced. The Ironworkers pivot away from cases upholding the validity of similar subcontracting clauses and distinguish those cases on the ground that none of them considered the enforcement of subcontracting clauses against contractors whose role in the construction industry did not exist in 1959. Ironworkers argue that construction managers did not exist in 1959 and, therefore, that the Carpenters have not shown that the enforcement of the work assignment agreements against construction managers in the 2000s is consistent with the 1959 status quo.

Ironworkers' argument misses the point of *Local 210*'s test for permissibility under the construction industry proviso. *See* *Local 210, 844 F.2d at 75*. Courts must interpret the proviso in light of Congress' concerns regarding the construction industry in 1959. *Id. at 75*. What Congress saw in the industry was restrictive subcontracting clauses **[**24]** in collective bargaining agreements limiting the ability of employers to deal with non-union or non-signatory subcontractors. *Id.* The issue Congress confronted was the phenomenon of restrictive subcontracting clauses between employers in the construction industry and labor. Nothing suggests that Congress was particularly concerned with the *title* of an individual employer in the construction industry. Rather, Congress was concerned with whether the employer was in the construction industry. Construction managers are in the construction industry and are involved in the phenomenon of restrictive subcontracting. Even if the title "construction manager" did not exist in 1959, the concept of a construction industry employer engaged in subcontracting certainly did.[4]

The Carpenters have established the requisite elements to be afforded the protection of the construction industry proviso and Ironworkers have failed to raise any triable issue of fact **[**25]** with respect to any of the elements.

2. Non-Statutory Labor Exemption

Even if a clause is protected by the construction industry proviso, "it is not necessarily beyond the reach of the federal antitrust laws." *Local 210, 844 F.2d at 79*. In *Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100*, the Supreme Court recognized that certain clauses in collective bargaining agreements, even those concerning the construction industry, can act as a "direct restraint on the business market" in a manner having "substantial anticompetitive effects, both actual and potential." *421 U.S. 616, 625, 95 S. Ct. 1830, 44 L. Ed. 2d 418 (1975)*. Restrictive clauses like the one at issue in this case may be challenged under federal antitrust laws unless the clause is protected by both the construction industry proviso *and* an antitrust labor exemption. *See* *Local 210, 844 F.2d at 73*.

"[T]he [Sherman] Act is aimed primarily at combinations having commercial objectives and is applied only to a very limited extent to organizations, like labor unions, which normally have other objectives." *Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 213 n.7, 79 S. Ct. 705, 3 L. Ed. 2d 741 (1959)*. Nevertheless, "[i]t would be a surprising thing if Congress, in order to prevent a misapplication of [antitrust] legislation to labor unions, **[*184]** had

[3] After oral argument, I asked Ironworkers to provide support for their contention that Carpenters' enforcement of their CBA was contrary to public bid statutes. Ironworkers failed to mention any specific public bid law that the Carpenters allegedly violated in their attempt to enforce provisions of the CBA agreement. Accordingly I conclude that no dispute of material fact exists with respect to the allegations that the Carpenters enforced their CBA contrary to any public bid law.

[4] I also should note that the assertion that construction managers did not exist in 1959 is quite dubious, given that Carpenters have pointed to two pre-1959 cases involving construction managers. Nevertheless, that factual question is not material.

bestowed upon such unions complete and unreviewable authority to aide business groups **[**26]** to frustrate its primary objective." *Allen Bradley Co. v. Local Union No. 3, Int'l Bhd. of Elec. Workers, 325 U.S. 797, 809-10, 65 S. Ct. 1533, 89 L. Ed. 1939 (1945)*.

Courts have long recognized the tension between national antitrust policy and national labor policy. In light of the competing interests of congressional policy favoring both collective bargaining under the NLRA and free competition in business, two antitrust exemptions are recognized. *Connell, 421 U.S. at 622*. The statutory exemption, which the parties agree does not apply here, provides that union activity is exempt from antitrust liability "so long as [the] union acts in its self-interest and does not combine with non-labor groups."[5] *United States v. Hutcheson, 312 U.S. 219, 232, 61 S. Ct. 463, 85 L. Ed. 788 (1941)*. The non-statutory exemption provides that the restraints are lawful so long as the alleged anticompetitive conduct is: inherent in the collective-bargaining process, concerns only the parties to the collective bargaining relationship, and relates to wages, hours, conditions of employment, or other relevant subjects of collective bargaining. *See* *Connell, 421 U.S. at 622*.

In this circuit, a court assessing whether an agreement **[**27]** is protected by the non-statutory labor exemption should consider the relative impact of the agreement on the product market and the interests of the union members. *See* *Local 210, 844 F.2d at 79*. The *Local 210* decision also instructs the district court to balance the conflicting policies embodied in labor and antitrust laws. *Id.*

The court must first consider whether the agreement at issue furthers goals that are protected by national labor law and are within the scope of traditionally mandatory subjects of collective bargaining. *Id.* Traditionally, mandatory subjects in a collective bargaining agreement include wages, hours, fringe benefits, conditions of employment, and other subjects that are more likely to embody legitimate employee concerns about compensation, workplace, or security, and less likely to be restraints on competition. *See* 1B Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law***, at ¶ 256d3 (3d ed. 2007). Courts have held that subcontracting agreements—"the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment"—can be mandatory subjects of collective bargaining. *See* *Fibreboard Paper Products Corp. v. N.L.R.B., 379 U.S. 203, 215, 85 S. Ct. 398, 13 L. Ed. 2d 233 (1964)*. Even though the Court in **[**28]** *Fibreboard* declined to extend its holding to all types of subcontracting, it held that the "substitution of one group of workers for another to perform the same task in the same [location] under the ultimate control of the same employer" is a mandatory subject of collective bargaining. *Id. at 224* (Stewart, J., concurring).

Second, the court must consider whether the agreement imposes a direct restraint on the market that has substantial anticompetitive effects that do not follow naturally from the collective bargaining agreement. *Local 210, 844 F.2d at 79-80*. If the agreement is a legitimate collective bargaining agreement, then the **[*185]** "touchstone in assessing its validity must be the policies embodied in federal labor law." *Id. at 81*. In *Local 210*, the Court relied heavily on the fact that the subcontracting clause at issue was part of an otherwise valid collective bargaining agreement. *Id. at 80*. The Court held that, "in seeking the inclusion of the clause in the agreement, the union was pursuing a legitimate bargaining objective . . . to promote the close community of interests among construction workers within its jurisdiction." (internal citations, quotation marks and alterations omitted). *Id. at 81*. Accordingly, because the Court saw no evidence **[**29]** of an "antitrust conspiracy otherwise existing," both the construction industry proviso and the non-statutory labor exemption "preclude[d] any further antitrust scrutiny." *Id.*[6] The Court was not concerned with the threat that such a holding might allow the union to achieve monopoly status. Rather, the Court held that such a threat "would not, standing alone, necessarily mandate antitrust liability." *Id.*

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[5] The Carpenters have not claimed that the challenged agreements fall within the statutory exemption. In any event, the agreements would not fall under the statutory exemption because the agreements concern both union and non-union conduct. *See* *Local 210, 844 F.2d at 79*.

[6] *See also* H. Perritt, Jr., *Keeping the Government Out of the Way: Project Labor Agreements Under the Supreme Court's Boston Harbor Decision*, *12 Lab. Law. 69, 90 (1996)* ("[T]he more logical relationship between the two statutes is that conduct allowed by the NLRA also is within the labor exemptions to the antitrust laws. In other words, if a project labor agreement is permitted by *section 8(e)*, it may not be the basis of antitrust liability.").

In denying the Carpenters' motion to dismiss, I gave Ironworkers the opportunity to introduce evidence that tended to show that the subcontracting agreements at issue were not embodied in a legitimate collective bargaining agreement.[7] Ironworkers once again rely on their assertion that the PLAs replace rather than incorporate the CBAs. Ironworkers contend that any attempt to enforce Carpenters' subcontracting **[**30]** agreements outlined in the CBAs constitutes an agreement outside of the collective bargaining relationship. That argument has been considered and rejected in my discussion of the applicability of the construction industry proviso. *See supra*, Section III.A.1.

Ironworkers also allege that the Carpenters fail to satisfy elements of the non-statutory labor exemption as outlined in *American Steel Erectors v. Local Union No. 7, 536 F.3d 68, 77 (1st Cir. 2008)*. Pls.' Opp'n to Def.'s Mot. Summ. J. at 24. In support of that argument, Ironworkers cite a number of cases, none of which involves a subcontracting agreement similar to those in the instant case. *Id.* For example, Ironworkers rely on *U.S. Info. Sys., Inc. v. Int'l Bhd. of Elec. Workers Local Union No. 3, AFL-CIO*—a case in which a plaintiff alleged that the defendants resorted to their "tried and true tactic of creating fear . . . sabotage and vandalism . . . if a [competition union] contractor is awarded the job." *No. 00-CV-4763 (RMB) (JCF), 2007 U.S. Dist. LEXIS 56229, 2007 WL 2219513, at *2 (S.D.N.Y. Aug. 3, 2007)*, *report and recommendation* **[**31]** *adopted sub nom.* *United States Info. Sys. v. IBEW Local Union No. 3, No. 00-CV-4763 (RMB) (JCF), 2007 U.S. Dist. LEXIS 69760, 2007 WL 2746902 (S.D.N.Y. Sept. 18, 2007)*, *aff'd*, *366 F. App'x 290 (2d Cir. 2010)*. Ironworkers also point to *Allen Bradley Co. v. Local Union No. 3, Int'l Bhd. of Elec. Workers*, a case in which the Supreme Court refused to apply the non-statutory labor exemption to an agreement that prohibited employers from buying goods manufactured by companies employing non-union labor. *325 U.S. 797, 809, 65 S. Ct. 1533, 89 L. Ed. 1939* **[*186]** *(1945)*. All of the alleged agreements in those cases shared one of two characteristics: either they did not arise out of a collective bargaining relationship or they involved an agreement that far exceeded the scope of a lawful CBA.

In this case, however, each subcontracting agreement did not just arise in the *context* of a collective bargaining relationship, but also was a *part* of an existing CBA. D.L.R. ¶¶ 29-34. Furthermore, Ironworkers fail to cite any cases indicating that the type of subcontracting agreement at issue is anything other than a lawful subject of a CBA.[8]

This case is dissimilar to *Connell*, where the Court held that a union used extra-legal methods to pursue the legal goal of organizing as many subcontractors as possible. *See* *Connell, 421 U.S. at 625*. In *Connell*, the Court focused on the fact that the labor union's agreements with a general contractor were not designed to protect union members. *Id. at 631*. The union was unable to argue that the agreement was part of a valid collective bargaining relationship between the union and the general contractor because the contractor did not employ union laborers and the union had no interest in bargaining with the general contractor on their behalf. *Id. at 619*. Rather than arising out of the collective bargaining process designed to protect union member's labor interests, the agreements in *Connell* sought only to pressure subcontractors into recognizing the union as the representative of their employees. *Id. at 631*. The Court was concerned with the fact that the agreement between the general contractor and the defendant-union "did not flow naturally from **[**33]** elimination of competition over wages and working conditions." *Id. at 635*. Similarly, in *Larry V. Muko, Inc. v. Sw. Pa. Bldg. & Constr. Trades Council*, the court held that an agreement was subject to antitrust scrutiny when it arose not out of a CBA but rather as a result of the defendant's picketing the employer for not hiring union labor. *609 F.2d 1368, 1371 (3d Cir. 1979)*.

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[7] The Carpenters have come forward with evidence that the subcontracting agreements are part of the existing CBAs, which, absent evidence to the contrary, I conclude serve the legitimate goal of controlling the workplace. D.L.R. ¶¶ 29-34; Def.'s Mot. Summ. J. Br. at 6-9.

[8] Courts have also looked to the history of bargaining over a particular subject as evidence that an agreement relating to that subject fell within the non-statutory labor exemption. *See* *Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen of N. Am., AFL-CIO v. Jewel Tea Co., 381 U.S. 676, 697, 85 S. Ct. 1596, 14 L. Ed. 2d 640 (1965)*. In the instant case, the Carpenters **[**32]** point to the fact that Ironworkers have similar subcontracting agreements with their union-affiliated employers. That is even further evidence that such agreements are the proper subject of a CBA.

Ironworkers attempt to raise a similar issue of fact with respect to Carpenters' attempt to enforce subcontracting agreements with various construction managers. For example, Ironworkers point to grievance settlements reached by the Carpenters and their various construction managers as evidence that the Carpenters are attempting to unlawfully enforce the subcontracting agreements. Pls.' Opp'n to Def.'s Mot. Summ. J. at 3, 5, 9. In those cases, the Carpenters would contact the construction manager to inform it that they would be filing a grievance based on the failure to assign work according to the existing CBA. As a result of such communications, the construction manager would typically sign an agreement indicating that it had violated the relevant CBA and that, in the future, it would assign the work to Carpenters in accordance with the CBA. Def.'s Ex. **[**34]** 30. Alternatively, if the construction manager felt it had not violated the CBA, it would refuse to sign such an agreement. Pls.' *Local Rule 56(a)(2)* Stmt. ¶ 48; Pls.' Suppl. Mem. in Opp'n to Def.'s Mot. Summ. J. at 9.

[*187] The described practice does not amount to evidence of an antitrust violation because it merely shows that the Carpenters were attempting to enforce their subcontracting agreements. Unless Ironworkers can show that such agreements are unlawful, a showing of attempts to enforce the agreements is beside the point. Ironworkers have failed to introduce evidence sufficient for a fact finder to conclude that the subcontracting provisions at issue were anything but lawful provisions of a valid CBA. Furthermore, Ironworkers have failed to point to any evidence of an antitrust conspiracy. Accordingly, I hold that the subcontracting agreements are protected by the non-statutory labor exemption. *See* *Local 210, 844 F.2d at 81*. I do not reach the question whether, absent the non-statutory labor exemption and the construction industry proviso, the Carpenters' conduct violated *sections 1* or *2 of the Sherman Act*.

B. Unfair Labor Practices (Count II)

In the second count, plaintiff MRS alleges that the Carpenters, in concert with their signatory **[**35]** construction employers, violated *29 U.S.C. § 158(b)(4) (section 8(b)(4) of the NLRA)* by encouraging and inducing its signatory contractors to refrain from entering into contracts with MRS in violation of *29 U.S.C. § 187*. MRS claims that the Carpenters have a history of pursuing grievances against construction managers who are believed to have violated their CBAs by assigning covered work to non-Carpenters' signatory contractors. Pls.' Opp'n to Def.'s Mot. Summ. J. at 29. One of the non-Carpenters' signatory contractors was Turgeon Construction. MRS alleges that the Carpenters were not entitled to enforce their subcontracting clause against Turgeon with respect to the assignment of the installation of metal panels because that assignment was not covered by Carpenters' CBA. MRS contends that, notwithstanding the CBA's inapplicability, Carpenters threatened Turgeon with the enforcement of the subcontracting clause. Allegedly out of fear of such enforcement, Turgeon cancelled a portion of its contract with MRS.

Section 8(b)(4) of the NLRA makes it unlawful, *inter alia*, to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where the object thereof is forcing or requiring any person to cease using, selling, handling, transporting, **[**36]** or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person. *29 U.S.C. § 158(b)(4)*. Here, MRS alleges that the Carpenters forced Turgeon, a Carpenters' signatory, to cease doing business with MRS in violation of *section 8(b)(4)*.

The Carpenters move for summary judgment on the basis that MRS fails to state a claim under *section 8(b)(4)*. Specifically, the Carpenters argue that the subcontracting clause is part of a valid CBA and therefore the construction industry proviso allows the restraint. Def.'s Mot. Summ. J. Br. at 24-25. Furthermore, the Carpenters contend that, even if the proviso does not apply, the undisputed facts show that Turgeon unilaterally cancelled the work project without any input from the Carpenters.[9]

My earlier denial of defendant's motion to dismiss the unfair labor practices claim rested on the fact that, at the time, it was still undecided whether the construction industry proviso and non-statutory labor exemption applied. Because

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[9] The Carpenters also point out that injunctive relief is not available under *section 187*. I need not address that issue because I have concluded that there has been no unfair labor practices violation.

I now hold both apply **[**37]** with respect to the subcontracting **[*188]** clause at issue, I conclude as a matter of law that there has been no violation of *section 158(b)(4)*.

Section 158(b)(4) prohibits threats to enforce agreements that are in violation of other provisions of *section 158*, including *section 158(e)*. *See § 158(b)(4)(A)*. In holding that the construction industry proviso permits Carpenters' subcontracting agreement with Turgeon, I am necessarily holding that the Carpenters have not violated *section 158(e)* with respect to those contracts. If the Carpenters have not entered into the contracts in violation of *section 158(e)*, they cannot be liable under *section 158(b)(4)* for threatening to enforce them. Simply put, the Carpenters are not liable for attempting—even threatening—to enforce an otherwise lawful subcontracting agreement. Because MRS has not introduced evidence that, in a light most favorable to the plaintiff, tends to show that the Carpenters have committed a predicate violation of *section 158(b)(4)*, MRS cannot maintain its unfair labor practices claim under *section 187*.[10] Summary judgment on Count II is granted in favor of the Carpenters.

IV. CONCLUSION

For the foregoing reasons, I conclude that both the construction industry proviso and non-statutory labor exemption apply to the claimed anticompetitive conduct.[11] All of the challenged subcontracting agreements were entered into pursuant to valid CBAs. Ironworkers have failed to introduce evidence sufficient to permit a reasonable jury to find that the CBAs are unlawful or that the Carpenters attempted to enforce them beyond their legal scope. Accordingly, the Carpenters are not subject to antitrust liability for their attempts to enforce the subcontracting agreements at issue. Furthermore, there is no evidence that enforcement of such agreements violates the prohibition on unfair labor practices set forth in *section 187*. Accordingly, I grant Carpenters' motion for summary judgment on Counts I and II.

The clerk shall enter judgment and close this case.

So ordered at Bridgeport, Connecticut, this 20th day of January 2016.

/s/ STEFAN R. UNDERHILL

Stefan R. Underhill

United States District Judge

APPENDIX

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[10] Because I have concluded that the construction industry proviso applies to shield the Carpenters from any alleged labor violation with respect to their lawful subcontracting agreements, I do not reach the question whether **[**38]** or not an issue of fact was raised with respect to Carpenters' role in Turgeon's rescission of MRS's contract.

[11] Ironworkers moved to strike portions of the Carpenters' reply brief and accompanying exhibits (doc. # 106). Ironworkers argued that Carpenters violated *Rule 56* and *Local Rule 7(d)* by introducing new materials in their reply brief and arguing outside the scope of the discussion of matters raised by **[**39]** Ironworkers' opposition brief. Furthermore, Ironworkers argued that Carpenters violated *Rule 56* by using inadmissible evidence in support of its motion for summary judgment. There is no need to strike those portions of the reply brief. *See Martin v. Town of Westport, 558 F. Supp. 2d 228, 231 (D. Conn. 2008)* ("the court knows the difference between admissible and non-admissible evidence, and would not base a summary judgment decision [on the latter]"). Because I have arrived at my conclusion independent of the Carpenters' arguments in their reply brief and the alleged inadmissible evidence submitted in support of the motion for summary judgment, I deny as moot Ironworkers' motion to strike (doc. # 106).

Each Carpenters' signatory must agree to be bound by the terms of its CBA which, among other things, includes a subcontracting provision that requires signatories to hire subcontractors who are party **[*189]** to Carpenters' CBA. The text of the pertinent subcontracting provision in the three regions is provided below:

> **Rhode Island**
>
> Section 1. The Employer agrees that he will not subcontract **[**40]** any work covered by this Agreement which is to be performed on the job site except to contractors who are parties to a collective bargaining agreement with the Union, or to a contractor who is willing to sign a collective bargaining agreement with the Union; provided that the Union with good cause may reject any such contractor. The parties recognize the Union's right to reject a contractor who it has previously terminated or a contractor that does not employ carpenters to perform work covered by this Agreement. The Union will notify the Association of any terminated contractors on a quarterly basis.
>
> Section 2. The Employer agrees that it will not contract any work covered by this Agreement which is to be performed on the jobsite, except from contractors who are parties to a collective bargaining agreement with the Union. The only penalty for violations of this Section is the loss of mobility of manpower set forth in Article V on the project at issue and a $2.50 per hour wage premium for all carpenters employed on the project. The Executive Secretary/Treasurer of NERCC or his designee may grant relief from this Section. The granting of such relief shall not constitute a violation of the favored **[**41]** nations clause of this Agreement.

D.L.R. ¶¶ 29, 30.

> **Connecticut**
>
> SECTION I. The employer agrees to notify the Union when and with whom the Employer has entered into a subcontract for work to be performed in the territorial jurisdiction of the Union, before the work of the subcontractor commences, and shall further state the scope and approximate starting date of the same. No subcontractor shall commence work unless it is a party to an agreement with the Union covering the work to be performed.
>
> SECTION 2. Any subcontractor on the site shall be covered by and subject to the terms of this Agreement except where the work covered by this Agreement is awarded or assigned directly to the Employer by a state, municipal or other public awarding authority in accordance with Connecticut law and regulations.
>
> SECTION 3. In the event that a subcontractor does not make payment of wages, or contributions to the Funds enumerated in Schedules C and D, in accordance with the terms of this Agreement, then the Union must give the general contractor notice thereof as quickly as possible but not later than thirty days after the date payment was due. Upon notification from the Union, the general contractor agrees to hold any amounts **[**42]** due and owing to the subcontractor to satisfy the subcontractor's delinquency.
>
> SECTION 4. It is agreed that the Employer will not sublet the labor or any part or parts of its work or lump out work on a piece-work basis to any worker.

D.L.R. ¶¶ 31, 32.

> **Western Massachusetts**
>
> Except for filed sub-bids, the Employer agrees that he will not subcontract any work covered by this Agreement which is to be performed on the job site except to contractors who are parties to a collective bargaining agreement with the Union, or to a contractor who is willing to sign a collective bargaining agreement **[*190]** with the Union; provided that the Union may reject any such contractor. Said subcontractor must have entered into the collective bargaining agreement with the union before starting any carpentry work.
>
> Damages for violations of the subcontracting clause shall be the value of wages and benefits for all substantiated carpentry hours worked by the subcontractor provided, however, that, with respect only to

> members of the CIAWM [Construction Industry Association of Western Massachusetts, Inc.] who violate the subcontracting clause, the Joint Board shall be limited in its authority to assess damages against of no more than **[**43]** $25,000 for each violation. In any such case where the Union seeks additional damages against a CIAWM member, it shall have the right to refer the case for additional damages to the American Arbitration Association. In cases referred to the American Arbitration Association under this provision, the sole issue shall be the amount of damages.
> The Employer agrees that it will not subcontract any work covered by this Agreement which is to be performed on the job site except from contractors who are parties to a collective bargaining agreement with the Union. The only penalty for violations of this paragraph is the loss of mobility of manpower set forth in Article V on the project and a $2.50 per hour wage premium for all carpenter employees on the project. The Executive Secretary-Treasurer of the Council or his designee may grant relief from this paragraph. The granting of such relief shall not constitute a violation of the favored nations clause of this Agreement.
>
> In order to protect and preserve work traditionally performed by carpenters under this Agreement, all exterior wall system work covered by this Agreement that has traditionally been performed on-site that is performed off-site, **[**44]** either by the Employer or a subcontractor of the employer, shall be performed in accordance with the wages, benefits and other economic terms provided for in this Agreement. This provision does not apply to the wood frame panels, manufactured glazed curtain wall systems and panels purchased directly from recognized manufacturers whose business is exclusively manufacturing that [is] traditionally performed off-site.

D.L.R. ¶¶ 33, 34.

Robb v. Conn. Bd. of Veterinary Med.

United States District Court for the District of Connecticut

January 20, 2016, Decided; January 20, 2016, Filed

3:15-CV-00906 (CSH)

Reporter

157 F. Supp. 3d 130 *; 2016 U.S. Dist. LEXIS 6232 **; 2016-1 Trade Cas. (CCH) P79,477

JOHN M. ROBB, DVM, Plaintiff, v. CONNECTICUT BOARD OF VETERINARY MEDICINE, B. KENNETH BERNHARD, THERESA CIANCILO, DVM, MARY ANNE O'NEILL, TIMOTHY PLUNKETT, DVM, and ALFREDO SANCHEZ-ZONDONO, DVM, Defendants.

Subsequent History: Related proceeding at *Robb v. Conn. Bd. of Veterinary Med., 2021 Conn. App. LEXIS 166 (Conn. App. Ct., May 1, 2021)*

Prior History: *Charter Practices Int'l, LLC v. Robb, 2012 U.S. Dist. LEXIS 195731 (D. Conn., Dec. 18, 2012)*

Core Terms

vaccination, veterinarian, alleges, conspiracy, antitrust, charges, motion to dismiss, dosages, conspire, rabies, amended complaint, administrative proceeding, competitors, adjudicate, ripe, factual allegations, veterinary medicine, antitrust claim, anticompetitive, protocols, infer, alleged injury, manufacturer's, recommended, injunctive, animals, motive, member of the board, restraint of trade, Interveners'

Counsel: **[**1]** For John M. Robb, DVM, Plaintiff: Joseph P. Secola, LEAD ATTORNEY, Secola Law Offices LLC, Brookfield, CT.

For Connecticut Board of Veterinary Medicine, B. Kenneth Bernhard, Timothy Plunkett, DVM, Alfredo Sanchez-Londono, DVM, Theresa Cianciolo, DVM, Mary Anne O'Neill, Defendants: Henry A. Salton, Attorney General's Office, Health & Human Services, Hartford, CT; Walter Menjivar, Attorney General's Office - HHS (Htfd), Health & Human Services, Hartford, CT.

For Charter Practices International, LLC, Medical Management International, Inc., Movants: Jeffrey H Wolf, LEAD ATTORNEY, PRO HAC VICE, Quarles & Brady, LLP, Phoenix, AZ; Bethany L. Appleby, Wiggin & Dana, New Haven, CT.

Judges: CHARLES S. HAIGHT, JR., Senior United States District Judge.

Opinion by: CHARLES S. HAIGHT, JR.

Opinion

[*132] **RULING ON DEFENDANTS' MOTION TO DISMISS, PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION, AND PROPOSED INTERVENER'S MOTIONS**

HAIGHT, Senior District Judge:

Plaintiff Dr. John M. Robb, D.V.M., a doctor of veterinary medicine licensed in the state of Connecticut, brings this action for injunctive relief and damages under the Sherman Antitrust Act, *15 U.S.C. § 1*, against Defendants, the Connecticut Board of Veterinary Medicine (the "Board")[1] and its five constituent **[**2]** members: B. Kenneth Bernhard, Dr. Theresa Cianciolo, D.V.M., Mary Anne O'Neill, Dr. Timothy Plunkett, D.V.M., and Dr. Alfredo Sanchez-Zondono, D.V.M (together, the "Individual Defendants," and with the Board, the "Defendants"). The gravamen of Plaintiff's complaint is that Defendants have conspired to restrain trade through an agreement to remove from the Connecticut market for veterinary services any veterinarian who offers certain reduced dosages of the rabies vaccine to animal-patients, and that the Board is currently effectuating this **[*133]** anticompetitive scheme through an administrative proceeding against Plaintiff.

On June 12, 2015, Plaintiff filed his initial complaint, a motion for a temporary restraining order ("TRO") and a motion for a preliminary injunction **[**3]** ("PI"), all aimed at forestalling Defendants' administrative proceedings against him. Docs. 1-5. The Court denied Plaintiff's TRO motion on the same day, [Doc. 11], but reserved decision on the PI motion, which is pending. Following a June 18, 2015 hearing with this Court on his PI motion, Plaintiff filed an Amended Complaint. Doc. 30. Defendants thereafter filed a motion to dismiss the Amended Complaint pursuant to *Rules 12(b)(1)* and *12(b)(6) of the Federal Rules of Civil Procedure*, which is also pending. Docs. 39, 44, 46. Non-parties Charter Practices International, LLC and Medical Management International, Inc. ("Proposed Interveners") have filed joint motions to intervene in the action, [Doc. 21], and for joinder in Defendants' motion to dismiss, [Doc. 43]. This Ruling resolves all pending motions.

I. Background

The following recitation is taken principally from Plaintiff's Amended Complaint ("AC"), whose well-pleaded factual allegations the Court takes as true for purposes of this motion to dismiss.

In 2008, Dr. Robb acquired ownership of a Banfield Pet Hospital franchise ("Banfield") in Stamford, Connecticut pursuant to an agreement with Charter Practices International ("CPI"), a corporate franchisor. AC ¶ 8. As part of his practice at the **[**4]** hospital, Dr. Robb administered various animal vaccinations, including that for rabies. In his first several months at the Banfield franchise, he administered "the manufacturer's standard recommended dose" of 1 milliliter of the rabies vaccine to canines, regardless of the dog's size. *Id.* ¶¶ 19, 22. However, soon thereafter, a significant number of Dr. Robb's animal-patients experienced "vaccine-associated adverse events" or "VAAEs," particularly smaller breeds of dog. *Id.* ¶ 22. In light of this experience, and after review of a 2005 peer-reviewed study documenting a correlation between animal size and VAAEs,[2] Dr. Robb amended his hospital's vaccination policy such that it would administer only 0.5 milliliters to dogs under ten pounds. *Id.* ¶ 24. Dr. Robb offered lower dosages because he "was scientifically and morally unsatisfied with the unnecessary adverse reactions in companion animals from one-size-fits-all manufacturer's recommended dosages." *Id.* ¶ 3. Following the change in protocol, Dr. Robb's hospital saw an immediate reduction in VAAEs and thereafter incrementally expanded its reduced dosage policy to all breeds under fifty pounds. *Id.* ¶ 25.

According to the Amended Complaint, the resulting success in reducing VAAEs was stark. In the period between 2010 and July 2015, other Banfield franchise hospitals experienced 300 cases of anaphylaxis, "one of the most severe and fatal VAAEs that can occur," leading to six deaths, while Dr. Robb's hospital had no such cases, all while not a single animal contracted any of the diseases for which they were vaccinated. *Id.* ¶¶ 26-28. Given these circumstances, Dr. Robb vehemently and with manifest conviction and sincerity alleges that he has an "ethical

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[1] The Board "is a quasi-private, quasi-public agency established under the laws of the State of Connecticut, charged with regulating the licensing and practice of veterinary medicine in Connecticut." Am. Compl. [Doc. 30] ¶ 9. Pursuant to *C.G.S. § 20-196(a)*, three of the five Board members must be practicing veterinarians. *Id.* ¶ 60. Here, that role is served by Defendants Ciancolo, Plunkett, and Sanchez-Londono (the "Veterinarian Defendants"). *Id.* ¶ 61.

[2] George M. Moore, *Adverse Events Diagnosed **[**5]** Within Three Days of Vaccine Administration in Dogs*, 277 J. Am. Vet. Med. Ass'n 1102 (2005)

obligation" to provide lower-dose vaccinations to smaller animals and that to do so has "been decisively found to be within the standard of care." *Id.* ¶¶ 3-4. Further, he experienced a significant consumer demand for his lower-dose **[*134]** vaccinations. *Id.* ¶ 3; *see also* Doc. 31, at 2 ("Patients flocked to his practice").

Not surprisingly, Dr. Robb's decision to offer lower than manufacturer-recommended doses led to direct conflict with certain institutional interests. The Amended Complaint lists a number of adverse reactions with which Dr. Robb has been contending. **[**6]**

First, the Mars Candy Company, CPI's corporate parent, allegedly in retaliation for Dr. Robb's refusal to accept a "well-below-market" buy-out offer, used Dr. Robb's failure to provide the manufacturer's recommended vaccine dosage as a pretextual justification to terminate without justification his Banfield franchise agreement.[3] AC ¶¶ 30-31.

Second, "the Connecticut Department of Public Health brought charges . . . against Dr. Robb stemming directly from his rabies vaccination procedures." *Id.* ¶ 33. In an August 28, 2014 letter sent to Dr. Robb by the Board, the Board ordered Dr. Robb to appear "for a hearing on the attached Charges against [him]." Doc. 5-4, at 2-3. The "attached Charges" referenced by the Board's letter consists of an August 1, 2014 "Statement of Charges" issued by the Connecticut Department of Public Health ("DPH"). *Id.* at 4. The Statement of Charges states that "Pursuant to the General Statutes of Connecticut, *§§19a-10* and *19a-14*[4], the Department of Public Health . . . brings the following charges against John M. Robb." *Id.* The principal **[**7]** and relevant charge at-issue against Dr. Robb is that he "instructed employees to administer half doses of rabies vaccines to animals under the weight of fifty pounds." AC ¶ 39. The Statement of Charges recites that, despite Dr. Robb's vehement protestations, the provision of lower than the manufacturer-recommended dosages of the rabies vaccine "constitute[s] grounds for disciplinary action pursuant to the General Statutes of Connecticut, *§20-202(2)*."[5] Doc. 5-4, at 4. DPH then "prays that: The Connecticut Board of Veterinary Medicine, as authorized in *§§19a-17* and *20-202*, revoke or order other disciplinary action against the veterinary license of John M. Robb as it deems appropriate and consistent with law." *Id.* The Board ordered Dr. Robb to appear for a December 2, 2014 hearing on those charges. *Id.* at 1. It is this administrative proceeding that is at the core of the instant litigation before this Court.

Dr. Robb argues that there is no basis for the administrative action against him because Connecticut "state policy is ambiguous as to vaccination protocols generally and entirely silent on dosage amount."[6] AC ¶ 63. Rather, as

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[3] This dispute is being litigated concurrently in this District in front of Judge Chatigny. *Charter Practices International v. Robb*, No. 12-cv-01768 (RNC).

[4] *Section 19a-14* states that DPH has the power to "[c]onduct any necessary review, inspection or investigation regarding qualifications of applicants for licenses or certificates, possible violations of statutes or regulations, and disciplinary matters."

[5] *C.G.S. §20-202(2)* states that the Board may impose disciplinary action pursuant to *Section 19a-17* where, *inter alia*, there is "proof **[**8]** that [a licensed veterinarian] has been guilty of . . . negligence towards animals[.] In determining whether the holder of such license has acted with negligence, the board may consider standards of care and guidelines published by the American Veterinary Medical Association including, but not limited to, guidelines for the use, distribution and prescribing of prescription drugs."

[6] Dr. Robb was not always of the view that state law is silent as to rabies dosages amounts. This is evident from various sources. Dr. Robb stated the following at a January 7, 2015 hearing in front of the Defendant Board:

> MR. BERNARD: Now, [whether you administered half dosages of rabies vaccine is] either true or not true. If it's **[**9]** true, the reasons why you did it are not really anything we care about.
>
> DR. ROBB: Oh really.
>
> MR. BERNARD: There's a state statute that says you are to administer a full dose of rabies vaccine.
>
> DR. ROBB: That's wrong.
>
> MR. BERNARD: What's wrong?

discussed further below, **[*135]** Dr. Robb argues that the action is brought solely as part of a conspiracy by Defendants to eliminate competitors from the Connecticut veterinarian market that aim to compete with the Veterinarian Defendants by offering lower-dose vaccines.

To support his claims that the rationale for the disciplinary action against him for violation of state regulations is pretext, Dr. Robb alleges that at a hearing in front of the Defendant **[**10]** Board, the "Board's own veterinarian expert witness, Dr. Jeffrey Loeven," testified clearly that Dr. Robb caused no harm to his animal-patients, that he "'fully agree[s] with [Dr. Robb's] assertion that you can modify the practice of medicine according to the Aesculapian authority,[7] including the Hippocratic oath,'" and that Dr. Robb's "'approach resulted in fewer reactions based on limited titers done and lack of documented disease breaks.'" *Id.* ¶¶ 41, 43 (quoting March 27, 2015 testimony).[8]

In consequence, Dr. Robb alleges that the Defendant Board has no basis "to pursue its baseless action against [him]" because it "and its veterinarian members have no medical, health or safety reason to pursue veterinarians like Dr. Robb that offer vaccination services with lower doses for smaller animals." *Id.* ¶ 44. Rather, at the core of his antitrust complaint, Dr. Robb alleges that the Board "pursues its" action "for the anticompetitive reason that offering such services threatens the profits that veterinarians, including three board members, make from vaccinations." *Id.* To effectuate their anticompetitive **[**12]** goals,

> **[*136]** the Board, along with the Individual Defendants, entered into an agreement to prevent competition on quality and price by excluding from the relevant service market any doctor of veterinary medicine who does not provide the manufacturer's recommended dose for rabies vaccinations. The agreement and conspiracy includes the Defendants' decision to pursue sanctions against Dr. Robb.

Id. ¶¶ 67-68. Dr. Robb also alleges that "[a]s part of Defendants' agreement and conspiracy, Defendants have communicated to the relevant purchasing public that Dr. Robb is currently under investigation for professional misconduct." *Id.* ¶ 72. Dr. Robb then alleges that "Defendants' conduct has no procompetitive or business justification." *Id.* ¶ 73.

> DR. ROBB: You should be interested.
>
> MR. BERNARD: No, no.
>
> DR. ROBB: ***The state statute is harming your pet because it's outdated***. You should be interested.

Doc. 20-2, at 120 (emphasis added). Additionally, in his Second Amended Answer in the administrative proceeding, he argued that *Conn. Agencies Regs. 22-359-1* is "**an unconstitutional delegation of powers**," but also referred to it as a "regulatory requirement . . . to administer the rabies vaccine in accordance with the private for-profit manufacture's label directions." Doc. 5-7, at 2. Further, in his initial TRO and PI papers, he refers to this as an "outdated regulation." Doc. 5-1, at 10. He also admits Section 22-359-1 is a regulation that "arguably requires that a veterinarian follow for-profit manufacturer label instructions when administering rabies vaccines." *Id.* at 13.

[7] Dr. Robb explained in his memorandum of law in support of his TRO and PI that the "Aesculapian Authority is the power of physicians to choose for their patient what they believe is the best practice," a "power [that] is now available to Veterinarians because of companion animal practice." Doc. 5-1, at 7 n.1 (citing Bernard E. Rollin, PhD, *An Introduction to Veterinary Medical Ethics, Theory and Cases*, at 84 (2d ed. 2006)). The adjective "Aesculapian" is derived from Aesculapius, the Greco-Roman god of medicine.

[8] There are a several issues with Plaintiff's citations to Dr. Loeven's March 27, 2015 testimony. *First*, his name is Dr. Koen Loeven, not Dr. Jeffrey Loeven. Doc. 39-4, at 8. *Second*, this witness was called by DPH, and thus is not the Defendant Board's witness. *Id.* ("The Department **[**11]** calls Dr. Loeven to the stand"). *Third*, and most significantly, in a section omitted from Plaintiff's excerpted submission from the transcript, Dr. Loeven testified that: "My function was to review the case as to the standard of care under Connecticut statute and also veterinary guidelines and ***I believe that the use of half volume rabies vaccination is against State statute and also against the standard of care***." *Id.* at 10 (emphasis added); *see also id.* at 13 (Plaintiff's letter response to Dr. Loeven "did not change the main core of my review that the standard of veterinary care was violated").

Dr. Robb does not allege any specific conduct actually engaged in by the Board's members that would constitute an "agreement" or a "conspiracy." Rather, Dr. Robb relies on circumstantial factors, specifically the Veterinarian Defendants' "direct pecuniary motivation" to preclude the availability of size-appropriate vaccinations. *Id.* at 18. He alleges that "the three veterinarian members of the Defendant Board use vaccination protocols that rely solely upon the manufacturer's **[**13]** recommended dosage," and that therefore a market for vaccinations that deviate from that protocol "represent[s] a direct financial threat to the veterinarian Individual Defendants." *Id.* ¶¶ 56-57.

It is through the above conduct that Dr. Robb alleges that he, and the Connecticut markets for vaccination and veterinary services more generally, were harmed. Dr. Robb alleges repeatedly that the Defendants' actions harm the Connecticut market for vaccination and veterinarian services, of which Dr. Robb alleges vaccination services account for seventy percent. *Id.* ¶¶ 47, 55; *see also* Doc. 31, at 1 (vaccinations are "the golden goose of veterinarian practices"). Specifically, he alleges that his

> competitors on the Connecticut Board of Veterinary Medicine—a quasi-private, quasi-public entity dominated by doctors of veterinary medicine in active, private practice—have restrained competition by declaring these safe, effective, and heretofore legal vaccination practices as a violation of their own vaguely drafted administrative rules.

Id. ¶ 4. Dr. Robb alleges that the practical effect of this restraint on competition has been to improperly obstruct a demonstrated demand for "size-appropriate vaccination dosages," **[**14]** *id.* ¶ 46, both from veterinarians,[9] and from consumers.[10] Apart from harm caused by market disturbance, Dr. Robb also alleges that he is harmed directly through the administrative proceeding because his license, "professional reputation, goodwill, and livelihood [are] at **[*137]** stake," *id.* ¶ 75, and because "if successful, [it] will also jeopardize [his] $6.5 million in counterclaims against Banfield in a related federal case," *id.* ¶ 74.

Moreover, the Board, pursuant to its adjudicative function, has sufficient market power to effectuate such an anticompetitive effect "because they have the power to exclude any competitor from the practice of veterinary medicine in Connecticut." *Id.* ¶ 49; *see also id.* ¶ 64 (the Veterinarian Defendants "have the power to take collective action against Dr. Robb and any other veterinarian that seeks to offer better, different, or lower cost services relating to vaccinations").

In short, "[t]he anticompetitive actions of the Board, acting as a trade association, directly restrain trade by protecting the veterinarian establishment from the competition that would come from veterinarians, like Dr. Robb, who would adopt the reduced volume vaccine protocol." *Id.* ¶ 54.

In light of the above alleged conduct, Dr. Robb's Amended Complaint asserts a single claim for violation of Section 1 of the Sherman Antitrust Act, *15 U.S.C. § 1*, against all Defendants in their individual and official capacities, for "Conspiracy to Restrain Trade — Group Boycott." Dr. Robb seeks injunctive relief, **[**16]** treble compensatory damages under *15 U.S.C. § 15(a)*, and his costs and expenses in bringing the instant action. AC, at 23.

II. Defendants' Motion to Dismiss

Defendants argue that Plaintiff's claim should be dismissed in full for a significant number of independent reasons, which they group together as follows. Doc. 39. *First*, this Court lacks subject matter jurisdiction because: (i) Dr.

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[9] Dr. Robb alleges that there are "multiple doctors of veterinary medicine," such as Dr. Marcus Suppa, D.V.M., who either "ceased providing size-appropriate vaccination dosages or [] entertained the possibility of offering size-appropriate vaccination dosages and have decided not to offer them as a direct result of the Defendants' anticompetitive actions." *Id.* ¶ 52.

[10] Dr. Robb alleges that "owners of pets who are concerned about or who have experienced VAAEs as a result of needless, one-size-fits-all vaccine dosages have flocked to his practice." *Id.* ¶ 50. Dr. Robb also alleges that "[m]any individual pet owners on [*sic*] Connecticut would, if they had the opportunity, purchase vaccination lower-dosage services for their small pets." *Id.* ¶ 53. Dr. Robb then identifies one **[**15]** such patient who "demand[s] and desire[s] half-dosages of vaccine for [her] smaller pets [and] will be unable to contract for them" because of the Board's action. *Id.*

Robb lacks Article III standing; (ii) Dr. Robb lacks the more particularized "antitrust standing"; and (iii) Dr. Robb's claims are not ripe for review. *Second*, the 11th Amendment bars claims (i) against the Board and (ii) for monetary damages against the Board members in their official capacities. *Third*, the Individual Defendants are immune from suit either pursuant to absolute or qualified immunity. *Fourth*, Dr. Robb failed to allege in substance an antitrust claim. *Fifth*, this Court should not interfere with an ongoing state administrative proceeding in light of the abstention doctrine articulated in *Younger v. Harris, 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971)*. And *Sixth*, Dr. Robb has failed to exhaust his administrative remedies. The Court will address the substance of Defendants' arguments, as necessary, below.

III. Standard of Review

"To survive a motion to dismiss, a complaint must contain sufficient **[**17]** factual matter, accepted as true, to 'state a claim that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. This pleading standard creates a "two-pronged approach," *Iqbal, 556 U.S. at 679*, based on "[t]wo working principles, " *id. at 678*.

First, although a complaint need not include detailed factual allegations, it must provide "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal, 556 U.S. at 678*. "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Id.* (quoting *Twombly, 550 U.S. at 555*). "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'"*Id.* (quoting *Twombly, 550 U.S. at 557*. "Although for the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, **[*138]** we 'are not bound to accept as true a legal conclusion couched as a factual allegation.'" *Id.* (quoting *Twombly, 550 U.S. at 555*). "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Id. at 679*.

Second, "[w]hen there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Iqbal, 556 U.S. at 679*. This "facial plausibility" prong requires the plaintiff to plead facts "allow[ing] the **[**18]** court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id. at 678*. Importantly, the complaint must demonstrate "more than a sheer possibility that a defendant has acted unlawfully." *Id.* "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged but it has not 'show[n]' — 'that the pleader is entitled to relief.'" *Id. at 679* (quoting *Fed. R. Civ. P. 8(a)(2)*). "Determining whether a complaint states a plausible claim for relief [is] . . . a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.*

IV. Analysis

The Supreme Court has "direct[ed] federal courts to resolve questions of Article III jurisdiction before reaching the merits of a plaintiff's claim." *Spargo v. N.Y. State Comm'n on Judicial Conduct, 351 F.3d 65, 74 (2d Cir. 2003)* (citing *Steel Co. v. Citizens for a Better Env., 523 U.S. 83, 94, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998)* ("declin[ing] to endorse . . . an approach [of 'hypothetical jurisdiction'] because it carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers")).

The Court therefore begins with Defendants' jurisdictional arguments—that Plaintiff lacks Article III standing and that his claims are not yet ripe.[11] Only if Plaintiff prevails on those initial issues will the **[**19]** Court be in a position to consider the merits of Plaintiff's antitrust claim.

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[11] Defendants argue that "antitrust standing" is a jurisdictional question. Doc. 39-1, at 14 n.6 (citing *Balaklaw v. Lovell, 14 F.3d 793, 800 (2d Cir. 1994))*. *First, Balaklaw* does not address the question of the jurisdictional nature of antitrust standing. *Second*, while the question has been the subject of some debate, the Second Circuit has cited with approval the D.C. Circuit's "holding that statutory standing under the antitrust laws is not a prerequisite to federal subject matter jurisdiction." *Lerner v. Fleet Bank,*

As to that separate issue, Defendants contend on their motion to dismiss that Plaintiff's Amended Complaint fails as a matter of law to state an antitrust claim under the Sherman Act.

I discuss in order the related but separate issues of Plaintiff's standing to assert his claim and the legal viability of that claim as pleaded.

A. Subject Matter Jurisdiction [20]**

Subject matter jurisdiction is a prerequisite for an adjudication in federal court. A federal district court has no subject matter jurisdiction over claims for **[*139]** which a plaintiff lacks Article III standing. *Mahon v. Ticor Title Ins. Co., 683 F.3d 59, 62 (2d Cir. 2012)*. The same is true as to claims that are unripe. *U.S. v. Quinones, 313 F.3d 49, 58 (2d Cir. 2002)*. The Court turns to these issues now.

1. Article III Standing

Defendants argue that Plaintiff's complaint fails to meet the "'irreducible constitutional minimum of standing.'" Doc. 39-1, at 12 (quoting *Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992))*. As recently reiterated by the Supreme Court, "[t]he requirements of Article III standing are familiar." *U.S. v. Windsor, 133 S. Ct. 2675, 2685, 186 L. Ed. 2d 808 (2013)*. "First, the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not 'conjectural or hypothetical.' Second, there must be a causal connection between the injury and the conduct complained of . . . [and] [t]hird, it must be 'likely' . . . that the injury will be 'redressed by a favorable decision.'" *Id.* (quoting *Lujan, 504 U.S. at 560-61*) (footnote and citations omitted)). "The party invoking federal jurisdiction bears the burden of establishing these elements." *Lujan, 504 U.S. at 561*. I consider those elements in that order.

a. Injury-in-Fact

Dr. Robb has alleged injuries that are **[**21]** current, "concrete," "particularized," and "actual." Principally, Dr. Robb alleges an "antitrust injury"—a harm to the market for veterinary services—which is "sufficient to satisfy the constitutional standing requirement of injury in fact." *Associated Gen. Contractors of Calif. v. Calif. State Council of Carpenters, 459 U.S. 519, 551 n.31, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*. Specifically, Dr. Robb alleges that he—and other like-minded veterinarians—cannot properly compete in the market because they "cannot provide size-appropriate vaccinations" given the administrative proceedings that they face. AC ¶ 51. Because, "[f]or purposes of determining standing, we 'must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party,'" Dr. Robb has sufficiently alleged an injury-in-fact. *Denney v. Deutsche Bank AG, 443 F.3d 253, 263 (2d Cir. 2006)* (quoting *Warth v. Seldin, 422 U.S. 490, 501, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975))*.

Defendants' arguments do not lead to a contrary result. *First*, Defendants confusingly argue that Dr. Robb was not injured because his "allegation that the Board has prevented him from competing on quality is unfounded" in light of the fact the Board did not "promulgate the statutes or regulations that Plaintiff claims prohibit him from competing." Doc. 39-1, at 12-13. Whether or not it was the Defendants' actions that harmed Plaintiff goes to the element of causation—it is **[**22]** irrelevant in determining an injury-in-fact. *Second*, they argue that Dr. Robb has not suffered an injury because the Board has yet to make any determination as to whether he in fact committed the regulatory

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N.A., 318 F.3d 113, 128 (2d Cir. 2003) (citing *In re Lorazepam & Clorazepate Antitrust Litig., 289 F.3d 98, 107-08, 351 U.S. App. D.C. 223 (D.C. Cir. 2002)* ("Unlike constitutional standing, this court's jurisdiction does not turn on antitrust standing.")); *see also* *Paulsen v. Remington Lodging & Hospitality, LLC, 773 F.3d 462, 468 (2d Cir. 2014)* ("statutory standing is not jurisdictional unless Congress says so"). Therefore, the Court need not address Defendants' antitrust standing argument as part of its Article III jurisdictional analysis.

violations with which he was charged. *Id.* at 13. However, in so arguing, Defendants ignore this action's antitrust context. As discussed above, Dr. Robb does not only allege injuries stemming from a potential adverse determination in the administrative proceeding against him; he alleges that the proceedings against him have dissuaded him and others from competing as to dosages.[12] Also, it is not the case that a **[*140]** plaintiff lacks standing *ipso facto* when his alleged injury stems from the potential future effect of a yet-to-occur government action. *See* *Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2342-43, 189 L. Ed. 2d 246 (2014)* (discussing Supreme Court "cases [that] illustrate the circumstances under which plaintiffs may bring a preenforcement challenge consistent with Article III"). Plaintiff has alleged an injury-in-fact.

However, Plaintiff then argues that his allegation of antitrust injury is sufficient to confer Article III standing *in toto*. Doc. 44, at 7 (citing *Assoc. Gen., 459 U.S. at 551 n.31*). Plaintiff is mistaken. As made clear in *Assoc. Gen.*,"[h]arm to the antitrust plaintiff is sufficient to satisfy the constitutional standing requirement *of injury in fact*." *459 U.S. at 551 n.31* (emphasis added). Dr. Robb still must sufficiently allege **[**24]** the remaining two elements of Article III standing.

b. Causal Connection

To have Article III standing, a plaintiff must show "a causal connection between the injury and the conduct complained of—the injury has to be fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." *Lujan, 504 U.S. at 560* (internal quotation omitted). However, "the 'fairly traceable' standard is not equivalent to a requirement of tort causation. . . . [F]or purposes of satisfying Article III's causation requirement, we are concerned with something *less than the concept of proximate cause*." *Rothstein v. UBS AG, 708 F.3d 82, 92 (2d Cir. 2013)* (internal quotation and citation omitted, emphasis in original). "Rather, 'at [the pleading] stage of the litigation,' the plaintiffs' 'burden . . . of alleging that their injury is 'fairly traceable' to' the challenged act 'is relatively modest.'" *Id.* (quoting *Bennett v. Spear, 520 U.S. 154, 171, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997))*.

As Defendants repeatedly note—and as demonstrated through sources with which this Court may consider at this stage—Dr. Robb is undoubtedly incorrect when he posits that it is the Defendant Board that has brought the administrative proceeding against him. As made clear by, *inter alia*, the Statement of Charges **[**25]** attached to Dr. Robb's initial complaint, it is the Connecticut "*Department of Public Health* [that] brings the [at-issue] charges against John M. Robb." Doc. 5-4, at 4 (emphasis added). Defendants use this fact to opine, quite accurately, that the "actions that Plaintiff complains against are actions traceable to the Legislature, the Commissioner of Agriculture, and the Department of Public Health. All parties not before the Court." Doc. 39-1, at 13. Despite its truth, it proves **[*141]** too much to argue that this fact alone leads to the conclusion that Dr. Robb does not have standing to bring this action.

Although other parties may be the *proximate causes* of Dr. Robb's alleged injuries, the issue here is whether Plaintiff's alleged injuries can meet the "relatively modest" test of being "fairly traceable" to the Defendants' alleged conduct. The demonstrated factual inaccuracies in the Amended Complaint aside, Dr. Robb makes the following allegation:

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[12] In this regard, this case is distinct from *Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 185 L. Ed. 2d 264 (2013)*, in which the Court rejected plaintiff's standing theory that it was injured through the adoption of certain costly measures it took in anticipation of the government's use of a regulatory power in a way **[**23]** that might injure it. There, where the government had not even taken action with respect to the regulation at issue, the Court denied this standing theory because "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." *Id. at 1152*. Here, where Dr. Robb is already facing regulatory sanctions (in the form of forcing him to refrain from providing lower dosages), he has caught a "chill" from standing in the face of the adverse wind of the administrative proceeding, and that chill is objective, not subjective, since Dr. Robb is required to defend himself against the administrative charges. Dr. Robb clearly stands in the face of a "threat of specific future harm," a circumstance sufficient at this stage of the case to constitute Article III "injury."

> [T]he Board, along with the Individual Defendants, entered into an agreement to prevent competition on quality and price by excluding from the relevant service market any doctor of veterinary medicine who does not provide the manufacturer's recommended **[**26]** dose for rabies vaccinations.

AC ¶ 67. If that be true,[13] the alleged injuries—*i.e.*, veterinarians not being able to provide lower-dose vaccinations—is "fairly traceable" to the Board's conduct in light of the fact that the adjudicator of any administrative proceeding challenging such vaccination procedures is likely, on Plaintiff's theory of the case, to have predetermined its outcome for anticompetitive reasons. In other words, Dr. Robb—and other like veterinarians—have been forced to "chill" their behavior, and thus they and the veterinarian market have suffered an injury, at least in part because of the knowledge that their potential or actual adjudicators have formed an agreement to remove them from the relevant market. Although the proximate cause of that chill may be the DPH, which decides to pursue sanctions in the first place, it cannot be said that a partial adjudicator of those charges is not also *a* cause of said chill. Dr. Robb has met his "relatively modest" burden of alleging a causal connection between the Board's conduct and the alleged injury.

c. Redressability

Finally, to have standing, a plaintiff must show that his alleged injury "can likely be redressed by a favorable decision." *Mantena v. Johnson, 809 F.3d 721, 2015 U.S. App. LEXIS 22843, 2015 WL 9487867, at *8 (2d Cir. Dec. 30, 2015)* (citing *Lujan, 504 U.S. at 560-61*). Defendants argue that Dr. Robb's injury is not redressable by this Court because an injunction against the Board's disciplinary proceeding "would not change the rabies statute or regulations [which] would still prohibit veterinarians from administering rabies vaccines in the manner Plaintiff wishes." Doc. 39-1, at 13-14.

However, in line with the above analysis, Defendants' argument can quickly be dispatched. Dr. Robb alleges a harm to the veterinarian market effectuated through **[**28]** an administrative adjudication infected by an anticompetitive conspiracy. In short, Dr. Robb argues that the Board will not fairly address a question of Connecticut law—whether veterinarians providing lower-dose vaccinations violate the law—because it has agreed to exclude these veterinarians **[*142]** from the market for reasons entirely unrelated to the purpose behind any regulatory vaccination requirement. To redress that injury to the market, Dr. Robb seeks, in part, permanent injunctive relief barring the Defendants from illegally conspiring to remove veterinarians from the market on the basis of an anti-competitive rationale, rather than impartially applying Connecticut law. *See* AC, at 23. Such relief is likely to redress the illegally caused harm to the veterinarian market.

Plaintiff has standing to bring this action.

2. Ripeness

"The doctrine of constitutional ripeness 'prevents a federal court from entangling itself in abstract disagreements over matters that are premature for review because the injury is merely speculative and may never occur.'" *In re Methyl Tertiary Butyl Ether (MTBE) Prods Liab. Litig., 725 F.3d 65, 110 (2d Cir. 2013)* (quoting *Ross v. Bank of Am., N.A. (USA), 524 F.3d 217, 226 (2d Cir. 2008))*. As is therefore apparent, "[t]his aspect of the ripeness doctrine overlaps with the standing doctrine, 'most notably in the shared requirement that **[**29]** the plaintiff's injury be

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[13] The Court acknowledges (as made clear below) that for purposes of establishing an antitrust claim, the "ultimate existence of an **[**27]** 'agreement' under ***antitrust law*** . . . is a legal conclusion, not a factual allegation," and thereby should not be accepted as true for purposes of a motion to dismiss. *Mayor and City Council of Baltimore v. Citigroup, Inc., 709 F.3d 129, 135 (2d Cir. 2013)*. However, for purposes of standing, the Court may accept as true that the individual Defendants entered into an agreement without accepting the "ultimate existence of an 'agreement'" as that term is used with respect to the antitrust laws. *See* *Denney v. Deutsche Bank AG, 443 F.3d 253, 264* ("an injury-in-fact," for standing purposes, "differs from a 'legal interest'; an injury-in-fact need not be capable of sustaining a valid cause of action").

imminent rather than conjectural or hypothetical.'" *Id.* (quoting *Ross, 524 F.3d at 226*) ("In most cases, that a plaintiff has Article III standing is enough to render its claim constitutionally ripe.").

Here, Defendants argue that Dr. Robb's claim is not ripe for review because the Board has yet to issue a decision. Doc. 39-1, at 18. As Defendants acknowledge, this is the same argument it made "[a]s with the standing issue." *Id.* The Court denied this argument as to standing, and it denies Defendants' argument as to ripeness for the same reasons. Further, the Second Circuit has also held that "[i]n the antitrust context in particular, a rule that has yet to be enacted or enforced may be ripe for review if its mere proposal is likely to inhibit competition." *Volvo N. Am. Corp. v. Men's Int'l Prof. Tennis Council, 857 F.2d 55, 64 (2d Cir. 1988)*.

In the case at bar, Dr. Robb alleges that competition has already been inhibited by Defendants' illegal agreement to remove certain competitors from the market in light of the proceedings against him. His claim is thereby ripe for review, and, in light of the Article III standing analysis *supra*, I conclude that this Court has subject matter jurisdiction over this action.

B. Antitrust Claim

Although Plaintiff has standing to assert his **[**30]** claim, that claim is nonetheless subject to dismissal if it has no merit as a matter of law. Defendants contend that Plaintiff's claim against them has no merit because, *inter alia*, it fails to plead an antitrust claim that is cognizable under the Sherman Act.

Plaintiff brings a one-count complaint alleging a violation of *15 U.S.C. § 1*, which states that:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

The threshold question of a Section 1 claim is "whether an arrangement is a contract, combination, or conspiracy," a question "informed by the basic distinction in the Sherman Act between concerted and independent action." *American Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 186, 190, 130 S. Ct. 2201, 176 L. Ed. 2d 947 (2010)* (internal quotation omitted). A state board comprised of a majority of private practitioners, such as the Defendant Board, is capable of illegal concerted action for purposes of *Section 1*. *See* *North Carolina State Bd. of Dental Exam'rs v. F.T.C., 717 F.3d 359, 371-72 **[*143]** (4th Cir. 2013)*, *aff'd* *135 S. Ct. 1101, 191 L. Ed. 2d 35 (2015)* ("Any agreement between the Board members . . . deprives the market of an independent center of decision making."). However, "concluding that the Board has the capacity to conspire 'does not mean . . . that every action taken' by the Board 'satisfies the contract, **[**31]** combination, or conspiracy requirement.'" *Id. at 372* (quoting *Oksanen v. Page Mem'l Hosp., 945 F.2d 696, 706 (4th Cir. 1991))* (upholding a Sherman Act violation where "[s]ubstantial evidence support[ed] th[e] conclusion" of concerted action). In short, to survive dismissal, Dr. Robb must allege that the members of the Defendant Board affirmatively came together to form an agreement to restrain trade.

However, to satisfy the pleading requirement at the *Rule 12(b)(6)* stage, an antitrust plaintiff may not simply allege that "the parties agreed." This is because the "ultimate existence of an 'agreement' under ***antitrust law*** . . . is a legal conclusion, not a factual allegation." *Mayor and City Council of Baltimore v. Citigroup, Inc., 709 F.3d 129, 135 (2d Cir. 2013)*. Accordingly, any conclusory allegation of an "agreement" is not to be accepted as true; the plaintiff must allege *facts* affirmatively demonstrating such an agreement. *See* *Anderson News, L.L.C., 680 F.3d at 184* (plaintiff "must plead 'enough factual matter (taken as true) to suggest that an agreement was made,' *i.e.*, it must provide 'some factual context suggesting [that the parties reached an] agreement,' not facts that would be 'merely consistent' with an agreement" (quoting *Twombly, 550 U.S. at 556*)). In *Twombly*, the Supreme Court laid out clearly the allegations sufficient for an antitrust plaintiff to overcome a motion to dismiss as to the element of conspiracy in a Section 1 claim:

> [A]n allegation **[**32]** of parallel conduct and a bare assertion of conspiracy will not suffice. Without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified

> point does not supply facts adequate to show illegality. Hence, when allegations of parallel conduct are set out in order to make a § 1 claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action.

550 U.S. at 556-57; *see also* *id. at 567-68* (dismissing allegations of conspiracy where allegedly conspiratorial actors had "an obvious alternative explanation" for their parallel conduct).

That is not to say that an antitrust complaint must always identify a "smoking gun" evincing an agreement (such as a written contract). However, a complaint like this one, which omits a "smoking gun," may survive dismissal only if an actual agreement "'may be inferred on the basis of conscious parallelism, when such interdependent conduct is accompanied by circumstantial evidence and plus factors.'" *Mayor and City Council of Baltimore, 709 F.3d at 136* (quoting *Todd v. Exxon Corp., 275 F.3d 191, 198 (2d Cir. 2001))*. A "plaintiff must show the existence of additional circumstances, often referred to as 'plus' factors, which, when viewed in conjunction **[**33]** with the parallel acts, can serve to allow a fact-finder to infer a conspiracy." *Apex Oil Co. v. DiMauro, 822 F.2d 246, 253 (2d Cir. 1987)*. "'These 'plus factors' may include: a common motive to conspire, evidence that shows that the parallel acts were against the apparent individual economic self-interest of the alleged conspirators, and evidence of a high level of interfirm communications.'" *Mayor and City* ***[*144]*** *Council of Baltimore, 709 F.3d at 136* (quoting *Twombly, 425 F.3d at 114*).

In the case at bar, Dr. Robb makes only conclusory allegations as to an agreement among the Individual Defendants, either tacit or express. The Amended Complaint does not describe any action to that effect engaged in by any of the Individual Defendants. The pleading refers to the alleged conspirators by name only once, and then only to identify the parties to the litigation. AC ¶¶ 10-14. By failing to make a single allegation as to the conduct of the individuals that allegedly came to an illegal agreement, nor as to the form, dates, place, structure, or detail of such an agreement, Dr. Robb faces a significant hurdle, as a matter of law, to support his claim of an antitrust conspiracy. To establish the factual underpinning of an actual "agreement," a party must allege facts that in some way describe the process of that agreement's formation. **[**34]** For example, in *Anderson News*, the Second Circuit overturned the lower court's ruling that plaintiff's claims were overly conclusory in light of the fact that:

> The [complaint] allege[d] actual agreement; it allege[d] not just that all of the defendants ceased, in virtual lock-step, to deal with Anderson, but allege[d] that on various dates within the preceding two-week period defendants and News Group—through their executives, 10 of whose names or positions are specified—had met or communicated with their competitors and others and made statements that may plausibly be interpreted as evincing their agreement to attempt to eliminate Anderson and Source as wholesalers in the single-copy magazine market and to divide that market between News Group and Hudson.

680 F.3d at 186-89 (holding that in light of these allegations, the complaint "in the present case is vastly different from the complaint at issue in *Twombly*"). The Second Circuit's decision in *Anderson News* may be contrasted with its ruling in *Mayor and City Council of Baltimore*, which rejected a conspiracy claim as impermissibly conclusory even though the complaint alleged "two actual communications between competitors." *709 F.3d at 139* (emphasis omitted). Dr. Robb makes not even a single **[**35]** such factual allegation as to the behavior of the individuals whom he accuses of conspiring.

Without alleging any "gun" (let alone of the "smoking" variety), Dr. Robb must allege sufficient "conscious parallelism," or "interdependent conduct," from which an agreement among the Individual Defendants may be plausibly inferred. *See* *Ross v. Citigroup, Inc., 630 F. App'x 79, 2015 U.S. App. LEXIS 20025, 2015 WL 7292176, at *1 (2d Cir. Nov. 19, 2015)*. As shown below, this he also entirely failed to do. In other words, not only has Dr. Robb failed to allege any facts supporting an actual agreement (as discussed above), he has also failed to allege properly any facts alleging concerted conduct from which this Court could theoretically infer such an agreement. Dr. Robb has simply made no proper and acceptable allegations that the Individual Defendants have done *anything* to implement or further the conspiratorial agreement that he (conclusorily) alleges.

A review of the few actions of the Board that Dr. Robb has alleged demonstrates the inadequacy of the pleading. *First*, he alleges that the "Board has continued to pursue its baseless action against Dr. Robb." AC ¶ 44. However, it is indisputably true that the Board is *not* pursuing the administrative action against Dr. Robb, but merely sits in adjudication of **[**36]** charges that the DPH pursues, a fact Plaintiff **[*145]** largely admits in his pleading, *id.* ¶ 33, is made clear from the DPH's Statement of Charges, [Doc. 5-4], at 4, and is clear as a matter of Connecticut law, *see* C.G.S. §§ 19a-13(6), 19a-14(a)(8), 19a-14(a)(10)-(11), 20-196b, 20-204a.

Second, Dr. Robb purports to allege that the Board made a "decision not to dismiss the complaint upon failure of the case as a result of their own expert's testimony." Doc. 31, at 20. However, the Board did not deny Dr. Robb's motion to dismiss the complaint, it simply took "the motion under advisement" given that it had not "finish[ed] hearing the case" when Dr. Robb moved to dismiss the action at a June 15, 2015 hearing.[14] Doc. 34-1 Ex. C, at 80. Such an action cannot plausibly be used to infer that the Board members entered into an agreement to exclude Dr. Robb from the market, and actually furthers the Board's contention that it was taking serious its role as an impartial adjudicator. Moreover, and as discussed, the expert referred to by Dr. Robb was that of the DPH, not of the Board, and, in fact, that expert testified that Dr. Robb's conduct "*is against State statute and also against the standard of care*." Doc. 39-4, at 10 (emphasis added). It would be strange indeed for the Board to *grant* a motion to dismiss a complaint **[**37]** alleging a violation of a state statute on the basis of an expert testifying that the respondent in fact committed the violation with which he was charged.

Third, in the introduction of his amended complaint, Dr. Robb alleges that the Board has "declar[ed] . . . [his] legal vaccination practices as a violation of their own vaguely drafted administrative rules." AC ¶ 4. However, it is quite clear that the Board has yet to make a decision as to whether Dr. Robb has violated any rules. *See, e.g.*, Doc. 31, at 21 (Dr. Robb referring to the "Board's continued proceedings" against him).

Fourth, Dr. Robb alleges that, as part of its conspiracy, the Board has "communicated to the relevant purchasing public that Dr. Robb is currently under investigation for professional misconduct." AC ¶ 72. As an initial matter, Defendants **[**38]** vigorously dispute that the Board had any role in publicizing the charges against Dr. Robb and proffers sworn testimony that it was the DPH that did so simply as a matter of course, [Doc. 34-1 Ex. B] ¶¶ 6-10; further, the documents Dr. Robb proffered allegedly evidencing such publication by the Board provide no ascertainable support for Dr. Robb's allegation that it was the Board, rather than DPH, that published the charges, [Docs. 31-3, 31-4]. More important, however, is the fact that, without more, simply listing on a website the true fact that Dr. Robb was under investigation for professional misconduct in no way evinces an illegal conspiracy amongst the adjudicators to remove the target of that investigation from the relevant market. *See* Mayor and City Council of Baltimore, 709 F.3d at 139 ("two vague references to isolated [behavior] among only three defendants" are insufficient to support inference of antitrust conspiracy). To hold otherwise would place under the umbrella of an antitrust conspiracy an overwhelming amount of legitimate actions taken by regulatory boards comprised of industry members.

[*146] Moreover, even were Dr. Robb to have alleged properly "interdependent conduct," Dr. Robb makes only one allegation suggesting any **[**39]** of the circumstantial evidence or "plus factors" that would thereby be required for his claim to survive dismissal. Dr. Robb alleges "[o]n information and belief [that] the three veterinarian members of the Defendant Board use vaccination protocols that rely solely upon the manufacturer's recommended dosage," and that thereby "[s]ize-appropriate vaccination protocols like Dr. Robb's vaccination protocols thus represent a direct financial threat to the veterinarian Individual Defendants."[15] AC ¶¶ 56-57; *see also* Doc. 44, at 22 (describing such as an "enormous incentive to restrain trade"). Although this may demonstrate a theoretical "common motive to conspire" amongst the Veterinarian Defendants, it is insufficient to establish an antitrust conspiracy when there

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[14] To the extent Dr. Robb refers to the Board's earlier May 4, 2015 denial of his motion to dismiss, that decision likewise can in no way be used to infer an illegal conspiracy to remove Dr. Robb from the market. In that decision, the Defendant Board properly rejected Dr. Robb's clearly erroneous argument for dismissal based on an entirely unsupportable interpretation of North Carolina State Board of Dental Examiners v. Federal Trade Commission, 135 S. Ct. 1101, 191 L. Ed. 2d 35 (2015). *See* Doc. 5-9.

[15] This motive cannot even apply to the two members of the Board who do not have any demonstrated pecuniary motive to remove Dr. Robb from the market, Defendants Bernhard and O'Neill. The claims against them are therefore not just without merit, but largely frivolous.

exists an "obvious alternative explanation," *Twombly, 550 U.S. at 567*, for any parallel conduct: compliance with their statutory duty to adjudicate claims brought by the Connecticut DPH. Therefore, the evidence of the Veterinarian Defendants' common motive to conspire does not come close to "exclud[ing] the possibility of independent action." *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 768, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)*; *see also* *Mayor and City Council of Baltimore, 709 F.3d at 137* ("even if a plaintiff alleges . . . "plus factors" . . . these facts must still lead to an inference of conspiracy"). **[**40]** Any regulatory board comprised of industry members with a statutory duty to adjudicate regulatory violations will almost always have some common motive to conspire (*i.e.*, excluding at least one competitor from the market). That motive simply cannot be independently sufficient to infer an antitrust conspiracy.

In this regard, this case is far from *North Carolina State Board of Dental Examiners*, the Supreme Court's affirmance of which was and is relied on extensively by Dr. Robb. As summarized by the circuit court, that case was "about a state board run by private actors in the marketplace *taking action outside of the procedures mandated by state law* to expel a competitor from the market." *717 F.3d at 375* (emphasis added) (addressing board members' discretionary decision to send cease-and-desist letters to competitors). Here, Dr. Robb has not properly alleged any conduct of the individual Board members other then sitting in adjudication of **[**41]** an administrative proceeding brought by another state agency, *an action the Board members are required to take under state law. See* *C.G.S. § 20-196b* (the Board "*shall* (1) hear and decide matters concerning suspension or revocation of licensure, (2) adjudicate complaints filed against practitioners licensed under this chapter and (3) impose sanctions where appropriate" (emphasis added)). Again, to thereby hold that Dr. Robb's bare allegations make out an antitrust conspiracy would effectively mean that nearly all actions of an adjudicative body controlled by a majority of industrial participants would constitute an antitrust conspiracy *per se*, an unsupportable argument that Plaintiff initially proffered, but wisely abandoned.[16]

[*147] In sum, Dr. Robb has failed to plead a single factual allegation affirmatively evincing **[**42]** the existence of an agreement amongst the Defendants, and can point to no proper allegations of Defendants' conduct from which this Court can remotely infer such an agreement. Dr. Robb is thereby forced to rely solely on his allegation that the Veterinarian Defendants had a common incentive to foreclose veterinarians such as Dr. Robb from the market. Such naked identification of a theoretical motive to conspire, without significantly more, is far from sufficient to establish the plausible existence of an agreement amongst competitors. Dr. Robb has thereby failed to allege a plausible claim that the Defendants have conspired with each other. His antitrust claim must be dismissed.

With such a clear and adequate ground for dismissal based upon Defendants' substantive antitrust defense, the Court need not address Defendants' other arguments (as to immunity, abstention, or exhaustion), many of which implicate constitutional concerns. This is because judges are clearly directed to avoid unnecessary adjudications as to questions of constitutional law. *See* *Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 445-46, 108 S. Ct. 1319, 99 L. Ed. 2d 534 (1988)* (collecting cases discussing the "fundamental and longstanding principle of judicial restraint [that] requires courts avoid reaching constitutional **[**43]** questions in advance of the necessity of deciding them"); *see also* *Burton v. U.S., 196 U.S. 283, 295, 25 S. Ct. 243, 49 L. Ed. 482 (1905)* ("It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case"). Here, Dr. Robb's antitrust claim is clearly deficient for the reasons discussed above, and any further ruling would be unnecessary.

V. Conclusion

The record in this case makes manifest the sincerity of spirit, even devotion, with which Dr. Robb, an experienced and successful practitioner of veterinary medicine, asserts that it is unnecessary, dangerous and contrary to sound

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[16] As Dr. Robb admitted in his reply brief in support of his preliminary injunction, "the Board's argument that Dr. Robb has 'grossly misconstrued' the holding of *North Carolina State Board of Dental Examiners* . . . is now moot because Dr. Robb's verified amended complaint (Dkt. 30) does not allege that the Board is violating the federal antitrust laws by way of its composition alone." Doc. 31, at 4.

practice to require that the full dosage of rabies vaccine administered to a Great Dane also be administered to a Chihuahua. However, such a requirement appears to be envisioned by the Connecticut Department of Public Health, and forms the gravamen of its administrative charge against Dr. Robb. Presumably the Board will eventually adjudicate that charge.

The Court is constrained to conclude that Dr. Robb's complaint must be dismissed because it does not allege a viable antitrust claim under the Sherman Act. In the absence of a viable claim under the Constitution or a federal statute, the limited jurisdiction of **[**44]** this United States District Court does not extend to righting whatever wrongs, however real, Dr. Robb may have identified. The Rule of Law that courts such as this one enforce is a secular law. The Constitution places spiritual questions beyond the competence of courts. If Connecticut's rules with respect to rabies vaccine dosages should be changed, the Legislature and Governor must be asked to change them.

For the reasons stated above, Defendants' Motion to Dismiss [Doc. 39] is GRANTED. The following motions are DENIED AS MOOT: (i) Plaintiff's Motion for Preliminary Injunction [Doc. 4]; (ii) Proposed Interveners' Emergency Motion **[*148]** to Intervene [Doc. 21]; and (iii) Proposed Interveners' Proposed Joinder in Defendants' Motion to Dismiss the Amended Complaint [Doc. 43]. The Clerk of Court is directed to enter judgment for the Defendants, dismissing this action, and to close the file.

It is SO ORDERED.

Dated: New Haven, Connecticut

January 20, 2016

/s/ Charles S. Haight, Jr.

CHARLES S. HAIGHT, JR.

Senior United States District Judge

State v. Au Optronics Corp.

Circuit Court of Cook County, Illinois, County Department, Chancery Division

January 20, 2016, Decided; January 20, 2016, Filed

Case No. 10-CH-34472

Reporter

2016 Ill. Cir. LEXIS 13879 *

THE STATE OF ILLINOIS, by its Attorney General, Lisa Madigan, Plaintiff, v. AU OPTRONICS CORPORATION; AU OPTRONICS CORP. AMERICA, INC.; CHI MEI INNOLUX CORP.; CHI MEI OPTOELECTRONICS CORP. USA, INC.; CMO JAPAN COMPANY, LTD.; EPSON IMAGING DEVICES CORP.; EPSON ELECTRONICS AMERICA, INC.; HITACHI, LTD.; HITACHI DISPLAYS LTD.; HITACHI AMERICA, LTD.; HITACHI ELECTRONIC DEVICES USA, INC.; LG DISPLAY CO., LTD.; LG DISPLAY AMERICA, INC.; SAMSUNG ELECTRONICS CO., LTD.; SAMSUNG SEMICONDUCTOR, INC.; SAMSUNG ELECTRONICS AMERICA INC.; SHARP CORP.; SHARP ELECTRONICS CORP.; TOSHIBA CORP.; TOSHIBA AMERICA ELECTRONIC COMPONENTS, INC.; TOSHIBA MOBILE DISPLAY CO.; and TOSHIBA AMERICA INFORMATION SYSTEMS, INC., Defendants.

Core Terms

commerce clause, commerce, affirmative defense, antitrust, regulation, domestic, import, foreign commerce, state law, occurring, summary judgment, dormant, effects, cases, interstate commerce, entities, panels, anti trust law, federal government, foreign nation, instant suit, take place, sales, state action, extraterritorial, pre-empted, grounds, prices, state statute, manufacturers

Judges: [*1] Moshe Jacobius, Judge.

Opinion by: Moshe Jacobius

Opinion

MEMORANDUM OPINION AND ORDER

This matter comes before the Court on the State of Illinois' Motion for Partial Summary Judgment Against the Defendants' Foreign-Conduct Defenses. The Court has reviewed the foregoing motion and the State of Illinois' memorandum in support thereof ("MSJ"), as well as Defendants' Joint Opposition to the Attorney General's Motion for Partial Summary Judgment against the Defendants' Foreign-Conduct Defenses ("Resp."), the State of Illinois' Reply ("Reply"), Defendants' Sur-Reply ("S.Rep."), and the State of Illinois' Sur-Surreply ("SS.Rep."). The Court has also considered the oral arguments of counsels and relevant legal authorities.

Background

The underlying allegations of this long-pending case have been discussed at length in previous Orders and thus need not be recited again in great detail.[1] In late 2006, the public learned of a price-fixing investigation being conducted by the United States Department of Justice. The investigation centered on allegations that manufacturers of thin-film transistor liquid crystal display ("LCD") panels had held unlawful meetings for the purpose of fixing the prices and output of LCD panels **[*2]** throughout the United States, including in Illinois. The price fixing allegedly occurred between November 30, 1998, and December 11, 2006, during which time the State of Illinois and Illinois consumers purportedly paid artificially inflated prices for LCD panels.

After the investigation became public, a torrent of litigation ensued, with hundreds of civil actions filed in United States district courts throughout the country. To promote the efficient adjudication of those cases, the federal matters were consolidated in the United States District Court for the Northern District of California under the caption *In re: TFT-LCD (Flat Panel) Antitrust Litigation*, Case No. 3:07-MD-1827 SI, MDL No. 1827 (N.D. Cal.) (the "multidistrict litigation"). The Honorable Judge Susan Illston has presided over the multidistrict litigation since 2006, and ultimately certified two class actions therein. The first class consisted of entities that were direct purchasers of LCD panels (e.g., entities that utilize LCD panels as components of other products). The second class consisted of indirect purchasers of LCD panels, specifically individuals and entities that purchased products containing LCD panels **[*3]** (e.g., cellular phones, computer monitors, televisions, and numerous other items). Additionally, various plaintiffs opted out of the two classes and brought cases of their own in front of Judge Illston.

Though many states elected to participate in the multidistrict litigation, the State of Illinois opted to pursue its own action. On August 10, 2010, the Illinois Attorney General (the "Attorney General" or "the State") filed the instant case on behalf of Illinois indirect purchasers of products containing LCD panels.[2] The Complaint alleges that Defendants violated section 3(1) of the Illinois Antitrust Act (the "IAA") by conspiring to fix prices on LCD panels. The Complaint asserts claims for monetary relief (including treble damages) for damages suffered by the State of Illinois, its state agencies, and, in the State's *parens patriae* capacity, Illinois residents (both individuals and businesses) who purchased products containing LCD panels during the period of alleged price-fixing. Additionally, the Complaint seeks injunctive relief to undo the effects of Defendants' alleged unlawful conduct.

Numerous affirmative defenses to the Complaint have been filed. The instant motion is brought **[*4]** by the State regarding two categories of affirmative defenses filed by the AU Optronics Defendants[3] the Chimei Defendants[4] the Samsung Defendants[5] the Sharp Defendants[6] and the Toshiba Defendants[7] (collectively, the "Defendants"). The affirmative defenses at issue are: (1) statutory defenses derived from *section 5(14) of the IAA* and subsection 6a of the United States Foreign Trade Antitrust Improvements Act of 1982[8] ("FTAIA"); and (2) that the State's claims are barred by the *Commerce Clause of the United States Constitution*.

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[1] *See*, e.g., this Court's previously entered May 30, 2012, and November 26, 2013, Orders.

[2] Indirect purchasers include entities that sell products containing LCD panels and the consumers that ultimately buy the products.

[3] Consisting of AU Optronics Corp. and AU Optronics Corp. America, Inc.

[4] Consisting of Chimei Innolux Corp., Chimei Optoelectronics USA, Inc., and CMO Japan Co., Ltd.

[5] Consisting of Samsung Electronics Co., Ltd., Samsung Electronics America, Inc., and Samsung Semiconductor, Inc.

[6] Consisting of Sharp Corp., and Sharp Electronics Corp.

[7] Consisting of Toshiba Corp., Toshiba America Electronic Components, Inc., Toshiba Mobile Display Co., and Toshiba America Information Systems, Inc.

[8] Although the instant suit is brought pursuant to the IAA, not the FTAIA, *subpart 14 of section 5 of the IAA* invoked by Defendants as an affirmative defense is substantively identical to subsection 6a of the FTAIA. *740 ILCS 10/5*; *15 U.S.C. § 6a*. The IAA expressly directs that where its wording is "identical or similar to that of a federal ***antitrust law***" such as the FTAIA, Illinois courts shall look to federal law for guidance when construing the language of the IAA. *740 ILCS 10/11*.

The State requests that this Court grant summary judgment in its favor on both types of affirmative defenses because the State argues that Defendants' alleged conduct in the instant suit does not fall within the IAA exclusion invoked by Defendants, and because the Commerce Clause is not a bar to application of the IAA against Defendants in the instant suit. The State also argues that the AU Optronics Defendants are precluded from litigating the central issue of what constitutes "import trade or commerce" with respect to the first defense because they are collaterally estopped as to this issue by the Ninth Circuit's decision in *United States v. Hsiung, 778 F.3d 738 (9th Cir. 2015)* (upholding an indictment of the AU Optronics Defendants under the Sherman Act for the same price-fixing alleged in the instant suit based **[*5]** on a "domestic effects" theory and finding in the alternative that sufficient evidence was presented to convict based on "the import trade theory alone").[9]

With respect to the first category of affirmative defense, Defendants argue that the conduct alleged by the State falls within the IAA's exclusion. They argue that *Hsiung* does not preclude the AU Optronics Defendants from asserting that their alleged conduct in the instant case did not involve import trade or commerce because the court in *Hsiung* did not consider that issue. If *Hsiung* did make any finding on the issue, Defendants argue the outcome would be in conflict with the Seventh Circuit's decision in *Motorola Mobility LLC v. AU Optronics Corporation, 775 F.3d 816, 818 (7th Cir. 2015)* (price-fixed components sold to foreign subsidiaries and *subsequently* imported by plaintiff manufacturer are not part of "import commerce" and Sherman Act claims based thereon must proceed under a domestic effect theory). Defendants assert that there is a "conflict" between circuits whether their conduct involved "import commerce" and thus the State should not be allowed to raise collateral estoppel offensively on this issue. With respect to the Commerce Clause defense, Defendants separately assert that the *Commerce Clause of the United States Constitution* precludes Illinois from regulating commerce that take place **[*6]** in foreign countries.

Discussion

Summary judgment is appropriate "if the pleadings, depositions, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *735 ILCS 5/2-1005(c)*. For the purposes of summary judgment, the court should construe the facts strictly against the movant and liberally in favor of the opponent. *Adams v. N. Ill. Gas Co., 211 Ill.2d 32, 43 (2004)*. A summary judgment proceeding is not used to try an issue of fact, but to determine whether any genuine issue of material fact exists. *Happel v. Wal-Mart Stores, 199 Ill.2d 179, 186 (2002)*. Summary judgment should not be granted unless the right of the moving party is clear and free from doubt. *Horwitz v. Holabird & Root, 212 Ill.2d 1, 8 (2004)*. Partial summary judgment may also be appropriate on discrete issues where "a party moves for a summary determination of one or more, but less than all, of the major issues in the case, and the court finds that there is no genuine issue of material fact as to that issue or those issues," in which case "the court shall thereupon draw an order specifying the major issue or issues that appear without substantial controversy, and directing such further proceedings upon the remaining undetermined issues as are just." *735 ILCS 5/2-1005(d)*.

I. *Section 5(14) of the IAA* does **[*7]** not constitute an affirmative defense to the State of Illinois' claim against Defendants

The IAA, pursuant to which the State has brought the instant suit against Defendants, expressly provides in section 7.9 that "No action under this Act shall be barred on the grounds that the activities or conduct complained of in any way affects or involves interstate or foreign commerce." 740 LLCS 10/7.9. *Section 5 of the IAA* also provides in pertinent part as follows:

> No provisions of this Act shall be construed to make illegal:
>
> * * *
>
> (14) Conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless:

[9] The substantive difference between the "domestic effects" and "import trade" approaches to a claim under the Sherman Act are explained *infra* beginning on page six.

> (a) such conduct has a direct, substantial, and reasonably foreseeable effect:
>
> > (i) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
> >
> > (ii) on export trade or export commerce with foreign nations of a person engaged in such trade or commerce in the United States; and
>
> (b) such effect gives rise to a claim under the provisions of this Act, other than this subsection (14).
>
> (c) if this Act applies to conduct referred to in this subsection (14) only because of the provisions of paragraph (a)(ii), then this Act shall apply to such conduct only for **[*8]** injury to export business in the United States which affects this State: [...]

740 ILCS 10/5. Defendants have asserted *section 5(14)*, as well as subsection 6a of the FTAIA from which the language of *section 5(14) of the IAA* was directly drawn, as an affirmative defense to the State's complaint against them.

The Ninth Circuit has previously held that *section 6a of the FTAIA* is not an affirmative defense to a Sherman Act offense, and that such interpretation is "at odds with the plain language of the statute, which establishes that when a case involves nonimport trade with foreign nations, the Sherman Act does not apply *unless* the FTAIA domestic effects exception applies." *Hsiung, 778 F.3d at 756*. Utilizing interpretation of its federal counterpart, as *section 11 of the IAA* directs Illinois courts to do,[10] this Court likewise finds that *section 5(14) of the IAA* is not an affirmative defense to *section 3(1) of the IAA*.

An affirmative defense is an affirmative matter asserted by a party that "gives color to the opposing party's claim and then asserts new matter by which the apparent right is defeated." *Basselen v. GMC, 341 Ill. App. 3d 278, 287 (2d Dist. 2003)*. Under the plain language of the statute, the IAA excludes "anticompetitive conduct that causes only foreign injury," just as FTAIA excludes such conduct from the Sherman Act, by creating a general rule that the acts "shall not apply to conduct involving trade or commerce . . **[*9]** . with foreign nations." *See F. Hoffmann-La Roche Ltd. v. Empagran S. A., 542 U.S. 155, 158 (2004)*; *15 U.S.C. § 6a*. The statutes then create "exceptions to the general rule, applicable where (roughly speaking) that conduct significantly harms imports, domestic commerce, or American[11] exporters." *Empagran S.A., 542 U.S. at 158*.

The United States Supreme Court divides inquiries regarding price-fixing conduct alleged to have occurred abroad into two parts: the court first looks at whether the alleged conduct falls within the general rule, and second, the court determines whether the conduct falls within one of the statute's exceptions to that general rule. *Id.* This analysis demonstrates that, rather than serving as an affirmative defense by which an apparent right to recovery under the IAA is defeated, *section 5(14)* removes from the IAA's reach all export activities and other commercial activities occurring entirely outside the state *unless* those activities have a direct, substantial, and reasonably foreseeable domestic effect. *740 ILCS 10/5*; *see also Empagran S.A., 542 U.S. at 161* ("the FTAIA seeks to make clear to American exporters (and to firms doing business abroad) that the Sherman Act does not prevent them from entering into business arrangements . . . however anticompetitive, as long as those arrangements adversely affect only foreign markets").

The substantive **[*10]** thrust of the State's Motion for Partial Summary Judgment as to Defendants' *section 5(14)* "affirmative defense" is thus effectively a motion for summary judgment on the merits of their claim against Defendants under *section 3(1) of the IAA*. This is because an "affirmative defense" that actually challenges whether the statute in question is applicable to the conduct alleged goes to the heart of the claim's merits: it is not some other affirmative matter negating the claim. As a result, the State's motion does not ask the Court to determine as a

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[10] *See 740 ILCS 10/11*, as explained in Note 8, *supra*.

[11] The IAA adds to the language of the FTAIA that any harm to U.S. exporters must also affect the State of Illinois. *740 ILCS 10/5*.

matter of law whether, even *if* Defendants violated the IAA, some other affirmative matter defeats the State's claim; the motion asks the Court to determine whether Defendants' conduct *is in fact a violation* of *section 3(1)*.

The instant motion is not the proper vehicle for such a determination, particularly where the Defendants' purported "affirmative defense" may be disposed of on other grounds that pose no risk of prejudicing any of the parties' arguments with respect to the merits of the State's claim. This Court's finding in favor of the State that *section 5(14)* does not constitute an affirmative defense to *section 3(1)* is therefore not determinative of the merits of the State's claim under *section 3(1)*. The Court ***makes no [*11] finding at this time*** as to whether *section 3(1)* or *section 5(14)* are applicable to any of the conduct alleged by the State, or whether any of the Defendants are precluded from arguing any legal theories relating thereto. These issues will be taken up with the remainder of the case if and when the parties pursue them in their proper course.

II. The State of Illinois' claims against Defendants are not barred by the *Commerce Clause of the United States Constitution*

The State next argues that the Court should grant summary judgment against Defendants with respect to their affirmative defense that the State's claim under the IAA is barred by the *Commerce Clause of the United States Constitution*. Defendants have asserted that application of the IAA to activities that allegedly occurred overseas would constitute an impermissible intrusion of state law into foreign commerce.

Although there is only one Commerce Clause in the United States Constitution, federal courts typically distinguish between issues involving domestic interstate commerce and foreign commerce, referring separately to the "Domestic Commerce Clause" and the "Foreign Commerce Clause." *See e.g., ABC Charters, Inc. v. Branson, 591 F. Supp. 2d 1272, 1304 (S.D. Fla. 2008)* (citing *National Foreign Trade Council v. Natsios, 181 F.3d 38, 66 (1st Cir. 1999)* (the purpose of the dormant Domestic Commerce Clause is "preventing states and their political subdivisions from promulgating protectionist policies," while the Foreign Commerce Clause "also restrains the states from excessive **[*12]** interference in foreign affairs")); *Gerling Global Reinsurance Corp. of Am. v. Quackenbush, 2000 U.S. Dist. LEXIS 8815. * 40-41 (E.D. Cal.)*.

Just as the analysis differs somewhat between the domestic and foreign prongs of the Commerce Clause, federal courts also distinguish between dormant Commerce Clause analysis, where a state action may interfere with a foreign policy matter even though the federal government has not spoken on the issue, and preemption analysis, where a state action is in direct conflict with federal law or policy. *See Odebrecht Constr., Inc. v. Prasad, 876 F. Supp. 2d 1305, 1317-18 (S.D. Fla. 2012)*.

One federal district court, addressing a dormant Foreign Commerce Clause challenge to a state statute, summarized the United States Supreme Court's interpretation and application of the constitutional provision as follows:

> The United States Constitution grants Congress the power to 'regulate Commerce with foreign Nations.' *U.S. Const. art. I, § 8, cl. 3*. The Supreme Court has consistently recognized that this allocation of power implicitly contains a negative command, known as the dormant Commerce Clause, which prohibits certain state action even absent Congressional legislation or regulation. *See Okla. Tax Com'n v. Jefferson Lines, Inc., 514 U.S. 175, 179 (1995)* (citing *Quill Corp. v. North Dakota, 504 U.S. 298, 309 (1992)*; *Nw. States Portland Cement Co. v. Minnesota, 358 U.S. 450, 458 (1959)*; *H.P. Hood & Sons. Inc. v. Du Mond, 336 U.S. 525, 534-535 (1949)*). The Foreign Commerce Clause in particular recognizes that 'with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national **[*13]** power.' *Japan Line, Ltd. v. Los Angeles Cnty., 441 U.S. 434, 448 (1979)* (quoting *Bd. of Tr. v. United States, 289 U.S. 48, 59 (1933)*).
>
> In *Japan Line, Ltd. v. Los Angeles County*, the Supreme Court held that the power conferred under the Foreign Commerce Clause is greater than the power conferred by the Interstate Commerce Clause. *441 U.S. at 448*. This is because discriminatory treatment of foreign commerce 'may create problems, such as the potential for

> international retaliation, that concern the Nation as a whole.' *Kraft Gen. Foods, Inc. v. Iowa Dep't of Revenue & Fin., 505 U.S. 71, 79 (1992)* (citing *Japan Line, 441 U.S. at 450*). Accordingly, the Supreme Court held that a state law violates the Foreign Commerce Clause when it 'impair[s] federal uniformity in an area where federal uniformity is essential,' and 'prevents this Nation from speaking with one voice in regulating foreign trade.' *Japan Line, 441 U.S. at 448-53*. Later, the Supreme Court qualified *Japan Line* by holding that absent an explicit directive from Congress, a state law does not violate the Foreign Commerce Clause if it merely has 'foreign resonances' but does not 'implicate foreign affairs.' *Container Corp. of Am. v. Franchise Tax Bd.. 463 U.S. 159, 194 (1983)*. A state law 'at variance with federal policy' will thus violate the 'one voice' standard articulated in *Japan Line* if it 'either implicates foreign policy issues which must be left to the Federal Government or violates a clear federal directive.' *Id.* As the Supreme Court observed, 'the **[*14]** second of these considerations is, of course, essentially a species of preemption analysis.' *Id.*

Odebrecht Constr., Inc., 876 F. Supp. 2d at 1317-18.

Preemption analysis, with respect to the Commerce Clause specifically, is further divided between direct conflicts between laws and "field preemption," as explained in *ABC Charters, Inc.*:

> Field preemption occurs when federal regulation in a field is so pervasive that a court can reasonably infer that there is no room left for the states to supplement it. *Hughes v. Att'y Gen. of Fla., 377 F.3d 1258, 1267 (11th Cir. 2004)*. The Supreme Court has repeatedly cited *Hines [v. Davidowitz, 312 U.S. 52, 67, (1941)]* for the proposition that an "Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Maryland v. Louisiana, 451 U.S. 725, 746 (1981)*; *Ray v. Atlantic Richfield Co., 435 U.S. 151, 157 (1978)*; *see City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 633 (1973)*. Where the federal government has acted in an area of unique federal concern and has crafted a balanced, tailored approach to an issue, and the state law threatens to upset that balance, the state law is preempted. [*Natsios, 181 F.3d at 77*].

591 F. Supp. 2d at 1304.

The State initially seems to have understood Defendants' affirmative defense as invoking Due Process requirements to challenge application of the IAA to "foreign conduct." MSJ at 14. To that end, the State points to *section 7.9 of the IAA*, which provides that "No action under this Act shall **[*15]** be barred on the grounds that the activities or conduct complained of in any way affects or involves interstate or foreign commerce" as a manifestation of an intent on the part of the Illinois General Assembly for the IAA to apply to foreign conduct that has an effect on Illinois. *740 ILCS 10/7.9*; MSJ at 14. The State then cites *United States v. Nippon Paper Industrial Company* for the following principle:

> a sovereign ordinarily can impose liability for conduct outside its borders that produces consequences within them, and while considerations of comity argue against applying [the Sherman Act] to situations in which no effect within the United States has been shown ... the statute, properly interpreted, does proscribe extraterritorial acts which were 'intended to affect imports to the United States and did affect them.'

109 F.3d 1, 3 (1st Cir. 1997); MSJ at 14.

In their Response, however, Defendants clarified that they had asserted "no such defense" and instead were of the position that the State's "foreign commerce claims" were barred by the Commerce Clause as stated in *Healy v. Beer Institute. 491 U.S. 324, 336 (1989)*; Resp. at 17-18.[12] Defendants distinguish case law relied upon by the

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[12] The Court notes that certain phraseology used by Defendants, such as "extraterritorial," is not improper in the context of the Commerce Clause, but is more commonly associated with a Due Process challenge. *See* *Watson v. Employers Liability Assurance Corp., 348 U.S. 66, 71 (1954)* (referencing "extraterritoriality due process doctrine"). To avoid confusion, and in light of Defendants' unequivocal statement that they are *not* arguing a Due Process defense in the instant motion, this Court limits its analysis in this Part II to whether the Commerce Clause presents a bar to certain of the State's claim-', and does not address whether application of the IAA to the alleged conduct would exceed the scope of the IAA's reach for Due Process purposes.

State as pertaining to acts of the United States Congress, as an arm of the federal government, and insist **[*16]** it has no applicability to state legislation because the Commerce Clause "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." *Healy, 491 U.S. at 336* (quoting *Edgar v. Mite Corp., 457 U.S. 624, 642 (1982)*); Resp. at 18.

In *Healy*, the United States Supreme Court considered a Connecticut price-affirmation statute aimed at ensuring out-of-state beer vendors did not charge more to Connecticut wholesalers than the vendors charged to wholesalers in neighboring states for the same product. *Id. at 326*. The court invalidated the statute on two grounds: first, because of its extraterritorial price-controls, and second, because it facially discriminated against interstate commerce. *Id. at 337-40*. Regarding the extraterritorial grounds, the court explained that:

> Taken together, our cases concerning the extraterritorial effects of state economic regulation stand at a minimum for the following propositions: First, the 'Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State,' and, specifically, a State may not adopt legislation **[*17]** that has the practical effect of establishing 'a scale of prices for use in other states.' Second, a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature. The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State. Third, the practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation. Generally speaking, the Commerce Clause protects against inconsistent legislation arising from the projection of one slate regulatory regime into the jurisdiction of another State. And, specifically, the Commerce Clause dictates that no State may force an out-of-state merchant to seek regulatory approval in one State before undertaking a transaction in another.

Id. at 335-37 (internal **[*18]** citations omitted); *see also* *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573 (1986)*; *Baldwin v. G.A.F. Seelig Inc., 294 U.S. 511 (1935)*; *but see* *Pharm. Research & Mfrs. of Am. v. Walsh, 538 U.S. 644 (2003)*[13]

The State replies that because *Healy* dealt with a statute that facially discriminated against domestic interstate commerce it does not address the issue posed by the instant case, where the State is arguing that a nondiscriminatory statute applies to foreign imports coming into Illinois. Reply at 13. The State cites the Seventh Circuit's discussion in *In re Brand Name Prescription Drugs Antitrust Litigation* as supporting its argument that "State antitrust statutes generally comport with the Commerce Clause, even if they reach interstate commerce." *123 F.3d 599, 613 (7th Cir. 1997)*; Reply at 13. *Brand Name* involved several consolidated appeals arising from an alleged price fixing scheme between drug manufacturers. *Id.* Of potential relevance to the instant suit was a denial of a motion to remand to state court a class action on behalf of consumers in several states, purportedly based on an Alabama statute modeled after the Sherman Act. *Id. at 604, 607*. The plaintiff's desired to remain in state court and disputed the district court's determination of diversity jurisdiction, and alternatively, of federal question jurisdiction based on federal occupation of the field of ***antitrust law*** despite plaintiff's **[*19]** "'artfully pleaded" cause of action under Alabama law. *Id. at 610-11*.

The Seventh Circuit's decision in *Brand Name* reversed the district court's refusal to remand on the grounds that the suit had "potential merit" as a cause of action under the state statute. *Id. at 613*. The court also clarified that, although outdated case law had deemed federal power to regulate interstate commerce as "exclusive," reading some state antitrust statutes as reaching interstate commerce had become "constitutionally permissible." *Id.* The court went on to clarify its reasoning as follows:

[13] See Note 20, *infra*, for discussion of *Walsh*.

> A state's power to regulate interstate commerce is limited ... by the provisions of the federal Constitution that limit the extraterritorial powers of state government. A state cannot regulate sales that take place wholly outside it. State A cannot use its ***antitrust law*** to make a seller in State B charge a lower price to a buyer in C. Insofar as the Alabama suit challenges sales from plants or offices in other slates to pharmacies in other states, it exceeds the constitutional scope of the Alabama ***antitrust law***. But insofar as it challenges sales from other states to pharmacies in Alabama, it is within the intended and permissible scope of the **[*20]** statute[.]

Id. (internal citations omitted).

The State points to another federal case, *In re Lorazepam & Clorasepate Antitrust Litigation*, as specifically upholding the IAA against a Commerce Clause challenge, 295 F.Supp. 2d 30, 49 (D.D.C. 2003); Reply at 14. In *Lorazepam*, a number of plaintiff-insurers brought a class action suit under Minnesota, Massachusetts and Illinois state law on behalf of themselves, as third party payors for prescription drugs, and a number of nonparty customers, seeking to recover alleged overpayments for the drugs Lorazepam and Clorasepate. Id. at 33. The plaintiffs alleged that defendant drug manufacturers had entered into exclusive licensing agreements in restraint of trade that drove up costs of generic versions of the drugs and that defendants had monopolized the markets for both the drugs and their active ingredients. *Id.* One of the plaintiffs, Health Care Service Corporation ("HCSC"), an entity incorporated in Illinois and "doing business principally in the states of Illinois, Texas, and New Mexico," sought damages under the IAA for sales to its divisions located in Texas and New Mexico. Id. at 47, 50. Defendant moved to dismiss the claims for damages incurred outside the state of Illinois on the grounds that **[*21]** interpreting the IAA as reaching such claims would violate the Commerce Clause. *Id.* at 47-48.

The federal district court explained that "the nexus between the alleged antitrust violation and the state of Illinois" was determinative of the IAA's reach pursuant to section 7.9[14] of the statute and held that the IAA "extends not only to illegal antitrust activity that occurs wholly within Illinois, but also to activity which may have effects in that state and which may have occurred, in part, outside of Illinois." Id. at 48. Key to this finding was the fact that HCSC alleged in its claim that it was "ultimately responsible" for the cost - and thus ultimately incurred the damages - for overpayments made by its divisions in Texas and New Mexico. Id. at 50. This factual allegation supported HCSC's claim that the harm at issue "occurred at least in part in Illinois and had a substantial effect in Illinois." *Id.* The court held that reading the IAA as applicable to HCSC's claim did not run afoul of the Commerce Clause because the IAA did not directly conflict with the Sherman Act and the IAA stated a legitimate state interest as its purpose in section 2.[15] *Id.* at 49.

Defendants argue in their Surreply that where a state action affects **[*22]** foreign commerce, as opposed to merely interstate commerce, "additional scrutiny is necessary to determine whether the regulations 'may impair uniformity in an area where federal uniformity is essential,' or may implicate 'matters of concern to the whole nation ... such as the potential for international retaliation.'" Pacific Northwest Venison Producers v. Smitch, 20 F.3d 1008, 1014 (9th Cir. 1994) (quoting Japan Line, Ltd. v. Cnty. of Los Angeles, 441 U.S. 434, 448, (1979); Kraft General Foods v. Iowa Dep't of Revenue, 505 U.S. 71, 79 (1992)); S. Rep. at 3.

Defendants further argue that the cases cited by the State are inapposite to the scenario in the instant case, where the Attorney General seeks to apply the IAA to commercial activity that Defendants characterize as "occurring wholly outside" the state of Illinois. S. Rep. at 4. Defendants argue that applying the IAA to such activity exceeds "the inherent limits of the enacting State's authority" described by *Healy* as restraining state action "regardless of whether the statute's extraterritorial reach was intended by the legislature" or "whether or not the commerce has effects within the State." Healy v. Beer Inst., 491 U.S. 324, 336 (1989) (internal citations omitted); S. Rep. at 4-5.

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[14] "No action under this Act shall be barred on the grounds that the activities or conduct complained of in any way affects or involves interstate or foreign commerce." 740 ILCS 10/7.9.

[15] "[T]he purpose of this Act is to promote the unhampered growth of commerce and industry throughout the State [of Illinois] by prohibiting restraints of trade which are secured through monopolistic ... practices and which act or tend to decrease competition[.]" 740 ILCS 10/2.

Likewise, Defendants argue that it makes no difference if the IAA is not in conflict with the Sherman Act because the Commerce Clause "has long been understood . . . to provide 'protection from state legislation inimical **[*23]** to the national commerce [even] where Congress has not acted'" due to "the Framers' overriding concern that 'the Federal Government must speak with one voice when regulating commercial relations with foreign governments.'" *Barclays Bank PLC v. Franchise Tax Bd., 512 U.S. 298, 310 (1994)*; *Japan Line, Ltd., 441 U.S. at 449*; S. Rep. at 6. *Lorazepam* - where the entity responsible for payment of the allegedly inflated drug prices was based in Illinois - does not support the State's position, Defendants argue, but instead follows *Healy* by pointing out that application of the IAA "to sales that take place wholly outside the state, whether or not the commerce has an effect within the state, *would violate the Commerce Clause*." *In re Lorazepam & Clorasepate Antitrust Litigation, 295 F.Supp. 2d 30, 48 (D.D.C. 2003)* (internal quotation omitted) (emphasis by Defendants); S. Rep. at 6.[16]

In a Sur-Surreply, the State argues that *Healy* and other cases cited by Defendants are limited to the context of state actions involving "economic protectionism" and do not present a challenge to an evenhanded application of the IAA to all price-fixing where the IAA is consistent with both the substance and the reach of the Sherman Act. SS. Rep. at 2-3. In support of this position, the State cites *Energy And Environment: Legal Institute v. Epel*, a Tenth Circuit case that characterizes the sweeping **[*24]** statement in *Healy* - and other cases which say that regulation of commercial activities occurring wholly outside the state violates the Commerce Clause - as applying only to price control statutes that "link prices paid in [the regulating state] with those paid out of state" or discriminate against out of state entities. *793 F.3d 1169, 1173 (10th Cir. 2015)* (pet. for cert. currently pending before U.S. Supreme Court).

Epel considered a Colorado law that required electricity generators to ensure that a certain percentage of power sold to consumers in Colorado was derived from renewable resources. *Id. at 1170*. The electricity at issue was delivered via "an interconnected grid serving eleven states and portions of Canada and Mexico," meaning the electricity flowed freely between all points on the grid. *Id. at 1171*. Plaintiff was a coal producer located outside of Colorado who challenged the law under the Commerce Clause because the renewable energy mandate meant that it would lose business from utility companies also located outside of Colorado who supplied power to the grid, thereby attempting to control and causing harm to conduct outside Colorado. *Id. at 1171, 1175*. Plaintiffs argued that such application rendered the Colorado law *per se* invalid under *Baldwin* ***[*25]*** ,[17]*Brown-Forman*,[18] and *Healy*.[19]*Id. at 1175*. The Tenth Circuit characterized the law as regulating "the quality of a good sold to in-state residents," acknowledging that the law might have "ripple effects, including price effects, both in-state and elsewhere," but upholding it nonetheless because the law did not discriminate against out-of-state entities or attempt to implement price controls as did the laws in the *Healy* line of cases.[20]*Id. at 1173*.

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[16] Defendants also briefly argue at page one of their Surreply that the Attorney General, has waived its argument against their Commerce Clause defense by initially characterizing it as a "due process" defense. *See* *Ill. S. Ct. Rule 341(h)(7)* ("Points not argued are waived and shall not be raised in the reply brief); S. Rep. at 1. However. mischaracterization of an argument is not the same as failing to raise the point at all: the State's initial brief argues and cites case law (described at page 11, *supra*) in support of its position that Illinois may impose liability for conduct that extends beyond its borders that causes in-state harm. MSJ at 14. The argument that the IAA is applicable to Defendants' alleged conduct despite limits on extraterritorial state regulations was therefore not waived by the State's initial brief.

[17] *Baldwin v. G. A. F. Seelig, Inc.. 294 U.S. 511 (1935)*.

[18] *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573 (1986)*.

[19] *Healy. 491 U.S. at 335-37*.

[20] The court's reasoning in *Epel* relied in part on the U.S. Supreme Court's holding in another case called *Pharmaceutical Research & Manufacturers Of America v. Walsh*, where plaintiffs also challenged a state statute under the Commerce Clause. *538 U.S. 644, 669 (2003)*. The regulation at issue in *Walsh* was a "prior authorization" process applied by the State of Maine to Medicaid sales from drug manufacturers who declined to enter into rebate agreements for program participants. *Id. at 650*. Plaintiff; in *Walsh* argued that the program constituted an impermissible extraterritorial regulation under the negative or donnant aspect of the Commerce Clause as iterated in *Baldwin* and *Healy* by regulating the terms of transactions occurring outside the

Even if the broad statements in *Healy* and its predecessor cases were applied to the instant suit, the State disputes Defendants' characterization of the conduct sought to be regulated as occurring "wholly outside Illinois." SS. Rep. at 7; S. Rep. at 4. The State argues that the commercial activity at issue in the instant suit, unlike that in the *Healy* line of cases, did not occur wholly outside Illinois because "the relevant commercial activity includes not only the first sale but also the last the one to the end-user... in Illinois." SS. Rep. at 7. Failure to include end-users in Illinois within the sphere of commercial conduct at issue because the first sale in the **[*26]** majority of instances took place abroad is contrary, the State insists, to the *Lorazepam* court's reading of the IAA as covering "activity which may have effects in that state and which may have occurred, in part, outside of Illinois." *In re Lorazepam & Clorasepate Antitrust Litig., 295 F. Supp. 2d at 48*; SS. Rep. at 8.

Furthermore, the result of failing to include end-users in Illinois as part of the conduct at issue "would eclipse other Commerce Clause tests and render unconstitutional many current state statutes." SS. Rep. at 7. The State returns to the Tenth Circuit's discussion in *Epel* for support its policy concerns regarding what it would characterize as an overly-expansive reading of *Healy*:

> if any state regulation that 'control[s] . . . conduct' out of state is *per se* unconstitutional, wouldn't we have to strike down state health and safety regulations that require out-of-state manufacturers to alter their designs or labels? [Plaintiffs have offered] no limiting principle that might prevent that possibility or others like it. Instead, it seems to embrace such results and, in this way, it seems to call on us not merely to respect the actual holdings of the most dormant authorities in all of donnant commerce clause jurisprudence but to revive and **[*27]** rebuild them on the basis of dicta into a weapon far more powerful than *Pike*[21] or *Philadelphia*.[22] That's an audacious invitation we think the [U.S. Supreme] Court unlikely to take up, especially given its remarks about the limits of *Baldwin*[23] doctrine in *Walsh*,[24] and it's a novel lawmaking project we decline to take up on our own.

Energy & Env'l Legal Inst, 793 F.3d at 1175.

The issue before the Court in the instant motion is whether the State has demonstrated that, as a matter of law, none of the State's claims are barred by the foreign or domestic prongs of the *Commerce Clause of the United Slates Constitution* in either their dormant or preclusive capacities. This Court finds that the State's claims are not barred.

As an initial matter, the Court finds that neither party has argued that the claims at issue with respect to the Commerce Clause defense are based upon conduct occurring in any of the several states other than Illinois. This removes from consideration concerns regarding the Domestic Commerce Clause, the purpose of which "is to curtail states' abilities to hinder interstate trade." *Houlton Citizens' Coalition v. Town of Houlton, 175 F.3d 178, 182 (1st Cir. 1999)* (citing *Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin County, 115 F.3d 1372, 1381-82 (8th Cir. 1997)*; *Individuals for Responsible Gov't, Inc. v. Washue County, 110 F.3d 699, 703-04 (9th Cir. 1997)*). As explained *supra*, this purpose is distinct from the Foreign Commerce Clause, which not only restricts protectionist policies but also restrains states from "excessive interference **[*28]** in foreign affairs" *Nat. Foreign Trade Council v. Natsios, 181 F.3d 38, 66 (1st Cir. 1999)*.

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state, and also that the program discriminated against interstate commerce by subsidizing in-state sales. *Id. at 669*. The *Walsh* court found that the Maine law did not regulate out-of-state prices, either expressly or effectively, nor did it attempt to tie in-state prices to out-of-state prices, and held, without further explanation, that "[t]he rule that was applied in *Baldwin* and *Healy* accordingly is not applicable to this case." *Id.*

[21] *Pike v. Bruce Church, Inc. 397 U.S. 137 (1970)*.

[22] *City of Philadelphia v. New Jersey, 437 U.S. 617 (1978)*.

[23] *Baldwin, 294 U.S. at 523-25*.

[24] Sec discussion in Note 20, *supra*.

This Court finds case law cited by both sides offering guidance on the Domestic Commerce Clause, including *Healy, Brown-Forman, Baldwin, Walsh, Brand Name*, and *Lorazepam*, largely inapposite because the holdings in each of those cases addressed conduct occurring in one state which affected domestic commerce between states, not conduct involving commerce alleged to have occurred overseas and to have had a damaging effect in the plaintiff state. *See* *Healy v. Beer Inst., 491 U.S. 324, 336 (1989)*; *Brown-Forman Distillers Corp., 476 U.S. 573*; *Baldwin v. G. A. F. Seelig, Inc., 294 U.S. 511 (1935)*; *Pharm. Research & Mfrs. of Am. v. Walsh, 538 U.S. 644 (2003)*: *In re Brand Name Prescription Drugs Antitrust Litigation, 123 F.3d 599, 613 (7th Cir. 1997)*: *In re Lorazepam & Clorasepate Antitrust Litigation. 295 F.Supp. 2d 30, 49 (D.D.C. 2003)*. Even *Epel*, which considered a facial challenge to a state statute that had implications for both domestic and foreign commerce, is somewhat lacking in persuasive power here to the extent that it considered whether resulting loss of business by out-of-state entities was actionable under the Commerce Clause, not whether a state law action based on alleged conduct by foreign entities affecting the plaintiff state is barred by the Commerce Clause. *Energy & Env't Legal Inst., 793 F.3d at 1173*.

The case law cited by the parties would have more weight if Defendants articulated any discrimination or discriminatory effect against foreign commerce, because discriminatory regulation would be unlikely to survive a challenge based upon *either* the domestic or foreign **[*29]** prongs of the Commerce Clause. Defendants have not, however, pointed to any way in which the IAA differentiates between foreign commerce - either from overseas or other states - and intrastate commerce. Neither can the Court see any basis in the IAA, the Complaint against Defendants, nor any of Defendants' briefs on the instant motion for finding that the IAA or the State have discriminated against foreign commerce.

The relevant inquiry under the Foreign Commerce Clause, as articulated *supra*, is whether a state law impairs federal uniformity with respect to foreign affairs. *Japan Line, Ltd. v. Cnty. of Los Angeles, 441 U.S. 434, 448-53 (1979)*; *Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 194 (1983)*. A state law impairs that uniformity if it "implicates foreign policy issues which must be left to the Federal Government or violates a clear federal directive." *Container Corp. of Am., 463 U.S. at 194*. Because foreign affairs are the province of Congress, and not the states, where Congress has not spoken, the dormant Foreign Commerce Clause may preempt interfering state regulation. *See* *Wardair Canada, Inc. v. Florida Dep't of Revenue, 477 U.S. 1, 12 (1986)* ("the dormant Commerce Clause, in both its interstate and foreign incarnations, only operates where the Federal Government has not spoken"). Where Congress has spoken extensively, as it has in this case with the Sherman Act and related federal anti-trust legislation, two questions **[*30]** remain: (1) whether Congress has evidenced an intent to occupy the field of anti-trust law such that states are preempted entirely from even congruent regulation therein, and (2) whether a direct conflict exists between the federal and state laws at issue. *See* *Wardair Canada, Inc., 477 U.S. at 12*: *ABC Charters, Inc. v. Branson, 591 F. Supp. 2d 1272, 1304 (S.D. Fla. 2008)*.

The answer to the first question has already been provided by the United States Supreme Court, which clearly stated in *California v. ARC America Corporation* that "Congress has not pre-empted the field of ***antitrust law***. Congress intended the federal antitrust lawrs to supplement, not displace, state antitrust remedies." *490 U.S. 93, 101-02 (1989)*.[25] The second question is simplified by the fact that the IAA. and in particular *section 3* and *section 5*, closely follow federal law ***antitrust law***. *See* *740 ILCS 10/3*; *740 ILCS 10/5*; *15 U.S.C. § 1*; *15 U.S.C. § 6a*. Defendants have not pointed to any text in the IAA which contradicts any federal statute, nor have they pointed to any way in which the IAA has a broader reach than its federal counterpart. Defendants have instead argued that the bar to application of the IAA in the instant suit "does not depend upon whether federal law and state law conflict" or whether the IAA is "congruous" with the Sherman Act. Surreply at 6. That position is not consistent with federal Commerce Clause case law, **[*31]** as explained *supra*, which makes clear that the dormant Commerce Clause

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[25] Defendants characterize the State's argument as conflating "Commerce Clause and preemption principles." Surreply at 6. But as the United States Supreme Court explained in *Container Corporation of America*, consideration of whether a state law is "at variance with federal policy" by "violat[ing] a clear federal directive" is "essentially a species of preemption analysis." *463 U.S. at 194*.

analysis relied upon by Defendants operates only "where the Federal Government *has not spoken*." *Wardair Canada, Inc., 477 U.S. at 12* (emphasis added).

Defendants cite *Pacific Northwest Venison Producers v. Switch, 20 F.3d 1008, (9th Cir. 1994)*, and *Reeves, Inc. v. Stake, 447 U.S. 429 (1980)*, for the premise that additional scrutiny is applied under Commerce Clause analysis to slate laws affecting foreign commerce. While careful analysis is surely called for by those cases, they too failed to find a violation of the Commerce Clause where no evidence was presented of "economic protectionism on the part of the state, or of substantial burdens on interstate or foreign commerce." *Pac. N. W. Venison Prods., 20 F.3d at 1017*; *Reeves, Inc., 447 U.S. at 446*. Defendants" citation to *Barclays Bank PLC v. Franchise Tax Board of California*, where the United States Supreme Court addressed a dormant Foreign Commerce Clause challenge to a California state tax scheme, likewise reinforces this Court's conclusion that "specific indications of congressional intent" are needed to bar state regulation in a particular field *even if the regulation has some impact on foreign companies*, *512 U.S. 298, 323-28(1994)*.

Defendants have asserted numerous times in their briefs that their challenge is based upon the premise that the alleged conduct at issue occurred **[*32]** "wholly outside the state." The Court observes that, as stated in Part I, the IAA only reaches conduct involving "import trade or import commerce" with foreign nations *or* certain conduct having "a direct, substantial, and reasonably foreseeable effect," as further enumerated by the IAA, in Illinois. *740 ILCS 10/5*, Defendants state in their Surreply that the federal court in *Lorazepam* "held that 'applying an Illinois statute to sales that take place wholly outside the state, whether or not the commerce has an effect within the state, *would violate the Commerce Clause*." Surreply at 6 (emphasis added). This statement by Defendants is patently false, and in fact the opposite of what the *Lorazepam* court held.

The quotation used by Defendants is taken from a section of the *Lorazepam* court's opinion entitled "Defendants Arguments." *In re Lorazepam & Clorasepate Antitrust Litigation, 295 F. Supp. 2d at 47-48*. The court in that case went on to reject the position taken by defendants, and held instead that "a determination of the nexus between the alleged antitrust violation and the state of Illinois . . . defines the reach of the Illinois Antitrust Act" with respect to transactions occurring outside the state. *Id. at 48*. "A state regulation is pre-empted by the 'negative' or 'dormant' Commerce **[*33]** Clause," the *Lorazepam* court held, "only if the state regulation unduly impedes upon interstate commerce such that it is in direct conflict with federal law." *Id. at 49*. The court then concluded that "the scope of the Illinois Antitrust Act does not directly conflict with that of the Sherman Act such that the state statute is partially pre-empted" with respect to sales occurring in other states that resulted in overpayments by an Illinois corporation. *Id.*

As explained *supra*, the *Lorazepam* case does not involve foreign commerce, but rather interstate commerce. However, it did involve an alleged conspiracy by drug manufactures to fix prices in violation of both federal and state antitrust laws, including the IAA. *Id. at 34*. The Court in *Lorazepam* considered whether a private plaintiff based in Illinois and bringing suit under the IAA could recover damages for activities that had occurred in other states but resulted in the Illinois plaintiff making overpayments. *Id. at 48*. Defendants argued that the Commerce Clause barred application of the IAA to activity that occurred in other states, but the federal district court disagreed because of the effect in Illinois. *Id. at 48*. *Lorazepam*, while not reaching Foreign Commerce Clause concerns **[*34]** as expressed in *Japan Line*, and not relied upon by this Court as authority with respect to overseas conduct, stands for the principle that the IAA is not limited only to activity occurring within Illinois so long as that activity has an effect in Illinois as defined under the statute. More importantly, it does not, as Defendants claim, say that that "applying an Illinois statute to sales that take place wholly outside the state, whether or not the commerce has an effect within the state, *would violate the Commerce Clause*." Surreply at 6 (emphasis added).

Defendants have pointed to many instances of *discriminatory* state actions being struck down under the Commerce Clause, but have not pointed to any discrimination in the IAA, either as written or as applied. The United States Supreme Court has held that the field of ***antitrust law*** is not preempted by federal legislation, and has stated that "state laws permitting indirect purchaser recoveries" for antitrust violations are generally "consistent with the broad purposes of the federal antitrust laws: deterring anticompetitive conduct and ensuring the compensation of victims of that conduct." *ARC America Corp., 490 U.S. at 102*. While that case did not consider whether the **[*35]** IAA specifically is consistent with federal ***antitrust law***, nor did it scrutinize any impact on application to foreign entities, this Court finds no conflict between the provisions of the IAA at issue and federal law, and Defendants have not attempted to argue any. This Court therefore finds, as a matter of law, that the *Commerce Clause of the United States Constitution* does not present a bar to the State's claims against Defendants.

IT IS, THEREFORE, HEREBY ORDERED that:

1. The State of Illinois' Motion for Partial Summary Judgment Against the Defendants' Foreign-Conduct Defenses is GRANTED;

2. This matter is continued for status on __ without further notice.

January 20, 2016

ENTERED:

Judge Moshe Jacoblus No. 1556

Int'l Constr. Prods. LLC v. Caterpillar Inc.

United States District Court for the District of Delaware

January 21, 2016, Decided; January 21, 2016, Filed

Civil Action No. 15-108-RGA

Reporter

2016 U.S. Dist. LEXIS 6826 *; 2016-1 Trade Reg. Rep. (CCH) P79,487

INTERNATIONAL CONSTRUCTION PRODUCTS LLC, Plaintiff; v. CATERPILLAR INC., KOMATSU AMERICA CORP., VOLVO CONSTRUCTION EQUIPMENT NORTH AMERICA, LLC and ASSOCIATED AUCTION SERVICES, LLC d/b/a CAT AUCTION SERVICES, Defendants.

Subsequent History: Reconsideration denied by, Motion denied by, Dismissed by, in part, Motion denied by, in part *Int'l Constr. Prods. LLC v. Caterpillar Inc., 2016 U.S. Dist. LEXIS 111174 (D. Del., Aug. 22, 2016)*

Motion granted by *Int'l Constr. Prods. LLC v. Caterpillar Inc., 2018 U.S. Dist. LEXIS 164801, 2018 WL 4611216 (D. Del., Sept. 26, 2018)*

Dismissed by, in part *Int'l Constr. Prods. LLC v. Caterpillar Inc., 419 F. Supp. 3d 791, 2019 U.S. Dist. LEXIS 176177, 2019 WL 5086957 (D. Del., Oct. 10, 2019)*

Dismissed by, in part, Motion denied by, in part *Int'l Constr. Prods. LLC v. Caterpillar Inc., 2020 U.S. Dist. LEXIS 142561 (D. Del., Aug. 10, 2020)*

Motion granted by *Int'l Constr. Prods. LLC v. Caterpillar Inc., 2020 U.S. Dist. LEXIS 143204, 2020 WL 4607882 (D. Del., Aug. 11, 2020)*

Motion denied by, Motion granted by, Transferred to *Int'l Constr. Prods. v. Ring Power Corp., 2020 U.S. Dist. LEXIS 260030, 2020 WL 12189176 (N.D. Fla., Nov. 12, 2020)*

Summary judgment granted by, Summary judgment denied by, Motion denied by *Int'l Constr. Prods., LLC v. Caterpillar Inc., 2022 U.S. Dist. LEXIS 173800, 2022 WL 4465376 (D. Del., Sept. 26, 2022)*

Motion denied by *Int'l Constr. Prods., LLC v. Caterpillar, Inc., 2023 U.S. Dist. LEXIS 66502 (D. Del., Apr. 17, 2023)*

Core Terms

Manufacturer, alleges, heavy construction, monopolization, dealers, merger, monopoly power, Counts, relevant market, threats, factual allegations, conspiracy, market share, anticompetitive, monopoly, Auction, fails, motion to dismiss, competitors, percent, conspiracy to monopolize, group boycott, no facts, foreclosure, antitrust, channels, effects, markets, reasons, online

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Judges: RICHARD G ANDREWS, UNITED STATES DISTRICT JUDGE.

Opinion by: RICHARD G ANDREWS

Opinion

MEMORANDUM OPINION

ANDREWS, U.S. DISTRICT JUDGE:

Presently before the Court are motions to dismiss filed by defendants Caterpillar Inc., Volvo Construction Equipment North America, LLC, Komatsu America Corp., and Associated Auction Services LLC ("AAS"). (D.I. 27, 28, 30, 33). Defendants request dismissal pursuant to *Fed. R. Civ. P. 12(b)(6)*. The issues have been fully briefed. (D.I. 35, 36, 38). Oral argument was held on October 20, 2015. (D.I. 44). For the reasons set forth herein, the motions to dismiss are **GRANTED**.

I. BACKGROUND

On January 29, 2015, International Construction Products LLC ("ICP") brought this antitrust action against Caterpillar, Volvo, Komatsu, and AAS. (D.I. 1). ICP imports and sells heavy construction equipment. (*Id.* ¶ 7). Caterpillar, Volvo, and Komatsu (the "Manufacturer Defendants") manufacture heavy construction equipment. (*Id.* ¶¶ 8-10). AAS facilitates auctions of used heavy construction equipment. (*Id.* ¶ 11). ICP's claims relate to violations of the Sherman Act, the Clayton Act, and state law. (*Id.* ¶¶ **[*3]** 113-52). More specifically, ICP alleges a group boycott, exclusive dealing, various monopolization claims, and unlawful merger. (*Id.*). I will summarize the relevant allegations of the complaint.

ICP alleges that, in the United States, the market for the sale of new heavy construction equipment is highly concentrated. (*Id.* ¶ 21). Defendant Caterpillar accounts for approximately 40 percent or more of all sales. (*Id.*). Komatsu accounts for more than 15%. (*Id.* ¶ 21). Volvo has a market share of more than 5%. (*Id.* ¶ 44).

Manufacturers of new heavy construction equipment typically sell equipment to local dealers throughout the country, who take title and resell the equipment to end users. (*Id.* ¶¶ 19, 20, 39). End users rely on these local dealers for service and support and therefore do not typically purchase new equipment from dealers without an authorized service location within 75 miles. (*Id.* ¶ 38). This in turn means that prices may vary in different states and regions within states. (*Id.*).

ICP alleges that the Manufacturer Defendants require exclusivity on the part of their equipment dealers. (*Id.* ¶ 39). That is, when a dealer takes title to equipment manufactured by one of the Manufacturer **[*4]** Defendants, the dealer is expected not to deal with competing suppliers. (*Id.*). ICP alleges that these exclusivity requirements foreclose substantial portions of the dealer market to new entrants. (*Id.* ¶ 42).

Historically, direct sales of new heavy construction equipment to end users have been uncommon. (*Id.* ¶ 20). ICP sought to change that paradigm by selling foreign (particularly Chinese) heavy construction equipment directly to consumers through the use of the Internet. (*Id.* ¶¶ 69, 70, 74). ICP planned to use an online entity called IronPlanet to host and support their online store. (*Id.* ¶ 74). IronPlanet is the largest online marketplace for the sale of used heavy construction equipment. (*Id.* ¶¶ 56, 57, 58). ICP alleges that the Manufacturer Defendants are among the highest volume sellers of used heavy construction equipment on the IronPlanet platform. (*Id.* ¶ 94). Through its partnership with IronPlanet, ICP hoped to benefit from the substantial user base of end users already using IronPlanet to purchase used heavy construction equipment. (*Id.* ¶ 74). ICP alleges that although the Manufacturer Defendants had exclusivity agreements with dealers, the requirements imposed by the Manufacturer **[*5]** Defendants did not extend to the servicing of equipment. (*Id.* ¶¶ 75, 76). Therefore ICP was able to successfully enter into arrangements with dealers for maintenance and repair of equipment it distributed online. (*Id.*). With this new business model, ICP could be a "master distributor" for "low priced, high-quality new heavy construction equipment" in a new and efficient distribution channel. (*Id.* ¶¶ 74, 76).

ICP announced its partnership with IronPlanet on March 3, 2014 at the CONEXPO-CON/AGG industry event. (*Id.* ¶ 82). This announcement was widely covered in the trade press and generated substantial interest, particularly from Chinese manufacturers seeking to enter into distribution deals with ICP. (*Id.* ¶¶ 82, 87, 88, 89, 90). ICP alleges that its entry into the market posed a significant competitive threat to the Manufacturer Defendants and that they, in response, conspired to block ICP's entry. (*Id.* ¶¶ 93, 94). ICP alleges that each of the Manufacturer Defendants communicated "the same or similar threat" to IronPlanet "within days of one another." (*Id.* ¶ 96). The thrust of the threat, ICP alleges, was that each Manufacturer Defendant would stop selling their used equipment through **[*6]** IronPlanet if IronPlanet continued to deal with ICP. (*Id.* ¶¶ 95, 96). IronPlanet then informed ICP that it would not perform under the terms of their agreement, and delivered a written notice of termination. (*Id.* ¶ 102).

ICP alleges that in furtherance of eliminating any potential threat to Caterpillar's business through the use of IronPlanet, Caterpillar sought to merge Cat Auction Services and IronPlanet. (*Id.* ¶¶ 105, 106). ICP alleges this merger was made possible because Caterpillar owned a minority stake in both companies. (*Id.* ¶ 105). This merger was effectuated by Caterpillar, ICP alleges, to align the goals of IronPlanet with those of Caterpillar, thus allowing Caterpillar to eliminate the threat ofiCP or any other potential market entrants. (*Id.* ¶¶ 105, 106).

II. LEGAL STANDARD

Rule 8(a) requires "a short and plain statement of the claim showing that the pleader is entitled to relief." *Fed. R. Civ. P. 8(a)(2)*. When reviewing a motion to dismiss pursuant to *Fed. R. Civ. P. 12(b)(6)*, the court must accept the complaint's factual allegations as true, but may disregard any legal conclusions. *Fowler v. UPMC Shadyside, 578 F.3d 203, 210-11 (3d Cir. 2009)*. The factual allegations do not have to be detailed, but they must provide more than labels, conclusions, or a "formulaic recitation" of the claim **[*7]** elements. *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555-56, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* ("Factual allegations must be enough to raise a right to relief above the speculative level ... on the assumption that all the allegations in the complaint are true (even if doubtful in fact)."). There must be sufficient factual matter to state a facially plausible claim to relief. *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. The facial plausibility standard is satisfied when the complaint's factual content "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* ("Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." (quotation marks omitted)).

III. ANALYSIS

A. Group Boycott Under Sherman Act § 1 (Counts One and Two)

Section 1 of the Sherman Act provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." *15 U.S.C. § 1*. In order to satisfy the requirement of a "contract, combination ... or conspiracy," there must be "some form of concerted action." *In re Baby Food Antitrust Litig., 166 F.3d 112, 117 (3d Cir. 1999)*. "The existence of an agreement is the hallmark of a *Section 1* claim." *Id.*

In alleging **[*8]** the existence of such an agreement, the plaintiff must state "enough factual matter (taken as true) to suggest that an agreement was made." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. Evidence of parallel conduct is, by itself, not sufficient to show an agreement. *In re Ins. Brokerage Antitrust Litig., 618 F.3d 300, 321 (3d Cir. 2010)*. When factual allegations of parallel conduct are set forth to satisfy the § 1 agreement requirement, the parallel conduct "must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action." *Twombly, 550 U.S. at 557*. Parallel conduct can support an inference of agreement when it "would probably not result from chance, coincidence, independent responses to common stimuli, or mere interdependence unaided by an advance understanding among the parties." *Id. at 556 n.4*. The Third Circuit has advised courts to look to certain so-called "plus factors" to determine whether parallel conduct may give rise to an inference of agreement. *In re Flat Glass Antitrust Litig., 385 F.3d 350, 360 (3d Cir. 2004)*. While there is no exhaustive list of "plus factors," the Third Circuit has identified the following three: "(1) evidence that the defendant had a motive to enter into a price fixing conspiracy; (2) evidence that the defendant acted contrary to its interests; and (3) evidence implying a traditional **[*9]** conspiracy." *Id.* (quotation marks omitted). When "'common economic experience,' or the facts alleged in the complaint itself, show that independent self-interest is an 'obvious alternative explanation' for defendants' common behavior," the complaint should be dismissed. *In re Ins. Brokerage, 618 F.3d at 326*.

In addition to demonstrating an agreement, the *§ 1* plaintiff must show that "the conspiracy to which the defendant was a party imposed an unreasonable restraint on trade:" *Toledo Mack Sales & Serv., Inc. v. Mack Trucks, Inc., 530 F.3d 204, 218 (3d Cir. 2008)*. While *§ 1* agreements are ordinarily analyzed under the "rule of reason," some agreements are *per se* unlawful once proven. *In re Ins. Brokerage, 618 F.3d at 316*. One such *per se* unlawful agreement is a group boycott, or a "concerted refusal[] by traders to deal with other traders." *Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212, 79 S. Ct. 705, 3 L. Ed. 2d 741 (1959)*; *see also* *NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 135, 119 S. Ct. 493, 142 L. Ed. 2d 510 (1988)*.

The Court must first determine which allegations of the complaint are factual, and thus entitled to a presumption of truth, and which are mere legal conclusions. *Fowler v. UPMC Shadyside, 578 F.3d 203, 210-11 (3d Cir. 2009)*. Here, the complaint's bare conclusory allegations of agreement-such as "[o]n information and belief, the Manufacturer Defendants agreed and conspired with one another to issue these threats" (D.I. 1 ¶ 98)—are to be disregarded in assessing the sufficiency of the complaint. *See* *Fowler, 578 F.3d at 210-11*.

As for the complaint's factual allegations, which must be accepted **[*10]** as true, there are no facts that directly show the existence of an agreement between the Manufacturer Defendants. ICP instead insists that the existence of an agreement can be inferred from the circumstances surrounding IronPlanet's failure to perform the terms of its agreement with ICP. (D.I. 40 at 20-22; D.I. 1 ¶¶ 81-86, 95-97, 100, 101). ICP "announced its partnership with IronPlanet on March 3, 2014." (D.I. 1 ¶ 82). ICP further alleges that "[e]ach of the Manufacturer Defendants communicated the same or similar threat to IronPlanet within days of one another," and that IronPlanet "contemporaneously communicated the fact and substance of these communications to ICP." (*Id.* ¶¶ 95, 96). Specifically, the complaint alleges that on April 3, 2014, the President of IronPlanet "informed ICP's Chairman that Caterpillar, and at least one other manufacturer of heavy construction equipment, had threatened to stop doing business with IronPlanet if IronPlanet continued to deal with ICP." (*Id.* ¶ 96). On April 10, 2014, in response to an inquiry about the identity of the other manufacturers, IronPlanet's President "replied 'you know who our investors are.'" (*Id.*). The complaint alleges that the investors **[*11]** in IronPlanet are the Manufacturer Defendants and venture capital firms. (*Id.* ¶ 97).

With all inferences drawn in favor of ICP, the complaint can be understood as alleging that each of the Manufacturer Defendants made similar threats to IronPlanet and that those complaints were made "within days of one another." (*Id.* ¶ 95). The Court may infer that because the Manufacturer Defendants were the sole manufacturer investors in IronPlanet, and because the President of IronPlanet stated that "Caterpillar and at least one other manufacturer" issued threats, all of the Manufacturer Defendants issued boycott threats.[1] (*Id.* ¶¶ 96, 97). This parallel conduct, however—without more—does not suffice. *Twombly, 550 U.S. at 557*. Even "'conscious parallelism' ... is 'not in itself unlawful,'" as "parallel conduct is 'just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market.'" *In re Ins. Brokerage Antitrust Litig., 618 F.3d 300, 321 (3d Cir. 2010)* (quoting *Twombly, 550 U.S. at 553-54*). ICP argues that it has alleged sufficient additional "plus factor" facts to plausibly suggest the existence of an agreement, rather than independent action. I disagree.

ICP argues that the close temporal proximity of the threats, in conjunction with their content, leads to an inference of agreement. The complaint does not, however, present a scenario where threats were made within minutes or hours of one another. *See, e.g., Taxi Weekly, Inc. v. Metropolitan Taxicab Bd. of Trade, Inc., 539 F.2d 907, 911 (2d Cir. 1976)* (taxi fleet owners all unexpectedly telephoned cancellations of long-standing subscriptions within a half-hour period). Nor does the complaint present a scenario where the threats at issue were so specific or complex that they could not be explained absent prior agreement. *See, e.g., Twombly, 550 U.S. at 556 n.4* (noting with apparent approval that the parties agreed that "complex and historically unprecedented changes in pricing structure made at the very same time by multiple competitors, and made for no other discernible reason, would support a plausible inference of conspiracy" (quotation **[*13]** marks omitted)); *FTC v. Cement Inst., 333 U.S. 683, 713 n.15, 68 S. Ct. 793, 92 L. Ed. 1010, 44 F.T.C. 1460 (1948)* (identical bids were made by rivals on an item with no standard price). Instead, the factual allegations here are entirely consistent with the Manufacturer Defendants reacting to a common stimulus: the recent announcement of the ICP and IronPlanet partnership, an announcement made a month before the threats, which occurred "within days of one another." (D.I. 1 ¶¶ 82, 95, 96). The timing of the threats, as described in the complaint, does not suggest the contrary. Although ICP urges the Court to interpret IronPlanet's "contemporaneous communicat[ions]" with ICP to mean that several threats were issued on the same day, that reading is far too strained. (*Id.* ¶ 96; D.I. 44 at 20-22). The implausibility of this reading is particularly evident in light of the complaint's clear statement that the threats were made days apart. (D.I. 1 ¶ 95).

Further, while the complaint concludes that the Manufacturer Defendants "communicated the *same or similar threat* to IronPlanet," this particular boycott threat is not particularly complex. (*Id.* (emphasis added)). It is hard to imagine a scenario where one refusal to deal—under the circumstances described in the complaint—would not be "the same or similar" **[*14]** to another. In the absence of facts setting out some unexplained or striking similarity, a general assertion about the similarity of the threats is of little or no significance.

ICP argues that the because of the "costly and risky nature of [these] threats," no Manufacturer Defendant "would have made [such threats] had it not had assurances that the other Manufacturer Defendants would do the same." (D.I. 1 ¶¶ 99, 100; D.I. 36 at pp. 9-11). These conclusory statements fail to find support in the facts set forth in the complaint. In fact, ICP acknowledges that the Manufacturer Defendants individually wield powerful leverage over IronPlanet. The complaint states: "IronPlanet has in the past publicly acknowledged the risks to its revenues and profitability if *one or more* of the Manufacturer Defendants stopped selling their used heavy construction equipment through IronPlanet." (D.I. 1 ¶ 94 (emphasis added)). Therefore, the boycott threats issued to IronPlanet by each the Manufacturer Defendants are not "inconsistent with independent self-interest." *In re Processed Egg Prods. Antitrust Litig., 821 F. Supp. 2d 709, 730 (E.D. Pa. 2011)*. In response to the recent announcement of a new entrant that threatened to change the entire industry dynamic, one would expect the Manufacturer **[*15]** Defendants to make the same rational decision to the same stimulus: stop ICP's entry. (D.I. 36 at pp. 2-4; D.I. 38 at pp. 3-4). That seems

[1] This understanding may exceed what would be properly understood in viewing the allegations **[*12]** in the light most favorable to Plaintiff. Caterpillar was named by IronPlanet's President, but no one else was. It approaches speculation to infer from the cryptic remarks of IronPlanet's President that there was more than one other threat conveyed to IronPlanet, and there is no basis to choose between Komatsu and Volvo as the threatmaker if there was only one other threat.

to be the "obvious alternative explanation" for the conduct of the Manufacturer Defendants. *Twombly, 550 U.S. at 567*.

The purported interests of the Manufacturer Defendants, viewed together with the content and timing of the threats, do not suffice to plausibly suggest the existence of an agreement. That the complaint sets forth facts showing that an agreement was possible is not enough. *See* *In re Text Messaging Antitrust Litig., 630 F.3d 622, 629 (7th Cir. 2010)*. To be actionable under *§ 1*, the threats issued by the Manufacturer Defendants must have been predicated on an agreement, rather than independent self-interest. That necessary factual predicate is absent here. Therefore, Counts One and Two of the complaint are dismissed for failure to state a claim upon which relief could be granted.

B. Exclusive Dealing Under Clayton Act § 3 (Counts Three and Four)

An exclusive dealing claim may be pursued under *§ 1* or *§ 2* of the Sherman Act, or *§ 3* of the Clayton Act. See, e.g., *United States v. Dentsply Int'l, Inc., 399 F.3d 181, 184 (3d Cir. 2005)*; *Barr Labs., Inc. v. Abbott Labs., 978 F.2d 98, 110 (3d Cir. 1992)* ("All exclusive dealing agreements must comply with *section 1* of the Sherman Act ....," while "[c]ontracts for the sale of goods ...must also comply with the more rigorous standards of *section 3* of the Clayton Act."). **[*16]** "An exclusive dealing arrangement is an agreement in which a buyer agrees to purchase certain goods or services only from a particular seller for a certain period of time." *ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 270 (3d Cir. 2012)*. The "agreement" may be express or *de facto. Id.* Exclusive dealing agreements are not by themselves unlawful; indeed, they may be entered into for "entirely procompetitive reasons ... and pose little threat to competition." *Id.* "Due to the potentially procompetitive benefits of exclusive dealing agreements, their legality is judged under the rule of reason," where the legality of such an agreement "depends on whether it will foreclose competition in such a substantial share of the relevant market so as to adversely affect competition." *Id. at 271* (citing *Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961))*. In short, the exclusion of competitors becomes actionable under the antitrust laws only when "it impairs the health of the competitive process itself." *Roland Mach. Co. v. Dresser Indus., 749 F.2d 380, 394 (7th Cir. 1984)*; *see also* *ZF Meritor, 696 F.3d at 271, 281*.

In conducting the rule of reason analysis, "courts consider not only the percentage of the market foreclosed, but also take into account the restrictiveness and the economic usefulness of the challenged practice in relation to the business factors extant in the market." *ZF Meritor, 696 F.3d at 271* (quotation marks omitted). To state a **[*17]** claim, a plaintiff must generally show "significant market power by the defendant, substantial foreclosure, contracts of sufficient duration to prevent meaningful competition by rivals, and an analysis of likely or actual anticompetitive effects considered in light of any procompetitive effects." *Id. at 271-72* (internal citations omitted). Courts may also consider whether "the dominant firm engaged in coercive behavior, ... the ability of customers to terminate the agreements," and "[t]he use of exclusive dealing by competitors." *Id. at 272* (internal citations omitted). For present purposes, it should be noted that if "competitors can reach the ultimate consumers of the product by employing existing or potential alternative channels of distribution, it is unclear whether such restrictions foreclose from competition *any* part of the relevant market." *Omega Envtl., Inc. v. Gilbarco, Inc., 127 F.3d 1157, 1163 (9th Cir. 1997)*; *see also* *United States v. Dentsply Int'l, Inc., 399 F.3d 181, 195 (3d Cir. 2005)* (acknowledging the need to "assess[]" the "overall significance to the market" of "other avenues of distribution" in a Sherman Act *§ 2* exclusive dealing case).

Here, the factual allegations pertaining to exclusive dealing arrangements are sparse. (*See* D.I. 1 ¶¶ 40-42). ICP alleges that the Manufacturer Defendants impose "all or nothing" terms on dealers. (*Id.* 40 **[*18]**). Further, the complaint asserts that dealers are "slow to switch to new entrants ...because [the] exclusivity requirements effectively require new entrants to have a nearly full-line in order to compete successfully for distribution." (*Id.*). The complaint goes on to allege that "[b]arriers to entry at the ... dealer level of the market are also high, ... [since] [e]ntry ...would require ... access to a full line of heavy construction equipment[,] ... substantial investments in sales and service locations in any given territory, and ... substantial financing." (*Id.* ¶ 47). ICP concludes that, as a result of these exclusive dealing arrangements, "substantial portions of the dealer market" are foreclosed. (*Id.* ¶ 42). The "foreclosure percentages attributable to ... [the Manufacturer Defendants' arrangements] is at least equal to their market shares in relevant markets around the country," and "the exclusivity policies of the Manufacturer Defendants and the largest of the domestic incumbent manufacturers foreclose new entrants from 85 percent or more of dealers."[2] (*Id.*).

These factual allegations fail to make out a *prima facie* case of exclusive dealing for at least two independent reasons. First, ICP fails to adequately plead the lack of alternative channels of distribution. Second, aside from this shortcoming, ICP does not sufficiently allege substantial foreclosure of the relevant market.[3] These deficiencies are addressed separately below.

The complaint **[*19]** repeatedly acknowledges multiple alternative means of distribution. There are dealers "not tied up by ... exclusivity requirements." (D.I. 1 ¶ 42). There are several online marketplaces, aside from IronPlanet.[4] (*Id.* ¶ 65). ICP simply dismisses these alternatives as inferior. (D.I. 36 at p. 45). That may be, but the key consideration in an exclusive dealing claim is the harm to competition, not the "mere[] disadvantage" to a rival, arising from its inability to use its preferred distribution-methods. *ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 281 (3d Cir. 2012)*; *see also* *Roland Mach. Co. v. Dresser Indus., 749 F.2d 380, 394 (7th Cir. 1984)* ("The exclusion of one or even several competitors, for a short time or even a long time, is not *ipso facto* unreasonable."). ICP provides some factual allegations to support the conclusion that physical auctions are no substitute for online auctions. (D.I. 1 ¶¶ 62, 63). ICP also alleges that IronPlanet is the largest and most active online marketplace. (*Id.* ¶ 65). These factual allegations, however, do not plausibly suggest a lack of alternative distribution channels for ICP. ICP simply concludes—without any relevant factual support—that it is deprived of any "feasible way to reach consumers." (*Id.* ¶ 107; *see also* ¶¶ 2, 4, 109, 110; D.I. 36 at p. 45). That is not enough. *See,* ***[*20]*** *e.g.,* *PNY Techs., Inc. v. SanDisk Corp., 2014 U.S. Dist. LEXIS 58108, 2014 WL 1677521, at *7-8 (N.D. Cal. Apr. 25, 2014)*.

ICP's cited cases are distinguishable. The complaint does not lay out any facts that show a dominant firm barred competitors from entire modes of distribution, or from nearly all cost-effective means of distribution. *See, e.g.,* *United States v. Dentsply Int'l, Inc., 399 F.3d 181, 193 (3d Cir. 2005)*; *United States v. Microsoft Corp., 253 F.3d 34, 64, 346 U.S. App. D.C. 330 (D.C. Cir. 2001)*. Instead, the complaint actually suggests that there are several viable alternative means of distribution. Recently, Chinese manufacturers SANY and LiuGong were able to enter the market by establishing their own dealerships. (*Id.* ¶¶ 45, 76); *see* *Roland, 749 F.2d at 394* (holding that Komatsu's successful entry into the market, despite the "nationwide practice of exclusive dealing," tended to negate the plaintiff's claim of substantial foreclosure). SANY has been "able to reach approximately 5 percent of the U.S. market,"[5] and both SANY and LiuGong are now profitable. (*Id.* ¶¶ 45, 76). Further, the existence of IronPlanet itself demonstrates that "users **[*21]** of heavy construction equipment will purchase such equipment outside of longstanding channels of distribution." (D.I. 36 at p. 2). The complaint advances no facts and provides no theory as to how the large user base of an online auctioneer for used equipment renders it the sole avenue for direct sales of

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[2] The term "domestic incumbent manufacturers" refers to "somebody who's currently a manufacturer," whether or not that manufacturer happens to be a defendant in this case. (D.I. 44 at 109).

[3] The parties agree that the exclusive dealing allegations may be characterized as three separate cases, one against each of the Manufacturer Defendants. (D.I. 44 at 44, 46). For purposes of showing substantial foreclosure, ICP argues that the effects of each exclusive dealing arrangement can be aggregated under principles established in *Standard Oil Co. v. United States, 337 U.S. 293, 69 S. Ct. 1051, 93 L. Ed. 1371 (1949)*. (D.I. 36 at p. 40; D.I. 44 at 46).

[4] ICP contends that since the Manufacturer Defendants have prevented them from using IronPlanet, there are no alternative means of distribution left. For purposes of this motion, the Court assumes, without deciding, that ICP's inability to use IronPlanet precludes the consideration of IronPlanet as an alternative distribution method.

[5] It is not entirely clear what ICP means by this. From the context of the complaint, I take it to mean that SANY products are available for purchase in 5% of the nationwide market for new heavy construction equipment. While this may indicate that using IronPlanet would permit a seller to reach more of the market (as ICP states in the preceding sentence that "[t]hrough IronPlanet, ICP would reach approximately 80 percent of end users"), it does not indicate that SANY has been unable to establish its own alternative means of distribution. (*See id.* ¶ 76).

new equipment over the Internet. Accordingly, ICP has not adequately alleged facts showing the absence of alternative channels of distribution. *See* PNY Techs., 2014 U.S. Dist. LEXIS 58108, 2014 WL 1677521, at *8.

Aside from ICP's failure to plead a lack of alternative distribution channels, it fails to demonstrate that the Manufacturer Defendants' exclusive dealing arrangements amount to substantial foreclosure in any alleged market at all. The complaint generally states that the Manufacturer Defendants have exclusive dealing arrangements with dealers, and therefore, new entrants are "unable to compete successfully for distribution." (D.I. 1 ¶¶ 40, 44). Further, ICP alleges that this "imposition of exclusivity ... is coercive and contrary to the preference of the dealers." (*Id.* ¶ 41). These are mere conclusions, ICP does, however, allege some facts for its assertion that existing dealers may have difficulty switching to new manufacturers and that **[*22]** entry is difficult for new dealers, but that is not enough. (*Id.* ¶¶ 40, 46, 47).

Since ICP alleges no facts about the nature of the exclusive dealing arrangements and their potentially anticompetitive effects, the Court cannot assess, as part of the *prima facie* case, whether the arrangements could suppress competition or not. In the rule of reason analysis of exclusive dealing arrangements, courts consider "significant market power by the defendant, substantial foreclosure, contracts of sufficient duration to prevent meaningful competition by rivals, and an analysis of likely or actual anticompetitive effects considered in light of any procompetitive **[*23]** effects," as well as the existence of coercion, "the ability of customers to terminate the agreements, ... [and] [t]he use of exclusive dealing by competitors." *ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 271 (3d Cir. 2012)*. Aside from allegations that all Manufacturer Defendants engage in exclusive dealing, and that there are risks and costs associated with dealerships switching suppliers, ICP has provided almost no factual basis upon which the court could consider the practical effects of the exclusive dealing arrangements. *Compare, e.g., Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 325-35, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961)* (rule of reason analysis); *ZF Meritor, 696 F.3d at 286-90* (same), *with* PNY Techs., 2014 U.S. Dist. LEXIS 58108, 2014 WL 1677521, at *4-5 (finding that there were inadequate facts to determine whether there was unlawful foreclosure); Pro Search Plus, LLC v. VFM Leonard, Inc.; 2013 U.S. Dist. LEXIS 107895, 2013 WL 3936394, at *2-4 (C.D. Cal. July 30, 2013) (same). ICP need not prove its case in the complaint, but it must allege facts sufficient to "plausibly suggest an entitlement to relief." *Ashcroft v. Iqbal, 556 U.S. 662, 681, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. It has not done so here. The Court cannot simply hypothesize that some set of facts could support a basis for relief to be granted. *See Twombly, 550 U.S. at 562-63*. Indeed, "the costs of modern federal antitrust litigation and the increasing caseload of the federal courts counsel against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint." *Id. at 558* (quoting *Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (7th Cir. 1984))*.

The complaint **[*24]** fails to make out a *prima facie* case of exclusive dealing sufficient to survive Defendants' motion to dismiss. The thrust of ICP's allegations is that the Manufacturer Defendants each have exclusive dealing arrangements with their respective dealers. This is not by itself actionable, as many industries function in such a fashion for entirely procompetitive reasons. *See, e.g., Queen City Pizza, Inc. v. Domino's Pizza Inc., 124 F.3d 430, 440-41 (3d Cir. 1997)*; *see also ZF Meritor, 696 F.3d at 270*. There must be harm to the competitive process itself. *ZF Meritor, 696 F.3d at 271, 281*. Since ICP has failed to adequately plead substantial foreclosure and a lack of alternative channels of distribution, its exclusive dealing claim cannot be sustained. Therefore, Counts Three and Four of the complaint are dismissed.

C. Monopolization, Attempted Monopolization, and Conspiracy to Monopolize Under Sherman Act § 2 (Counts Five, Six, Seven, and Eight)

ICP alleges three types of § 2 monopoly claims in its complaint: monopolization, attempted monopolization, and conspiracy to monopolize. (D.I. 1 && 125, 127, 129, 131). The monopolization and attempted monopolization claims (Counts Five and Six) are directed solely at Caterpillar, while the conspiracy to monopolize claims (Counts Seven and Eight) are alleged against all of the Manufacturer Defendants **[*25]** and AAS. (*Id.*). The three types of monopoly claims are addressed separately below.

I. Monopolization

To state a claim for monopolization, the plaintiff must plead "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 306-07 (3d Cir. 2007)* (quoting *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966))*.

"Monopoly power is the ability to control prices or exclude competition in a given market." *Grinnell, 384 U.S. at 571*. Monopoly power may be inferred from a firm's "possession of a dominant share of a relevant market that is protected by entry barriers." *Harrison Aire, Inc. v. Aerostar Int'l, Inc., 423 F.3d 374, 381 (3d Cir. 2005)* (quoting *United States v. Microsoft Corp., 253 F.3d 34, 51, 346 U.S. App. D.C. 330 (D.C. Cir. 2001))*. "Plaintiffs relying on market share as a proxy for monopoly power must plead and produce evidence of a relevant product market, of the alleged monopolist's dominant share of the market, and of high barriers to entry." *Id.* Barriers to entry include "regulatory requirements, high capital costs, or technological obstacles, that prevent new competition from entering a market in response to a monopolist's supra competitive prices." *Broadcom, 501 F.3d at 307*. The Third Circuit has held that "[a]s a matter of law, absent other relevant factors, a 55 percent market share **[*26]** will not prove the existence of monopoly power," and further, that a "significantly larger market share than 55 percent has been required to demonstrate *prima facie* monopoly power." *Fineman v. Armstrong World Indus., 980 F.2d 171, 201-02 (3d Cir. 1992)*. In fact, "courts virtually never find monopoly power when market share is less than about 50 percent." ABA Section of ***Antitrust Law***, ***Antitrust Law*** *Developments* 231-32 (6th ed. 2007).

Plaintiffs must plead a relevant market in which monopoly power exists. *Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 436 (3d Cir. 2007)*. The boundaries of the relevant market "are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe Co. v United States, 370 U.S. 294, 325, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*. Products are considered reasonably interchangeable if"one product is roughly equivalent to another for the use to which it is put." *Queen City Pizza, 124 F.3d at 437*. When a plaintiff fails to properly define "its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, ...the relevant market is legally insufficient and a motion to dismiss may be granted." *Id. at 436*.

In addition to market power, the monopolization plaintiff must show "an element of anticompetitive *conduct." Verizon Commc'ns Inc. v. Law Offices of Curtis V Trinka, LLP, 540 U.S. 398, 407, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)*. This conduct "comprehends at the most behavior that not only (1) tends to impair **[*27]** the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way." *Aspen Siding Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 605 n.32, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985)* (quoting 3 Phillip Areeda & Donald F. Turner, ***Antitrust Law*** 78 (1978)). The Third Circuit has held that "there must be proof that competition, and not merely competitors, has been harmed." *United States v. Dentsply Int'l, Inc., 399 F.3d 181, 187 (3d Cir. 2005)*.

ICP's allegations of monopoly power, to the extent they exist at all, consist almost entirely of threadbare conclusions. The complaint concludes that "Caterpillar has substantial market power in the relevant heavy construction equipment market as a whole [and] monopoly power within certain of the relevant heavy construction equipment markets within certain local geographic markets." (D.I. 1 ¶ 51). The factual support for this conclusion is as follows. The complaint alleges that Caterpillar "accounts for approximately 40 percent or more of all sales of new heavy construction equipment in the United States." (*Id.* ¶ 21). ICP further alleges that the exclusive dealing arrangements between manufacturers and local dealers, together with the substantial initial investments associated with entering the dealer market, constitute barriers to entry. (*Id.* ¶¶ 39-50). The **[*28]** complaint also alleges that the merger between AAS and IronPlanet is "anticompetitive." (*Id.* ¶¶ 111).

The complaint both fails to allege a relevant market and to plausibly suggest monopoly power. As to the former, ICP attempts to rely on several "submarkets" to meet its burden of pleading a relevant market for purposes of showing monopoly power: "[t]he relevant markets in which to evaluate Defendants' conduct are the sale of specific types of new heavy construction equipment (*e.g.*, backhoes) in local geographic markets around the country (*e.g.*, California), and in any event are no broader than the sale of all types of new heavy construction equipment in the United States." (D.I. 36 at p. 22; D.I. 1 ¶¶ 33-38). The complaint, however, alleges that ICP and the Manufacturer Defendants (including Caterpillar) compete nationally. (D.I. 1 ¶¶ 8-10, 19-21, 37, 56-57, 69, 76, 85). ICP must support its allegations of smaller, state-specific relevant markets with factual allegations. ICP cannot simply gerrymander markets, without supporting facts, where it deems it advantageous. *See, e.g., Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 330-32, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961)*; *E.I DuPont de Nemours & Co. v. Kolon Indus., 688 F. Supp. 2d 443, 456-57 (E.D. Va. 2009)*; *Sun Microsystems, Inc. v. Versata Enters., Inc., 630 F. Supp. 2d 395, 403-04 (D. Del 2009)*.

ICP's attempt to slice up heavy construction equipment into individual equipment-specific markets fails for **[*29]** similar reasons. ICP provides no facts for its equipment-specific markets, instead simply concluding that "[t]he closest substitutes for each type of new heavy construction equipment is used heavy construction equipment of that type." (D.I. 1 ¶ 35). This conclusion (which seems plausible to me) does nothing to explain how the various types of construction equipment differ from one another, however. While "the 'market' for antitrust purposes is the *one* relevant to the particular legal issue at hand," 2B Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** 266 (4th ed. 2014), it is possible that Caterpillar possesses monopoly power in more than one market. If segments of a market are prone to prices being raised above competitive levels, "those segments would be proper topics of antitrust concern not because they are submarkets, but because they would be relevant product markets in their own right." *Id.* at 271 (quoting *In re Owens-Illinois, Inc., 115 F.T.C. 179, 298 (1992))*; *see also Geneva Pharms. Tech. Corp. v. Barr Labs., Inc., 386 F.3d 485, 496 (2d Cir. 2004)*. The complaint advances no facts that define these markets "with reference to the rule of reasonable interchangeability and cross elasticity of demand." *Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 436 (3d Cir. 2007)*. Therefore, these submarkets cannot constitute the relevant markets for ICP's monopolization claim.

Even assuming a market **[*30]** was properly alleged, ICP fails to adequately plead monopoly power on the part of Caterpillar. The complaint alleges that Caterpillar has "substantial market power," engages in "oligopoly pricing," and possesses a market share of "approximately 40 percent or more." (D.I. 1 && 21, 49, 51). ICP's claim fails on its face. An allegation of 40 percent market share does not suffice to show monopoly power. *See, e.g., Fineman v. Armstrong World Indus., 980 F.2d 171, 201-02 (3d Cir. 1992)*. Aside from the allegation of market share, ICP has alleged no facts plausibly suggesting that Caterpillar has monopoly power. *See Rebel Oil Co. v. At!. Richfield Co., 51 F.3d 1421, 1442-43 (9th Cir. 1995)* (holding that oligopoly pricing does not show market power sufficient to cause antitrust concern and that "one firm *alone* must have the power to control market output and exclude competition").

ICP's complaint fails to allege the requisite facts to plausibly suggest monopoly power in a relevant market. Therefore, Counts Five and Six fail to state a claim for monopolization.

2. Attempted Monopolization

To state a claim for attempted monopolization, the plaintiff must plead "(1) that the defendant has a specific intent to monopolize, and (2) that the defendant has engaged in anticompetitive conduct that, taken as a whole, creates (3) a dangerous probability **[*31]** of achieving monopoly power." *W. Penn. Allegheny Health Sys., Inc. v. UPMC, 627 F.3d 85, 108 (3d Cir. 2010)*. In assessing whether a defendant has a dangerous probability of achieving monopoly power, the court should examine factors other than the size of the defendant's market share, including "the strength of competition, probable development of the industry, the barriers to entry, the nature of the anti-competitive conduct, and the elasticity of consumer demand." *Barr Labs., Inc. v. Abbott Labs., 978 F.2d 98, 112 (3d Cir. 1992)*.

Like ICP's claim for monopolization, the complaint is almost entirely bereft of any factual allegations supporting its claim for attempted monopolization. The allegations upon which ICP relies are identical to those it relies on for its monopolization claim. With the same facts and a similar claim, the result is the same.

One of the major distinctions between attempted monopolization and monopolization is that the latter requires a showing that, despite not being a monopoly, a firm possesses a "dangerous probability of achieving monopoly power" and has a "specific intent to monopolize." *W Penn Allegheny Health Sys., Inc. v. UPMC, 627 F.3d 85, 103 (3d Cir. 2010)*. The complaint is devoid of any factual allegations that satisfy either of these elements.

Therefore, Counts Five and Six also fail to state a claim for *§ 2* attempt to monopolize. Since both the monopolization and attempt **[*32]** to monopolize theories cannot be maintained, Counts Five and Six of the complaint are dismissed.

3. Conspiracy to Monopolize

To state a claim for conspiracy to monopolize, the plaintiff must plead: "(1) an agreement to monopolize; (2) an overt act in furtherance of the conspiracy; (3) a specific intent to monopolize; and (4) a causal connection between the conspiracy and the injury alleged." *Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc., 602 F.3d 237, 253 (3d Cir. 2010)*. For present purposes, it should be noted that *§ 2* "applies to the conduct of single firms only, rather than to the conduct of a small number of firms engaged in tacit collusion, as in cases involving oligopoly, shared monopoly, or ... duopoly." *ID Sec. Sys. Canada, Inc. v. Checkpoint Sys, Inc., 249 F. Supp. 2d 622, 649 (E.D. Pa. 2003)*; *see also* *Arista Records LLC v. Lime Grp. LLC, 532 F. Supp. 2d 556, 580 (S.D.N.Y. 2007)* (District courts "have uniformly held or approved the view that allegations of a 'shared monopoly' do not state a claim under *section 2* of the Sherman Act." (collecting cases)); ABA Section of ***Antitrust Law***, ***Antitrust Law*** *Developments* 322-23 (6th ed. 2007) ("Even where competitors allegedly have conspired to monopolize the market, the traditional view has been that the offense of monopolization requires that a single firm possess monopoly power.").

ICP fails to allege any facts which could give rise to a plausible inference of conspiracy **[*33]** to monopolize. In its opposition to this motion, ICP references the portions of the complaint pertaining to the group boycott. (D.L 36 at p. 53; D.L 1 ¶¶ 93-107). As indicated above, the only type of actionable conspiracy to monopolize necessarily involves a single firm monopoly, *i.e.*, a conspiracy to make Caterpillar a monopoly. *See* *Arista Records, 532 F. Supp. 2d at 580*. Quite simply, there are no factual allegations concerning an agreement to create a single dominant firm. Even assuming the group boycott allegations were sufficient to plausibly suggest a conspiracy of any sort, they do not, under these circumstances, satisfy the requirements of a *§ 2* conspiracy to monopolize.

The allegations of conspiracy must be supported by factual allegations. *Howard Hess, 602 F.3d at 255*. ICP advances no facts beyond its assertion that the Manufacturer Defendants sought to exclude ICP from the market through the use of a group boycott. This does not suffice. Therefore, Counts Seven and Eight of the complaint are dismissed for failure to state a claim upon which relief can be granted.

D. Unlawful Merger Under Sherman Act § 1 and Clayton Act § 7 (Counts Nine and Ten)

Section 7 of the Clayton Act prohibits mergers the effect of which "may be substantially to lessen competition, or **[*34]** to tend to create a monopoly." *15 U.S.C. § 18*. The plaintiff must properly allege a market wherein the injury to competition occurs. *Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 436 (3d Cir. 1997)*; *see also* *United States v. E. I duPont de Nemours & Co., 353 U.S. 586, 593, 77 S. Ct. 872, 1 L. Ed. 2d 1057 (1957)* (The "[d]etermination of the relevant market is a necessary predicate to a finding of a violation of the Clayton Act because the threatened monopoly must be one which will substantially lessen competition within the area of effective competition."). To state a claim, the harm to competition cannot be speculative. Instead, there must be "a threat of antitrust injury which produces directly harmful effects that are closely related to the violation." *Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 321 (3d Cir. 2007)* (quotation marks omitted). "[I]njury ...will not qualify as 'antitrust injury' unless it is attributable to an anticompetitive aspect of the practice under scrutiny." *Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)*. Thus, the "[f]ailure to allege actionable anticompetitive conduct forecloses further judicial inquiry." *Broadcom, 501 F.3d at 321*.

It is difficult to comprehend the nature of ICP's claim for unlawful merger. The entirety of ICP's claim appears to be that the merger of AAS with IronPlanet effectively amounted to AAS joining an ongoing conspiracy between the Manufacturer Defendants "to eliminate the threat of ICP's entry through IronPlanet." (D.I. 1 ¶ 106). ICP explains that by taking control of IronPlanet **[*35]** through AAS, Caterpillar and the other Manufacturer Defendants could ensure that the possibility of a future competitive threat, like ICP, would be eliminated. (*Id.* ¶¶ 105-107). Put another way, ICP attempts to allege a vertical merger between Caterpillar and AAS. (D.I. 36 at pp. 55-56). This conclusion is premised on ICP's contentions that Caterpillar and the other Manufacturer Defendants are somehow acting through AAS, and that IronPlanet and ICP operate in the same market. (D.I. 1 ¶ 63, 64, 107).

ICP's vertical merger theory does not state a claim. The complaint does not allege a merger of Caterpillar (a manufacturer) and IronPlanet (an auctioneering service). The complaint instead refers to a horizontal merger between two auctioneering services, AAS and IronPlanet. (*Id.* ¶¶ 1, 5, 105, 106, 111, 133, 135). The vertical merger theory proposed by ICP hinges on the assumption that Caterpillar and AAS are interchangeable. The complaint, however, concedes that "Caterpillar is a shareholder in Cat Auction Services, along with more than twenty Caterpillar equipment dealers," and further, that "Caterpillar holds minority stakes" in both IronPlanet and AAS. (*Id.* ¶¶ 11, 105). ICP supplies no **[*36]** explanation as to how Caterpillar, let alone the other Manufacturer Defendants, could be deemed to have vertically merged with IronPlanet. Since ICP's unlawful merger claim depends on a vertical merger theory that cannot be sustained, it fails.

Even if the Court were to accept ICP's theory that AAS is some sort of alter ego of Caterpillar, the complaint fails to explain how any of the allegations give rise to any anticompetitive concern. The alleged market for ICP is the market for new heavy construction equipment. (D.I. 1 ¶¶ 105, 106, 133-36). The complaint does not explain how the merger of AAS and IronPlanet-both entities which operate in the market for used heavy construction equipment—substantially lessens competition in the market for new heavy construction equipment.

ICP's cited cases are inapposite. (D.I. 44 at 93-94, 105-06); *see, e.g., AlliedSignal, Inc. v. B.F. Goodrich Co., 183 F.3d 568, 574-75 (7th Cir. 1999)*; *HTI Health Servs., Inc. v. Quorum Health Grp., Inc., 960 F. Supp. 1104, 1114 (S.D. Miss. 1997)*. *In AlliedSignal*, B.F. Goodrich (a manufacturer of several components of aircraft landing systems: landing gear, wheels, and brakes) sought to merge with Coltec (a manufacturer oflanding gear). *AlliedSignal, 183 F.3d at 570*. AlliedSignal (a manufacturer of wheels and brakes) alleged that the merger would substantially lessen competition in the landing gear market, which **[*37]** would harm AlliedSignal in its capacity as a *purchaser* of landing gear. *Id. at 571, 574*. In *HTI Health*, the plaintiff sought to halt the merger between two large physician clinics and a large hospital. *HTI Health, 960 F. Supp. at 1107*. The plaintiff hospital alleged that the inpatient hospital services market, a market in which the plaintiff and the defendant hospital participated, would be harmed because clinic physicians, as future shareholders in the merged entity, would "have a financial incentive ...to send their patients to" the hospital belonging to the merged entity. *Id. at 1114*. The court found this to be sufficient antitrust injury. *Id.* These cases, along with others cited by the parties, stand for the proposition that the merger must have the effect of harming competition in the alleged market in which the plaintiff participates. *United States v. E. I. duPont de Nemours & Co., 353 U.S. 586, 593, 77 S. Ct. 872, 1 L. Ed. 2d 1057 (1957)*. ICP has made no allegations as to how the merger of two auctioneers for used heavy construction equipment lessens competition in the market for new heavy construction equipment.

For the aforementioned reasons, I find that ICP has failed to state a claim for unlawful merger. Therefore, Counts Nine and Ten are dismissed.

E. Related State Law Claims

The basis for the court's subject matter jurisdiction over **[*38]** ICP's state law claims is the supplemental jurisdiction conferred by *28 U.S.C. § 1367*. (D.I. 1 ¶ 15). A court "may decline to exercise supplemental jurisdiction" when the court "has dismissed all claims over which it has original jurisdiction." *28 U.S.C. § 1367(c)(3)*. A court should not exercise its supplemental jurisdiction in such circumstances unless "judicial economy, convenience, and fairness" require it. *Bright v. Westmoreland Cty., 443 F.3d 276, 286 (3d Cir. 2006)*.

This case is still in its early stages, having not proceeded beyond the motion to dismiss stage. Accordingly, the Court sees no need to exercise its supplemental jurisdiction over ICP's state law claims. *See* *United Mine Workers v. Gibbs, 383 U.S. 715, 726, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966)*. Therefore, since the Court has no jurisdiction over the state law claims, Counts Eleven through Eighteen are dismissed.

F. Prejudice

A dismissal under *Fed. R. Civ. P. 12(b)(6)* is a "judgment on merits" and is therefore ordinarily presumed to be with prejudice. *See* *Federated Dep 't Stores, Inc. v. Moitie, 452 U.S. 394, 399 n.3, 101 S. Ct. 2424, 69 L. Ed. 2d 103 (1981)*. At oral argument, counsel for ICP requested that if the complaint were dismissed on the grounds that it "lack[ed] specificity," then ICP should be given "the ability to amend." (D.I. 44 at 107). The phrasing of this request informs the Court's decision with respect to whether the claims should be dismissed with or without prejudice. The monopoly and unlawful merger claims are defective **[*39]** on their face. Since no facts alleged in good faith could survive a motion to dismiss, the counts relating to these claims (Five, Six, Seven, Eight, Nine, and Ten) are dismissed with prejudice. As for the group boycott and exclusive dealing claims, I am not convinced that any amendment brought by Plaintiff would necessarily be futile. The factual pleading may fall short of stating a claim, but it does not appear from the face of the claims that the legal theory is clearly without merit. Therefore, the counts pertaining to these claims (One, Two, Three, and Four) are dismissed without prejudice.

The Court is confident that if Plaintiff seeks to amend its complaint, it "will do so only in good faith and allege facts that [it] believe[s] [it] can prove." *United States ex rel. Wilkins v. United Health Grp., Inc., 659 F.3d 295, 315 (3d Cir. 2011)*. The Court is not sure, however, what facts Plaintiff may be able to allege, or indeed, whether Plaintiff will stand on its complaint as written. Therefore, Plaintiff is given leave to amend its group boycott and exclusive dealing claims. If Plaintiff does not so amend, the dismissal without prejudice of these four counts will be converted into a dismissal with prejudice.

The state law claims are dismissed for lack of subject matter jurisdiction. **[*40]** Accordingly, their dismissal is without prejudice. *See* *Thompson v. Cty. of Franklin, 15 F.3d 245, 253 (2d Cir. 1994)*.

IV. CONCLUSION

For the reasons set forth above, the defendants' motions to dismiss (D.I. 27, 28, 30, 33) are **GRANTED**. An appropriate order will be entered.

ORDER

For the reasons discussed in the accompanying Memorandum Opinion, **IT IS HEREBY ORDERED**:

Defendants' Motions to Dismiss the Complaint (D.I. 27, 28, 30, 33) are **GRANTED**.

Counts One through Four are hereby **DISMISSED WITHOUT PREJUDICE**. If Plaintiff does not file a new complaint within **TWO WEEKS**, this dismissal will be converted into a **DISMISSAL WITH PREJUDICE**.

Counts Five through Ten are hereby **DISMISSED WITH PREJUDICE**.

Counts Eleven through Eighteen are hereby **DISMISSED WITHOUT PREJUDICE**.

Entered this 21 day of January, 2016.

/s/ Richard G. Andrews

United States District Judge

Trendsettah USA, Inc. v. Swisher Int'l, Inc.

United States District Court for the Central District of California

January 21, 2016, Decided; January 21, 2016, Filed

Case No. SACV14-01664 JVS (DFMx)

Reporter

2016 U.S. Dist. LEXIS 184758 *

Trendsettah USA, Inc., et al. v. Swisher International Inc.

Subsequent History: Decision reached on appeal by, Remanded by *Trendsettah USA, Inc. v. Swisher Int'l, Inc., 761 Fed. Appx. 714, 2019 U.S. App. LEXIS 3985, 2019 WL 495139 (9th Cir. Cal., Feb. 8, 2019)*

Prior History: *Trendsettah United States v. Swisher Int'l, 2015 U.S. Dist. LEXIS 186869 (C.D. Cal., Feb. 3, 2015)*

Core Terms

cigarillo, genuine issue of material fact, email, summary judgment, distributors, wholesalers, monopolization, antitrust, products, relevant market, monopoly power, discovery, barriers, tortious interference, documents, expert report, disparaging, orders, partial summary judgment, anticompetitive conduct, anti trust law, trade libel, market share, competitors, output, sticks, adverse inference, fulfill, prospective business relationship, grant summary judgment

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

Attorneys for Defendants: Not Present

Judges: James V. Selna.

Opinion by: James V. Selna

Opinion

CIVIL MINUTES — GENERAL

Proceedings: (IN CHAMBERS) Order DENYING Plaintiff's Motion to Exclude Evidence and Impose Evidentiary Inference; and GRANTING IN PART and DENYING IN PART Defendant's Motion for Partial Summary Judgment

Before the Court are two motions:

First, Plaintiffs Trendsettah USA, Inc. and Trend Settah Inc. (collectively, "Trendsettah") have filed a motion to exclude evidence and permit adverse evidentiary inferences against Defendant Swisher International, Inc. ("Swisher"). Docket No. 63. Swisher has filed an opposition. Docket No. 89. Trendsettah has filed a reply. Docket No. 90.

Second, Swisher has filed a motion for partial summary judgment on Trendsettah's claims for violation of the Sherman Act, *15 U.S.C. § 2*, violation of Florida ***Antitrust Law***, *Fl. Stat. § 542.19*, trade libel, tortious interference with contract, and intentional interference with prospective economic relations. Docket No. 67. Trendsettah has filed an opposition. Docket No. 80. Swisher has filed a reply. Docket No. 93.

For the following reasons, the Court **denies** Trendsettah's motion to exclude evidence and **grants** in part and **denies [*2]** in part Swisher's motion for partial summary judgment.

1. Background

Swisher is a cigar manufacturer with its principal place of business in Florida. Docket No. 67-10 at 90. In January 2011, Trendsettah, another cigar manufacturer, entered into a supply agreement (the "First Private Label Agreement") with Swisher to manufacture cigarillos for Trendsettah under its "Splitarillos" brand name. Docket No. 67-5 at 2-14. In turn, Trendsettah would sell its Splitarillo-branded products to tobacco wholesalers and distributors.

In early December 2011, Swisher notified Trendsettah that it was terminating the First Private Label Agreement because Trendsettah failed to meet certain minimum order requirements as specified in the agreement. Id. at 35. After discussions between the parties, the First Private Label Agreement was then amended to terminate on October 31, 2012. Id. at 16-17. In February 2013, after the First Private Label Agreement expired, Swisher and Trendsettah entered into a second supply agreement (the "Second Private Label Agreement") that was scheduled to terminate on February 1, 2014. Id. at 20-32. The parties did not renew the Second Private Label Agreement when it ultimately expired in February 2014.

In October **[*3]** 2014, several months after the Second Private Label Agreement expired, Trendsettah filed a complaint with this Court against Swisher, alleging (1) violation of the Sherman Act, *15 U.S.C. § 2*; (2) violation of Florida ***Antitrust Law***, *Fl. Stat. § 542.19*; (3) breach of contract; (4) breach of the implied covenant of good faith and fair dealing; (5) trade libel; (6) tortious interference with contract; (7) intentional interference with prospective economic relations; (8) negligent interference with prospective economic relations; and (9) violation of California's Unfair Competition Law, *Cal. Bus. & Prof. Code § 17200 et seq.* Docket No. 1. In May 2015, the Court granted judgment on the pleadings on Trendsettah's claims for negligent interference with prospective economic relations and violation of California's Unfair Competition Law. Docket No. 40.

After discovery, Swisher now brings a motion for partial summary judgment under *Federal Rule of Civil Procedure 56* on Trendsettah's claims for violation of the Sherman Act, *15 U.S.C. § 2*, violation of Florida ***Antitrust Law***, *Fl. Stat. § 542.19*, trade libel, tortious interference with contract, and intentional interference with prospective economic relations. Docket No. 67.

Trendsettah's antitrust claims under the Sherman Act, *15 U.S.C. § 2*, and Florida ***Antitrust Law***, *Fl. Stat. § 542.19*, allege that, throughout **[*4]** both the First Private Label Agreement and the Second Private Label Agreement, Swisher, in an effort to maintain its monopoly over the cigarillo industry, engaged in anticompetitive conduct that inhibited the economic growth of Trendsettah. E.g., Docket No. 1 ¶ 44. Swisher's anticompetitive conduct included failing to timely fulfill Trendsettah's product orders, refusing to deal with Trendsettah by failing to renew the Second Private Label Agreement, disparaging Trendsettah's products to Swisher's actual and potential customers, and physically removing Trendsettah products, advertising, and marketing materials from the wholesalers and distributors' shelves. Id. at 5-8. Trendsettah's claims for trade libel, tortious interference with contract, and intentional interference with prospective economic relations alleged that Swisher committed business torts by disparaging Trendsettah's products to wholesalers and distributors and interfering with Trendsettah's actual and prospective business relationships with wholesalers and distributors by failing to timely fulfill Trendsettah's orders. Id. at 13-14. As a result of Swisher's anticompetitive conduct and business torts, Trendsettah suffered both lost profits **[*5]** (from reduced or lost orders) and diminution of value (from being unable to increase its market growth).

2. Legal Standard on *Rule 56* Motion for Summary Judgment

Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(a)*. Material facts are those necessary to the proof or defense of a claim, and are determined by the underlying substantive law. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*.

To determine whether summary judgment is appropriate, federal district courts must engage in a two-step process. First, the party moving for summary judgment bears the initial burden to show the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. This burden may be satisfied by either (1) presenting evidence that negates an element of the non-moving party's case or (2) showing that the non-moving party has failed to establish an element of the non-moving party's case. *Id. at 322-23*. If the party moving for summary judgment does not bear the burden of proof at trial, it may show the absence of a genuine issue of material fact by showing that "there is an absence of evidence to support the non-moving party's case." *Id. at 325*. Second, if the moving party has met its initial burden, the burden then **[*6]** shifts to the party opposing summary judgment to designate "specific facts showing there is a genuine issue for trial." Id. In determining whether there is a genuine issue as to material fact, the court draws all reasonable factual inferences in favor of the non-movant. *Scott v. Harris, 550 U.S. 372, 378, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007)*.

3. Discussion

3.1. Evidentiary Record

When resolving a motion for summary judgment, the court may only consider admissible evidence. See *Fed. R. Civ. P. 56(e)*. At the summary judgment stage, a court must focus on the admissibility of the evidence's content, not its form. *Fraser v. Goodale, 342 F.3d 1032, 1036 (9th Cir. 2003)*. Accordingly, the court may consider evidence on summary judgment that is inadmissible in form so long as its contents can be presented in admissible form at trial. *Id. at 1037*. If the opposing party objects to the proposed evidence as inadmissible, the party seeking admission must direct the court to "authenticating documents, deposition testimony bearing on attribution, hearsay exceptions and exemptions, or other evidentiary principles under which the evidence in question could be deemed admissible . . . ." *In re Oracle Corp. Sec. Litig., 627 F.3d 376, 385-86 (9th Cir. 2010)*.

Trendsettah objects to various evidence submitted in support of Swisher's motion for partial summary judgment. Docket No. 79 at 2. Trendsettah also requests the Court to exclude **[*7]** evidence regarding Swisher's profits from manufacturing Trendsettah's cigarillos and to permit adverse inferences that Swisher's profit margins on its cigarillo products were consistent with those of a monopoly. Docket No. 63 at 2. As the Court discusses below, all of these objections fail, and the Court declines to exclude evidence or permit adverse inferences regarding Swisher's profit margins.

3.1.1. Documents produced by Swisher during discovery.

Trendsettah objects to the admissibility of certain documents produced by Swisher on the grounds that Swisher's counsel lacked personal knowledge to authenticate the documents when submitting them in support of Swisher's motion for partial summary judgment. These documents include: (1) October 6, 2012 email from T. Hilmoe to C. Casey, Docket No. 67-5 at 37-38; (2) September 27, 2013 letter from C. Casey to T. Hilmore, Docket No. 67-6 at 40-41; (3) August 23, 2012 email from J. Green to B. Schoep, Docket No. 67-5 at 43-44; (4) January 15, 2013 email from J. Green, Docket No. 67-6 at 6; (5) January 30, 2014 email from J. Green, Docket No. 67-6 at 8-11; (6) November 19, 2010 letter from A. Alrahib to B. Schoep, Docket No. 67-6 at 16-17; (7) **[*8]** June 23, 2011 email from A. Alrahib to B. Schoep, Docket No. 67-6 at 19-24; (8) September 4, 2012 email from A. Alrahib to P. Arvia, Docket No. 67-6 at 26-27; (9) document entitled "Git N Go Planogram," Docket No. 67-7 at 6-8; (10) document entitled "K & G Stores -2 FT. SET," Docket No. 67-7 at 10-11; (11) document entitled "Schnucks 49" Kiosk POG," Docket No. 67-7 at 13-15; (12) document entitled "J&H Oil 24" Tadisfloor Display," Docket No. 67-7 at 17-19; (13) document entitled "BETA 4ft 6 shelves OTP Q2 2014," Docket No. 67-7 at 21-24; (14) document entitled "West Coast POG Main Line Items," Docket No. 67-7 at 26-28; (15) document entitled "G&M 2014 Extra Mile Planogram," Docket No. 67-7 at 30-33; (16) document entitled "Circle K West -8 x 94 -New 8' Set," Docket No. 67-7 at 40-45;

(17) document entitled "Circle K West -9 x 94 -New 9' Set," Docket No. 67-8 at 2-7; (18) document entitled "Circle K West -10 x 94 -New 10' Set," Docket No. 67-8 at 9-14; (19) document entitled, "Circle K West -11 x 94 -New 11' Set," Docket No. 67-8 at 16-22; and (20) document entitled, "Circle K West -12 x 94 -New 12' Set," Docket No. 67-8 at 24-30. At trial, Swisher employees could either authenticate **[*9]** each document based on their personal knowledge, see *Fed. R. Evid. 901(b)*, or testify to the contents of each document from their personal knowledge, see *Fed. R. Evid. 602*. Accordingly, the documents are admissible at summary judgment. *Fraser, 342 F.3d at 1037*.

3.1.2. Documents produced by Trendsettah during discovery.

Trendsettah objects to the admissibility of certain documents that it produced during discovery on the grounds that Swisher's counsel lacked personal knowledge to authenticate the documents when submitting them in support of Swisher's motion for partial summary judgment. These documents include: (1) December 5, 2011 email from C. Casey to T. Hilmoe, Docket No. 67-4 at 34-35; (2) Amendment to First PLA, Docket No. 92-1 at 48-53; (3) July 26, 2012 email from R. Rahib to A. Alrahib, Docket No. 67-5 at 46; (4) August 15, 2012 email from B. Schoep to R. Rahib, Docket No. 67-5 at 48-50; (5) August 15, 2012 email from B. Schoep to R. Rahib, Docket No. 67-5 at 52-54; (6) June 18, 2013 email from R. Rahib to J. Miller, Docket No. 67-6 at 2-4; (7) January 30, 2014 email from A. Alrahib to J. Miller, Docket No. 67-6 at 13-14; (8) November 30, 2012 email from A. Alrahib to J. Green, Docket No. 67-6 at 29, (9) October 4, 2012 email from A. Alrahib **[*10]** to P. Arvia, Docket No. 67-6 at 33; (10) document entitled "OTP Competition vs. TSI," Docket Nos. 67-7 at 2, 92-1 at 102; (11) January 15, 2013 email from A. Alrahib to J. Miller, Docket No. 67-8 at 35; (12) August 24, 2012 email from A. Alrahib to J. Green, Docket No. 67-8 at 37; (13) March 9, 2015 email from A. Alrahib to B. Schoep, Docket No. 67-8 at 40-41; and (14) February 11, 2013 email from T. Hilmoe to C. Casey, Docket No. 67-8 at 43-44. Because these documents were produced by Trendsettah in response to Swisher's discovery requests, the documents are admissible at summary judgment. *Anand v. BP West Coast Products LLC, 484 F. Supp. 2d 1086, 1092 n.11 (C.D. Cal. 2007)* ("Documents produced in response to discovery requests are admissible on a motion for summary judgment since they are self-authenticating and constitute the admissions of a party opponent.").

3.1.3. Unsworn expert reports.

Trendsettah objects to excerpts from the expert report of Swisher's expert witness Alan Cox, Docket No. 67-10 at 69-84, the expert report of Trendsettah's expert witness DeForest McDuff, Docket No. 67-10 at 56-61, and the supplemental expert report of McDuff, Docket No. 67-10 at 63-66, because the expert reports were not sworn under penalty of perjury when first filed with Swisher's **[*11]** motion for partial summary judgment. Docket No. 79 at 7, 12, 21. All three reports have since been adopted by sworn affidavit. See Docket No. 92-1 at 95 (swearing Cox's report by affidavit); Docket No. 84 at 3 (swearing McDuff's expert report and supplemental expert report by affidavit). Accordingly, the reports are admissible at summary judgment. *Volterra Semiconductor Corp. v. Primarion, Inc., 796 F. Supp. 2d 1025, 1039 (N.D. Cal. 2011)* ("Volterra has now remedied any deficiency by providing a sworn declaration by Dr. Szepesi with all of the challenged reports attached."); *Maytag Corp. v. Electrolux Home Products, Inc., 448 F. Supp. 2d 1034, 1064 (N.D. Iowa 2006)* (holding that "subsequent verification or reaffirmation of an unsworn expert's report, either by affidavit or deposition, allows the court to consider the unsworn expert's report on a motion for summary judgment").

3.1.4. Motion to Exclude Evidence and Permit Adverse Inference.

In its motion to exclude, Trendsettah requests the Court to permit an adverse inference that Swisher's profit margins on its cigarillo products were consistent with those of a monopoly on the grounds that Swisher employees improperly failed to answer questions concerning Swisher's profits in depositions on Swisher's financial information. Docket No. 63 at 9. Federal district courts have the inherent power "to manage their own affairs **[*12]** so as to achieve the orderly and expeditious disposition of cases." *Chambers v. NASCO, Inc., 501 U.S. 32, 43, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991)*. As part of its inherent powers, the courts have "broad discretion to make discovery and evidentiary rulings conducive to the conduct of a fair and orderly trial." *Campbell Indus. v. M/V Gemini, 619 F.2d 24, 27 (9th Cir. 1980)* (citations omitted). This includes sanctioning parties for breaching their discovery obligations, for example, by granting an adverse inference instruction after the defendant fails to produce evidence. *Residential Funding Corp. v. DeGeorge Fin'l Corp., 306 F.3d 99, 107 (2d. Cir. 2002)* (citing *Reilly v. Natwest*

Markets Group Inc., 181 F.3d 253, 267 (2d. Cir. 1999)). Here, the Court declines to exercise its discretion to permit adverse inferences on Swisher's profit margins.

The appropriate way to remedy the opposing party's failure to answer deposition questions is to file a motion to compel under Federal Rule of Civil Procedure 37(a). See Fed. R. Civ. P. 37(a)(3)(B) (permitting motion to compel discovery response when deponent fails to answer a question asked in oral deposition). Trendsettah did not file a Rule 37(a) motion to compel discovery on Swisher's profit margins by the November 26, 2015 deadline for discovery motions. Trendsettah attempts to justify its failure to file a timely motion to compel by explaining that it forgot to file on time, and that it did not want to file a late motion pursuant to an informal scheduling agreement between Swisher and Trendsettah and risk **[*13]** violating the Court's standing order governing stipulations to modify scheduling deadlines. Docket No. 90 at 23-24; see Docket No. 10 at 12-14 ("No stipulations extending scheduling requirements or modifying applicable rules are effective until and unless the Court approves them.") (emphasis added). But Trendsettah did not need to file a joint stipulation extending the discovery motion deadline in order to file its motion to compel: instead, Trendsettah could have independently sought leave of court by filing an appropriate motion or ex parte application. Trendsettah did neither. Because Trendsettah failed to diligently pursue filing a motion to compel, Trendsettah should not now be allowed to seek adverse inference sanctions against Swisher as a substitute. Accordingly, the Court declines to exercise its discretionary inherent powers to permit adverse inferences on Swisher's profit margins.

In its motion to exclude, Trendsettah also requests that the Court preclude Swisher from offering evidence about (1) Swisher's production capacity constraints, (2) Trendsettah's failure to make monthly minimum orders or provide proper forecasting, or (3) Swisher's internal investigation of Trendsettah's **[*14]** trade libel allegations. Docket No. 63 at 8-9. None of these facts is relevant in determining whether there is a genuine issue of material fact as to Trendsettah's antitrust or tort claims. Accordingly, the Court **denies** these requests on summary judgment without prejudice to a properly filed pre-trial motion in limine. See Docket No. 63 at 10 ("[Trendsettah] recognizes that this Court typically hears motions to preclude evidence in conjunction with pre-trial motions in limine.").

3.2. The Court denies summary judgment on Trendsettah's antitrust claims.

Trendsettah's first and second causes of action for violation of the Sherman Act, 15 U.S.C. § 2, and Florida ***Antitrust Law***, Fl. Stat. § 542.19, allege that Swisher engaged in widespread anticompetitive activity against Swisher in the cigarillo market. Docket No. 1 ¶¶ 46-59. Trendsettah raises genuine issues of material fact as to both causes of action.

3.2.1. Monopolization

The Sherman Act and the Florida ***Antitrust Law*** make it unlawful to engage in a monopoly or attempt to engage in a monopoly. See 15 U.S.C. § 2; Fla. Stat. § 542.19. To state a claim for monopolization under federal or Florida law,[1] a plaintiff must show: (1) possession of monopoly power in the relevant market; (2) willful acquisition **[*15]** or maintenance of that power; and (3) causal antitrust injury. SmileCare Dental Grp. v. Delta Dental Plan of California, Inc., 88 F.3d 780, 783 (9th Cir. 1996). Swisher argues that it is entitled to summary judgment on Trendsettah's monopolization claims because there is no genuine issue of material fact as to any of these three elements. Docket No. 67-1 at 11-21. The Court disagrees.

3.2.1.1. Monopoly power

[1] "Federal and Florida antitrust laws are analyzed under the same rules and case law." All Care Nursing Service, Inc. v. High Tech Staffing Services, Inc., 135 F.3d 740, 745 n.11 (9th Cir. 1998); see also Ad-Vantage Tel. Directory Consultants, Inc. v. GTE Directories Corp., 849 F.2d 1336, 1340 (11th Cir. 1987) ("[T]he Florida courts held that the Florida legislature has, in effect, adopted as the law of Florida the body of anti-trust law developed by the federal courts under the Sherman Act. . . . Thus, in analyzing this case, we may, and indeed must, apply the federal precedent developed under Section 2 of the Sherman Act."). Accordingly, the Court's analysis on Trendsettah's federal antitrust claims also applies to its Florida antitrust claims.

Monopoly power is the "power to control prices or exclude competition." *Rebel Oil Co., Inc. v. Atlantic Richfield, Co., 51 F.3d 1421, 1434 (9th Cir. 1995)*. Monopoly power can be proven through direct or circumstantial evidence. Id. To show monopoly power by direct evidence, the plaintiff must show (1) restricted output and (2) supracompetitive prices. Id. To show monopoly power by circumstantial evidence, the plaintiff must "(1) define the relevant market, (2) show that the defendant owns a dominant share of that market, and (3) show that there are significant barriers to entry." Id. Here, Trendsettah has provided sufficient circumstantial evidence to raise a genuine issue of material fact as to Swisher's monopoly power.[2]

Relevant market. To define the "relevant market," the plaintiff must identify both the relevant geographic market and the relevant product market. *Am. Ad Mgmt., Inc. v. GTE Corp., 92 F.3d 781, 790 (9th Cir. 1996)*. "The relevant product market identifies the products or services that compete with **[*16]** each other, and the relevant geographic market identifies the area where the competition in the relevant product market takes place." *Sidibe v. Health, 51 F. Supp. 3d 870, 883 (N.D. Cal. 2014)* (citing *Los Angeles Mem'l Coliseum Comm'n v. NFL, 726 F.2d 1381, 1392 (9th Cir. 1984))*. The definition of the relevant market is generally a question of fact for the jury. *Morgan, Strand, Wheeler & Biggs v. Radiology, Ltd., 924 F.2d 1484, 1489 (9th Cir. 1991)* ("Ordinarily, the relevant market is a question of fact for the jury").

The parties disagree on both the geographic and product market. Swisher defines the geographic market as the entire United States, Docket No. 67-1 at 19-20, and Trendsettah defines the geographic market as 15 regional markets within the United States, Docket No. 80 at 18. Swisher defines the product market to include "non-tipped cigarillos," "tipped cigarillos," and large cigars, Docket No. 67-1 at 18-19, and Trendsettah argues that the product market is only non-tipped cigarillos, Docket No. 80 at 15-16.

To support its definition for geographic market, Trendsettah provides evidence from Swisher's vice president of sales that Swisher planned competitive strategies around regional markets, Docket No. 83-4 at 17-21, the tobacco industry uses regional-level data to assess market shares and trends, Docket No. 83-10 at 6-7, and distributors consider where manufacturers are located (and related **[*17]** transportation and shipping costs) when determining which manufacturer to purchase cigarillos from, Docket No. 86 at 2. This evidence raises genuine issues of material fact regarding the geographic areas in which the relevant market takes place.

To support its definition for product market, Trendsettah provides an expert report that conducted a "small but significant nontransitory increase in price" ("SSNIP") analysis[3] finding that the product market includes only non-tipped cigarillos. Docket No. 84 at 14-21 (describing and reporting results of expert report's SSNIP analysis).[4] In contrast, Swisher's expert report conducted a conflicting SSNID analysis to find that the product market, at minimum, also includes large cigars. Docket No. 93-1 at 80-81. Construing this conflicting expert testimony in the light most favorable to Trendsettah, the Court finds that there is a genuine dispute of material fact that precludes summary judgment on the relevant product market.

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[2] Because the Court finds that Trendsettah provided sufficient circumstantial evidence to raise a genuine issue of material fact as to Swisher's monopoly power, the Court need not consider whether Trendsettah has provided direct evidence to raise a genuine issue of material fact as to Swisher's monopoly power, particularly the requirement to show supracompetitive prices.

[3] The Ninth Circuit regularly uses SSNIP analysis to determine the relevant market in antitrust cases. *Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd., 778 F.3d 775, 784 (9th Cir. 2015)* ("A common method to determine the relevant geographic market, and the one used by the district court, is to find whether a hypothetical monopolist could impose a 'small but significant nontransitory increase in price' ("SSNIP") in the proposed market."); *Vesta Corp. v. Amdocs Mgmt. Ltd., 129 F. Supp. 3d 1012, 2015 WL 5178073, at *8 (D. Or. 2015)* (observing that courts "often employ" SSNIP analysis to determine the relevant market in antitrust claims related to horizontal mergers). SSNIP analysis determines the relevant market by testing whether a monopolist "could profitably impose a small but significant and nontransitory price increase." ***Theme Productions, Inc. v. News Amer. Mkt'g FSI, 546 F.3d 991, 1002 (9th Cir. 2008)***. "If a significant number of customers would respond to a SSNIP by purchasing substitute products, the SSNIP would not be profitable for the hypothetical monopolist. If a monopolist could not profitably impose a SSNIP, the market definition should be expanded to include those substitute products that constrain the monopolist's pricing." Id. (citations omitted).

[4] Swisher's assertion at oral argument that Trendsettah's expert performed no SSNIP analysis is simply mistaken.

Market share. "A plaintiff relying on circumstantial evidence to establish a *§ 2* monopolization claim must show that the defendant owned a 'dominant share' of the market." *Image Tech., 125 F.3d at 1206*. "Courts generally require a 65% market share to establish **[*18]** a prima facie case of market power." Id.

A determination as to whether Swisher has a dominant share of the market depends on the definition of the relevant market. For example, if the relevant market is defined as the regional non-tipped cigarillo market, Trendsettah has made a prima facie case of Swisher's market share in the regions roughly corresponding to the Pacific Northwest, the Mountain States, the Southwestern United States, and the Great Plains. See Docket No. 84 at 6 (Trendsettah's expert report). In contrast, if the relevant market is defined as the national non-tipped cigarillo market, Trendsettah has not established a prima facie case of Swisher's market share: Swisher's market share in non-tipped cigarillos is currently around 55%. See Docket No. 67-10 at 64 (Trendsettah's supplemental expert report). This is less than the 65% threshold required to establish a prima facie case of market share. *Image Tech., 125 F.3d at 1206*. Because the Court concludes that Trendsettah has raised a genuine issue of material fact regarding the proposed relevant market, the Court also concludes that Trendsettah has raised a genuine issue of material fact regarding market share.[5]

Barriers to entry. Barriers to **[*19]** entry are "additional long-run costs that were not incurred by incumbent firms but must be incurred by new entrants," or "factors in the market that deter entry while permitting incumbent firms to earn monopoly returns." *Los Angeles Land Co. v. Brunswick Corp., 6 F.3d 1422, 1427 (9th Cir. 1993)*. Such barriers include: (1) legal licenses; (2) control of essential or superior resources; (3) entrenched buyer preferences; (4) high capital entry costs; and (5) economies of scale. *Image Technical Services, Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1208 (9th Cir. 1997)* (citing *Rebel Oil, 51 F.3d at 1439*). "Whether barriers to entry exist is usually a fact-intensive question." *IGT v. Alliance Gaming Corp., 2008 U.S. Dist. LEXIS 111773, 2008 WL 7071468, at *14 (D. Nev. Oct. 21, 2008)*.

To show that the cigarillo market has significant barriers to entry, Trendsettah's expert report enumerates various factors imposing significant barriers to entry in the cigarillo market, including high capital investments; limited access to inputs (e.g., tobacco, wrapper paper, and flavorings/additives); economies of scale; strict limits on advertising; strict regulations on tobacco retailer licensing, tobacco flavors, and tobacco pricing; entrenched distributor relationships; and entrenched customer preferences. Docket No. 84 at 27-35. This evidence is sufficient to raise a genuine issue of material fact, apart from the hearsay statement of Trendsettah's founder to which Swisher objected both in its **[*20]** reply and at the hearing. See Docket No. 93 at 8. In response, Swisher argues that there can be no genuine issue of material fact as to whether these barriers are significant because there were many entrants into the cigarillo market from 2011 to 2013, and there are now over 30 competitors in the cigarillo market. Docket No. 93 at 21-22. The Court agrees that the number of market entrants suggests that the barriers to entry to the cigarillo market are not insurmountably high. But the number of new competitors alone does not necessarily indicate whether these barriers are significant. *Rebel Oil, 51 F.3d at 1440* ("The fact that entry has occurred does not necessarily preclude the existence of 'significant' entry barriers."). In the absence of additional countervailing evidence that the barriers to entry are insignificant, and construing all evidence in the light most favorable to Trendsettah, the Court determines that Trendsettah has raised a genuine issue of material fact as to whether there are significant barriers of entry.

3.2.1.2. Willful acquisition or maintenance of monopoly power

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[5] At the hearing on Swisher's motion for partial summary judgment, Swisher argued for the first time that it is entitled to summary judgment on Trendsettah's Florida antitrust claim because there is no genuine issue of material fact as to whether Swisher has made a prima facie case of market power: the relevant market for Trendsettah's Florida antitrust claim is Florida, see *Fl. Stat. § 542.19* (prohibiting monopolies only "in this state"), and Swisher's market share for Florida is less than 65%. See Docket No. 67-10 at 23 (stating that Swisher's share of non-tipped cigarillos for the region consisting of Mississippi, Alabama, western Tennessee, and Northwest Florida is between 53-62%, and Swisher's share for the region consisting of Georgia, Puerto Rico, the Caribbean Islands, and the rest of Florida is 35-41%). Swisher did not raise this argument in its moving papers, however. Docket No. 67-1 at 20-21. Accordingly, this argument is waived for present purposes. See *Zamani v. Carnes, 491 F.3d 990, 997 (9th Cir. 2007)* ("The district court need not consider arguments raised for the first time in a reply brief.").

In addition to monopoly power, the plaintiff must also show that defendant engaged in anticompetitive conduct. Anticompetitive **[*21]** conduct is the use of monopoly power "to foreclose competition, to gain a competitive advantage, or to destroy a competitor." *United States v. Griffith, 334 U.S. 100, 107, 68 S. Ct. 941, 92 L. Ed. 1236 (1948)*. The parties dispute that there is a genuine issue of material fact as to whether Swisher's alleged failure to timely fulfill Trendsettah's orders or its refusal to renew the Second Private Label Agreement constituted anticompetitive conduct.[6]

"As a general rule, a monopolist has no duty to deal with its competitors." *High Tech., 996 F.2d 987* (citing *Eastman Kodak, 504 U.S. 451, 483 n.32, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992))*. This rule is not absolute, however. A monopolist can refuse to deal with its competitors only if there are legitimate business reasons for its refusal. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 602-605, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985)*. Accordingly, "[w]hen a legitimate business justification supports a monopolist's exclusionary conduct, that conduct does not violate *§ 2* of the Sherman Act." *Image Tech. Servs., 125 F.3d at 1212*. "Whether valid business reasons motivated a monopolist's conduct is a question of fact." *High Technology Careers v. San Jose News, 996 F.2d 987, 990 (9th Cir. 1993)*.

Here, there is a genuine dispute of material fact as to whether valid business reasons motivated Swisher's alleged failure to fulfill orders and refusal to renew the Second Private Label Agreement. Swisher provides evidence that it attempted to fill Trendsettah's orders as they were received, and any failure to fulfill orders was caused by issues **[*22]** with Trendsettah's faulty ordering, forecasting, and credit practices. See Docket No. 67-6 at 2-3 ("Although [the fulfillment rate is] not 100%, we are trying to balance an extensive Swisher portfolio with the Splitarillo products."). In turn, Trendsettah disputes Swisher's characterization of its ordering, forecasting, and credit practices, see Docket No. 85 at 7, and provides deposition testimony from Swisher's vice president of sales stating that Swisher's decision not to renew the Second Private Label Agreement was motivated in part by its concern about the market growth of Splitarillo products, see Docket No. 83-4 at 11. Construing all evidence in the light most favorable to Trendsettah, the Court determines that Trendsettah has raised a genuine issue of material fact as to whether there were legitimate business reasons for Swisher's refusal to deal with Trendsettah.

3.2.1.3. Causal antitrust injury

Lastly, to recover under federal or Florida ***antitrust law***, the plaintiff must demonstrate "antitrust injury." *Rebel Oil, 51 F.3d at 1433*. The Ninth Circuit has identified four requirements for antitrust injury: "(1) unlawful conduct, (2) causing an injury to the plaintiff, (3) that flows from that which makes **[*23]** the conduct unlawful, and (4) that is of the type the antitrust laws were intended to prevent." *Am. Ad Mgm't, Inc., 190 F.3d at 1055*. Under this standard, conduct results in an "antitrust injury" when the conduct harms competition. *Glen Holly Entm't, Inc. v. Tektronix Inc., 343 F.3d 1000, 1007-08 (9th Cir. 2003)*. Accordingly, "[i]f the injury flows from aspects of the defendant's conduct that are beneficial or neutral to competition, there is no antitrust injury . . . ." *Rebel Oil, 51 F.3d at 1433*.

Here, Trendsettah raises a genuine issue of material fact as to whether it suffered causal antitrust injury. For example, Trendsettah provided evidence that it suffered lost revenue and inhibited economic growth because Swisher failed to timely deliver approximately 200 million cigarillo sticks. See Docket 83-9 at 24-25. This standing alone is not antitrust injury. However, this conduct harmed competition because it ultimately reduced the total market output for Trendsettah's cigarillo sticks; harm to competition resulting from restricted output constitutes a viable antitrust injury. *Rheumatology Diagnostics Lab., Inc. v. Aetna, Inc., 2013 U.S. Dist. LEXIS 151128, 2013 WL*

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[6] In its complaint, Trendsettah also alleged that Swish's anticompetitive conduct included charging Trendsettah prices above those designated in the private label agreements, disparaging Trendsettah in the market, and removing Splitarillo products and advertisements from wholesaler and distributors' shelves. Docket No. 1 ¶¶ 31 (overcharging), 36-40 (disparagement and removal). Trendsettah provided no evidence of overcharging at summary judgment. Docket No. 81 at 58 ("undisputed" that "Swisher never charged [Trendsettah] higher prices for Splitarillos than those set forth in the parties agreements"). Moreover, as discussed in Section 3.3 below, Trendsettah has failed to provide any evidence that Trendsettah suffered injury as a result of Swisher's alleged disparagement or its removal of Splitarillo products and advertisements. E.g., Id. at 61 ("Undisputed that [Trendsettah] lacks knowledge that any of its customers stopped doing business as a result of the specific acts of Swisher removing Splitarillos products or advertising and marketing materials from stores.").

*5694452, at *15 (N.D. Cal. Oct. 18, 2013)* ("Market power can be shown by actual harm to competition inflicted by the defendant, such as restricted output or supra-competitive prices, or by the defendant's dominant market share and barriers to entry in the relevant market.") (emphasis added); *Stearns v. Select Comfort Retail Corp., 2009 WL 1635931, at *13 (N.D. Cal. June 5, 2009)* **[*24]** ("The antitrust laws are intended to prevent harm to competition manifested as higher prices, lower output, or decreased quality in the products within a defined market.") (emphasis added).

In response, Swisher argues that its failure to deliver 200 million cigarillo sticks to Trendsettah did not reduce overall market output for cigarillos because sales within the entire cigarillo industry increased during this period. Docket No. 67-1 at 15-16. But increased sales by itself does not show that the overall market output was unaffected by Swisher's failure to timely deliver cigarillo sticks to Trendsettah: it could still be the case that, had Swisher timely delivered cigarillo sticks to Trendsettah, Trendsettah would have sold these sticks to distributors and wholesalers. To show that there is no genuine issue of fact as to causal antitrust injury, Swisher needs to instead establish that, even if Swisher timely delivered the cigarillo sticks to Trendsettah, the total market output for cigarillos would have remained the same. To that end, Swisher argues that its failure to deliver the cigarillo sticks did not reduce market output because Trendsettah's customers (i.e., wholesalers and distributors) ultimately **[*25]** purchased substitute sticks from Trendsettah's competitors. Docket No. 93 at 10. To support this argument, Swisher cites to various emails from Trendsettah showing that wholesalers and distributors threatened to purchase cigarillos from competitors because Trendsettah failed to timely fulfill their orders for Splitarillo-branded products. E.g., Docket No. 67-6 at 29 ("[Wholesalers] are threatening and telling us that they are forced to go back to working with [Good Times USA, LLC] because of our lack in product and lack in timing of products."). But these emails only show that some wholesalers and distributors sometimes threatened to purchase cigarillos from competitors, and not that they actually did purchase substitute cigarillos. Construing the evidence in the light most favorable to Trendsettah, the Court cannot find that threats to purchase substitute goods from Trendsettah's competitors show that there is no genuine issue of material fact as to Trendsettah's alleged causal antitrust injury.

3.2.2. Attempted monopolization

To show attempted monopolization under federal or Florida law, a plaintiff must show: (1) the defendant engaged in predatory or anticompetitive conduct; (2) the **[*26]** defendant had a specific intent to monopolize; (3) a dangerous probability of achieving monopoly power; and (4) causal antitrust injury. *SmileCare, 88 F.3d at 783*; *Lockheed Martin Corp. v. Boeing Co., 314 F. Supp. 2d 1198, 1224 (M.D. Fla. 2004)* ("In order to state a claim for attempted monopolization under either the Sherman Act or the Florida ***Antitrust Law***, a plaintiff must allege facts that, if proven, would satisfy his burden at trial to prove that: (1) the defendant has engaged in predatory or anticompetitive conduct (2) with a specific intent to monopolize and (3) that there is a dangerous probability that defendant will achieve monopoly power."). The requirements for attempted monopolization are similar to the requirements for a monopolization claim, "differing primarily in the requisite intent and the necessary level of monopoly power." *Image Technical Services, Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1202 (9th Cir. 1997)*.

In its motion, Swisher argues only that there is no genuine issue of material fact on Trendsettah's attempted monopolization claim because Trendsettah and its expert defined the wrong relevant market when determining whether there was a dangerous probability of achieving monopoly power. Docket No. 67-1 at 21. But, as discussed above, the Court has denied summary judgment on Trendsettah's monopolization claims because there are genuine issues of **[*27]** material fact about how to define the relevant market. Accordingly, as with the monopolization claims, the Court also denies summary judgment on Trendsettah's attempted monopolization claims.

3.3. The Court grants summary judgment on Trendsettah's trade libel claim.

Trendsettah's fifth cause of action for trade libel alleges that Swisher representatives orally disparaged the Splitarillo brand to wholesalers and distributors that purchased Splitarrillos. Docket No. 1 ¶¶ 71-77. To show trade libel under Florida law, the plaintiff must show: (1) a falsehood (2) has been published to a third person, (3) defendant knew or had reason to know that the falsehood will likely cause others not to deal with the plaintiff, (4) the falsehood induced others not to deal with the plaintiff, and (5) the published falsehood caused plaintiff to suffer special damages. *Border Collie Rescue, Inc. v. Ryan, 418 F. Supp. 2d 1330, 1348 (M.D. Fla. 2006)* (citing *Stewart Title Guar. Co. v. Title Dynamics, Inc., 2005 U.S. Dist. LEXIS 48191, 2005 WL 2548419 (M.D. Fla. 2005))*.

In support of its trade libel claim, Trendsettah provided a declaration from an officer at SM Brothers, Inc., a wholesale distributor of Splitarillo products, stating only that unidentified Swisher representatives made disparaging comments about Splitarillos in his presence.[7] Docket No. 88 at 2-3. Trendsettah also provided a declaration **[*28]** from Trendsettah's Chief Financial Officer stating that, "after [he] first started hearing these rumors [that Swisher representatives made disparaging remarks about Splitarillos]," Trendsettah experienced a reduction in net sales of Splitarillos to Colonial Grocers, Core-Mark and Import Warehouse. Docket No. 87 at 2-3. These declarations provide no specific facts that the Swisher's disparaging comments in fact caused SM Brothers, Inc., Colonial Grocers, Core-Mark, Import Warehouse, or any other wholesaler or distributor not to deal with Trendsettah.[8] For example, the SM Brothers, Inc. officer nowhere declared that he chose not to deal with Trendsettah because of Swisher's disparaging comments.[9] Similarly, Trendsettah's Chief Financial Officer nowhere declares that the decrease in net sales to Colonial Grocers, Core-Mark and Import Warehouse was in fact caused by Swisher's disparaging comments. In the absence of specific facts establishing causation and damages, the Court grants summary judgment to Swisher on Trendsettah's trade libel claim.

3.4. The Court grants summary judgment on Trendsettah's tortious interference with contract claim.

To show tortious interference with contract under **[*29]** Florida law, the plaintiff must show: (1) the existence of a contract between plaintiff and a third-party; (2) the defendant knew of the contract; (3) breach of contract; (4) the defendant caused or induced the breach; (5) the defendant specifically intended to procure a breach of contract; (6) the defendant had no justification or privilege for his conduct; and (7) the plaintiff suffered damages as a result of the breach. See *Johnson Enterprises of Jacksonville, Inc. v. FPL Group, Inc., 162 F.3d 1290, 1321 (11th Cir. 1998)*; *Chicago Title Ins. Co. v. Alday-Donalson Title Co. of Florida, 832 So. 2d 810, 814 (Fla. Dist. Ct. App. 2002)*.[10]

In its motion for partial summary judgment, Swisher argues that there is no genuine issue of material fact as to whether Swisher caused Trendsettah to breach its contracts with wholesalers or distributors, or whether Trendsettah suffered any damages as a result of breach. Docket No. 67-1 at 28-29.[11] Swisher is correct. Although

[7] As relevant to Trendsettah's trade libel claim, the declarant also stated that part of the following statement is not true: "No Swisher representative has made statements to, or engaged in any conduct at, SM Brothers, Inc., that disparaged Splitarrillos brand cigarillos, Trendsettah USA, Inc., or Trend Settah, Inc., that had the purpose of reducing or stopping Splitarillos brand cigarillos purchases or sales, or that had the purpose of undermining Splitarillos brand cigarillos, Trendsettah USA, Inc. or Trend Settah, Inc. in any way." Docket No. 88 at 3. The declarant does not identify what part of that statement is false, however. Id.

[8] In response to a question whether any company "reduce[d] the volume of their business with Trendsettah as a result of Swisher's alleged disparagement of Trendsettah," Akrum Alrahib, founder of Trendsettah, stated that "[he] wouldn't know what the individual wholesaler did or --intended to do after they heard that." Docket No. 83-1 at 13.

[9] The parties do not dispute that SM Brothers, Inc. has continued doing business with Trendsettah. Docket No. 81 at 65.

[10] The Court is skeptical that a plaintiff can maintain a claim for tortious interference with a third-party contract against a defendant when, as here, the tortious interference arises wholly from conduct that constitutes breach of a separate, unrelated contract between the plaintiff and the defendant. Said another way, there must be some evidence of breach of the third-party contract, typically by showing that the third party has been induced to breach. See, e.g., *Law Offices of David J. Stern, P.A. v. SCOR Reinsurance Corp., 354 F. Supp. 2d 1338, 1341 (S.D. Fla. 2005)*; ***Chicago Title, 832 So. 2d at 814*** ("Chicago Title offered no evidence and raised no issue of material fact as to whether Stewart Title intended to procure the breach of the contracts between Chicago Title and the Alday Agencies."). To allow such a claim would, in effect, convert an ordinary breach of contract claim to an additional tort claim when the defendant's breach of its contract with the plaintiff also affects the plaintiff's third-party contracts. Under such circumstances, the plaintiff should instead seek consequential damages for the ensuing breach of its third-party contract, see Hadley v. Baxendale, 156 Eng. Rep. 145 (Ex. Ch. 1854), and not bring a separate tort claim. The Court nevertheless declines to grant summary judgment on Trendsettah's tortious interference with contract claim on this basis because, in any event, there is no genuine issue of material fact as to either breach, causation, or resulting damages.

Trendsettah has provided evidence of oral contracts between Trendsettah and certain distributors and wholesalers, see Docket No. 85 at 8, Trendsettah provides no specific evidence that Trendsettah, its distributors, or its wholesalers breached one such contract, or, if there was a breach, that the breach was caused by Swisher's anticompetitive conduct. Accordingly, the Court grants summary judgment on Trendsettah's tortious **[*30]** interference with contract claim.

3.5. The Court grants summary judgment on Trendsettah's tortious interference with prospective business relationships claim.

To show tortious interference with prospective business relationships under Florida law, the plaintiff must show: (1) the existence of a business relationship; (2) the defendant knew about the relationship; (3) the defendant intentionally and unjustifiably interfered with the relationship; and (4) plaintiff suffered damages as a result of the breach. *Tamiami Trail Tours, Inc. v. Cotton, 463 So. 2d 1126, 1127 (Fla. 1985)*. "An action for tortious interference with a prospective business relationship requires a business relationship evidenced by an actual and identifiable understanding or agreement which in all probability would have been completed if the defendant had not interfered." *ISS Cleaning Servs. Grp., Inc. v. Cosby, 745 So. 2d 460, 462 (Fla. Dist. Ct. App. 1999)*.

Trendsettah's claim for tortious interference with prospective business relationships alleges that Swisher interfered with Trendsettah's prospective business relationships in two ways. First, Swisher disparaged Splitarillo-branded products to wholesalers and distributors. Docket No. 1 ¶ 89. Second, Swisher limited its production of Splitarillos-branded cigarillos so that Trendsettah could not fulfill potential orders **[*31]** to wholesalers and distributors. Id. ¶ 88. Trendsettah has not raised a genuine issue of material fact on either theory. First, as to disparagement, Trendsettah provides no specific facts showing that Swisher's disparaging remarks materially affected Trendsettah's business relationships (contractual, prospective, or otherwise) with its wholesalers or distributors. See Section 3.3, supra. Accordingly, the Court grants summary judgment on Trendsettah's tortious interference claim to the extent it relies on Swisher's alleged disparagement. Second, as to limiting production, Trendsettah fails to provide specific evidence of even one prospective business relationship that would have been completed but for Trendsettah's anticompetitive conduct. See also Section 3.4 (failure to provide evidence of breach, causation, and resulting damages). Accordingly, the Court also grants summary judgment on Trendsettah's tortious interference to the extent it relies on Swisher's limited production of Splitarillo-branded products.

4. Conclusion

For the reasons stated above, the Court **denies** Trendsettah's motion to exclude evidence and **grants** in part and **denies** in part Swisher's motion for partial summary judgment.

As a result of **[*32]** the hearing, the Court allows limited discovery motions practice. Trendsettah shall file with this Court any ex parte applications relating to Swisher's profit data within seven days after issuance of this Order. Swisher shall have seven days to file its respective reply, if any. Swisher raised at oral argument possible motions practice related to third-party discovery. Any such motion shall be presented to the magistrate judge on a similarly expedited basis. The Scheduling Order is deemed amended to permit this limited motions practice.

IT IS SO ORDERED.

End of Document

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[11] Trendsettah's assertion at oral argument that Swisher did not argue lack of breach, causation, or damages in its motion for partial summary judgment is mistaken. See Docket No. 67-1 at 28 ("Plaintiffs also fail to show that they lost any business as a result of the alleged interference."), 29 ("There is no record evidence to show that Swisher's alleged actions influenced, induced, or coerced even one company to breach its contract or avoid doing business with [Trendsettah].") (internal quotations and alterations removed).

In re Trulia, Inc. Stockholder Litig.

Court of Chancery of Delaware

October 16, 2015, Submitted; January 22, 2016, Decided

CONSOLIDATED C.A. No. 10020-CB

Reporter
129 A.3d 884 *; 2016 Del. Ch. LEXIS 8 **

IN RE TRULIA, INC. STOCKHOLDER LITIGATION

Subsequent History: Counsel As Amended September 29, 2017.

Core Terms

disclosure, stockholders, settlement, multiples, Proxy, supplemental, synergies, proposed settlement, merger, parties, transactions, fiduciary, announcement, plaintiffs', approve, cash flow, assumptions, financial adviser, equity value, growth rate, expedited, class action, fair summary, Market-Based, projections, challenges, discounted, estimated, publicly, intrinsic value

LexisNexis® Headnotes

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

HN1[] **Class Actions, Compromise & Settlement**

Because a class action impacts the legal rights of absent class members, it is the responsibility of the Court of Chancery of Delaware to exercise independent judgment to determine whether a proposed class settlement is fair and reasonable to the affected class members.

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

HN2[] **Class Actions, Compromise & Settlement**

Under Del. Ch. Ct. R. 23, the Court of Chancery must approve the dismissal or settlement of a class action. Del. Ch. Ct. R. 23(e). Although Delaware has long favored the voluntary settlement of litigation, the fiduciary character of a class action requires the Court to independently examine the fairness of a class action settlement before approving it. Approval of a class action settlement requires more than a cursory scrutiny by the Court of the issues presented. The Court must exercise its own judgment to determine whether the settlement is reasonable and intrinsically fair. In doing so, the Court evaluates not only the claim, possible defenses, and obstacles to its successful prosecution, but also the reasonableness of the "give" and the "get," or what the class members receive in exchange for ending the litigation.

Business & Corporate Law > ... > Corporate Governance > Directors & Officers > Management Duties & Liabilities

HN3[] **Directors & Officers, Management Duties & Liabilities**

Under Delaware law, when corporate directors solicit stockholder action, they must disclose fully and fairly all material information within the board's control. Delaware has adopted the standard of materiality used under the federal securities laws. Information is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote. In other words, information is material if, from the perspective of a reasonable stockholder, there is a substantial likelihood that it significantly alters the "total mix" of information made available.

Business & Corporate Law > ... > Corporate Governance > Directors & Officers > Management Duties & Liabilities

Securities Law > Postoffering & Secondary Distributions > Proxies

Mergers & Acquisitions Law > Mergers > Duties & Liabilities of Directors & Officers

Mergers & Acquisitions Law > Takeovers & Tender Offers > Duties & Liabilities of Directors & Officers

HN4[] **Directors & Officers, Management Duties & Liabilities**

Under Delaware law, when a corporate board relies on the advice of a financial advisor in making a decision that requires stockholder action, those stockholders are entitled to receive in the proxy statement a fair summary of the substantive work performed by the investment bankers upon whose advice the recommendations of their board as to how to vote on a merger or tender rely. This "fair summary" standard has been a guiding principle for the Court of Chancery in considering proxy disclosures concerning the work of financial advisors. A fair summary, however, is a summary. By definition, it need not contain all information underlying the financial advisor's opinion or contained in its report to the board. Indeed, the Court has held that the summary does not need to provide sufficient data to allow the stockholders to perform their own independent valuation. The essence of a fair summary is not a cornucopia of financial data, but rather an accurate description of the advisor's methodology and key assumptions.

Business & Corporate Law > ... > Corporate Governance > Directors & Officers > Management Duties & Liabilities

Mergers & Acquisitions Law > Mergers > Duties & Liabilities of Directors & Officers

Mergers & Acquisitions Law > Takeovers & Tender Offers > Duties & Liabilities of Directors & Officers

HN5[] **Directors & Officers, Management Duties & Liabilities**

Although management projections and internal forecasts are not per se necessary for a fair summary of the substantive work performed by the investment bankers upon whose advice the recommendations of their corporate board as to how to vote on a merger or tender rely, the Court of Chancery of Delaware has placed special importance on this information because it may contain unique insights into the value of the company that cannot be obtained elsewhere.

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Joseph Christensen, JOSEPH CHRISTENSEN P.A., Wilmington, Delaware; Counsel for Amicus Curiae Sean J. Griffith.

Judges: BOUCHARD, C.

Opinion by: BOUCHARD

Opinion

[*886] BOUCHARD, C.

This opinion concerns the proposed settlement of a stockholder class action challenging Zillow, Inc.'s acquisition of Trulia, Inc. in a stock-for-stock merger that closed in February 2015. Shortly after the public announcement of the proposed transaction, four Trulia stockholders filed essentially identical complaints alleging that Trulia's directors had breached their fiduciary duties in approving the proposed merger **[*887]** at an unfair exchange ratio. Less than four months later, after taking limited discovery, the parties reached an agreement-in-principle to settle.

The proposed settlement is of the type often referred to as a "disclosure settlement." It has become the most common method for quickly resolving stockholder lawsuits that are filed routinely in response to the announcement of virtually every transaction involving the acquisition of a public corporation. In essence, Trulia agreed to supplement the proxy materials disseminated to its stockholders before they voted on the proposed transaction to include some additional **[**3]** information that theoretically would allow the stockholders to be better informed in exercising their franchise rights. In exchange, plaintiffs dropped their motion to preliminarily enjoin the transaction and agreed to provide a release of claims on behalf of a proposed class of Trulia's stockholders. If approved, the settlement will not provide Trulia stockholders with any economic benefits. The only money that would change hands is the payment of a fee to plaintiffs' counsel.

HN1[] Because a class action impacts the legal rights of absent class members, it is the responsibility of the Court of Chancery to exercise independent judgment to determine whether a proposed class settlement is fair and reasonable to the affected class members. For the reasons explained in this opinion, I conclude that the terms of this proposed settlement are not fair or reasonable because none of the supplemental disclosures were material or even helpful to Trulia's stockholders, and thus the proposed settlement does not afford them any meaningful consideration to warrant providing a release of claims to the defendants. Accordingly, I decline to approve the proposed settlement.

On a broader level, this opinion **[**4]** discusses some of the dynamics that have led to the proliferation of disclosure settlements, noting the concerns that scholars, practitioners and members of the judiciary have expressed that these settlements rarely yield genuine benefits for stockholders and threaten the loss of potentially valuable claims that have not been investigated with rigor. I also discuss some of the particular challenges the Court faces in evaluating disclosure settlements through a non-adversarial process.

Based on these considerations, this opinion offers the Court's perspective that disclosure claims arising in deal litigation optimally should be adjudicated outside of the context of a proposed settlement so that the Court's consideration of the merits of the disclosure claims can occur in an adversarial process without the defendants' desire to obtain an often overly broad release hanging in the balance. The opinion further explains that, to the extent that litigants continue to pursue disclosure settlements, they can expect that the Court will be increasingly vigilant in scrutinizing the "give" and the "get" of such settlements to ensure that they are genuinely fair and reasonable to the absent class **[**5]** members.

I. BACKGROUND

The facts recited in this opinion are based on the allegations of the Verified Amended Class Action Complaint in C.A. No. 10022-CB, which was designated as the operative complaint in the consolidation action; the brief plaintiffs submitted in support of their motion for a preliminary injunction; and the briefs and affidavits submitted in connection with the proposed settlement. Because of the posture of the litigation, the recited facts do not represent factual findings, but rather the **[*888]** record as it was presented for the Court to evaluate the proposed settlement.

A. The Parties

Defendant Trulia, Inc., a Delaware corporation, is an online provider of information on homes for purchase or for rent in the United States. Individual defendants Pete Flint, Robert Moles, Theresia Gouw, Gregory Waldorf, Sami Inkinen, Erik Bardman, and Steve Hafner were members of Trulia's board of directors when the merger was approved.

Defendant Zillow, Inc., a Washington corporation, is a real estate marketplace that helps home buyers, sellers, landlords and others find and share information about homes. Defendant Zebra Holdco, Inc. ("Holdco"), now known as Zillow Group, Inc., is a Washington **[**6]** corporation that was formed to facilitate the merger at issue and is now the parent company of Zillow and Trulia.

Plaintiffs Christopher Shue, Matthew Sciabacucci, Chaile Steinberg, and Robert Collier were Trulia stockholders at all times relevant to this action.

B. The Announcement of the Merger and the Litigation

On July 28, 2014, Trulia and Zillow announced that they had entered into a definitive merger agreement under which Zillow would acquire Trulia for approximately $3.5 billion in stock.[1] The transaction was structured to include two successive stock-for-stock mergers whereby separate subsidiaries of Holdco would acquire both Trulia and Zillow. After these mergers, Trulia and Zillow would exist as wholly-owned subsidiaries of Holdco, and the former stockholders of Trulia and Zillow would receive, respectively, approximately 33% and 67% of the outstanding shares of Holdco.

After the merger was announced, the four plaintiffs filed class **[**7]** action complaints challenging the Trulia merger and seeking to enjoin it. Each of the complaints alleged essentially identical claims: that the individual defendants had breached their fiduciary duties, and that Zillow, Trulia, and Holdco aided and abetted those breaches.

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[1] By closing, the transaction value had fallen to $2.5 billion, based on the value of Zillow stock at the time. *See Zillow Completes Acquisition of Trulia for $2.5 Billion in Stock; Forms "Zillow Group" Family of Brands*, (Feb. 17, 2015), *available at http://zillow.mediaroom.com/2015-02-17-Zillow-Completes-Acquisition-of-Trulia-for-2-5-Billion-in-Stock-Forms-Zillow-Group-Family-of-Brands* .

On September 11, 2014, Holdco filed a registration statement containing Trulia and Zillow's preliminary joint proxy statement with the United States Securities and Exchange Commission. On September 24, 2014, one of the four plaintiffs filed a motion for expedited proceedings and for a preliminary injunction.

On October 13, 2014, the Court granted an unopposed motion to consolidate the four cases into one action and to appoint lead counsel. On October 14, at 10:37 a.m., plaintiffs filed a motion to expedite the proceedings in the newly consolidated case. The Court never heard the motion, however, because the parties promptly agreed on an expedited schedule, which they documented in a stipulated case schedule filed on October 14 at 12:12 p.m., less than two hours after the motion to expedite was filed.

Over the next few weeks, plaintiffs reviewed documents produced by defendants and deposed one director of Trulia (Chairman, **[**8]** CEO, and co-founder Pete Flint) and a banker from J.P. Morgan Securities **[*889]** LLC, Trulia's financial advisor in the transaction.

On November 14, 2014, plaintiffs filed a brief in support of their motion for a preliminary injunction. In that brief, plaintiffs asserted that the individual defendants had breached their fiduciary duties by "failing to obtain the highest exchange ratio available for the Company's stockholders in a single-bidder process, failing to properly value the Company, agreeing to preclusive provisions in the Merger Agreement that impede the Board's ability to consider and accept superior proposals, and disseminating materially false and misleading disclosures to the Company's stockholders . . . ."[2] The discussion of the merits in that brief, however, focused only on disclosure issues. Plaintiffs provided no argument in support of any other aspect of their claims.

On November 17, Trulia and Zillow filed a definitive joint proxy statement regarding the transaction on Schedule 14A (the "Proxy").

C. The Parties Reach a Settlement

On November 19, 2014, the parties entered into a Memorandum of Understanding detailing an agreement-in-principle **[**9]** to settle the litigation for certain disclosures to supplement those contained in the Proxy, subject to confirmatory discovery. The same day, Trulia filed a Form 8-K with the Securities and Exchange Commission containing the disclosures (the "Supplemental Disclosures").

On December 18, 2014, Trulia and Zillow held special meetings of stockholders at which each company's stockholders voted on and approved the transaction. Trulia's stockholders overwhelmingly supported the transaction. Of the Trulia shares that voted, 99.15% voted in favor of the transaction. In absolute terms, 79.52% of Trulia's outstanding shares voted in favor the transaction.[3]

On February 10, 2015, plaintiffs conducted a confirmatory deposition of a second Trulia director, Gregory Waldorf. On February 17, 2015, the transaction closed.

On June 10, 2015, the parties executed a Stipulation and Agreement of Compromise, Settlement, and Release (the "Stipulation") in support of a proposed settlement reiterating the terms of the Memorandum of Understanding. In the Stipulation, the parties agreed to seek certification of a class consisting of all Trulia stockholders from **[**10]** July 28, 2014 (when the transaction was announced) through February 17, 2015 (when the transaction closed). The Stipulation included an extremely broad release encompassing, among other things, "Unknown Claims"[4] and claims

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[2] Pls.' Op. Br. Supp. Mot. Prelim. Inj. 2.

[3] Trulia, Inc., Current Report (Form 8-K) (Dec. 18, 2014).

[4] "Unknown Claims" were defined as "any claim that a releasing person does not know or suspect exists in his, her or its favor at the time of the release of the Released Claims as against the Released Persons, and at the time of Defendants' release of Plaintiffs, each and all Class Members, and all Plaintiffs' counsel from all claims as set forth in Paragraph 9, including without limitation those claims which, if known, might have affected the decision to enter into the Settlement." Stipulation ¶ 10.

"arising under federal, state, foreign, statutory, regulatory, common law or other law or rule" held by any member of the proposed class relating in any conceivable way to the transaction.[5] The Stipulation further provided that plaintiffs' counsel intended to seek an award of attorneys' fees and expenses **[*890]** not to exceed $375,000, which defendants agreed not to oppose.

Beginning on July 17, 2015, Trulia disseminated notices to the proposed class members in accordance **[**11]** with a scheduling order the Court had entered.

D. Procedural Posture

On September 16, 2015, after receiving a brief and an affidavit from plaintiffs advocating for approval of the proposed settlement, I held a hearing to consider the fairness of the terms of the proposed settlement. Defendants made no submissions concerning the proposed settlement before the hearing, and no stockholder filed an objection to it. After the hearing, I took the request to approve the settlement under advisement and asked the parties for supplemental briefing on whether disclosures must meet the legal standard of materiality in order to constitute an adequate benefit to support a settlement, and on the rationale and justification for including "unknown claims" among the claims that would be released by the proposed settlement.

On September 22, 2015, Sean J. Griffith, a professor at Fordham University School of Law who has researched disclosure settlements and objected to them in the past,[6] requested permission to appear as *amicus curiae* in order to submit a brief on the topics for which I requested supplemental briefing. I approved this request on September 23, and the parties submitted their supplemental briefing **[**12]** on October 16.

Along with their supplemental briefing, plaintiffs submitted an affidavit from Timothy J. Meinhart, a managing director of Willamette Management Associates, which provides business valuation and transaction financial advisory services. The affidavit addresses certain concerns about some (but not all) of the disclosures that I raised at the settlement hearing. Plaintiffs and defendants also informed the Court that, following the hearing, the parties had agreed to a revised stipulation with a narrower release.

Specifically, the parties removed "Unknown Claims" and "foreign" claims from the ambit of the release and added a carve-out so that the release would not cover "any claims that arise under the Hart-Scott-Rodino, Sherman, or Clayton Acts, or any other state or federal ***antitrust law***." As revised, the release still encompasses "any claims arising under federal, state, statutory, regulatory, common law, or other law or rule" held by any member of the proposed class relating in any conceivable way to the transaction, with the exception of the carve-out for claims arising under state and federal ***antitrust law***.[7]

II. LEGAL [**13] ANALYSIS

A. Legal Standard

HN2[] Under *Court of Chancery Rule 23*, the Court must approve the dismissal or settlement of a class action.[8] Although Delaware has long favored the voluntary settlement of litigation,[9] the fiduciary character of a class action

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[5] Stipulation ¶ 8.

[6] *See In re Riverbed Tech., 2015 Del. Ch. LEXIS 241, 2015 WL 5458041, at *2*.

[7] Revised Proposed Order and Final J., Oct. 16, 2015.

[8] *See Ct. Ch. R. 23(e)*. *Court of Chancery Rule 23.1(c)* similarly requires Court approval of the dismissal or settlement of derivative actions.

requires the Court to independently examine the fairness of a class action settlement before approving **[*891]** it.[10] "Approval of a class action settlement requires more than a cursory scrutiny by the court of the issues presented."[11] The Court must exercise its own judgment to determine whether the settlement is reasonable and intrinsically fair.[12] In doing so, the Court evaluates not only the claim, possible defenses, and obstacles to its successful prosecution,[13] but also "the reasonableness of the 'give' and the 'get,'"[14] or what the class members receive in exchange for ending the litigation.

Before turning to that analysis here, I pause to discuss some of the dynamics that have led to the proliferation of disclosure settlements[15] and the concerns that have been expressed about this phenomenon, and to offer the Court's perspective on how disclosure claims in deal litigation should **[**14]** be adjudicated in the future.

B. Considerations Involving Disclosure Claims in Deal Litigation

Over two decades ago, Chancellor Allen famously remarked in *Solomon v. Pathe Communications Corporation* that "[i]t is a fact evident to all of those who are familiar with shareholder litigation that surviving a motion to dismiss means, as a practical matter, that economical[ly] rational defendants . . . will settle such claims, often for a peppercorn and a fee."[16] The Chancellor's remarks were not made in the context of a settlement, but they touch **[**15]** upon some of the same dynamics that have fueled disclosure settlements of deal litigation.

Today, the public announcement of virtually every transaction involving the acquisition of a public corporation provokes a flurry of class action lawsuits alleging that the target's directors breached their fiduciary duties by agreeing to sell the corporation for an unfair price. On occasion, although it is relatively infrequent, such litigation has generated meaningful economic benefits for stockholders when, for example, the integrity of a sales process has been corrupted by conflicts of interest on the part of corporate fiduciaries or their advisors.[17] But far too often

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[9] *Rome v. Archer, 41 Del. Ch. 404, 197 A.2d 49, 53 (Del. 1964)*.

[10] *Kahn v. Sullivan, 594 A.2d 48, 58 (Del. 1991)*.

[11] *Rome v. Archer, 197 A.2d at 53*.

[12] *Id.*

[13] *See id.*

[14] ***In re Activision Blizzard, Inc. S'holder Litig., 124 A.3d 1025, 1043 (Del. Ch. 2015)***.

[15] In this Opinion, I use the term "disclosure settlement" to refer to settlements in which the sole or predominant consideration provided to stockholders in exchange for releasing their claims is the dissemination of one or more disclosures to supplement the proxy materials distributed for the purpose of soliciting stockholder approval for a proposed transaction. An example of a disclosure settlement in which the supplemental disclosures would be the predominant but not sole consideration is one that, in addition to supplemental disclosures, includes an insubstantial component of other non-monetary consideration, such as a minor modification to a deal protection measure.

[16] *1995 Del. Ch. LEXIS 46, 1995 WL 250374, at *4 (Del. Ch. Apr. 21, 1995)*, *aff'd*, *672 A.2d 35 (Del. 1996)*.

[17] Some examples of adjudicated cases of this type arising from acquisitions of public corporations include: *In re Rural/Metro Corp. Stockholders Litig., 102 A.3d 205, 263 (Del. Ch. 2014)* (finding after trial that class **[**16]** suffered damages of $91 million, of which the board's financial advisor was liable for 83%, based on aiding and abetting fiduciary breaches in sale of corporation), *aff'd sub nom.* ***RBC Capital Mkts., LLC v. Jervis, 129 A.3d 816, 2015 Del. LEXIS 629, 2015 WL 7721882 (Del. Nov. 30, 2015)***; *In re Dole Food Co., Inc. S'holder Litig., 2015 Del. Ch. LEXIS 223, 2015 WL 5052214, at *47 (Del. Ch. Aug. 27, 2015)* (finding after trial that certain directors were liable for $148 million in damages, based on fiduciary breaches in going-private transaction); *In re Emerging Communs., Inc. S'holders Litig., 2004 Del. Ch. LEXIS 70, 2004 WL 1305745, at *43 (Del. Ch. May 3, 2004)* (finding after trial that certain defendants were liable to stockholders for damages of $27.80 per share for fiduciary

[*892] such litigation serves no useful purpose for stockholders. Instead, it serves only to generate fees for certain lawyers who are regular players in the enterprise of routinely filing hastily drafted complaints on behalf of stockholders on the heels of the public announcement of a deal and settling quickly on terms that yield no monetary compensation to the stockholders they represent.

In such lawsuits, plaintiffs' leverage is the threat of an injunction to prevent a transaction from closing. Faced with that threat, defendants are incentivized to settle quickly in order to mitigate the considerable expense of litigation and the distraction it entails, to achieve closing **[**17]** certainty, and to obtain broad releases as a form of "deal insurance." These incentives are so potent that many defendants self-expedite the litigation by volunteering to produce "core documents" to plaintiffs' counsel, obviating the need for plaintiffs to seek the Court's permission to expedite the proceedings in aid of a preliminary injunction application and thereby avoiding the only gating mechanism (albeit one friendly to plaintiffs[18]) the Court has to screen out frivolous cases and to ensure that its limited resources are used wisely.[19]

Once the litigation is on an expedited track and the prospect of an injunction hearing looms, the most common currency used to procure a settlement is the issuance of supplemental disclosures to the target's stockholders before they are asked to vote on the proposed transaction. The theory behind making these disclosures is that, by having the additional information, stockholders will be better informed when exercising their franchise rights.[20] Given the Court's historical practice of approving disclosure settlements when the additional information is not material, and indeed may be of only minor **[*893]** value to the stockholders,[21] providing supplemental disclosures is a particularly easy "give" for defendants **[**19]** to make in exchange for a release.

Once an agreement-in-principle is struck to settle for supplemental disclosures, the litigation takes on an entirely different, non-adversarial character. Both sides of the caption then share the same interest in obtaining the Court's approval of the settlement.[22] The next step, after notice has been provided to the stockholders, is a hearing in

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breaches in going-private transaction). *See also* *In re Jefferies Grp., Inc. S'holders Litig., 2015 Del. Ch. LEXIS 158, 2015 WL 1414350 (Del. Ch. Mar. 26, 2015)* (ORDER) (approving settlement for $70 million (net of attorneys' fees) to resolve allegations involving conflicts of interest in the sale of Jefferies Group to Leucadia National Corporation); *In re Del Monte Foods Co. S'holder Litig.*, Cons. C.A. No. 6027-VCL (Del. Ch. Dec. 1, 2011) (ORDER) (approving $89 million settlement of stockholder suit alleging fiduciary duty violations in connection with leveraged buy-out).

[18] Stockholder plaintiffs who seek expedition benefit from the most favorable standard available under our law for assessing the merits of a claim—"colorability"—and from the sensible policy of this Court to attempt to resolve disclosure claims before stockholders are asked to vote. *See* *Ortsman v. Green, 2007 Del. Ch. LEXIS 29, 2007 WL 702475, at *2 (Del. Ch. Feb. 28, 2007)* (granting expedited proceedings because disclosure claims were "colorable" and "[o]nly by remedying proxy deficiencies in advance of a vote can irreparable harm be avoided"); *Morton v. Am. Mktg. Indus. Hldgs., Inc., 1995 Del. Ch. LEXIS 162, 1995 WL 1791090, at *2-4 (Del. Ch. Oct. 5, 1995)* (granting expedition because colorability finding did not require a determination of merits or even legal sufficiency of pleadings, and disclosures must be made before stockholder vote rather than after **[**18]** the fact).

[19] Notwithstanding the plaintiff-friendly pleading standard governing a motion to expedite, the Court takes seriously its role to deny expedition in deal litigation when warranted. *See, e.g., In re Rite Aid Corp. S'holders Litig.*, Cons. C.A. No. 11663-CB, at 78-92 (Del. Ch. Jan. 5, 2016) (TRANSCRIPT) (denying motion to expedite); *Sheet Metal Workers Local No. 33 Cleveland Dist. Pension Plan v. URS Corp.*, C.A. No. 9999-CB, at 47-56 (Del. Ch. Aug. 28, 2014) (TRANSCRIPT) (same); *In re Zalicus Inc. S'holder Litig.*, Cons. C.A. No. 9602-CB, at 100-11 (Del. Ch. Jun. 13, 2014) (TRANSCRIPT) (same).

[20] *See* *In re Riverbed Tech., 2015 Del. Ch. LEXIS 241, 2015 WL 5458041, at *4*.

[21] *See, e.g.,* *2015 Del. Ch. LEXIS 241, [WL] at *5* (finding that "a positive result of small therapeutic value to the Class . . . can support . . . a settlement, but only where what is given up is of minimal value"); *In re Dr. Pepper/Seven Up Cos., Inc. S'holders Litig., 1996 Del. Ch. LEXIS 21, 1996 WL 74214, at *4 (Del. Ch. Feb. 9, 1996)* ("[E]ven a meager settlement that affords some benefit for stockholders is adequate to support its approval."), *aff'd*, ***683 A.2d 58 (Del. 1996)*** (TABLE).

which the Court must evaluate the fairness of the proposed settlement. Significantly, in advance of such hearings, the Court receives briefs and affidavits from plaintiffs extolling the value of the supplemental disclosures and advocating for approval of the proposed settlement, but rarely receives any submissions expressing an opposing viewpoint.[23]

Although the Court commonly evaluates the proposed settlement of stockholder class and derivative actions without the benefit of hearing opposing viewpoints, disclosure settlements present some unique challenges. It is one thing for the Court to judge the fairness of a settlement, even in a non-adversarial context, when there has been significant **[**21]** discovery or meaningful motion practice to inform the Court's evaluation. It is quite another to do so when little or no motion practice has occurred and the discovery record is sparse, as is typically the case in an expedited deal litigation leading to an equally expedited resolution based on supplemental disclosures before the transaction closes. In this case, for example, no motions were decided (not even a motion to expedite), and discovery was limited to the production of less than 3,000 pages of documents and the taking of three depositions, two of which were taken before the parties agreed in principle to settle and one of which was a "confirmatory" deposition taken thereafter.[24]

[*894] The lack of an adversarial process often requires that the Court become essentially a forensic examiner of proxy materials so that it can play devil's advocate in probing the value of the "get" for stockholders in a proposed disclosure settlement. Consider the following example. During discovery, plaintiffs will typically receive copies of board presentations made by financial advisors who ultimately opine on the fairness of the transaction from a financial point of view. It is all too common for a plaintiff to identify and obtain supplemental disclosure of a laundry list of minutiae in a financial advisor's board presentation that does not appear in the summary of the advisor's analysis in the proxy materials—summaries that commonly run ten or more single-spaced pages in the first instance. **[**23]** Given that the newly added pieces of information were, by definition, missing from the original proxy, it is not difficult for an advocate to make a superficially persuasive argument that it is better for stockholders to have more information rather than less. In an adversarial process, defendants, armed with the help of their financial advisors, would be quick to contextualize the omissions and point out why the missing details are immaterial (and may even be unhelpful) given the summary of the advisor's analysis already disclosed in the proxy. In the settlement context, however, it falls to law-trained judges to attempt to perform this function, however crudely, as best they can.

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[22] *See* *Ginsburg v. Phila. Stock Exch., Inc., 2007 Del. Ch. LEXIS 142, 2007 WL 2982238, at *1 (Del. Ch. Oct. 9, 2007)* ("When parties have reached a negotiated settlement, the litigation enters a new and unusual phase where former adversaries join forces to convince the court that **[**20]** their settlement is fair and appropriate.").

[23] *See* *In re Caremark Int'l Inc. Deriv. Litig., 698 A.2d 959, 961 (Del. Ch. 1996)* (Allen, C.) ("[I]n most instances, the court is constrained by the absence of a truly adversarial process, since inevitably both sides support the settlement and legally assisted objectors are rare."); Browning Jeffries, *The Plaintiffs' Lawyer's Transaction Tax: The New Cost of Doing Business in Public Company Deals, 11 Berkeley Bus. L.J. 55, 59, 89 (2014)* ("[D]ue to the agency costs involved in class action litigation and the lack of motivation of any one plaintiff shareholder to monitor class counsel, these fee awards are rarely objected to . . . ."). In the rare case in which objectors are present, the question necessarily becomes whether the objectors represent the interests of the class or instead represent yet another set of interests. *See* Sean J. Griffith & Alexandra D. Lahav, *The Market for Preclusion in Merger Litigation*, *66 Vand. L. Rev. 1053, 1084 n.142, 1122 (2013)* (noting that in some cases objectors may also be hold-outs demanding a piece of the settlement value).

[24] "Confirmatory" discovery is discovery taken after an agreement-in-principle to settle a case has been reached. Theoretically, it is an opportunity for plaintiffs' counsel to "confirm" that the settlement terms are reasonable—that is, to probe further the strengths and weaknesses of the claims relative to the consideration for the proposed settlement. In reality, given that plaintiffs' counsel already have resigned themselves to settle on certain terms, confirmatory discovery rarely leads to a renunciation **[**22]** of the proposed settlement and, instead, engenders activity more reflective of "going through the motions." *See* *Brinckerhoff v. Tex. E. Prods. Pipeline Co., LLC, 986 A.2d 370, 385 (Del. Ch. 2010)* (questioning quality of confirmatory discovery process) ("Confirmatory discovery performances ranging from the diffident to the feckless impair, rather than inspire, judicial confidence."); *In re Coleman Co., Inc. S'holders Litig., 750 A.2d 1202, 1212 (Del. Ch. 1999)* ("[C]onfirmatory discovery in settlement situations is hardly the equivalent of adversarial pre-trial discovery.").

It is beyond doubt in my view that the dynamics described above, in particular the Court's willingness in the past to approve disclosure settlements of marginal value and to routinely grant broad releases to defendants and six-figure fees to plaintiffs' counsel in the process,[25] have caused deal litigation to explode in the United States beyond the realm of reason. In just the past decade, the percentage of transactions of $100 million or more that have triggered stockholder litigation in this country has more **[**24]** than doubled, from 39.3% in 2005 to a peak of 94.9% in 2014.[26] Only recently has the percentage decreased, falling to 87.7% in 2015 due to a decline near the end of the year.[27] In Delaware, the percentage of such cases settled solely on the basis of supplemental disclosures grew significantly from 45.4% in 2005 to a high of 76.0% in 2012, and only recently has seen some decline.[28] The increased prevalence of deal litigation and **[*895]** disclosure settlements has drawn the attention of academics, practitioners, and the judiciary.

Scholars have criticized disclosure settlements, arguing that non-material supplemental disclosures provide no benefit to stockholders and amount to little more than deal "rents" or "taxes," while the liability releases that accompany settlements threaten the loss of potentially valuable claims related to the transaction in question or other matters falling within the literal scope of overly broad releases.[29] One recent study provides empirical data suggesting that supplemental disclosures make no difference in stockholder voting, and thus provide no benefit that could serve as consideration for a settlement.[30] Another paper, written by a practitioner, provides examples of cases in which unexplored but valuable claims that almost were released through disclosure settlements later yielded significant recoveries for stockholders.[31] A particularly vivid example is the recently concluded *Rural/Metro* case.[32] In that case, the Court of Chancery initially considered it a "very close call"[33] to reject **[**27]** a disclosure

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[25] *See* *In re Sauer-Danfoss Inc. S'holders Litig., 65 A.3d 1116, 1135-43 (Del. Ch. 2011)* (discussing disclosure settlements and compiling fee awards in various disclosure-only cases).

[26] Matthew D. Cain & Steven Davidoff Solomon, *Takeover Litigation in 2015* 2 (Jan. 14, 2016), *available at* *http://ssrn.com/abstract*=2715890 . The sample consists of transactions of at least $100 million with publicly traded targets, and includes both Delaware and non-Delaware corporations. Figures for 2015 are preliminary.

[27] *See id.* at 2-3.

[28] *See id.* at 6. The percentage of settlements in Delaware based solely on supplemental disclosures was 63.6% in 2013 and 70.6% in 2014. Figures for 2015 appear to be too preliminary to be meaningful.

[29] *See generally* Jill E. Fisch, Sean J. Griffith & Steven Davidoff Solomon, *Confronting the Peppercorn* ***[**25]*** *Settlement in Merger Litigation: An Empirical Analysis and a Proposal for Reform*, *93 Tex. L. Rev. 557 (2015)* (proposing that state courts reject disclosure settlements and shift disclosure policing to the federal securities laws). *See also* J. Travis Laster, *A Milder Prescription for the Peppercorn Settlement Problem in Merger Litigation*, 93 Tex. L. Rev. See Also 129 (2015) (responding to the Fisch, Griffith & Solomon article, acknowledging similar concerns regarding disclosure settlements, and proposing solutions involving greater judicial scrutiny of claims at motion to expedite stage); Matthew D. Cain & Steven Davidoff Solomon, *A Great Game: The Dynamics of State Competition and Litigation*, *100 Iowa L. Rev. 465 (2015)* (examining merger litigation data and theorizing that states seeking to attract corporate litigation award higher fees and dismiss fewer cases); Jeffries, *supra* note 23 (criticizing disclosure-only settlements and suggesting legislative responses); Griffith & Lahav, *supra* note 23 (discussing the value for defendants of receiving release through disclosure-only settlements and the potential usefulness of multi-jurisdiction litigation). *But see* Phillip R. Sumpter, *Adjusting Attorneys' Fee Awards: The Delaware Court of Chancery's Answer to Incentivizing Meritorious Disclosure-Only* ***[**26]*** *Settlements*, *15 U. Pa. J. Bus. L. 669 (2013)* (arguing that disclosure-only settlements can have value and discussing the concept of awarding of varying levels of fees to encourage or discourage different types of disclosure settlements).

[30] *Fisch, Griffith & Solomon, supra note 29, at 582-87*.

[31] *See generally* Joel Edan Friedlander, *How* Rural/Metro *Exposes the Systemic Problem of Disclosure Settlements* (U. Pa. L. Sch. Inst. for L. and Econ. Res. Paper No. 15-40, Draft Dec. 17, 2015), *available at* *http://ssrn.com/abstract*=2689877 .

settlement that would have released claims which subsequently yielded stockholders over $100 million, mostly from a post-trial judgment, after new counsel took over the case.[34]

Members of this Court also have voiced their concerns over the deal settlement process, expressing doubts about the value of relief obtained in disclosure settlements, and explaining their reservations over the **[*896]** breadth of the releases sought and the lack of any meaningful investigation of claims proposed to be released.[35] Judges outside of Delaware have expressed similar concerns.[36]

Given the rapid proliferation and current ubiquity of deal litigation, the mounting evidence that supplemental disclosures rarely yield genuine benefits for stockholders, the risk of stockholders losing potentially valuable claims that have not been investigated with rigor, and the challenges of assessing disclosure claims in a non-adversarial settlement process, the Court's historical predisposition toward approving disclosure settlements needs to be reexamined. In the Court's opinion, the optimal means by which disclosure claims in deal litigation should be adjudicated is outside the context of a proposed settlement so that the Court's consideration of the merits of the disclosure claims can occur in an adversarial process where the defendants' desire to obtain a release does not hang in the balance.

Outside the settlement context, **[**30]** disclosure claims may be subjected to judicial review in at least two ways. One is in the context of a preliminary injunction motion, in which case the adversarial process would remain intact and plaintiffs would have the burden to demonstrate on the merits a reasonable likelihood of proving that "the alleged omission or misrepresentation is material."[37] In other words, plaintiffs would bear the burden of showing "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."[38]

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[32] *In re Rural/Metro Corp., 102 A.3d 205*, *aff'd sub nom.* ***RBC Capital Mkts., LLC v. Jervis, 129 A.3d 816, 2015 Del. LEXIS 629, 2015 WL 7721882 (Del. Nov. 30, 2015)***.

[33] *In re Rural/Metro Corp. S'holders Litig.*, Cons. C.A. No. 6350-VCL, at 134 (Del. Ch. Jan. 17, 2012) (TRANSCRIPT).

[34] *See , supra* note 31, at 16-22. The paper also examines litigation over the sale of Prime Hospitality Corporation, which settled for $25 million after a disclosure settlement was rejected and new counsel was appointed to litigate the case. *See id.* at 11-14.

[35] *See, e.g., Acevedo v. Aeroflex Hldg. Corp.*, C.A. No. 9730-VCL, at 60-79 (Del. Ch. July 8, 2015) (TRANSCRIPT) (rejecting settlement because relief **[**28]** obtained was insufficient to support a broad release, and giving the option to reapply with a release tailored only to the Delaware disclosure and fiduciary claims investigated by plaintiffs); *In re Riverbed Tech., 2015 Del. Ch. LEXIS 241, 2015 WL 5458041, at *3-6* (approving settlement, but expressing concerns over agency problems, lack of adversarial presentation, limited benefit conferred by disclosures, and noting that broad releases may not be approved going forward); *In re Intermune, Inc. S'holder Litig.*, C.A. No. 10086-VCN (Del. Ch. July 8, 2015) (TRANSCRIPT) (deferring decision on a disclosure settlement and questioning whether the releases should be limited only to disclosure claims) (settlement later approved in C.A. No. 10086-VCN (Del. Ch. Dec. 29, 2015) (TRANSCRIPT)); *In re TW Telecom, Inc. S'holders Litig.*, C.A. No. 9845-CB (Del. Ch. Aug. 20, 2015) (TRANSCRIPT) (approving a settlement "somewhat reluctantly" while opining that settlements going forward will receive more scrutiny and that all but one disclosure obtained had "no consequential value").

[36] *See, e.g.,* ***In re Allied Healthcare S'holder Litig., 49 Misc. 3d 1210[A], 26 N.Y.S.3d 212, 2015 NY Slip Op 51552[U], 2015 WL 6499467, at *2 (N.Y. Sup. Ct. Oct. 23, 2015)*** (rejecting a settlement and expressing concern that "in the area of derivative litigation, a culture has developed that results in cases of relatively worthless settlements (derivative **[**29]** actions are rarely tried to a verdict) that discontinue the action (with releases) resulting in the corporate defendants not opposing an agreed upon legal fee to class counsel"); ***City Trading Fund v. Nye, 46 Misc. 3d 1206[A], 9 N.Y.S.3d 592, 2015 NY Slip Op 50008[U], 2015 WL 93894 (N.Y. Sup. Ct. Jan. 7, 2015)*** (rejecting a settlement the court regarded as exceptionally frivolous and noting that the nature of "merger tax suits" incentivizes settlement regardless of a case's frivolity).

[37] *Gantler v. Stephens, 965 A.2d 695, 710 (Del. 2009)*.

[38] *Id.* (quoting *Arnold v. Soc'y for Sav. Bancorp, Inc., 650 A.2d 1270, 1277 (Del. 1994))*.

A second way is when plaintiffs' counsel apply to the Court for an award of attorneys' fees after defendants voluntarily decide to supplement their proxy materials by making one or more of the disclosures sought by plaintiffs, thereby mooting some **[*897]** or all of their claims. In that scenario, where securing a release is not at issue, defendants are incentivized to oppose fee requests they view as excessive.[39] Hence, the adversarial process would remain in place and assist the Court in its evaluation of the nature of the benefit conferred (*i.e.*, the value of the supplemental **[**31]** disclosures) for purposes of determining the reasonableness of the requested fee.

In either of these scenarios, to the extent fiduciary duty claims challenging the sales process remain in the case, they may be amenable to dismissal. Harkening back to Chancellor Allen's words in *Solomon*, the Court would be cognizant of the need to "apply the pleading test under *Rule 12* with special care" in stockholder litigation because "the risk of strike suits means that too much turns on the mere survival of the complaint."[40] In that regard, both the litigants and the Court are aided today by thirty years of jurisprudence that now exists interpreting the principles enunciated in *Unocal* and *Revlon* that often are central to reviewing fiduciary conduct in deal litigation.[41]

The preferred scenario of a mootness dismissal appears to be catching on. In the wake of the Court's increasing scrutiny of disclosure settlements, the Court has observed an increase in the filing of stipulations in which, after disclosure claims have been mooted by defendants electing to supplement their proxy materials, plaintiffs dismiss their actions without prejudice to the other members of the putative class (which has not yet been certified) and the Court reserves jurisdiction solely to hear a mootness fee application.[42] From the Court's perspective, this arrangement provides a logical and sensible framework for concluding the litigation. After being afforded some discovery **[**33]** to probe the merits of a fiduciary challenge to the substance of the board's decision to approve the transaction in question, plaintiffs can exit the litigation without needing to expend additional resources (or causing the Court and other parties to expend further resources) on dismissal motion practice after the transaction has closed. Although defendants will not have obtained a formal release, the filing of a stipulation of dismissal **[*898]** likely represents the end of fiduciary challenges over the transaction as a practical matter.

In the mootness fee scenario, the parties also have the option to resolve the fee application privately without obtaining Court approval. **[**34]** Twenty years ago, Chancellor Allen acknowledged the right of a corporation's directors to exercise business judgment to expend corporate funds (typically funds of the acquirer, who assumes the expense of defending the litigation after the transaction closes) to resolve an application for attorneys' fees when the litigation has become moot, with the caveat that notice must be provided to the stockholders to protect

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[39] If defendants do not oppose a mootness fee application, then the Court presumably would not have the benefit of any opposing position when considering the application unless an objector appeared. But, in that case, the Court would have some indication of the reasonableness of the fee request.

[40] *1995 Del. Ch. LEXIS 46, 1995 WL 250374, at *4*.

[41] That jurisprudence includes the Delaware Supreme Court's recent express confirmation that "the business judgment rule is invoked as the appropriate standard **[**32]** of review for a post-closing damages action when a merger that is not subject to the entire fairness standard of review has been approved by a fully informed, uncoerced majority of the disinterested stockholders." ***Corwin v. KKR Fin. Hldgs. LLC, 125 A.3d 304, 305-06 (Del. 2015)***.

In this case, because the disputed transaction involved a stock-for-stock merger of widely held, publicly traded corporations, plaintiffs' claims presumably would not benefit from the enhanced scrutiny of *Revlon* and instead would need to overcome the business judgment presumption. *Paramount Commc'ns, Inc. v. QVC Network, Inc., 637 A.2d 34, 46-47 (Del. 1994)* (quoting *Paramount Communications Inc. v. Time Inc., 1989 Del. Ch. LEXIS 77, 1989 WL 79880, at *23 (Del. Ch. July 14, 1989)*, *aff'd*, *571 A.2d 1140 (Del. 1989)*).

[42] *See, e.g., In re Family Dollar Stores, Inc. S'holder Litig.*, C.A. No. 9985-CB (Del. Ch. Aug. 4, 2015) (ORDER) (dismissing case with prejudice to plaintiffs and without prejudice to class, where supplemental disclosures had mooted certain claims, and setting schedule for mootness fee application); *In re Zalicus, Inc. S'holder Litig.*, C.A. No. 9602-CB (Del. Ch. Nov. 12, 2014) (ORDER) (dismissing action without prejudice after defendants had mooted certain disclosure claims, and setting schedule for mootness fee application).

against "the risk of buy off" of plaintiffs' counsel.[43] As the Court recently stated, "notice is appropriate because it provides the information necessary for an interested person to object to the use of corporate funds, such as by 'challeng[ing] the fee payment as waste in a separate litigation,' if the circumstances warrant."[44] In other words, notice to stockholders is designed to guard against potential abuses in the private resolution of fee demands for mooted representative actions. With that protection in place, the Court has accommodated the use of the private resolution procedure on several recent occasions and reiterates here the propriety of proceeding in that fashion.[45]

Returning to the historically trodden but suboptimal path of seeking to resolve disclosure claims in deal litigation through a Court-approved settlement, practitioners should expect that the Court will continue to be increasingly vigilant in applying its independent judgment to its case-by-case assessment of the reasonableness of the "give" and "get" of such settlements in light of the concerns discussed above. To be more specific, practitioners should expect that disclosure settlements are likely to be met with continued disfavor in the future unless the supplemental disclosures address a plainly material misrepresentation or omission, and the subject matter of the proposed release is narrowly circumscribed to encompass nothing more than disclosure claims and fiduciary duty claims concerning the sale process, if the record shows that such claims have been investigated sufficiently.[46] In using the term "plainly material," I mean that it should not be a close call that the supplemental **[**36]** information is material as that term is defined under Delaware law. Where the **[*899]** supplemental information is not plainly material, it may be appropriate for the Court to appoint an *amicus curiae* to assist the Court in its evaluation of the alleged benefits of the supplemental disclosures, given the challenges posed by the non-adversarial nature of the typical disclosure settlement hearing.[47]

Finally, some have expressed concern that enhanced judicial scrutiny of disclosure settlements could lead plaintiffs to sue fiduciaries of Delaware corporations in other jurisdictions in the hope of finding a forum more hospitable to signing off on settlements of no genuine value. It is within the power of a Delaware corporation to enact a forum

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[43] *In re Advanced Mammography Sys., Inc. S'holders Litig., 1996 Del. Ch. LEXIS 132, 1996 WL 633409, at *1 (Del. Ch. Oct. 30, 1996)*; *see also* *In re Cellular Communs. Int'l, Inc. S'holders Litig., 752 A.2d 1185, 1188 (Del. Ch. 2000)*.

[44] *In re Zalicus, Inc. S'holders Litig., 2015 Del. Ch. LEXIS 15, 2015 WL 226109, at *2 (Del. Ch. Jan. 16, 2015)* (quoting *Hack v. Learning Co., 1996 Del. Ch. LEXIS 138, 1996 WL 633306, at *2 (Del. Ch. Oct. 29, 1996)*).

[45] *See, e.g.,* *Swomley v. Schlecht, 2015 Del. Ch. LEXIS 58, 2015 WL 1186126, at *1-2 (Del. Ch. Mar. 12, 2015)* (setting forth class notice procedure for mootness fee, after defendants mooted **[**35]** certain disclosure claims and successfully moved to dismiss rest of case); *In re Zalicus, 2015 Del. Ch. LEXIS 15, 2015 WL 226109, at *1-2* (supporting private mootness fee resolution procedure while requiring that adequate notice be provided to stockholders); *Astex Pharms., Inc. S'holders Litig., 2014 Del. Ch. LEXIS 153, 2014 WL 4180342, at *1-2 (Del. Ch. Aug. 25, 2014)* (same).

[46] In contrast to the settlement context, the Court does not need to weigh the "get" of the supplemental disclosures against the "give" of a release when determining whether to grant an award of fees in the mootness fee scenario discussed above. Accordingly, an award of fees in the mootness fee scenario may be appropriate for supplemental disclosures of less significance than would be necessary to sustain approval of a settlement. The amount of the fee in the mootness scenario, however, would be commensurate with the value of the benefit conferred. Thus, for example, a supplemental disclosure of nominal value would warrant only a nominal fee award.

[47] *See* *Hoffman v. Dann, 42 Del. Ch. 123, 205 A.2d 343, 345 (Del. 1964)* (noting that "the Chancellor appointed an *amicus curiae* to report to him on the relevant issues to be tendered at the hearing on the proposed settlement, **[**37]** and as to proof which would be of assistance to him in passing on the fairness of the settlement."). The costs of the *amicus curiae* may be taxed to the parties, as appropriate, in the Court's discretion. *See* 3B C.J.S. Amicus Curiae § 6 ("Where the court appoints an amicus curiae who renders services which prove beneficial to the solution of the question presented, the court may properly award compensation and direct it to be paid by the party responsible for the situation that prompted the court to make the appointment."). *Cf.* *Chapin v. Benwood Found., Inc., 1977 Del. Ch. LEXIS 180, 1977 WL 2583, at *1 (Del. Ch. June 28, 1977)* (describing appointment of individual trustee defendant as *amicus curiae* with costs paid by defendant corporation, as agreed by the parties). Scholars have proposed a similar solution in which the Court may "appoint an objector as a kind of guardian ad litem for the class." *See* *Griffith & Lahav, supra note 23, at 1122 n.309* (compiling sources for proposal).

selection **[**38]** bylaw to address this concern.[48] In any event, it is the Court's opinion, based on its extensive experience in adjudicating cases of this nature, that the historical predisposition that has been shown towards approving disclosure settlements must evolve for the reasons explained above. We hope and trust that our sister courts will reach the same conclusion if confronted with the issue.

With the foregoing considerations in mind, I consider next the "give" and the "get" of the proposed settlement in this case.

C. The Supplemental Disclosures Are not Material and Provided no Meaningful Benefit to Stockholders

HN3[] Under Delaware law, when directors solicit stockholder action, they must "disclose fully and fairly all material information within the board's control."[49] Delaware has adopted the standard of materiality used under the federal securities laws. Information is material "if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote."[50] In other words, information is material if, from the perspective of a reasonable stockholder, there is a substantial likelihood that it "significantly **[**39]** alter[s] the 'total mix' of information made available."[51]

Here, the joint Proxy that Trulia and Zillow stockholders received in advance of their respective stockholders' meetings to consider whether to approve the proposed **[*900]** transaction ran 224 pages in length, excluding annexes. It contained extensive discussion concerning, among other things, the background of the mergers, each board's reasons for recommending approval of the proposed transaction, prospective financial information concerning the companies that had been reviewed by their respective boards and financial advisors, and explanations of the opinions of each company's financial advisor. In the case of Trulia, the opinion of J.P. Morgan was summarized in ten single-spaced pages.

The Supplemental Disclosures plaintiffs obtained in this case solely concern the section of the Proxy summarizing J.P. Morgan's financial analysis, which the Trulia board cited as one of the factors it considered in deciding to recommend approval of the proposed merger.[52] Specifically, these disclosures provided additional details concerning: (1) certain synergy numbers in J.P. Morgan's value creation analysis; (2) selected **[**40]** comparable transaction multiples; (3) selected public trading multiples; and (4) implied terminal EBITDA multiples for a relative discounted cash flow analysis.

Relevant to considering the materiality of information disclosed in this section of the Proxy, then-Vice Chancellor Strine observed in *In re Pure Resources, Inc. Shareholders Litigation* that there were "conflicting impulses" in Delaware case law about whether, when seeking stockholder action, directors must disclose "investment banker analyses in circumstances in which the bankers' views about value have been cited as justifying the recommendation of the board."[53] The Court held that, ***HN4***[] under Delaware law, when the board relies on the advice of a financial advisor in making a decision that requires stockholder action, those stockholders are entitled to

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[48] *See* *Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 963 (Del. Ch. 2013)* (upholding statutory validity of forum selection bylaw).

[49] *Stroud v. Grace, 606 A.2d 75, 84 (Del. 1992)*.

[50] *Rosenblatt v. Getty Oil Co., 493 A.2d 929, 944 (Del. 1985)* (adopting materiality standard of *TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449, 96 S. Ct. 2126, 48 L. Ed. 2d 757 (1976))*.

[51] *Arnold v. Soc'y for Sav. Bancorp, 650 A.2d 1270 at 1277*.

[52] Proxy at 118.

[53] *808 A.2d 421, 449 (Del. Ch. 2002)* (discussing, **[**41]** among other decisions, *Skeen v. Jo-Ann Stores, Inc., 750 A.2d 1170 (Del. 2000)* and *McMullin v. Beran, 765 A.2d 910 (Del. 2000))*.

receive in the proxy statement "a fair summary of the substantive work performed by the investment bankers upon whose advice the recommendations of their board as to how to vote on a merger or tender rely."[54] This "fair summary" standard has been a guiding principle for this Court in considering proxy disclosures concerning the work of financial advisors for more than a decade.[55]

A fair summary, however, is a *summary*. By definition, it need not contain all information underlying the financial advisor's opinion or contained in its report to the board.[56] Indeed, this Court has held **[*901]** that the summary does not need to provide sufficient data to allow the stockholders to perform their own independent valuation.[57] The essence of a fair summary is not a cornucopia of financial data, but rather an accurate description of the advisor's methodology and key assumptions.[58] In my view, disclosures that provide extraneous details do not contribute to a fair summary and do not add value for stockholders.[59]

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[54] *Id.*

[55] *See, e.g.,* In re Netsmart Techs., Inc. S'holders Litig., 924 A.2d 171, 203-04 (Del. Ch. 2007) ("[W]hen a banker's endorsement of the fairness of a transaction is touted to shareholders, the valuation methods used to arrive at that opinion as well as the key inputs and range of ultimate values generated by those analyses must also be fairly disclosed.").

[56] *See, e.g.,* In re Micromet, Inc. S'holders Litig., 2012 Del. Ch. LEXIS 41, 2012 WL 681785, at *11 (Del. Ch. Feb. 29, 2012) (rejecting claim that the board failed to disclose underlying assumptions and bases for probabilities of success of clinical trial drugs) ("Stockholders are entitled to a fair summary of the substantive work performed by the investment bankers, but Delaware courts have repeatedly **[**42]** held that a board need not disclose specific details of the analysis underlying a financial advisor's opinion.") (internal quotation marks omitted); In re Cogent, Inc. S'holder Litig., 7 A.3d 487, 511 (Del. Ch. 2010) (holding stockholders are entitled to fair summary, but not to minutiae, and rejecting requests for additional disclosures); Ryan v. Lyondell Chem. Co., 2008 Del. Ch. LEXIS 105, 2008 WL 2923427, at *20 & n.120 (Del. Ch. July 29, 2008) (finding that fair summary did not require disclosure of all projections, as long as it disclosed description of valuation exercises, key assumptions, and range of values generated; but noting that the failure to disclose that the financial advisor used a significantly higher WACC in its calculation than management's WACC estimate, even when it was using management's other financial projections, could constitute a disclosure violation), *rev'd on other grounds*, 970 A.2d 235 (Del. 2009). *See also* David P. Simonetti Rollover IRA v. Margolis, 2008 Del. Ch. LEXIS 78, 2008 WL 5048692, at *9-10 (Del. Ch. June 27, 2008) (distinguishing *Pure Resources* as a case in which a proxy statement was deficient because it did not disclose "*any* substantive portions of the bankers' work") (internal quotation marks omitted); In re MONY Grp. Inc. S'holder Litig., 852 A.2d 9, 28 (Del. Ch. 2004) ("The plain meaning of 'summary' belies the Stockholders' interpretation.").

[57] *See* Globis Partners, L.P. v. Plumtree Software, Inc., 2007 Del. Ch. LEXIS 169, 2007 WL 4292024, at *12-13 (Del. Ch. Nov. 30, 2007) (rejecting disclosure claims for various details that may have been helpful in determining accuracy of analysis) ("Delaware law does not **[**43]** require disclosure of all the data underlying a fairness opinion such that a shareholder can make an independent determination of value."); In re Gen. Motors (Hughes) S'holder Litig., 2005 Del. Ch. LEXIS 65, 2005 WL 1089021, at *16 (Del. Ch. May 4, 2005) (rejecting claim for information that would amount to "the raw data behind the advisors' updated summaries") ("A disclosure that does not include all financial data needed to make an independent determination of fair value is not, however, per se misleading or omitting a material fact. The fact that the financial advisors may have considered certain non-disclosed information does not alter this analysis."), *aff'd*, 897 A.2d 162 (Del. 2006).

One important qualification bears mention. ***HN5***[] Although management projections and internal forecasts are not *per se* necessary for a fair summary, this Court has placed special importance on this information because it may contain unique insights into the value of the company that cannot be obtained elsewhere. *See* In re Netsmart Techs., 924 A.2d at 203 (noting that management projections can be important because management can have "meaningful insight into their firms' futures that the market [does] not").

[58] *See* In re 3Com S'holders Litig., 2009 Del. Ch. LEXIS 215, 2009 WL 5173804, at *2-3 (Del. Ch. Dec. 18, 2009) (rejecting claim for omission of financial projections because "an adequate and fair summary of the work performed by [the advisor] [was] included in the proxy"); **[**44]** In re CheckFree Corp. S'holders Litig., 2007 Del. Ch. LEXIS 148, 2007 WL 3262188, at *3 (Del. Ch. Nov. 1, 2007) (distinguishing *Netsmart* and rejecting disclosure claim based on omission of management financial projections, because proxy statement fairly summarized financial advisor's methods and conclusions); In re Pure Res., 808 A.2d

With the foregoing principles in mind, I consider next whether any of the four specific Supplemental Disclosures that plaintiffs obtained here were material or whether they provided any benefit to Trulia's stockholders at all.

1. Synergy Numbers in the Value Creation Analysis

The Supplemental Disclosures provided some additional details in the sections of J.P. Morgan's analysis entitled "Value Creation Analysis — Intrinsic Value Approach" and "Value Creation Analysis — Market-Based Approach." In the "Intrinsic Value Approach" analysis, J.P. Morgan compared the implied equity value derived **[*902]** from its discounted cash flow analysis of Trulia on a standalone basis to **[**45]** Trulia stockholders' pro forma ownership of the implied equity value of the combined company. In the "Market- Based Approach," J.P. Morgan compared the public market equity value of Trulia on a standalone basis to Trulia stockholders' pro forma ownership of the implied equity value of the combined company.

As supplemented, the disclosure concerning the Intrinsic Value Approach reads in relevant part as follows, with the information that was added to the original disclosure in the Proxy appearing in bolded text:

> The pro forma combined company equity value was equal to: (1) the Trulia standalone discounted cash flow value of $2.9 billion, plus (2) the Zillow standalone discounted cash flow value of $6.2 billion, plus (3) $2.2 billion, **representing** the present value of **(a)** Trulia's management expected after-tax synergies **of $2.4 billion**, less **(b)** Trulia's management estimates of **(i)** the one-time costs to achieve such synergies **of $65.0 million** and **(ii)** transaction expenses of **$85 million. The present value of after-tax synergies was based on an estimate of $175.0 million in synergies to be fully realized starting in 2016, extrapolated through 2029 based on assumptions provided by Trulia's [**46] management**.[60]

Plaintiffs argue that the disclosure of the $175 million synergies figure in the quote above was important because it is substantially different from the $100 million in synergies that J.P. Morgan used in the Market-Based Approach, which figure already was disclosed in the Proxy.[61] According to plaintiffs, "[h]ad [stockholders] initially known that the market-based approach analysis was skewed downward by using lower synergies numbers, their view as to the resulting implied value and reliability of [J.P. Morgan's] analysis may have changed appreciably."[62] There are three fundamental problems with this argument.

First, although plaintiffs question why J.P. Morgan used two different synergies figures in two different analyses, they provide no explanation as to why doing so would be inappropriate. To the contrary, it seems logical that an intrinsic value approach (which is based on a comparison derived from a discounted cash flow analysis) would use synergies based on long-term management projections, while a market-based approach **[**47]** (which is based on a comparison to the public market equity value of Trulia) would use synergies based on what would be publicly announced to investors. Regardless, the Proxy accurately disclosed which synergies assumptions the financial advisor deemed appropriate to use in each analysis.[63]

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at 449 (noting in fair summary discussion that stockholders would find it material to know the advisor's basic valuation exercises, key assumptions of those exercises, and range of values produced).

[59] *See In re PAETEC Hldg. Corp. S'holders Litig., 2013 Del. Ch. LEXIS 72, 2013 WL 1110811, at *8 (Del. Ch. Mar. 19, 2013)* (citing *In re Pure Res., 808 A.2d at 449*) (declining to award settlement fees for disclosures that "provide a level of detail beyond what the law of Delaware requires").

[60] Supplemental Disclosures at 5-6.

[61] Pls.' Br. Supp. Proposed Settlement at 23 (citing Proxy at 103 (noting that the synergies "are expected to be at least $100 million in annualized cost savings by 2016")).

[62] *Id.* at 23-24.

[63] Proxy at 130, 132.

Second, the $175 million synergies figure that plaintiffs consider so important was not new information. It already was disclosed in the Proxy, which contained the following table providing information about management's synergies expectations:[64]

> **[*903]** The following table presents summary estimated synergies that Trulia's management also prepared in respect of the combined company following the completion of the mergers for the calendar years ending 2014 through 2024 in connection with Trulia's evaluation of the mergers.

	Trulia Management Estimated Synergies (in millions, unaudited)										
	2014E	2015E	2016E	2017E	2018E	2019E	2020E	2021E	2022E	2023E	2024E
Total Operating Synergies (1)	$—	$23	$175	$225	$285	$349	$416	$480	$535	$574	$594

> (1) *"Total Operating Synergies" means the expected EBIT effect of revenue synergies plus the EBIT effect of cost savings/cost avoidance less one-time costs to achieve and retain such synergies. "EBIT" means earnings before interest and taxes. An assumed tax rate of 40% was applied to Total Operating Synergies to determine estimated after-tax synergies. Projected synergies (including costs to* ***[**48]*** *achieve synergies) were prepared by Trulia's management through fiscal year 2016 after discussion with Zillow's management. The management of Trulia provided J.P. Morgan with assumptions relating to projected synergies for fiscal years 2017 through 2024 deemed appropriate by Trulia's management. The management of Trulia then directed J.P. Morgan to use these assumptions in extrapolating such estimated synergies for fiscal years extending beyond those for which the management of Trulia had provided projections. The management of Trulia then reviewed and approved such extrapolation of the synergies*.[65]

Because the $175 million figure for 2016 synergies already appeared in this table, inserting it into a methodological paragraph a few pages later is of no benefit to stockholders. In my view, the supplemental disclosure may have added confusion more than anything else, because it lacks explanatory context and does not clearly describe the nature of management's estimate of synergies that was disclosed in the original Proxy.[66]

Third, plaintiffs exaggerate the significance of juxtaposing the synergy figures used in the Intrinsic Value Approach with those used in the Market-Based Approach. In contrast to the Intrinsic Value Approach, the Market-Based Approach was placed in the end of the summary of the financial advisor's analysis in the "Other Information" section, was termed an "illustrative value creation analysis," and "was presented merely for informational purposes."[67] As plaintiffs concede, a "fair reading" of the Proxy indicates that the Market-Based Approach analysis was less important than the Intrinsic Value Approach analysis.[68] Thus, the notion that the disclosure of the $175 million synergies figure used in one analysis (which already was disclosed **[**50]** in the Proxy) was significant because it was higher than the $100 million figure used in a second, different analysis is based on a false equivalence of the relative importance of the two analyses.

In sum, the disclosures in the original Proxy already provided a fair summary of **[*904]** J.P. Morgan's methodology and assumptions in its two "Value Creation" analyses. Inserting additional minutiae underlying some of the assumptions could not reasonably have been expected to significantly alter the total mix of information and thus was not material. Indeed, in my view, the supplemental information was not even helpful to stockholders.

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[64] Plaintiffs' counsel was not aware that this information already was disclosed in the Proxy until the Court pointed it out at the settlement hearing. *See* Hr'g Tr. 12-15, **[**49]** Sept. 16, 2015. If the proposed settlement had been opposed, this fact presumably would have been brought to the attention of plaintiffs and the Court.

[65] Proxy at 123.

[66] For instance, the Supplemental Disclosures refer to the expected synergies after 2016 as extrapolations through 2029 based on management's assumptions. But the table in the Proxy, produced above, notes that management provided assumptions regarding synergies through 2024. Plaintiffs do not address this ambiguity.

[67] Proxy at 131-32.

[68] Hr'g Tr. 15, Sept. 16, 2015.

2. Individual Company Multiples in the Selected Transaction Analysis

The Proxy disclosed that J.P. Morgan used publicly available information to analyze certain selected precedent transactions involving companies engaged in businesses that J.P. Morgan considered analogous to Trulia's businesses.[69] The Proxy listed the date, the target, and the acquirer for each of 32 transactions that were considered. It also disclosed the low and high forward EBITDA multiples for the group of transactions. Using a narrower range of multiples falling between **[**51]** the low and the high for the group, J.P. Morgan created an estimated range of equity values per share for Trulia common stock. This methodology was summarized in the Proxy as follows:

> J.P. Morgan reviewed the implied firm value for each of the transactions as a multiple of the target company's two-year forward EBITDA immediately preceding the announcement of the transaction. The analysis indicated a range of EBITDA multiples of 8.0x to 69.1x. Based on the result of this analysis and other factors that J.P. Morgan considered appropriate, J.P. Morgan applied an EBITDA multiple range of 10.0x to 23.0x to Trulia's fiscal 2015 Adjusted EBITDA and arrived at an estimated range of equity values per share for Trulia common stock of $17.25-$38.50.[70]

Plaintiffs' grievance is that the Proxy did not provide the relevant multiples for each of the 32 individual transactions. The individual multiples were added in the Supplemental Disclosures for those transactions for which the information was publicly available.[71] The addition of this information made evident that multiples were not publicly available for 15 of the 32 transactions. Plaintiffs argue that, without the Supplemental Disclosures, stockholders **[**52]** would not have realized that J.P. Morgan's analysis did not consider multiples for half of the precedent transactions it listed and was therefore less robust than the Proxy portrayed it to be.

The addition of the individual multiples and the revelation that some were not publicly available could not reasonably have been expected to significantly alter the total mix of information. No argument is made, for example, that having 16 similar transactions was not sufficient to perform the analysis that J.P. Morgan conducted. The discussion in the Proxy, moreover, including the portion quoted above, fairly summarized the methodology and assumptions J.P. Morgan used in conducting that analysis to extrapolate a range of per share values for Trulia stock. A fair summary does not require disclosure of sufficient data to allow stockholders to perform their own valuation.[72]

This conclusion is supported by the Court's decision in *In re MONY Group* ***[*905]*** *Shareholder Litigation*.[73] There, the Court rejected a similar argument that the disclosure of transaction multiples was important **[**53]** because it showed that 25% of the multiples in a set of 71 transactions were unavailable. After noting that the plaintiffs had not argued that the financial advisor did not have sufficient data to perform its analysis, the Court held that the additional information was "immaterial, as a matter of law," and a "triviality [that] could not reasonably be expected to affect the total mix of information."[74] In my view, the addition of similar trivialities was not helpful to Trulia's stockholders here.

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[69] Proxy at 129-30.

[70] *Id.* at 130.

[71] In one case, the publicly available multiple was not included because it exceeded 100x and thus was not considered meaningful. Supplemental Disclosures at 5.

[72] *In re Gen. Motors (Hughes), 2005 Del. Ch. LEXIS 65, 2005 WL 1089021, at *16*.

[73] *852 A.2d 9 (Del. Ch. 2004)*.

[74] *Id. at 28*.

3. Individual Company Multiples in the Selected Public Trading Analysis

The Proxy disclosed the names of sixteen publicly traded companies that J.P. Morgan used to construct ranges of forward EBITDA and revenue multiples for Trulia and Zillow.[75] The Proxy provided these multiples for Trulia and Zillow based on their last unaffected trading day before the announcement of the merger, and provided the median multiples for the three groups into which J.P. Morgan categorized the sixteen comparable companies: "Real Estate," "Software as a Service," and "Other." The Proxy did not include individual multiples for the peer companies.

The Supplemental Disclosures added the revenue and EBITDA multiples for **[**54]** each of the sixteen companies. Citing *In re Celera Corporation Shareholder Litigation*,[76] plaintiffs argue, in essence, that individual company multiples are material *per se*. That is not a fair reading of the case. In *Celera*, the Court commented that "as a matter of best practices, a fair summary of a comparable companies or transactions analysis probably should disclose the market multiples derived for the comparable companies or transactions."[77] Although the decision reluctantly concluded that a multiples disclosure was compensable, it found it "questionable whether [the multiples] altered the 'total mix' of available information" because that information "already was publicly available."[78] The individual company multiples in the Supplemental Disclosures here also were already publicly available.[79]

[*906] More importantly, the original disclosures in *Celera* simply listed the comparable companies with no summary multiple data at all.[80] Although the supplemental disclosures in that case added *summary* data for each of three categories of companies, they did not provide any individual company multiples.[81] In **[**56]** other words, the disclosures in Trulia's Proxy, which provided the median multiples for three different categories of companies that J.P. Morgan considered in its judgment to be similar to Trulia, essentially started at the point where *Celera* ended.[82]

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[75] Proxy at 125-26.

[76] *2012 Del. Ch. LEXIS 66, 2012 WL 1020471 (Del. Ch. Mar. 23, 2012)*, *aff'd in part, rev'd in part on other grounds*, *59 A.3d 418 (Del. 2012)*.

[77] *2012 Del. Ch. LEXIS 66, [WL] at *32*.

[78] *Id.*

[79] Meinhart, plaintiffs' expert, points out that not all stockholders can access all of this information because some of the forward-looking data are available only from proprietary fee-based services. It may be correct that not all of these data would be freely or easily obtainable. A fair summary, however, does not require disclosure of sufficient **[**55]** data to allow stockholders to perform their own valuation. And it certainly does not require disclosure of underlying data that stockholders could obtain on their own, even if doing so would involve some cost or investment of time. Meinhart also opines that the multiples show a high level of dispersion, but he fails to explain how that information undermines J.P. Morgan's analysis or is otherwise informative considering that J.P. Morgan explicitly stated that its analysis was not strictly quantitative in nature. *See* Proxy at 126-27 ("J.P. Morgan did not rely solely on the quantitative results . . . . Based on various judgments concerning relative comparability of each of the selected companies to Trulia, as well its experience with the industry . . . J.P. Morgan selected a range of revenue and Adjusted EBITDA multiples that it believed reflected an appropriate range of multiples applicable to Trulia.").

[80] *See* *In re Celera Corp., 2012 Del. Ch. LEXIS 66, 2012 WL 1020471, at *32*.

[81] *See id.* The supplemental disclosure in *Celera* added more categories of summary data, namely the high, low, median, and mean multiples. This distinction is immaterial. The point of a fair summary is to summarize the methodologies and assumptions the financial advisor used in its analysis. Here, the Proxy fairly summarizes J.P. Morgan's use of multiples in its trading multiples analysis.

[82] Plaintiffs also rely on a transcript ruling in *Turberg v. ArcSight*, C.A. No. 5821-VCL (Del. Ch. Sept. 20, 2011) (TRANSCRIPT). As in *Celera*, the initial description in *ArcSight* did not have any multiples at all. The plaintiff obtained a full description of the analysis comparable to the depiction that would appear in a board book. The Court praised that disclosure in the context of a

[57]** Plaintiffs next argue that the individual multiples are important here because they allow stockholders to compare the selected companies' EBITDA growth rates and EBITDA multiples to Trulia's. This argument is unpersuasive for two reasons. First, basic valuation principles already would suggest to stockholders that higher growth rates should correspond to higher multiples.[83] Second, the Supplemental Disclosures do not contain EBITDA growth rates, so the figures necessary to make that comparison are not present in any event. Thus, plaintiffs have not persuaded me that individual company multiples are material or were even helpful in this case.

4. Implied Terminal EBITDA Multiples in the DCF Analysis

J.P. Morgan performed a relative discounted cash flow analysis to determine the per-share equity values of Trulia and Zillow, using **[**58]** expected cash flows from 2014 through 2028 based on management's projections for each company and the perpetuity growth method to calculate the companies' respective terminal values.[84] The Proxy explained this methodology and provided the assumptions J.P. Morgan used in its analysis. Specifically, the Proxy disclosed management's projections of unlevered free cash flows, the ranges of discount rates (11.0% to 15.0%) and perpetuity growth rates (2.5% to 3.5%) that were used, the terminal period projected cash flows, and other details.[85] In my view, these disclosures already provided a more-than-fair summary of the relative discounted cash flow analysis that J.P. Morgan performed.

The Supplemental Disclosures added to this summary the EBITDA exit multiple ranges for Trulia and Zillow that were **[*907]** implied by the range of terminal values calculated based on J.P. Morgan's chosen inputs. Plaintiffs argue that, although J.P. Morgan used the perpetuity growth method and only derived the implied EBITDA exit multiples to check the strength of its methodology, the implied multiples were important to stockholders, who would be concerned that the exit multiples for Trulia and Zillow are nearly **[**59]** identical despite differences in their current EBITDA growth rates, and that the exit multiples are much lower than the current EBITDA multiples of Trulia and its peers.[86]

The logic of plaintiffs' argument is flawed in two respects. First, because the same range of perpetuity growth rates (2.5% to 3.5%) was used to calculate the terminal values for both companies, it should not have been surprising that the implied exit EBITDA multiples would be similar for both companies: 4.0x to 6.7x for Trulia and 4.1x to 6.8x for Zillow. Second, although Trulia's then-current EBITDA growth rate was high, the exit EBITDA multiples are based on growth assumptions *as of 2028, not 2015*, and the 2015 growth rate cannot realistically continue through the projection period.[87] Basic principles of valuation suggest that it would be more reasonable to forecast that the growth of both Trulia and Zillow eventually would fall to a market-based rate, making plaintiffs' comparison to the current growth rates of Trulia and its peers inappropriate.[88] Thus, not only is the supplemental disclosure immaterial, it also serves none of the purposes that plaintiffs allege.

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non-adversarial presentation regarding settlement approval. The case is distinguishable because, unlike here, no summary multiples were initially provided to stockholders.

[83] Joshua Rosenbaum & Joshua Pearl, *Investment Banking: Valuation, Leveraged Buyouts, and Mergers & Acquisitions* 19 (2009) ("A company's growth profile, as determined by its historical and estimated future financial performance, is an important driver of valuation. Equity investors reward high growth companies with higher trading multiples than slower growing peers.").

[84] *See* Proxy at 127.

[85] *See id.* at 108, 122, 127.

[86] Pls.' Br. Supp. Proposed Settlement at 30-31.

[87] *Id.* at 26 (noting **[**60]** Trulia's expected EBITDA growth rate of 148% and the "decided correlation between higher growth rates and higher valuation multiples"). Were Trulia able to retain this impressive EBITDA growth rate for the entire forecast period, its 2028 EBITDA would amount to nearly $10 trillion, more than half the current GDP of the United States.

[88] *See* Rosenbaum & Pearl, *supra* note 83, at 132 ("The perpetuity growth rate is typically chosen on the basis of the company's expected long-term industry growth rate, which generally tends to be within a range of 2% to 4% (i.e., nominal GDP growth).").

* * * *

For the reasons explained above, none of plaintiffs' Supplemental Disclosures were material or even helpful to Trulia's stockholders. The Proxy already provided a more-than-fair summary of J.P. Morgan's financial analysis in each of the four respects criticized by the plaintiffs. As such, from the perspective of Trulia's stockholders, the "get" in the form of the Supplemental Disclosures does not provide adequate consideration to warrant the "give" of providing a release of claims to defendants and their affiliates, in the form submitted[89] or otherwise. Accordingly, I find that the proposed settlement is not fair or reasonable to Trulia's stockholders. **[**61]** [90]

[*908] III. CONCLUSION

For the foregoing reasons, approval of the proposed settlement is DENIED.

IT IS SO ORDERED.

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[89] As noted above, after the settlement hearing, the parties commendably agreed to narrow the release to exclude "Unknown Claims," foreign claims, and claims arising under state or federal ***antitrust law***. Nevertheless, even if the Supplemental Disclosures had provided sufficient consideration to warrant the "give" of a release of claims, which they did not, the scope of the revised release still would have been too broad to support a fair and reasonable settlement because the revised release was not limited to disclosure claims and fiduciary duty claims concerning the decision to enter the merger.

[90] Because I reject the proposed settlement, I do not address the issue of class certification, although stockholder classes in cases such as this are typically certified.

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Resco Prods. v. Bosai Minerals Grp. Co.

United States District Court for the Western District of Pennsylvania

January 25, 2016, Decided; January 25, 2016, Filed

Civil Case No. 06-235

Reporter
158 F. Supp. 3d 406 *; 2016 U.S. Dist. LEXIS 8217 **; 2016-1 Trade Cas. (CCH) P79,474

RESCO PRODUCTS, INC., Plaintiff, v. BOSAI MINERALS GROUP CO., LTD., and CMP TIANJIN CO., LTD., Defendants.

Prior History: *Resco Prods. v. Bosai Minerals Group Co., Ltd., 2010 U.S. Dist. LEXIS 54949 (W.D. Pa., June 4, 2010)*

Core Terms

bauxite, quota, export, Bidding, conspiracy, prices, meetings, circumstantial evidence, direct evidence, coordination, summary judgment, conspired, voted, tons, commodities, announced, factors, email, proposals, alleged conspiracy, price fixing, import, material fact, documents, adduce, output, summary judgment motion, reasonable jury, Minerals, quantity

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Judges: Joy Flowers Conti, Chief United States District Judge.

Opinion by: Joy Flowers Conti

Opinion

[*412] CONTI, Chief District Judge.

I. INTRODUCTION

Resco Products, Inc. ("plaintiff"), individually and as a class representative, brought a claim against Bosai Minerals Group ("Bosai") and CMP Tianjin Co. ("Tianjin") **[**2]** (collectively, "defendants") alleging a conspiracy to fix the price and limit the supply of refractory grade bauxite in violation of the Sherman Act, *15 U.S.C. § 1*. Pending before the court is defendants' motion for summary judgment, pursuant to *Federal Rule of Civil Procedure 56*. (ECF No. 263). Upon consideration of the parties' submissions and the applicable law, the court concludes defendants are entitled to judgment as a matter of law. Their motion will be granted and the action dismissed.

II. Factual Background and Procedural History[1]

Plaintiff's principal place of business is in Pittsburgh, Pennsylvania. (ECF No. 92 ¶ 7). Plaintiff manufactures refractories—*i.e.*, "heat resistant materials that provide the linings for high temperature furnaces, reactors, and other processing units." (*Id.* ¶ 28.) Bauxite is one of the raw materials plaintiff uses in the manufacture of refractories. Since at least the mid-1980s, a substantial percentage of the "refractory grade" **[**3]** bauxite ("RGB") consumed throughout the world has been exported from China. (*Id.* ¶¶ 30, 32-33.) Defendants are two of China's largest RGB exporters. (*Id.* ¶¶ 8-9.)

Sometime before 1990, the Chinese government implemented industry-specific import-export "chambers of commerce," in place of government "ministries," to administer its export control laws and regulations. (ECF No. 284, Part I ¶ 14.) The "routine administration" of these "social organizations with function of business coordination and partial administration in a line of trade" was to "be under the direct charge of [the Chinese Ministry of Commerce]" ("MOFCOM").[2] (ECF No. 268-23 at 5).[3]

In its 1994 "Articles of Association," the China Chamber of Commerce of Metals, Minerals & Chemicals Importers & Exporters ("CCCMC") described itself as

> a body corporate, consist[ing] of various kinds of enterprises incorporated within **[*413]** the territory of [China] in accordance with the laws, conducting import and export trading business of metal, mineral and chemical commodities, as well as providing with coordination among the industry and other services to the corporations, as approved by the [MOFCOM]. . . .

(ECF No. 268-3 at 1.) The announced purpose of the CCCMC is "to coordinate the import and export trading activities of [the] metal, mineral and chemical industry; to secure the normal order of import and export trading; to protect the legal rights and interests of the state; . . . and to serve to expand the import and export trading of metal, mineral[,] and chemical commodities." (*Id.*) In furtherance of its purpose, the CCCMC was given the power to establish, subject to MOFCOM approval, a **[**5]** "Branch" for all CCCMC members engaged in the trade of each given commodity. (*Id.* at 4.) The CCCMC exercised this power to create the Bauxite Branch, of which both defendants are members. (ECF No. 284, Part II ¶ 5.)

In 1996, MOFCOM implemented "Export Quota Bidding with Compensation." (ECF No. 268-2 at 2.) The "Detailed Rules" of this implementation define a "Bidding Committee for Quotas of Export Commodities" (the "Bidding

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[1] The factual background is derived from the undisputed evidence of record and the disputed evidence viewed in the light most favorable to the nonmoving party. *See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)* ("The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.").

[2] Prior to being renamed, the Ministry of Foreign Trade and Economic Cooperation ("MOFTEC") was known as the Ministry of Foreign Economic Relations and Trade ("MOFERT"). (ECF No. 268-23 at 2.) Later, the MOFTEC became known as the MOFCOM (ECF No. 284, Part I ¶ 19), short for "Ministry of Commerce." (ECF No. 268-22 ¶ 3.) For simplicity, all three of these organizations will be referred to as "MOFCOM" regardless of which was active at the relevant time.

[3] The "Measures for Administration of Foreign Economic Relations and Trade Social Organizations" cited **[**4]** here, as well as many of the other documents produced as evidence, are English translations of Chinese originals. Grammatical irregularities appear throughout as apparent artifacts of the translation process.

Committee"), which was to "undertake the responsibilities of administering the bidding work for export quota with compensation." (*Id.* at 2.) MOFCOM required the Bidding Committee to set up a "Bidding Office" to interact with the chambers of commerce and handle the "routine affairs of compensated quota bidding." (*Id.* at 3.) The Bidding Committee was to "be accountable to [MOFCOM]," and the Bidding Office was set up to "be accountable to the Bidding Committee." (*Id.*) Though multiple "modes" of quota bidding are defined within these rules, the practice generally consists of an annual "quota," which is the total amount of a given commodity that can be exported within the subject year; individual exporters "bid" for the right to export some portion of the total quota. *See* (ECF No. 268-26.) The **[**6]** Bidding Committee was authorized to set the amount of a commodity's annual quota up for bid on any occasion and the minimum and maximum amounts for bids. (*Id.* at 7.)

Under the quota bidding system, in addition to meeting other requirements, an aspiring exporter was required to pay an export license fee for each ton of a commodity it wished to export. (ECF No. 284, Part I ¶ 19.) For bauxite prior to 2005, under what was referred to as "paid use," the license fee was set at 230 Chinese yuan ("CNY") per ton. *Id.*; (ECF No. 268-52 at 2; ECF No. 268-53 at 1; ECF No. 268-54 at 2.) Beginning in 2005, bauxite exporters had to bid the amount they would pay for the license fee. (ECF No. 284, Part I ¶ 19.) According to public bidding announcements from 2005 through 2012, a bid had to be in an amount greater than the minimum set by the Bidding Committee in order to be considered valid. (ECF Nos. 268-55 through 268-67.)

Aside from the power of the Bidding Committee over the quota bidding processes, the Branches performed several functions with respect to import and export policy. The scope of these functions and the Bauxite Branch's autonomy in performing them, however, are less than clear based upon the **[**7]** evidence produced in this case. Among other "authorities" granted to the Branches by CCCMC in 1994, they were tasked with "formulating or amending detailed coordination regulations in respect to import and export commodities" and "formulating or adjusting the price proposals of import and export commodities." (ECF No. 268-3 at 4.) In its "Measures for Coordination Management of **[*414]** Bauxite Branch" ("Coordination Measures"), adopted no later than 1999 (ECF No. 284, Part I ¶ 15), the Bauxite Branch was instructed to engage in "coordination work" that would be "favorable for protecting the fair competition" and "preventing and deterring the undesirable competition that impairs the interests of the state and the industry" and "favorable for self-regulation, self-discipline, self-protection, and self-development of the enterprise group." (ECF No. 268-4 at 2.) The "content" of this coordination work was defined to include "[e]xport price," among various other topics. (*Id.*)

These terms appear throughout later CCCMC and Bauxite Branch governing documents. In its 2001 Charter, the CCCMC provided that one of its purposes was to "coordinate and instruct the import and export trading activities. . . ." (ECF **[**8]** No. 268-5 at 2.) According to the Bauxite Branch's 2003 Articles of Association, it is a "self-regulation trade organization" with a tenet of "conduct[ing] the coordination and guidance on the import and export trade of the bauxite." (ECF No. 275-4 at 1.) Specific actions to be taken by the CCCMC and the Bauxite Branch in furtherance of coordination, self-regulation, and self-discipline are not spelled out. Based on the 2001 "Measures for Quota Bidding of Export Commodities," however, MOFCOM "is responsible for deciding and announcing the types and the total quota quantity of commodities subject to bidding." (ECF No. 268-30 at 2.)

Despite the formal allocation to MOFCOM of power over export quotas, Liu Jian Hong ("Hong"), Bosai's vice president, explained in an October 27, 2005 email that "CCCMC will have meeting on Nov 12th to discuss/decide the quantity/price of bauxite quota in 2006." (ECF No. 275.) The Bauxite Branch was to have annual "General Meetings" according to its 2003 Articles of Association. (ECF No. 275-4 at 7-8.) Notices sent out in advance of the 2004, 2005, and 2010 meetings indicate these meetings were held at hotels over two to three days. (ECF No. 268-9; ECF No. 268-11; ECF No. 268-16.) Announced topics of these meetings included "advanced **[**9]** research of market trends" (ECF No. 268-9 at 1), "[d]iscussing the total amount of bidding quota" (ECF No. 268-16 at 1), and a "vote" on the "coefficients" or "parameters" for quota bidding in the following year (ECF No. 268-9 at 1; ECF No. 268-11 at 1; ECF No. 268-16 at 1.) The minutes of the November 12, 2005 Bauxite Branch meeting indicate that six "opinions" were voted on, but only one "bec[a]me [an] industry resolution. . . ." (ECF No. 275-11 at 1.) "After the meeting, thirty-one members proposed to set the base price for 2006 bauxite export quota bidding at 100." (*Id.*)

The minutes from the other yearly meetings held between 2004 and 2010 reflect that "proposals" related to quota amount and price for the export quota were discussed and voted on. (ECF Nos. 268-10, 268-12, 268-13, 268-15, 268-17.) Most of these proposals, however, failed to pass after a vote.[4] Of the four proposals **[*415]** related to either quota amount or price for the export quota that passed during this time period, two were at odds with actions ultimately taken by the Bidding Committee. In 2008, despite the Bauxite Branch's successful resolution that the export quota be set at "1 million or more" (ECF No. 268-13 at 2), the Bidding Committee **[**10]** announced only 940,000 tons available for bid. (ECF Nos. 268-60, 268-61.) The following year, although the Bauxite Branch had passed a resolution to "maintain" the quota at 940,000 metric tons, the Bidding Committee made available only 930,000 tons.[5] The only successful resolution of the Bauxite Branch related to the bauxite quota was one passed during the 2009 meeting specifying that the export quota "remain at 930,000 tons."[6] (ECF No. 268-17 at 1.)

In his declaration for the CCCMC, Liu Jian ("Jian"), a CCCMC employee **[**12]** since 1995 and deputy director of the Bidding Office since 2006, provided the context for the Bauxite Branch resolutions and the often divergent actions of the Bidding Committee. (ECF No. 268-22.) Jian explained that "[a]t Bauxite Branch meetings, Bidding Office staff asked the Bauxite Branch members for their opinions about specific proposed quota amounts, quota bidding minimum prices, and other matters relating to quota bidding." (*Id.* at 2.)

> "Passage" of a Bauxite Branch resolution indicated that a certain percentage of exporting industry members were in favor of a proposal, but the authority and power to adopt quotas, and to establish the quota amount, minimum bidding price, and other terms, was always with MOFCOM, not the members or the CCCMC. MOFCOM could, and often did, set the quotas and minimum bidding prices at levels different than those favored by members.

(*Id.* at 3.)

Aside from the formal discussions at the Bauxite Branch annual meetings, there was also ample opportunity for informal private discussions between attendees. Haijian Liu ("Liu"), Tianjin's general manager in 1998 and its current chief executive officer, testified that meals were provided for meeting attendees in the conference room, **[**13]** instead of requiring them to separate at meal times. (ECF No. 275-15 at 40-41.) Liu testified that in private conversations, attendees sometimes complained about "low" export prices for RGB. (*Id.* at 86-87.) Hong similarly testified that companies sometimes complained about contract prices reflected in customs data because they were "not reasonable." (ECF No. 275-17 at 96-97.) Private conversations also took place between Bosai and Tianjin executives outside Bauxite Branch meetings on multiple occasions since 2002, both **[*416]** in person and over the telephone. (ECF No. 284, Part II ¶ 21.)

According to plaintiff, the "price of RGB in the United States doubled during 2003 and 2004 and increased an additional 70 [percent] between 2004 and 2007." (*Id.* ¶ 4.) Bosai explains the increase by noting that its "costs for RGB more than quadrupled between 2003 and 2008" and its "transportation, loading, energy, and storage costs

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[4] In 2004, proposals to "set the bauxite export quota at one million tons" and "to set 180 as the minimum price for 2005 export quota" "failed to pass in the enlarged council meeting." (ECF No. 268-10 at 2.) Proposals "to set the bauxite export quota at 1 million metric tons for 2007," "to maintain the level of bauxite export quota at 970,000," and "to set the minimum price for 2007 bauxite export quota at 130/ton," "100/ton," "60/ton," and "80/ton" all "failed to pass in the enlarged council meeting" in 2006. (ECF No. 268-12 at 2-3.) During the 2007 meeting, proposals to set the 2008 bauxite export quota at 950,000, 1 million, and 1.1 million metric tons similarly failed. (ECF No. 268-13 at 1-2.) A 2009 proposal that the 2010 bauxite export **[**11]** quota "be cut down by 30%-50% of total volumes" failed to pass as well. (ECF No. 268-17 at 1.)

[5] Only one of the Bidding Committee's announcements concerning the 2009 bauxite export quota was produced here. The conclusion that the 2009 quota was 930,000 primarily is based on a Bauxite Branch proposal at the 2009 meeting that the quota "remain at 930,000 tons." (ECF No. 268-17, at 1). It is supported by the Bidding Committee's first announcement on bauxite export quotas for 2009, which specifies 465,000 tons available. (ECF No. 268-62, at 2). Announcements in other years show that 50 percent of the total annual quota was released with each announcement. (ECF Nos. 268-55, 268-56, 268-57, 268-58, 268-60, 268-61, 268-63, 268-64, 268-65, 268-66.)

[6] According to the minutes, the only other relevant resolution that "passed and came into resolution" was one to "maintain the minimum price for the bauxite export quota at 130/ton," which passed during the 2008 Bauxite Branch meeting. (ECF No. 268-15 at 2.) No evidence was produced to indicate what the Bidding Committee set the minimum price for the quota following this resolution.

also increased." (ECF No. 284, Part II ¶ 4.) In particular, the Chinese government reinstituted a 13 percent value-added tax ("VAT") on bauxite exports in 2003 and implemented a 15 percent duty on bauxite in 2008. (*Id.*) China also took certain actions for pollution control reasons, including **[**14]** eliminating older-technology bauxite processing facilities and placing limitations on the transportation of commodities. (*Id.*) During this period, domestic demand for bauxite "sharply increased." (*Id.*) With all these variables considered, Bosai noted that "[o]ver the same period, Bosai's RGB export price increases closely tracked the levels of the increases in prices Bosai paid for RGB." (*Id.*)

Plaintiff filed a complaint on February 2, 2006, asserting that defendants[7] violated the Sherman Act, *15 U.S.C. § 1*, by conspiring to "limit competition, control supply, and increase prices for [RGB] products." (ECF No. 1 ¶ 2). Plaintiff brings this action under the Clayton Act, *15 U.S.C. §§ 15* and *26*, seeking treble damages and injunctive relief on its own and on behalf of a putative class. (ECF No. 92, ¶¶ 3, 17-18.)

On October 7, 2009, defendants filed a joint motion to dismiss for lack of subject-matter and personal jurisdiction.[8] (ECF No. 98.) The court denied this motion without prejudice on June 4, 2010, and the case was stayed pending the release of a final report in a then-pending World Trade Organization proceeding with potential implications on the applicability of the "act of state" and "sovereign compulsion" doctrines to the instant matter. (ECF No. 146 at 2 (citing *China-Measures Related to the Exportation of Raw Materials*, WTO Doc. WT/DS394/7 (Nov. 9, 2009).) The stay was lifted on July 26, 2011.

Defendants again filed a joint motion to dismiss on August 16, 2011. (ECF No. 174.) After an unsuccessful attempt **[**16]** at mediation (ECF Nos. 186, 191), the court denied this motion on January 9, 2012. (ECF No. 194.) Plaintiff was required to file a more definite statement with respect to paragraph 61 of its first amended complaint to specify "what effects of the cartel are separate and distinguishable from any government mandated ex parte restriction." (*Id.* at 2-3.) After plaintiff filed the more definite statement (ECF No. 193), defendants filed their answers on February 23, 2012. (ECF Nos. 197, 198.)

Discovery related to liability closed on February 27, 2015. (ECF No. 249.) Defendants filed a motion for summary judgment **[*417]** on May 29, 2015 (ECF No. 263), followed by a supporting brief, a concise statement of material facts, and exhibits filed under seal on June 1, 2015. (ECF Nos. 266, 267, 268.)[9] Plaintiff filed its responsive brief, concise statement of material facts, and supporting exhibits under seal on July 1, 2015. (ECF Nos. 275, 276, 277.)[10] On July 13, 2015, defendants filed their reply under seal. (ECF No. 281.)[11] The parties filed a combined concise statement of material facts under seal on July 27, 2015. (ECF No. 286.)[12] Defendant's motion for summary judgment is now fully briefed and ripe for disposition. **[**17]**

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[7] In plaintiff's original complaint, it named the following as defendants: Nanchuan Minerals Group Co. Ltd.; Jersey Mineral Processing Co. Ltd.; CMP Ltd., Minelco Tianjin Minerals Co. Ltd.; Minelco, Inc., USA; and LKAB. (ECF No. 1.) Due to ineffective service of process, LKAB, Minelco Tianjin Minerals Co. Ltd., and Minelco, Inc., USA were dismissed by stipulation (ECF Nos. 16, 43), and Nanchuan Minerals Group Co. Ltd. **[**15]** and Jersey Mineral Processing Co. Ltd. were terminated. Plaintiff filed its first amended complaint on July 17, 2009, naming only Bosai and Tianjin as defendants. (ECF No. 92.) Bosai was previously known as Nanchuan Minerals Group Co. Ltd. and Tianjin was previously known as Jersey Mineral Processing Co. Ltd. (ECF No. 92, ¶¶ 8-9.)

[8] Tianjin filed a separate motion to dismiss for lack of personal jurisdiction that same day (ECF No. 99), but withdrew it on May 12, 2010. (ECF No. 142.)

[9] On May 29, 2015, defendants filed redacted copies of their supporting brief and concise statement of material facts along with the motion for summary judgment. (ECF Nos. 264, 265.)

[10] On June 29, 2015, redacted copies of plaintiff's brief in response to summary judgment and concise statement of material facts were filed. (ECF No. 272, 273.)

[11] Defendants filed a redacted copy of their reply that same day. (ECF No. 280.)

[12] A redacted copy of this document was filed. (ECF No. 284.)

III. STANDARD OF REVIEW

Summary judgment is appropriate if the record shows there is no genuine dispute with respect to any material fact and the movant is entitled to judgment as a matter of law. *FED. R. CIV. P. 56(a)*. The mere existence of a factual dispute, however, will not necessarily defeat a motion for summary judgment. Only a dispute over a material fact—*i.e.*, a fact that would affect the outcome of the suit under the governing substantive law—will preclude the entry of summary judgment. *Liberty Lobby, 477 U.S. at 248*. Even then, the dispute over the material fact must be genuine, such that a reasonable jury could resolve it in the nonmoving party's favor. *Id. at 248-49*.

In deciding a summary judgment motion, a court must view the facts in the light most favorable to the nonmoving **[**18]** party and draw all reasonable inferences, and resolve all doubts, in favor of the nonmoving party. *Id. at 255*; *Wishkin v. Potter, 476 F.3d 180, 184 (3d Cir. 2007)*; *Doe v. Cnty. of Centre, 242 F.3d 437, 446 (3d Cir. 2001)*; *Woodside v. Sch. Dist. of Phila. Bd. of Educ., 248 F.3d 129, 130 (3d Cir. 2001)*; *Heller v. Shaw Indus., Inc., 167 F.3d 146, 151 (3d Cir. 1999)*. A court must not engage in credibility determinations at the summary judgment stage. *Simpson v. Kay Jewelers, Div. of Sterling, Inc., 142 F.3d 639, 643 n.3 (3d Cir. 1998)*.

One of the principal purposes of summary judgment is to isolate and dispose of factually unsupported claims or defenses. *Celotex Corp. v. Catrett, 477 U.S. 317, 323-24, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. The summary judgment inquiry asks whether there is a need for trial—"whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Liberty Lobby, 477 U.S. at 250*. In ruling on a motion for summary judgment, the court's function is not to weigh the evidence or determine the truth of the matter, but to determine whether the evidence of record is such that a reasonable jury could return a verdict for the nonmoving party. *Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150-51, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000)* (citing decisions); *Liberty Lobby, 477 U.S. at 248-49*.

The burden of showing that no genuine issue of material fact exists rests **[*418]** initially on the party moving for summary judgment. *Celotex, 477 U.S. at 323*; *Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1080 (3d Cir. 1996)*. The moving party may satisfy its burden either by producing evidence showing the absence of a genuine issue of material fact or by demonstrating that there is an absence of evidence to support the nonmoving party's case. **[**19]** *Marten v. Godwin, 499 F.3d 290, 295 (3d Cir. 2007)* (citing *Celotex, 477 U.S. at 325*). A defendant who moves for summary judgment is not required to refute every essential element of the plaintiff's claim; rather, the defendant must only point out the absence or insufficiency of plaintiff's evidence offered in support of one or more those elements. *Celotex, 477 U.S. at 322-23*. Once the movant meets that burden, the burden shifts to the nonmoving party to "set forth specific facts showing that there is a genuine issue for trial" and to present sufficient evidence demonstrating there is indeed a genuine and material factual dispute for a jury to decide. *FED. R. CIV. P. 56(e)*; *see* *Liberty Lobby, 477 U.S. at 247-48*; *Celotex, 477 U.S. at 323-25*. If the evidence the nonmovant produces is "merely colorable, or is not significantly probative," the moving party is entitled to judgment as a matter of law. *Liberty Lobby, 477 U.S. at 249*.

The nonmoving party must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*. To survive summary judgment, the nonmoving party must "make a showing sufficient to establish the existence of [every] element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex, 477 U.S. at 322*. Furthermore, "[w]hen opposing summary judgment, the [nonmovant] may not rest upon mere allegations, but rather must 'identify those facts **[**20]** of record which would contradict the facts identified by the movant.'" *Corliss v. Varner, 247 F. App'x 353, 354 (3d Cir. 2007)* (quoting *Port Auth. of N.Y. & N.J. v. Affiliated FM Ins. Co., 311 F.3d 226, 233 (3d Cir. 2002))*.

IV. DISCUSSION

A. Section 1 of the Sherman Act

Section 1 of the Sherman Act provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce" is unlawful. 15 U.S.C. § 1. The United States Court of Appeals for the Third Circuit has explained that "this statutory language imposes two essential requirements on an antitrust plaintiff." In re Ins. Brokerage Antitrust Litig., 618 F.3d 300, 315 (3d Cir. 2010). First, the plaintiff must show that defendants were parties to "'an agreement,' because '[§] 1 liability is predicated upon some form of concerted action.' Unilateral activity by a defendant, no matter the motivation, cannot give rise to a [§] 1 violation." InterVest, Inc. v. Bloomberg, L.P., 340 F.3d 144, 159 (3d Cir. 2003) (quoting Rossi v. Standard Roofing, Inc., 156 F.3d 452, 465 (3d Cir. 1998)). Second, the plaintiff must show that the agreement in question "imposed an unreasonable restraint on trade." In re Ins. Brokerage, 618 F.3d at 315. While purported restraints are generally analyzed under a "rule of reason" standard, *id.*, "[h]orizontal price fixing and output limitation are ordinarily condemned as a matter of law under an 'illegal *per se'* approach because the probability that these practices are anticompetitive is so high," Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 100, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984).

[*419] Here, plaintiff's § 1 claim is based on its assertion that "[d]efendants and their co-conspirators colluded to fix export **[**21]** prices and quotas for bauxite from 2003 to 2009." (ECF No. 272 at 8.) Because these alleged "'practice[s] appear . . . to be one[s] that would always or almost always tend to restrict competition and decrease output,'" an agreement to engage in them would be *per se* illegal. In re Ins. Brokerage, 618 F.3d at 316 (quoting Nat'l Collegiate Athletic Ass'n, 468 U.S. at 100). Defendants do not argue against this conclusion. Instead, they assert summary judgment is proper because no reasonable jury could find that they entered into such an agreement.

B. Proof of a Conspiracy in Restraint of Trade

In a *per se* case, "'the plaintiff need only prove that the defendants conspired among each other and that this conspiracy was the proximate cause of the plaintiff's injury.'" In re Chocolate Confectionary Antitrust Litig., 801 F.3d 383, 395 (3d Cir. 2015) (quoting InterVest, Inc., 340 F.3d at 159). Concerted action is the "very essence" of such a claim, and may be established with evidence of "'unity of purpose or a common design and understanding or a meeting of minds in an unlawful arrangement.'" Id. at 395 - 96 (quoting Alvord-Polk, Inc. v. F. Schumacher & Co., 37 F.3d 996, 999 (3d Cir. 1994)). The required evidence may be either direct or circumstantial. Id. at 396. However, when a plaintiff relies upon circumstantial evidence that necessarily requires the court to draw inferences, ***antitrust law*** sets permissible limits upon such inferences. *Id.* (citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)).

To that end, "'[c]onduct as consistent with permissible **[**22]** competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy.'" In re Chocolate Confectionary, 801 F.3d at 396 (quoting Matsushita, 475 U.S. at 588). "[U]nless the plaintiff 'presents evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently,' summary judgment is appropriate." *Id.* Additionally, the plausibility of a plaintiff's economic theory behind a defendant's alleged conspiracy will also affect the range of permissible inferences. *Id.* (citing In re Flat Glass Litig., 385 F.3d 350, 357 (3d Cir. 2004)). Presently, plaintiff argues "[t]here is both direct and circumstantial evidence that [d]efendants conspired to increase prices of Chinese bauxite beginning in 2003." (ECF No. 272 at 19.) The court addresses plaintiff's assertions with respect to each kind of evidence, in turn.

1. Direct Evidence

"Direct evidence of a conspiracy is 'evidence that is explicit and requires no inferences to establish the proposition or conclusion being asserted.'" Burtch v. Milberg Factors, Inc., 662 F.3d 212, 225 (3d Cir. 2011) (quoting In re Ins.

Brokerage, 618 F.3d at 324 n.23) (noting an example of direct evidence is "a document or conversation explicitly manifesting the existence of the agreement in question"). To be considered direct evidence, the Third Circuit Court of Appeals has found that purportedly direct evidence must reach a certain level of "clarity." InterVest, Inc., 340 F.3d at 162-63 (citing **[**23]** decisions in which documents or verbal statements that in some way referred to a conspiracy were considered as direct evidence). When a plaintiff successfully sets forth direct evidence of a conspiracy, the *Matsushita* standard does not apply because the "fact finder is not required to make inferences to establish facts." Rossi, 156 F.3d at 466. **[*420]** Direct evidence, therefore, relieves the plaintiff of the need to "adduce circumstantial evidence 'that tends to exclude the possibility that the alleged conspirators acted independently.'" *Id.* (quoting Matsushita, 475 U.S. at 588).

Plaintiff points to activities of members taken in relation to Bauxite Branch meetings from 2004 through 2008 as direct evidence that defendants conspired to fix prices and limit bauxite production. (ECF No. 272 at 19 - 20). Primarily, plaintiff's "direct" evidence consists of minutes from these meetings that show that defendants "voted on proposals concerning export quotas." (*Id.* at 20). Plaintiff notes Hong's email and deposition testimony regarding matters to be addressed during the November 12, 2005 meeting. (*Id.*). Plaintiff places particular emphasis on the October 27, 2005, email authored by Liu Hong, vice president of defendant Bosai. (*Id.*). When taken in the context **[**24]** of the record before the court, a reasonable jury could not conclude that this evidence rises to the level of clarity necessary to consider it direct evidence of a conspiracy. *See* InterVest, Inc., 340 F.3d at 162-63.

In a vacuum, proposals to set bauxite quotas at specified levels being voted on at Bauxite Branch meetings appear to indicate explicit member participation in a conspiracy to limit output. However, the Bauxite Branch's demonstrated lack of authority with respect to quotas invalidates such a finding. Since at least 2001, MOFCOM has been "responsible for deciding and announcing the types and the total quota quantity of commodities subject to bidding," not the CCCMC or its Branches. (ECF No. 268-30 at 2). The quota announced by the Bidding Committee during each of the years of the alleged conspiracy never corresponded to a resolution of the Bauxite Branch. At its 2004 through 2006 meetings, the Bauxite Branch failed to pass any resolution related to quota amount, yet the Bidding Committee, an instrumentality of MOFCOM, still announced quotas in each of those years. (ECF Nos. 275-10 through 275-12; ECF Nos. 268-52 through 268-60.) Though the Bauxite Branch passed resolutions that the quota be set at "1 million **[**25]** or more" tons in 2008 and 940,000 tons in 2009 (ECF Nos. 275-13, 275-14), the Bidding Committee announced quotas of only 940,000 in 2008 and 930,000 tons in 2009. (ECF Nos. 268-60 through 268-62.) No proposed quota quantity was ever less than the one ultimately announced by the Bidding Committee, which invalidates any inference that these proposals were intended to establish quotas separate from those publically announced. Any conspiracy to establish a limit equal to or higher than that imposed by the government could have no effect.

Consistent with the undisputed Declaration of the CCCMC, Bauxite Branch member votes for proposals concerning the yearly bauxite quota amount can only be construed as opinions offered to MOFCOM. (ECF No. 268-22 at 2-3.) These opinions were not that limits *should be* placed on bauxite output. The implementation of quotas was mandated by the Chinese government, not agreed to by private entities. *See* (ECF No. 268-26 at 2.) Opinions only went to the level at which the otherwise required quotas should be set. As such, these votes do not explicitly and without inference establish that Bauxite Branch members conspired to limit bauxite output. The votes cannot be **[**26]** considered as direct evidence supporting a conspiracy. *See* Burtch, 662 F.3d at 225.

The Bauxite Branch's role in determining the yearly bauxite quota undermines plaintiff's argument that Hong's email and deposition testimony concerning the November 12, 2005 meeting support the existence of a conspiracy. In his October 27, **[*421]** 2005 email, Hung wrote that "CCCMC will have a meeting on Nov 12th to discuss/decide the quantity/price of bauxite quota in 2006." (ECF No. 275.) During his deposition, Hung testified that this statement was intended to convey that "there would be quantity and a price discussion and that we . . . would give our opinion on that." (ECF No. 275-17 at 149.) This explanation is consistent with the CCCMC's declaration that Bauxite Branch members were asked for their opinions pertaining to the bauxite quota during meetings, "but the authority and power to adopt quotas, and to establish the quota amount, minimum bidding price, and other terms, was always with MOFCOM." (ECF No. 268-22 at 2-3.) This explanation is supported by the Bidding Committee's December 6, 2005 announcement of a 970,000 ton bauxite quota for 2006 (ECF Nos. 268-57, 268-58), when the minutes of the

November 12, 2005 Bauxite Branch **[**27]** meeting contain no reference to a single proposal related to quota amount. (ECF No. 275-11.) Hung's email cannot be considered direct evidence that the Bauxite Branch conspired to limit bauxite output during the November 12, 2005 meeting when it lacked the authority to do so and the quota was later set by MOFCOM through the Bidding Committee.

In addition to lacking any ability to set prices under the quota bidding system, plaintiff's purported direct evidence that Bauxite Branch members "voted to fix prices" (ECF No. 272 at 14-15) fails for a separate and independently sufficient reason. The evidence plaintiff relies upon consists of the same meeting minutes and email from Hong, discussed above, and does not support plaintiff's claim that defendants fixed export prices. Instead, this evidence refers to conversations about the license fee—the price of the bauxite quota—that exporters would have to pay the Chinese government for each ton of bauxite exported, not the export price at which the bauxite itself would be sold to eventual purchasers. (ECF No. 275 (Hung's October 27, 2005 email explaining that discussions would concern the "price of bauxite *quota* in 2006" (emphasis added)).). **[**28]**

The specific prices in the proposals voted on at the Bauxite Branch meetings cited by plaintiff clearly indicate they were not in reference to the prices to be charged to buyers. At Bauxite Branch meetings between 2004 and 2008, proposed "minimum prices for export quota" ranged from 60 to 180 CNY. (ECF Nos. 268-10, 268-12, 268-13, 268-15, 275-11.) By comparison, the "paid use" license fee was fixed at 230 CNY before exporters were required to bid the amount they would pay for the fee beginning in 2005. (ECF No. 284, Part I ¶ 19.) The proposals at issue could not have referred to minimum export prices where the export license fee, a necessary component of the total price charged to purchasers, equaled or exceeded the amounts proposed.

The conclusion that the votes pertaining to "minimum price for export quota" during Bauxite Branch meetings were not in reference to the price purchasers would pay is confirmed by the prices plaintiff actually paid for bauxite during the period of the alleged conspiracy. In January and April 2004, plaintiff purchased a total of 4,150 metric tons of bauxite between two orders placed with Bosai's predecessor, Nanchuan Minerals Group Co. Ltd. ("Nanchuan"). **[**29]** (ECF Nos. 275-2, 275-3.) The unit cost per metric ton was $154.00 United States dollars ("USD") for the January order (ECF No. 275-2, at 7) and $172.50 USD for the April order, (ECF No. 275-3 at 3.) During the November 17, 2004 Bauxite Branch meeting, members voted on a proposal "to set 180 as the minimum price for [the] 2005 export **[*422]** quota." (ECF No. 268-10 at 2.) The court takes judicial notice that the exchange rate on this date was 8.2765 CNY per USD.[13] In USD, therefore, the amount being debated by the members was approximately $21.75.[14] At a time when Nanchuan was charging plaintiff a price nearly eight times higher seven months earlier and prices were steadily rising, a minimum export price of $21.75 could have served no purpose. In fact, plaintiff's own records of its bauxite purchases from late 1999 until mid-2012 show that plaintiff never paid less than $92.25 USD per ton, including the years before the alleged conspiracy began.[15] The only reasonable conclusion is that Bauxite Branch proposals pertaining to the "minimum price for export quota" were in reference to the amount of the export license fee, and are not direct evidence of a conspiracy to fix export prices of bauxite.

Because plaintiff failed to adduce direct evidence from which a reasonable jury could conclude defendants conspired to fix prices and limit bauxite output, it must rely solely on circumstantial evidence to prove the existence of a conspiracy, and the strictures of *Matsushita* apply. *Rossi, 156 F.3d at 465-66*.

2. Circumstantial Evidence

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[13] *IMF **[**30]** Exchange Rates*, INT'L MONETARY FUND, *http://www.imf.org/external/np/fin/ert/GUI/Pages/CountryDataBase.aspx* (last visited Nov. 20, 2015).

[14] (180 CNY) / 8.2765 = $21.748324 USD.

[15] Plaintiff's exhibit, entitled "Resco Spreadsheet of Chinese RGB Purchases, 2000-12," and labeled "RESCO0005552" through "RESCO0005559," was submitted in hardcopy to the court, but was not electronically filed.

When unable to offer direct evidence of a conspiracy, proof may come in the form of circumstantial evidence. *In re Chocolate Confectionary, 801 F.3d at 395 - 96*. *Section 1* liability cannot be "predicated on a defendant's unilateral actions, no matter its anticompetitive motivations;" therefore, circumstantial evidence must tend to exclude the possibility of unilateral action. *Id. at 396 - 97*. The "range of acceptable inferences that may be drawn from ambiguous or circumstantial evidence 'varies with the plausibility of the plaintiffs' theory and the dangers associated with such inferences.'" *Id. at 396* (quoting *In re Flat Glass Antitrust Litig., 385 F.3d 350, 357 (3d Cir. 2004))*. Mistaken inferences could impose **[**31]** liability for lawful conduct. *Id.* (citing *Matsushita, 475 U.S. at 594*. "[S]trong circumstantial evidence," however, will not implicate such concerns, because it is sufficiently unambiguous to limit the inferences which may reasonably be gleaned. *Id. at 397 n. 9*.

The evidence adduced by plaintiff as direct evidence of a price-fixing conspiracy, including the October 27, 2005, email authored by Liu Hong, may properly be considered strong circumstantial evidence, because it leaves little room for unreasonable inferences regarding defendants' conduct with respect to bauxite bidding and quotas. However, for the same reasons this evidence failed to support plaintiff's claim as direct evidence, it fails as circumstantial evidence; specifically, defendants lacked the authority to influence bauxite bidding and quotas. If anything, the October 27, 2005, email and Bauxite Branch meeting records illustrate only an opportunity to conspire. *In re Chocolate Confectionary, 801 F.3d at 409* (evidence of mere opportunity to conspire cannot alone support an inference of conspiracy). Even viewed in the light most favorable to plaintiff, no reasonable jury could render a verdict in plaintiff's favor based upon this evidence.

[*423] 3. Conscious Parallelism as Circumstantial Evidence

A showing of parallel conduct **[**32]** or conscious parallelism is one other means of establishing the requisite proof of conspiracy via circumstantial evidence. *Cosmetic Gallery, Inc. v. Schoeneman Corp., 495 F.3d 46, 53 (3d Cir. 2007)*. As this court has previously noted, "special considerations" must be applied to ensure that only reasonable inferences are drawn from that kind of evidence. *InterVest, 340 F.3d at 155-60*. While "strong circumstantial evidence" will not demand restrictive inferential limits because such evidence is "sufficiently unambiguous," *In re Chocolate Confectionary, 801 F.3d at 397 n. 9*, as a general matter, parallel conduct and conscious parallelism are not considered to be strong circumstantial evidence, and "cannot alone create a reasonable inference of conspiracy." *Id. at 398* (citing *In re Baby Food Antitrust Litig., 166 F.3d 112, 122 (3d Cir. 1999))*. "To survive a motion for summary judgment, therefore, a plaintiff 'must present evidence that 'tends to exclude the possibility' that the alleged conspirators acted independently.'" *InterVest, 340 F.3d at 160* (quoting *Matsushita, 475 U.S. at 588*).

In order to establish a successful claim supported by only conscious parallelism, "'a plaintiff must show (1) that the defendants' behavior was parallel; (2) that the defendants were conscious of each other's conduct and that this awareness was an element in their decision-making process; and (3) certain 'plus' factors.'" *Superior Offshore Int'l, Inc., 490 F. App'x at 498* (quoting *In re Flat Glass Antitrust Litig., 385 F.3d at 360 n.11*). The evidence must "establish at least one 'plus **[**33]** factor,' since plus factors are, by definition, facts that 'tend to ensure that courts punish concerted action—an actual agreement—instead of the unilateral, independent conduct of competitors.'" *In re Ins. Brokerage, 618 F.3d at 323* (quoting *In re Flat Glass, 385 F.3d at 360* (internal alterations omitted)); *Superior Offshore Int'l, Inc., 490 F. App'x at 498* ("'Plus factors' are circumstances under which the inference of rational independent choice is less attractive than that of concerted action."). Though the list is admittedly non-exhaustive, the Third Circuit Court of Appeals has identified "at least three such plus factors: (1) evidence that the defendant had a motive to enter into a price fixing conspiracy; (2) evidence that the defendant acted contrary to its interests; and (3) 'evidence implying a traditional conspiracy.'" *In re Flat Glass, 385 F.3d at 360* (quoting *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., 998 F.2d 1224, 1244 (3d Cir. 1993))*.

Here, plaintiff argues there is "compelling evidence of 'plus' factors which would allow a fact-finder to infer the existence of a conspiracy," even in the absence of direct evidence. (ECF No. 272 at 16.) Plaintiff's evidence relates to the bauxite bidding and quotas, not to the price paid by a buyer like plaintiff. For reasons discussed previously, the bauxite bidding and quota evidence is not sufficient to support a finding — directly or circumstantially —

that **[**34]** a conspiracy existed. There was no other evidence of parallel behavior adduced and, in any event, plaintiff failed to offer sufficient evidence to establish any of the plus factors.

The establishment of plus factors is essential to any § 1 claim supported by exclusively circumstantial evidence. Typically, a plaintiff must also show parallel behavior to survive summary judgment. *See* *In re Ins. Brokerage, 618 F.3d at 323*. As their name suggests, plus factors are only supplemental to a threshold showing of parallel behavior, meant to establish **[*424]** that the "allegedly wrongful conduct of the defense was conscious and not the result of independent business decisions of the competitors." *In re Baby Food, 166 F.3d at 122*. Without first showing some "allegedly wrongful conduct" by a defendant, there can be no evaluation of that defendant's motivation for engaging in it. *See* *Superior Offshore Int'l, Inc., 490 F. App'x at 498* (observing a plaintiff must "adduce sufficient evidence of parallel conduct—so-called 'conscious parallelism'—and other 'plus factors' to survive summary judgment").

Plaintiff's argument against summary judgment focuses solely on the plus factors and other than the evidence of bauxite bidding and quotas makes no mention of any evidence of sufficient circumstantial evidence such as parallel behavior **[**35]** by defendants or other alleged co-conspirators in fixing the prices paid by buyers. Despite its allegation that defendants conspired to limit the amount of bauxite exported through the use of quotas, the evidence shows that defendants did not have the authority or power to establish those limits; rather, the Chinese government fixed the bidding amount for the quotas and the amount of the quotas. As discussed previously, the evidence adduced with respect to the quotas cannot support a § 1 claim, because the Chinese government — and not defendants — set the quotas. There is no indication defendants began either producing less bauxite or turning away interested purchasers due to insufficient inventory. Plaintiff fails to point to parallel pricing behavior to support its claim that defendants fixed the price of bauxite. The nearest thing to evidence of that kind of behavior is plaintiff's unsupported assertion that the "price of RGB in the United States doubled during 2003 and 2004 and increased an additional 70 [percent] between 2004 and 2007." (ECF No. 284, Part II ¶ 4.) Even accepting this assertion as true, there is no suggestion that defendants' and other alleged co-conspirators' prices **[**36]** "moved in a parallel fashion" during this period. *In re Baby Food, 166 F.3d at 128*. Plaintiff presented no evidence of the amount or timing of any of the pricing increases it claims were the product of collusion. Having failed to establish the necessary element of parallel behavior, or some other wrongful conduct, by defendants with respect to bauxite output or pricing, plaintiff's § 1 claim fails as a matter of law. *Superior Offshore Int'l, Inc., 490 F. App'x at 498*.

4. Plus factors

Even if plaintiff could show consciously parallel behavior by defendants, summary judgment is still proper given its failure to establish any plus factor. Plaintiff's arguments with respect to each of the three plus factors will be discussed.

(1) First plus factor

Plaintiff attempts to satisfy the first plus factor by noting that the "export market for RGB is concentrated in the hands of several Chinese producers." (ECF No. 272 at 16.) This factor, "[e]vidence that the defendant had a motive to enter into a price fixing conspiracy[,] means evidence that the industry is conducive to oligopolistic price fixing, either interdependently or through a more express form of collusion." *In re Flat Glass, 385 F.3d at 360*. An oligopolistic market is one in which there are few sellers. *In re Baby Food, 166 F.3d at 122*. The record does not support that the Chinese bauxite market **[**37]** was oligopolistic. The "Report on the Work of the Second Governing Board of the CCCMC Bauxite Branch" notes that "[sixty-two] business enterprises" were engaged in bauxite export in 2002. (ECF No. 275-7 at 1.) The minutes of the Bauxite Branch meetings from 2005 through 2009 **[*425]** show that between fifty-eight and eighty bauxite exporters attended each meeting. (ECF Nos. 275-10 through 275-14.) A market with that many participants does not qualify as an oligopoly. *In re Baby Food, 166 F.3d at 128* (discussing "an oligopoly consisting of no more than three companies at one time and collectively controlling almost the entire market"). Plaintiff offered no "evidence that the structure of the market was such as to make secret price fixing feasible." *In re Flat Glass, 385 F.3d at 360*. Plaintiff, therefore, failed to establish the first plus factor.

(2) Second plus factor

The second plus factor is satisfied with "evidence that the defendant acted contrary to its interests," *i.e.*, "conduct that would be irrational assuming that the defendant operated in a competitive market." *In re Flat Glass, 385 F.3d at 360*. Plaintiff points only to its assertion that "Chinese bauxite exporters raised prices dramatically during the alleged conspiracy period" as an example of such conduct. (ECF No. 272 at 16.) **[**38]** While increased prices undeniably could be the result of a price fixing agreement, they can be "'just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market.'" *In re Ins. Brokerage, 618 F.3d at 321* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 554, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. As discussed above, defendants pointed to numerous external factors that increased their cost to export bauxite.[16] (ECF No. 284, Part I ¶ 4.) Plaintiff disputes neither the legitimacy of these factors nor that "Bosai's RGB export price increases closely tracked the levels of the increases in prices Bosai paid for RGB." (*Id.*) Given these facts, plaintiff failed to adduce sufficient evidence to permit a reasonable jury to find defendants' price increases were irrational and did not satisfy the second plus factor.

(3) Third Plus Factor

To satisfy the third and final plus factor, plaintiff must adduce "evidence implying a traditional conspiracy." *In re Flat Glass, 385 F.3d at 360*. This is

> [noneconomic] **[**39]** evidence that there was an actual, manifest agreement not to compete[,] . . . [which] may involve customary indications of traditional conspiracy, or proof that the defendants got together and exchanged assurances of common action or otherwise adopted a common plan even though no meetings, conversations, or exchanged documents are shown.

Id. at 361 (internal citations omitted). Plaintiff relies on CCCMC and Bauxite Branch governing documents, discussions that took place during Bauxite Branch meetings, and the occurrence of separate meetings and communications between representatives of Bosai and Tianjin as evidence that a traditional conspiracy was formed. Each of these categories of evidence is addressed below.

Plaintiff argues the existence of a conspiracy is confirmed by the CCCMC and Bauxite Branch "organizational and procedural documents." (ECF No. 272 at 3-4.) It should be noted at the outset that "mere membership in a trade association, including attendance at meetings, is insufficient without more to give rise to an inference of conspiracy." *Zenith Radio* ***[*426]*** *Corp. v. Matsushita Elec. Indus. Co., 513 F. Supp. 1100, 1149 (E.D. Pa. 1981)* (citing decisions). By pointing to the governing documents, plaintiff essentially contends that because defendants were members of the Bauxite Branch, **[**40]** and the Bauxite Branch is a "self-regulation trade organization" (ECF No. 275-4 at 1) engaging in "coordination work" that should "be favorable for self-regulation, self-discipline, self-protection and self-development of the enterprise group" (ECF No. 268-4 at 2), defendants conspired to limit bauxite production and fix export prices. (ECF No. 272 at 3-4.) That inference is not reasonable.

Plaintiff calls attention to the use of the words "coordination," "self-regulation," and "self-discipline" throughout the CCCMC and Bauxite Branch governing documents to prove collusion. The meaning of those words, as intended by the subject documents, is ambiguous at best. The strongest indication that "coordination" was intended to encompass forming agreements to fix the export price of bauxite is found in the Coordination Measures. (ECF No. 268-4.) It explains that "Coordination content includes: . . . export price" and that the "Governing Board of [the] Bauxite Branch . . . shall study and decide the industrial agreement price of bauxite export." (*Id.* at 2-3.) It is unclear whether the "industrial agreement price of bauxite export" is the price to be paid by export buyers. Even assuming it

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[16] These factors included the price of bauxite more than quadrupling between 2003 and 2008, increases in transportation, loading, energy, and storage costs, the reimplementation of a 13 percent VAT in 2003, and the implementation of a 15 percent duty in 2008. (ECF No. 284, Part I ¶ 4.)

is, plaintiff **[**41]** concedes that regulations, like the Coordination Measures, that were "promulgated in the 1990s are immaterial to this litigation." (ECF No. 284, Part I ¶ 15.) This litigation concerns allegedly illegal agreements in effect from 2003 through 2009—not the 1990s.

None of the remaining CCCMC and Bauxite Branch organizational and procedural documents in effect during the alleged conspiracy provide sufficient proof that "coordination," "self-regulation," and "self-discipline" should be understood to require the formation of agreements to fix bauxite export prices. This evidence is, at best, ambiguous and insufficient to prove a traditional conspiracy in satisfaction of the third plus factor.

Plaintiff argues various discussions that took place at Bauxite Branch meetings are evidence of a traditional conspiracy. (ECF No. 272 at 4-5.) Plaintiff relies on the Bauxite Branch member votes on proposals related to bauxite quotas as evidence that a conspiracy was formed. (*Id.*) As discussed above, the members' lack of authority with respect to setting quota quantities and license fees and subsequent contradictory actions taken by the Bidding Committee prevent these votes from being construed as "assurances **[**42]** of common action" that could satisfy the third plus factor. *In re Ins. Brokerage, 618 F.3d at 322*. Beyond these votes, plaintiff points to Liu's testimony explaining that during these meetings, the companies also "discussed whether the market was good or bad, their forecasts for supply and demand, and whether overall prices would be going up or down." (ECF No. 272 at 5.) Liu explained that the companies "complained to one another regarding low prices and unfair competition." (*Id.*) These conversations occurred during and outside of official meeting times, because "meals were arranged so that representatives of companies would have meals together." (*Id.*) Hong testified similarly concerning these topics. (*Id.*) Defendants' meeting and discussing market conditions on multiple occasions is insufficient to raise an inference of an agreement. *See Burtch, 662 F.3d at 228* ("'[F]requent meetings between the alleged conspirators . . . will not sustain a plaintiff's burden absent evidence which would permit the inference that **[*427]** those close ties led to an illegal agreement.'" (quoting *Venture Tech., Inc. v. Nat'l Fuel Gas Co., 685 F.2d 41, 45 (2d Cir. 1982))*). To support the third plus factor, evidence must suggest defendants somehow "adopted a common plan." *See In re Ins. Brokerage, 618 F.3d at 322*. Here, beyond the insinuation underlying its assertions that defendants met and **[**43]** discussed prices, plaintiff offers no evidence that defendants "exchanged assurances of common action" with respect to fixing prices or limiting output of bauxite during any of these meetings. *Id.* Finally, plaintiff points to communications by and between representatives of Bosai and Tianjin separate from Bauxite Branch meetings as evidence that a traditional conspiracy was formed. (ECF No. 272 at 6.) Plaintiff notes Hong's October 2005 email that "CCCMC will have meeting on Nov 12th to discuss/decide the quantity/price of bauxite quota in 2006." (*Id.* (quoting (ECF No. 275)).) As discussed above, MOFCOM's delegation to the Bidding Committee of the power to set such a quota combined with the Bidding Committee's announcement of the 2006 quota following the November 12, 2005 meeting supports the interpretation that Hung expected to learn the quota amount at the meeting—not to agree to it. Hong's email is not "'sufficiently unambiguous' evidence that the defendants conspired." *Petruzzi's IGA Supermarkets, Inc., 998 F.2d at 1233* (quoting *Matsushita, 475 U.S. at 597*).

In addition to Hong's email, plaintiff asserts "[d]efendants also engaged in other direct communications and held in-person meetings" to prove a conspiracy among them. (ECF No. 272 at 6.) Plaintiff offered no evidence **[**44]** about the substance of the conversations that took place on these occasions. At best, the occurrences of these direct communications and in-person meetings show defendants had the *opportunity* to conspire. The Third Circuit Court of Appeals has held, however, that "[p]roof of opportunity to conspire, without more, will not sustain an inference that a conspiracy has taken place." *Petruzzi's IGA Supermarkets, Inc., 998 F.2d at 1235*.

Plaintiff failed to establish sufficient circumstantial evidence such as consciously parallel behavior by defendants or the existence of the plus factors. There is insufficient circumstantial evidence as a matter of law to support plaintiff's § 1 claim. *See Superior Offshore Int'l, Inc., 490 F. App'x at 498*.

V. CONCLUSION

Because plaintiff failed to adduce sufficient direct or circumstantial evidence of a conspiracy, summary judgment is proper. *See* *Rossi, 156 F.3d at 465-66*. No reasonable jury could render a verdict in favor of plaintiff on its claims. For the reasons set forth in this opinion, defendants' motion for summary judgment (ECF No. 263) will be granted.

An appropriate order will be entered.

/s/ Joy Flowers Conti

Joy Flowers Conti

Chief United States District Judge

Dated: January 25, 2016

[EDITOR'S NOTE: The following court-provided text does not appear at this cite in F. Supp. 3d.]

[*none] **ORDER**

And now, this 25th day of January 2016, for the reasons set forth in the accompanying memorandum **[**45]** opinion,

IT IS HEREBY ORDERED that the Motion for Summary Judgment filed by defendants Bosai Minerals Group Co., Ltd. and CMP Tianjin Co., Ltd., (ECF No. 263), is GRANTED;

IT IS FURTHER ORDERED that judgment is entered in favor of defendants Bosai Minerals Group Co., Ltd. and CMP Tianjin Cp., Ltd. against plaintiff Resco Products, Inc..

BY THE COURT:

/s/ *Joy Flowers Conti*

Joy Flowers Conti

Chief United States District Judge

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Valspar Corp. v. E.I. du Pont de Nemours & Co.

United States District Court for the District of Delaware

January 25, 2016, Decided; January 25, 2016, Filed

Civil Action No. 14-527-RGA

Reporter
152 F. Supp. 3d 234 *; 2016 U.S. Dist. LEXIS 7962 **; 2016-1 Trade Cas. (CCH) P79,475

THE VALSPAR CORPORATION and VALSPAR SOURCING, INC., Plaintiffs; v. E.I. DU PONT DE NEMOURS AND COMPANY, Defendant.

Subsequent History: Affirmed by *Valspar Corp. v. E. I. du Pont de Nemours & Co., 2017 U.S. App. LEXIS 19015 (3d Cir. Del., Sept. 14, 2017)*

Prior History: *Valspar Corp. v. E.I. DuPont de Nemours & Co., 15 F. Supp. 3d 928, 2014 U.S. Dist. LEXIS 54963 (D. Minn., Apr. 21, 2014)*

Core Terms

conspiracy, prices, announcements, increased price, interdependence, emails, titanium dioxide, collusion, summary judgment, competitors, sales, oligopolists, contends, argues, communications, cases, factors, reasonable inference, independent action, Statistics, oligopoly, genuine, motive, market share, non-collusive, consultants, aggregated, non-moving, customers, inventory

LexisNexis® Headnotes

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

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

HN1[] **Entitlement as Matter of Law, Appropriateness**

The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(a)*. The moving party has the initial burden of proving the absence of a genuinely disputed material fact relative to the claims in question. Material facts are those that could affect the outcome of the proceeding, and a dispute about a material fact is genuine if the evidence is sufficient to permit a reasonable jury to return a verdict for the nonmoving party. The burden on the moving party may be discharged by pointing out to the district court that there is an absence of evidence supporting the non-moving party's case.

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

HN2[] Burdens of Proof, Nonmovant Persuasion & Proof

With respect to a motion for summary judgment, once the moving party has discharged its burden, the burden then shifts to the non-movant to demonstrate the existence of a genuine issue for trial. A non-moving party asserting that a fact is genuinely disputed must support such an assertion by: (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations, admissions, interrogatory answers, or other materials; or (B) showing that the materials cited by the opposing party do not establish the absence of a genuine dispute. *Fed. R. Civ. P. 56(c)(1)*.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

HN3[] Summary Judgment, Evidentiary Considerations

When determining whether a genuine issue of material fact exists, the court must view the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in that party's favor. A dispute is "genuine" only if the evidence is such that a reasonable jury could return a verdict for the non-moving party. If the non-moving party fails to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof, the moving party is entitled to judgment as a matter of law.

Antitrust & Trade Law > Sherman Act > Claims

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

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

HN4[] Sherman Act, Claims

Section 1 of the Sherman Act provides: Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. *15 U.S.C.S. § 1*. In order to satisfy the requirement of a contract, combination or conspiracy, there must be some form of concerted action. The existence of an agreement is the hallmark of a *Section 1* claim.

Antitrust & Trade Law > Sherman Act > Claims

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

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

HN5[] Sherman Act, Claims

In an action under *15 U.S.C.S. § 1*, in addition to demonstrating an agreement, the *§ 1* plaintiff must show that the conspiracy to which the defendant was a party imposed an unreasonable restraint on trade. In most cases, courts apply the so-called rule of reason, a case-by-case inquiry designed to assess whether challenged conduct is an anticompetitive practice. Some agreements, however, are per se unlawful once proven. One such per se unlawful agreement is horizontal price fixing. In per se cases, the plaintiff need only prove that the defendants conspired among each other and that this conspiracy was the proximate cause of the plaintiff's injury.

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

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

HN6[] **Cartels & Horizontal Restraints, Price Fixing**

There is no special burden on plaintiffs facing summary judgment in antitrust cases. There is, however, an important distinction in *15 U.S.C.S. § 1* cases: ***antitrust law*** limits the range of permissible inferences that may be drawn from ambiguous evidence. The acceptable inferences which can be drawn from circumstantial evidence vary with the plausibility of the plaintiff's theory and the dangers associated with such inferences. Thus, when a plaintiff's theory makes no economic sense, the plaintiff must produce more persuasive evidence. Even with a plausible theory, however, a plaintiff relying on ambiguous evidence alone cannot raise a reasonable inference of conspiracy sufficient to survive summary judgment. The Supreme Court has held explicitly that conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. Therefore, to survive summary judgment, the plaintiff must present evidence that tends to exclude the possibility that the alleged conspirators acted independently. In the context of a claim alleging a horizontal price fixing conspiracy, the plaintiff must present evidence that would enable a reasonable jury to reject the hypothesis that the defendants, foreswore price competition without actually agreeing to do so.

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

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

HN7[] **Cartels & Horizontal Restraints, Price Fixing**

Courts have been cautious in accepting inferences from circumstantial evidence in cases involving allegations of horizontal price-fixing among oligopolists, due to the theory of interdependence. That theory posits that in an oligopolistic market, a single firm's change in output or price will have a noticeable impact on the market and on its rivals. Therefore, any rational decision by an oligopolist must take into account the anticipated reaction of the other firms. While the practice of parallel pricing, known as conscious parallelism, produces anticompetitive outcomes, it is lawful. It is lawful, in part, because it is not an agreement. Put another way, express collusion violates ***antitrust law***; tacit collusion does not.

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

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

HN8[] **Cartels & Horizontal Restraints, Price Fixing**

Conscious parallelism cannot by itself create a reasonable inference of conspiracy. Parallel conduct is just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market. Therefore, when a plaintiff seeks to base a claim of collusion on inferences from consciously parallel behavior, the plaintiff is required to show certain "plus factors." While there is no exhaustive list of plus factors, the Third Circuit has identified three: (1) evidence that the defendant had a motive to enter into a price fixing conspiracy; (2) evidence that the defendant acted contrary to its interest; and (3) evidence implying a traditional conspiracy. The requirement of showing plus factors helps to ensure that courts punish an actual agreement instead of the unilateral, independent conduct of competitors.

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

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

HN9[] **Cartels & Horizontal Restraints, Price Fixing**

In cases alleging parallel price increases, the first two "plus" factors (motive and acting contrary to interests) largely restate the phenomenon of interdependence. Therefore, they may not suffice—by themselves—to defeat summary judgment on a claim of horizontal price-fixing among oligopolists. In short, they are neither necessary nor sufficient to preclude summary judgment. Accordingly, the most important evidence will generally be non-economic evidence that there was an actual, manifest agreement not to compete. This is the third plus factor. Evidence satisfying this plus factor may involve customary indications of traditional conspiracy, or proof that the defendants got together and exchanged assurances of common action or otherwise adopted a common plan even though no meetings, conversations, or exchanged documents are shown.

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

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

HN10[] **Cartels & Horizontal Restraints, Price Fixing**

In an action under *15 U.S.C.S. § 1*, when assessing the "plus factor" of evidence that the defendant acted contrary to its interests, a court looks for evidence of conduct that would be irrational assuming that the defendant operated in a competitive market, or put differently, evidence that the market behaved in a noncompetitive manner.

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

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

HN11[] **Cartels & Horizontal Restraints, Price Fixing**

Absent increases in marginal cost or demand, raising prices generally does not approximate—and cannot be mistaken as—competitive conduct. While raising prices cannot be mistaken as competitive conduct, it does not necessarily follow that raising prices is evidence of an agreement. A firm's motivation to meet rival prices constitutes only interdependence. For parallel pricing to go beyond mere interdependence, it must be so unusual that in the absence of an advance agreement, no reasonable firm would have engaged in it. Oligopolists may maintain supracompetitive prices through rational, interdependent decision making, as opposed to unlawful concerted action, if the oligopolists independently conclude that the industry as a whole would be better off by raising prices. Evidence of a price increase disconnected from changes in costs or demand only raises the question: was the anticompetitive price increase the result of lawful, rational interdependence or of an unlawful price-fixing conspiracy? On this issue, expert testimony is useful as a guide to interpreting market facts, but it is not a substitute for them.

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

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

HN12[] **Cartels & Horizontal Restraints, Price Fixing**

In cases involving oligopolists and parallel pricing, the most important plus factor is the third: evidence implying a traditional conspiracy. This evidence has been characterized as non-economic evidence that there was an actual, manifest agreement not to compete. Such evidence may involve customary indications of traditional conspiracy, or proof that the defendants got together and exchanged assurances of common action or otherwise adopted a common plan even though no meetings, conversations, or exchanged documents are shown.

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

HN13[] Per Se Rule & Rule of Reason, Sherman Act

For purposes of an action under *15 U.S.C.S. § 1*, nothing about the sharing of aggregated information suggests the existence of a conspiracy.

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

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

HN14[] Cartels & Horizontal Restraints, Price Fixing

For purposes of an action under *15 U.S.C.S. § 1*, communications between competitors do not permit an inference of an agreement to fix prices unless those communications rise to the level of an agreement, tacit or otherwise. In short, evidence that the executives from the industry were in the same place at the same time is insufficient to support a reasonable inference of conspiracy.

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

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

HN15[] Cartels & Horizontal Restraints, Price Fixing

In an oligopoly setting, any single firm's price and output decisions will have a noticeable impact on the market and its rivals. As a result, oligopolists may maintain supracompetitive prices through rational, interdependent decision making, as opposed to unlawful concerted action, if the oligopolists independently conclude that the industry as a whole would be better off by raising prices. In a concentrated market with high barriers to entry, a higher price generating higher profits will not be undone by the output of new entrants. Even if a new entrant caused a drastic fall in prices that would deny them the profits they sought to obtain from having entered, that drastic fall could well be the result of parallel but independent pricing decisions by the incumbent firms, rather than of agreement.

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

HN16[] Per Se Rule & Rule of Reason, Per Se Violations

The dissemination of price information is not itself, a per se violation of the *Sherman Act*.

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

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

HN17[] **Cartels & Horizontal Restraints, Price Fixing**

There is a fundamental distinction between express and tacit collusion: while express collusion violates ***antitrust law***, tacit collusion does not. The same distinction is important when interpreting terms that refer to the industry generally. In an oligopoly, it may be in a firm's best interest to consider the interests and needs of the industry as a whole. Oligopolists may independently conclude that the industry as a whole would be better off by raising prices. Tacit collusion, however, does not suggest an agreement.

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

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

HN18[] **Cartels & Horizontal Restraints, Price Fixing**

As the Third Circuit has recently held, it is generally unremarkable for the pendulum in oligopolistic markets to swing from less to more interdependent and cooperative. In fact, the extent of interdependence within an oligopolistic market may be either weak or strong and may vary from time to time. In order for a change in conduct to create an inference of a conspiracy, the shift in behavior must be a radical or abrupt change from the industry's business practices.

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

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

HN19[] **Cartels & Horizontal Restraints, Price Fixing**

For purposes of an action under *15 U.S.C.S. § 1*, in determining whether the plaintiff can survive summary judgment, the key question is whether the plaintiff has advanced sufficient evidence that would enable a reasonable jury to reject the hypothesis that the defendants foreswore price competition without actually agreeing to do so. Evidence used to meet that burden of production cannot be as consistent with interdependence as with a conspiracy, as that does not tend to exclude the possibility that the defendants acted lawfully.

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For E.I. du Pont de Nemours and Company, Defendant: Kathleen Furey McDonough, Esq., John A. Sensing, Esq., Potter, Anderson & Corroon LLP, Wilmington, DE; Shari Ross Lahlou, Esq. (argued), Crowell & Moring LLP, Washington, DC; Joshua C. Stokes, Esq., Crowell & Moring LLP, Los Angeles, CA.

Judges: ANDREWS, UNITED STATES DISTRICT JUDGE.

Opinion by: ANDREWS

Opinion

[*237] MEMORANDUM OPINION

January 25, 2016

ANDREWS, U.S. DISTRICT JUDGE:

Presently before the Court is E.I. du Pont de Nemours and Company's motion for summary judgment. (D.I. 239). The issues have been fully briefed. (D.I. 240, 286, 381). Oral argument was held on November 16, 2015. (D.I. 396). For the reasons set forth herein, the motion for summary judgment is **GRANTED**.

I. PROCEDURAL BACKGROUND

Prior to filing suit in this case, Plaintiffs opted out of two separate class actions against the defendants in this **[**2]** case.[1] **[*238]** (D.I. 1). On November 22, 2013, The Valspar Corporation and Valspar Sourcing, Inc. (collectively "Valspar") brought an antitrust action against DuPont, Huntsman International LLC, Rronos Worldwide, Inc., and Millennium Inorganic Chemicals, Inc., for violations of *Section 1* of the Sherman Act, along with several state law claims.[2] (D.I. 1). Valspar alleged that DuPont and the other defendants, all suppliers of titanium dioxide (or "TiO2"), conspired to fix the price of titanium dioxide. (*Id.*). The action was originally brought in the District of Minnesota. (*Id.*). Valspar's case against Millennium remains there. *Valspar Corp. v. Millennium Inorganic Chems., Inc.*, No. 13-CV-03214. Valspar's case against Huntsman was severed and transferred to the Southern District of Texas. (D.I. 100). The action against Kronos was also severed and transferred to that court. *Valspar Corp. v. Kronos Worldwide, Inc., 50 F. Supp. 3d 1152, 1157-58 (D. Minn. 2014)*. The case against DuPont was severed and transferred to the District of Delaware. (D.I. 100). Following discovery, DuPont moved for summary judgment. (D.I. 239).

II. FACTUAL BACKGROUND

Titanium dioxide is a white pigment with certain refractive and UV properties, which makes it useful in certain products including paint and other coatings, plastics, rubber, and paper. (D.I. 250, Ex. 198; D.I. 293, Ex. 199). The market is highly concentrated.[3] (D.I. 288, Ex. 7 at 97-99, Ex. 11 at 5-12; D.I. 289, Ex. 24 at 4, Ex. 31; D.I. 290, Ex. 35 at 51; D.I. 291, Ex. 75 at . 12). DuPont was one of several companies—along with Huntsman, Millennium, Kronos, Tronox, and Asian and European producers—that sold titanium dioxide in the United States during the relevant time period. (D.I. 250, Ex. 206 at 10-12). Valspar, a manufacturer of paints and other coatings, was one of DuPont's largest customers. (D.I. 245, Ex. 74 at 271-72).

Relevant to this case is the existence of the Titanium Dioxide Manufacturers Association ("TDMA") and its associated Global Statistics Program ("GSP"). (D.I. 307, Ex. 701). The TDMA is a trade association organized by a European chemical industry trade association called "CEFIC." (*Id.*). The TDMA established the GSP to collect data on monthly sales, production, and inventory for members of the TDMA. (D.I. 307, Exs. 688, 690; D.I. 308, Ex. 734 at 54-56). This data is aggregated and distributed to the members of the TDMA. (D.I 307, Exs. 688, 690).

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[1] The class action in the Northern District of California (*Los Gatos Mercantile, Inc. v. E.I. DuPont de Nemours & Co.*, 13-cv-13-1180-BLF) is still active. The class action in **[**3]** the District of Maryland ("Maryland Class Action") was dismissed in its entirety following settlement. *In re Titanium Dioxide Antitrust Litig., 2013 U.S. Dist. LEXIS 176100, 2013 WL 7389427 (D. Md. Dec. 13, 2013)*. Notably, this occurred after the court denied the defendants' motion for summary judgment. *See* *In re Titanium Dioxide Antitrust Litig., 959 F. Supp. 2d 799 (D. Md. 2013)*. It should also be noted that while Tronox was initially a defendant and an alleged co-conspirator in the Maryland case, it later declared bankruptcy. *See* *In re Titanium Dioxide Antitrust Litig., 959 F. Supp. 2d at 802 n.2*.

[2] Valspar later agreed to dismiss without prejudice its state law claims. (D.I. 72).

[3] The **[**4]** parties agree that the titanium dioxide market is an oligopoly. (*See* D.I. 286 at 13; D.I. 240 at 11). An oligopoly is a market "in which a few relatively large sellers account for the bulk of the output." 2B Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** 10 (4th ed. 2014).

In the 1990s and 2000s, the titanium dioxide industry suffered considerable declines in consumption and price. (D.I. 312, Ex. 983 ¶¶ 71-75, figs. 4, 5 & 6; D.I. 297, Ex. 386; D.I. 288, Ex. 16 at 143). Profitability reached an all-time low in 2001. (D.I. 289, Ex. 31 at 40; D.I. 297, Ex. 386). Valspar alleges that because of this decline, DuPont and the other defendants **[**5]** entered into a conspiracy to fix prices. (D.I. 286 at 8). Valspar contends that this conspiracy resulted in 31 parallel price increase announcements between 2002 and 2013 (the "Conspiracy Period"). (*Id.* at 8-9). Valspar contends that, as a result of this conspiracy, DuPont and the other defendants charged an average of 16% more than they would have but for the conspiracy. (*Id.* at 9). Valspar purchased $1.27 billion of titanium dioxide from DuPont and the other defendants in the period **[*239]** from February 2003 to December 2013. (*Id.*; D.I. 312, Ex. 981 at 10-11). Valspar contends this resulted in an overcharge to Valspar of $176 million. (D.I. 286 at 9).

III. LEGAL STANDARD

HN1[] "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*. The moving party has the initial burden of proving the absence of a genuinely disputed material fact relative to the claims in question. *Celotex Corp. v. Catrett, 477 U.S. 317, 330, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. Material facts are those "that could affect the outcome" of the proceeding, and "a dispute about a material fact is 'genuine' if the evidence is sufficient to permit a reasonable jury to return a verdict for the nonmoving party." **[**6]** *Lamont v. New Jersey, 637 F.3d 177, 181 (3d Cir. 2011)* (quoting *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986))*. The burden on the moving party may be discharged by pointing out to the district court that there is an absence of evidence supporting the non-moving party's case. *Celotex, 477 U.S. at 323*.

HN2[] The burden then shifts to the non-movant to demonstrate the existence of a genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*; *Williams v. Borough of West Chester, Pa., 891 F.2d 458, 460-61 (3d Cir. 1989)*. A non-moving party asserting that a fact is genuinely disputed must support such an assertion by: "(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations . . ., admissions, interrogatory answers, or other materials; or (B) showing that the materials cited [by the opposing party] do not establish the absence . . . of a genuine dispute . . . ." *Fed. R. Civ. P. 56(c)(1)*.

HN3[] When determining whether a genuine issue of material fact exists, the court must view the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in that party's favor. *Scott v. Harris, 550 U.S. 372, 380, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007)*; *Wishkin v. Potter, 476 F.3d 180, 184 (3d Cir. 2007)*. A dispute is "genuine" only if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson, 477 U.S. at 247-49*. If the non-moving party fails to make a sufficient showing on an essential element of its case with respect to which it **[**7]** has the burden of proof, the moving party is entitled to judgment as a matter of law. *See* *Celotex, 477 U.S. at 322*.

IV. ANALYSIS

A. *Sherman Act § 1* Legal Standard

HN4[] *Section 1* of the Sherman Act provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." *15 U.S.C. § 1*. In order to satisfy the requirement of a "contract, combination . . . or conspiracy," there must be "some form of concerted action." *In re Baby Food Antitrust Litig., 166 F.3d 112, 117 (3d Cir. 1999)*. "The existence of an agreement is the hallmark of a *Section 1* claim." *Id.; see also* *Alvord-Polk, Inc. v. F. Schumacher & Co., 37 F.3d 996, 999 (3d Cir. 1994)* (The "very essence of a *section 1* claim . . . is the existence of an agreement.").

HN5[] In addition to demonstrating an agreement, the § 1 plaintiff must show that "the conspiracy to which the defendant was a party imposed an unreasonable **[*240]** restraint on trade." *Toledo Mack Sales & Serv., Inc. v. Mack Trucks, Inc., 530 F.3d 204, 218 (3d Cir. 2008)*. In most cases, courts "apply the so-called rule of reason, a case-by-case inquiry designed to assess whether challenged conduct is an anticompetitive practice." *In re Chocolate Confectionary Antitrust Litig., 801 F.3d 383, 395 (3d Cir. 2015)*. Some agreements, however, are *per se* unlawful once proven. *In re Ins. Brokerage Antitrust Litig., 618 F.3d 300, 316 (3d Cir. 2010)*. One such *per se* unlawful agreement is horizontal price fixing. *Texaco Inc. v. Dagher, 547 U.S. 1, 5, 126 S. Ct. 1276, 164 L. Ed. 2d 1 (2006)*. In *per se* cases, "the plaintiff **[**8]** need only prove that the defendants conspired among each other and that this conspiracy was the proximate cause of the plaintiff's injury." *InterVest, Inc. v. Bloomberg, L.P., 340 F.3d 144, 159 (3d Cir. 2003)*.

HN6[] There is no "special burden on plaintiffs facing summary judgment in antitrust cases." *Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 468, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)*. There is, however, an "important distinction" in § 1 cases: "***antitrust law*** limits the range of permissible inferences [that may be drawn] from ambiguous evidence." *In re Flat Glass Antitrust Litig., 385 F.3d 350, 357 (3d Cir. 2004)* (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986))*. The "acceptable inferences which can be drawn from circumstantial evidence vary with the plausibility of the plaintiff's theory and the dangers associated with such inferences." *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., 998 F.2d 1224, 1232 (3d Cir. 1993)*. Thus, when a plaintiff's theory "makes no economic sense," the plaintiff must produce "more persuasive evidence." *Flat Glass, 385 F.3d at 357*. Even with a plausible theory, however, "a plaintiff relying on ambiguous evidence alone cannot raise a reasonable inference of conspiracy sufficient to survive summary judgment." *In re Chocolate, 801 F.3d at 396-97*. The Supreme Court has held explicitly that "[c]onduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Matsushita, 475 U.S. at 588*. Therefore, to survive summary judgment, the plaintiff must present evidence "'that tends to exclude the possibility' that the alleged **[**9]** conspirators acted independently." *Id.* (quoting *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984))*. In the context of a claim alleging a horizontal price fixing conspiracy, the plaintiff must present "evidence that would enable a reasonable jury to reject the hypothesis that the defendants, foreswore price competition without actually agreeing to do so." *Flat Glass, 385 F.3d at 368* (quoting *In re High Fructose Corn Syrup Antitrust Litig., 295 F.3d 651, 661 (7th Cir. 2002))*.

HN7[] Courts "have been cautious in accepting inferences from circumstantial evidence in cases involving allegations of horizontal price-fixing among oligopolists," due to the theory of "interdependence." *Flat Glass, 385 F.3d at 358-59*. That theory posits that in an oligopolistic market, "a single firm's change in output or price 'will have a noticeable impact on the market and on its rivals.'" *In re Chocolate, 801 F.3d at 397* (quoting *Flat Glass, 385 F.3d at 359*). Therefore, "any rational decision [by an oligopolist] must take into account the anticipated reaction of the other firms." *Flat Glass, 385 F.3d at 359* (quoting Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** 207 (2d ed. 2000)). While the "practice of parallel pricing, known as 'conscious parallelism,' produces anticompetitive outcomes, it is lawful." *In re Chocolate, 801 F.3d at 397*. It is lawful, in part, because it "is not an agreement." **[*241]** *Id.* Put another way, "[e]xpress collusion violates ***antitrust law***; tacit collusion does not." *In re Text Messaging Antitrust Litig., 782 F.3d 867, 872 (7th Cir. 2015)*; *see also Flat Glass, 385 F.3d at 362* (acknowledging, in the **[**10]** context of price increases, the distinction between "collusion [that] was merely interdependent or [that which was] the result of an actual agreement").

HN8[] Conscious parallelism cannot by itself "create a reasonable inference of conspiracy." *In re Chocolate, 801 F.3d at 398*. "[P]arallel conduct is 'just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market.'" *In re Ins. Brokerage Antitrust Litig., 618 F.3d 300, 321 (3d Cir. 2010)* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 554, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. Therefore, when a plaintiff seeks to "bas[e] a claim of collusion on inferences from consciously parallel behavior," the plaintiff is required to show certain "plus factors." *Flat Glass, 385 F.3d at 360*. While there is no exhaustive list of plus factors, the Third Circuit has identified three: "(1) evidence that the defendant had a motive to enter into a price fixing conspiracy; (2) evidence that the defendant acted contrary to its interest; and (3) 'evidence implying a traditional conspiracy.'" *Id.* (quoting *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., 998 F.2d*

1224, 1244 (3d Cir. 1993)). The "require[ment]" of showing plus factors helps to "ensure that courts punish . . . an actual agreement . . . instead of the unilateral, independent conduct of competitors." *Id.* (internal quotation marks omitted).

HN9[] In cases alleging parallel price increases, however, "the first two factors **[**11]** largely restate the phenomenon of interdependence." *Id.; see also* *In re Chocolate, 801 F.3d at 398*. Therefore, they "may not suffice—by themselves—to defeat summary judgment on a claim of horizontal price-fixing among oligopolists." *Flat Glass, 385 F.3d at 361*. In short, they are "neither necessary nor sufficient to preclude summary judgment." *Id. at 361 n.12*. Accordingly, "[t]he most important evidence will generally be non-economic evidence 'that there was an actual, manifest agreement not to compete.'" *Id. at 361* (quoting *In re High Fructose Corn Syrup, 295 F.3d at 661*). This is the third plus factor. Evidence satisfying this plus factor "may involve 'customary indications of traditional conspiracy,' or 'proof that the defendants got together and exchanged assurances of common action or otherwise adopted a common plan even though no meetings, conversations, or exchanged documents are shown.'" *Id.* (quoting Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** 243 (2d ed. 2000)).

A. Parallel Conduct

Valspar does not advance any direct evidence of conspiracy. Instead, Valspar relies on parallel conduct undertaken by DuPont and the other defendants, together with "plus factors." The parallel conduct at issue is parallel pricing. According to Valspar, DuPont and the other defendants "issued 31 parallel price increase announcements **[**12]** nearly simultaneously, almost always in an identical amount and with identical effective dates." (D.I. 286 at 14; D.I. 312, Ex. 983 at 19-31). This characterization is generally accurate, with two caveats. First, "nearly simultaneously" frequently means several days or even weeks apart. (D.I. Ex. 983 at 19-31). Second, the "almost" in "almost always" is operative, as the total of "31" is reached by counting a number of announcements without identical amounts and with effective dates several days apart. (*Id.*).

DuPont does not contest the existence of parallel pricing, but instead argues that **[*242]** this conduct "alone is insufficient . . . to support an inference of conspiracy." (D.I. 240 at 9-11). DuPont is correct. Parallel pricing is obviously important to Valspar's claim, but "an inference of conspiracy" can be drawn only when there are "sufficient other 'plus' factors." *In re Citric Acid Litig., 191 F.3d 1090, 1102 (9th Cir. 1999)*; *see also* *Flat Glass, 385 F.3d at 360-61*. Since the price increase announcements may be explained by conscious parallelism, Valspar must be able to show—through plus factors—the existence of "an actual agreement." *Flat Glass, 385 F.3d at 360*; *see also* *In re Chocolate, 801 F.3d at 398*.

B. Motive to Enter into Conspiracy

The first "plus factor" articulated by the Third Circuit relates to the motive of the defendant **[**13]** to enter into a price fixing conspiracy. *Flat Glass, 385 F.3d at 360*. DuPont apparently concedes that the market for titanium dioxide is conducive to conspiracy. (D.I. 240 at 23-24; D.I. 396 at 59-60). The market is highly concentrated. (D.I. 288, Ex. 7 at 97-99, Ex. 11 at 5-12; D.I. 289, Ex. 24 at 4, Ex. 31; D.I. 290, Ex. 35 at 51; D.I. 291, Ex. 75 at 12). Titanium dioxide is a standardized commodity-like product. (D.I. 290, Exs. 36, 50-52, 58 at 87; D.I. 291, Ex. 59 at 5). There are no viable substitutes. (D.I. 289, Ex. 31 at 37; D.I. 290, Ex. 34 at 13, Ex. 35 at 51). There are substantial barriers to entry. (D.I. 289, Ex. 19 at 6; D.I. 292, Ex. 113). DuPont also does not dispute that the market conditions prior to the Conspiracy Period provided DuPont with a motive to enter into a conspiracy. (D.I. 240 at 23-24; D.I. 396 at 59-60). Prior to the Conspiracy Period, the demand for titanium dioxide declined, which resulted in a concomitant decline in prices. (D.I. 312, Ex. 983 ¶¶ 71-75, figs. 4, 5 & 6). Such market conditions made "price competition more than usually risky and collusion more than usually attractive." *See* *In re High Fructose Com Syrup Antitrust Litig., 295 F.3d 651, 657 (7th Cir. 2002)*. Indeed, in the Maryland Class Action, the court concluded that these conditions amounted **[**14]** to "a text book example of an industry susceptible to efforts to maintain supracompetitive prices." *In re Titanium Dioxide Antitrust Litig., 959 F. Supp. 2d 799, 827 (D. Md. 2013)* (quoting *Flat Glass, 385 F.3d at 361*). I therefore conclude that the market for titanium dioxide was conducive to conspiracy and that DuPont had a motive to enter into such a conspiracy. As articulated above, however, evidence of motive "does not create a reasonable inference of concerted action because it merely restates interdependence." *In re Chocolate, 801 F.3d at 398*; *see also* *Flat Glass, 385 F.3d at 361*; *In re Baby Food Antitrust Litig., 166 F.3d 112, 122 (3d Cir. 1999)*.

C. Actions Contrary to Interest

The second "plus factor" that may indicate an agreement is "evidence that the defendant acted contrary to its interests." *Flat Glass, 385 F.3d at 360*. ***HN10***[] When assessing this factor, a court looks for "evidence of conduct that would be irrational assuming that the defendant operated in a competitive market," or "[p]ut differently, . . . 'evidence that the market behaved in a noncompetitive manner.'" *Id. at 360-61* (quoting *In re High Fructose Corn Syrup, 295 F.3d at 655*).

Here, Valspar points to several types of evidence that it argues satisfy this plus factor. Valspar contends that the market shares of the titanium dioxide manufacturers remained static, that defendants raised prices without correlated changes in the market, and that the defendants made inter-company sales at nonmarket prices. (D.I. 286 at 17-19). Each category **[**15]** of evidence is addressed separately below.

Valspar contends that the market shares of the titanium dioxide producers remained relatively stable—despite some shifts from **[*243]** year-to-year—during the Conspiracy Period. (D.I. 303, Ex. 584 at 51-55; D.I. 313, Ex. 985 ¶¶ 174-84). Using the same evidence, DuPont argues that there were significant shifts in overall market shares throughout the Conspiracy Period. (D.I. 381 at 11-12). The undisputed evidence shows that DuPont's share fluctuated between 27% and 35%; Millennium's between 15% and 22%; Kronos's between 14% and 20%; and Huntsman's between 7% and 10%. (D.I. 313, Ex. 985 at 102). Even granting that Valspar's interpretation of stability is correct, this is entirely consistent—according to Valspar's own expert—with market shares in a concentrated, oligopolistic market. (D.I. 248, Ex. 109 ¶¶ 177-79). Therefore, even accepting Valspar's view, this fact does not support an inference of conspiracy.

In arguing that the price increases were not correlated with the market or "to supply-and-demand principles," Valspar relies on its expert, who opines that, by raising prices, DuPont overcharged Valspar by an average of 16% during the Conspiracy Period. **[**16]** (D.I. 286 at 18-19; D.I. 312; Exs. 981 at 10, 982). Dr. McClave asserts that this overcharge has no non-collusive explanation. (D.I. 286 at 18-19; D.I. 312; Exs. 981 at 10, 982). The 16% figure is based on the average overcharge during the damages period of 2003 to 2013. (D.I. 312, Ex. 981 at 6). DuPont argues against the existence of an overcharge, but for purposes of this motion, does not dispute Dr. McClave's model or his conclusion that there was an overcharge. (D.I. 240 at 35 n.114).

HN11[] "[A]bsent increases in marginal cost or demand, raising prices generally does not approximate—and cannot be mistaken as—competitive conduct." *Flat Glass, 385 F.3d at 358*. While raising prices cannot be mistaken as competitive conduct, it does not necessarily follow that raising prices is evidence of an agreement. A "firm's motivation . . . to meet rival prices . . . constitute[s] only interdependence." *In re Baby Food, 166 F.3d at 135*; *see also* *White v. R.M. Packer Co., 635 F.3d 571, 586 (1st Cir. 2011)* ("One does not need an agreement to bring about this kind of follow-the-leader effect in a concentrated industry." (quoting *Clamp-All Corp. v. Cast Iron Pipe Inst., 851 F.2d 478, 484 (1st Cir. 1988))*). For parallel pricing to go "beyond mere interdependence," it "must be so unusual that in the absence of an advance agreement, no reasonable firm would have engaged in it." *In re Baby Food, 166 F.3d at 135*. Here, the evidence is entirely consistent **[**17]** with interdependent behavior. Nothing about the parallel price increase announcements is "so unusual" that "no reasonable firm would have engaged in it." *Id.* Indeed, "oligopolists may maintain supracompetitive prices through rational, interdependent decision making, as opposed to unlawful concerted action, if the oligopolists independently conclude that the industry as a whole would be better off by raising prices." *In re Chocolate Confectionary Antitrust Litig., 801 F.3d 383, 397 (3d Cir. 2015)*. "[E]vidence of a price increase disconnected from changes in costs or demand only raises the question: was the anticompetitive price increase the result of lawful, rational interdependence or of an unlawful price-fixing conspiracy?" *Id. at 400*. Dr. McClave's opinion, by itself, therefore cannot raise an inference of conspiracy. As the

Supreme Court has advised, "[e]xpert testimony is useful as a guide to interpreting market facts, but it is not a substitute for them." *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 242, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993)*.

Valspar argues that evidence of inter-company sales at nonmarket prices is evidence of conduct contrary to self-interest. (D.I. 286 at 19). Valspar's expert, Dr. **[*244]** Williams, argues that these sales are evidence of conspiracy because they could be "true-ups." **[**18]** (D.I. 247, Ex. 106 ¶¶ 100-01). That is, they could be redistributions of gains or losses in share in accordance with the terms of an agreement. (*Id.*). Additionally, Dr. Williams opines that "if one seller buys anything from another at nonmarket prices, then a resource transfer is made for which there is no reasonable noncollusive explanation." (D.I. 247, Ex. 106 101-02 (quoting William E. Kovacic et al., *Plus Factors and Agreement in **Antitrust Law***, *110 Mich. L. Rev. 393, 423 (2011)*)). Throughout the Conspiracy Period, DuPont and the other defendants made inter-company sales at below-market prices. (D.I. 312, Ex. 983 at 67-76; D.I. 298-303, Exs. 476-579). It is undisputed that these sales existed; however, that does not advance Valspar's ball very far. These sales are just as consistent with non-collusive activity as with conspiracy. For instance, DuPont's purchases in 2005 and 2006 were made by DuPont's manufacturing business, which used titanium dioxide in its own products. (D.I. 248, Ex. 108 ¶¶ 194-209). Dr. Williams expressly concedes that the purchases made by DuPont during this period "might be explained by DuPont's temporary decrease in capacity due to its DeLisle plant being shut down from September 2005 through **[**19]** February 2006 following Hurricane Katrina." (D.I. 247, Ex. 106 ¶ 103 n.157; *see also* D.I. 248, Ex. 108 ¶¶ 194-209). Dr. Williams also acknowledges that DuPont's purchases prices were sometimes higher and sometimes lower than the average prices for non-defendants. (D.I. 247, Ex. 106 at 64-75). Further, it is undisputed that the sales from DuPont to Kronos were largely attributable to a cross-licensing agreement reached to avoid litigation.[4] (D.I. 250, Exs. 188, 189, 204). From 2006 to 2008, the price was set by the agreement. (D.I. 250, Ex. 188 at 7-8). Thereafter, DuPont repeatedly negotiated to increase the price. (D.I. 250, Exs. 190-93, 197, 199-205). Even putting aside these non-collusive explanations, Dr. Williams acknowledged that while he had not "calculated how the shares would change given the volumes of intercompany sales . . ., [m]any of the sales [were] relatively small volumes . . . [and therefore he would not] expect that they would have resulted in large share shifts." (D.I. 382, Ex. 4 at 25-26). This concession undermines the entire theory of "true-ups." Therefore, these intercompany sales, which are consistent with a firm's independent interest, fail—under the theory advanced **[**20]** by Dr. Williams—to be probative of conspiracy. In short, these transfers had "productive unilateral motivations" and therefore do not tend to exclude the possibility of independent action. (D.I. 247, Ex. 106 ¶ 101 (quoting William E. Kovacic et al., *Plus Factors and Agreement in **Antitrust Law***, *110 Mich. L. Rev. 393, 423 (2011)*)).

Valspar has presented sufficient evidence to show that the titanium dioxide market "behaved in a noncompetitive manner." *In re High Fructose Com Syrup Antitrust Litig, 295 F.3d 651, 655 (7th Cir. 2002)*. Despite that showing, however, "the evidence does not go beyond interdependence and therefore does not create an inference of conspiracy." *In re Chocolate Confectionary Antitrust Litig., 801 F.3d 383, 401 (3d Cir. 2015)*. This is not surprising, as in cases of parallel pricing, "the first two [plus] factors largely restate the phenomenon of interdependence." *In re **[*245]** Flat Glass Antitrust Litig., 385 F.3d 350, 360 (3d Cir. 2004)*.

D. Evidence Implying a Traditional Conspiracy

HN12[] In cases involving oligopolists and parallel pricing, **[**21]** the most important plus factor is the third: evidence implying a traditional conspiracy. *Id. at 361*. This evidence has been characterized as "non-economic evidence 'that there was an actual, manifest agreement not to compete.'" *Id.* (quoting *In re High Fructose Corn Syrup, 295 F.3d at 661*). Such evidence "may involve 'customary indications of traditional conspiracy,' or 'proof that

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[4] Dr. Williams relies heavily on Professor Kovacic's article for this part of his opinion. In the section upon which Dr. Williams relies, Professor Kovacic himself notes: "Other transactions require scrutiny, such as patent licensing, cross-licensing, and patent pools, as well as the settlement of seemingly frivolous lawsuits." William E. Kovacic et al., *Plus Factors and Agreement in* ***Antitrust Law***, *110 Mich. L. Rev. 393,423(2011)*.

the defendants got together and exchanged assurances of common action or otherwise adopted a common plan even though no meetings, conversations, or exchanged documents are shown.'" *Id.* (quoting Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** 243 (2d ed. 2000)).

To satisfy this plus factor, Valspar relies on four general categories of evidence. First, Valspar argues that the Global Statistics Program provided DuPont and the other defendants an opportunity both to share information and to conspire to fix prices. Second, Valspar contends that DuPont and the other defendants engaged in price signaling through the use of, among other things, price increase announcements. Third, Valspar argues that certain email communications are circumstantial evidence from which the Court can infer the existence of an agreement. Fourth, Valspar argues that, due to an agreement, **[**22]** DuPont and the other defendants departed from their pre-conspiracy conduct by issuing numerous parallel price increase announcements. These categories of evidence are addressed separately below.

1. Global Statistics Program

Valspar contends that the "GSP was a means by which the defendants shared sensitive information and coordinated price increases." (D.I. 286 at 20-21). In September 2001, the TDMA's General Committee established the GSP to collect data on monthly sales, production, and inventory. (D.I. 308, Ex. 734 at 54-55). The data was then aggregated on a regional and country-by-country basis, and returned to the members of the TDMA on a monthly and quarterly basis. (D.I. 249, Ex. 183 at 16, Ex. 185 at 29-36; D.I. 242, Ex. 13 at 305-06; D.I. 307, Ex. 690). The TDMA sought DuPont's membership in the TDMA (and the GSP), because in the absence of DuPont's data, the aggregated GSP data would not be meaningful. (D.I. 249, Ex. 182). In January 2002, the TDMA amended its rules in order to admit DuPont as an Associate Member of the TDMA. (D.I. 307, Ex. 712 at 132-33). In September 2002, DuPont was approved as an Associate Member. (D.I. 307, Ex. 701 at 68).

The data reported by the GSP gave **[**23]** the defendants "a very powerful and timely over view [sic] of market supply (production) and demand (region, country, market segment) conditions." (D.I. 306, Ex. 638 at 7). It permitted the defendants to determine "market share developments by country and region, amount and location of inventory, inventory relative to industry, industry trends, and capacity additions." (D.I. 286 at 22; D.I. 330, Ex. 1341 at 28-30).

Valspar contends that "[t]he defendants were able to disaggregate the data to better track individual firm inventories, market share, and capacity utilization." (D.I. 286 at 22; D.I. 396 at 47-48). The evidence provided by Valspar does not support this conclusion. The email—relied upon by Valspar—from Huntsman marketing analyst Paul Bradley, indicates that Huntsman could determine a production total in aggregate of Kronos (within Canada), Millennium (within Brazil), and DuPont **[*246]** (within Brazil and Mexico). (D.I. 307, Ex. 678 at 24). This could be achieved by subtracting the USA production totals from the North and South America production totals. (*Id.*). There is nothing in the record that suggests that DuPont or any other defendant could determine any individual statistics about **[**24]** any firm other than their own. Indeed, Valspar's expert Dr. Williams conceded precisely this in his deposition. (D.I. 382, Ex. 4 at 28-29).

HN13[] Nothing about the sharing of aggregated information suggests the existence of a conspiracy. Participation in the GSP is properly characterized as "[c]onduct as consistent with permissible competition as with illegal conspiracy." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*. This was not an exchange of firm-specific information between competitors. It was historical, aggregated market statistics, which firms could use to analyze their position within the market. (D.I. 249, Ex. 183 at 16, Ex. 185 at 29-36; D.I. 242, Ex. 13 at 305-06; D.I. 307, Ex. 690). As such, it is directly analogous to the program at issue in *In re Citric Acid Litig., 191 F.3d 1090 (9th Cir. 1999)*, which the court described as one which "collected figures on production and sales from its members . . . and produced statistics aggregated by country" to its members. *Id. at 1099*. There, the Ninth Circuit found that there was no evidence that any firm had access to firm-specific information of other members. *Id.* The court concluded that the program had a "perfectly legal" and "legitimate" purpose and therefore was "as consistent with legitimate behavior as with conspiratorial behavior." *Id.* I conclude **[**25]** the same is true here.

Valspar also contends that during the period of 2002 to 2010, "the vast majority of the price increase announcements occurred within 30 days of a General Committee meeting of the TDMA." (D.I. 286 at 24). This demonstrates, according to Valspar, that "the defendants used the TDMA meetings to communicate their pricing plans, coordinate price increases, and confirm that each competitor would follow the leader on a price increase." (D.I. 386 at 24). The mere fact that there were communications between DuPont and the other defendants at TDMA meetings[5] does not, without more, raise an inference of conspiracy. *In re Baby Food Antitrust Litig., 166 F.3d 112, 126 (3d Cir. 1999)* (***HN14***[] "[Communications between competitors do not permit an inference of an agreement to fix prices unless 'those communications rise to the level of an agreement, tacit or otherwise.'" (quoting *Alvord-Polk, Inc. v. F. Schumacher & Co., 37 F.3d 996, 1013 (3d Cir. 1994))*), There is no evidence that there was any discussion of prices during these meetings and certainly no evidence of an agreement. In short, evidence "that the executives from the [industry] were in the same place at the same time . . . is insufficient to support a reasonable inference of' conspiracy. *In re Chocolate Confectionary Antitrust Litig., 801 F.3d 383, 409 (3d Cir. 2015)*. Valspar's argument about the temporal proximity of price increases in relation **[**26]** to TDMA meetings fares no better. In arriving at the **[*247]** stated "vast majority" of announcements, Valspar includes any announcements that occurred within 30 days *before or after* a General Committee meeting of the TDMA. (D.I. 247, Ex. 106 at 404; D.I. 286 at 24; D.I. 396 at 13). Since the meetings of the TDMA General Committee occurred quarterly, Valspar's logic would find suspect any announcement which occurred in eight out of twelve months. (D.I. 247, Ex. 106 at 404; D.I. 286 at 24; D.I. 396 at 13). This proves too much. Further, Valspar supplies no explanation as to how announcements occurring *before* a TDMA General Committee meeting could give rise to an inference that the meeting provided an opportunity to conspire about a subsequent price announcement.

Therefore, Valspar's evidence pertaining to the Global Statistics Program and the TDMA cannot raise a reasonable inference of conspiracy.

2. Signaling Price A nnouncements

Valspar proposes that the various price announcements issued by DuPont and the other defendants were "price beacons to competitors for the purpose of gauging their willingness to raise prices." (D.I. 286 at 25-26 (quoting *In re Currency Conversion Fee Antitrust Litig., 773 F. Supp. 2d 351, 371 (S.D.N.Y. 2011))*. Consistent with this theory, the court in the Maryland Class Action concluded that "[f]requent price increase announcements could have served as 'signals,' making further exchange of actual price information superfluous." *In re Titanium Dioxide Antitrust Litig., 959 F. Supp. 2d 799, 828 (D. Md. 2013)*.

In further support of its signaling theory, Valspar cites to a presentation and several internal emails exchanged within the ranks of the defendant manufacturers. In one email, in September 2009, DuPont's North American Marketing Manager for Titanium Technologies Lloyd Sommers wrote:

> With our recent prices increases, we've begun the process of 'training' our competitors to follow our lead on price increases (or, in one **[**28]** example, that we'll follow if they lead). From a testing perspective, it may be valuable to make the October announcement. If our competitors do follow, it sends a clear message to us that they are receiving/understanding our price increase messages. (D.I. 308, Ex. 770 at 55).

In another email, in July 2009, DuPont's Colette Daney remarked that a price increase "could help with messaging in the market place."[6] (D.I. 295, Ex. 297 at 16). A 2004 email from Millennium's Tim Edwards suggested that an

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[5] It is undisputed that DuPont did not actually attend the General Meetings of the TDMA until 2010. (D.I. 242, Ex. 7 at 159; D.I. 245, Ex. 70 at 181-82; D.I. 396 at 11-12). Valspar states that this is immaterial, as DuPont attended other CEFIC meetings which were concurrent with the General Meetings. (D.I. 396 at 11-2; *see also* D.I. 249, Exs. 179-81). The Court will assume, for purposes of this motion, that DuPont and the other defendants **[**27]** were at quarterly CEFIC meetings of some sort—and therefore were capable of communicating with each other in person—even though DuPont did not attend the General Meetings.

[6] The two 2009 DuPont emails seem, to put it charitably, inconsistent with the idea that DuPont had agreed to fix prices seven years earlier.

October 1st announcement date was "a bit early," while an announcement on November 1st would give "others [a] chance to get on their horses." (D.I. 298, Ex. 462). A 2008 email from a Millennium employee attached a Huntsman price increase and indicated that "[e]veryone is now on the bus." (D.I. 296, Ex. 344). On September 14, 2004, a Millennium email stated: "we have competition on board for the Oct 1 price increase announcement."[7] (D.I. 298, Ex. 436). In a strategic pricing presentation in 2007, DuPont noted in a slide titled "Lessons Learned," that in regard to "Price Leadership and Market Messaging," "[o]ur behavior, **[*248]** and how it is perceived, has a major impact on marketplace dynamics and pricing." (D.I. 292, **[**29]** Ex. 93 at 36). In October 2008, Thomas Cerny of Kronos stated: "We must not give a signal to the competition with lower prices now . . . ,"[8] (D.I. 298, Ex. 407).

Valspar's characterization of this evidence largely neglects the theory of interdependence, as well as the distinction between tacit and express collusion. As stated earlier, ***HN15***[] in an oligopoly setting, "any single firm's 'price and output decisions will have a noticeable **[**31]** impact on the market and its rivals.'" *In re Flat Glass Antitrust Litig., 385 F.3d 350, 359 (3d Cir. 2004)* (quoting Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** 206 (2d ed. 2000)). As a result, "oligopolists may maintain supracompetitive prices through rational, interdependent decision making, as opposed to unlawful concerted action, if the oligopolists independently conclude that the industry as a whole would be better off by raising prices." *In re Chocolate Confectionary Antitrust Litig., 801 F.3d 383, 397 (3d Cir. 2015)*; *see also* *In re Text Messaging Antitrust Litig., 782 F.3d 867, 871 (7th Cir. 2015)* ("'[F]ollow the leader' pricing ('conscious parallelism,' as lawyers call it, 'tacit collusion' as economists prefer to call it).., means coordinating . .. pricing without an actual agreement to do so."); *White v. R.M. Packer Co., 635 F.3d 571, 586 (1st Cir. 2011)* ("One does not need an agreement to bring about this kind of follow-the-leader effect in a concentrated industry." (quoting *Clamp-All Corp. v. Cast Iron Pipe Inst., 851 F.2d 478, 484 (1st Cir. 1988)))*. DuPont and the other defendants had lawful, non-collusive reasons for making public price announcements. The price announcements here served several purposes, including the satisfaction of a "contractual condition" to provide "some formal notification" to customers and the assurance to customers that announced prices (the starting point for negotiations) were raised as to *all* customers. (D.I. 382, Ex. 1 at 4-6, Ex. 3 at 16-18). Valspar's expert concedes that there are lawful **[**32]** non-collusive reasons for a firm to make, public price announcements. (D.I. 382, Ex. 4 at 22-24). Even in the absence of these explanations, the parallel rises in price following a firm's announcement "may not be because they've agreed not to compete but because all of them have determined independently that they may be better off with a higher price." *In re Text Messaging, 782 F.3d at 871*. That this occurred over **[*249]** a long period of time is not surprising. In a concentrated market with high barriers to entry, "a higher price generating higher profits will not be undone by the output of new entrants." *Id. at 872*. Even if a new entrant caused a drastic fall in prices "that would deny them the profits [they sought to obtain] from having entered," "that drastic fall could well be the result of parallel but independent pricing decisions by the incumbent firms, rather than of agreement." *Id.*

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[7] Contrary to Valspar's urging at oral argument, there is no nefarious inference of prior knowledge that can be derived from this communication. (D.I. 396 at 62-63). This conversation occurred *after* not only Millennium's announcement, but also the announcements from DuPont, Huntsman, and Kronos. (D.I. 247, Ex. 106 at 400).

[8] This is how the quote appears in Valspar's brief. (D.I. 286 at 25). The context is important, however. Mr. Cemy wrote this email in response to one from Kronos executive Joe Maas, where Mr. Maas informed Mr. Cemy that the Israeli paint company Tambour asked for a reduction in price for titanium dioxide. (D.I. 298, Ex. 407). Mr. Maas thought Kronos should comply and "take [that] business unless it [would] really [have] an adverse pricing impact in the market." (*Id.*). In response, Mr. Cemy stated that "such decisions [would] have an adverse impact on prices," and that prices **[**30]** were higher in the Near East "as a result of significant price increases having been implemented by competition." (*Id.*). Mr. Cemy went on to state that Kronos should not lower prices for Tambour, as that would thereby "give a signal to competition" about Kronos' "bidding . . . for the ENAP business." (*Id.*). This email, as a whole, is thus best understood as one in which Kronos—knowing how its decisions may affect the market—sought to avoid providing its competitors with information about its activities. Therefore, not only does this email fail to support a nefarious inference of conspiracy, it clearly shows a perfectly legitimate, competitive interest. The Cemy excerpt is characteristic of many of the statements to which Valspar cites in support of its theory. That is, divorced from context, the quote is ambiguous. In context, the quote is not ambiguous. Instead, it can only be read as probative of "legitimate behavior." *See* *In re Citric Acid Litig., 191 F.3d 1090, 1099 (9th Cir. 1999)*.

Valspar cannot "proceed by first assuming a conspiracy and then setting out to prove it." Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan, 203 F.3d 1028, 1037 (8th Cir. 2000). These parallel price increases, or "signals," would perhaps describe how a conspiracy practically functioned, but only if there were there some indication of an agreement to begin with, rather than conduct that could just as well be explained by independent action. **[**33]** In short, nothing about these announcements tends to exclude the possibility of independent action. Importantly, **HN16**[] the "dissemination of price information is not itself, a *per se* violation of the Sherman Act." United States v. Citizens & S. Nat'l Bank, 422 U.S. 86, 113, 95 S. Ct. 2099, 45 L. Ed. 2d 41 (1975). Were it any other way, any evidence of lawful interdependence would also necessarily be evidence of actionable conspiracy. Despite Valspar's labeling of these announcements as "signals," it has presented no evidence that "tend[s] to exclude the possibility that the primary players in the . . . [market] were engaged in rational, lawful, parallel pricing behavior that is typical of an oligopoly." Williamson Oil Co., Inc. v. Philip Morris USA, 346 F.3d 1287, 1310 (11th Cir. 2003).

3. Other Email Communications

Valspar contends that certain emails from individuals, employed by DuPont and the other defendants, evince the existence of an agreement. Valspar repeatedly referenced these emails throughout its brief and in oral argument. The emails, however, suffer from many of the same flaws as the other evidence advanced by Valspar. That is, they are just as consistent with oligopoly as they are with conspiracy.

Several emails relate to market share. For instance, in 2007, Millennium executive John Hall advised that Millennium should "[b]e disciplined, keep our volume, do not take **[**34]** others." (D.I. 311, Ex. 937 at 47). Also in 2007, Michael Card of Millennium stated: "Our share YTD is 20%, and our historical and sustainable share is 21%. The 1% represents approx. 8000MT analyzed sales we are not getting. We should have this extra share - customers have been and want to buy this from us. Competitors will let us have this." (D.I. 309, Ex. 816 at 192). A 2002 email from a Kronos employee, when discussing volume, stated: "I assume we still have SP to sell. The SP approved is 2090. Probably will be only 500st to start as this will not disrupt DUP." (D.I. 298, Ex. 456 at 59).

Other emails pertain to price increases. For instance, DuPont executive Ian Edwards wrote in 2006 that Millennium's and Huntsman's "reading of the CEFIC info like ours should give them confidence that NA price increases can be prosecuted despite the flat market in [North America] itself." (D.I. 306, Ex. 657). In March 2009, as "North American and Western European demand is decreasing," a DuPont executive commented, "[customers will ask why their 4Q price has not decreased or why they have not seen a price decrease this year." (D.I. 310, Ex. 861).

Valspar also cites to emails that refer to industry **[**35]** "discipline" and "collective needs." (D.I. 286 at 28). For instance, in 2002, Millennium executive David Vercollone told other Millennium employees that the GSP would "be the best opportunity we have in structuring industry data for all **[*250]** of our collective needs."[9] (D.I. 308, Ex. 746 at 22). In a 2001 strategic development presentation, Millennium wrote—in a slide called "TiO2 Industry Trends"—"Possibly more industry discipline on pricing and capacity." (D.I. 304, Ex. 621, Part 1, at 8). In the minutes to a 2012 Millennium meeting, an entry states: "There is usually good discipline in our industry, however, Kronos were the first to break discipline and begin to sell in markets they don't usually sell in." (D.I. 303, Ex. 593 at 75).

These statements, while evidencing a noncompetitive market, do not tend to exclude the possibility of independent action. These emails are similar to those in *In re Text Messaging* because there **[**36]** is no indication that any author or recipient "believed there was a conspiracy among the [defendants]." *In re Text Messaging Antitrust Litig.*, 782 F.3d 867, 873 (7th Cir. 2015). Contrary to Valspar's interpretation, these emails—along with the others referenced by Valspar in their brief and during oral argument—actually suggest the absence of an agreement. The employees of DuPont and the other defendants repeatedly emphasize their lack of assurance as to what the other

[9] It is clear from context that "our collective needs" refers to Millennium's needs, not the needs of Millennium and its competitors. Mr. Vercollone uses the phrase after separately asking four Millennium employees whether the statistics would meet their individual needs.

players in the industry were doing or were intending to do. For instance, the phrase "reading of the CEFIC info like ours should give them confidence" suggests an awareness of how other firms might act, but not an express agreement. (*See* D.I. 306, Ex. 657). DuPont and the other defendants relied on the Global Statistics Program to gain information about the state of the market and competition. This information was used to "make better business decisions." (D.I. 308, Ex. 746). It appears that, in making those decisions, DuPont and the other defendants undertook actions that could plausibly be interpreted as "collusive." (*See* D.I. 311, Ex. 937 at 47). That is not by itself sufficient, however, as ***HN17***[] there is a "fundamental distinction between express and tacit collusion:" while "[e]xpress collusion violates **[**37]** ***antitrust law***[,] tacit collusion does not." *In re Text Messaging, 782 F.3d at 867*; *see also* *In re Chocolate Confectionary Antitrust Litig., 801 F.3d 383, 398, 400 (3d Cir. 2015)*; *In re Flat Glass Antitrust Litig., 385 F.3d 350, 362 (3d Cir. 2004)*. The same distinction is important when interpreting terms that refer to the industry generally. In an oligopoly, it may be in a firm's best interest to consider the interests and needs of the industry as a whole. "[O]ligopolists [may] independently conclude that the industry as a whole would be better off by raising prices." *In re Chocolate, 801 F.3d at 397*; *see also* *In re Text Messaging, 782 F.3d at 871*. Tacit collusion, however, does not suggest an agreement.

The communications at issue here are markedly different from those found sufficient to survive summary judgment in cases like *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., 998 F.2d 1224 (3d Cir. 1993)* and *In re High Fructose Corn Syrup Antitrust Litig., 295 F.3d 651 (7th Cir. 2002)*. In *Petruzzi's*, a witness testified that a defendant "followed a 'code' in not soliciting the accounts of other renderers." *Petruzzi's, 998 F.2d at 1233-34*. A taped conversation revealed that a defendant firm's executive stated: "You're not playing." *Id. at 1235-36*. The Third Circuit found that the reasonable inference there was that this was an "attempt[] to get [someone] to play by the rules." *Id.* In *High Fructose Corn Syrup*, employees made the following statements, among others: **[*251]** "[w]e have an understanding within the industry not to undercut each other's prices" and "our competitors are our friends. Our customers are the enemy." *In re High Fructose Corn Syrup, 295 F.3d at 662*. Further, an executive stated that **[**38]** "*every business* [he was] in [was] an organization," and in context, "it appear[ed] that 'organization' meant price-fixing conspiracy." *Id.* In these cases, the evidence tended to exclude the possibility of independent action. There were references to some sort of explicit agreement between competitors. Here, that is absent.

Valspar further contends that communications involving industry consultants Jim Fisher and Gary Cianfichi "demonstrate [that] these consultants served as conduits in the price-fixing conspiracy." (D.I. 286 at 29). In support of this assertion, Valspar points to numerous documents. Some documents show the sharing of information between Jim Fisher and Gary Cianfichi. For instance, in 2003, Mr. Cianfichi asked Mr. Fisher: "Are global TiO2 inventories modest, normal, high - steady or growing at Dup, KMG, Kronos, HT? . . . . Directional views with a few numbers on inventory if you can get them would be appropriate." (D.I. 319 Ex. 1058; *see also* Exs. 1056-57). Other communications show that Jim Fisher gave advice to Kronos executive Joe Maas:

> Jim, according [to] the Cefic production data and your estimate of capacity shutdowns ww . . ., the capacity utilization rates could be in the **[**39]** mid 90's which is a prescription for prices to move up!. I know this is missing non Cefic production and demand but cefic is a big chunk of the business. Do you buy this story?? (D.I. 320, Ex. 1075; *see also* Exs. 1074, 1076).

Other emails indicate that DuPont regularly relied on the advice of Jim Fisher. (*See, e.g.*, D.I. 319, Exs. 1026, 1028-29, 1031-33). In its brief, Valspar—without much discussion—cites to many more documents pertaining to Mr. Fisher and Mr. Cianfichi. (D.I. 298 at 30 n.19).

None of these cited communications support an inference of conspiracy. Valspar's theory amounts to an assertion that the consultants could have been an avenue whereby DuPont and the other defendants shared information pursuant to a conspiracy. That does not make the usage of consultants suggestive of conspiracy, nor does it tend to exclude the possibility of independent action. It defies common sense to suggest that there is no non-collusive purpose to retain consultants. Much of the cited evidence has little, if anything, to do with the activities of competitors within the industry. Further, to the extent that the consultants did help one competitor gather information on another, this is certainly **[**40]** within a firm's unilateral self-interest. Indeed, "to keep tabs on the commercial activities of [one's] competitors" is "economically beneficial." *Williamson Oil Co., Inc. v. Philip Morris*

USA, 346 F.3d 1287, 1313 (11th Cir. 2003). Therefore, the use of these consultants to gather information "does not tend to exclude the possibility of independent action or to establish anticompetitive collusion." *Id.*

4. Departure from Pre-Conspiracy Conduct

Valspar argues that the parallel price increase announcements increased in frequency during the Conspiracy Period. (D.I. 286 at 14-17; D.I. 312, Ex. 983 ¶¶ 87-89, figs. 7, 8; D.I. 313, Ex. 985 ¶ 69, fig. 5). DuPont does not dispute this fact, but does dispute the inferences that can be drawn from it. (D.I. 381 at 11 n.7). Based on the data available, there were three unanimous parallel price increase announcements between 1994 and 2001. (D.I. 312, Ex. 983 at 59). There were a number of other nearly unanimous parallel price increase **[*252]** announcements during this period. (*Id.*). During the Conspiracy Period, there were 31 parallel price increase announcements. (D.I. 286 at 14; D.I. 312, Ex. 983 at 19-31). Valspar argues this increase in frequency is because the "competitors agreed to raise their prices, rather than doing so independently **[**41]** and with no concerted coordination." (*See* D.I. 286 at 14-15 (quoting In re Flat Glass Antitrust Litig., 385 F.3d 350, 355 (3d Cir. 2004))).

Contrary to Valspar's assertion that this departure "is unprecedented and reflects strong circumstantial evidence of conspiracy," this variation in conduct gives rise to no such inference. (*See* D.I. 286 at 14). ***HN18***[] As the Third Circuit has recently held, "[i]t is generally unremarkable for the pendulum in oligopolistic markets to swing from less to more interdependent and cooperative." In re Chocolate Confectionary Antitrust Litig., 801 F.3d 383, 410 (3d Cir. 2015). In fact, the extent of interdependence within an oligopolistic market "may be either weak or strong and may vary from time to time." *Id.* (quoting Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** 229 (3d ed. 2010)). In order "[f]or a change in conduct to create an inference of a conspiracy, the shift in behavior must be a 'radical' or 'abrupt' change from the industry's business practices." In re Chocolate, 801 F.3d at 410 (quoting Toys "R" Us, Inc. v. FTC, 221 F.3d 928, 935 (7th Cir. 2000)).

The evidence presented by Valspar indicates that public announcements of price increases and parallel pricing were not historically uncommon in the titanium dioxide industry. (D.I. 312, Ex. 983 ¶¶ 87-89, figs. 7, 8). The behavior of DuPont and the other defendants is "consistent with how this industry has historically operated." In re Chocolate, 801 F.3d at 410. The **[**42]** increased frequency of conduct that was lawful both before and during the conspiracy does not mark a "radical" or "abrupt" change. *Id.* Instead, the record reflects an "unremarkable" swing of the pendulum in an interdependent, oligopolistic market, and therefore does not support a reasonable inference of a conspiracy. *See id.*

E. Sufficiency of the Evidence

I have carefully reviewed the considered analysis in the Maryland Class Action. *See* In re Titanium Dioxide Antitrust Litig., 959 F. Supp. 2d 799 (D. Md. 2013). While there is substantially the same record in this case as in the Maryland Class Action, I must reach a different conclusion.[10] ***HN19***[] In determining whether Valspar can survive summary judgment here, the key question is whether Valspar has advanced sufficient "evidence that would enable a reasonable jury to reject the hypothesis that the defendants foreswore price competition without actually agreeing to do so." In re Flat Glass Antitrust Litig., 385 F.3d 350, 368 (3d Cir. 2004) (quoting In re High Fructose Com Syrup Antitrust Litig., 295 F.3d 651, 661 (7th Cir. 2002)). Evidence used to meet that burden of production cannot be "as consistent with interdependence as with a conspiracy," as that does not "tend to exclude **[*253]** the possibility that

[10] The Third Circuit's *Chocolate Confectionary* decision, decided after the Maryland Class Action ruling, is, I think, quite instructive. While it remains clear that careful consideration of the evidentiary record is necessary, it seems to me that *Chocolate Confectionary* might also be understood as suggesting that, in the antitrust oligopoly context, summary judgment cannot be avoided simply by having amassed a significant amount of ambiguous evidence. *See* In re Chocolate, 801 F.3d at 396-97, 397 n.9 ("[A] plaintiff relying on ambiguous evidence alone cannot raise a reasonable inference of a conspiracy sufficient to survive summary judgment." (citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 597 n.21, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986))).

the [defendants] acted lawfully." *In re Chocolate Confectionary Antitrust Litig., 801 F.3d 383, 412 (3d Cir. 2015)*; *see also* *In re Text Messaging Antitrust Litig., 782 F.3d 867, 879 (7th Cir. 2015)* (finding that the plaintiffs had only shown "[t]acit collusion," which is not prohibited by *§ 1*, when they "presented circumstantial **[**43]** evidence consistent with an inference of collusion, but that. . . . [was] equally consistent with independent parallel behavior").

In short, Valspar has not satisfied its burden of production. The evidence cited by Valspar demonstrates that the titanium dioxide industry is an oligopoly. That oligopoly may well have caused substantial anticompetitive harm to Valspar. To successfully bring a *§ 1* horizontal price fixing case, however, there must be evidence of an actual agreement to fix prices. That is lacking here. In alleging an eleven year conspiracy to fix prices, Valspar has failed to **[**44]** obtain any evidence which, while consistent with conspiracy, is not just as consistent with the phenomenon of interdependence which is characteristic of oligopolies. In the oligopoly context, lawful conduct can bear a great resemblance to unlawful conduct. Without evidence that tends to exclude the possibility of independent action, however, Valspar has not presented evidence that creates a dispute as to the material fact of whether there was an agreement. Therefore, I find that summary judgment in favor of DuPont is appropriate.

V. CONCLUSION

For the reasons set forth above, defendant's motion for summary judgment (D.I. 239) is **GRANTED**. An appropriate order will be entered.

ORDER

For the reasons discussed in the accompanying Memorandum Opinion, **IT IS HEREBY ORDERED**:

Defendant's Motion for Summary Judgment (D.I. 239) is **GRANTED**.

Entered this 25 day of January, 2016.

/s/ Richard G. Andrews

United States District Judge

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

United States District Court for the Northern District of California

January 26, 2016, Decided; January 26, 2016, Filed

No. C 14-0437 CW

Reporter

2016 U.S. Dist. LEXIS 9078 *; 2016-1 Trade Reg. Rep. (CCH) P79,522

HEARTLAND PAYMENT SYSTEMS, INC., Plaintiff and Counter-Defendant, v. MERCURY PAYMENT SYSTEMS, LLC, Defendant and Counter-Claimant.

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

Core Terms

alleges, counterclaims, cause of action, pricing, merchant, website, interchange-plus, advertisement, defamation, misleading, business practice, false advertising, customers, defamation claim, deceptive, motion to dismiss, particularity, upfront, webpage, Lanham Act, argues, statute of limitations, fraudulent, deceived, grant leave to amend, contradicting, termination, processing, unfair, fails

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Judges: CLAUDIA WILKEN, United States District Judge.

Opinion by: CLAUDIA WILKEN

Opinion

ORDER GRANTING MOTION TO STRIKE AND GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS MERCURY'S COUNTERCLAIMS

(Docket No. 94)

Plaintiff Heartland Payment Systems filed its original complaint on January 29, 2014. Defendant Mercury Payment Systems moved to dismiss the complaint and, on November 7, 2014, the Court granted Mercury's motion and granted Heartland leave to amend. Heartland filed an amended complaint, and Mercury moved to dismiss. On February **[*2]** 24, 2015, the Court granted Mercury's motion in part and denied it in part.

Mercury filed its answer to Heartland's amended complaint on March 23, 2015. In its answer, it asserted various affirmative defenses and counterclaims against Heartland. Heartland now moves to strike Mercury's affirmative defense of unclean hands, and moves to dismiss Mercury's counterclaims in their entirety. (Docket No. 94). Mercury has filed an opposition. Heartland has filed a reply. Having considered the motions on the papers, the Court GRANTS in part the motion to dismiss, DENIES it in part, GRANTS the motion to strike and GRANTS leave to amend.

BACKGROUND

The following is a summary of facts alleged in the counterclaims and taken as true for purposes of this motion.

Heartland and Mercury are competitors in the payment processing industry. Docket No. 84, Mercury's Counterclaims ¶ 16. Both companies offer payment processing services to small-and medium-sized businesses. Id. ¶¶ 15-18.

Heartland advertises its services on its website. Id. ¶ 20. On the website, Heartland states that it provides "fair, honest and fully disclosed payment solutions to help businesses prosper." Id. ¶ 21. It purports to offer its services **[*3]** to all of its customers according to an "interchange-plus" pricing model. Id. ¶ 19. Heartland claims that the term "interchange-plus" is a term of art in the industry, which is well understood by small and medium-sized businesses. Id. According to Mercury, however, "interchange-plus" does not have a generally accepted meaning in the payment processing industry. Id.

Mercury alleges that, despite Heartland's advertising that it offers "all" of its customers interchange-plus pricing, that offer extends only to customers who process $50,000 or more yearly. Id. ¶ 23. Mercury alleges that, in response to an unidentified survey about Heartland's advertising, several businesses complained that Heartland does not in fact offer "true" interchange-plus pricing, and that the pricing for businesses that process less than $50,000 per year is "way higher than any sane interchange-plus plan." Id. ¶ 24.

Heartland also advertises that it offers "fair and upfront pricing" to its customers. Id. ¶ 32. Mercury alleges that businesses understand that to mean that all fees and charges are disclosed in advance. Id. Despite this guarantee, Mercury alleges that Heartland charges "hidden early-termination fees." **[*4]** Id. ¶ 33. Mercury alleges that three of Heartland's former customers were surprised when they were charged $295 for terminating their contract early. Id. ¶ 34.

Mercury also alleges that Heartland "marks up certain fees that it claims to pass through at cost." Id. ¶ 33. These fees include MasterCard and Visa settlement fees. Id. Mercury also alleges that Heartland receives rebates from American Express, but fails to share those rebates with the businesses it serves. Id.

In addition to Heartland's deceptive pricing, Mercury alleges that Heartland falsely promises to keep businesses' customer data "safe at every level." Id. ¶ 43. On Heartland's website, it boasts that "Heartland Secure," its data protection system, "is the most secure credit card processing method backed by the most comprehensive merchant warranty -— in the industry." Id. It goes on to state: "Through our innovative use of [encryption and tokens] we are able to protect your customer credit card data from the moment you swipe their card. After that we use [another encryption] to make the data invisible to prying eyes. And this means that your business is protected like no other." Id. Mercury alleges that this statement is **[*5]** false because the "Heartland Secure" system is not totally secure, as admitted by Heartland's Chief Information Officer when he stated, "There is no such thing as totally secure software anymore, and there probably never will be." Id. ¶ 44.

Mercury also alleges that, "since at least 2011," Heartland has engaged in "deceptive business practices" by charging a fee and describing it on merchant statements as a "Service & Regulatory Mandate." Id. ¶¶ 3, 75 (describing the "mandate" as "but one specific example of Heartland's deceptive business practices"). According to Mercury, "[n]o such regulatory 'mandate' exists in the industry," id. ¶ 75, and using that terminology suggests that Heartland must charge the fee when, in fact, it charges the fee and keeps the proceeds without providing them to any regulatory entity, id.

In addition to its allegedly deceptive practices, Heartland has created a website that allegedly includes disparaging remarks about Mercury. Id. ¶ 52. On the site, Heartland states that Mercury has overcharged and defrauded businesses in the amount of $68,400,000 and has inflated Visa and MasterCard fees. Id. ¶ 53. Heartland also published a press release on the website that **[*6]** refers to this litigation. Id. Mercury alleges that it has suffered damages due to Heartland's conduct. Id. ¶ 60.

Mercury asserts five causes of action against Heartland: (1) false advertising in violation of *15 U.S.C. § 1125(a)(1)(B)* (Lanham Act); (2) unfair competition in violation of California's Unfair Competition Law, Business and Professions Code *section 17200 et seq.* (UCL); (3) false advertising in violation of *California Business and Professions Code section 17500 et seq.* (FAL); (4) defamation; and (5) trade libel. As is relevant to this motion, Mercury also asserts an unclean hands affirmative defense.

LEGAL STANDARD

The standards that apply to the complaint apply to the counterclaims as well. See Charles Allen Wright & Arthur R. Miller, 5 Fed. Prac. & Proc. Civ. § 1407 (3d ed.) (noting that the "pleading of counterclaims and crossclaims is subject to the same *Rule 8* standards that apply to the statement of any claim for relief" and that "an attempt to invoke *Rule 13* must state a claim upon which relief can be granted . . ."). A complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." *Fed. R. Civ. P. 8(a)*. The plaintiff must proffer "enough facts to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. A claim is facially plausible "when the plaintiff **[*7]** pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id.

In considering whether the complaint is sufficient to state a claim, the court will take all material allegations as true and construe them in the light most favorable to the complaining party. *Metzler Inv. GMBH v. Corinthian Colleges, Inc., 540 F.3d 1049, 1061 (9th Cir. 2008)*. The court's review is limited to the face of the complaint, materials incorporated into the complaint by reference, and facts of which the court may take judicial notice. Id. However, the court need not accept legal conclusions, including "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Iqbal, 556 U.S. at 678* (citing *Twombly, 550 U.S. at 555*).

When granting a motion to dismiss, the court is generally required to grant the complaining party leave to amend, even if no request to amend the pleading was made, unless amendment would be futile. *Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911 F.2d 242, 246-47 (9th Cir. 1990)*. In determining whether amendment would be futile, the court examines whether the complaint could be amended to cure the defect requiring dismissal "without contradicting any of the allegations of [the] original complaint." *Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th Cir. 1990)*.

DISCUSSION

I. *Rule 9(b)*

As a threshold matter, Heartland argues that Mercury's false advertising, FAL **[*8]** and UCL causes of action fail because they do not satisfy the heightened pleading requirements of *Rule 9(b)*.

"In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." *Fed. R. Civ. P. 9(b)*. "Therefore, in an action based on state law, while a district court will rely on state law to ascertain the elements of fraud that a party must plead, it will also follow *Rule 9(b)* in requiring that the circumstances of the fraud be pleaded with particularity." *Marolda v. Symantec Corp., 672 F. Supp. 2d 992, 996 (N.D. Cal. 2009)*; see also *Kearns v. Ford Motor Co., 567 F.3d 1120, 1125 (9th Cir. 2009)*. "[W]hen the claim is 'grounded in fraud,' the pleading of that claim as a whole is subject to *Rule 9(b)*'s particularity requirement." *Marolda, 672 F. Supp. 2d at 997* (citing *Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1104 (9th Cir. 2003))*. A plaintiff must describe the alleged fraud in specific enough terms "to give defendants notice of the particular misconduct so that they can defend against the charge." *Kearns, 567 F.3d at 1124*. *Rule 9(b)* requires the plaintiff to allege "the who, what, when, where, and how" of the alleged fraudulent conduct. *Cooper v. Pickett, 137 F.3d 616, 627 (9th Cir. 1997)*. "The requirement of specificity in a fraud action against a corporation requires the plaintiff to allege the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written." *Tarmann v. State Farm Mut. Auto. Ins. Co., 2 Cal. App. 4th 153, 157, 2 Cal. Rptr. 2d 861 (1991)*.

While Mercury **[*9]** may not use the word "fraud" in its false advertising, UCL and FAL causes of action, it has alleged "a unified course of fraudulent conduct and rel[ies] entirely on that course of conduct as the basis of [its] claim[s]." See *Kearns, 567 F.3d at 1125*. Throughout these counterclaims, Mercury alleges that Heartland has "intentionally set out to deceive the relevant consuming public." Mercury's Counterclaims ¶¶ 27, 38, 47. It claims that Heartland's advertisements are "literally false or misleading." Id. ¶¶ 30, 41, 45. Mercury also seeks punitive damages under California law "in view of Heartland's willful and malicious conduct." Docket No. 84 at 40.

Accordingly, the Court finds that Mercury must plead each of its false advertising, UCL and FAL claims with the particularity required by *Rule 9(b)*. Mercury's defamation and trade libel claims relate to Heartland's statements on a website about Mercury and this litigation, and Heartland does not respond specifically to Mercury's argument that *Rule 9(b)* does not apply to these claims. The Court assumes that it does not.

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

Mercury alleges that Heartland falsely advertises its "Interchange-Plus" pricing model, its "Fair and Upfront" **[*10]** pricing guarantee and its data security system.

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

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

> to succeed on an Internet false advertising claim, a plaintiff must show that a statement made in a commercial advertisement or promotion is false or misleading, that it actually deceives or has the tendency to deceive a substantial segment of its audience, that it's likely to influence purchasing decisions and that the plaintiff has been or is likely to be injured by the false advertisement.

TrafficSchool.com, Inc. v. Edriver Inc., 653 F.3d 820, 828 (9th Cir. 2011).

As discussed below, Mercury fails to state a claim under *Rule 9(b)* and the Lanham **[*11]** Act.

1. "Interchange-Plus" pricing

It appears that Mercury's sole allegation on this point is that Heartland's website falsely states that "all" merchants are offered "interchange-plus" pricing. However, the facts Mercury provides in support of that allegation suggest that the real issue is not that "all" merchants do not receive "interchange-plus" pricing, but that the pricing offered to businesses with less than $50,000 yearly processing is not "true" or "sane" "interchange-plus" pricing. See Mercury's Counterclaims ¶ 24.

Heartland argues, "Mercury fails to plead any explanation of how Heartland's plan offered to merchants who process less than $50,000 per year is inconsistent with interchange-plus pricing." Heartland's Mot. to Dismiss, Docket No. 94 at 11. The Court agrees. Other than the alleged statements of two anonymous merchants commenting on an unidentified survey, Mercury states no facts to support the allegation that Heartland's customers that process less than $50,000 a year are not receiving "interchange-plus" pricing. Mercury does not identify the survey that reported these merchants' alleged dissatisfaction with Heartland's services, or provide any facts to support the **[*12]** inference that the survey exists or that the merchants' claims are credible.

Thus, Mercury fails to state facts sufficient to support its allegation that Heartland's "interchange-plus" pricing claim is false or misleading. Accordingly, this cause of action cannot be based on the allegedly false "interchange-plus" pricing guarantee.

2. "Fair and Upfront" pricing

Mercury claims that Heartland's guarantee of "fair and upfront pricing" is false because Heartland: (1) fails to pass through at cost MasterCard and Visa settlement fees; (2) fails to share an American Express rebate with businesses; and (3) fails to disclose an early termination fee. Heartland argues this basis for Mercury's Lanham Act claim should be dismissed because Mercury "never provides an explanation or support for its allegation that Heartland falsely advertises these fees or pricing." Docket No. 94 at 12.

Mercury does not state any facts to support its allegation that the MasterCard and Visa settlement fees are not disclosed. It does not state what the settlement fees are or how they should be disclosed in order to support the inference that those fees are not disclosed "upfront." Likewise, it does not state any facts **[*13]** to support the inference that those fees are marked-up and, thus, are not "passed through at cost."

In addition, Mercury's allegation with regard to the American Express rebate is insufficient to support its claim. Mercury alleges that the phrase "fair and upfront pricing" "necessarily implies that Heartland will not . . . siphon off rebates received from card networks." Mercury's Counterclaims ¶ 36. Mercury does not provide any facts to support the conclusion that telling businesses how they will be charged also implies that Heartland will share money that is returned to it by the card network.

Lastly, with regard to the early termination fees, Mercury again relies on the responses to an unidentified survey of anonymous businesses that formerly used Heartland's services. Pleading that a termination fee was not disclosed until a merchant had signed a contract, and that nonetheless a termination fee was later charged, could constitute pleading that the "fair and upfront pricing" advertisement was false or misleading. Nonetheless, the Court agrees with Heartland that Mercury has failed to meet its *Rule 9(b)* requirements. Mercury alleges that a first businessperson stated that he or she was told **[*14]** by a Heartland sales representative that there was no cancellation fee or penalty, and that the fee does not appear "on any document you sign." Mercury's Counterclaims ¶ 34 (quotation marks omitted). Yet when he or she cancelled the contract, a fee was charged. Id. To the extent Mercury relies on a sales representative's statement rather than Heartland's website, it is insufficient under *Rule 9(b)*; for oral statements, the complainant must "allege the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written." *Tarmann, 2 Cal. App. 4th at 157*. To the extent this allegation and Mercury's allegation that two other business owners stated that the early termination fee was not disclosed in Heartland's contract or any document they signed, the allegations do not support Mercury's claim that the fee was not disclosed "upfront" elsewhere. And one of those unidentified merchants' statement to the unidentified surveyor about an undisclosed termination fee is also insufficient under *Rule 9(b)* to allege how the "fair and upfront pricing" advertisement was false or misleading because he or she does not state that he or she was **[*15]** charged the fee.

Thus, Mercury fails to state facts sufficient to support its allegation that Heartland's "fair and upfront pricing" claim is false or misleading. Accordingly, this cause of action cannot be based on the allegedly false "fair and upfront pricing" guarantee.

3. Data security

Mercury alleges that Heartland's website contains a statement about how securely the "Heartland Secure" data protection system keeps businesses' customer data. Mercury's Counterclaims ¶ 43. Mercury claims that the statement "necessarily implies" that Heartland's security system is "totally secure." Id. ¶ 45.

Mercury does not state any facts to support its conclusion that Heartland's description of its data security system implies that the system is "totally secure." Nowhere in Heartland's statement does the phrase "totally secure" appear. Furthermore, Mercury does not state any facts to support the conclusion that Heartland does not provide the "most secure credit card processing methods backed by the most comprehensive merchant warranty . . . in the industry."

Thus, Mercury fails to state facts sufficient to support its allegation that Heartland's data security claim is false or misleading. Accordingly, **[*16]** this cause of action cannot be based on the allegedly false data security statements.

4. Conclusion

For all the reasons discussed above, Mercury has failed to plead its Lanham Act cause of action with the particularity required by *Rule 9(b)*. Accordingly, the Court GRANTS Heartland's motion to dismiss the Lanham Act cause of action. Mercury is granted leave to amend to remedy these deficiencies if it can do so truthfully and without contradicting the allegations in its prior pleadings.

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

The UCL prohibits "any unlawful, unfair or fraudulent business act . . . ." *Cal. Bus. & Prof. Code § 17200 et seq.* Because *section 17200* is written in the disjunctive, it establishes three types of unfair competition. *Davis v. Ford Motor Credit Co., 179 Cal. App. 4th 581, 593, 101 Cal. Rptr. 3d 697 (2009)*. Therefore, a practice may be prohibited as unfair or deceptive even if it is not unlawful and vice versa. *Podolsky v. First Healthcare Corp., 50 Cal. App. 4th 632, 647, 58 Cal. Rptr. 2d 89 (1996)*. Mercury alleges claims under all three prongs. Because the counterclaims sound in fraud, Mercury must plead its UCL causes of action in accordance with *Rule 9(b)*.

A. Unlawful business practices

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

Because Mercury relies on the same allegations to support this claim as it does to support its Lanham Act claim and its California False Advertising claim, Mercury's allegations fail under *Rule 9(b)* and are insufficient to state a claim under either statute, as discussed elsewhere in this order.

Accordingly, Mercury's unlawful business practice claim fails.

B. Unfair business practices

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

Mercury alleges that Heartland's actions "constitute unfair competition" because they, in part, "threaten an incipient violation of a consumer law, including but not limited to *Section 5* of the Federal Trade Commission **[*18]** Act, violate the policy or spirit of such law, and/or otherwise threaten or harm competition." Mercury's Counterclaims ¶ 73.

Because Mercury relies on the same allegations to support this claim as it does to support its Lanham Act claim and its California False Advertising claim, Mercury's allegations fail under *Rule 9(b)*, as discussed elsewhere in this order. In addition, although the Court allowed Heartland's allegations of Mercury's deceptive practices to proceed under the "unfair" prong of the UCL, the Court notes that Cel-Tech indicates that only incipient violations of antitrust laws satisfy this prong. It may be that further proceedings will show that neither party may proceed under this prong, even if it plead its fraud allegations with sufficient particularity.

Accordingly, Mercury's unfair business practice claim fails.

C. Fraudulent business practices

"A fraudulent business practice is one in which members of the public are likely to be deceived." *Morgan v. AT&T Wireless Servs., Inc., 177 Cal. App. 4th 1235, 1254, 99 Cal. Rptr. 3d 768 (2009)*.

Mercury alleges that Heartland's actions "are fraudulent in that they are likely to mislead the public; or [that] [t]hey constitute acts of untrue and misleading advertising." Mercury's Counterclaims ¶ 73. As discussed above, Mercury's allegations **[*19]** fail under *Rule 9(b)*. Mercury fails to state any facts to support the allegation that statements on Heartland's website or in merchant statements are deceptive or misleading.

In addition, to the extent Mercury relies on its allegation that Heartland engaged in "deceptive business practices" by charging a fee it described on merchant statements as a "Service & Regulatory Mandate," the Court agrees with Heartland that Mercury fails to meet *Rule 9(b)*'s requirements. Mercury explains that using the words "Service & Regulatory Mandate" on merchant statements "since at least 2001," by itself—rather than using such terminology alongside any other disclosures—is deceptive because no such regulatory mandate exists. Yet, as Heartland argues, Mercury does not plead an instance in which Heartland charged the fee or how Heartland presented the fee to merchants on a billing statement, Merchant Application or other document.

Accordingly, Mercury's fraudulent business practice claim fails.

D. Conclusion

For all the reasons discussed above, Mercury has failed to plead its UCL cause of action with the particularity required by *Rule 9(b)*. Accordingly, the Court GRANTS Heartland's motion to dismiss this cause of action. Mercury is **[*20]** granted leave to amend to remedy these deficiencies if it can do so truthfully and without contradicting the allegations in its prior pleadings.

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

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

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

Mercury relies on the same set of facts to support its FAL claims as it does to support its Lanham Act claim. Thus, for the reasons discussed above, Mercury has failed to plead its FAL cause of action with the particularity required by *Rule 9(b)*. Mercury fails to state any facts to support the allegation that statements on Heartland's website are deceptive or misleading. **[*21]** Accordingly, the Court GRANTS Heartland's motion to dismiss the FAL cause of action. Mercury is granted leave to amend to remedy these deficiencies if it can do so truthfully and without contradicting the allegations in its prior pleadings.

V. Fourth Cause of Action: Defamation

Mercury argues that statements on Heartland's "Merchant Services Defense" website, specifically that Heartland has "found direct evidence of Mercury's deceptive practices," were made with the intent to defame Mercury.

Mercury alleges that Heartland published these statements on a webpage titled "Pennies Add Up," which Mercury downloaded on March 20, 2015. Mercury's Counterclaims ¶ 53. It also claims that Heartland has "disparaged [it] in other direct or indirect communications with other members of the payment processing industry[.]" Mercury's Counterclaims ¶ 56. Heartland argues that this claim is barred by the statute of limitations and that, with regard to the "direct or indirect communications," Mercury fails to state a claim.

A. Statute of Limitations

Under California law, the statute of limitations for defamation is one year. *Cal. Civ. Proc. Code § 340*. California courts follow the "single publication" rule for statements made in mass **[*22]** communications:

> No person shall have more than one cause of action for damages for libel or slander or invasion of privacy or any other tort founded upon any single publication or exhibition or utterance, such as any one issue of a newspaper or book or magazine or any one presentation to an audience or any one broadcast over radio or television or any one exhibition of a motion picture. Recovery in any action shall include all damages for any such tort suffered by the plaintiff in all jurisdictions.

Cal. Civ. Code § 3425.3. The Ninth Circuit has held that California Courts of Appeal have uniformly applied this rule to websites. See *Roberts v. McAfee, Inc., 660 F.3d 1156, 1167 (9th Cir. 2011)*. Furthermore, the Ninth Circuit has held that the publication date of webpages, for the purposes of the statute of limitations, is the date the allegedly defamatory statements were first posted on the website. See id. ("Information is generally considered 'published' within the meaning of the single-publication rule when it is first made available to the public[.]"). Thus, claims brought more than one year from an initial publication on a website are time-barred. See *id. at 1169*.

Mercury states in its opposition that its "[c]ounterclaims allege that the Defamatory Statements were published on March 20, 2015 **[*23]** — well within the one-year statute of limitations for defamation claims." Docket No. 98 at 20.

However, as Heartland points out, Mercury's argument in its opposition, that the webpage was published on March 20, 2015, see id., is different from its allegation in its counterclaims, that it downloaded the webpage on March 20, 2015. See Mercury's Counterclaims ¶ 53. The statute of limitations for a defamation claim begins to run as of the date the information was "first made available to the public." *Roberts, 660 F.3d at 1167*. In its counterclaims, Mercury does not allege when the information was first published, only that it downloaded the information on March 20, 2015.

Heartland argues that Mercury must concede that the allegedly defamatory statements were made on January 30, 2014, because Mercury's counterclaim alleges that, on that date, Heartland published a press release announcing this litigation with a link to a "Merchant Services Defense" website containing the webpage at issue. Mercury does not allege that the webpage was changed or that content was added to it since it was first published. Thus, Mercury's defamation claim would be time-barred as of January 30, 2015. Heartland's argument is well-taken. **[*24]**

Regardless, Mercury argues that its defamation claim is a compulsory counterclaim. Thus, the statute of limitations was tolled by the filing of Heartland's complaint on January 29, 2014, and the claim was not time-barred when the counterclaims were filed on March 23, 2015. Mercury relies on *Sidney v. Superior Court, 198 Cal. App. 3d 710, 244 Cal. Rptr. 31 (1988)*, which explained:

> Although ordinarily the statute of limitations will bar a cross-complaint in the same fashion as if the defendant had brought an independent action, the rule is different when the original complaint was filed before the statute of limitations on the cross-complaint had elapsed . . . . Such a cross-complaint need only be subject-matter related to the plaintiff's complaint -— i.e. arise out of the same occurrence —- to relate back to the date of filing the complaint for statute of limitation purposes.

Id. at 714 (citations, quotation marks and brackets omitted). For the purpose of the statute of limitations, if the defamation cause of action is a compulsory counterclaim, the claim is tolled as of the date of the complaint. See *Burger v. Kuimelis, 325 F. Supp. 2d 1026, 1045 (N.D. Cal. 2004)* ("Under Sidney, the commencement of an action by a plaintiff tolls the statute of limitations for any counterclaims that 'arise out of the same occurrence' as the allegations **[*25]** of the complaint." (citation omitted)). Heartland argues that this rule does not apply here because

"Mercury's defamation claim is based entirely on alleged conduct that took place after Heartland filed its Complaint, and therefore does not arise from the same transactions or occurrences that are at issue in the Complaint." Docket No. 94 at 20. Thus, the question is whether a defamation claim, with regard to statements made by Heartland after the complaint was filed, can be considered a compulsory counterclaim.

As the parties agree, the Ninth Circuit has explicitly declined to decide this issue, but has discussed it. In *Pochiro v. Prudential Ins. Co. of Am., 827 F.2d 1246 (9th Cir. 1987)*, the Ninth Circuit held, "As long as the allegedly defamatory statements are sufficiently related to [the] subject matter of the original action," they must be considered compulsory counterclaims. *Id. at 1251*. In Pochiro, Prudential plead various causes of action against a former employee and his wife, the Pochiros, who it alleged had used confidential records against it. The Pochiros filed a defamation counterclaim, based on Prudential's informing the employee's prospective employers about his allegedly dishonest actions. Many of the allegedly defamatory statements were made **[*26]** after the complaint was filed. The Ninth Circuit found that even though a few of the Pochiros' allegations "appear a bit removed from Prudential's action to enjoin the Pochiros' use of confidential records, it is undisputed that [the employee's] use of Prudential's customer records is inextricably intertwined with the facts as alleged in the Pochiros' complaint." *Id. at 1250*. The Ninth Circuit acknowledged that, in the Second Circuit, "a counterclaim which stems from the filing of the main action and subsequent alleged defamations is not a compulsory counterclaim." *827 F.2d at 1251 n.9* (citing *Harris v. Steinem, 571 F.2d 119, 124 (2nd Cir. 1978))*. The Ninth Circuit surmised,

> The rationale for [the Second Circuit's] rule seems to be that statements made after the filing of the original complaint simply cannot be logically related to the "transaction" which gave rise to the original complaint. This creates an exception to the general rule that an otherwise logically related claim need only have accrued by the time a responsive pleading is filed in the first action, not by the time of the complaint. . . . Indeed, Harris and the cases it relies upon seem to view any alleged defamation as a separate transaction from the underlying claim.

Id. The Ninth Circuit then expressly **[*27]** declined to reach the "limited issue actually addressed by Harris" because the Pochiros also alleged that Prudential made some defamatory statements prior to filing its complaint. Id.

Thus, there is no Ninth Circuit precedent that resolves this issue. The Court is persuaded, however, that the general rule is that if "the allegedly defamatory statements are sufficiently related to subject matter of the original action" the defamation claim is a compulsory counterclaim even if the alleged statements were made after the complaint was filed. Here, the facts underlying Mercury's defamation claim are sufficiently linked to the facts alleged in Heartland's complaint because the defamation claim alleges that Heartland's statements—that Mercury defrauded merchants—were false; if Heartland were to prevail on its fraud claims against Mercury, Mercury could be collaterally estopped from pursuing this defamation claim. Thus, even if the alleged defamatory statements were first published on January 30, 2014 at the time of Heartland's press release, the defamation claim would not be time-barred.

Accordingly, taking the facts as alleged in the counterclaims as true, Mercury's defamation cause of action **[*28]** is not time-barred. The Court will now turn to the sufficiency of the allegations.

2. Failure to state a claim

As already noted, Mercury alleges that, on a webpage titled "Pennies Add Up," Heartland has published disparaging statements that "Mercury has 'deceiv[ed] merchants' and 'misrepresented pennies per transaction' by 'falsely inflat[ing] pass-through Visa and MasterCard interchange fees of four (4) cents per transaction'[.]" Mercury's Counterclaims ¶ 53.

As stated above, under California law, a claim for defamation requires the intentional publication of a statement that is false, unprivileged, and has a tendency to injure. *Cal. Civ. Code §§ 44-46*. There is little doubt that the "Pennies Add Up" webpage was an intentional publication. Mercury also alleges adequate facts with particularity to support the allegation that the webpage contains false statements, and that such false statements have a tendency to injure Mercury. Thus, with regard to statements on the "Pennies Add Up" webpage that specifically state that Mercury has deceived or overcharged its customers, Mercury has alleged facts sufficient to support its defamation claim. Even if *Rule 9(b)* applies, Mercury has stated those facts with the particularity required by *Rule 9(b)*.

However, **[*29]** allegations relating to the January 30, 2014 press release itself are insufficient to state a claim for defamation. Mercury does not state what defamatory information is included in the press release. Likewise, the Court agrees with Heartland that Mercury's reference to "other direct or indirect communications with other members of the payment processing industry concerning Heartland's allegations in its Complaint and Amended Complaint," Mercury's Counterclaims ¶ 56, is vague and fails to meet even *Rule 8* pleading requirements. Mercury has not stated any facts to support the inference that Heartland's "other direct or indirect communications" were defamatory.

3. Conclusion

Accordingly, for the reasons discussed above, to the extent Mercury's defamation cause of action is based on the "Pennies Add Up" webpage, the Court DENIES Heartland's motion to dismiss. Also for the reasons above, however, the cause of action cannot be based on the January 30, 2014 press release or unspecified communications with other businesses in the industry. Mercury is granted leave to amend to remedy these deficiencies if it can do so truthfully and without contradicting the allegations in its prior pleadings.

VI. **[*30]** Fifth Cause of Action: Trade Libel

Mercury's trade libel cause of action relies on the same allegations that support its defamation cause of action.

"A cause of action for trade libel . . . requires (at a minimum): (1) a publication; (2) which induces others not to deal with plaintiff; and (3) special damages." *Nichols v. Great Am. Ins. Companies, 169 Cal. App. 3d 766, 773, 215 Cal. Rptr. 416 (1985)*. "[U]nder *Fed. R. Civ. P. 9(g)* the pleader must state special damages with specificity. Counterplaintiffs must 'identify particular customers and transactions of which it was deprived as a result of the libel.'" *Piping Rock Partners, Inc. v. David Lerner Associates, Inc., 946 F. Supp. 2d 957, 981 (N.D. Cal. 2013)*(citing *Mann v. Quality Old Time Service, Inc., 120 Cal. App. 4th 90, 109, 15 Cal. Rptr. 3d 215 (2004))*.

Mercury does not identify any customer who refused to do business with it as a result of Heartland's allegedly libelous statements. Accordingly, the Court GRANTS Heartland's motion to dismiss the trade libel cause of action. Mercury is granted leave to amend to remedy this deficiency if it can do so truthfully and without contradicting the allegations in its prior pleadings.

VII. Motion to Strike Unclean Hands Affirmative Defense

Heartland argues that Mercury's unclean hands defense should be stricken for failure to plead it with particularity.

Rule 8 requires that, when "responding to a pleading, a party must . . . state in short and plain terms its defenses to each claim asserted against it." **[*31]** *Fed. R. Civ. P. 8(b)*. *Rule 12(f)* provides that, on its own or on a motion by a party, a "court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." *Fed. R. Civ. P. 12(f)*. "The purpose[] of a *Rule 12(f)* motion is to avoid spending time and money litigating spurious issues." *Barnes v. AT&T Pension Benefit Plan, 718 F. Supp. 2d 1167, 1170 (N.D. Cal. 2010)* (citing *Fantasy, Inc. v. Fogerty, 984 F.2d 1524, 1527 (9th Cir. 1993))*. If a defense is struck, "[i]n the absence of prejudice to the opposing party, leave to amend should be freely given." *Wyshak v. City Nat'l Bank, 607 F.2d 824, 826 (9th Cir. 1979)*. Thus Mercury's unclean hands defense must comply with *Rule 8*. Furthermore, because Mercury's unclean hands defense alleges fraud, it must also be plead with the particularity required by *Rule 9(b)*.

Mercury's unclean hands defense relies on the same allegations Mercury uses unsuccessfully to support its Lanham Act and FAL causes of action. Likewise, they fail here.

Thus the Court GRANTS Heartland's *Rule 12(f)* motion to strike Mercury's unclean hands defense. Mercury is granted leave to amend if it can do so truthfully and without contradicting its previous pleadings.

CONCLUSION

For the reasons stated above, the Court GRANTS in part Heartland's motion to dismiss Mercury's counterclaims (Docket No. 94) and DENIES it in part. In addition, the Court GRANTS Heartland's motion to strike **[*32]** Mercury's unclean hands defense. Within fourteen days of the date of this order, Mercury may file an amended answer and counterclaims to remedy the deficiencies identified above. It may not add further claims or defenses not authorized by this order. If Mercury does not have facts to support some of these claims despite due diligence, but later discovers them, it may timely move for leave to amend further in the future. If Mercury files an amended answer with or without counterclaims, Heartland may file a motion to strike or dismiss, or both, within fourteen days of the date the amended answer is filed.

As set in the Court's April 1, 2015 Case Management Order, the parties' mediation deadline has passed. If the parties have not complied, they shall do so within twenty-eight days. The discovery deadline is July 1, 2016, and a further case management conference and motion hearing is scheduled for March 2, 2017. The final pre-trial conference is scheduled for June 7, 2017, with jury selection and trial to begin on June 19, 2017.

IT IS SO ORDERED.

Dated: January 26, 2016

/s/ Claudia Wilken

CLAUDIA WILKEN

United States District Judge

LexisNexis

In re Pool Prods. Distrib. Mkt. Antitrust Litig.

United States District Court for the Eastern District of Louisiana

January 27, 2016, Decided; January 27, 2016, Filed

MDL No. 2328 SECTION: R(2)

Reporter

158 F. Supp. 3d 544 *; 2016 U.S. Dist. LEXIS 9525 **; 2016-1 Trade Reg. Rep. (CCH) P79,483

IN RE: POOL PRODUCTS DISTRIBUTION MARKET ANTITRUST LITIGATION

Subsequent History: Motion granted by, in part, Motion denied by, in part *In re Pool Prods. Distrib. Mkt. Antitrust Litig., 2016 U.S. Dist. LEXIS 20974 (E.D. La., Feb. 22, 2016)*

Prior History: *In re Pool Prods. Distrib. Mkt. Antitrust Litig., 2016 U.S. Dist. LEXIS 6565 (E.D. La., Jan. 20, 2016)*

Core Terms

freight, Manufacturer, Pool, Products, Dealers, conspiracy, buying, customers, Defendants', distributors, announced, costs, direct evidence, e-mail, sales, horizontal, pricing, orders, increased price, competitors, circumstantial evidence, price-fixing, collusion, shipping, volume, conspire, slide, smaller, summary judgment, channel

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Judges: SARAH S. VANCE, UNITED STATES DISTRICT JUDGE. MAG. JUDGE WILKINSON.

Opinion by: SARAH S. VANCE

Opinion

[*548] THIS DOCUMENT RELATES TO ALL DIRECT-PURCHASER PLAINTIFF CASES

ORDER AND REASONS

Defendants Pool Corporation, SCP Distributors LLC, and Superior Pool Products (collectively, "Pool") move for summary judgment on direct-purchaser **[**3]** plaintiffs' (DPPs') *per se* horizontal conspiracy claim.[1] Having considered the record evidence as a whole, the Court finds that DPPs have not presented sufficient evidence to raise an issue of material fact as to the existence of an unlawful horizontal conspiracy. Accordingly, the Court grants the motion for summary judgment.

I. BACKGROUND

DPPs' lone *per se* claim under Section 1 of the Sherman Act, *15 U.S.C. § 1*, alleges that in the fall of 2007, the Manufacturer Defendants, Pentair Water Pool and Spa, Inc. (Pentair); Hayward Industries, Inc. (Hayward); and Zodiac Pool Systems, Inc. (Zodiac; formerly "Jandy"),[2] unlawfully conspired with each other and with Pool to increase the minimum purchase amount necessary for customers to qualify for free freight on their Pool Products purchases ("free freight minimums") from $10,000 to $20,000. Plaintiffs claim that Pool orchestrated the conspiracy to disadvantage buying groups. These buying groups consist of Pool Products "Dealers" who aimed to buy directly from the manufacturers rather than from Pool Products distributors, such as Pool. Plaintiffs contend that Pool, the Manufacturer Defendants' largest customer, demanded that the manufacturers increase their **[**4]** free freight minimums. Plaintiffs also contend that the Manufacturer Defendants acted against their independent business interests by agreeing among **[*549]** themselves and with Pool to the identical price increase.

Defendants deny that any agreement exists among the manufacturers or with Pool. Regarding the Manufacturer Defendants' free freight minimum increases, defendants contend that the manufacturers acted in their independent best interests because their preferred means to market was through distribution and Dealer buying groups, which were a small part of the manufacturers' **[**5]** sales base, grew to include smaller Dealers, which increased the manufacturers' production and distribution expenses during a time of rising fuel costs.

A. Summary Judgment Standard

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[1] R. Doc. 516.

[2] Zodiac, as it exists today, did not come about until October 2008. Before then, a company called Polaris Pool Systems, Inc. sold pool products in the United States. Simultaneously, The Carlyle Group owned and operated Jandy Pool Products, Inc. In 2006, Polaris Pool Systems changed its name to Zodiac Pool Care, Inc. On September 28, 2007, the Carlyle Group and Zodiac announced that Jandy and Zodiac would be merging to form "Zodiac Marine & Pool." DPPs challenge Jandy's 2007 free freight minimum increase only. Therefore, any reference to conduct by "Jandy" throughout this Order is attributable to the modern, post-merger Zodiac.

Summary judgment is warranted when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also* Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); Little v. Liquid Air Corp., 37 F.3d 1069, 1075 (5th Cir. 1994). When assessing whether a dispute as to any material fact exists, the Court considers "all of the evidence in the record but refrain[s] from making credibility determinations or weighing the evidence." Delta & Pine Land Co. v. Nationwide Agribusiness Ins. Co., 530 F.3d 395, 398-99 (5th Cir. 2008). All reasonable inferences are drawn in favor of the nonmoving party, but "unsupported allegations or affidavits setting forth 'ultimate or conclusory facts and conclusions of law' are insufficient to either support or defeat a motion for summary judgment." Galindo v. Precision Am. Corp., 754 F.2d 1212, 1216 (5th Cir. 1985); *see also* Little, 37 F.3d at 1075.

If the dispositive issue is one on which the moving party will bear the burden of proof at trial, the moving party "must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial." Int'l Shortstop, Inc. v. Rally's, Inc., 939 F.2d 1257, 1264-65 (5th Cir. 1991). The nonmoving party can then defeat the motion by either countering with evidence sufficient to demonstrate the existence of a genuine **[**6]** dispute of material fact, or "showing that the moving party's evidence is so sheer that it may not persuade the reasonable fact-finder to return a verdict in favor of the moving party." Id. at 1265.

If the dispositive issue is one on which the nonmoving party will bear the burden of proof at trial, the moving party may satisfy its burden by merely pointing out that the evidence in the record is insufficient with respect to an essential element of the nonmoving party's claim. *See* Celotex, 477 U.S. at 325. The burden then shifts to the nonmoving party, who must, by submitting or referring to evidence, set out specific facts showing that a genuine issue exists. *See* id. at 324. The nonmovant may not rest upon the pleadings, but must identify specific facts that establish a genuine issue for trial. *See, e.g., id.*; Little, 37 F.3d at 1075 ("Rule 56 *mandates* the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." (quoting Celotex, 477 U.S. at 322)).

B. Proving a Horizontal Conspiracy Under Section 1 of the Sherman Act

Section 1 of the Sherman Act forbids every contract, combination, or conspiracy **[**7]** that unreasonably restrains trade. *See* 15 U.S.C. § 1; Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the **[*550]** Univ. of Okla., 468 U.S. 85, 98, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984). To prevail on their horizontal conspiracy claim, DPPs must prove the existence of an anticompetitive agreement or conspiracy among actual competitors. *See* Texaco Inc. v. Dagher, 547 U.S. 1, 5, 126 S. Ct. 1276, 164 L. Ed. 2d 1 (2006); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223-24, 60 S. Ct. 811, 84 L. Ed. 1129 (1940). A showing of concerted action is vital to any Section 1 conspiracy claim. Tunica Web Adver. v. Tunica Casino Operators Ass'n, 496 F.3d 403, 409 (5th Cir. 2007) (citing Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)). DPPs must also prove that they suffered an "antitrust injury" from Pool's alleged violation. *Id.*; *see also* Alabama v. Blue Bird Body Co., 573 F.2d 309, 317 (5th Cir. 1978). "Antitrust injury" is an "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977).

1. Horizontal Price-Fixing Agreements Are Per Se Illegal

Courts consider certain agreements to be "inherently anticompetitive." *See* Tunica Web, 496 F.3d at 412. When the defendants' agreement "facially appears to be one that would always or almost always tend to restrict competition and decrease output," or constitutes a "naked restrain[t] of trade with no purpose except stifling [] competition," it is deemed *per se* unreasonable—and thus *per se* illegal—under Section 1, and condemned without further analysis. Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 19-20, 99 S. Ct. 1551, 60 L. Ed. 2d 1 (1979); *see also* Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877, 886, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007).

Horizontal price-fixing agreements among competitors are traditionally *per se* illegal, while vertical price-fixing agreements among firms at different levels in the distribution chain **[**8]** are not. *See, e.g.,* Leegin, 551 U.S. at 886; Hyland v. HomeServices of Am., Inc., 771 F.3d 310, 318 (6th Cir. 2014). Agreements affecting components of a product's purchase price, such as agreements to terminate discounts or the practice of extending credit to purchasers, are equivalent to price fixing because they distort the ultimate price a consumer pays for a good or service. *See* Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 648, 100 S. Ct. 1925, 64 L. Ed. 2d 580 (1980).

Here, the Manufacturer Defendants' freight charges are a component of the purchase price for Pool Product purchases. *See* id. at 648-49. DPPs allege that the Manufacturer Defendants, who are horizontal competitors, conspired among themselves and with Pool, to raise the free freight minimums for Pool Products purchases. To prevail on their claim of *per se* liability, plaintiffs must show that the Manufacturer Defendants conspired with each other, and that Pool knowingly joined their horizontal conspiracy. If plaintiffs cannot show the existence of the horizontal element, *i.e.*, collusion among the Manufacturer Defendants, their *per se* claim must fail.

2. Proving an Unlawful Agreement with Direct Evidence or with Circumstantial Evidence and "Plus" Factors

To prove a Section 1 conspiracy, an antitrust plaintiff may present direct or circumstantial evidence of an unlawful agreement. Golden Bridge Tech., Inc. v. Motorola Inc., 547 F.3d 266, 271 (5th Cir. 2008). "Direct evidence explicitly refers to **[**9]** an understanding between the alleged conspirators, while circumstantial evidence requires **[*551]** additional inferences . . . to support a conspiracy claim." *Id.* (citing Tunica Web, 496 F.3d at 409). In other words, direct evidence cannot be ambiguous; rather, "[d]irect evidence is tantamount to an acknowledgment of guilt . . . ." Hyland v. HomeServices of Am., Inc., 771 F.3d 310, 318 (6th Cir. 2014). With direct evidence, "the fact finder is not required to make inferences to establish facts." In re Baby Food Antitrust Litig., 166 F.3d 112, 118 (3d Cir. 1999) (quoting Rossi v. Standard Roofing, 156 F.3d 452, 466 (3d Cir. 1998)). Evidence of a conspiracy that depends on additional inferences is "at most, circumstantial[.]" Viazis v. Am. Ass'n of Orthodontists, 314 F.3d 758, 762 (5th Cir. 2002); *see also* Burtch v. Milberg Factors, Inc., 662 F.3d 212, 225 (3d Cir. 2011) (Direct evidence "is explicit and requires no inferences to establish the proposition or conclusion being asserted.")

An antitrust plaintiff who is unable to present direct evidence may nonetheless rely on circumstantial evidence of a conspiracy. *See* Viazis, 314 F.3d at 763. To survive summary judgment, however, the plaintiff must present strong circumstantial evidence of a conspiracy because "***antitrust law*** limits the range of permissible inferences from ambiguous evidence in a § 1 case." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). Circumstantial evidence "must tend to rule out the possibility that the defendants were acting independently[.]" Bell Atl. Corp. v. Twombly, 550 U.S. 544, 554, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (citing Matsushita, 475 U.S. at 588); *see also* Golden Bridge Tech., 547 F.3d at 270-71 ("To survive a motion for summary judgment [the plaintiff] must present evidence that tends **[**10]** to exclude the possibility that the alleged conspirators acted independently.").

Independent parallel conduct, "or even conduct among competitors that is consciously parallel," on its own, cannot establish the requisite contract, combination, or conspiracy. Golden Bridge Tech., 547 F.3d at 271 (citing Bell Atl., 550 U.S. at 553-54)). Neither will conduct that is "consistent with other, equally plausible explanations . . . give rise to an inference of conspiracy." Stewart Glass & Mirror, Inc. v. U.S. Auto Glass Disc. Centers, Inc., 200 F.3d 307, 315 (5th Cir. 2000) (quoting Matsushita, 475 U.S. at 587)); *see also* Southway Theatres, Inc. v. Ga. Theatre Co., 672 F.2d 485, 494 (5th Cir. 1984) ("[T]he inference of a conspiracy is always unreasonable when it is based solely on parallel behavior that can be explained as the result of the [defendants'] independent business judgment . . . ."); In re Ins. Brokerage Antitrust Litig., 618 F.3d 300, 322-23 (3d Cir. 2010) ("[A]llegations of conspiracy are deficient if there are 'obvious alternative explanation[s]' for the facts alleged."). Accordingly, a plaintiff relying only on circumstantial evidence must establish both "conscious parallelism" and certain "plus factors." *See* Royal Drug Co., Inc. v. Grp. Life & Health Ins. Co., 737 F.2d 1433, 1437 (5th Cir. 1984) (citation omitted). "Existence of these plus factors tends to ensure that courts punish 'concerted action'—an actual agreement—instead of the 'unilateral, independent conduct of competitors.'" In re Flat Glass Antitrust Litig., 385 F.3d 350, 360 (3d Cir. 2004) (citation omitted).

"Plus factors" include "(1) evidence that the defendant had a motive to enter into a price-fixing conspiracy; (2) evidence that the **[**11]** defendant acted contrary to its interests; and (3) evidence implying a traditional conspiracy." Burtch, 662 F.3d at 227 (quoting In re Ins. Brokerage, 618 F.3d at 321-22). Most courts require evidence demonstrating the defendants' conduct **[*552]** "was contrary to their economic self-interest so as not to amount to a good faith business judgment." Royal Drug Co., 737 F.2d at 1437 (quoting Pan-Islamic Trade Corp. v. Exxon Corp., 632 F.2d 539, 559 (5th Cir. 1980)); *see also* Intervest, Inc. v. Bloomberg, L.P., 340 F.3d 144, 165 (3d Cir. 2003) (requiring plaintiff relying on circumstantial evidence to show that defendants acted contrary to their economic interests). Some courts also consider whether the defendants exchanged or "had the opportunity to exchange information relative to the alleged conspiracy." Hyland, 771 F.3d at 320. Generally though, "evidence that a market is ripe for collusion, that defendants acted against their interests, or that defendants were motivated to collude is too ambiguous to support an inference of agreement" because these circumstances are just as likely to result from independent conduct. In re Chocolate Confectionary Antitrust Litig., 999 F. Supp. 2d 777, 789 (M.D. Pa. 2014) (citing In re Baby Food, 166 F.3d at 122), *aff'd*, 801 F.3d 383 (3d Cir. 2015); *see also* In re Musical Instruments & Equip. Antitrust Litig., 798 F.3d 1186, 1193-94 (9th Cir. 2015).

The court "should not permit factfinders to infer conspiracies when such inferences are implausible, because the effect of such practices is often to deter procompetitive conduct." Matsushita, 475 U.S. at 593 (citing Monsanto, 465 U.S. at 762-64). Indeed, mistaken inferences of unlawful action "chill the very conduct the antitrust laws are designed to protect." **[**12]** *Id.* (citing Monsanto, 465 U.S. at 763-64). In sum, an antitrust plaintiff will survive summary judgment only if "the inference of conspiracy is reasonable in light of competing inferences of independent action or collusive action that could not have harmed the plaintiff." Tunica Web, 496 F.3d at 409 (quoting Matsushita, 475 U.S. at 588)).

II. DISCUSSION

A. The Pool Products Industry

As defined by DPPs, Pool Products are the equipment, products, parts, and materials used for the construction, renovation, maintenance, repair, and service of residential and commercial swimming pools. Pool Products include pumps, filters, covers, drains, fittings, rails, diving boards, and chemicals, among other goods. The Pool Products industry is made up of multiple layers of market participants, including manufacturers, distributors, dealers, and ultimately, the end-consumers. Manufacturers sell Pool Products primarily to distributors, but they also sell to Dealer buying groups and big box retailers. Distributors also sell Pool Products to Dealers, who in turn sell those products to the end-consumers.

The Manufacturer Defendants are Pentair, Hayward, and Zodiac. Pool, the only distributor defendant, buys Pool Products from manufacturers, including the three Manufacturer Defendants, and **[**13]** in turn sells them to DPPs, which include pool builders, pool retail stores, and pool service and repair companies (collectively referred to as "Dealers").

Pool is the largest Pool Products distributor, with a market share of no more than thirty-eight percent, which remained stable from 2004 - 2011.[3] The record does not reveal the Manufacturer Defendants' market shares, but Pool's preferred vendor program, which consisted of manufacturers who sold at least $2 million worth of merchandise to Pool, included seventy-six other **[*553]** vendors during the relevant period.[4] It appears undisputed that Pentair, Hayward, and Zodiac are the largest manufacturers in Pool's preferred vendor program and that each Manufacturer Defendant offers a broad line of Pool Products. During the relevant time period, Pool was the

[3] Rausser Initial Report, April 10, 2014, at 38-39.

[4] *Id.* at 37.

Manufacturer Defendants' largest distributor customer. Together, the Manufacturer Defendants' sales to Pool totaled approximately forty-six percent of Pool's total purchases.[5]

Dealer "buying groups" are organizations made up of a number of Pool Products Dealers who aim to buy directly from the manufacturers instead of from Pool Products distributors, **[**14]** such as Pool. Using their collective volume of purchases as leverage to negotiate directly with the manufacturers, Dealers submit their individual orders to the buying group organization, which then purchases, on behalf of its Dealer members, larger orders of Pool Products from the manufacturers.[6] The two principal buying groups in the Pool Products industry are Aquatech, led at all relevant times by Jeff Fausett, and Carecraft, led at all relevant times by Greg Howard.

During the alleged conspiracy period, buying groups expanded their membership to include smaller Pool Products Dealers. During the same period, fuel costs increased, peaking in November 2007.[7] According to plaintiffs' expert, no buying group accounted for more than one percent of the Manufacturer Defendants' sales, except for Aquatech and Carecraft. Plaintiffs' expert estimates that Pentair's sales to these two buying groups totaled five percent of its overall business; Zodiac's sales, eight percent; and Hayward's sales, three percent.[8]

B. Summary Judgment Evidence

*1. Plaintiffs' **[**15]** Purported Direct Evidence*

There is no direct evidence that the Manufacturer Defendants agreed among themselves to the increase in free freight minimums. Nonetheless, plaintiffs contend that there is direct evidence of collusion.

First, plaintiffs rely on a November 30, 2007 e-mail in which Pool's CEO Manny Perez de la Mesa wrote: "Pentair, Hayward, and Jandy have all agreed to the $20K freight minimum with NO exceptions. I need to know if anyone does not comply."[9] This e-mail is not direct evidence of a horizontal agreement among the Manufacturer Defendants to increase their free freight minimums because the e-mail is ambiguous. *See* *Hyland, 771 F.3d at 318* ("Direct evidence is tantamount to an acknowledgment of guilt . . . ."); *Golden Bridge Tech., 547 F.3d at 271* (explaining that direct evidence must be "explicit"). This one-time use of the word "agree" cannot be unambiguously read to mean that the Manufacturer Defendants agreed with each other, as well as with Pool, to fix prices. *See* *In re Baby Food, 166 F.3d at 127* (holding that an "isolated, single use" of the word "truce" was not direct evidence of an unlawful conspiracy).

The Manufacturer Defendants' $20,000 free freight minimums **[**16]** applied **[*554]** equally to distributors, like Pool, and to other customers, like buying groups or independent Dealers. Considering this, the e-mail could be read to mean that each Manufacturer Defendant agreed separately with Pool that its new free freight minimum was $20,000 and that the manufacturers would not make exceptions for other customers. Thus, DPPs' argument that no additional evidence is required to show collusion among the Manufacturer Defendants is without merit. Although Perez de la Mesa testified as to what he meant by this e-mail, the Court's holding does not rest on a credibility determination as to Perez de la Mesa's testimony. The evidence, on its face, is ambiguous. Evidence that is equally consistent with each Manufacturer Defendant's agreeing separately with Pool is not direct evidence of a horizontal conspiracy among the manufacturers. Ambiguous statements cannot serve as direct evidence of a conspiracy. *See* *Hyland, 771 F.3d at 318*; *Golden Bridge Tech., 547 F.3d at 271*. "[C]ases require that direct evidence of an illegal

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[5] *Id.* at 38.

[6] Deposition of Jeffrey Fausett, January 24, 2014, at 23:21-25:18.

[7] Elzinga DPP Report, April 10, 2014, at 53.

[8] Rausser Initial Report, April 10, 2014, at 40-42.

[9] POOLMDL-013-0023586 (November 30, 2007 e-mail from Perez de la Mesa to Postoll and Cook).

agreement be established with much greater clarity." *InterVest, Inc. v. Bloomberg, L.P., 340 F.3d 144, 149 (3d Cir. 2003)*.

Plaintiffs also rely on a September 2007 conversation between Bruce Fisher, Hayward's Vice President of Sales and Marketing, and Bob Rasp, Jandy's President and **[**17]** CEO, as direct evidence of a conspiracy. The record does not support that assertion. On September 17-18, 2007, Fisher, for Hayward, and Rasp, for Jandy, separately attended the annual conference of the Independent Distributors Network (IDN).[10] By this time, both Pentair and Hayward had already announced their free freight minimum increases.[11] Pentair alerted customers, including Aquatech's Jeff Fausett, as early as August 30, 2007, that a $20,000 free freight minimum was effective immediately as part of Pentair's 2008 Early Buy program.[12] Hayward publicized its decision to combine its multiple product lines, accompanied by a new $20,000 free freight minimum—effective January 2, 2008—on September 10, 2007.[13]

After the IDN conference, Fisher summarized his encounter with Rasp in an e-mail to other Hayward employees. Fisher wrote: "Chatted with Bob Rasp and he advised that business is still very weak for them and he cannot afford to cut any more people. Interestingly enough, he openly admitted to being over staffed to begin **[*555]** with." **[**19]** [14] DPPs argue that this "meeting" serves as direct evidence of a horizontal agreement among defendants because this conversation gave Fisher and Rasp an opportunity "to confirm the free-freight conspiracy."[15] Further, DPPs charge Rasp with admitting, "I might have said something to him."[16]

Not only does Fisher's e-mail fail to "explicitly refer[] to an understanding" between Hayward and Jandy, but it also fails to implicate in any way the other alleged conspirators, Pentair and Pool. *See* *Golden Bridge Tech., 547 F.3d at 271*. Most importantly, the e-mail is devoid of any mention of free freight minimums. Fisher's recalling that Jandy's "business is still very weak and [that Jandy] cannot afford to cut any more people" demonstrates nothing more than that Fisher and Rasp engaged in business small talk. *Coleman v. Cannon Oil Co., 849 F. Supp. 1458, 1469 (M.D. Ala. 1993)* ("[T]hat defendants met together or telephoned each other [does] not support a finding by itself that they had engaged in an effort to fix prices. . . . [I]t remains the plaintiff's burden to prove that the defendant succumbed to the temptation and conspired."). To conclude that this vague statement about Jandy's employee roster establishes that **[**20]** Hayward and Jandy colluded with each other, as well as with Pentair and Pool, to fix the price of free freight minimums, would require additional inferences. *See* *Tunica Web, 496 F.3d at 409* (holding that direct evidence must be explicit "while circumstantial evidence requires additional inferences").

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[10] *See* R. Doc. 516-1 at 27.

[11] AQ0001370 (August 30, 2007 e-mail from Murray to Fausett announcing that free freight minimum increase would accompany Pentair's 2008 Early Buy program); HAY-MDL-0802568 (September 10, 2007 letter from Massa to Customers announcing a free freight minimum increase effective January 2, 2008).

[12] AQ0001370 (August 30, 2007 e-mail from Murray to Fausett announcing that free freight minimum increase would accompany Pentair's 2008 Early Buy program).

[13] HAY-MDL-0802568 (September **[**18]** 10, 2007 letter from Massa to Customers announcing a free freight minimum increase effective January 2, 2008). Before 2007, Hayward maintained three separate free freight programs because Hayward maintained three separate product lines: "Hayward" brand products, "Goldline" brand products, and "AquaVac" brand products. To receive free freight, a customer had to purchase a minimum of $10,000 in Hayward brand products, a minimum of $10,000 in Goldline brand products, or a minimum of $10,000 in AquaVac brand products. A customer could not receive free freight on an order that totaled $10,000 in purchases from more than one product line. *See* HAY-0002638 (January 7, 2011 First Amended Responses to the Civil Investigative Demand issued by the Federal Trade Commission); HAY-MDL-0425818-21 (September 13, 2007 e-mail from Fausett to Massa with Hayward program flyer attached).

[14] HAY-MDL-0209906 (September 20, 2007 e-mail from Fisher to Massa and Buffa).

[15] R. Doc. 585 at 18.

[16] *Id.*

The Court also rejects DPPs' assertion that Rasp admitted at his deposition that he "might have said something to [Fisher]" about Jandy's free freight minimums. Rasp's "admission" came in response to questioning about a subject unrelated to price fixing: whether Rasp told Fisher that Jandy was over-staffed. When asked, "can you tell me what you meant when you said you couldn't afford to cut anymore people?" Rasp answered:

> [A]t that time we were going through an integration of the two companies, too. I knew that I was going to become president of the combined company, so there was -- and that wasn't public information. So I knew that we were going to have to combine and cut people, so I might have said something to him.[17]

Rasp's testimony is far from the admission or "acknowledgment of guilt," necessary to serve as direct evidence of a price-fixing conspiracy. *See Hyland, 771 F.3d at 318*. His reponse does not even touch the relevant subject matter **[**21]** of the alleged conspiracy—that is, an increase in the Manufacturer Defendants' free freight minimums. At best, DPPs have offered circumstantial evidence of an opportunity to conspire. Yet the existence of an opportunity to conspire is an insufficient basis on which to infer a conspiracy. *See, e.g., Cosmetic Gallery, Inc. v. Schoeneman Corp., 495 F.3d 46, 53 (3d Cir. 2007)*; *Am. Chiropractic Ass'n v. Trigon Healthcare, Inc., 367 F.3d 212, 227 (4th Cir. 2004)*. Accordingly, this testimony does not constitute direct evidence of a price-fixing conspiracy among Pool and the Manufacturer Defendants.

Next, DPPs assert that an April 1, 2009 e-mail from a Pool employee, sent nearly two years after the allegedly unlawful 2007 free freight increase, is direct **[*556]** evidence of the alleged horizontal conspiracy. On December 15, 2008, Zodiac announced to Aquatech customers that its free freight minimum for 2009 would be $25,000.[18] Approximately three months later, on March 2009, Zodiac announced that, starting April 1, 2009, its free freight minimum would decrease to $20,000.[19] When another employee forwarded Zodiac's March announcement to Steve Nelson at Pool, Nelson wrote to Zodiac's David Nibler and Todd Cramer:

> I am concerned about the email below . . . on a couple of levels. The first is that a lot **[**22]** of thought went into the establishment of the amount of the purchase from you that would result in freight prepaid status. We participated in those discussions and believe that the prior level was appropriate for distribution to provide value to its customers.
>
> The second concern is the total lack of consideration in providing us information not only on the fact that you were considering changing this level, but once that decision was reached no prior notification was provided to us.
>
> . . . .

Please evaluate how this issue was handled.[20] Cramer replied:

> We made the decision to change our freight policy very quickly, and in our haste, my colleagues and I each thought the other was to communicate this information to PoolCorp. We make it a point to communicate to you sooner than we do to others. But we blew this one, and for that I apologize.
>
> Your first point concerns the content of the decision itself.
>
> Our prepaid freight minimum has been at $25,000. Our primary competitors, Pentair and Hayward, are at $20,000.
>
> In a tough business environment, this placed **[**23]** us at a severe competitive disadvantage.
>
> Sales pressure came from many directions, most of all Distribution. This was not a decision made in response to pressure from buying groups.
>
> Had Pentair and Hayward raised their minimums to $25,000, we would have been happy to keep ours there as well. It has been many months since we announced the move to $25,000, and they chose not to follow.

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[17] Deposition of Robert Rasp, January 8, 2014, at 144:16 - 145:14.

[18] *See* ZPC0300642 (December 15, 2008 letter from Cramer to Fausett).

[19] POOLMDL-013-0007491 (March 30, 2009 letter from Zamora to "Valued Customer").

[20] POOLMDL-013-0007489 (April 1, 2009 e-mail from Nelson to Nibler and Cramer).

> We felt we had no choice but to remain competitive, and drop to their level.
>
> We also felt that most of our customers are operating at smaller volumes. Yesterday's 25 is today's 20. Just like we lowered the minimum for your orders at the end of March from $75K to $25K, we felt we needed to accommodate ourselves to everyone's new operational demands.[21]

The foregoing e-mail exchange is not direct evidence of DPPs' alleged price-fixing conspiracy for a number of reasons. First, DPPs' allege that the Manufacturer Defendants and Pool conspired to fix the price of the manufacturers' free freight minimums in fall 2007.[22] Nelson's e-mail, **[*557]** sent on April 1, 2009, came directly after **[**24]** Zodiac announced a change to its free freight minimum in March 2009. Neither Zodiac's March 2009 announcement, Nelson's e-mail to Zodiac, nor Cramer's response to Nelson mention the 2007 free freight minimum increase. Second, Nelson's e-mail fails to mention any agreement that allegedly occurred two years earlier or any agreement with the other Manufacturer Defendants. *See* *Golden Bridge Tech., 547 F.3d at 271* ("Direct evidence explicitly refers to an understanding between the alleged conspirators . . . ."); *Burtch, 662 F.3d at 225-26* (holding that telephone conversations between defendants failed to constitute direct evidence of a conspiracy because they did not "specify a time or place that any actual agreement to fix credit terms occurred [or] indicate that any particular individuals or [defendants] made such an agreement"). In fact, the e-mail plainly explains that Zodiac had increased its free freight minimum from $20,000 to $25,000 without agreeing to the increase with the other two Manufacturer Defendants, that neither Pentair nor Hayward followed suit, and that Zodiac ultimately had to decrease its $25,000 minimum to meet competition.

Third, that Zodiac discussed the $25,000 minimum with Pool before Zodiac reduced it to $20,000 is not evidence of a horizontal conspiracy. Pool's relationship with Zodiac is vertical, not horizontal. *See* *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 762, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)* ("A manufacturer and its distributors have legitimate reasons to exchange information about the prices and the reception of their products in the market."); *Ill. Corporate Travel, Inc. v. Am Airlines, Inc., 806 F.2d 722, 726 (7th Cir. 1986)* ("In any chain of distribution discussions of price will be frequent—and . . . beneficial too."). Without more, Nelson's e-mail—sent to a single Manufacturer Defendant well after the relevant time period and in response to some other business decision—is far from "tantamount to an acknowledgment of guilt," and therefore cannot serve as explicit, direct evidence of an unlawful conspiracy. *See* *Hyland, 771 F.3d at 318*. If anything, Nelson's e-mail suggests that the Manufacturer Defendants did not collude regarding their free freight minimums.

In sum, none of the evidence on which DPPs rely directly establishes, without additional inferences, that defendants **[**26]** engaged in a horizontal price-fixing conspiracy to raise the Manufacturer Defendants' free freight minimums. Accordingly, the Court considers the foregoing evidence among the totality of circumstantial evidence supporting DPPs' claims.

2. Analysis of Circumstantial Evidence and Plus Factors

Without direct evidence of an unlawful conspiracy, the Court must consider all of the circumstantial evidence in the record to determine whether the Manufacturer Defendants engaged in parallel pricing and whether sufficient evidence of certain "plus factors" supports DPPs' allegations of a horizontal price-fixing conspiracy. DPPs contend that, during August through December 2007, all three Manufacturer Defendants doubled their free freight minimums from $10,000 to $20,000. DPPs also rely on the following plus factors to support their claim of a horizontal price-fixing conspiracy: (1) the Manufacturer Defendants acted contrary to their individual interests; (2) the Manufacturer

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[21] POOLMDL-013-0007488 (April 1, 2009 e-mail from Cramer to Nelson).

[22] R. Doc. 585 at 7 ("During the August-December 2007 period, all three Manufacturer Defendants doubled their **[**25]** minimum amount needed to qualify for free freight on product shipments from $10,000 to $20,000 . . . . The Manufacturer Defendants' collective increase was part of a conspiracy, led by PoolCorp . . . .").

Defendants' purported business justifications are pretextual; (3) the Manufacturer Defendants were motivated to conspire; and (4) **[*558]** the structure of the Pool Products industry was conducive to collusion.[23]

[27]** To demonstrate parallel pricing, a plaintiff need not show that the defendants set uniform prices. *See In re Baby Food Antitrust Litig., 166 F.3d 112, 132 (3d Cir. 1999)* (citing *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 222, 60 S. Ct. 811, 84 L. Ed. 1129 (1940))*. "It is sufficient that the price increases are reasonably proximate in time and value." *In re Chocolate Confectionary Antitrust Litig., 999 F. Supp. 2d 777, 787 (M.D. Pa. 2014)*, *aff'd*, *801 F.3d 383* (citations omitted).

Here, the evidence demonstrates that not only did the Manufacturer Defendants each announce their free freight minimum increases within a four-month period, but also that these increases all took effect within four months of each other. Pentair was the first to announce its free freight minimum increase on August 30, 2007, via e-mail to certain customers.[24] Pentair's Dave Murray wrote to Aquatech's Jeff Fausett: "Jeff . . . need to go over 2008 Early Buy program real time with you - same as 2007 except for following: . . . Prepaid freight has increase[d] from 10,000 to 20,000."[25] Hayward announced second. Though internal documents indicate that Hayward had decided as early as July 2007 to increase its free freight minimum to accompany unifying its multiple product lines,[26] Hayward did not announce the free freight increase until September 10, 2007, approximately two weeks after Pentair's announcement.[27] An e-mail between Hayward employees reveals that Hayward waited specifically to see if other manufacturers increased their free freight minimums: "Mike thought it would be **[**28]** a good idea to see if Pentair and Jandy move forward with an increase in their free freight threshold before we announce."[28] Zodiac (Jandy) announced last. On December 7, 2007, four months after Pentair made the first announcement, Jandy published its new $20,000 free freight minimum in a bulletin titled, "Updated Jandy Freight Program."[29]

Pentair was also the first to make effective its free freight minimum increase. According to Pentair's 2008 National Early Buy Program, the "Standard 2008 Freight Terms," which required customers to purchase at least $20,000 worth of products to receive free freight, were effective with orders placed on September 4, 2007.[30] Hayward's September 2007 announcement **[*559]** specifically noted that its new "$20,000 prepaid freight minimum for all whole goods" would take effect on January 2, 2008, approximately four months after Pentair's free freight increase took effect.[31] Finally, Zodiac's December 2007 updated freight program bulletin explained that "[e]ffective with

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[23] *See* R. Doc. 585 at 21.

[24] *See* PWPS-0618840 (August 30, 2007 e-mail from Murray to Fausett).

[25] *Id.*

[26] *See* HAY-MDL-0240712 (July 1, 2007 e-mail from Metkovich to Massa) ("He is going to look pretty smart when we go to 20K for freight."); HAY-MDL-0208241 (July 19, 2007 e-mail from Baker to Davis, Diamond, et al.) ("I do not like the $20K free freight policy where customers can mix and match GL + HPP product . . . I would however put more benefits into growth incentives rather than giving away freight."); HAY-MDL-0430932 (August 29, 2007 e-mail from Caldwell to Bahr) ("[W]e have a new free freight threshold minimum forthcoming . . . . HOWEVER, the new threshold has not been announced yet, so we **cannot communicate anything at this point**.).

[27] *See* HAY-MDL-0802568 (September 10, 2007 letter from Massa to "Customers").

[28] HAY-MDL-0430936 (August 31, 2007 e-mail from Caldwell to Davis).

[29] *See* PWPS-0619613 (December **[**29]** 7, 2007 flyer titled "Updated Jandy Freight Program").

[30] *See* PWPS-0888847-49 (September 1, 2007 e-mail from Del Amo attaching the "2008 Pentair Water Pool and Spa Early-Buy Programs for National Distributors").

[31] *See* HAY-MDL-0802568 (September 10, 2007 letter from Massa to "Customers"); *see also* HAY-MDL-0209693 (September 12, 2007 letter from Massa to "Customers").

orders placed January 2, 2008"—four months after Pentair's effective date, but the same day as Hayward's effective date—Jandy products would be subject to a $20,000 free freight minimum.[32]

In support of its motion for summary judgment, Pool points out, and DPPs do not dispute, that the "pool year," which regulates the distribution of Pool Products, begins October 1.[33] Thus, according to Pool, the simultaneous timing of the Manufacturer Defendants' announcements is not unusual. Pool also emphasizes that the Manufacturer Defendants independently raised their respective free freight minimums at different times, with days or weeks between the Manufacturer Defendants' announcements and between the effective dates of the price increases. But as noted, to demonstrate that defendants engaged in parallel pricing, DPPs are not required to show that the Manufacturer Defendants increased their prices in lockstep; DPPs need only show that the price increases "are reasonably proximate in time." *See* In re Chocolate Confectionary, 999 F. Supp. 2d at 787. That the Manufacturer Defendants' announcements and effective price increases took place over the course of several months does not disprove that the Manufacturer Defendants engaged in parallel behavior. *See* In re Flat Glass Antitrust Litig., 385 F.3d 350, 364-68 (2d Cir. 2004) (finding sufficiently parallel price increases that occurred over two months); In re Text Messaging Antitrust Litig., No. 08 C 7082, MDL No. 1997, 2009 U.S. Dist. LEXIS 115513, 2009 WL 5066652, at *5 (N.D. Ill. Dec. 10, 2009) **[**31]** (accepting as sufficiently parallel price increases that occurred over ten months).

Because proof beyond mere parallelism is required to sustain a claim of horizontal conspiracy, the Court now analyzes DPPs' plus factor evidence.

Actions Contrary to Individual Interests

DPPs first argue that the Manufacturer Defendants' free freight minimum increases were contrary to their individual economic interests.[34] To show that a defendant acted contrary to its interests, an antitrust plaintiff must present "evidence of conduct that would be irrational assuming that the defendant operated in a competitive market." *See* In re Flat Glass Antitrust Litig., 385 F.3d 350, 360-61 (3d Cir. 2004). "Where there is an independent business justification for the defendant's behavior, no inference of conspiracy can be drawn." Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan, 203 F.3d 1028, 1037 (8th Cir. 2000) (citing Todorov v. DCH Healthcare Auth., 921 F.2d 1438, 1456-57 (11th Cir. 1991)).

To show that the Manufacturer Defendants' direct sales to Dealers were profitable and thus in the manufacturers' best interests to continue, DPPs point to three documents indicating that, at some point, all three Manufacturer Defendants looked into how to maintain generally their Pool Products sales. DPPs first direct the Court **[*560]** to an undated Pentair PowerPoint, titled "Pentair Core Strategic **[**32]** Growth," which contains a slide titled "Must Balance Multiple Channels to Market."[35] A chart on this slide depicts the four types of customers to which Pentair directly sells Pool Products.[36] The first group of customers contains "Distributor Association Groups & Dealer Buying Groups"; the second group, "Distributor[s]"; the third group, "Nat'l Retail[,] e.g. Leslie's"; and the fourth group, "Internet/Catalog."[37] This slide also notes that in the distributor category, Pool is the largest, but there are "170 others."[38] The following slide on Pentair's PowerPoint, titled "Channels to market - Preliminary," indicates that

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[32] *See* ***[**30]*** PWPS-0619613 (December 7, 2007 flyer titled "Updated Jandy Freight Program").

[33] R. Doc. 516-1 at 9.

[34] *See* R. Doc. 585 at 21.

[35] PWPS-0137804 ("Pentair Core Strategic Growth" PowerPoint, Slide 13).

[36] *Id.*

[37] *See id.*

[38] See id.

Pentair's direct sales to Dealers make up less than ten percent of its total sales.[39] Specifically, Pentair calculates its sales to distributors as 92.4 percent of its total sales, while direct sales to Dealers make up 7.6 percent.[40]

DPPs next direct the Court to consider a Hayward document titled "Strategic Review of the Role of the Distributor in the U.S. Market."[41] This document, dated March 20, 2007—as DPPs note, months before the Hayward's **[**33]** free freight increase—indicates that Hayward had considered a "Pool Market Channel Access Strategy between distribution (traditional 2 step) and the growth of dealer buying groups."[42] The document also states, "[t]he group was in agreement that the strategy should remain to be everything to all Markets. Commitment is to remain in both channels with some degree of separation through programming."[43] On the same page, but not mentioned by DPPs, Hayward notes that it also considered "Freight Requirements," elaborated as follows:

> Issue was to raise freight Requirements in all business segments nationally. Dollars discussed ranged from $15k to 20K, which would include Hayward, Goldline and Aqua Vac. One of the concerns was how it would affect Goldline. It was agreed that having single point of inventory would be essential in increasing the freight minimums and should be investigated further in order to be competitive with other major bundlers.[44]

Finally, DPPs direct the Court to consider a 2007 "Business Review" PowerPoint that Zodiac (Jandy) created.[45] On a slide titled "Special Topics-Strategic **[**34]** Plan Outline," Zodiac notes as one of its strategies that it wants to "Continue to expand Jandy customer base & increase customer profitability."[46]

DPPs' proffered evidence is too general to suggest that the Manufacturer Defendants acted irrationally, or contrary to **[*561]** their individual interests, by increasing their free freight minimums. Further, DPPs ignore the breadth of evidence, dating as far back as 2002, which reveals that the Manufacturer Defendants considered large, full-truck orders of Pool Products, rather than smaller, more frequent orders from buying group Dealers, to be the most efficient means of distributing their goods to end-consumers.

Specifically, the Court begins by noting that Hayward's "Strategic Review" does demonstrate that Hayward desired to "remain in both [distribution] channels," albeit, "with some degree of separation."[47] On its face, this memo demonstrates that Hayward did not view distributors and dealers equally. In the same breath, however, Hayward considered "rais[ing] **[**35]** freight Requirements in all business segments nationally," discussed increasing its current amount to "20K," and planned to investigate further how to raise its free freight minimum "to be competitive with other major bundlers."[48] The juxtaposition of Hayward's intent to sell its products to both distributors and Dealers with Hayward's idea to increase its free freight minimum illustrates that Hayward did not believe that these two sales approaches were inconsistent. This document indicates that Hayward did not view a decision to increase its free freight minimum as likely "to deprive itself of a profitable sales outlet," as DPPs suggest. *See* Toys "R" Us,

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[39] PWPS-0137805 ("Pentair Core Strategic Growth" PowerPoint, Slide 14).

[40] *Id.*

[41] *See* HAY-MDL-0014704 (March 20th "Strategic Review of the Role of the Distributor in the U.S. Market").

[42] *See id.*

[43] *See id.*

[44] *See id.*

[45] *See* ZPS080041198 (Jandy Business Review PowerPoint Slide no. 2: Jandy Business Environment).

[46] *See* ZPS-080041211 (Jandy Business Review PowerPoint Slide no. 28: Special Topics - Strategic Plan Outline).

[47] *See* HAY-MDL-0014704 (March 20th "Strategic Review of the Role of the Distributor in the U.S. Market").

[48] *See id.*

Inc. v. FTC, 221 F.3d 928, 932 (7th Cir. 2000) (noting that defendant toy manufacturers were "reluctan[t]" to forego continued sales to "a new, fast-growing, and profitable channel of distribution").

The evidence against Pentair and Zodiac is even less persuasive. As to Pentair, DPPs emphasize the title of an undated PowerPoint slide—"Must Balance Multiple Channels to Market"—without considering the information in context. DPPs ignore the remainder of the information on that slide, as well as the remainder of the information in the PowerPoint as a whole. *See* *Brown v. Pro Football, Inc., 518 U.S. 231, 241, 116 S. Ct. 2116, 135 L. Ed. 2d 521 (1996)* (noting that a plaintiff's supposed evidence of unlawful conduct must be considered in the appropriate context); *Hyland, 771 F.3d at 319* (same). The relevant slide contains a chart, with sections indicating the four types of customers to which Pentair directly sells Pool Products, two of which are "Distributor Association Groups & Dealer Buying Groups" and "Distributor[s]."[49] The slide contains no other relevant information regarding **[**36]** its sales to these customers.[50] Only on the following slide does Pentair note that the vast majority of its business—92.4 percent—goes through distribution, with 7.6 percent of total sales directly to Dealers. Further, a 2010 Pentair e-mail indicates that Pentair believed that its direct sales to buying groups had changed over the last several years because of a proliferation of smaller members, making these sales inefficient and disruptive of Pentair's primary channel to market, which was distribution. Dave Murray explained his view of dealer buying groups as follows:

> [T]hese groups historically were small in membership, made up of higher end builders with protected exclusive territories. This all changed over the past 4-5 years . . . . This was due to virtually allowing anyone at any time in any territory **[*562]** to join. The conflict created by them caused an unnecessary disruption to our distribution channel due to loss of business, lower distributor margins as dealers received our pricing and was a complete no win situation for Pentair. Distribution is 85% of our business and we must have distributors financially health[y] in order for Pentair to be successful. Additionally and most importantly, operationally **[**37]** we do not have the template to service these smaller accounts efficiently or effectively.[51]

As to Zodiac, DPPs direct the Court to a company PowerPoint. A slide titled "Special Topics-Strategic Plan Outline" contains the following note within a long, bullet-point list: "Continue to expand Jandy customer base & increase customer profitability."[52] The slide says nothing about buying groups or the profitability or efficiency of Jandy's sales to Dealer customers. It would be speculative to infer anything about the relative value of buying group sales to Jandy from this single line in a multi-page PowerPoint presentation.

In addition to the overly general nature of DPPs' proffered evidence, there is ample record evidence suggesting that the Manufacturer Defendants viewed direct sales to Dealers as less desirable than their sales through distribution, especially as buying groups accepted an influx of smaller participants and fuel costs increased. To begin with, DPPs themselves specifically claim, and the **[**38]** Manufacturer Defendants agree, that "the wholesale distribution network is *the most efficient way for manufacturers to reach customers*."[53] DPPs admit that manufacturers prefer to sell to distributors, rather than directly to Dealers, for a number of reasons:

> Distributors purchase and warehouse significant volumes of Pool Products throughout the year, allowing manufacturers to operate their factories year-round notwithstanding the seasonal nature of the pool industry. Distributors also provide one-stop shopping, timely delivery, and the extension of credit to thousands of Dealers, thereby providing Dealers and manufacturers with significant transactional efficiencies. Additionally, distributors often help manufacturers administer their Dealer rebate and warranty programs, and provide answers to the Dealers' product-related questions. By displaying the Pool Products of particular manufacturers,

[49] PWPS-0137804 ("Pentair Core Strategic Growth" PowerPoint, Slide 13).

[50] *See id.*

[51] PWPS-0613696.

[52] *See* ZPS-080041211 (Jandy Business Review PowerPoint Slide no. 28: Special Topics - Strategic Plan Outline).

[53] R. Doc. 284 at 11 ¶ 32 (emphasis added).

distributors are also able to afford manufacturers product visibility and help to create and maintain brand recognition among industry participants generally.[54]

Additionally, DPPs recognize that manufacturers prefer to sell their products to wholesale distributors because of the costs attendant to distribution, **[**39]** the Manufacturer Defendants' lack of expertise in distribution, and the difficulty manufacturers have obtaining products to distribute from competing manufacturers.[55] The Supreme Court has also recognized the benefits of a traditional wholesale distribution chain: "[D]istributors are an important source of information for manufacturers. In order to assure an efficient distribution system, manufacturers and distributors constantly must coordinate their activities to assure that their product will reach the consumer persuasively and efficiently." *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 763-64,* ***[*563]*** *104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)*.

Moreover, each Manufacturer Defendant offers evidence suggesting that distribution efficiencies and efforts to cut costs were the impetus behind its free freight minimum increase. As Vice President of Marketing Carlos Del Amo testified, Pentair's business model "is to go through distribution . . . for consolidating freight purposes and many strategic reasons. A lot of cost savings. [Pentair is] really not good at selling small quantities of product and shipping them on time."[56] This testimony is consistent with Murray's e-mail from 2010, cited earlier. Further, Jeff Fausett, the President and CEO **[**40]** of the Aquatech buying group admitted: "Pentair was consistently telling us that they were concerned about the smaller vendors . . . meaning that, you know, *they were shipping product at low volume to people and that wasn't their business model*. They were built around large-order sales, not small-order sales."[57] Consistent with Pentair's "lean" approach to manufacturing and distributing its Pool Products, Pentair repeatedly sought to decrease the cost of shipping goods to its customers.[58]

In August 2006, one year before Pentair increased its free freight minimum, a Pentair employee opined that raising free freight to just $14,000 was a "$750,000 opportunity" because this order minimum "would allow [Pentair] to build multi stop truckloads [that] are cheaper, faster, and will get [Pentair's] products to [its] customers in a non compromised fashion."[59] Pentair President Karl Frykman also testified that he discussed raising the $10,000 free freight minimum to "increase the **[**41]** size of the orders going out of [Pentair's] factory [because] [t]he lower the order volume, the more [Pentair was] acting like a distributor, and [Pentair] really [was]n't set up to do that well. So it was a matter of efficiency . . . ."[60] Frykman also explained that "smaller dealers" burdened Pentair's shipping process, so Pentair "wanted to discourage their ability to buy small quantity orders . . . and drive [Pentair's] efficiency down."[61]

When Pentair finally announced its free freight increase in August 2007, Aquatech's Jeff Fausett described Pentair's increase as a way for Pentair "to mask its own ineffectiveness in production and inventory."[62] Another Dealer also wrote to Murray about the increase and acknowledged Pentair's freight issues: "*I understand that freight cost[s] have been issues for most manufacture[r]s* this past season and I am sure the level of your backorders and shipping from across the country have not helped your cost."[63] This same Dealer later wrote to Dave Murray again:

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[54] *Id.* at ¶ 33.

[55] *Id.* at ¶ 34.

[56] Deposition of Carlos Del Amo, January 22, 2014 at 35:3-10.

[57] Deposition of Jeffrey Fausett, January 24, 2014, at 109:10-110:10 (emphasis added).

[58] *See* Deposition of Bill Whitehurst, January 30, 2014, at 65:14-66:21, 99:16-100:16.

[59] PWPSe-0283945.

[60] *See* Deposition of Karl Frykman, December 19, 2013, at 219:2-7.

[61] *See id.* at 219:10-15.

[62] AQ0000647 (September 4, 2007 e-mail from Fausett to Murray).

"The one point that . . . makes some sense to me is that *Pentair is not a company that can support a lot of small volume locations*."[64] **[**42]** In contrast to those Dealer buying **[*564]** group members upset by the freight increase, Carecraft's Greg Howard wrote to Pentair's Dave Murray: "I fully support the change and . . . will gladly comply with it."[65]

Beginning in 2004, Hayward also considered increasing its free freight minimum to compensate for rising fuel costs. Vice President of Logistics and Information Systems David Caldwell wrote to another Hayward employee:

> [S]everal months ago, we (Bruce, you[,] Kevin[,] and I) talked about raising the free freight possibly as high as $15k. The reasoning at that time was the increase in freight costs as a result of fuel oil price inflation. With crude oil now even higher than it was in May/June when the issue was last raised . . . it would seem that we should opt for the higher threshold. For the past several years, I have been asked to monitor and report on freight costs whenever the issue came up during **[**43]** the POB financial review.[66]

In March 2007, Hayward's Vice President of Sales and Marketing Bruce Fisher asked other employees to provide input on topics they wanted to discuss at Hayward's 2008 Annual Sales and Marketing Planning Meeting.[67] Fisher received a number of responses indicating that Hayward employees were concerned about shipping efficiency, freight costs, the existing $10,000 free freight minimum, and the influx of small Dealers joining buying groups. For example, Hayward's Vice President of Sales Michael Massa wrote:

> 1) Analyze our freight policy with regard to Freight Minimums and Single Point of Shipment:
>
> • *Freight costs continue to rise and the more we can put on one shipment helps us keep our costs in line*.
>
> • Purchasers of G[old]L[ine] Product are at a disadvantage because they need to buy a min of 10K on one order to receive freight prepaid. HPP [Hayward branded products] Customers have the same 10K minimum. Our competitors are able to offer their customers a combined 10K minimum including all products. (Pumps/filters, cleaners, along with controls and salt). We need to look at shipping GL Products out of all HPP **[**44]** Warehouses to joint customers.
> • With adding HPP, GL, and now AquaVac products into one shipment, I see no reason we could not raise our minimum shipment to 15K - 18K Min or more to our direct customers By doing so, [we] would probably raise our actual shipment amount to more than double.
> • The increase in freight minimums would make it harder for the small builder group member to meet the freight minimums and it would help distribution get some of these customers back into distribution. This would make a true distributor stronger in his market to compete with buying groups[.]
> • It would benefit our current HPP & GL supporters because it would be a joint purchase to reach the minimums as opposed to two separate orders of 10K each to reach these minimums.
>
> • *Look at ways to encourage full truckload orders. At some point the cost of* ***[*565]*** *the trailer is paid for before the truck is full*. Should we look at offering a discount to our customers who order in full truckloads and offer a portion of the savings back to distribution for ordering in truckload quantities[?] Our competitors are doing that today.
> . . . .
>
> 3) Builder Groups Vs. Distribution: With builder groups increasing their membership weekly, **[**45]** *what do we do to pro-actively (and in our best interest) control the influx of small builders and dealers joining buying groups and buying direct*? What advantages can we give distribution to keep these smaller members from wanting to

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[63] PWPS-0619033 (September 11, 2009 e-mail from Tassin to Cannon and Murray) (emphasis added).

[64] PWPS-0070878 (July 27, 2010 letter from Tassin to Murray and Fausett) (emphasis added).

[65] PWPS-0619374 (October 3, 2007 e-mail from Howard to Murray).

[66] HAY-MDL-0258378 (September 2, 2004 e-mail from Caldwell to Williams).

[67] HAY-MDL-0205784 (March 12, 2007 e-mail from Fisher to Harper, Whitmarsh, et al.).

> join a builder group? *The addition of too many group members will eventually put a strain on the system as we try to deliver to each of these members. Look at freight issues/minimums, pricing difference, truckload discount programs, terms, early buy programs, etc*.[68]

David Caldwell voiced similar concerns:

> #1 - Freight Costs issue - assess notion of free freight and only freight. In other words, continue to provide free freight incentives, but assess the viability to pass along accessorial charges as a standard. Excessive accessorial charges would be billed (e.g., demurrage charges and the like)[.]
>
> . . . .
>
> *Truckload orders will save some freight dollars. Full pallet ordering in combination with that would really speed the pick process and help to offset the cost of an affordable truckload discount*.
>
> Parts orders - "each" picks to be split off from case picks. *Freight costs for Each Picks could be passed on to the customer to help defray some cost* to HPP and incentivise **[**46]** [sic] full case ordering.[69]

In addition, this e-mail chain reflects that Hayward's decision to combine its previously separate product lines also motivated its free freight minimum increase. Similarly, on July 1, 2007, another Hayward employee noted that he had already begun telling Dealer buying groups about the potential to combine product lines accompanied by a free freight increase:

> Here are my notes on a meeting . . . I had with Greg Howard last week. . . . [Howard] [u]nderstands that their [sic] may be changes in freight programs in 2008. I said nothing has been decided but we are looking at possibl[y] making a change. Tied in GL and HPP lines next year and raise minimum. He didn't see a problem.[70]

Zodiac's President and CEO also testified that freight costs were one of the reasons behind Jandy's new $20,000 free freight minimum:

> [T]here's various factors in the marketplace. One is we had a more extensive line. We at Jandy Pool Products - - we kept, you know, higher **[**47]** volumes. *Freight costs were going up. So to get free freight, we just required a larger volume*. Plus, you know, we heard through market intelligence that Pentair or Hayward had done it as well, earlier in the year. So we thought it justified for us.[71]

Jandy's decision to follow its competitor's price increase to offset cost increases **[*566]** does not signal behavior contrary to its independent business interests. *See In re Baby Food Antitrust Litig., 166 F.3d 112, 128 (3d Cir. 1999)* (refusing to infer conscious parallelism "merely because the evidence tends to show that a defendant may have followed a competitor's price increase"). In *In re Chocolate Confectionary Antitrust Litigation*, the district court noted that a defendant with less market share relative to the others not only independently wanted to increase prices to meet rising costs, but also waited to see if its competitors increased prices so that it could "follow any price advance." *999 F. Supp. 2d 777, 796-97 (M.D. Pa. 2014)*, *aff'd*, *801 F.3d 383 (3d Cir. 2015)*. The court in *Chocolate Confectionary* found that this defendant's following other competitors' price leads was a rational business decision. *See id. at 796*; *see also In re Musical Instruments & Equip. Antitrust Litig., 798 F.3d 1186, 1193 (9th Cir. 2015)* (explaining that **[**48]** "firms may arrive at identical decisions independently [because] they are cognizant of—and reacting to—similar market pressures [and their] competitors' behavior . . . .").

Further, DPPs' own economic expert, Dr. Gordon Rausser, testified that it was not unreasonable for Zodiac (Jandy) to pay attention to its competitors' prices and adopt similar policies:

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[68] HAY-MDL-0512418-20 (March 16, 2007 e-mail from Massa to Fisher, Diamond, *et al.*) (emphasis added).

[69] HAY-MDL-0512417 (April 5, 2007 e-mail from Caldwell to Massa) (emphasis added).

[70] HAY-MDL-0240712 (July 1, 2007 e-mail from Metkovick to Massa).

[71] Deposition of Robert Rasp, January 8, 2014, at 140:13-21 (emphasis added).

Q: . . . It's not your position that Jandy somehow had an obligation to ignore information that's in the marketplace about what its competitors were doing on free freight policies, is it?
A: No.
Q: . . . And it's reasonable for a company that sees its competitors have taken a certain stance on free freight policy to consider adopting that policy for itself?
A: In the abstract . . . Yes.[72]

In sum, increasing free freight minimums made good business sense for the Manufacturer Defendants because higher free freight minimums encouraged all customers—distributors and Dealers alike—to make larger, less frequent orders. This, in turn, helped to reduce shipping costs in the face of rising fuel prices. It is undisputed that the Manufacturer Defendants preferred to deal in bulk because larger **[**49]** orders, or "full truckload orders" decreased the Manufacturer Defendants' shipping costs, and therefore potentially increased profits. *See* *Barr Labs. Inc. v. Abbott Labs., 978 F.2d 98, 104 (3d Cir. 1992)* (noting that "dealing in large volumes" minimizes transaction costs). Further, it is undisputed, that "the vast majority of Dealers . . . tend to be small operations that lack the resources and customer base to purchase Pool Products in volume directly from manufacturers."[73] Thus, the higher free freight minimums benefitted the Manufacturer Defendants in two ways. First, the $20,000 minimum encouraged Dealers to continue to buy Pool Products from wholesale distributors—the Manufacturer Defendants' preferred channel to market. Second, the $20,000 minimum ensured that Dealers buying directly from the manufacturers would purchase Pool Products in sufficiently large volumes to minimize the Manufacturer Defendants' existing shipping inefficiencies, particularly as the buying groups began including smaller Dealers and fuel costs rose.

Hayward's free freight minimum was also justified by its decision to combine its previously distinct product lines. According **[*567]** to Hayward's September 2007 pricing announcement, this new "Single Point **[**50]** of Contact" model gave customers "a single source for all of their Hayward, Goldline, and AquaVac product requirements," and enabled customers "to reach order minimums and prepaid freight minimums by combining what previously was a separate requirement for order size and freight minimums for each of the three companies."[74]

In opposition, DPPs point to the timing of the free freight increases—fall 2007, amid a national recession—as general evidence the price increases were contrary to the Manufacturer Defendants' economic interests. It is undisputed that the economy at this time was weak, the housing market was down, and the pool industry was slowing.[75] Generally, "reduced demand and excess supply are economic conditions that favor price cuts, rather than price increases." *In re Flat Glass, 385 F.3d at 361*. But "[r]ising prices do not themselves permit an inference of a collusive market dynamic. Even in a concentrated market, the occurrence of a price increase does not itself permit a rational inference of . . . supracompetitive pricing." *In re Baby Food Antitrust Litig., 166 F.3d 112, 129-30 (3d Cir. 1999)* (quoting *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 237, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993))*. And, as noted, cutting costs is also a rational response to declining economic conditions. *See, e.g.,* *Barr Labs., 978 F.2d at 104* (noting **[**51]** that "dealing in large volumes" minimizes transaction costs); *In re Chocolate Confectionary, 999 F. Supp. 2d at 792-93* (noting that competitors may rationally increase price to mitigate anticipated increases in costs); 6 Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** ¶ 1434, at 269 (3d ed. 2010) (noting a "rise in raw material costs" as an "independent explanation" for a price increase); *cf.* *Am. Tobacco Co. v. United States, 328 U.S. 781, 805-10, 66 S. Ct. 1125, 90 L. Ed. 1575 (1946)* (finding conspiracy when firms simultaneously increased price *absent* a corresponding increase in costs).

In the face of ample evidence indicating that the Manufacturer Defendants raised their free freight minimums to offset growing and costly shipping inefficiencies, DPPs bear the burden to identify specific facts that establish a

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[72] Deposition of Dr. Gordon Rausser, July 11, 2014, at 354:3-20.

[73] R. Doc. 284 at 11 ¶ 34.

[74] *See* HAY-MDL-0802568 (September 10,2007 letter from Massa to "Customers").

[75] *See, e.g.*, Deposition of Bob Rasp, January 8, 2014, at 149:3-5 ("[T]he industry was slowing down, and we had to reduce costs.").

genuine issue for trial. *See* *Celotex, 477 U.S. at 325*; *Little, 37 F.3d at 1075*. To counter the Manufacturer Defendants' efficiency justifications, DPPs argue that these reasons are merely pretextual. The Court addresses this argument in the following section.

Pretextual Business Justifications

DPPs contend that there are factual disputes as to whether the Manufacturer Defendants' proffered efficiency justifications are pretextual. In support, DPPs **[**52]** assert that none of the Manufacturer Defendants' formal announcements cites fuel costs or efficiency as the reason for the free freight increase.

Neither Pentair's 2008 Early-Buy Program announcement, nor Zodiac's Updated Freight Program announcement, cites any reason for their increases in free freight minimums or any other costs noted on the announcements.[76] They appear to be simply **[*568]** promotional bulletins. But, as noted, other documentary evidence supports the Manufacturer Defendants' explanation. Defendants point to evidence as far back as 2002 that shows shipping inefficiencies at the forefront of the manufacturers' pricing concerns. That these documented concerns predate, as well as are contemporaneous with, the allegedly collusive free freight increase undermines DPPs' pretextual argument. *See* *In re Chocolate Confectionary, 999 F. Supp. 2d at 794* ("Plaintiffs have failed to adduce any evidence which would tend to suggest that these documents were sham portrayals in furtherance of the price-fixing conspiracy.").

[53]** Further, although the price announcements themselves fail to mention fuel costs, oral and written communications between the manufacturers and their customers reveal that the Aquatech and Carecraft buying groups, as well as individual Dealers, understood that defendants justified their raising free freight minimums to account for shipping costs. For example, Pentair's Dave Murray left Jeff Fausett a voice message explaining that, to meet the new $20,000 free freight minimum, Pentair expected its customers to "condense buys" and "put things together" to build larger orders.[77] A Pool Products Dealer and Aquatech buying group member wrote to Murray: "I understand that freight cost[s] have been issues for most manufacture[r]s this past season."[78] Later, the same Dealer wrote to Murray again: "The one point that Dave [Murray] made that makes some sense to me is that Pentair is not a company that can support a lot of small volume locations."[79] In the face of evidence contrary to DPPs' arguments, "plaintiffs may not rely merely on general assertions that defendants' cost-based and self-interested rationalizations are pretextual: at summary judgment, antitrust plaintiffs, like any plaintiff, must offer affirmative evidence which creates a genuine issue of material fact for trial." *In re Chocolate Confectionary, 999 F. Supp. 2d at 796*.

Regarding Hayward's 2007 free freight minimum increase, DPPs admit that Hayward cited its product combination as justification raising its free freight minimum. Nonetheless, DPPs contend that this justification does not suffice to explain how Hayward came to offer its $20,000 free freight minimum "at exactly the same time" that Pentair and Zodiac increased their minimums.[80]

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[76] PWPS-0888847 (September 1, 2007 e-mail from Del Amo attaching the "2008 Pentair Water Pool and Spa Early-Buy Programs for National Distributors"); PWPS-0619613 (December 7, 2007 flyer titled "Updated Jandy Freight Program").

[77] AQ0000644 (Transcript of voicemail message from Murray to Fausett).

[78] PWPS-0619033 (September 11, 2009 e-mail from Tassin to Cannon and Murray).

[79] PWPS-0070878 (July 27, 2010 letter from Tassin to Murray and Fausett).

[80] R. Doc. 585 at 24.

First, Pentair's free **[**54]** freight increase was already market knowledge by the time Hayward announced its increase on September 10, 2007.[81] In addition, that Hayward and Zodiac's price increase took effect simultaneously does not alter Hayward's announcing in early September that it would unify its product lines, accompanied by a $20,000 free freight minimum, starting January 2, 2008. Months after Hayward's announcement, in December 2007, Zodiac (Jandy) announced its own free freight increase would also take effect on the same day. Thus, the timing of Zodiac's free freight increase does not **[*569]** detract from Hayward's earlier justifications for its own decision.

In sum, beyond their own speculative assertions, DPPs have not offered any specific evidence to refute the Manufacturer Defendants' proffered business justifications. DPPs cannot withstand a motion for summary judgment merely by attempting to "discredit[] the **[**55]** credibility of the movant's evidence." *Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d. Cir. 1992)* (citing *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256-57, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986))*. They must produce "some affirmative evidence" in their favor to create a factual dispute for trial. *See id.*

Motivation to Conspire and Industry Structure Conducive to Collusion

Evidence that a defendant was motivated to enter a price-fixing conspiracy is often similar or related to evidence that the industry is conducive to collusion. *See, e.g., In re Flat Glass Antitrust Litig., 385 F.3d 350, 360-61 (3d Cir. 2004)*; *see also In re Chocolate Confectionary Antitrust Litig., 801 F.3d 383, 398 (3d Cir. 2015)* ("Evidence of a motive to conspire means that the market is conducive to price fixing . . . ."). Accordingly, the Court considers these factors together.

DPPs assert that a number of market dynamics rendered the Pool Products industry conducive to collusion. First, Pool Products are specialized, with few realistic substitutes. Second, the Manufacturer Defendants are the nation's "most important Pool Products suppliers." Third, Pool is the only national distributor; other Pool Products distributors are regional or local. Fourth, Pool is the Manufacturer Defendants' best customer. Fifth, Pool had "significant leverage" over the Manufacturer Defendants. Sixth, the Pool Products industry is insulated from import competition because foreign manufacturers sell poor quality products. DPPs **[**56]** rely on the report of their economics expert, Dr. Gordon Rausser, for each of these assertions.[82] DPPs contend that the Manufacturer Defendants were motivated to conspire for similar reasons. DPPs assert that because Pool was each manufacturer's largest customer, all manufacturers sought to maintain access to Pool's national distribution network. DPPs also assert that to avoid any loss in market share incurred by raising prices, each Manufacturer Defendant was unwilling to increase its free freight minimum absent assurance that the others would do the same.[83]

DPPs' arguments here rest on the assumptions that the Manufacturer Defendants' free freight increases were contrary to their individual business interests and that the Manufacturer Defendants increased the free freight minimums out of fear of losing Pool's business. There is no evidence that Pool "demanded" or "insisted" that the Manufacturer Defendants raise their free freight minimums before the manufacturers' parallel price increase occurred. Nor is there any evidence that Pool threatened to switch to other manufacturers if the free freight minimums were not increased. Indeed, when Zodiac unilaterally **[**57]** decreased its $25,000 free freight minimum in March 2009, Pool's response was not to cut off or punish Zodiac as a supplier, but merely to complain. Further, DPPs simply assume that Pool would have jettisoned a premier product line offered by its largest supplier, Pentair,

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[81] *Compare* AQ0001370 (August 30, 2007 e-mail from Murray to Fausett announcing that free freight minimum increase would accompany Pentair's 2008 Early Buy program), *with*, HAY-MDL-0802568 (September 10, 2007 letter from Massa to Customers announcing a free freight minimum increase effective January 2, 2008).

[82] *See* R. Doc. 585 at 29-31.

[83] *See id.* at 27-29.

to force a free freight increase to disadvantage buying groups and that Pentair had a realistic fear that this would **[*570]** happen.[84] DPPs' mere citation to conclusory statements by an expert does not make this assertion supported by the record evidence.

Aside from these problematic assumptions, any evidence that the Manufacturer Defendants **[**58]** were motivated to conspire in a market conducive to collusion is insufficient to push DPPs' theory of conspiracy past the summary judgment stage. Once a court has already found that evidence of the defendants' parallel pricing may exist, "evidence that a market is ripe for collusion . . . or that defendants were motivated to collude is too ambiguous to support an inference of agreement, because these circumstances could just as readily be the result of unilateral independent conduct." *In re Chocolate Confectionary Antitrust Litig., 999 F. Supp. 2d 777, 789 (M.D. Pa. 2014)* (citing *In re Baby Food Antitrust Litig., 166 F.3d 112, 122 (3d. Cir. 1999))*, *aff'd*, *801 F.3d 383 (3d Cir. 2015)*. According to Professors Areeda and Hovenkamp, "motivation in the sense of a reasonable prospect of increasing profits through collective action is a logical corollary of interdependence. . . . Motivation is thus synonymous with interdependence and therefore adds nothing to it." 6 Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** ¶ 1434, at 269 (3d ed. 2010). In other words, motivation to collude or market interdependence merely restates that parallel conduct occurred. *See id.* at 264.

When courts do rely on evidence of the defendants' motivation or general market structure, they often require that the plaintiff also show that defendants acted contrary to their own economic interests. *See, e.g.,* ***[**59]*** *Royal Drug Co. Inc. v. Grp. Life & Health Ins. Co., 737 F.2d 1433, 1437 (5th Cir. 1984)* (citation omitted); *Venzie Corp. v. U.S. Mineral Prods. Co., Inc., 521 F.2d 1309, 1314 (3d Cir. 1975)* (citations omitted). That the defendants acted contrary to their self-interests helps illustrate that something more than mere interdependence led to the parallel pricing. *See* Areeda & Hovenkamp, *supra* at 270. Here, because DPPs failed to present sufficient evidence that the Manufacturer Defendants acted irrationally by increasing their free freight minimums, DPPs' evidence does not go beyond mere interdependence. "Parallel conduct or interdependence, without more, mirrors the ambiguity of the behavior: consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 554, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. The Sherman Act does not condemn parallel pricing achieved merely through interdependence, rather than collusion. *See, e.g., Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 227, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993)* (holding interdependence is "not in itself unlawful").

3. Summary

Viewing the record as a whole, the Court finds that the evidence presented is insufficient to raise an genuine issue of material fact as to the existence of a horizontal conspiracy among the Manufacturer Defendants and with Pool. DPPs' best evidence is the ambiguous e-mail Pool's CEO **[*571]** Manny Perez de la Mesa sent to coworkers on November **[**60]** 30, 2007, and the Manufacturer Defendants' parallel pricing. But the evidence presented here in its totality cannot withstand summary judgment because plaintiffs have failed to demonstrate significant plus factors. DPPs' circumstantial evidence does not tend to exclude the possibility that the Manufacturer Defendants independently raised their free freight minimums. Accordingly, DPPs' claim of a horizontal price-fixing conspiracy against Pool must be dismissed.

C. Impact

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[84] Dr. Rausser estimates that, together, the Manufacturer Defendants made up approximately forty-six percent of Pool's total purchases during the relevant time period. Dr. Rausser does not further break down that number. *See* Rausser Initial Report, April 10, 2014, at 37. According to the defendants' experts, Pentair's sales to Pool accounted for anywhere from twenty to twenty-five percent of Pool's total purchases during the relevant period. This is almost twice as large as Pool's next largest supplier, Hayward. *See* Johnson Initial Report, at 29; Elzinga DPP Report, April 10, 2014, at 16-17.

Because the Court concludes that DPPs' evidence of alleged price-fixing agreement is insufficient as a matter of law, the Court need not also consider whether DPPs have demonstrated that they suffered "antitrust injury" as a result. Without proof of concerted action, DPPs' claim must fail because the "very essence of a section 1 claim, of course, is the existence of an agreement." *Alvord-Polk, Inc. v. F. Schumacher & Co., 37 F.3d 996, 999 (3d Cir. 1994)*.

IV. CONCLUSION

For the foregoing reasons, the Court GRANTS Pool's motion for summary judgment on DPPs' horizontal conspiracy claims.

New Orleans, Louisiana, this 27 day of January, 2016.

/s/ Sarah S. Vance

SARAH S. VANCE

UNITED STATES DISTRICT JUDGE

Reese v. Pook & Pook, LLC

United States District Court for the Eastern District of Pennsylvania

January 27, 2016, Decided; January 27, 2016, Filed

CIVIL ACTION NO. 14-5715

Reporter

158 F. Supp. 3d 271 *; 2016 U.S. Dist. LEXIS 10275 **

CARTER P. and SARAH REESE (HUSBAND AND WIFE), Plaintiffs vs. POOK & POOK, LLC., RON POOK, DEBRA POOK, JAMES POOK, JAY LOWE, CONNIE & JAY LOWE ANTIQUES, MIKE CAFFARELLA, JAMIE SHEARER, MAINE ANTIQUE DIGEST, S. CLAYTON PENNINGTON, KATE PENNINGTON, and LITA SOLIS-COHEN, Defendants

Subsequent History: Amended by, On reconsideration by, Motion granted by, in part, Motion denied by, in part *Reese v. Pook & Pook, LLC, 2016 U.S. Dist. LEXIS 129883 (E.D. Pa., Sept. 22, 2016)*

Motion granted by, Motion denied by, As moot *Reese v. Pook & Pook, LLC, 2017 U.S. Dist. LEXIS 23127, 2017 WL 660853 (E.D. Pa., Feb. 16, 2017)*

Motion granted by, in part, Motion denied by, in part, Dismissed by, in part *Cater P. v. Pook & Pook, LLC, 2017 U.S. Dist. LEXIS 208521, 2017 WL 6497340 (E.D. Pa., Dec. 19, 2017)*

Summary judgment granted by, in part, Summary judgment denied by, in part *Carter P. v. Pook & Pook, LLC, 2019 U.S. Dist. LEXIS 242423 (E.D. Pa., Jan. 23, 2019)*

Prior History: *In re Reese, 482 B.R. 530, 2012 Bankr. LEXIS 5230 (Bankr. E.D. Pa., Nov. 6, 2012)*

Core Terms

toys, auction, disparagement, collection, conspiracy, civil conspiracy, actual malice, false light, argues, motion to dismiss, unjust enrichment, bankruptcy court, allegations, Defendants', antique, breach of fiduciary duty, unfair competition, antitrust, promotion, parties, Counts, subject to dismissal, injurious falsehood, courts, intracorporate conspiracy doctrine, matter of law, implausible, fiduciary, conspire, commercial advertising

LexisNexis® Headnotes

Civil Procedure > Pleading & Practice > Pleadings > Complaints

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

HN1[] **Pleadings, Complaints**

A motion to dismiss under *Fed. R. Civ. P. 12(b)(6)* for failure to state a claim upon which relief can be granted examines the sufficiency of the complaint.

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

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

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

Pleadings standards in federal actions have shifted from simple notice pleading to a more heightened form of pleading, requiring a plaintiff to plead more than the possibility of relief to survive a motion to dismiss under *Fed. R. Civ. P. 12(b)(6)*. Therefore, when presented with a motion to dismiss for failure to state a claim, district courts conduct a two-part analysis. First, the factual and legal elements of a claim are separated. The court must accept all of the complaint's well-pleaded facts as true, but may disregard legal conclusions. Second, a district court must determine whether the facts alleged in the complaint are sufficient to show that the plaintiff has a plausible claim for relief. In other words, a complaint must do more than allege the plaintiff's entitlement to relief. A complaint has to show such an entitlement with its facts. Where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not shown— that the pleader is entitled to relief.

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

HN3[] **Complaints, Requirements for Complaint**

Under *Fed. R. Civ. P. 8(a)(2)*, a pleading must contain a short and plain statement of the claim showing that the pleader is entitled to relief. The pleading standard *Rule 8* announces does not require detailed factual allegations, but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. Nor does a complaint suffice if it tenders naked assertions devoid of further factual enhancement.

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions

Evidence > ... > Presumptions > Particular Presumptions > Regularity

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

HN4[] **Subject Matter Jurisdiction, Jurisdiction Over Actions**

A motion to dismiss pursuant to Fed. R. Civ. P. 12 (b)(1) for lack of jurisdiction over the subject matter is governed by a different standard. Because the motion goes to a court's jurisdiction, i.e., the very power to hear the case, there is substantial authority that the court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. There is no presumptive truthfulness attached to plaintiff's allegations, the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims, the plaintiff has the burden of proof that jurisdiction does in fact exist.

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

HN5[] **Defenses, Demurrers & Objections, Motions to Dismiss**

As a general rule, a court may not consider on a motion to dismiss matters extraneous to the pleadings, but an exception exists for documents integral to or explicitly relied upon in the complaint.

Bankruptcy Law > ... > Examiners, Officers & Trustees > Duties & Functions > Immunities & Liabilities

HN6[] **Duties & Functions, Immunities & Liabilities**

Under the doctrine established in *Barton v. Barbour, 104 U.S. 126, 26 L. Ed. 672 (1881)*, leave of the bankruptcy court is required before instituting an action against a bankruptcy trustee. It applies to bar suits against bankruptcy fiduciaries even after the bankruptcy proceedings have closed. Finally, the doctrine shields not only the bankruptcy trustee, but also other bankruptcy-court-appointed officers, for acts done in the actor's official capacity.

Bankruptcy Law > Procedural Matters > Jurisdiction > Core Proceedings

HN7[] **Jurisdiction, Core Proceedings**

A proceeding is within the bankruptcy jurisdiction, defined by *28 U.S.C.S. § 1334(b)*, if it "arises under" the Bankruptcy Code or "arises in" or is "related to" a case under the Code. "Arising under" proceedings are matters invoking a substantive right created by the Bankruptcy Code. The "arising in a case under" category is generally thought to involve administrative-type matters, or matters that could arise only in bankruptcy. The usual articulation of the test for determining whether a civil proceeding is related to bankruptcy is whether the outcome of the proceeding could conceivably have an effect on the estate being administered in bankruptcy.

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

HN8[] **False Advertising, Lanham Act**

Section 43(a)(1)(B) of the Lanham Act, *15 U.S.C.S. § 1125(a)(1)(B)*, provides: (1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact which; (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

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

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

Liability under the *Lanham Act* arises if a commercial message, statement, or advertisement is either (1) literally false; or (2) literally true or ambiguous, but has the tendency to deceive consumers.

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

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

The elements of a *Lanham Act* claim for false advertising, or false or misleading representation of a product, are: (1) that the defendant has made false or misleading statements as to his own product or another's; (2) that there is actual deception or at least a tendency to deceive a substantial portion of the intended audience; (3) that the deception is material in that it is likely to influence purchasing decisions; (4) that the advertised goods traveled in interstate commerce; and (5) that there is a likelihood of injury to the plaintiff in terms of declining sales, loss of good will, etc.

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

HN11[] **False Advertising, Lanham Act**

Commercial advertising or promotion for purposes of *Lanham Act § 43(a)(1)(B)*, *15 U.S.C.S. § 1125(a)(1)(B)*, consists of (1) commercial speech; (2) by a defendant in commercial competition with the plaintiff; (3) designed to influence customers to buy the defendant's products; (4) that is sufficiently disseminated to the relevant purchasing public to constitute advertising or promotion within the industry. The word "commercial" excludes use of *§ 43(a)* to challenge the falsity of consumer or editorial content, parodies, satires, or other constitutionally protected material. Thus, any message that does not qualify as commercial speech cannot be the subject of a § 43(a) false advertising or product disparagement challenge.

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

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

HN12[] **False Advertising, Lanham Act**

Under Pennsylvania law, the elements necessary to prove unfair competition through false advertising parallel those elements needed to show a *Lanham Act* violation, absent the requirement for goods to travel in interstate commerce.

Torts > Business Torts > Slander of Title > Elements

Torts > Business Torts > Trade Libel > Elements

HN13[] **Slander of Title, Elements**

The elements of commercial disparagement and injurious falsehood (1) a false statement; (2) that the publisher either intends to cause pecuniary loss or reasonably should recognize that publication will result in pecuniary loss; (3) pecuniary loss does in fact result; and (4) the publisher either knows the published statement is false or acts in reckless disregard of its truth or falsity.

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

HN14[] **Standards of Review, Questions of Fact & Law**

Courts are not bound to accept as true legal conclusions couched as factual allegations.

Torts > ... > Invasion of Privacy > False Light > Elements

HN15[] False Light, Elements

One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy if (a) the false light in which the other was placed would be highly offensive to a reasonable person; and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed. For the information about a person to be "highly offensive," it must constitute a major misrepresentation of his character, history, activities, or beliefs that serious offense may reasonably be expected to be taken by a reasonable man in his position. The false light tort also has as an element the actual malice standard required by commercial disparagement and injurious falsehood.

Torts > Negligence > Elements > Breach of Duty

Torts > Negligence > Elements > Duty

Torts > Negligence > Elements > Causation

Torts > Remedies > Damages

HN16[] Elements, Breach of Duty

Under Pennsylvania law, to establish a common law cause of action in negligence, a plaintiff must demonstrate that the defendant owed a duty of care to the plaintiff, the defendant breached that duty, the breach resulted in injury to the plaintiff and the plaintiff suffered an actual loss or damage.

Torts > Negligence > Elements > Breach of Duty

HN17[] Elements, Breach of Duty

All negligence claims are premised on the alleged violation of a duty. A duty is that responsibility which exists by operation of law requiring a person to adhere to a standard of conduct protecting others against unreasonable or unnecessary risks. In the absence of legal duty, no liability will attach, even if a defendant's conduct was negligent. In this sense, the concept of legal duty is both a source of legal responsibility, and a limitation upon liability to others: recognition of a legal duty by the courts will impose certain obligations, while refusal to recognize a legal duty by the courts will insulate a party against liability. The duty owed by a defendant may be express or implied, may be general or arise from specific circumstances. In determining the existence of a duty, the courts will look to a variety of sources, including the common law, statutes, or a contract between the parties. Ultimately, however, it is the court's decision whether to recognize a duty that is fundamental to the existence of a negligence claim.

Torts > ... > Concerted Action > Civil Conspiracy > Elements

HN18[] Civil Conspiracy, Elements

A claim of civil conspiracy in Pennsylvania contains the following elements: (1) a combination of two or more persons acting with a common purpose to do an unlawful act or to do a lawful act by unlawful means; (2) an overt act done in pursuance of the common purpose; and (3) actual legal damage.

Torts > ... > Concerted Action > Civil Conspiracy > Elements

HN19[] **Civil Conspiracy, Elements**

An actionable civil conspiracy must be based on an existing independent wrong or tort that would constitute a valid cause of action if committed by one actor. Ultimately, only a finding that the underlying tort has occurred will support a claim for civil conspiracy.

Torts > ... > Concerted Action > Civil Conspiracy > Elements

HN20[] **Civil Conspiracy, Elements**

Absent a civil cause of action for a particular act, there can be no cause of action for civil conspiracy to commit that act.

Torts > ... > Concerted Action > Civil Conspiracy > Elements

HN21[] **Civil Conspiracy, Elements**

To allege a plausible claim of civil conspiracy, a plaintiff must make factual allegations of combination, agreement, or understanding among all or between any of the defendants or coconspirators to plot, plan, or conspire to carry out the alleged chain of events. It is not enough that the end result of the parties' independent conduct caused plaintiff harm or even that the alleged perpetrators of the harm acted in conscious parallelism.

Torts > ... > Concerted Action > Civil Conspiracy > Elements

HN22[] **Civil Conspiracy, Elements**

Proof of malice i.e., an intent to injure, is essential in proof of a conspiracy.

Torts > ... > Concerted Action > Civil Conspiracy > Defenses

HN23[] **Civil Conspiracy, Defenses**

For purposes of a civil conspiracy claim, a corporation cannot conspire with itself through the activities of its own employees, officers, and directors.

Torts > ... > Concerted Action > Civil Conspiracy > Defenses

HN24[] **Civil Conspiracy, Defenses**

Federal courts in the Third Circuit have explained that agents acting in their individual capacities rather than their official capacities can be liable for civil conspiracy. Courts that have followed the intra-corporate conspiracy doctrine allow an exception when the employees have acted for their sole personal benefit and thus outside the course and scope of their employment. That exception is based on the proposition that since the employer would not be subject to liability under respondeat superior, it would not be a conspirator. A conspiracy may exist between a corporation and an officer if the officer is acting in a personal, as opposed to official, capacity. An employer and its officers and employees acting in the scope of their duties constitute one legal person for purposes of conspiracy law and therefore cannot conspire together. However, at least one panel of the Pennsylvania Superior Court, in a non-precedential decision, has opined that no such exception to the intra-corporate conspiracy doctrine is recognized by Pennsylvania state courts. Consequently, it is not clear whether such an exception to the intra-corporate conspiracy doctrine exists in Pennsylvania law.

Torts > ... > Concerted Action > Civil Conspiracy > Defenses

HN25[] **Civil Conspiracy, Defenses**

Pennsylvania courts have often applied the intra-corporate conspiracy doctrine without elaborating on its reasoning or its relationship to the scope of employment, but they ordinarily apply the doctrine when defendants allegedly conspired with other agents or the principal corporation on behalf of the principal corporation. It cannot be the case that co-agents can never be liable for civil conspiracy—even if the alleged conspiracy was outside the scope of their employment—merely because they happen to be co-workers. There must be some connection between the alleged conspirators' status as co-agents and the alleged tort for the doctrine to preclude a finding of liability.

Torts > Intentional Torts > Invasion of Privacy > False Light

Torts > Business Torts > Trade Libel

Torts > Business Torts > Slander of Title

Torts > Procedural Matters > Statute of Limitations

HN26[] **Invasion of Privacy, False Light**

42 Pa.C.S. § 5523 provides a one year statute of limitation on claims of commercial disparagement, false light, and injurious falsehood.

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

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

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

HN27[] **Standing, Clayton Act**

Section 1 of the Sherman Act states that every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. *15 U.S.C.S. § 1*. *Section 4 of the Clayton Act*, in turn, grants the right to maintain a private cause of action to any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws. *15 U.S.C.S. § 15(a)*. As these sections imply, standing and antitrust injury are essential elements to maintaining an action for damages thereunder. Under *Section 1*, a plaintiff must plausibly allege the following three elements: (1) an agreement; (2) imposing an unreasonable restraint of trade within a relevant product market; and (3) resulting in antitrust injury. Antitrust injury consists of (1) harm of the type the antitrust laws were designed to prevent; and (2) an injury which flows from that which makes defendants acts unlawful.

Antitrust & Trade Law > Robinson-Patman Act > Coverage

HN28[] Robinson-Patman Act, Coverage

Section 2(c) of the Robinson-Patman Act provides: It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or on behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid. 15 U.S.C.S. § 13(c).

Antitrust & Trade Law > Robinson-Patman Act > Coverage

HN29[] Robinson-Patman Act, Coverage

Section 2(c) of the Robinson-Patman Act was designed to eliminate the competitive advantage large buyers and sellers attained over their smaller competitors by virtue of their economic clout and bargaining power. Section 2(c) encompasses cases of commercial bribery tending to undermine the fiduciary relationship between a buyer and its agent, representative, or other intermediary in a transaction involving the sale or purchase of goods. For a finding of commercial bribery, a plaintiff must show that the illegal payments in question crossed the line from buyer to seller or vice-versa. Intrastate sales are subject to the Robinson-Patman Act as long as the sales remain in the flow of interstate commerce.

Torts > Intentional Torts > Breach of Fiduciary Duty > Elements

HN30[] Breach of Fiduciary Duty, Elements

To allege a breach of fiduciary duty, plaintiffs must assert that a fiduciary or confidential relationship existed between themselves and the defendants. Although no precise formula has been devised to ascertain the existence of a confidential relationship, it has been said that such a relationship exists whenever one occupies toward another such a position of advisor or counselor as reasonably to inspire confidence that he will act in good faith for the other's interest. To allege a breach of that duty, the plaintiffs must allege (1) that the defendants negligently or intentionally failed to act in good faith and solely for the benefit of the plaintiffs in all matters for which they were employed; (2) that the plaintiffs suffered injury; and (3) the defendants' failure to act solely for the plaintiffs' benefit was a real factor bringing about plaintiffs' injuries.

Contracts Law > Contract Interpretation > Fiduciary Responsibilities

Torts

HN31[] Contract Interpretation, Fiduciary Responsibilities

The gist of the action doctrine applies to tort claims: (1) arising solely from a contract between the parties; (2) where the duties allegedly breached were created and grounded in the contract itself; (3) where the liability stems from a contract; or (4) where the tort claim essentially duplicates a breach of contract claim or the success of which is wholly dependent on the terms of the contract. The principle underlying the doctrine is that a tort action derives from the breach of duties imposed as a matter of social policy, whereas a breach of contract action stems from the breach of duties imposed by mutual consensus.

Torts > Vicarious Liability > Agency Relationships > Negligence

HN32[] **Agency Relationships, Negligence**

Plaintiffs in a negligence action are allowed to recover from both a principal and his agent under Pennsylvania law.

Torts > Vicarious Liability > Employers > Scope of Employment

HN33[] **Employers, Scope of Employment**

Under Pennsylvania law, employees are liable for their own torts, even if they were acting within the scope of their employment when they engaged in the tortious conduct in question.

Torts > Vicarious Liability > Agency Relationships

HN34[] **Vicarious Liability, Agency Relationships**

An agent who does an act otherwise a tort is not relieved from liability by the fact that he acted at the command of the principal or on account of the principal.

Torts > Procedural Matters > Multiple Defendants

HN35[] **Procedural Matters, Multiple Defendants**

Pennsylvania law recognizes the participation theory, under which a corporate officer, employee, or other agent who takes part in the commission of a tort by the corporation is personally liable therefor. To be liable under this theory, the corporate agent must have participated in the wrongful acts, a requirement the Pennsylvania courts have interpreted to permit liability for an agent's misfeasance, but not for mere nonfeasance. Misfeasance consists of the doing of something which ought not to be done, something which a reasonable man would not do, or doing it in such a manner as a man of reasonable and ordinary prudence would not do it.

Business & Corporate Compliance > ... > Breach > Breach of Contract Actions > Elements of Contract Claims

HN36[] **Breach of Contract Actions, Elements of Contract Claims**

A claim of unjust enrichment must allege the following elements: (1) plaintiff conferred a benefit on the defendant; (2) the defendant appreciated the benefit; and (3) acceptance and retention by the defendant of the benefits, under the circumstances, would make it inequitable for the defendant to retain the benefit without paying for the value of the benefit.

Business & Corporate Compliance > ... > Breach > Breach of Contract Actions > Elements of Contract Claims

Contracts Law > Contract Interpretation > Intent

HN37[] **Breach of Contract Actions, Elements of Contract Claims**

To sustain a claim of unjust enrichment, a claimant must show that the party against whom recovery is sought either wrongfully secured or passively received a benefit that it would be unconscionable for her to retain. The polestar of the unjust enrichment inquiry is whether the defendant has been unjustly enriched; the intent of the parties is irrelevant. In order to recover, there must be both (1) an enrichment; and (2) an injustice resulting if recovery for the enrichment is denied.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > Immaterial Matters

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > Redundant Matters

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > Scandalous Matters

HN38[] **Motions to Strike, Immaterial Matters**

Fed. R. Civ. P. 12(f) provides: a court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

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

HN39[] **Defenses, Demurrers & Objections, Motions to Strike**

Motions to strike function to clean up the pleadings, streamline litigation, and avoid unnecessary forays into immaterial matters.

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

HN40[] **Defenses, Demurrers & Objections, Motions to Strike**

The standard for striking a complaint or a portion of it is strict, and only allegations that are so unrelated to the plaintiffs' claims as to be unworthy of any consideration should be stricken. Consequently, motions to strike are generally disfavored by courts and will be denied unless the allegations have no possible relation to the controversy and may cause prejudice to one of the parties, or if the allegations confuse the issues in the case.

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Judges: LAWRENCE F. STENGEL, J.

Opinion by: LAWRENCE F. STENGEL

Opinion

[*280] **MEMORANDUM**

STENGEL, J.

I. INTRODUCTION

Presently pending are multiple Motions by the named Defendants in this *Lanham Act* and antitrust action to dismiss the Amended Complaint ("AC") of Plaintiffs Carter P. ("Reese") **[**2]** and Sarah Reese (collectively the "Reeses").[1] For the reasons that follow, I grant the pending Motions, save for several common law claims against Defendants Jay Lowe[2] and Mike Caffarella.

II. STANDARD OF REVIEW

HN1[] A motion to dismiss under *Rule 12(b)(6) of the Federal Rules of Civil Procedure* for failure to state a claim upon which relief can be granted examines the sufficiency of the complaint. *Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)*. Following the Supreme Court decisions in *Bell At. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* and *Ashcroft v. Iqbal, 556 U.S. 662, 679, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*, ***HN2***[] pleadings standards in federal actions have shifted from simple notice pleading to a more heightened form of pleading, requiring a plaintiff to plead more than the possibility of relief to survive a motion to dismiss under *Fed. R. Civ. P. 12(b)(6)*. *Fowler v. UPMC Shadyside, 578 F.3d 203, 210-211 (3d Cir. 2009)*; see also *Phillips v. County of Allegheny, 515 F.3d 224, 230 (3d Cir. 2008)*. Therefore, when presented with a motion to dismiss for failure to state a claim, district courts conduct a two-part analysis. First, the factual and legal elements of a claim are separated. The court must accept all of the complaint's well-pleaded facts as true but may disregard legal conclusions. *Iqbal, 556 U.S. at 679*. Second, a district court must determine whether **[**3]** the facts alleged in the complaint are sufficient to show that the plaintiff has a "plausible claim for relief." Id. In other words, a complaint must do more than allege the plaintiff's entitlement to relief. A complaint has to "show" such an entitlement with its facts. Id.; see also *Phillips, 515 F.3d at 234-235*. "Where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged — but it has not 'show[n]' — 'that the pleader is entitled to relief.'" *Iqbal, 556 U.S. at 679*.

HN3[] Under *Federal Rule of Civil Procedure 8(a)(2)*, a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." As the Court held in Twombly, the pleading standard *Rule 8* announces does not require "detailed factual allegations," but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. *Iqbal, 556 U.S. at 678* (quoting *Twombly, 550 U.S. at 555*). A pleading that offers "labels and conclusions" or "a formulaic recitation **[*281]** of the elements of a cause of action will not do."

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[1] Because there are multiple Motions, Responses, and Replies, I will refer and cite to them by their ECF docket number.

[2] Plaintiffs name as defendants Jay Lowe and Connie and Jay Lowe Antiques. I refer to them collectively as "Lowe."

Twombly, 550 U.S. at 555. Nor does a complaint suffice if it tenders "naked assertion[s]" devoid of "further factual enhancement." *Id. at 557*.

HN4[] A motion to dismiss pursuant to *Rule 12 (b)(1)* for "lack of jurisdiction over the subject matter" is governed by a different standard. Because the motion goes to our jurisdiction, **[**4]** i.e., the very power to hear the case, there is substantial authority that the court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. *Mortensen v. First Fed. Sav. and Loan Ass'n, 549 F.2d 884, 891 (3d Cir.1977)*. There is no presumptive truthfulness attached to plaintiff's allegations, the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims, the plaintiff has the burden of proof that jurisdiction does in fact exist. Id.

III. FACTUAL ALLEGATIONS

The Reeses are collectors of antique toys. (AC ¶ 4.) On October 2, 2012, they filed a Chapter 11 bankruptcy petition in the United States Bankruptcy Court for the Eastern District of Pennsylvania. (*Id. ¶¶ 44-45*.) As part of the bankruptcy proceeding, the Reeses were required to sell a portion of their toy collection. (*Id. ¶ 46*.) Defendant Pook & Pook, LLC ("P&P") was approved by the Bankruptcy Court as the auctioneer to sell the collection. (*Id. ¶ 47*.) P&P and the Bankruptcy Estate of Carter Reese and Sarah Reese entered into an agreement for the sale of the toys. (ECF 26 Ex. B.[3]) The agreement was approved by the Bankruptcy Court. (Id. Ex. C.) Defendants Ron Pook, Debra Pook, and James Pook **[**5]** (collective "the individual Pook Defendants") are principals of P&P. (AC ¶¶ 20-22.) None of the individual Pook Defendants were parties to the agreement. There is no allegation in the AC that the Reeses obtained permission from the Bankruptcy Court to file the pending claims against P&P.

The Reeses allege that Carter Reese and Ron Pook agreed that the toy collection would be sold in several different sales, owing to the great volume being offered (AC ¶ 49), and Carter would be involved in the sale preparations to identify objects and review pre-sale estimates. (AC ¶ 51.) They allege that this did not happen and, despite their disapproval, P&P retained Defendants "Caffarella and, thus, Lowe," as experts to assist the auction **[**6]** sale. (AC ¶ 53-54.) Although the auction resulted in proceeds of approximately $560,000, the Reeses assert that the toys should have "fetched a far greater amount." (*Id. ¶ 80*.) They contend that the poor result was caused by the improper presentation of the toys at the auction. They assert that the staging of the sale was deliberately flawed to diminish the value of the toys: toys were presented in piles with no effort to match parts into complete toys, parts of various two- and three-part toys were not matched, allowing, for example, the front end of one horse-drawn toy to go in one box lot with the back end placed in a different lot. (*Id. ¶¶ 56-60*.) As a result, on-line and phone **[*282]** bidders had no opportunity to identify boxes of mismatched objects and could not know the contents of any lot or where various parts could be found. (*Id. ¶¶ 61-62*.) They allege that this benefited Lowe, who knew where the mismatched parts were located in the different lots, and that he bid accordingly for the items he wanted, won them at depressed prices, reassembled them, and placed them for resale at significant markup at his own business. (*Id. ¶¶ 63-75*.) The Reeses allege that Lowe had previously disparaged **[**7]** their collection at the James Julia Auctions in Maine, where he worked on commission basis gathering collections for auction, then bought dozens of lots to resell. (*Id. ¶¶ 83-85*.) Plaintiffs also assert that the P&P catalogue of the Reese sale prominently promoted fake antiques called "newtiques," created by Lowe using original parts from antique toys and placing them on new toys, further disparaging the quality of toys in the Reese collection. (*Id. ¶¶ 87-109*.) They also allege that, after the auction, P&P sent an employee, Jamie Shearer, to the Reninger Antique Mall to criticize the collection as "junk." (*Id. ¶¶ 115-117*.)

[3] Although it is not attached as an exhibit to the AC, the Reeses reference the agreement in the AC and do not dispute that Ex. B is the actual agreement. Accordingly, I consider it as part of the pleadings in deciding the pending Motions to dismiss. See *W. Penn Allegheny Health Sys. v. UPMC, 627 F.3d 85, 97 n. 6 (3d Cir. 2010)* (stating that, ***HN5***[] as a general rule, the court may not consider on a motion to dismiss matters extraneous to the pleadings, but an exception exists for documents "integral to or explicitly relied upon in the complaint").

Lita Solis-Cohen is the senior editor of the Maine Antique Digest ("MAD"). (*Id. ¶ 15*.[4]) She authored an article, "Pook's First Toy Auction," for the December 2013 MAD issue ("the Article"). (*Id. ¶ 129*.) The first sentence read in part that P&P "will sell any collection that comes along." (*Id. ¶ 130*.) She went on to write, relying on information allegedly from Lowe, that:

> Everyone in the toy world seemed to know the major cosignor [sic, in AC] was Carter Reese, a longtime collector who bought toys that he loved before collectors got hung up on condition. It didn't matter **[**8]** to him if the toy had replaced figures, was repainted, or if much of the paint was missing. If the toy had charm and was cheap, he bought it.

(*Id. ¶ 131*.) She stated that "'[t]he consensus was that many of the toys that Pook offered brought all they were worth. . .' because, in the words of Jay Lowe, 'condition is king.'" (*Id. ¶ 132*.) Plaintiffs allege that these statements were published with actual malice and/or with reckless disregard for the truth as a "puff piece" for Lowe and his newtiques. (*Id. ¶¶ 133-135*.)

The AC contains eleven counts: (1) civil conspiracy against P&P, the individual Pook Defendants, Caffarella and Lowe; (2) violation of the *Lanham Act*, *15 U.S.C. § 1125* for false commercial advertising in the placement of Lowe's newtique on the cover of the sale catalogue and the negative commentary in MAD about the quality of the collection;[5] (3) common law unfair competition, coextensive with the *Lanham Act* claim; (4) violation of section one **[**9]** and **[*283]** two of the *Sherman Act*;[6] (5) commercial disparagement/trade defamation against MAD and Lowe for which they seek *inter alia* the publication of a corrective article; (6) a claim pursuant to *Restatement (Second) of Torts § 652E* for false light against MAD and Lowe; (7) common law "injurious falsehood" against MAD and Lowe; (8) breach of fiduciary duty against P&P, the individual Pook Defendants and Caffarella; (9) negligence;[7] (10) breach of contract, breach of the duty of good faith and fair dealing, and "dishonesty in fact" against P&P and the individual Pook Defendants; and (11) common law unjust enrichment against P&P, the individual Pook Defendants, Caffarella and Lowe.

IV. P&P AND INDIVIDUAL POOK DEFENDANTS' MOTION TO DISMISS

In their Motion (ECF 26), **[**11]** P&P and the individual Pook Defendants argue that, as the claims contained in the AC all arise from their involvement in the auction sale of the Reeses' assets, and that their involvement arose from

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[4] Also named as defendants are MAD, S. Clayton Pennington, editor of MAD, and Kate Pennington, managing editor of MAD (collectively with Solis-Cohen, the "MAD Defendants"). (*Id. ¶¶ 13-14*.) The AC contains no substantive allegations concerning the Penningtons.

[5] Plaintiffs do not specifically state which Defendants they intend to hold liable under Count II and Count III. I assume they intend to include P&P, the individual Pook Defendants, and the MAD defendants. I note that while these Counts do not mention him, Lowe has raised an argument why the claims should be dismissed. There is no allegation that Lowe was responsible for the placement of his newtique on the cover of the sale catalogue; indeed the Reeses entitle that portion of the AC "Pook's Promotion of Lowe's "Newtiques" . . . . (AC at page 15.) While there is **[**10]** no allegation that he published the allegedly negative comment in MAD about the quality of the Reeses' collection, he is quoted in the Article. Accordingly, I will address this aspect of the claim when I discuss Lowe's Motion.

[6] Count IV also does not specify which defendants Plaintiffs intend to name. They mention only that the count is based on "Pook & Pook sale preparation by Lowe/Caffarella." (*Id. ¶ 198*.) I note, however, that the MAD Defendants have included an argument why the *Sherman Act* count should be dismissed as to them. (See MAD Defs.' Mem. at 11-12.) In their Response, the Reeses have not addressed that argument, and only discuss the *Sherman Act* claim with regard to P&P, the individual Pook Defendants, Lowe, and Caffarella. (See Resp. at 60-63.) Accordingly, I assume that Plaintiffs intended to assert *Sherman Act* liability only against P&P, the individual Pook Defendants, Lowe, and Caffarella.

[7] Count X also does not state which defendants are sought to be held liable. It merely recited "Defendants have breached duties owed the Reeses." (AC ¶ 228.) I assume that Count X includes all defendants.

the Bankruptcy Court's order approving P&P's appointment to conduct the sale, Plaintiff's failure to allege that they secured the permission of the Bankruptcy Court before filing the claims strips us of subject matter jurisdiction. I agree.

In *In re VistaCare Grp., LLC, 678 F.3d 218 (3d Cir. 2012)*, the United States Court for the Third Circuit "join[ed] our sister circuits in holding that, ***HN6***[] under the doctrine established in *Barton v. Barbour, [104 U.S. 126, 26 L. Ed. 672 (1881)*,] leave of the bankruptcy court is required before instituting" an action against a bankruptcy trustee. *Id. at 224* (citing *Lawrence v. Goldberg, 573 F.3d 1265, 1269 (11th Cir. 2009)* (holding that the Barton doctrine is applicable to bankruptcy trustees); *In re Crown Vantage, Inc., 421 F.3d 963, 970 (9th Cir. 2005)* (same); *Muratore v. Darr, 375 F.3d 140, 143 (1st Cir. 2004)* (same); *In re Linton, 136 F.3d 544, 545-46 (7th Cir. 1998)* (same); *In re Lehal Realty Assocs., 101 F.3d 272, 276 (2d Cir. 1996)* (same); *In re DeLorean Motor Co., 991 F.2d 1236, 1240 (6th Cir. 1993)* (same); *Anderson v. United States, 520 F.2d 1027, 1029 (5th Cir. 1975)* (same). The Barton doctrine has been applied to Chapter 11 proceedings as well as Chapter 7 proceedings. See, e.g., *In re Crown Vantage, Inc., 421 F.3d at 970* (adopting Barton doctrine in Chapter 11 debtor-in-possession case). It applies to bar suits against bankruptcy fiduciaries even after the bankruptcy proceedings have closed. See *Muratore v. Darr, 375 F.3d 140, 147 (1st Cir. 2004)* (stating that "the doctrine serves additional purposes even after the bankruptcy case has been closed and the **[**12]** assets are no longer in the trustee's hands) citing *In re Linton, 136 F.3d at 544-45* (applying Barton to closed bankruptcy case). Finally, the doctrine shields not only the bankruptcy trustee, but also "other bankruptcy-court-appointed officer[s], for **[*284]** acts done in the actor's official capacity." *Carter v. Rodgers, 220 F.3d 1249, 1252 (11th Cir. 2000)* (applying doctrine to bar suit against bankruptcy trustee and antiques dealer appointed by the bankruptcy trustee to conduct sale of estate property).

The Reeses respond that the Barton doctrine does not apply because they "are operating under a confirmed plan and all of the assets have been returned to Carter to do with as he likes. Barton [is] simply inapplicable as there is zero impact on the confirmed plan and none of the Reeses' claims involve, in anyway [sic], any property under the Bankruptcy Court's jurisdiction." (ECF 26 at 18.) They also argue that Barton cannot apply because the Bankruptcy Court lacks jurisdiction to hear the claims against P&P and the Pook Defendants. While conceding that "it is true that the subject sale occurred during and as a result of the bankruptcy . . . all of the Reeses' claims exist post-confirmation outside of the Bankruptcy Code." (Id. at 18-19.)

The Reeses' arguments that the doctrine does not apply because **[**13]** their claims are outside the bankruptcy code, because their bankruptcy has ended, and because the bankruptcy court would have no jurisdiction to hear the claims are meritless. In *Carter*, the United States Court of Appeals for the Eleventh Circuit rejected these very assertions. In Carter, the court-appointed bankruptcy trustee and his wife attended the auction of the estate property and the wife successfully bid on one lot. Carter filed suit against the trustee and the antiques dealer that conducted the auction for breach of fiduciary duty and negligence. In affirming the district court's dismissal for lack of subject matter jurisdiction under the Barton doctrine, the Court held that there was no merit to

> Carter's assertion that his tort claims — breach of fiduciary duty and reasonable care — are "unrelated to" and "outside the scope" of the bankruptcy proceeding because they do not arise directly from substantive provisions of the Bankruptcy Code. **Carter posits the theory that because his claims are unrelated to the bankruptcy proceeding, the bankruptcy court lacks jurisdiction over his lawsuit and, therefore, he was not required to obtain leave of the bankruptcy court before bringing [**14] his suit in district court. We disagree**. The bankruptcy court has jurisdiction over Carter's claims because his breach of fiduciary duty and reasonable care claims are "related to" and "within the scope" of the bankruptcy proceeding. . . . ***HN7***[] A proceeding is within the bankruptcy jurisdiction, defined by *28 U.S.C. § 1334(b)*, if it "arises under" the Bankruptcy Code or "arises in" or is "related to" a case under the Code.[8] "'Arising under' proceedings are

[8] The Third Circuit has also recognized that bankruptcy jurisdiction under *28 U.S.C. § 157(a)* extends to cases "arising under," "arising in," and "related to" bankruptcy jurisdiction. *In re W.R. Grace & Co., 591 F.3d 164, 171 (3d Cir. 2009)*. "Arising under" and "arising in" claims are "core" bankruptcy claims; claims "related to" a bankruptcy case are not. *Stoe v. Flaherty, 436 F.3d 209, 219 (3d Cir. 2006)*.

> matters invoking a substantive right created by the Bankruptcy Code. The 'arising in a case under' category is generally thought to involve administrative-type matters, or as the ... court put it, 'matters that could arise only in bankruptcy.'" *In re Toledo, 170 F.3d 1340, 1345 (11th Cir. 1999)* (citations omitted).[9] We have stated, **[*285]** "The usual articulation of the test for determining whether a civil proceeding is related to bankruptcy is whether the outcome of the proceeding could conceivably have an effect on the estate being administered in bankruptcy." *Miller v. Kemira, Inc. (In re Lemco Gypsum, Inc.), 910 F.2d 784, 788 (11th Cir. 1990)*. **While Carter's action against Defendants arose after the date of the bankruptcy petition, his suit turns solely on allegations of wrongdoing in the sale of property belonging to the bankruptcy estate**. Any recovery would reduce the administrative expenses **[**15]** of the sale of the estate property and would perforce increase the amount of estate property available to satisfy creditors' claims. . . . Thus, the outcome of this case will impact Carter's bankruptcy estate. Further, Carter sued the trustee and other court approved officers of his bankruptcy estate for alleged breaches of their bankruptcy-related duties. The Bankruptcy Code establishes the office of trustee and defines the trustees' duties. Moreover, **an action against a bankruptcy trustee for breach of bankruptcy-related fiduciary duty can only arise in a bankruptcy case. Thus, Carter's "fiduciary claims against [the fiduciaries] are within the bankruptcy jurisdiction defined by *28 U.S.C. § 1334(b)* both as 'arising under' the Code and 'arising in' a bankruptcy case."**

Carter, 220 F.3d at 1253-54 (internal citations omitted, emphasis added). The Reeses, notably, have failed to address the holding of Carter.

I find, applying the holding of *Carter*, that the claims against P&P and the individual Pook Defendants fall within the "arising in a case under" category of bankruptcy jurisdiction. The claims against these Defendants assert civil conspiracy, violation of the *Lanham Act*, unfair competition, violation of the *Sherman Act*, breach of fiduciary duty, negligence, breach of contract, dishonesty in fact, and unjust enrichment. All of them arise from these Defendants' involvement in the auction of the Reeses' toy collection, as ordered by the Bankruptcy Court. Like in Carter, the claims arise out of the disposition of property of an estate, as opposed to non-estate property of the bankruptcy petitioners. If the auction was tainted, it was the bankruptcy estate that suffered since the auction proceeds that were allegedly diminished by the **[**17]** Defendants' actions were the property of the estate to be used to pay creditors. I also find that the claims, which concern how the estate was administered, qualify as both "arising under" the Code and "arising in" a bankruptcy case under *28 U.S.C. § 1334(b)*.

Because they are core claims, the *Barton* doctrine applies to them and leave of the bankruptcy court was required before instituting them. Because there is no assertion that the Reeses complied with that requirement, the claims against P&P and the individual Pook Defendants are subject to dismissal in their entirety.

V. MAD DEFENDANTS' MOTION TO DISMISS

In their Motion (ECF 25), the MAD Defendants argue all claims contained in the AC should be dismissed. I will discuss each claim in order.

[*286] a. Count II — *Lanham Act*

Count II is premised upon ***HN8***[] *Section 43(a)(1)(B) of the Lanham Act*, *15 U.S.C. § 1125(a)(1)(B)*, which provides in pertinent part:

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[9] The Third Circuit has similarly held that claims **[**16]** that "arise in" bankruptcy include those "that by their nature, not their particular factual circumstances, could only arise in the context of a bankruptcy case." *Stoe, 436 F.3d at 218* (citing *Halper v. Halper, 164 F.3d 830, 836 (3d Cir. 1999)* (stating that a proceeding is "core" "if it is a proceeding that, by its nature, could arise only in the context of a bankruptcy case") (quotation omitted) (emphasis added); 1 ***Collier on Bankruptcy § 3.01[4][c][iv]*** at 3-31).

> (1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact which . . . (B) in commercial advertising or promotion, misrepresents **[**18]** the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

15 U.S.C. § 1125(a). ***HN9***[] Liability arises if a commercial message, statement, or advertisement is "either (1) literally false or (2) literally true or ambiguous, but has the tendency to deceive consumers." *Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharms. Co., 290 F.3d 578, 586 (3d Cir. 2002)* citing *Castrol Inc. v. Pennzoil Co., 987 F.2d 939, 943 (3d Cir. 1993)* ("a plaintiff must prove either literal falsity or consumer confusion, but not both") (emphasis deleted). ***HN10***[] The elements of a *Lanham Act* claim for false advertising, or false or misleading representation of a product, are: "(1) that the defendant has made false or misleading statements as to his own product [or another's]; (2) that there is actual deception or at least a tendency to deceive a substantial portion of the intended audience; (3) that the deception is material in that it is likely to influence purchasing decisions; (4) that the advertised goods traveled in interstate commerce; and (5) that there is a likelihood of injury to the plaintiff in terms of declining sales, loss of good will, etc." *Warner-Lambert Co. v. Breathasure, Inc., 204 F.3d 87, 91-92 (3d Cir. 2000)* (alteration in original) (quoting *Johnson & Johnson-Merck Consumer Pharms. Co. v. Rhone—Poulenc Rorer Pharms., Inc., 19 F.3d 125, 129 (3d Cir. 1994))* **[**19]** ; *Pernod Ricard USA, LLC v. Bacardi U.S.A., Inc., 653 F.3d 241, 248 (3d Cir. 2011))*.

HN11[] Commercial "advertising or promotion" for purposes of *Lanham Act § 43(a)(1)(B)* "consists of (1) commercial speech; (2) by a defendant in commercial competition with the plaintiff; (3) designed to influence customers to buy the defendant's products; (4) that is sufficiently disseminated to the relevant purchasing public to constitute advertising or promotion within the industry." *Synygy, Inc. v. Scott-Levin, Inc., 51 F. Supp. 2d 570, 576-77 (E.D. Pa. 1999)* *aff'd sub nom*. *Synygy, Inc. v. Scott-Levin, 229 F.3d 1139 (3d Cir. 2000)*; *Premier Comp Solutions., LLC v. Penn Nat. Ins. Co., Civ. A. No. 07-1764, 2012 U.S. Dist. LEXIS 42524, 2012 WL 1038818, at *7 (W.D. Pa. Mar. 28, 2012)* (same); 5 McCarthy on Trademarks and Unfair Competition § 27:71 (4th ed.) (same). The word "commercial" "excludes use of *§ 43(a)* to challenge the falsity of "consumer or editorial content, parodies, satires, or other constitutionally protected material." 5 McCarthy on Trademarks and Unfair Competition § 27:71 (4th ed.). Thus, "any message that does not qualify as commercial speech cannot be the subject of a § 43(a) false advertising or product disparagement challenge." Id.

The MAD Defendants first argue that Count II fails to allege a plausible violation of *Section 43(a)* because the Article does not meet any of the first three elements of the test for commercial advertising or promotion. Specifically, they argue first that the Reeses have failed to allege that the Article — a piece of journalism **[**20]** — constitutes "commercial advertising **[*287]** or promotion" since it does not describe a specific product or service, but rather an event, the Pook auction, that had already occurred. They note that the Reeses have failed to allege any motivation on their part for publishing the Article other than to provide information and opinion of interest to readers about that event. Second, they argue that the Reeses have failed to allege that they are in commercial competition with Plaintiffs in the antique toy trade. Rather, the AC alleges that the MAD Defendants produce a trade journal. (AC ¶¶ 119-120.) Third, they argue that there is no allegation that the Article influenced customers to buy any products sold by the MAD Defendants, since they are not sellers of antique toys.

The Reeses respond by asserting that direct competition between themselves and the MAD Defendants is not relevant because the *Lanham Act* is "'very broadly worded and applies to 'any person' who uses virtually any means to deceive the public regarding . . . commercial activities. . . ." (ECF 31 at 27 (quoting *Electronic Lab. Supply. Co., Inc. v. Cullen, 977 F.2d 798, 807 (3d Cir. 1992))*.) They contend that the Third Circuit has held that, "by denoting the broad scope of *Section 43(a)* — 'any person,' the 3rd Circuit conclusively **[**21]** held that a non-competitor has the right to sue for harm caused by the false representation of services in commerce." (Id. (citing *Serbin v. Ziebart Intern. Corp., Inc., 11 F.3d 1163, 1175-77 (3d Cir. 1993))*.) I find that these citations are inapposite. In *Cullen*, the issue was whether one could be liable for another person's violation of *Lanham Act § 34*'s prohibition on the use of counterfeit marks on an aiding and abetting theory (answered in the negative). *Id. at 798*. In Serbin, the issue was whether "**consumers** of goods or services in interstate commerce who allege that, to their detriment, they purchased such goods or services in reliance on the advertising claims of the vendor, have a federal cause of action under *subsection 1 of Section 43(a)*. . . ." *Id. at 1164* (emphasis added); *1177* (holding that "consumers fall outside the range of 'reasonable interests' contemplated as protected by the false advertising prong of *Section 43(a)*"). Neither decision stands for the proposition that a claim under Lanham Act *§ 43(a)*'s prohibition against false commercial advertising or promotion may be maintained in the absence of competition between the parties.

The sole allegation in Count II, insofar as it relates to the MAD Defendants, is that the Article was "widely disseminated to the antique world." (AC ¶ 172.[10]) It must be **[**22]** remembered, of course, that the Article was published **after** the sale occurred, and was a report of the sale itself. It is implausible, therefore, that any alleged falsity in the Article — even if it could be considered "commercial advertising or promotion"—could have damaged Plaintiffs by impacting the value of the collection sold at the auction.[11] As they allege no commercial competition with Plaintiffs in the antique toy trade, and no direct injury arising from the publication of the Article against which the *Lanham Act* was designed to protect, **[*288]** Count II is subject to dismissal as to the MAD Defendants.

b. Count III — State Law Unfair Competition

HN12[] "Under Pennsylvania law, the elements necessary to prove unfair competition through false advertising parallel those elements needed to show a *Lanham Act* violation, absent the requirement for goods to travel in interstate commerce." *Leonetti's Frozen Foods, Inc. v. Am. Kitchen Delights, Inc., Civ. A. No. 11-6736, 2012 U.S. Dist. LEXIS 47815, 2012 WL 1138590, at *11 (E.D. Pa. Apr. 4, 2012)* (quoting *KDH Elec. Sys., Inc. v. Curtis Tech. Ltd., 826 F. Supp. 2d 782, 807 (E.D. Pa. 2011))*; see also *Louis Vuitton Malletier & Oakley, Inc. v. Veit, 211 F. Supp. 2d 567, 582 (E.D. Pa. 2002)* (same). Because the *Lanham Act* allegations in Count II fail to allege a plausible claim under federal law for a false advertising injury against the MAD Defendants, I find that the common law claim also fails. I note, additionally, that Count III does not even mention the MAD Defendants or the Article.

c. Counts V and VII — Commercial Disparagement and Injurious Falsehood

Counts V and VII allege the same injury under two legal theories containing the same elements, commercial disparagement and injurious falsehood arising from the publication of the Article.[12] It **[*289]** is undisputed by the

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[10] The balance of Count II concerns only P&P, the individual Pook Defendants, Lowe, and Caffarella. The only other time the MAD Defendants are mention is the assertion that the placement of the newtiques on the cover of the sale catalogue "carried through antique malls and the nation's leading antique journal — the Maine Antique's Digest, both falsely represented, disparaged the Reeses' collection while inflating the value of Lowe's fake newtiques." (AC ¶ 170.)

[11] I discuss at length — and reject — whether the Article can constitute "commercial advertising or promotion" below in the consideration **[**23]** of Defendant Lowe's Motion.

[12] The Article is referenced and quoted in the AC but not attached thereto. I consider it as part of the pleadings in deciding the pending Motions to dismiss. *W. Penn Allegheny Health Sys., 627 F.3d at 97 n. 6*. It stated in pertinent part:

> As with many regional auction houses, Pook & Pook in Downington, Pennsylvania, will sell any collection that comes along. . . . When a local collector wanted to downsize his huge toy collection, Pook & Pook agreed to try its first toy sale.
>
> . . .
>
> Everyone in the toy world seemed to know the major consignor was Carter Reese, longtime collector who bought toys that he loved before collectors got hung up on condition. It didn't matter to him if the toy had replaced figures, was repainted, or if much of the paint was missing. If the toy had charm and was cheap, he bought it.
>
> "The sale was a good test of the **[**25]** middle market," said dealer Jay Lowe of Lancaster, Pennsylvania, who came to the sale and did some buying. The market has changed; condition makes a big difference. It used to be if a toy was an 8.5 or a 9, it could bring top dollar. Now it has to be 9.5 to 9.9 perfect, and if it isn't, it is not easy to sell, and the price differences are enormous."

parties that ***HN13***[] the elements of these two torts are: (1) a false statement; (2) that the publisher either intends to cause pecuniary loss or reasonably should recognize that publication will result in pecuniary loss; (3) pecuniary loss does in fact result; and (4) the publisher either knows **[**24]** the published statement is false or acts in reckless disregard of its truth or falsity.[13] See *Pro Golf Mfg., Inc. v. Tribune Review Newspaper Co., 570 Pa. 242, 809 A.2d 243, 246 (Pa. 2002)* (elements of commercial disparagement); *McNulty v. Citadel Broad. Co., 58 Fed. App'x 556, 566 (3d Cir. 2003)* (elements of common law injurious falsehood). The MAD Defendants argue that the Reeses have failed to allege a plausible claim under either iteration of the tort because they have not pled actual malice or any actual pecuniary loss arising from the publication of the Article. I agree.

While acknowledging in the AC that the elements of both torts require them to plead and prove actual malice, i.e., knowledge on the part of the publisher that the Article was false or that the MAD Defendants acted in reckless disregard of its truth or falsity[14] (see AC ¶¶ 134, 204, 214), the Reeses spend many pages of their Response asserting that they are not "public figures," and thus have no requirement to plead actual malice. (See Resp. at 37-42.[15]) This argument is entirely inapposite; the two torts clearly require that a plaintiff plausibly plead the actual malice element, irrespective of whether they are public figures.

> Lowe explained that's because in the 1970's and 1980's toys were rare, and fewer than 5% of the collectors wanted toys that were perfect. Now some toys that were rare are not rare anymore, and 60% of the toy collectors want toys to be 98% perfect.
>
> "It's the same thing with coins," Lowe went on. "One coin might sell for $1500, and one a little better goes for $3000, and one still better, $10,000. And it is the same with furniture. A chest with a rich old surface will bring one price, and one of the same forms that has been refinished [will bring] sixty to seventy percent less. The pendulum has swung. Huge prices are paid for condition."
>
> Lowe remembered a time when he could buy a toy for $800 that was missing a figure and needing a little repair and give it to a fellow to fix it and sell it for $1500 and have made a nice profit. Not anymore. **[**26]** "Now I buy a toy for $800, and it costs me $400 to fix it, and I hope to sell it for $1500. Condition is king," he said.
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> . . .
>
> The consensus was that may of the toys that Pook offered brought all they were worth, and there were a lot of bargains for dealers who knew what they were buying.
>
> . . .
>
> Condition drives all markets because collectors with deep pockets see perfect toys as investments. There was very little for them at this middle-market sale.
>
> . . .
>
> Some thought Pook should have employed a toy expert who would have included condition reports in the lot descriptions as many specialty toy auctioneers do, but others said the fact that this toy sale was not at a specialized toy auctioneer brought out the trade, who thought they would have a chance to make a discovery or two.

(ECF 25-2.)

[13] Count VII, alleging injurious falsehood, also references *Section 623A of the Restatement (Second) of Torts*. This section also has an actual malice element since it too requires that the defendant "knows that the statement is false or acts in reckless disregard of its truth or falsity." (Id.) Finally, Count VII also references *Restatement Section 626*, "Disparagement of Quality," which specifically incorporates the "rules of liability . . . stated in *§ 623A*." *Restatement (Second) of Torts § 626*. Accordingly, I find that **[**27]** every iteration of the injurious falsehood tort pled in Count VII contains an actual malice element.

[14] See *New York Times Co. v. Sullivan, 376 U.S. 254, 279-80, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964)* (defining the actual malice standard).

[15] They also spend many pages asserting that they have suffered defamation, a claim they have not pled in the AC. (See Resp. at 49-53.)

The only attempt the Reeses make to satisfy the pleading requirement is in paragraph 134 of the AC where they state: "The article and its [sic] was published with actual malice and/or a reckless disregard for the truth." (AC ¶ 134.) The also assert that its publication "violated . . . industry **[**28]** obligations and responsibilities," and it "evidences little to no editorial integrity — opting instead to be a puff piece for Lowe and his newtiques." (AC ¶¶ 133, 135.) I find that these allegations do not satisfy the Twombly/Iqbal standard. First, merely alleging actual malice is insufficient; ***HN14***[] courts are not bound to accept as true legal conclusions couched as factual allegations. *Twombly, 550 U.S. at 555, 564*. Second, the allegations concerning journalistic standards and editorial integrity are likewise insufficient to put the MAD Defendants on notice of the basis for the claim of actual malice and that the claim is plausible, absent any specific examples of falsities in the Article that violated those standards. Third, the reference to the Article being a "puff piece" for Lowe's newtiques is implausible to demonstrate actual malice as a matter of law since the Article never mentions newtiques.

[*290] Turning to the content of the Article, I conclude as a matter of law that the Reeses cannot plausibly claim disparagement and actual malice. If anything, the Article was critical only of P&P — noting its lack of experience in conducting toy auctions, its failure to engage a toy expert to write condition reports, and that **[**29]** its inclusion of too many lots in the auction may have resulted in "quite a few rarities sold under the money." The only references to the Reeses were that Carter bought toys "that he loved" rather than for their condition (i.e., investment potential) and that "if the toy had charm and was cheap he bought it." The only reference to the quality of their collection is the quote from Lowe describing the sale as a "good test of the middle market" (as opposed, one would assume, to the high end of the collectible toy market). Nothing in the AC suggests that the MAD Defendants were in possession of knowledge that would place a reasonable publisher on notice that these statements were false or that they acted with reckless disregard for whether they were true or false. Accordingly, Counts V and VII are dismissed as to the MAD Defendants.

d. Counts VI — False Light

A claim for false light is governed by the *Restatement (Second) of Torts § 652E*, which provides:

> ***HN15***[] One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy if
>
> (a) the false light in which the other was placed would be highly offensive to a reasonable person, **[**30]** and
> (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

Restatement (Second) of Torts § 652E (1977); *Krajewski v. Gusoff, 2012 PA Super 166, 53 A.3d 793, 805-806 (Pa. Super. Ct. 2012)*, *appeal granted*, *621 Pa. 117, 74 A.3d 119 (Pa. 2013)*, *appeal dismissed*, *624 Pa. 224, 84 A.3d 1057 (Pa. 2014)*. For the information about a person to be "highly offensive," it must constitute a "major misrepresentation of his character, history, activities or beliefs that serious offense may reasonably be expected to be taken by a reasonable man in his position . . . ." Id. *cmt. c*.

Because the false light tort also has as an element the actual malice standard required by commercial disparagement and injurious falsehood, I find that this claim too has not been plausibly pled. Alternatively, I find the claim is also implausible as a matter of law since the content of the Article would not be taken by reasonable persons in the Reeses' position to be highly offensive. As illustrations of material that would be highly offensive, the comment to the Restatement offers: the police improperly including one's photograph in a "rogues gallery" of criminals when one was mistakenly arrested and never convicted of a crime; and the use of a picture of a child who has been injured through no fault of **[**31]** his own to illustrate an article captioned "They Ask to Be Killed." Referring to the Reeses' toy collection as "middle market" does not rise to the same level of offensiveness, and does not cast a similar level of adverse reflection on their character or reputation. Thus, this claim against the MAD Defendants is also dismissed as implausible.

e. Counts IX — Negligence

Finally, the MAD Defendants argue that the negligence claim is subject to dismissal. In Count IX, the Reeses allege only that "[a]s demonstrated above, in the best light, Defendants have breached duties owed the Reeses and, as a result, the **[*291]** Reeses have been injured, suffering actual damages." (AC ¶ 228.) Defendants contend that since the commercial disparagement and false light claims require a degree of fault greater than negligence under Pennsylvania law, the Reeses "must allege a degree of fault . . . that is greater than negligence." (ECF 25 at 23.) In their Response, the Reeses fail to address the negligence claim argument in any manner.

I find that this claim is subject to dismissal. Plaintiffs do not identify any specific duty the MAD Defendants breached, other than the duty not to engage in commercial disparagement or **[**32]** paint them in a false light. ***HN16***[] Under Pennsylvania law, "[t]o establish a common law cause of action in negligence, 'the plaintiff must demonstrate that the defendant owed a duty of care to the plaintiff, the defendant breached that duty, the breach resulted in injury to the plaintiff and the plaintiff suffered an actual loss or damage.'" *Brisbine v. Outside In School of Experiential Educ., Inc., 2002 PA Super 138, 799 A.2d 89, 93 (Pa. Super. Ct. 2002)* (quoting *Brezenski v. World Truck Transfer, Inc., 2000 PA Super 175, 755 A.2d 36, 40 (Pa. Super. Ct. 2000))*. ***HN17***[] "All negligence claims are premised on the alleged violation of a duty." *Peek v. Philadelphia Coca-Cola Bottling Co., Civ. A. No. 97-3372, 1997 U.S. Dist. LEXIS 10138, 1997 WL 399379, at *5 (E.D. Pa. July 10, 1997)* (citing *Wenrick v. Schloemann—Siemag Aktiengesellschaft, 523 Pa. 1, 564 A.2d 1244, 1248 (Pa. 1989)*. A duty is

> that responsibility which exists by operation of law requiring a person to adhere to a standard of conduct protecting others against unreasonable or unnecessary risks. In the absence of legal duty, no liability will attach, even if a defendant's conduct was negligent. In this sense, the concept of legal duty is both a source of legal responsibility, and a limitation upon liability to others: recognition of a legal duty by the courts will impose certain obligations, while refusal to recognize a legal duty by the courts will insulate a party against liability. The duty owed by a defendant may be express or implied, may be general or arise from specific circumstances. In determining the existence of a duty, the **[**33]** courts will look to a variety of sources, including the common law, statutes, or a contract between the parties. Ultimately, however, it is the court's decision whether to recognize a duty that is fundamental to the existence of a negligence claim.

3 West's Pa. Prac., Torts: Law and Advocacy § 1.2 (footnotes omitted).

Whatever duty the MAD Defendants owed to the Reeses to refrain from publishing information that would constitute commercial disparagement or paint them in a false light is necessarily coterminous with the duty owed to refrain from committing the underlying torts. My findings that they have failed to allege plausible claims for those torts foreclose their ability to proceed on a negligence theory since these are the sources for any purported duty. More importantly, since this is a situation where liability for negligence is premised upon the exercise of the MAD Defendants' *First Amendment* right to publish their magazine, the same rationale that led the United States Supreme Court in Sullivan to impose the actual malice standard, rather than the common law negligence standard, applies here since all of the underlying torts incorporate the heightened standard in recognition that free speech rights **[**34]** are involved.

Accordingly, I grant the MAD Defendants' Motion to Dismiss in its entirety.

VI. LOWE'S AND CAFFARELLA'S MOTIONS TO DISMISS

In his Motion (ECF 27), Lowe argues that all claims contained in the AC in **[*292]** which he is named as a defendant are subject to dismissal. In his Motion (ECF 30), Caffarella joins many of Lowe's arguments. I will discuss the two motion jointly; I will discuss each claim in order.

a. Count I — Conspiracy

The parties do not dispute that ***HN18***[] a claim of civil conspiracy in Pennsylvania contains the following elements: (1) a combination of two or more persons acting with a common purpose to do an unlawful act or to do a lawful act by unlawful means; (2) an overt act done in pursuance of the common purpose; and (3) actual legal damage. *Goldstein v. Phillip Morris, Inc., 2004 PA Super 260, 854 A.2d 585, 590 (Pa. Super. Ct. 2004)*. ***HN19***[]

An "'actionable civil conspiracy must be based on an existing independent wrong or tort that would constitute a valid cause of action if committed by one actor.'" Levin v. Upper Makefield Twp., 90 F. App'x 653, 667 (3d Cir. 2004) (quoting In re Orthopedic Bone Screw Prods. Liab. Litig., 193 F.3d 781, 789 (3d Cir. 1999)). Ultimately, "only a finding that the underlying tort has occurred will support a claim for civil conspiracy." Alpart v. Gen. Land Partners, Inc., 574 F. Supp. 2d 491, 506 (E.D. Pa. 2008) (quotation omitted); see also Duffy v. Lawyers Title Ins. Co., 972 F. Supp. 2d 683, 698 (E.D. Pa. 2013) (**HN20**[] "Absent a civil cause of action for a particular act, there can be no cause of action for civil conspiracy to commit that **[**35]** act."). **HN21**[] To allege a plausible claim of civil conspiracy, a plaintiff must make "factual allegations of combination, agreement, or understanding among all or between any of the defendants [or coconspirators] to plot, plan, or conspire to carry out the alleged chain of events." Spencer v. Steinman, 968 F. Supp. 1011, 1020 (E.D. Pa. 1997) (citation and internal quotation marks omitted). It is not enough that the "end result of the parties' independent conduct caused plaintiff harm or even that the alleged perpetrators of the harm acted in conscious parallelism." Id.

Lowe argues that the Reeses' attempt to state a claim for civil conspiracy fails because: (1) they do not identify the Defendants' alleged common purpose or the particular unlawful act that the Defendants were pursuing; rather Count I consists merely of recitations of Pennsylvania case law along with the conclusory statement that Defendants engaged in a conspiracy; and (2) Lowe, as well as Caffarella, were acting as P&P's consultants, were conducting the business of P&P, and "formed an indispensable part of the company. Consequently, they cannot have conspired with the company. . . ." (ECF 27 at 13.) Caffarella makes similar arguments. I find that the AC contains enough factual matter, **[**36]** accepted as true, to create a plausible claim of civil conspiracy against these two Defendants. I also find that the intracorporate conspiracy doctrine does not bar the claim based on the allegations presented.

The substantive portion of Count I states, in its entirety, that "Pook[16] as principal, Caffarella as Pook's agent, and Lowe combined or agreed with intent to do an unlawful act, or to do an otherwise lawful act by unlawful means in the manner described above." (AC ¶ 163.) In other parts of the AC, the Reeses assert that Lowe and Caffarella improperly set up the display at the auction to permit their own below-value purchases of toys. They allegedly mixed unmatched parts of multi-part toys in different lots, reducing the likelihood **[*293]** that other bidders, particularly phone and internet bidders, would perceive the true value of the lots. They are alleged to have bid on lots using that inside information, in order to later rematch the parts and create toys of greater value that they could then sell at their own retail stand. (AC ¶¶ 56-75.) These allegations are sufficient, if proven, to show concerted action between them, their common purpose, and an intent to injure. See Thompson Coal Co. v. Pike Coal Co., 488 Pa. 198, 412 A.2d 466, 472 (Pa. 1979) (citing Miller v. Post Publ'g Co., 266 Pa. 533, 110 A. 265, 67 Pitts. Leg. J. 189 (Pa. 1920) (**HN22**[] "Proof **[**37]** of malice i.e., an intent to injure, is essential in proof of a conspiracy.")

At this stage of the proceedings, I must also reject Lowe's argument that he could not as a matter of law have conspired with P&P or Caffarella.[17] While Lowe is correct that, **HN23**[] for purposes of a civil conspiracy claim, a corporation cannot conspire with itself through the activities of its own employees, officers, and directors, see Jagielski v. Pkg. Mach. Co., 489 F. Supp. 232, 233 (E.D. Pa. 1980) (stating that under Pennsylvania law, officers and employees of a corporation "cannot conspire with the corporation of which they form an indispensable part"), the Reeses have not averred that Lowe or Caffarella were P&P employees. They allege Lowe was involved "in multiple facets of the antique industry," an "expert, dealer, and purchaser," the owner of his **[**38]** own antique business, Caffarella's partner in a consulting business, and had worked with Caffarella as an independent contractor for another auction house. (AC ¶¶ 27, 31, 33, 85.) James Pook allegedly told Carter Reese that P&P "was going to use a pair of 'toy experts' to assist him" in the Reese auction, and that Carter confirmed that

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[16] Count I of the AC does not state clearly to whom "Pook" refers. AC ¶ 16 states that Ron and Debra Pook would be referred to collectively as the "Pooks." AC ¶ 17 states that Pook & Pook, Inc. would be referred to as "Pook & Pook." The individual Pook family members are referred to individually by their first names. (See AC ¶¶ 20-22.) I assume that the use of "Pook" in Count I refers to P&P and not the individual Pook Defendants.

[17] Caffarella has not joined this argument.

"Caffarella and, thus, Lowe," were to be those experts. (AC ¶¶ 53-54.) There is no allegation that Lowe or Caffarella were P&P employees, and none of these alleged roles bring them within the intracorporate conspiracy doctrine.

At best, Lowe can be deemed an agent of P&P acting in his individual capacity. Judge Pratter recently had occasion to review the scope of the intracorporate conspiracy doctrine in *Cannon v. City & Cty. of Philadelphia, Civ A. No. 14-5388, 2014 U.S. Dist. LEXIS 178126, 2014 WL 7399037 (E.D. Pa. Dec. 30, 2014)*. She stated:

> ***HN24***[] Federal courts in the Third Circuit have explained that agents acting in their individual capacities rather than their official capacities can be liable for civil conspiracy. See, e.g., *Heffernan v. Hunter, 189 F.3d 405, 412-13 (3d Cir. 1999)* ("[C]ourts that have followed the [intracorporate conspiracy] doctrine allow an exception when the employees have acted for their sole personal benefit and thus outside the course and scope of their employment. That exception **[**39]** is based on the proposition that since the employer would not be subject to liability under *respondeat superior*, it would not be a conspirator."); *General Refractories Co. v. Fireman's Fund Ins. Co., 337 F.3d 297, 313 (3d Cir. 2003)*; *Robison v. Canterbury Village, Inc., 848 F.2d 424, 431 (3d Cir. 1988)* (noting that a conspiracy may exist between a corporation and an officer "if the officer is acting in a personal, as opposed to official, capacity"); *Lee v. SEPTA, 418 F. Supp. 2d 675, 681 (E.D. Pa. 2005)* ("An employer and its officers and employees acting in the scope of their duties constitute one legal person for purposes of conspiracy law and therefore cannot conspire together." (emphasis added)). However, "at least one panel of the Pennsylvania Superior Court, in a non **[*294]** precedential decision, has opined that no such 'exception' to the intracorporate conspiracy doctrine 'is recognized by Pennsylvania state courts.'" *Accurso [v. Infra-Red Servs., Inc.], 23 F. Supp. 3d [494] at 515 [E.D. Pa. 2014]* (quoting *Lilly v. Boots & Saddle Riding Club, No. 57 C.D.2009, 2009 Pa. Commw. Unpub. LEXIS 547, 2009 WL 9101459, at *6 (Pa. Commw. Ct. July 17, 2009))*. Consequently, it is not clear whether such an exception to the intracorporate conspiracy doctrine exists in Pennsylvania law.
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> . . .
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> ***HN25***[] Pennsylvania courts have often applied the intracorporate conspiracy doctrine without elaborating on its reasoning or its relationship to the scope of employment, but they ordinarily apply the doctrine when defendants allegedly conspired with other agents or the principal **[**40]** corporation on behalf of the principal corporation. See, e.g., *Lackner [v. Glosser,] 2006 PA Super 14, 892 A.2d [21] at 26 [(Pa. Super. Ct. 2006)]* (alleging a conspiracy to engage in improper accounting practices to deprive plaintiff of promised bonuses); *Rutherfoord v. Presbyterian-University [Hosp.], 417 Pa. Super. 316, 612 A.2d 500, 502 (Pa. Super. Ct.1992)* (alleging a conspiracy to terminate plaintiff's employment with defendant company); Weiner v. Markel Int'l Ins. Co., No. 2005-1045, 2006 WL 1142484 (Pa. Ct. Comm. Pl. Apr. 25, 2006) (alleging a conspiracy to refuse to pay benefits); *Rick's Original Philly Steaks, Inc. v. Reading Terminal Market Corp., No. 2008-3822, 2008 Phila. Ct. Com. Pl. LEXIS 43, 2008 WL 1780822 (Pa. Ct. Comm. Pl. Feb. 20, 2008)* (alleging conspiracy between landlord and agent to refuse to renew lease).

*Cannon, 2014 U.S. Dist. LEXIS 178126, 2014 WL 7399037, at *8-9*. Judge Pratter went on to find persuasive the "reasoning of the federal courts in Pennsylvania that have adopted a limited scope-of-employment exception to the intracorporate conspiracy doctrine," stating that "[i]t cannot be the case that co-agents can never be liable for civil conspiracy — even if the alleged conspiracy was outside the scope of their employment — merely because they happen to be co-workers. There must be some connection between the alleged conspirators' status as co-agents and the alleged tort for the doctrine to preclude a finding of liability." *2014 U.S. Dist. LEXIS 178126, [WL] at *10*.

Applying this rationale, I find that the Reeses' civil conspiracy claim against Lowe is not defeated by the alleged fact that Lowe assisted James Pook in setting up the auction. There is no assertion in the AC that Lowe was employed **[**41]** by P&P, was engaged by P&P as a consultant, or was conducting the business of P&P. What the Reeses have pled is that Lowe owned his own independent antique business. Significantly, Lowe is alleged to have undertaken his attempt to subvert the value of the auction lots to benefit himself, not to benefit P&P (which arguably lost commission revenue on the auction as a result of the depressed prices). There is, according, no basis to apply the intracorporate conspiracy doctrine at this point in the proceedings to dismiss the civil conspiracy claim against Lowe.

b. Count II — *Lanham Act*

Lowe argues that Count II[18] fails as a matter of law to state a claim under *Section 43(a)(1)(B) of the Lanham Act* **[*295]** , *15 U.S.C. § 1125(a)(1)(B)* insofar as it concerns the Article in which he was quoted. He argues that the Article merely recounted the events of the auction after it occurred, and cannot, accordingly, constitute "commercial advertising or promotion." He also argues that he is not in commercial competition with the Reeses. Caffarella argues that the claim fails because there are no allegations whatsoever that he engaged in any kind of commercial speech. I find that Lowe is correct when he asserts that the Article does not qualify as "commercial **[**42]** advertising or promotion." Caffarella is also correct that there is a complete failure to allege he engaged in commercial speech.

As noted above, Lowe is quoted in the Article as stating, that,

> "The sale was a good test of the middle market," said dealer Jay Lowe of Lancaster, Pennsylvania, who came to the sale and did some buying. The market has changed; condition makes a big difference. It used to be if a toy was an 8.5 or a 9, it could bring top dollar. Now it has to be 9.5 to 9.9 perfect, and if it isn't, it is not easy to sell, and the price differences are enormous."

(ECF 25-2.) He opined that, while in the past few collectors desired perfect toys, as with collectors of other antiques, the majority of the toy collectors now desire perfect **[**43]** examples and "[c]ondition is king." (Id.) Taken in the light most favorable to the Reeses, Lowe was quoted in an Article reporting on events that had already occurred, wherein he opined that the quality of their toys were middle market and failed to bring top dollar because of their less-than-perfect condition. He did not opine on the quality of the Reeses' remaining toy collection, or on the quality of his own inventory of toys, he did not write or publish the Article, there is no allegation he was responsible for its editorial content, and the Article contained no advertisement or promotion of Lowe's toy business. Given this, I find that the Reeses have failed to state a plausible violation of *Section 43(a)*. There is simply no basis to conclude that Plaintiffs have plausibly alleged the Article constituted commercial speech, let alone Lowe's or Caffarella's commercial speech, or that it was designed to influence customers to buy Defendants' products.

c. Counts III, V and VII — Unfair Competition, Commercial Disparagement and Injurious Falsehood

Lowe and Caffarella argue that, to the extent that these claims reference the P&P auction that occurred on September 6-7, 2013, they are time barred because each such **[**44]** claim is subject to a one year statute of limitations,[19] and the Reeses did not file this action until October 7, 2014. As the Reeses make no argument in their Response to show that this part of the claims are timely, I find they are subject to dismissal.

To the extent that the claims reference the Article, Lowe contends that his comments quoted therein did not address the Reeses personally, nor any specific item consigned by the Reeses in the P&P auction, but merely constituted a general description of antique toy market at that time and how items are valued by market participants. As such, he contends, his comments were not defamatory as a **[*296]** matter of law so as to support claims for unfair competition, commercial disparagement or injurious falsehood. Caffarella argues that the claims fails because he is not alleged to have engaged in any disparaging speech. I agree.

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[18] As I previously noted, although Count II does not mention him, Lowe has raised an argument why the claim should be dismissed. There is no allegation that Lowe was responsible for the placement of his newtique on the cover of the sale catalogue. Accordingly, I limit the discussion of liability to the allegedly negative comment in the Article about the quality of the Reeses' collection sold at the auction, based upon Lowe's quotes in the Article.

[19] See ***HN26***[] *42 Pa.C.S. § 5523* (providing one year statute of limitation on claims of commercial disparagement, false light and injurious falsehood); ***Pro Golf Mfg., 809 A.2d at 245*** (holding that "one-year limitations period found in *Section 5523(1)* governs an action for commercial disparagement"); *Little v. City & Cty. of Philadelphia, Civ. A. No. 07-5361, 2008 U.S. Dist. LEXIS 57972, 2008 WL 2704579, at *4 (E.D. Pa. July 3, 2008)* (holding that false light claim is subject to a one-year statute of limitations of *Section 5523*).

[45]** For reasons similar to those discussed above with regard to the MAD Defendants, I find that all of these claims are implausible because they do not rise to the level of actual malice. First, Lowe did not write the Article; thus, he can only be responsible for his own statements — which I assume are accurately quoted — and not the Article's editorial content and opinions. Most significantly, this would exclude the identification of the Reeses as the consignor of the toys, a statement not attributed by the author to Lowe. Thus, there is a clear break in the causation between Lowe and any alleged impugning of the Reeses' collection in the Article. Second, the Reeses have failed to assert that, in making his statements, Lowe uttered something he knew was false or was stated in reckless disregard of its truth or falsity. As noted, the allegation that the Article was a "puff piece" for Lowe's newtiques, even if it could be attributed to Lowe, is implausible to demonstrate actual malice as a matter of law since the Article never mentions newtiques. Third, the allegedly defamatory statement central to the claim, that Carter bought toys "that he loved" rather than for their condition, is not **[**46]** attributed to Lowe. Fourth, I find that the implication that the Reeses' collection was not high quality, which allegedly arises from Lowe describing the sale as a "good test of the middle market," is not "highly offensive" as a matter of law so as to support a false light claim, since it is not a "major misrepresentation of [] character, history, activities or beliefs that serious offense may reasonably be expected to be taken by a reasonable man." *Restatement (Second) of Torts § 652E cmt. c*. As suggested above with regard to the MAD Defendants, referring to the Reeses' toy collection as "middle market" does not rise to the same level of offensiveness as the examples listed in the Restatement, and does not cast a similar level of adverse reflection on their character or reputation. Finally, there is no allegation that Caffarella engaged in any allegedly disparaging speech.

Accordingly, Counts III, V and VII are dismissed as to Lowe and Caffarella.

d. Count IV — Antitrust Claims

In Count IV, the Reeses allege Lowe and Caffarella, along with P&P and the Pook Defendants, violated the *Sherman Act* and the *Clayton Act*, as well as *Section 2(c)* of the Robinson-Patman Act. (AC ¶¶ 188-200.) Other than recitations of the various antitrust statutes, **[**47]** the only allegation contained in Count IV is that the "poor Pook & Pook sale preparation by Lowe/Caffarella was intentional, aimed at ensuring they and others could piecemeal make a killing off of the Reeses by purchasing seemingly disparate lots that, when combined, contained complete toys and 'rare finds' worth thousands of dollars more than the entire lot was purchased for." (AC ¶ 198.) Lowe, joined by Caffarella, argues that the Count is subject to dismissal because the Reeses have completely failed to allege antitrust injury. I agree.

HN27[] *Section 1 of the Sherman Act* states that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal." *15 U.S.C. § 1*. *Section 4* of the Clayton Act, in turn, grants the right to maintain a private cause of action to "[a]ny person who shall be injured in his business or property by reason of anything forbidden **[*297]** in the antitrust laws." *15 U.S.C. § 15(a)*. As these sections imply, standing and antitrust injury are essential elements to maintaining an action for damages thereunder. See, e.g., *Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 110, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986)*. Under *Section 1*, a plaintiff must plausibly allege the following three elements: (1) an agreement; **[**48]** (2) imposing an unreasonable restraint of trade within a relevant product market; and (3) resulting in antitrust injury." *In re Ins. Brokerage Antitrust Litig., 618 F.3d 300, 315 (3d Cir. 2010)*. Antitrust injury consists of (1) harm of the type the antitrust laws were designed to prevent; and (2) an injury which flows from that which makes defendants acts unlawful. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*; *Gulfstream III Assocs., Inc. v. Gulfstream Aerospace Corp., 995 F.2d 425, 429 (3rd Cir. 1993)*. To be an antitrust injury, the injury must "reflect the anticompetitive effect either of the violation or of the anticompetitive acts made possible by the violation" and represent "the type of loss that claimed violations. . . would be likely to cause." *Brunswick Corp, 429 U.S. at 489*; *Race Tires of Am. Inc. v. Hoosier Racing Tire Corp., 614 F.3d 57, 76 (3d Cir. 2010)*; *City of Pittsburgh v. West Penn Power Co., 147 F.3d 256, 266 (3d Cir. 1998)*. "While a plaintiff may have individually suffered an injury as a result of defendants' actions, the antitrust laws were designed to protect market-wide anticompetitive activities." *Eichorn v. AT&T Corp., 248 F.3d 131, 140 (3d Cir. 2001)*, *amended* (June 12, 2001) (citing *Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 338, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990))*.

The Reeses make no attempt to tie the alleged wrongdoing of Lowe, Caffarella and P&P to any market-wide anticompetitive impact. Notably, they don't even attempt to define the relevant product market and the relevant geographic market. Count IV merely restates the Defendants' alleged improper conduct of the auction under the guise of an antitrust claim without any allegation of the specific ***antitrust law*** elements that create **[**49]** such a claim. As such, I conclude the claim is implausible and subject to dismissal.[20]

[*298] e. Counts VIII — Breach of Fiduciary Duty

Lowe argues that Count VIII's claim for breach of fiduciary duty — in which the Reeses claim that "the Pook Defendants — including Caffarella" had a fiduciary relationship to them, is subject to dismissal under the "gist of the action doctrine" and because it fails to state claims upon which relief may be granted.

I note, preliminarily, that Count VIII by its own terms does not name Lowe as one who would be liable. There is no allegation that he was in a fiduciary relationship with the Reeses. Further, in their omnibus Response, **[**51]** the Reeses do not raise any argument that Lowe is liable under Count VIII. (See ECF 31 at 66-70.) Accordingly, I the claim is dismissed to the extent that it might be construed as a claim against Lowe.

Caffarella argues the claim is implausible because any fiduciary relationship existed only between the Reeses and P&P, the entity with whom they contracted to conduct the sale. He argues there have been no facts alleged to suggest that he owed any such duty, that he had any form of contractual relationship with them, or that they had placed any trust or confidence in him, such that a fiduciary relationship could be deemed to exist. Indeed, he notes, Plaintiffs have alleged they told P&P they did not want Caffarella involved in the sale. (See AC ¶¶ 54-55.)

HN30[↑] To allege a breach of fiduciary duty, Plaintiffs must assert that a fiduciary or confidential relationship existed between themselves and Defendants. *Baker v. Family Credit Counseling Corp., 440 F. Supp. 2d 392, 414 (E.D. Pa. 2006)* (citing *Harold v. McGann, 406 F. Supp. 2d 562, 571 (E.D. Pa. 2005)*. "Although no precise formula has been devised to ascertain the existence of a confidential relationship, it has been said that such a relationship exists whenever one occupies toward another such a position of advisor or counselor as reasonably to inspire confidence that he will **[**52]** act in good faith for the other's interest." Id. (quoting *Silver v. Silver, 421 Pa. 533, 219 A.2d 659, 662 (Pa. 1966)*; see also *Basile v. H & R Block, Inc., 2001 PA Super 136, 777 A.2d 95, 101-02 (Pa.*

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[20] Although Plaintiffs quote *Section 2(c) of the Robinson-Patman Act* in the AC, neither side has addressed Count IV in terms of this statute. It provides:

> ***HN28***[↑] (c) It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or on behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

15 U.S.C. § 13(c). ***HN29***[↑] This provision "was designed to eliminate the competitive advantage large buyers and sellers attained over their smaller competitors by virtue of their economic clout and bargaining power." *Stephen Jay Photography, Ltd. v. Olan Mills, Inc., 903 F.2d 988, 991 n. 5 (4th Cir. 1990)*. Section 2(c) "encompasses cases of commercial bribery tending to undermine the fiduciary relationship between a buyer and its **[**50]** agent, representative, or other intermediary in a transaction involving the sale or purchase of goods." *Harris v. Duty Free Shoppers Ltd. P'ship, 940 F.2d 1272, 1274 (9th Cir. 1991)* (citation omitted). For a finding of commercial bribery, plaintiff "must show that the illegal payments in question crossed the line from buyer to seller or vice-versa." *Envtl. Tectonics v. W.S. Kirkpatrick, Inc., 847 F.2d 1052, 1066 (3d Cir. 1988)*, aff'd, *493 U.S. 400, 110 S. Ct. 701, 107 L. Ed. 2d 816 (1990)*; see also *Ellwood City v. Pennsylvania. Power Co., 570 F. Supp. 553, 562 (W.D. PA. 1983)* (noting "intrastate sales are subject to the Robinson—Patman Act as long as the sales remain in the flow of interstate commerce"). The AC also cites and quotes *15 U.S.C. § 13a*, prohibiting price discrimination.

Because there is no allegation of commercial bribery or price discrimination, I find these aspects of Count IV are also subject to dismissal.

Super. Ct. 2001). To allege a breach of that duty, Plaintiffs must allege (1) that the Defendants negligently or intentionally failed to act in good faith and solely for the benefit of Plaintiffs in all matters for which they were employed; (2) that Plaintiffs suffered injury; and (3) the Defendants' failure to act solely for the Plaintiffs' benefit was a real factor bringing about Plaintiffs' injuries. Id. at 414-415 (citing McDermott v. Party City Corp., 11 F. Supp. 2d 612, 626 n.18 (E.D. Pa. 1998). I find that the Reeses have failed to allege the plausible existence of a fiduciary relationship.

In their Response, the Reeses discuss at length the terms of their agreement with P&P and how they placed their trust in P&P, in an attempt to establish that the company exercised absolute control over the auction. (ECF 31 at 66-70.) Notably absent from that discussion, however, is any mention of how that agreement, to which Caffarella was not a party, created a fiduciary duty between themselves and Caffarella. They cannot plausibly assert that they placed trust in Caffarella when they allege and argue that P&P had absolute control over the auction and that **it** violated that trust by utilizing Caffarella's **[*299]** services against their **[**53]** wishes. Accordingly, Count VIII is dismissed against both Defendants.

e. Count IX — Negligence

Count IX's negligence claim, as noted earlier, appears to assert that all defendants are liable. Lowe argues that it is barred by the gist of the action doctrine because the negligence allegedly arises out of duties imposed by the contract the Reeses signed with P&P. I find this argument is meritless and the negligence claim survives.

HN31[] The gist of the action doctrine applies to tort claims: "(1) arising solely from a contract between the parties; (2) where the duties allegedly breached were created and grounded in the contract itself; (3) where the liability stems from a contract; or (4) where the tort claim essentially duplicates a breach of contract claim or the success of which is wholly dependent on the terms of the contract." Hults v. Allstate Septic Sys., L.L.P., Civ. A. No. 06-0541, 2007 U.S. Dist. LEXIS 56728, 2007 WL 2253509, at *10 (M.D. Pa. Aug. 3, 2007) (citing Hart v. Arnold, 2005 PA Super 328, 884 A.2d 316, 340 (Pa. Super. Ct. 2005)). The principle underlying the doctrine is that a tort action derives from "the breach of duties imposed as a matter of social policy," whereas a breach of contract action stems from "the breach of duties imposed by mutual consensus." Redevelopment Auth. of Cambria Cnty. v. Int'l Ins. Co., 454 Pa. Super. 374, 685 A.2d 581, 590 (Pa. Super. Ct. 1996).

The obvious flaw in Lowe's gist of the action argument is that there is no allegation that there is "a contract between the **[**54]** parties." Indeed, Lowe himself argues that the Reeses' breach of contract claim must be dismissed because he is not a party to any contract with them. (See ECF 27 at 32.) Lowe was not a signatory to the Reese/P&P contract. There is no assertion that his liability to the Reeses stems from a contract or that the breach of duty underlying the negligence claim against him duplicates duties owed by a contract. None of the cases he cites involves an application of the doctrine where the parties were not bound by a contract. See Hart, 884 A.2d at 316 (contract for sale of land); Bash v. Bell Tel. Co., 411 Pa. Super. 347, 601 A.2d 825, 830 (Pa. Super. Ct. 1992) (contract for yellow pages ad); eToll, Inc. v. Elias/Savion Adver., Inc., 2002 PA Super 347, 811 A.2d 10 (Pa. Super. Ct. 2002) (contract to market and advertise product); The Brickman Grp., Ltd. v. CGU Ins. Co., 2004 PA Super 487, 865 A.2d 918 (Pa. Super. Ct. 2004) (insurance contract).

The duty allegedly breached arises not from P&P's agreement to conduct the auction, but from Lowe's alleged conduct in improperly manipulating the content of the auction lots, dividing multi-part toys into separate lots to discourage interest by others bidders and thereby obtain the merchandize more cheaply for himself. I find that the Reeses have alleged a plausible negligence claim based on these allegations.

Caffarella argues that the claim is implausible because any work he performed for the auction was done in his capacity as **[**55]** a contractor engaged to perform work on behalf of P&P. Thus, he contends, he did not owe an independent duty of care to the Reeses. He cites no authority for his implied proposition that an employee/contractor/agent can never as a matter of law be negligent where the injured party has also sued his principal. Nor could he.

HN32[] Plaintiffs in a negligence action are allowed to recover from both a principal and his agent under Pennsylvania law. See, e.g., *Milton S. Hershey Med. Ctr. of Pa. State Univ. v. Commonwealth Med. Prof'l Liab. Catastrophe Loss Fund, 573 Pa. 74, 821 A.2d 1205, 1212* ***[*300]*** *(Pa. 2003)* (providing that a plaintiff may seek relief in tort from both an agent and his principal under a theory of vicarious liability) (citing *Mamalis v. Atlas Van Lines, Inc., 522 Pa. 214, 560 A.2d 1380, 1383 (Pa. 1989))*. ***HN33***[] Under Pennsylvania law, employees are liable for their own torts, even if they were acting within the scope of their employment when they engaged in the tortious conduct in question. See *Pilot Air Freight Corp. v. Sandair, Inc., 118 F. Supp. 2d 557, 564 (E.D. Pa. 2000)*; *Cosmas v. Bloomingdales Bros., Inc., 442 Pa. Super. 476, 660 A.2d 83, 88-89 (Pa. Super. Ct. 1995)* (observing ***HN34***[] "[a]n agent who does an act otherwise a tort is not relieved from liability by the fact that he acted at the command of the principal or on account of the principal" (citation omitted)). ***HN35***[] Pennsylvania law recognizes the participation theory, under which a corporate officer, employee, or other agent "who takes part in the commission of a tort by the corporation is personally liable therefor." *Wicks v. Milzoco Builders, Inc., 503 Pa. 614, 470 A.2d 86, 90 (Pa. 1983)* (citation omitted); **[**56]** see also *Sannuti v. Starwood Hotels & Resorts Worldwide, Inc., Civ. A. No. 14-587, 2014 U.S. Dist. LEXIS 52916, 2014 WL 1515650, at *2 (E.D. Pa. Apr. 16, 2014)*. To be liable under this theory, the corporate agent must have "participate[d] in the wrongful acts," a requirement the Pennsylvania courts have interpreted to permit liability for an agent's misfeasance, but not for "mere nonfeasance." *Wicks, 470 A.2d at 90*. Misfeasance consists of "the doing of something which ought not to be done, something which a reasonable man would not do, or doing it in such a manner as a man of reasonable and ordinary prudence would not do it." *Sannuti, 2014 U.S. Dist. LEXIS 52916, 2014 WL 1515650, at *2* (quoting *Brindley v. Woodland Vill. Rest., Inc., 438 Pa. Super. 385, 652 A.2d 865, 868-70 (Pa. Super. Ct. 1995))*.

That is exactly what the Reeses have alleged. They plausibly contend that Caffarella's misfeasance in manipulating the auction lots constituted negligence. I find that the fact that he is alleged to have been a consultant for P&P is irrelevant to whether he owed the Reeses a duty of care not to act improperly.

f. Count X — Breach of Contract

As stated above, neither Lowe nor Caffarella are parties to any contract with the Reeses. They seek to dismiss Count X for that reason. I agree. Neither Defendant is specifically named in Count X, they are not listed as parties to the only contract at issue, and the Reeses do no argue that there is any contract in existence between these Defendants and themselves.

g. Count XI — Unjust Enrichment **[**57]**

The Reeses allege that ". . . Caffarella, and Lowe jointly benefited, and continue to benefit, from exploitation Plaintiffs [sic]. . . . Plaintiffs have conferred upon Defendants economic opportunity and actual economic benefit, in the nature of profits resulting from unlawful auction practices and other conduct described above, to the economic detriment of Plaintiffs." (AC ¶¶ 239-240.) They assert it would be inequitable to permit Defendants to retain that profit, and seek an order of disgorgement. (*Id. ¶¶ 241-242*.) Lowe and Caffarella argue that the doctrine of unjust enrichment has no application to this dispute because the Reeses did not undertake any act or intentionally confer any benefit upon them. (ECF 27 at 33-34; ECF 30 at unnumbered page 7.) I find that the Reeses have stated a plausible unjust enrichment claim against Lowe and Caffarella.

As Judge O'Neill wrote:

> ***HN36***[] a claim of unjust enrichment must allege the following elements: (1) plaintiff conferred a benefit on the defendant; (2) the defendant appreciated the benefit; and **[*301]** (3) acceptance and retention by the defendant of the benefits, under the circumstances, would make it inequitable for the defendant to retain the benefit **[**58]** without paying for the value of the benefit. *Com. ex. rel. Pappert v. TAP Pharm. Prods., Inc., 885 A.2d 1127, 1137 (Pa. Commw. 2005)*. See also, *Torchia v. Torchia, 346 Pa. Super. 229, 499 A.2d 581, 582 (1985)* noting that ***HN37***[] "to sustain a claim of unjust enrichment, a claimant must show that the party against whom recovery is sought either wrongfully secured or passively received a benefit that it would be unconscionable for her to retain." (internal quotation omitted). "The polestar of the unjust enrichment inquiry is whether the defendant has been unjustly enriched; the intent of the parties is irrelevant." *Limbach v. City of*

> Phila., 905 A.2d 567, 577 (Pa. Commw. 2006). "In order to recover, there must be *both* (1) an enrichment, and (2) an injustice resulting if recovery for the enrichment is denied." Samuels v. Hendricks, 300 Pa. Super. 11, 445 A.2d 1273, 1275 (1982) (emphasis in original), quoting Meehan v. Cheltenham Twp., 410 Pa. 446, 189 A.2d 593, 595 (1963).

Global Ground Support, LLC v. Glazer Enters., Inc., 581 F. Supp. 2d 669, 675-76 (E.D. Pa. 2008). The Reeses have alleged both an enrichment and an injustice. Lowe and Caffarella allegedly enriched themselves — i.e., received a benefit — by manipulating the auction lots to discourage bidding and pay artificially low prices on toys they later resold for a profit. The AC plausibly alleges that they appreciated the benefit and that their retention of the benefit, under the circumstances, would be inequitable. Accordingly, Count XI survives as to Lowe and Caffarella.

VII. CONCLUSION

In conclusion, the claims against P&P and the individual Pook Defendants are subject **[**59]** to dismissal in their entirety. The MAD Defendants' Motion is also granted in its entirety. Lowe's Motion to dismiss is granted as to Counts II (Lanham Act), III (unfair competition), IV (antitrust claims), V (commercial disparagement), VI (false light), VII (injurious falsehood), VIII (breach of fiduciary duty), and X (breach of contract); Caffarella's Motion is granted as to these same counts, save Count VIII's claim of breach of fiduciary duty. Thus, only Lowe and Caffarella remain as defendants. The claims that remain against Lowe are Count I (conspiracy), IX (negligence), and XI (unjust enrichment).[21] The claims that remain **[*302]** against Caffarella are Count I (conspiracy), VIII (breach of fiduciary duty), IX (negligence), and XI (unjust enrichment).

An appropriate Order follows.

[EDITOR'S NOTE: The following court-provided text does not appear at this cite in F. Supp. 3d.]

[*none] **ORDER**

AND NOW, this 27th day of January, 2016, in consideration of the following Motions, all Responses and Replies thereto, it is hereby **ORDERED** as follows:

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[21] Lowe also argues that many provisions of the AC should be struck under Federal Rule of Civil Procedure 12(f) because they constitute immaterial, impertinent and scandalous material. (ECF 27 at 34.) ***HN38***[] Rule 12(f) provides: "[t]he court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). ***HN39***[] "Motions to strike function 'to clean up the pleadings, streamline litigation, and avoid unnecessary forays into immaterial matters.'" Mitchell v. Cmty. Educ. Ctrs., Inc., Civ. A. No. 14-5026, 2015 U.S. Dist. LEXIS 105718, 2015 WL 4770652, at *11 (E.D. Pa. Aug. 11, 2015) (quoting **[**60]** McInerney v. Moyer Lumber & Hardware, Inc., 244 F. Supp. 2d 393, 402 (E.D. Pa. 2002)). ***HN40***[] "'The standard for striking a complaint or a portion of it is strict, and only allegations that are so unrelated to the plaintiffs' claims as to be unworthy of any consideration should be stricken.'" Ford-Greene v. NHS, Inc., 106 F. Supp. 3d 590, 2015 WL 2395409, at *21 (E.D. Pa. 2015) (quoting Steak Umm Co., LLC v. Steak 'Em Up, Inc., Civ. A. No. 09-2857, 2009 U.S. Dist. LEXIS 101357, 2009 WL 3540786, at *2 (E.D. Pa. Oct. 29, 2009)). Consequently, "[m]otions to strike are generally disfavored by courts and will be denied unless the allegations 'have no possible relation to the controversy and may cause prejudice to one of the parties, or if the allegations confuse the issues in the case.'" Mitchell, 2015 U.S. Dist. LEXIS 105718, 2015 WL 4770652, at *11 (quoting Natale v. Winthrop Res. Corp., Civ. A. No. 07-4686, 2008 U.S. Dist. LEXIS 54358, 2008 WL 2758238, at *14 (E.D. Pa. July 9, 2008)).

Many of the provisions Lowe seeks to strike use bright purple prose to describe the Defendants' actions. Most of it, however, I find is related to the allegations of the claims that I find can survive. However, the Motion is due to be granted as to the following material: (1) Heading "V. Pooling" and ¶¶ 81-82 (describing an alleged 1987 conviction suffered by Ron Pook ; and (2) Heading "VII. The 'Second Rape' of the Reeses." None of this material is related to the surviving claims and may cause prejudice or confusion.

1. The Motion to **[**61]** Dismiss of Defendants Maine Antique Digest, Kate Pennington, S. Clayton Pennington, and Lita Solis-Cohen (Document #25) is **GRANTED**.

2. The Motion to Dismiss of Defendants Pook & Pook, LLC, Debra Pook, James, Pook, Ron Pook, and Jamie Shearer (Document #26) is **GRANTED**.

3. The Motion to Dismiss of Defendants Jay Lowe and Connie and Jay Lowe Antiques (Document #27) is **GRANTED IN PART AND DENIED IN PART**. The Motion is **GRANTED** as to as to Count II (*Lanham Act*), Count III (unfair competition), Count IV (antitrust claims), Count V (commercial disparagement), Count VI (false light), Count VII (injurious falsehood), Count VIII (breach of fiduciary duty), and Count X (breach of contract) of Plaintiffs' Amended Complaint. The Motion is **DENIED** as to Count I (conspiracy), Count IX (negligence), and Count XI (unjust enrichment).

4. The Motion to Dismiss of Defendant Mike Caffarella (Document #30) is **GRANTED IN PART AND DENIED IN PART**. The Motion is **GRANTED** as to as to Count II (*Lanham Act*), Count III (unfair competition), Count IV (antitrust claims), Count V (commercial disparagement), Count VI (false light), Count VII (injurious falsehood), and Count X (breach of contract) of Plaintiffs' Amended Complaint. **[**62]** The Motion is **DENIED** as to Count I (conspiracy), Count VIII (breach of fiduciary duty), Count IX (negligence), and Count XI (unjust enrichment).

BY THE COURT:

/s/ Lawrence F. Stengel

LAWRENCE F. STENGEL, J.

In re Cathode Ray Tube (CRT) Antitrust Litig.

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

January 28, 2016, Decided; January 28, 2016, Filed

Master File No. 3:07-cv-5944 JST; MDL No. 1917

Reporter

2016 U.S. Dist. LEXIS 24951 *

In re: CATHODE RAY TUBE (CRT) ANTITRUST LITIGATION. This Document Relates to: All Indirect-Purchaser Actions.

Subsequent History: Supplemental opinion at *In re : Cathode Ray Tube (Crt) Antitrust Litig., 2016 U.S. Dist. LEXIS 88664 (N.D. Cal., Feb. 29, 2016)*

Adopted by, in part, Reserved by, in part, Objection overruled by, Settled by *In re: Cathode Ray Tube (CRT) Antitrust Litig., 2016 U.S. Dist. LEXIS 88665 (N.D. Cal., July 7, 2016)*

Later proceeding at *In re Cathode Ray Tube CRT Antitrust Litig., 2020 U.S. Dist. LEXIS 263431, 2020 WL 13303554 (N.D. Cal., Oct. 26, 2020)*

Prior History: *Crago, Inc. v. Chunghwa Picture Tubes, Ltd. (In re Cathode Ray Tube (CRT) Antitrust Litig.), 536 F. Supp. 2d 1364, 2008 U.S. Dist. LEXIS 12204 (J.P.M.L., Feb. 15, 2008)*

Core Terms

settlement, notice, lead counsel, class member, purchasers, objectors, proposed settlement, indirect, damages, firms, lodestar, television, Cooper, settlement fund, billing, antitrust, cases, documents, Products, class action, discovery, depositions, attorney's fees, class representative, nationwide class, recommends, non-repealer, multiplier, terms, approving

Counsel: **[*1]** Mr. Martin Quinn, Special Master, Pro se, San Francisco, CA.

For Mr. Martin Quinn, Special Master: Martin Quinn, JAMS, San Francisco, CA.

For Crago, Inc., on behalf of itself and others similarly situated dba Dash Computers, Inc. a Kansas City corporation, Plaintiff: Bruce Lee Simon, LEAD ATTORNEY, Pearson Simon & Warshaw, LLP, San Francisco, CA; Guido Saveri, LEAD ATTORNEY, Saveri & Saveri, Inc., San Francisco, CA; Ashlei Melissa Vargas, Pearson, Simon & Warshaw LLP, San Francisco, CA; Christopher Wilson, Polsinelli Shughart PC, Kansas City, MO; Clifford H. Pearson, Pearson, Simon & Warshaw LLP, Sherman Oaks, CA; Daniel D. Owen, Shughart Thomson & Kilroy, P.C., Kansas City, MO; Daniel L. Warshaw, Pearson, Simon & Warshaw, LLP, Sherman Oaks, CA; Esther L Klisura, SL Environmental Law Group PC, San Francisco, CA; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica L. Grant, Coblentz Patch Duffy & Bass LLP, San Francisco, CA; Jessica Lynn Meyer, **[*2]** Lindquist & Vennum, Minneapolis, MN; Jonathan Mark Watkins, Pearson Simon Warshaw & Penny LLP, San Francisco, CA; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Patrick John Brady, Polsinelli PC, Kansas City, MO; Shpetim Ademi, Cudahy, WI; Aaron M. Sheanin, Pearson, Simon & Warshaw, LLP, San Francisco, CA; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James P. McCarthy, Lindquist & Vennum.

For Hawel A. Hawel d/b/a City Electronics, a California business, Plaintiff: Betty Lisa Julian, Modesto, CA; Cadio R. Zirpoli, Saveri & Saveri, Inc., San Francisco, CA; Clinton Paul Walker, Damrell, Nelson, Schrimp, Pallios, Pache & Silva, Modesto, CA; Fred A. Silva, Damrell Nelson Schrimp Pallios, Pacher & Silva, Modesto, CA; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Geoffrey Conrad Rushing, Saveri & Saveri Inc., San Francisco, CA; Gianna Christa Gruenwald, Saveri & Saveri, San Francisco, CA; Guido Saveri, Saveri & Saveri, Inc., San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jayne A. Goldstein, **[*3]** Mager & Goldstein LLP, Weston, FL; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Kathy Lee Monday, Damrell, Nelson, Schrimp, Pallios, Pacher & Silva, Modesto, CA; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Richard Alexander Saveri, Saveri & Saveri, Inc., San Francisco, CA; Roger Martin Schrimp, Damrell Nelson Schrimp Pallios Pacher & Silva, Modesto, CA; Shpetim Ademi, Cudahy, WI; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY.

For Michael Juetten, Plaintiff: Craig C. Corbitt, LEAD ATTORNEY, Zelle LLP, San Francisco, CA; Andrus Star Liberty, Andrus Anderson LLP, San Francisco, CA; Christopher Thomas Micheletti, Zelle LLP, San Francisco, CA; Francis Onofrei Scarpulla, Law Offices of Francis O. Scarpulla, San Francisco, CA; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Jennie Lee Anderson, Andrus Anderson LLP, San Francisco, CA; Judith A. Zahid, Zelle LLP, San Francisco, CA; Lori Erin Andrus, Andrus Anderson LLP, San Francisco, CA; Manfred **[*4]** Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Matthew Rutledge Schultz, Diamond McCarthy LLP, San Francisco, CA; Michael Jocobs, Zelle Hofmann Voelbel Mason & Gette LLP, Minneapolis, MN; Patrick Bradford Clayton, Law Offices of Francis O. Scarpulla, San Francisco, CA; Qianwei Fu, Zelle LLP, San Francisco, CA; Richard Michael Hagstrom, Hellmuth & Johnson, Edina, MN; Shpetim Ademi, Cudahy, WI.

For Art's TV & Appliance, Plaintiff: Douglas A. Millen, LEAD ATTORNEY, PRO HAC VICE, Freed Kanner London & Millen LLC, Bannockburn, IL; Steven A. Kanner, LEAD ATTORNEY, Freed Kanner London & Millen LLC, Bannockburn, IL; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; Harry Shulman, Shulman Law, San Francisco, CA; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Shpetim Ademi, Cudahy, WI.

For Orion Home Systems, LLC, Plaintiff: Cadio R. Zirpoli, Saveri & Saveri, Inc., San Francisco, CA; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Geoffrey Conrad Rushing, Saveri & Saveri Inc., **[*5]** San Francisco, CA; Guido Saveri, Saveri & Saveri, Inc., San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Joseph W. Cotchett, Cotchett Pitre & McCarthy LLP, Burlingame, CA; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Neil Swartzberg, Cotchett Pitre & McCarthy, Burlingame, CA; Niki B. Okcu, AT&T Services, Inc. Legal Dept., San Francisco, CA; Randy R. Renick, Hadsell Stormer & Renick LLP, Los Angeles, CA; Richard Alexander Saveri, Saveri & Saveri, Inc., San Francisco, CA; Shpetim Ademi, Cudahy, WI; Terry Gross, Gross Belsky Alonso LLP, San Francisco, CA; Adam C. Belsky, Gross Belsky Alonso LLP; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James P. McCarthy, Lindquist & Vennum; Monique Alonso, Gross & Belsky LLP; Sarah Crowley, Gross Belsky Alonso LLP; Steven Noel Williams, Cotchett Pitre & McCarthy LLP, Burlingame, CA.

For Univisions-Crimson Holding Inc., Plaintiff: Christopher T. Heffelfinger, **[*6]** LEAD ATTORNEY, Berman DeValerio, San Francisco, CA; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Joseph J. Tabacco, Jr., Berman DeValerio, San Francisco, CA; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Manuel Juan Dominguez, Cohen Milstein Sellers & Toll, Palm Beach Gardens, FL; Marc Jeffrey Greenspon, Berman DeValerio, Palm Beach Gardens, FL; Matthew David-Craig Pearson, Berman DeValerio, San Francisco, CA; Shpetim Ademi, Cudahy, WI.

For Carroll Cut-Rate Furniture, on behalf of itself and all others similarly situated, Plaintiff: Ronnie Seidel Spiegel, LEAD ATTORNEY, PRO HAC VICE, Hagens Berman Sobol Shapiro, Seattle, WA; Anthony D. Shapiro, Hagens Berman Sobol Shapiro LLP, Seattle, WA; Douglas A. Millen, Freed Kanner London & Millen LLC, Bannockburn, IL; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Jeff D Friedman, Hagens Berman Sobol Shapiro LLP, Berkeley, CA; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Shpetim Ademi, **[*7]** Cudahy, WI; Steven A. Kanner, Freed Kanner London & Millen LLC, Bannockburn, IL; William Henry London, Freed Kanner London & Millen LLC, Bannockburn, IL.

For Monikraft, Inc, individually and on behalf of a class of all those similarly situated, Plaintiff: Christopher L. Lebsock, LEAD ATTORNEY, Hausfeld LLP, San Francisco, CA; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Michael Paul Lehmann, Hausfeld LLP, San Francisco, CA; Shpetim Ademi, Cudahy, WI.

For Nathan Muchnick, Inc., Plaintiff: Brendan Patrick Glackin, Lieff, Cabraser, Heimann & Bernstein LLP, San Francisco, CA; Candice J. Enders, Berger & Montague, P.C., Philadelphia, PA; Eric B. Fastiff, Lieff Cabraser Heimann & Bernstein LLP, San Francisco, CA; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; H. Laddie Montague, Jr., Berger & Montague, P.C., Philadelphia, PA; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Joseph R. Saveri, Joseph **[*8]** Saveri Law Firm, Inc., San Francisco, CA; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Marc Howard Edelson, Edelson & Associates, LLC, Doylestown, PA; Michele Chickerell Jackson, Lieff Cabraser Heimann & Bernstein, LLP, San Francisco, CA; Richard Martin Heimann, Lieff Cabraser Heimann & Bernstein, San Francisco, CA; Ruthanne Gordon, Berger & Montague PC, Philadelphia, PA; Shpetim Ademi, Cudahy, WI.

For Barbara Caldwell, on behalf of herself and all others similarly situated, Plaintiff: Christopher L. Lebsock, Hausfeld LLP, San Francisco, CA; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; Henry A. Cirillo, Smith Dollar PC, Santa Rosa, CA; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Jon T. King, Hagens Berman Sobol Shapiro LLP, Berkeley, CA; Kathleen Styles Rogers, The Kralowec Law Group, San Francisco, CA; Lori A. Fanning, Miller Law LLC, Chicago, IL; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Mario Nunzio Alioto, Trump Alioto Trump & Prescott LLP, San Francisco, CA; Marvin A. Miller, Miller Law LLC, Chicago, IL; Matthew **[*9]** E. Van Tine, Miller Law LLC, Chicago, IL; Michael S. Christian, Zelle LLP, San Francisco, CA; Shpetim Ademi, Cudahy, WI; Thomas Patrick Dove, The Furth Firm LLP, San Francisco, CA; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY.

For Jeffrey Figone, a California resident, on behalf of himself and all others similarly situated, Plaintiff: Brian Joseph Barry, Law Offices of Brian Barry, Los Angeles, CA; Dennis Stewart, Hulett Harper Stewart LLP, San Diego, CA; Donald L. Perelman, Fine Kaplan & Black RPC, Philadelphia, PA; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Gerard A Dever, Fine Kaplan and Black, RPC, Philadelphia, PA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Joseph Goldberg, Freedman Boyd Hollander Goldberg Urias & Ward PA, Albuquerque, NM; Joseph Mario Patane, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Josh Ewing, Freedman Boyd Hollander Goldberg Urias & Ward PA, Albuquerque, NM; Julie A. Kearns, Hulett Harper Stewart LLP, San Diego, CA; Lauren Clare Capurro, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, **[*10]** & Balint, P.C., San Diego, CA; Mario N. Alioto, Trump Alioto Trump & Prescott, LLP, San Francisco, CA; Mario Nunzio Alioto, Trump Alioto Trump & Prescott LLP, San Francisco, CA; Matthew Duncan, Fine, Kaplan and Black, RPC, Philadelphia, PA; Shpetim Ademi, Cudahy, WI; Veronica Besmer, Besmer Law Firm, Los Angeles, CA; Vincent J. Ward, Freedman Boyd Hollander Goldberg Urias & Ward PA, Albuquerque, NM.

For Chad Klebs, a Minnesota resident, on behalf of themselves and all others similarly situated, Plaintiff: Craig C. Corbitt, LEAD ATTORNEY, Zelle LLP, San Francisco, CA; Andrus Star Liberty, Andrus Anderson LLP, San Francisco, CA; Christopher Thomas Micheletti, Zelle LLP, San Francisco, CA; Francis Onofrei Scarpulla, Law Offices of Francis O. Scarpulla, San Francisco, CA; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San

Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Jennie Lee Anderson, Andrus Anderson LLP, San Francisco, CA; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Judith A. Zahid, **[*11]** Zelle LLP, San Francisco, CA; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Lori Erin Andrus, Andrus Anderson LLP, San Francisco, CA; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Mario Nunzio Alioto, Trump Alioto Trump & Prescott LLP, San Francisco, CA; Matthew Rutledge Schultz, Diamond McCarthy LLP, San Francisco, CA; Michael Jacobs, Zelle Hofmann Voelbel Mason & Gette LLP, Minneapolis, MN; Patrick Bradford Clayton, Law Offices of Francis O. Scarpulla, San Francisco, CA; Qianwei Fu, Zelle LLP, San Francisco, CA; Richard Michael Hagstrom, Hellmuth & Johnson, Edina, MN; Shpetim Ademi, Cudahy, WI; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James P. McCarthy, Lindquist & Vennum.

For Central New York Univision Video Systems, Inc., Plaintiff: Christopher T. Heffelfinger, Berman DeValerio, San Francisco, CA; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Joseph J. Tabacco, Jr., Berman DeValerio, San Francisco, CA; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; **[*12]** Manuel Juan Dominguez, Cohen Milstein Sellers & Toll, Palm Beach Gardens, FL; Marc Jeffrey Greenspon, Berman DeValerio, Palm Beach Gardens, FL; Matthew David-Craig Pearson, Berman DeValerio Pease Tabacco et al, San Francisco, CA; Shpetim Ademi, Cudahy, WI.

For Crimson Tech, Inc., Plaintiff: Christopher T. Heffelfinger, Berman DeValerio, San Francisco, CA; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Joseph J. Tabacco, Jr., Berman DeValerio, San Francisco, CA; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Manuel Juan Dominguez, Cohen Milstein Sellers & Toll, Palm Beach Gardens, FL; Marc Jeffrey Greenspon, Berman DeValerio, Palm Beach Gardens, FL; Matthew David-Craig Pearson, Berman DeValerio Pease Tabacco et al, San Francisco, CA; Shpetim Ademi, Cudahy, WI.

For The Stroud Group, Inc., Plaintiff: Eric B. Fastiff, LEAD ATTORNEY, Lieff Cabraser Heimann & Bernstein LLP, San Francisco, CA; Brendan Patrick Glackin, Lieff, Cabraser, Heimann & Bernstein LLP, San Francisco, CA; Daniel Bruce Allanoff, Meredith Cohen Greenfogel **[*13]** & Skirnick, P.C., Philadelphia, PA; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Joel Cary Meredith, Meredith & Associates, Philadelphia, PA; Joseph R. Saveri, Joseph Saveri Law Firm, Inc., San Francisco, CA; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Martin E. Grossman, Law Offices of Martin E. Grossman, Villanova, PA; Michele Chickerell Jackson, Lieff Cabraser Heimann & Bernstein, LLP, San Francisco, CA; Richard Martin Heimann, Lieff Cabraser Heimann & Bernstein, San Francisco, CA; Shpetim Ademi, Cudahy, WI; Steven J. Greenfogel, Lite DePalma Greenberg, LLC, Philadelphia, PA.

For Paula Call, dba Poway-Rancho Beranrdo TV a California business, Plaintiff: Cadio R. Zirpoli, Saveri & Saveri, Inc., San Francisco, CA; Christopher D. Jennings, Emerson Poynter LLP, Little Rock, AR; Corey D. McGaha, Crowder McGaha LLP, Little Rock, AR; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guido Saveri, Saveri & Saveri, Inc., San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; James M. Lockhart, **[*14]** Lindquist & Vennum, P.L.L.P.; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; John G. Emerson, Emerson Scott LLP, Houston, TX; John G. Emerson, PRO HAC VICE, Emerson Scott LLP, Houston, TX; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Lawrence D. McCabe, Murray Frank & Sailer LLP, New York, NY; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Richard Alexander Saveri, Saveri & Saveri, Inc., San Francisco, CA; Scott E. Poynter, Steel, Wright & Collier, PLLC, Little Rock, AR; Shpetim Ademi, Cudahy, WI; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James P. McCarthy, Lindquist & Vennum.

For Mark Pierce, Plaintiff: Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; Henry A. Cirillo, Smith Dollar PC, Santa Rosa, CA; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Jonathan Mark Watkins, Pearson Simon Warshaw & Penny LLP, San

Francisco, CA; Joseph M. Alioto, Sr., Alioto Law Firm, San Francisco, CA; Lori A. Fanning, Miller Law **[*15]** LLC, Chicago, IL; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Matthew E. Van Tine, Miller Law LLC, Chicago, IL; Michael S. Christian, Zelle LLP, San Francisco, CA; Shpetim Ademi, Cudahy, WI; Thomas Patrick Dove, The Furth Firm LLP, San Francisco, CA.

For Princeton Display Technologies, Inc., on behalf of itself and all others similarly situated, a New Jersey corporation, Plaintiff: Bryan L. Clobes, LEAD ATTORNEY, Cafferty Clobes Meriwether & Sprengel LLP, Philadelphia, PA; Lee Albert, LEAD ATTORNEY, Glancy Prongay & Murray LLP, New York, NY; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; James E. Cecchi, Carella Byrne Cecchi Olstein Brody & Agnello, P.C., Roseland, NJ; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Jayne Arnold Goldstein, PRO HAC VICE, Pomerantz LLP, Weston, FL; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Lindsey H. Taylor, Carella Byrne, Roseland, NJ; Manfred Patrick **[*16]** Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Marisa C. Livesay, San Diego, CA; Shpetim Ademi, Cudahy, WI; Susan Gilah Kupfer, Glancy Prongay & Murray LLP, Berkeley, CA; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; Betsy Carol Manifold, Wolf Haldenstein Adler Freeman & Herz; Francis M. Gregorek, Wolf Haldenstein Adler Freeman & Herz LLP; James P. McCarthy, Lindquist & Vennum; Mary Jane Edelstein Fait, Chicago, IL; Rachele R. Rickert, Wolf Haldenstein Adler Freeman & Herz LLP.

For Greg A Glanz, on behalf of himself and all others similarly situated, Plaintiff: John Gressette Felder, Jr., LEAD ATTORNEY, McGowan Hood Felder and Johnson, Columbia, SC; Steven Randall Hood, LEAD ATTORNEY, Rock Hill, SC; William Angus McKinnon, LEAD ATTORNEY, McGowan, Hood & Felder, Rock Hill, SC; Derek G. Howard, Howard Law Firm, Mill Valley, CA; Fernando Xaxier Starkes, Starkes Law Firm, Columbia, SC; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Shpetim **[*17]** Ademi, Cudahy, WI.

For Carmen Gonzalez, a California resident, on behalf of herself and others similarly situated, Plaintiff: Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; James McManis, McManis Faulkner, San Jose, CA; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Mario Nunzio Alioto, Trump Alioto Trump & Prescott LLP, San Francisco, CA; Marwa Elzankaly, McManis, Faulkner, San Jose, CA; Shpetim Ademi, Cudahy, WI; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James P. McCarthy, Lindquist & Vennum.

For William E. Stack, a Tennessee resident, on behalf of himself and all others similarly situated, Plaintiff: Craig C. Corbitt, LEAD ATTORNEY, Zelle LLP, San Francisco, CA; Terry Rose Saunders, LEAD ATTORNEY, The Saunders Law Firm, Chicago, IL; Thomas Arthur Doyle, LEAD ATTORNEY, Thomas **[*18]** A. Doyle, Ltd., La Grange, IL; Christopher Lovell, Lovell Stewart Halebian LLP, New York, NY; Francis Onofrei Scarpulla, Law Offices of Francis O. Scarpulla, San Francisco, CA; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; Imtiaz A. Siddiqui, Cotchett Pitre & McCarthy, New York, NY; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Judith A. Zahid, Zelle LLP, San Francisco, CA; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Matthew Rutledge Schultz, Diamond McCarthy LLP, San Francisco, CA; Patrick Bradford Clayton, Law Offices of Francis O. Scarpulla, San Francisco, CA; Shpetim Ademi, Cudahy, WI; Traviss Levine Galloway, Zelle Hofmann Voelbel Mason & Gette, San Francisco, CA.

For Margo Stack, a Tennessee resident, on behalf of herself and all others similarly situated, Plaintiff: Craig C. Corbitt, LEAD ATTORNEY, Zelle LLP, San Francisco, CA; Terry Rose Saunders, LEAD ATTORNEY, The Saunders Law Firm, Chicago, IL; Thomas Arthur Doyle, LEAD ATTORNEY, Thomas A. Doyle, Ltd., La Grange, IL; Christopher Lovell, Lovell Stewart Halebian LLP, New York, NY; Francis Onofrei Scarpulla, **[*19]** Law Offices of Francis O. Scarpulla, San Francisco, CA; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; Imtiaz A. Siddiqui, Cotchett Pitre & McCarthy, New York, NY; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Judith A. Zahid, Zelle LLP, San Francisco, CA; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Matthew Rutledge Schultz, Diamond McCarthy LLP, San Francisco, CA; Patrick Bradford Clayton, Law Offices of Francis O. Scarpulla, San Francisco, CA; Shpetim Ademi, Cudahy, WI; Traviss Levine Galloway, Zelle Hofmann Voelbel Mason & Gette, San Francisco, CA.

For Donna Ellingson, Plaintiff: Alan Roth Plutzik, Bramson Plutzik Mahler & Birkhaeuser, LLP, Walnut Creek, CA; Christopher Le, Straus & Boies, LLP, Fairfax, VA; Daniel Edward Birkhaeuser, Bramson, Plutzik, Mahler & Birkhaeuser, Walnut Creek, CA; David Boies, III, Straus & Boies, LLP, Fairfax, VA; Eric James Pickar, Bangs, McCullen, Butler, Foye & Simmons, L.L.P., Rapid City, SD; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; Jayne A. Goldstein, **[*20]** Mager & Goldstein LLP, Weston, FL; Jennifer Susan Rosenberg, Bramson, Plutzik, Mahler & Birkhaeuser, Walnut Creek, CA; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Mario Nunzio Alioto, Trump Alioto Trump & Prescott LLP, San Francisco, CA; Shpetim Ademi, Cudahy, WI; Timothy D. Battin, Straus & Boies LLP, Fairfax, VA.

For Samuel J. Nasto, a Nevada resident, Plaintiff: Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Joel Flom, Jeffries Olson & Flom PA, Fargo, ND; Joseph Mario Patane, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Kenneth Leo Valinoti, Valinoti & Dito LLP, San Francisco, CA; Lauren Clare Capurro, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Lawrence Genaro Papale, Law Offices of Lawrence G. Papale, St. Helena, CA; M. Eric Frankovitch, Frankovitch Anetakis Colantonio **[*21]** & Simon, Weirton, WV; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Mario Nunzio Alioto, Trump Alioto Trump & Prescott LLP, San Francisco, CA; Michael G. Simon, Frankovitch Anetakis Colantonio & Simon - Weirton, Weirton, WV; Robert B. Gerard, Gerard Selden & Osuch, San Diego, CA; Seymour J. Mansfield, Foley & Mansfield, PLLP, Minneapolis, MN; Sherman Kassof, Law Offices of Sherman Kassof, Lafayette, CA; Shpetim Ademi, Cudahy, WI; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James P. McCarthy, Lindquist & Vennum.

For Patrick Piper, Plaintiff: Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Joel Flom, Jeffries Olson & Flom PA, Fargo, ND; Joseph Mario Patane, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Kenneth Leo Valinoti, Valinoti & Dito LLP, San Francisco, CA; Lauren Clare Capurro, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Lawrence Genaro Papale, Law Offices of Lawrence G. Papale, St. Helena, CA; M. Eric Frankovitch, Frankovitch Anetakis Colantonio & Simon, Weirton, WV; Manfred **[*22]** Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Mario Nunzio Alioto, Trump Alioto Trump & Prescott LLP, San Francisco, CA; Michael G. Simon, Frankovitch Anetakis Colantonio & Simon - Weirton, Weirton, WV; Robert B. Gerard, Gerard Selden & Osuch, San Diego, CA; Seymour J. Mansfield, Foley & Mansfield, PLLP, Minneapolis, MN; Sherman Kassof, Law Offices of Sherman Kassof, Lafayette, CA; Shpetim Ademi, Cudahy, WI.

For Craig Stephenson, a New Mexico resident, Plaintiff: Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Joel Flom, Jeffries Olson & Flom PA, Fargo, ND; Joseph Mario Patane, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Kenneth Leo Valinoti, Valinoti & Dito LLP, San Francisco, CA; Lauren Clare Capurro, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Lawrence Genaro Papale, Law Offices **[*23]** of Lawrence G. Papale, St. Helena, CA; M. Eric Frankovitch, Frankovitch Anetakis Colantonio & Simon, Weirton, WV; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Mario Nunzio Alioto, Trump Alioto Trump & Prescott LLP, San Francisco, CA; Michael G. Simon, Frankovitch Anetakis Colantonio & Simon - Weirton, Weirton, WV; Robert B. Gerard, Gerard Selden & Osuch, San Diego, CA; Seymour J. Mansfield, Foley & Mansfield, PLLP, Minneapolis, MN; Sherman Kassof, Law Offices of Sherman Kassof, Lafayette, CA; Shpetim Ademi, Cudahy, WI; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James P. McCarthy, Lindquist & Vennum.

For David G. Norby, a Minnesota resident, Plaintiff: Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Joel Flom, Jeffries Olson & Flom PA, Fargo, ND; Joseph Mario Patane, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Kelly Laudon, **[*24]** Lindquist Vennum, PLLP, Minneapolis, MN; Kenneth Leo Valinoti, Valinoti & Dito LLP, San Francisco, CA; Lauren Clare Capurro, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Lawrence Genaro Papale, Law Offices of Lawrence G. Papale, St. Helena, CA; M. Eric Frankovitch, Frankovitch Anetakis Colantonio & Simon, Weirton, WV; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Mario Nunzio Alioto, Trump Alioto Trump & Prescott LLP, San Francisco, CA; Michael G. Simon, Frankovitch Anetakis Colantonio & Simon - Weirton, Weirton, WV; Robert B. Gerard, Gerard Selden & Osuch, San Diego, CA; Seymour J. Mansfield, Foley & Mansfield, PLLP, Minneapolis, MN; Sherman Kassof, Law Offices of Sherman Kassof, Lafayette, CA; Shpetim Ademi, Cudahy, WI; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James P. McCarthy, Lindquist & Vennum.

For John Larch, a West Virginia resident, Plaintiff: Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Jennifer Milici, Boies Schiller and Flexner **[*25]** LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Joel Flom, Jeffries Olson & Flom PA, Fargo, ND; Joseph Mario Patane, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Kenneth Leo Valinoti, Valinoti & Dito LLP, San Francisco, CA; Lauren Clare Capurro, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Lawrence Genaro Papale, Law Offices of Lawrence G. Papale, St. Helena, CA; M. Eric Frankovitch, Frankovitch Anetakis Colantonio & Simon, Weirton, WV; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Mario Nunzio Alioto, Trump Alioto Trump & Prescott LLP, San Francisco, CA; Michael G. Simon, Frankovitch Anetakis Colantonio & Simon - Weirton, Weirton, WV; Robert B. Gerard, Gerard Selden & Osuch, San Diego, CA; Seymour J. Mansfield, Foley & Mansfield, PLLP, Minneapolis, MN; Sherman Kassof, Law Offices of Sherman Kassof, Lafayette, CA; Shpetim Ademi, Cudahy, WI; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James P. McCarthy, Lindquist & Vennum.

For Constance Hare, Plaintiff: Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, **[*26]** CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Joel Flom, Jeffries Olson & Flom PA, Fargo, ND; Joseph Mario Patane, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Kenneth Leo Valinoti, Valinoti & Dito LLP, San Francisco, CA; Lauren Clare Capurro, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Lawrence Genaro Papale, Law Offices of Lawrence G. Papale, St. Helena, CA; M. Eric Frankovitch, Frankovitch Anetakis Colantonio & Simon, Weirton, WV; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Mario Nunzio Alioto, Trump Alioto Trump & Prescott LLP, San Francisco, CA; Michael G. Simon, Frankovitch Anetakis Colantonio & Simon - Weirton, Weirton, WV; Robert B. Gerard, Gerard Selden & Osuch, San Diego, CA; Seymour J. Mansfield, Foley & Mansfield, PLLP, Minneapolis, MN; Sherman Kassof, Law Offices of Sherman Kassof, Lafayette, CA; Shpetim Ademi, Cudahy, WI.

For James Stringwell, Plaintiff: Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Joel Flom, Jeffries **[*27]** Olson & Flom PA, Fargo, ND; Joseph Mario Patane, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Kenneth Leo Valinoti, Valinoti & Dito LLP, San Francisco, CA; Lauren Clare Capurro, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Lawrence Genaro Papale, Law Offices of Lawrence G. Papale, St. Helena, CA; M. Eric Frankovitch, Frankovitch Anetakis Colantonio & Simon, Weirton, WV; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Mario Nunzio Alioto, Trump Alioto Trump & Prescott LLP, San Francisco, CA; Michael G. Simon, Frankovitch Anetakis Colantonio & Simon - Weirton, Weirton, WV; Robert B. Gerard, Gerard Selden & Osuch, San Diego, CA; Seymour J. Mansfield, Foley & Mansfield, PLLP, Minneapolis, MN; Sherman Kassof, Law Offices of Sherman Kassof, Lafayette, CA; Shpetim Ademi, Cudahy, WI.

For Gary Hanson, a North Dakota resident, on behalf of themselves and all others similarly situated, Plaintiff: Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Jennifer Milici, **[*28]** Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Joel Flom, Jeffries Olson & Flom PA, Fargo, ND; Joseph Mario Patane, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Kenneth Leo Valinoti, Valinoti & Dito LLP, San Francisco, CA; Lauren Clare Capurro, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Lawrence Genaro Papale, Law Offices of Lawrence G. Papale, St. Helena, CA; M. Eric Frankovitch, Frankovitch Anetakis Colantonio & Simon, Weirton, WV; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Mario Nunzio Alioto, Trump Alioto Trump & Prescott LLP, San Francisco, CA; Michael G. Simon, Frankovitch Anetakis Colantonio & Simon - Weirton, Weirton, WV; Robert B. Gerard, Gerard Selden & Osuch, San Diego, CA; Seymour J. Mansfield, Foley & Mansfield, PLLP, Minneapolis, MN; Sherman Kassof, Law Offices of Sherman Kassof, Lafayette, CA; Shpetim Ademi, Cudahy, WI; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James P. McCarthy, Lindquist & Vennum.

For Margaret Slagle, a Vermont resident, on behalf of herself and all others **[*29]** similarly situated, Plaintiff: Daniel R. Karon, LEAD ATTORNEY, Karon LLC, Cleveland, OH; Joseph M. Alioto, Sr., LEAD ATTORNEY, Alioto Law Firm, San Francisco, CA; Angelina Alioto-Grace, Alioto Law Firm, San Francisco, Ca; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Joseph Michelangelo Alioto, Jr, Alioto Law Firm, San Francisco, CA; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Mario Nunzio Alioto, Trump Alioto Trump & Prescott LLP, San Francisco, CA; Mary Gilmore Kirkpatrick, Kirkpatrick & Goldborough PLLC, South Burlington, VT; Shpetim Ademi, Cudahy, WI; Theresa Driscoll Moore, Alioto Law Firm, San Francisco, CA; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James P. McCarthy, Lindquist & Vennum.

For Barry Kushner, on behalf of themselves and all others similarly situated, Plaintiff: **[*30]** Joseph M. Alioto, Sr., LEAD ATTORNEY, Alioto Law Firm, San Francisco, CA; Angelina Alioto-Grace, Alioto Law Firm, San Francisco, Ca; Daniel R. Karon, Karon LLC, Cleveland, OH; Daniel Joseph Mulligan, St. James Recovery Services, P.C., San Francisco, CA; Derek G. Howard, Howard Law Firm, Mill Valley, CA; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Jeffrey D. Bores, Chestnut & Cambronne, Minneapolis, MN; Joseph Michelangelo Alioto, Jr, Alioto Law Firm, San Francisco, CA; Karl L. Cambronne, Chestnut & Cambronne, Minneapolis, MN; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Shpetim Ademi, Cudahy, WI; Theresa Driscoll Moore, Alioto Law Firm, San Francisco, CA.

For Jerry Cook, on behalf of himself and all others similarly situated, Plaintiff: Joseph M. Alioto, Sr., LEAD ATTORNEY, Alioto Law Firm, San Francisco, CA; Angelina Alioto-Grace, Alioto Law Firm, San Francisco, Ca; Bruce L. Mulkey, The Mulkey Attorneys Group P.A., Rogers, AR; Charles M. Kester, The Kester Law Firm, Fayetteville, AR; Gary L. Halling, Sheppard Mullin **[*31]** Richter & Hampton LLP, San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Joseph Michelangelo Alioto, Jr, Alioto Law Firm, San Francisco, CA; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Shpetim Ademi, Cudahy, WI; Theresa Driscoll Moore, Alioto Law Firm, San Francisco, CA.

For Brian A. Luscher, a Arizona resident, on behalf of himself and all others similarly situated, Plaintiff: Angelina Alioto-Grace, Alioto Law Firm, San Francisco, Ca; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Joseph Michelangelo Alioto, Jr, Alioto Law Firm, San Francisco, CA; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Mario Nunzio Alioto, Trump Alioto Trump & Prescott LLP, San Francisco, CA; Robert James Pohlman, **[*32]** Ryley Carlock & Applewhite PC, Phoenix, AZ;

Shpetim Ademi, Cudahy, WI; Theresa Driscoll Moore, Alioto Law Firm, San Francisco, CA; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James P. McCarthy, Lindquist & Vennum.

For Scott Friedson, on behalf of himself and all others similarly situated, Plaintiff: Joseph M. Alioto, Sr., LEAD ATTORNEY, Alioto Law Firm, San Francisco, CA; Angelina Alioto-Grace, Alioto Law Firm, San Francisco, Ca; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Joseph Michelangelo Alioto, Jr, Alioto Law Firm, San Francisco, CA; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Robert James Pohlman, Ryley Carlock & Applewhite PC, Phoenix, AZ; Shpetim Ademi, Cudahy, WI; Theresa Driscoll Moore, Alioto Law Firm, San Francisco, CA.

For Wettstein and Sons, Inc, on behalf of itself and all others similarly situated, is a corporation of Wisconsin, doing business as Wettstein's, Plaintiff: Katherine T. Kelly, LEAD ATTORNEY, Heins Mills & Olson PLC, Mpls, MN; Ranae D. Steiner, LEAD ATTORNEY, Heins Mills **[*33]** & Olson PLC, Minneapolis, MN; Samuel D. Heins, LEAD ATTORNEY, Heins Mills & Olson, P.L.C., Minneapolis, MN; Troy J. Hutchinson, LEAD ATTORNEY, Heins Mills & Olson PLC, Mpls, MN; Vincent J. Esades, LEAD ATTORNEY, Heins Mills & Olson, P.L.C., Minneapolis, MN; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guido Saveri, Saveri & Saveri, Inc., San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Joel Cary Meredith, Meredith & Associates, Philadelphia, PA; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Scott W. Carlson, Heins Mills & Olson PLC, Minneapolis, MN; Shpetim Ademi, Cudahy, WI.

For Industrial Computing, Inc., on behalf of Itself and all others similarly situated, Plaintiff: Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Jeffrey Alan Klafter, Klafter & Olsen LLP, White Plains, NY; Joseph M. Barton, Law Offices of Joseph M. Barton, Corte Madera, CA.

For Steven Ganz, a California resident, Plaintiff: Terry Gross, LEAD ATTORNEY, Gross Belsky Alonso LLP, San Francisco, CA; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, **[*34]** San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; John Dmitry Bogdanov, Cooper & Kirkham, P.C., San Francisco, CA; Josef Deen Cooper, Cooper & Kirkham, P.C., San Francisco, CA; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Mario Nunzio Alioto, Trump Alioto Trump & Prescott LLP, San Francisco, CA; Shpetim Ademi, Cudahy, WI; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James P. McCarthy, Lindquist & Vennum; Tracy R. Kirkman, Cooper & Kirkham PC.

For Dennis Patrick, Plaintiff: Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Reginald Von Terrell, The Terrell Law Group, Oakland, CA; Shpetim Ademi, Cudahy, WI.

For Dana Ross, a California **[*35]** resident, Plaintiff: Kathleen Styles Rogers, LEAD ATTORNEY, The Kralowec Law Group, San Francisco, CA; Susan Gilah Kupfer, LEAD ATTORNEY, Glancy Prongay & Murray LLP, Berkeley, CA; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Mario Nunzio Alioto, Trump Alioto Trump & Prescott LLP, San Francisco, CA; Shpetim Ademi, Cudahy, WI; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James P. McCarthy, Lindquist & Vennum.

For Electronic Design Company, Plaintiff: Charles H. Johnson, LEAD ATTORNEY, Charles H Johnson & Associates PA, New Brighton, MN; Eugene A. Spector, LEAD ATTORNEY, Spector Roseman Kodroff & Willis, PC, Philadelphia, PA; Garrett D. Blanchfield, Jr., LEAD ATTORNEY, Reinhardt Wendorf & Blanchfield, St. Paul, MN; Mark Reinhardt, LEAD **[*36]** ATTORNEY, Reinhardt Wendorf & Blanchfield, St. Paul, MN; Neal A Eisenbraun, LEAD ATTORNEY, Neal A Eisenbraun, Chartered, New Brighton, MN; William G. Caldes, LEAD ATTORNEY, Spector, Roseman, Kodroff & Willis, P.C., Philadelphia, PA; Cadio R. Zirpoli, Saveri & Saveri, Inc., San Francisco, CA; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guido Saveri, Saveri & Saveri, Inc., San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Richard Alexander Saveri, Saveri & Saveri, Inc., San Francisco, CA; Shpetim Ademi, Cudahy, WI; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James P. McCarthy, Lindquist & Vennum.

For Brigid Terry, a Wisconsin resident, on behalf of herself and all others similarly situated, Plaintiff: Jean B. Roth, LEAD ATTORNEY, Mansfield Tanick & Cohen, Minneapolis, **[*37]** MN; Joseph Mario Patane, LEAD ATTORNEY, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Kenneth Leo Valinoti, LEAD ATTORNEY, Valinoti & Dito LLP, San Francisco, CA; Lauren Clare Capurro, LEAD ATTORNEY, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Lawrence Genaro Papale, LEAD ATTORNEY, Law Offices of Lawrence G. Papale, St. Helena, CA; Lawrence P. Schaefer, LEAD ATTORNEY, Mansfield Tanick & Cohen, Minneapolis, MN; Mario Nunzio Alioto, LEAD ATTORNEY, Trump Alioto Trump & Prescott LLP, San Francisco, CA; Robert J. Bonsignore, LEAD ATTORNEY, Bonsignore Trial Lawyers, PLLC, Las Vegas, NV; Seymour J. Mansfield, LEAD ATTORNEY, Foley & Mansfield, PLLP, Minneapolis, MN; Sherman Kassof, LEAD ATTORNEY, Law Offices of Sherman Kassof, Lafayette, CA; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Manfred Patrick Muecke, Bonnett, **[*38]** Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Shpetim Ademi, Cudahy, WI; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James P. McCarthy, Lindquist & Vennum.

For Anthony Gianasca, on behalf of himself and all others similarly situated, Plaintiff: Jean B. Roth, LEAD ATTORNEY, Mansfield Tanick & Cohen, Minneapolis, MN; Joseph Mario Patane, LEAD ATTORNEY, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Kenneth Leo Valinoti, LEAD ATTORNEY, Valinoti & Dito LLP, San Francisco, CA; Lauren Clare Capurro, LEAD ATTORNEY, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Lawrence Genaro Papale, LEAD ATTORNEY, Law Offices of Lawrence G. Papale, St. Helena, CA; Lawrence P. Schaefer, LEAD ATTORNEY, Mansfield Tanick & Cohen, Minneapolis, MN; Mario Nunzio Alioto, LEAD ATTORNEY, Trump Alioto Trump & Prescott LLP, San Francisco, CA; Robert J. Bonsignore, LEAD ATTORNEY, Bonsignore Trial Lawyers, PLLC, Las Vegas, NV; Seymour J. Mansfield, LEAD ATTORNEY, Foley & Mansfield, PLLP, Minneapolis, MN; Sherman Kassof, LEAD ATTORNEY, Law Offices of Sherman Kassof, Lafayette, CA; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guri Ademi, Ademi & O'Reilly **[*39]** LLP, Cudahy, WI; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Shpetim Ademi, Cudahy, WI.

For Brighid Flaherty, on behalf of herself and all others similarly situated, Plaintiff: Jean B. Roth, LEAD ATTORNEY, Mansfield Tanick & Cohen, Minneapolis, MN; Joseph Mario Patane, LEAD ATTORNEY, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Kenneth Leo Valinoti, LEAD ATTORNEY, Valinoti & Dito LLP, San Francisco, CA; Lauren Clare Capurro, LEAD ATTORNEY, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Lawrence Genaro Papale, LEAD ATTORNEY, Law Offices of Lawrence G. Papale, St. Helena, CA; Lawrence P. Schaefer, LEAD ATTORNEY, Mansfield Tanick & Cohen, Minneapolis, MN; Mario Nunzio Alioto, LEAD ATTORNEY, Trump Alioto Trump & Prescott LLP, San Francisco, CA; Robert J. Bonsignore, LEAD ATTORNEY, Bonsignore Trial Lawyers, PLLC, Las Vegas, NV; Seymour J. Mansfield, LEAD ATTORNEY, Foley & Mansfield, PLLP, Minneapolis, MN; Sherman Kassof, LEAD ATTORNEY, Law Offices of Sherman Kassof, Lafayette, CA; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guri Ademi, Ademi **[*40]** & O'Reilly LLP, Cudahy, WI; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Shpetim Ademi, Cudahy, WI.

For Bridget Ten Eyck, on behalf of herself and all others similarly situated, Plaintiff: Jean B. Roth, LEAD ATTORNEY, Mansfield Tanick & Cohen, Minneapolis, MN; Joseph Mario Patane, LEAD ATTORNEY, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Kenneth Leo Valinoti, LEAD ATTORNEY, Valinoti & Dito LLP, San Francisco, CA; Lauren Clare Capurro, LEAD ATTORNEY, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Lawrence Genaro Papale, LEAD ATTORNEY, Law Offices of Lawrence G. Papale, St. Helena, CA; Lawrence P. Schaefer, LEAD ATTORNEY, Mansfield Tanick & Cohen, Minneapolis, MN; Mario Nunzio Alioto, LEAD ATTORNEY, Trump Alioto Trump & Prescott LLP, San Francisco, CA; Robert J. Bonsignore, LEAD ATTORNEY, Bonsignore Trial Lawyers, PLLC, Las Vegas, NV; Seymour J. Mansfield, LEAD ATTORNEY, Foley & Mansfield, PLLP, Minneapolis, MN; Sherman Kassof, LEAD ATTORNEY, Law Offices of Sherman Kassof, Lafayette, CA; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guri Ademi, **[*41]** Ademi & O'Reilly LLP, Cudahy, WI; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Shpetim Ademi, Cudahy, WI.

For Southern Office Supply, Inc, on behalf of itself and all others similarly situated, Plaintiff: Gilmur Roderick Murray, LEAD ATTORNEY, Murray & Howard, LLP, San Francisco, CA; Daniel R. Karon, Karon LLC, Cleveland, OH; Donna F Solen, Lexington Law Group, San Francisco, CA; Drew A. Carson, Miller Goler Faeges, Cleveland, OH; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; Issac L. Diel, Sharp McQueen, Overland Park, KS; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Krishna Brian Narine, Meredith Narine, Philadelphia, PA; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Mario Nunzio Alioto, Trump Alioto Trump & Prescott LLP, San Francisco, CA; Shpetim **[*42]** Ademi, Cudahy, WI; Steven J. Miller, Miller Goler Faeges, Cleveland, OH; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James P. McCarthy, Lindquist & Vennum.

For OK TV & Appliances, LLC, on behalf of itself and all others similarly situated, Plaintiff: Elizabeth R. Odette, LEAD ATTORNEY, Lockridge Grindal Nauen P.L.L.P., Minneapolis, MN; Lisa J. Rodriguez, LEAD ATTORNEY, Trujillo Rodriguez & Richards LLP, Haddonfield, NJ; W. Joseph Bruckner, LEAD ATTORNEY, Lockridge Grindal Nauen P.L.L.P, Minneapolis, MN; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Shpetim Ademi, Cudahy, WI.

For Charles Benson, on behalf of himself and all others similarly situated, Plaintiff: Gordon Ball, LEAD ATTORNEY, Law Office Gordon Ball, Knoxville, TN; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, **[*43]** DC; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Robert Gordon Methvin, Jr, McCallum, Methvin & Terrell, P.C., Birmingham, AL; Shpetim Ademi, Cudahy, WI.

For Meijer, Inc., On behalf of themselves and all others similarly situated, Plaintiff: Gregory K Arenson, LEAD ATTORNEY, Kaplan Fox and Kilsheimer LLP, New York, NY; Robert N. Kaplan, LEAD ATTORNEY, Kaplan Kilsheimer & Fox LLP, New York, NY; David Paul Germaine, PRO HAC VICE, Chicago, IL; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Gary Laurence Specks, Kaplan Fox & Kilsheimer LLP, Highland Park, IL; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Joseph Michael Vanek, PRO HAC VICE, Vanek Vickers & Masini PC, Chicago, IL; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Linda P. Nussbaum, PRO HAC VICE, Nussbaum Law Group PC, New York, NY; Linda Phyllis Nussbaum, Nussbaum Law Group, P.C., New York, NY; Manfred Patrick Muecke, Bonnett, Fairbourn, **[*44]** Friedman, & Balint, P.C., San Diego, CA; Shpetim Ademi, Cudahy, WI; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James P. McCarthy, Lindquist & Vennum.

For Meijer Distribution, Inc., on behalf of themselves and all others similarly situated, Plaintiff: Gregory K Arenson, LEAD ATTORNEY, Kaplan Fox and Kilsheimer LLP, New York, NY; Robert N. Kaplan, LEAD ATTORNEY, Kaplan Kilsheimer & Fox LLP, New York, NY; David Paul Germaine, PRO HAC VICE, Chicago, IL; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Gary Laurence Specks, Kaplan Fox & Kilsheimer LLP, Highland Park, IL; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Joseph Michael Vanek, PRO HAC VICE, Vanek Vickers & Masini PC, Chicago, IL; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Linda P. Nussbaum, PRO HAC VICE, Nussbaum LLP, Scarsdale, NY; Linda Phyllis Nussbaum, Nussbaum Law Group, P.C., New York, NY; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, **[*45]** & Balint, P.C., San Diego, CA; Shpetim Ademi, Cudahy, WI; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James P. McCarthy, Lindquist & Vennum.

For Arch Electronics, Inc, Plaintiff: Anthony J. Bolognese, LEAD ATTORNEY, Bolognese & Associates LLC, Philadelphia, PA; Gregory K Arenson, LEAD ATTORNEY, Kaplan Fox and Kilsheimer LLP, New York, NY; Linda P. Nussbaum, LEAD ATTORNEY, PRO HAC VICE, Kaplan Fox & Kilsheimer, LLP, New York, NY; Robert N. Kaplan, LEAD ATTORNEY, Kaplan Fox & Kilsheimer, LLP, New York, NY; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Joshua H. Grabar, Bolognese & Associates, LLC, Philadelphia, PA; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Kevin Bruce Love, PRO HAC VICE, Hanzman Criden & Love, P.A., South Miami, FL; Linda Phyllis Nussbaum, Nussbaum Law Group, P.C., New York, NY; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, **[*46]** P.C., San Diego, CA; Shpetim Ademi, Cudahy, WI; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James P. McCarthy, Lindquist & Vennum.

For Royal Data Services, Inc., on behalf of itself and all others similarly situated, is a Hawaii corporation, Plaintiff: Lisa J. Rodriguez, LEAD ATTORNEY, Trujillo Rodriguez & Richards LLP, Haddonfield, NJ; Elizabeth R. Odette, Lockridge Grindal Nauen P.L.L.P., Minneapolis, MN; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Shpetim Ademi, Cudahy, WI; W. Joseph Bruckner, Lockridge Grindal Nauen P.L.L.P, Minneapolis, MN.

For Dennis Patrick, Plaintiff: Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Reginald Von Terrell, The Terrell Law Group, Oakland, CA; Shpetim Ademi, Cudahy, WI.

For Studio Spectrum, Inc., is a California **[*47]** business, Plaintiff: Steven F. Benz, LEAD ATTORNEY, Kellogg, Huber, Hansen, Todd, Washington, DC; David Nathan-Allen Sims, Saveri & Saveri, Inc., San Francisco, CA; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guido Saveri, Saveri & Saveri, Inc., San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Shpetim Ademi, Cudahy, WI; James P. McCarthy, Lindquist & Vennum.

For James E. Allee, Plaintiff: Jeff S. Westerman, LEAD ATTORNEY, Westerman Law Corp, Los Angeles, CA; Andrew J. Morganti, Milberg LLP, New York, NY; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Peter G.A. Safirstein, Morgan & Morgan, New York, NY; Shpetim Ademi, Cudahy, WI.

For Kory Pentland, a Michigan resident, Plaintiff: Elizabeth **[*48]** Anne McKenna, LEAD ATTORNEY, Milberg LLP, NY, NY; Jeff S. Westerman, LEAD ATTORNEY, Westerman Law Corp, Los Angeles, CA; Paul F. Novak, LEAD ATTORNEY, PRO HAC VICE, Milberg LLP, Detroit, MI; Andrew J. Morganti, Milberg LLP, New York, NY; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Mario Nunzio Alioto, Trump Alioto Trump & Prescott LLP, San Francisco, CA; Peter G.A. Safirstein, Morgan & Morgan, New York, NY; Shpetim Ademi, Cudahy, WI; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James P. McCarthy, Lindquist & Vennum.

For Jim Brown, on behalf of themselves & others similarly situated, Plaintiff: Jeff S. Westerman, LEAD ATTORNEY, Westerman Law Corp, Los Angeles, CA; Andrew J. Morganti, Milberg LLP, New York, NY; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, **[*49]** P.C., San Diego, CA; Mario Nunzio Alioto, Trump Alioto Trump & Prescott LLP, San Francisco, CA; Peter G.A. Safirstein, Morgan & Morgan, New York, NY; Shpetim Ademi, Cudahy, WI.

For Radio & TV Equipment, Inc, is a business headquartered in Fargo, North Dakota, Plaintiff: Lisa J. Rodriguez, LEAD ATTORNEY, Trujillo Rodriguez & Richards LLP, Haddonfield, NJ; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jason Kilene, Gustafson Gluek PLLC, Minneapolis, MN; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James P. McCarthy, Lindquist & Vennum.

For SOUND INVESTMENTS CORPORATION, doing business as EGGERS AUDIO-VIDEO, Plaintiff: Lisa J. Rodriguez, LEAD ATTORNEY, Trujillo Rodriguez & Richards LLP, Haddonfield, NJ; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; James P. McCarthy, Lindquist & Vennum.

For Brady Lane Cotton, a Florida **[*50]** resident, Plaintiff: Mario Nunzio Alioto, LEAD ATTORNEY, Trump Alioto Trump & Prescott LLP, San Francisco, CA; Christina Diane Crow, Jinks, Crow & Dickson P.C., Union Springs, AL; J. Matthew Stephens, McCallum Methvin & Terrell PC, Birmingham, AL; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; James Michael Terrell, McCallum, Methvin & Terrell, P.C., Birmingham, AL; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Lauren Clare Capurro, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Robert G. Methvin, McCallum Methvin & Terrell PC, Birmingham, AL; Robert Gordon Methvin, Jr, McCallum, Methvin & Terrell, P.C., Birmingham, AL; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James P. McCarthy, Lindquist & Vennum; Lynn W. Jinks, Jinks Crow & Dickson PC; Nathan A. Dickson, Jinks Crow & Dickson PC.

For Colleen Sobotka, a Florida resident, Plaintiff: Mario Nunzio Alioto, LEAD ATTORNEY, Trump Alioto Trump & Prescott LLP, San Francisco, CA; Christopher William **[*51]** Cantrell, Birmingham, AL; J. Matthew Stephens, McCallum Methvin & Terrell PC, Birmingham, AL; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; James Michael Terrell, McCallum, Methvin & Terrell, P.C., Birmingham, AL; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Keith Thomson Belt, Jr., Belt Law Firm, P.C., Birmingham, AL; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Lauren Clare Capurro, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Robert Page Bruner, Belt Law Firm, P.C., Birmingham, AL; Robert G. Methvin, McCallum Methvin & Terrell PC, Birmingham, AL; Robert Gordon Methvin, Jr, McCallum, Methvin & Terrell, P.C., Birmingham, AL; William Tipton Johnson, III, Belt Law Firm, P.C, Birmingham, AL; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James P. McCarthy, Lindquist & Vennum; Lynn W. Jinks, Jinks Crow & Dickson PC; Nathan A. Dickson, Jinks Crow & Dickson PC.

For Daniel Riebow, a Hawaii resident, Plaintiff: Mario Nunzio Alioto, LEAD ATTORNEY, Trump Alioto Trump & Prescott LLP, San Francisco, **[*52]** CA; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Lauren Clare Capurro, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James P. McCarthy, Lindquist & Vennum.

For Travis Burau, a Iowa resident, Plaintiff: Elizabeth Anne McKenna, LEAD ATTORNEY, Milberg LLP, NY, NY; Mario Nunzio Alioto, LEAD ATTORNEY, Trump Alioto Trump & Prescott LLP, San Francisco, CA; Paul F. Novak, LEAD ATTORNEY, PRO HAC VICE, Milberg LLP, Detroit, MI; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Lauren Clare Capurro, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, **[*53]** Albany, NY; James P. McCarthy, Lindquist & Vennum.

For Andrew Kindt, a Michigan resident, Plaintiff: James P. McCarthy, LEAD ATTORNEY, Lindquist & Vennum; Mario Nunzio Alioto, LEAD ATTORNEY, Trump Alioto Trump & Prescott LLP, San Francisco, CA; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Lauren Clare Capurro, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY.

For James Brown, a Michigan resident, Plaintiff: Elizabeth Anne McKenna, LEAD ATTORNEY, Milberg LLP, NY, NY; Mario Nunzio Alioto, LEAD ATTORNEY, Trump Alioto Trump & Prescott LLP, San Francisco, CA; Paul F. Novak, LEAD ATTORNEY, PRO HAC VICE, Milberg LLP, Detroit, MI; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Lauren Clare **[*54]** Capurro, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James P. McCarthy, Lindquist & Vennum.

For Alan Rotman, a Minnesota resident, Plaintiff: Mario Nunzio Alioto, LEAD ATTORNEY, Trump Alioto Trump & Prescott LLP, San Francisco, CA; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Lauren Clare Capurro, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James P. McCarthy, Lindquist & Vennum.

For Ryan Rizzo, a Minnesota resident, Plaintiff: Elizabeth Anne McKenna, LEAD ATTORNEY, Milberg LLP, NY, NY; Mario Nunzio Alioto, LEAD ATTORNEY, Trump Alioto Trump & Prescott LLP, San Francisco, CA; Paul F. Novak, LEAD ATTORNEY, PRO HAC VICE, Milberg LLP, Detroit, MI; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jennifer **[*55]** Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Lauren Clare Capurro, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James P. McCarthy, Lindquist & Vennum.

For Charles Jenkins, a Mississippi resident, Plaintiff: Mario Nunzio Alioto, LEAD ATTORNEY, Trump Alioto Trump & Prescott LLP, San Francisco, CA; J. Matthew Stephens, McCallum Methvin & Terrell PC, Birmingham, AL; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; James Michael Terrell, McCallum, Methvin & Terrell, P.C., Birmingham, AL; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Lauren Clare Capurro, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Robert G. Methvin, McCallum Methvin & Terrell PC, Birmingham, AL; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James P. McCarthy, Lindquist & Vennum; Lynn W. **[*56]** Jinks, Jinks Crow & Dickson PC; Nathan A. Dickson, Jinks Crow & Dickson PC.

For Daniel R. Hergert, a Nebraska resident, Plaintiff: Mario Nunzio Alioto, LEAD ATTORNEY, Trump Alioto Trump & Prescott LLP, San Francisco, CA; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Lauren Clare Capurro, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James P. McCarthy, Lindquist & Vennum.

For Adrienne Belai, a New York resident, Plaintiff: Mario Nunzio Alioto, LEAD ATTORNEY, Trump Alioto Trump & Prescott LLP, San Francisco, CA; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Lauren Clare Capurro, Trump, Alioto, Trump & Prescott, LLP, San

Francisco, CA; Manfred Patrick Muecke, Bonnett, Fairbourn, **[*57]** Friedman, & Balint, P.C., San Diego, CA; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James P. McCarthy, Lindquist & Vennum.

For Joshua Maida, a North Carolina resident, Plaintiff: Elizabeth Anne McKenna, LEAD ATTORNEY, Milberg LLP, NY, NY; Mario Nunzio Alioto, LEAD ATTORNEY, Trump Alioto Trump & Prescott LLP, San Francisco, CA; Paul F. Novak, LEAD ATTORNEY, PRO HAC VICE, Milberg LLP, Detroit, MI; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Lauren Clare Capurro, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James P. McCarthy, Lindquist & Vennum.

For Rosemary Ciccone, a Rhode Island resident, Plaintiff: Mario Nunzio Alioto, LEAD ATTORNEY, Trump Alioto Trump & Prescott LLP, San Francisco, CA; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & **[*58]** Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Lauren Clare Capurro, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Robert J. Bonsignore, Bonsignore Trial Lawyers, PLLC, Las Vegas, NV; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James P. McCarthy, Lindquist & Vennum.

For Donna Marie Ellington, a South Dakota resident, Plaintiff: Mario Nunzio Alioto, LEAD ATTORNEY, Trump Alioto Trump & Prescott LLP, San Francisco, CA; Lauren Clare Capurro, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA.

For Frank Warner, a Tennessee resident, Plaintiff: Mario Nunzio Alioto, LEAD ATTORNEY, Trump Alioto Trump & Prescott LLP, San Francisco, CA; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Lauren Clare Capurro, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Manfred Patrick Muecke, Bonnett, **[*59]** Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James P. McCarthy, Lindquist & Vennum.

For Albert Sidney Crigler, a Tennessee resident, Plaintiff: Mario Nunzio Alioto, LEAD ATTORNEY, Trump Alioto Trump & Prescott LLP, San Francisco, CA; Robert Brent Irby, LEAD ATTORNEY, McCallum, Hoaguland Cook & Irby LLP, Vestavia Hills, AL; Eric D. Hoaglund, McCallum Hoaglund Cook & Irby LLP, Vestavia Hills, AL; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Lauren Clare Capurro, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Richard Freeman Horsley, King, Horsley & Lyons, Birmingham, AL; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James P. McCarthy, Lindquist & Vennum.

For Direct Purchaser Plaintiffs, Plaintiff: Richard Alexander Saveri, LEAD ATTORNEY, Saveri & Saveri, Inc., San Francisco, CA; Aaron M. Sheanin, Pearson, Simon & Warshaw, LLP, San **[*60]** Francisco, CA; Allan Steyer, Steyer Lowenthal Boodrookas Alvarez & Smith LLP, San Francisco, CA; Christopher L. Lebsock, Hausfeld LLP, San Francisco, CA; Donald Scott Macrae, Steyer Lowenthal Boodrookas Alvarez & Smith LLP, San Francisco, CA; Guido Saveri, Saveri & Saveri, Inc., San Francisco, CA; Henry A. Cirillo, Smith Dollar PC, Santa Rosa, CA; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jayne Ann Peeters, Steyer Lowenthal Boodrookas Alvarez & Smith LLP, San Francisco, CA; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Jill Michelle Manning, Steyer Lowenthal Boodrookas Alvarez & Smith LLP, San Francisco, CA; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Michael Paul Lehmann, Hausfeld LLP, San Francisco, CA; Stephanie Yunjin Cho, Hausfeld LLP, San Francisco, CA; Travis Luke Manfredi, Saveri and Saveri Inc, San Francisco, CA; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; Bruce Lee Simon, Pearson Simon & Warshaw, LLP, San Francisco, CA; Daniel D. Cowen, Shughart Thomson & Kilroy PC; James P. McCarthy, **[*61]** Lindquist & Vennum; P. John Brady, Shughart Thomson & Kilroy PC.

For Indirect Purchaser Plaintiffs, Plaintiff: Lingel Hart Winters, LEAD ATTORNEY, Law Offices of Lingel H. Winters, San Francisco, CA; Robert J. Gralewski, Jr., LEAD ATTORNEY, Kirby McInerney LLP, San Diego, CA; Charles Matthew Thompson, Charles M. Thompson, P.C., Birmingham, AL; Craig C. Corbitt, Zelle LLP, San Francisco, CA; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jennie Lee Anderson, Andrus Anderson LLP, San Francisco, CA; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jennifer Susan Rosenberg, Bramson, Plutzik, Mahler & Birkhaeuser, Walnut Creek, CA; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; John Dmitry Bogdanov, Cooper & Kirkham, P.C., San Francisco, CA; Josef Deen Cooper, Cooper & Kirkham, P.C., San Francisco, CA; Joseph Mario Patane, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Judith A. Zahid, Zelle LLP, San Francisco, CA; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Lauren Clare Capurro, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Mario Nunzio Alioto, Trump Alioto Trump & Prescott LLP, San Francisco, CA; Sylvie K. Kern, KAG Law Group, **[*62]** San Francisco, CA; Tracy R. Kirkham, Cooper & Kirkham, P.C., San Francisco, CA; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James P. McCarthy, Lindquist & Vennum.

For Indirect Purchaser Plaintiffs, Plaintiff: Mario Nunzio Alioto, LEAD ATTORNEY, Trump Alioto Trump & Prescott LLP, San Francisco, CA; Robert J. Gralewski, Jr., LEAD ATTORNEY, Kirby McInerney LLP, San Diego, CA; Charles Matthew Thompson, Charles M. Thompson, P.C., Birmingham, AL; Christopher Thomas Micheletti, Zelle LLP, San Francisco, CA; Craig C. Corbitt, Zelle LLP, San Francisco, CA; David Nathan Lake, Law Offices of David N. Lake, Encino, CA; Francis Onofrei Scarpulla, Law Offices of Francis O. Scarpulla, San Francisco, CA; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jennie Lee Anderson, Andrus Anderson LLP, San Francisco, CA; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Josef Deen Cooper, Cooper & Kirkham, P.C., San Francisco, CA; Joseph Mario Patane, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Judith A. Zahid, Zelle LLP, San Francisco, CA; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Lauren Clare **[*63]** Capurro, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Theresa Driscoll Moore, Alioto Law Firm, San Francisco, CA; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James P. McCarthy, Lindquist & Vennum.

For State of Washington, Plaintiff: David Michael Kerwin, LEAD ATTORNEY, Washington State Attorney General's Office, Seattle, WA; Jonathan A Mark, LEAD ATTORNEY, Attorney General of Washington, Seattle, WA; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James P. McCarthy, Lindquist & Vennum.

For Electrograph Systems, Inc, Plaintiff: Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; Benjamin Daniel Battles, Boies, Schiller & Flexner LLP, Albany, NY; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Philip J Iovieno, Boies, Schiller & Flexner **[*64]** LLP, Albany, NY; Philip J. Iovieno, PRO HAC VICE, Boies Schiller & Flexner LLP, Albany, NY; William A. Isaacson, Boies Schiller & Flexner, Washington, DC; James P. McCarthy, Lindquist & Vennum.

For Electrograph Technologies Corp., Plaintiff: Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; Benjamin Daniel Battles, Boies, Schiller & Flexner LLP, Albany, NY; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Philip J Iovieno, Boies, Schiller & Flexner LLP, Albany, NY; Philip J. Iovieno, PRO HAC VICE, Boies Schiller & Flexner LLP, Albany, NY; William A. Isaacson, Boies Schiller & Flexner, Washington, DC; James P. McCarthy, Lindquist & Vennum.

For Interbond Corporation of America, Plaintiff: Stuart Harold Singer, LEAD ATTORNEY, Boies Schiller & Flexner, Fort Lauderdale, FL; William A. Isaacson, LEAD ATTORNEY, Boies Schiller & Flexner, Washington, DC; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jennifer Milici, Boies Schiller and Flexner **[*65]** LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Philip J Iovieno, Boies, Schiller & Flexner LLP, Albany, NY; James P. McCarthy, Lindquist & Vennum.

For Office Depot, Inc., Plaintiff: Stuart Harold Singer, LEAD ATTORNEY, Boies Schiller & Flexner, Fort Lauderdale, FL; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Philip J Iovieno, Boies, Schiller & Flexner LLP, Albany, NY; William A. Isaacson, Boies Schiller & Flexner, Washington, DC; James P. McCarthy, Lindquist & Vennum.

For Compucom Systems Inc, Plaintiff: Lewis Titus LeClair, LEAD ATTORNEY, McKool Smith, P.C., Dallas, TX; William A. Isaacson, LEAD ATTORNEY, Boies Schiller & Flexner, Washington, DC; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, **[*66]** Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Mike McKool, McKool Smith, P.C., Dallas, TX; Philip J Iovieno, Boies, Schiller & Flexner LLP, Albany, NY; Scott R. Jacobs, McKool Smith, Dallas, TX; James P. McCarthy, Lindquist & Vennum.

For Costco Wholesale Corporation, Plaintiff: Cori Gordon Moore, Perkins Coie LLP, Seattle, WA; David Burman, PRO HAC VICE, Perkins Coie LLP, Seattle, WA; David P. Chiappetta, Perkins Coie LLP, San Francisco, CA; Eric J. Weiss, PERKINS COIE LLP, Seattle, WA; Euphemia Nikki Thomopulos, Hirschfeld Kraemer LLP, San Francisco, CA; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Joren Surya Ayala-Bass, The Law Office of Philip A. Leider, Berkeley, CA; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Nicholas H. Hesterberg, PRO HAC VICE, Perkins Coie LLP, Seattle, WA; Noah Guzzo Purcell, Seattle, Seattle, WA; Philip J Iovieno, Boies, Schiller & Flexner LLP, Albany, NY; Steven Douglas Merriman, Perkins Coie LLP, Seattle, WA; William A. Isaacson, Boies Schiller & Flexner, Washington, DC; Anne M. Nardacci, Boies, **[*67]** Schiller & Flexner, LLP, Albany, NY; James P. McCarthy, Lindquist & Vennum.

For Alfred H. Siegel, Plaintiff: Brian Gillett, Susman Godfrey L.L.P., Houston, TX; David M. Peterson, Susman Godfrey LLP, Houston, TX; H. Lee Godfrey, Susman Godfrey LLP, Houston, TX; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; John Pierre Lahad, Susman Godfrey LLP, Houston, TX; Johnny William Carter, Susman Godfrey LLP, Houston, TX; Jonathan Jeffrey Ross, N/A, Susman Godfrey L.L.P., Houston, TX; Jonathan Mark Weiss, Klee Tuchin Bogdanoff Stern LLP, Los Angeles, CA; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Matthew C. Behncke, Susman Godfrey LLP, Houston, TX; Michael Lloyd Tuchin, Klee Tuchin Bogdanoff Stern LLP, Los Angeles, CA; Philip J Iovieno, Boies, Schiller & Flexner LLP, Albany, NY; Robert J. Pfister, Klee, Tuchin, Bogdanoff & Stern LLP, Los Angeles, CA; Robert Sabre Safi, Susman Godfrey L.L.P., Houston, TX; Samuel J Randall, Kenny Nachwalter PA, Miami, FL; William A. Isaacson, Boies Schiller & Flexner, Washington, DC; Anne M. Nardacci, Boies, Schiller & Flexner, **[*68]** LLP, Albany, NY; James P. McCarthy, Lindquist & Vennum; Kenneth S. Marks, Susman Godfrey LLP.

For Department of Legal Affairs, Plaintiff: Eli Andrew Friedman, LEAD ATTORNEY, Office of the Attorney General, Antitrust Division, Tallahassee, FL; Patricia A. Conners, LEAD ATTORNEY, Attorney General's Office, Department of Legal Affairs, Antitrust Section, Tallahassee, FL; R. Scott Palmer, LEAD ATTORNEY, Office of the Attorney General, State of Florida, Tallahassee, FL; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Liz Ann Brady, Office of the Attorney General, Antitrust Division, Tallahassee, FL; Nicholas J. Weilhammer, Office of the Attorney General, State of Florida, Tallahassee, FL; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James P. McCarthy, Lindquist & Vennum.

For Office of the Attorney General, Plaintiff: Eli Andrew Friedman, LEAD ATTORNEY, Office of the Attorney General, Antitrust Division, Tallahassee, FL; Patricia A. Conners, LEAD ATTORNEY, Attorney General's Office, Department of Legal **[*69]** Affairs, Antitrust Section, Tallahassee, FL; R. Scott Palmer, LEAD ATTORNEY, Office of the Attorney General, State of Florida, Tallahassee, FL; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Liz Ann Brady, Office of the Attorney General, Antitrust Division, Tallahassee, FL; Nicholas J. Weilhammer, Office of the Attorney General, State of Florida, Tallahassee, FL; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James P. McCarthy, Lindquist & Vennum.

For State of Florida, Plaintiff: Anne M. Nardacci, LEAD ATTORNEY, Boies, Schiller & Flexner, LLP, Albany, NY; Eli Andrew Friedman, LEAD ATTORNEY, Office of the Attorney General, Antitrust Division, Tallahassee, FL; James P. McCarthy, LEAD ATTORNEY, Lindquist & Vennum; Patricia A. Conners, LEAD ATTORNEY, Attorney General's Office, Department of Legal Affairs, Antitrust Section, Tallahassee, FL; R. Scott Palmer, LEAD ATTORNEY, Office of the Attorney General, State of Florida, Tallahassee, FL; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jennifer Milici, **[*70]** Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Liz Ann Brady, Office of the Attorney General, Antitrust Division, Tallahassee, FL; Nicholas J. Weilhammer, Office of the Attorney General, State of Florida, Tallahassee, FL; Satu A Correa, Florida Office of the Attorney General, Tallahassee, FL.

For Best Buy Co., Inc., Plaintiff: Bernice Conn, LEAD ATTORNEY, Robins Kaplan L.L.P., Los Angeles, CA; David Martinez, LEAD ATTORNEY, Robins Kaplan LLP, Los Angeles, CA; Elizabeth Diemphuc Le, LEAD ATTORNEY, Robins, Kaplan, Miller & Ciresi L.L.P., Los Angeles, CA; Jordan Samuel Paul, LEAD ATTORNEY, Robins Kaplan Miller Ciresi LLP, Los Angeles, CA; Laura Elizabeth Nelson, LEAD ATTORNEY, Robins Kaplan Miller and Ciresi, Minneapolis, MN; Lauren Elizabeth Wood, LEAD ATTORNEY, Glynn & Finley LLP, Walnut Creek, CA; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jill Sharon Casselman, Robins, Kaplan, Miller and Ciresi L.L.P., Los Angeles, CA; Kenneth S. Marks, Susman Godfrey LLP, Houston, TX; Philip J Iovieno, Boies, Schiller & Flexner LLP, Albany, NY; Samuel J Randall, Kenny **[*71]** Nachwalter PA, Miami, FL; William A. Isaacson, Boies Schiller & Flexner, Washington, DC; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; Elliot S. Kaplan, Robins Kaplan Miller & Ciresi; K. Craig Wildfang, Attorney at Law, Minneapolis, MN; Roman M. Silberfeld, Robins Kaplan L.L.P., Los Angeles, CA.

For Best Buy Enterprise Services, Inc., Plaintiff: Bernice Conn, LEAD ATTORNEY, Robins Kaplan L.L.P., Los Angeles, CA; David Martinez, LEAD ATTORNEY, Robins Kaplan LLP, Los Angeles, CA; Elizabeth Diemphuc Le, LEAD ATTORNEY, Robins, Kaplan, Miller & Ciresi L.L.P., Los Angeles, CA; Jordan Samuel Paul, LEAD ATTORNEY, Robins Kaplan Miller Ciresi LLP, Los Angeles, CA; Laura Elizabeth Nelson, LEAD ATTORNEY, Robins Kaplan Miller and Ciresi, Minneapolis, MN; Lauren Elizabeth Wood, LEAD ATTORNEY, Glynn & Finley LLP, Walnut Creek, CA; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jill Sharon Casselman, Robins, Kaplan, Miller and Ciresi L.L.P., Los Angeles, CA; Kenneth S. Marks, Susman Godfrey LLP, Houston, TX; Philip J Iovieno, Boies, Schiller & Flexner LLP, Albany, NY; Samuel J Randall, Kenny Nachwalter PA, Miami, FL; William A. Isaacson, Boies Schiller & Flexner, Washington, **[*72]** DC; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; Elliot S. Kaplan, Robins Kaplan Miller & Ciresi; K. Craig Wildfang, Attorney at Law, Minneapolis, MN; Roman M. Silberfeld, Robins Kaplan L.L.P., Los Angeles, CA.

For Best Buy Purchasing LLC, Plaintiff: Bernice Conn, LEAD ATTORNEY, Robins Kaplan L.L.P., Los Angeles, CA; David Martinez, LEAD ATTORNEY, Robins Kaplan LLP, Los Angeles, CA; Elizabeth Diemphuc Le, LEAD ATTORNEY, Robins, Kaplan, Miller & Ciresi L.L.P., Los Angeles, CA; Jordan Samuel Paul, LEAD ATTORNEY, Robins Kaplan Miller Ciresi LLP, Los Angeles, CA; Laura Elizabeth Nelson, LEAD ATTORNEY, Robins Kaplan Miller and Ciresi, Minneapolis, MN; Lauren Elizabeth Wood, LEAD ATTORNEY, Glynn & Finley LLP, Walnut Creek, CA; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jill Sharon Casselman, Robins, Kaplan, Miller and Ciresi L.L.P., Los Angeles, CA; Kenneth S. Marks, Susman Godfrey LLP, Houston, TX; Philip J Iovieno, Boies, Schiller & Flexner LLP, Albany, NY; Samuel J Randall, Kenny Nachwalter PA, Miami, FL; William A. Isaacson, Boies Schiller & Flexner, Washington, DC; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; Elliot S. Kaplan, Robins **[*73]** Kaplan Miller & Ciresi; K. Craig Wildfang, Attorney at Law, Minneapolis, MN; Roman M. Silberfeld, Robins Kaplan L.L.P., Los Angeles, CA.

For Best Buy Stores, L.P., Plaintiff: Bernice Conn, LEAD ATTORNEY, Robins Kaplan L.L.P., Los Angeles, CA; David Martinez, LEAD ATTORNEY, Robins Kaplan LLP, Los Angeles, CA; Elizabeth Diemphuc Le, LEAD ATTORNEY, Robins, Kaplan, Miller & Ciresi L.L.P., Los Angeles, CA; Jordan Samuel Paul, LEAD ATTORNEY, Robins Kaplan Miller Ciresi LLP, Los Angeles, CA; Laura Elizabeth Nelson, LEAD ATTORNEY, Robins Kaplan Miller and Ciresi, Minneapolis, MN; Lauren Elizabeth Wood, LEAD ATTORNEY, Glynn & Finley LLP, Walnut Creek, CA; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jill Sharon Casselman, Robins, Kaplan, Miller and Ciresi L.L.P., Los Angeles, CA; Kenneth S. Marks, Susman Godfrey LLP, Houston, TX; Philip J Iovieno, Boies, Schiller & Flexner LLP, Albany, NY; Samuel J Randall, Kenny Nachwalter PA, Miami, FL; William A. Isaacson, Boies Schiller & Flexner, Washington, DC; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; Elliot S.

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For Best Buy.com LLC, Plaintiff: Bernice Conn, LEAD ATTORNEY, Robins Kaplan L.L.P., Los Angeles, CA; David Martinez, LEAD ATTORNEY, Robins Kaplan LLP, Los Angeles, CA; Elizabeth Diemphuc Le, LEAD ATTORNEY, Robins, Kaplan, Miller & Ciresi L.L.P., Los Angeles, CA; Jordan Samuel Paul, LEAD ATTORNEY, Robins Kaplan Miller Ciresi LLP, Los Angeles, CA; Laura Elizabeth Nelson, LEAD ATTORNEY, Robins Kaplan Miller and Ciresi, Minneapolis, MN; Lauren Elizabeth Wood, LEAD ATTORNEY, Glynn & Finley LLP, Walnut Creek, CA; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jill Sharon Casselman, Robins, Kaplan, Miller and Ciresi L.L.P., Los Angeles, CA; Kenneth S. Marks, Susman Godfrey LLP, Houston, TX; Philip J Iovieno, Boies, Schiller & Flexner LLP, Albany, NY; Samuel J Randall, Kenny Nachwalter PA, Miami, FL; William A. Isaacson, Boies Schiller & Flexner, Washington, DC; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; Elliot S. Kaplan, Robins Kaplan Miller & Ciresi; K. Craig Wildfang, Attorney at Law, Minneapolis, MN; Roman M. Silberfeld, Robins Kaplan L.L.P., Los Angeles, CA.

For Magnolia Hi-Fi, Inc., Plaintiff: David Martinez, LEAD **[*75]** ATTORNEY, Robins Kaplan LLP, Los Angeles, CA; Elizabeth Diemphuc Le, LEAD ATTORNEY, Robins, Kaplan, Miller & Ciresi L.L.P., Los Angeles, CA; Jordan Samuel Paul, LEAD ATTORNEY, Robins Kaplan Miller Ciresi LLP, Los Angeles, CA; Laura Elizabeth Nelson, LEAD ATTORNEY, Robins Kaplan Miller and Ciresi, Minneapolis, MN; Lauren Elizabeth Wood, LEAD ATTORNEY, Glynn & Finley LLP, Walnut Creek, CA; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Kenneth S. Marks, Susman Godfrey LLP, Houston, TX; Philip J Iovieno, Boies, Schiller & Flexner LLP, Albany, NY; William A. Isaacson, Boies Schiller & Flexner, Washington, DC; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; Elliot S. Kaplan, Robins Kaplan Miller & Ciresi; Jill Sharon Casselman, Robins, Kaplan, Miller and Ciresi L.L.P.; K. Craig Wildfang, Attorney at Law, Minneapolis, MN; Roman M. Silberfeld, Robins Kaplan L.L.P., Los Angeles, CA.

For Good Guys, Inc., Plaintiff: Jason C. Murray, LEAD ATTORNEY, Crowell & Moring LLP, Los Angeles, CA; Philip J Iovieno, Boies, Schiller & Flexner LLP, Albany, NY; William A. Isaacson, Boies Schiller & Flexner, Washington, DC.

For KMart Corporation, Plaintiff: Jason C. Murray, LEAD **[*76]** ATTORNEY, Crowell & Moring LLP, Los Angeles, CA; William J. Blechman, LEAD ATTORNEY, Kenny Nachwalter PA, Miami, FL; Gavin David Whitis, Pond North LLP, Los Angeles, CA; Jalaine Garcia, Miami, FL; James T Almon, Kenny Nachwalter, PA, Miami, FL; Kenneth S. Marks, Susman Godfrey LLP, Houston, TX; Kevin J. Murray, Kenny Nachwalter PA, Miami, FL; Philip J Iovieno, Boies, Schiller & Flexner LLP, Albany, NY; Richard A. Arnold, Kenny Nachwalter, Miami, FL; Ryan C Zagare, Kenny Nachwalter, PA, Miami, Fl; Samuel J Randall, Kenny Nachwalter PA, Miami, FL; William A. Isaacson, Boies Schiller & Flexner, Washington, DC.

For Old Comp Inc., Plaintiff: Jason C. Murray, LEAD ATTORNEY, Crowell & Moring LLP, Los Angeles, CA; Daniel Allen Sasse, Crowell & Moring LLP, Irvine, CA; Deborah Ellen Arbabi, Crowell and Moring LLP, Irvine, CA; Philip J Iovieno, Boies, Schiller & Flexner LLP, Albany, NY; William A. Isaacson, Boies Schiller & Flexner, Washington, DC.

For Radioshack Corp., Plaintiff: Jason C. Murray, LEAD ATTORNEY, Crowell & Moring LLP, Los Angeles, CA; Daniel Allen Sasse, Crowell & Moring LLP, Irvine, CA; Deborah Ellen Arbabi, Crowell and Moring LLP, Irvine, CA; Philip J Iovieno, Boies, Schiller **[*77]** & Flexner LLP, Albany, NY; William A. Isaacson, Boies Schiller & Flexner, Washington, DC.

For Sears, Roebuck and Co., Plaintiff: Jason C. Murray, LEAD ATTORNEY, Crowell & Moring LLP, Los Angeles, CA; William J. Blechman, LEAD ATTORNEY, Kenny Nachwalter PA, Miami, FL; Gavin David Whitis, Pond North LLP, Los Angeles, CA; Jalaine Garcia, Miami, FL; James T Almon, Kenny Nachwalter, PA, Miami, FL; Kenneth S. Marks, Susman Godfrey LLP, Houston, TX; Philip J Iovieno, Boies, Schiller & Flexner LLP, Albany, NY; Richard A. Arnold, Kenny Nachwalter, Miami, FL; Ryan C Zagare, Kenny Nachwalter, PA, Miami, Fl; Samuel J Randall, Kenny Nachwalter PA, Miami, FL; William A. Isaacson, Boies Schiller & Flexner, Washington, DC; Kevin J. Murray, Kenny Nachwalter PA, Miami, FL.

For Target Corp., Plaintiff: Jason C. Murray, LEAD ATTORNEY, Crowell & Moring LLP, Los Angeles, CA; Astor Henry Lloyd Heaven, III, Crowell and Moring LLP, Washington, DC; Jerome A. Murphy, Crowell & Moring LLP, Washington, DC; Kenneth S. Marks, Susman Godfrey LLP, Houston, TX; Matthew J. McBurney, Crowell & Moring

LLP, Washington, DC; Philip J Iovieno, Boies, Schiller & Flexner LLP, Albany, NY; Robert Brian McNary, Crowell & Moring **[*78]** LLP, Los Angeles, CA; Samuel J Randall, Kenny Nachwalter PA, Miami, FL; William A. Isaacson, Boies Schiller & Flexner, Washington, DC.

For Giovanni Constabile, On behalf of themselves and all others similarly situated, Plaintiff: Lingel Hart Winters, LEAD ATTORNEY, Law Offices of Lingel H. Winters, San Francisco, CA.

For Gio's Inc, a California corporation, Plaintiff: Lingel Hart Winters, LEAD ATTORNEY, Law Offices of Lingel H. Winters, San Francisco, CA.

For Schultze Agency Services, LLC, on behalf of Tweeter Opco, LLC and Tweeter Newco, LLC, Plaintiff: William A. Isaacson, LEAD ATTORNEY, Boies Schiller & Flexner, Washington, DC; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; Christopher V. Fenlon, Boies, Schiller & Flexner, LLP, Albany, NY; Philip J Iovieno, Boies, Schiller & Flexner LLP, Albany, NY; Philip J. Iovieno, PRO HAC VICE, Boies, Schiller & Flexner LLP, Albany, NY.

For Tweeter Newco, LLC, Plaintiff: Anne M. Nardacci, LEAD ATTORNEY, Boies, Schiller & Flexner, LLP, Albany, NY; Philip J. Iovieno, LEAD ATTORNEY, Boies, Schiller & Flexner LLP, Albany, NY; William A. Isaacson, LEAD ATTORNEY, Boies Schiller & Flexner, Washington, DC; Christopher V. Fenlon, Boies, Schiller **[*79]** & Flexner, LLP, Albany, NY; Philip J Iovieno, Boies, Schiller & Flexner LLP, Albany, NY.

For ABC Appliance, Inc., Plaintiff: Christopher V. Fenlon, LEAD ATTORNEY, Boies, Schiller & Flexner, LLP, Albany, NY; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Philip J Iovieno, Boies, Schiller & Flexner LLP, Albany, NY; William A. Isaacson, Boies Schiller & Flexner, Washington, DC.

For Marta Cooperative of America, Inc., Plaintiff: Christopher V. Fenlon, LEAD ATTORNEY, Boies, Schiller & Flexner, LLP, Albany, NY; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; Philip J Iovieno, Boies, Schiller & Flexner LLP, Albany, NY; William A. Isaacson, Boies Schiller & Flexner, Washington, DC.

For P.C. Richard & Son Long Island Corporation, Plaintiff: Christopher V. Fenlon, LEAD ATTORNEY, Boies, Schiller & Flexner, LLP, Albany, NY; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; Philip J Iovieno, Boies, Schiller & Flexner LLP, Albany, NY; William A. Isaacson, Boies Schiller & Flexner, Washington, DC.

For Sharp Corporation, Plaintiff: Colin C. West, Morgan Lewis & Bockius LLP, San Francisco, CA; Jonathan **[*80]** Alan Patchen, Taylor & Company Law Offices, LLP, San Francisco, CA.

For -----Plaintiff, Plaintiff: Gloria Comeaux Robert J. Bonsignore, Bonsignore Trial Lawyers, PLLC, Las Vegas, NV.

For Kerry Lee Hall, Plaintiff: Robert J. Gralewski, Jr., LEAD ATTORNEY, Gergosian & Gralewski LLP, San Diego, CA; Daniel Hume, Kirby McInerney LLP, New York, NY.

For Jeff Speaect, Plaintiff: Robert J. Bonsignore, Bonsignore Trial Lawyers, PLLC, Las Vegas, NV.

For Tech Data Corporation, Plaintiff: Melissa Willett, LEAD ATTORNEY, Boies, Schiller & Flexner, Washington, DC; Mitchell E. Widom, LEAD ATTORNEY, Bilzin Sumberg Baena Price & Axelrod, LLP, Miami, FL; Robert Turken, LEAD ATTORNEY, Bilzin Sumberg Baena Price & Axelrod LLP, Miami, FL; Scott N. Wagner, LEAD ATTORNEY, PRO HAC VICE, Bilzin Sumberg Baena Price & Axelrod LLP, Miami, FL; Stuart Harold Singer, LEAD ATTORNEY, Boies Schiller & Flexner, Fort Lauderdale, FL; William A. Isaacson, LEAD ATTORNEY, Boies Schiller & Flexner, Washington, DC; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; Philip J Iovieno, Boies, Schiller & Flexner LLP, Albany, NY; Philip J. Iovieno, PRO HAC VICE, Boies Schiller & Flexner LLP, Albany, NY.

For Tech Data Product **[*81]** Management, Inc., Plaintiff: Robert Turken, LEAD ATTORNEY, Bilzin Sumberg Baena Price & Axelrod LLP, Miami, FL; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Philip J Iovieno, Boies, Schiller & Flexner LLP, Albany, NY; Scott N. Wagner, Bilzin Sumberg Baena Price & Axelrod LLP, Miami, FL; William A. Isaacson, Boies Schiller & Flexner, Washington, DC.

For Sharp Electronics Corporation, Plaintiff: Cheryl Ann Galvin, Quinn Emmanuel Urquhart & Sullivan LLP, Redwood Shores, CA; Craig A Benson, Paul Weiss LLP, Washington, DC; Gary R Carney, PRO HAC VICE, Paul, Weiss, Rifkind, Wharton and Garrison LLP, New York, NY; Jonathan Alan Patchen, Taylor & Company Law Offices, LLP, San Francisco, CA; Joseph J Simons, Paul Weiss LLP, Washington, DC; Kenneth A. Gallo, Paul, Weiss, Rifkind, Wharton & Garrison LLP, Washington, DC; Kenneth S. Marks, Susman Godfrey LLP, Houston, TX; Kira A Davis, PRO HAC VICE, Paul, Weiss, Rifkind, Wharton and Garrison LLP, New York, NY; Stephen E. Taylor, Taylor & Company Law Offices, LLP.

For Sharp Electronics Manufacturing Company of America, Inc., Plaintiff: Cheryl Ann Galvin, Quinn Emmanuel **[*82]** Urquhart & Sullivan LLP, Redwood Shores, CA; Craig A Benson, Paul Weiss LLP, Washington, DC; Gary R Carney, PRO HAC VICE, Paul, Weiss, Rifkind, Wharton and Garrison LLP, New York, NY; Jonathan Alan Patchen, Taylor & Company Law Offices, LLP, San Francisco, CA; Joseph J Simons, Paul Weiss LLP, Washington, DC; Kenneth A. Gallo, Paul, Weiss, Rifkind, Wharton & Garrison LLP, Washington, DC; Kenneth S. Marks, Susman Godfrey LLP, Houston, TX; Kira A Davis, PRO HAC VICE, Paul, Weiss, Rifkind, Wharton and Garrison LLP, New York, NY; Stephen E. Taylor, Taylor & Company Law Offices, LLP.

For Dell Inc., Plaintiff: Debra Dawn Bernstein, LEAD ATTORNEY, Alston & Bird LLP, Atlanta, GA; Elizabeth Helmer Jordan, LEAD ATTORNEY, Alston & Bird LLP, Atlanta, GA; Jon G. Shepherd, LEAD ATTORNEY, Gibson Dunn & Crutcher, Dallas, TX; Matthew David Kent, LEAD ATTORNEY, Alston + Bird LLP, Atlanta, GA; Melissa Mahurin Whitehead, LEAD ATTORNEY, Alston and Bird, Atlanta, GA; Michael P. Kenny, LEAD ATTORNEY, Alston & Bird LLP, Atlanta, GA; Rodney J Ganske, LEAD ATTORNEY, Alston & Bird LLP, Atlanta, GA; James Matthew Wagstaffe, Kerr & Wagstaffe LLP, San Francisco, CA; Michael John Newton, Alston & Bird, Dallas, TX. **[*83]**

For Dell Products L.P., Plaintiff: Debra Dawn Bernstein, LEAD ATTORNEY, Alston & Bird LLP, Atlanta, GA; Elizabeth Helmer Jordan, LEAD ATTORNEY, Alston & Bird LLP, Atlanta, GA; Jon G. Shepherd, LEAD ATTORNEY, Gibson Dunn & Crutcher, Dallas, TX; Matthew David Kent, LEAD ATTORNEY, Alston + Bird LLP, Atlanta, GA; Melissa Mahurin Whitehead, LEAD ATTORNEY, Alston and Bird, Atlanta, GA; Michael P. Kenny, LEAD ATTORNEY, Alston & Bird LLP, Atlanta, GA; Rodney J Ganske, LEAD ATTORNEY, Alston & Bird LLP, Atlanta, GA; James Matthew Wagstaffe, Kerr & Wagstaffe LLP, San Francisco, CA; Michael John Newton, Alston & Bird, Dallas, TX.

For Magnolia Hi-Fi, LLC, Plaintiff: David Martinez, LEAD ATTORNEY, Robins Kaplan LLP, Los Angeles, CA; Laura Elizabeth Nelson, LEAD ATTORNEY, Robins Kaplan Miller and Ciresi, Minneapolis, MN; Jill Sharon Casselman, Robins, Kaplan, Miller and Ciresi L.L.P., Los Angeles, CA; Elliot S. Kaplan, Robins Kaplan Miller & Ciresi; Roman M. Silberfeld, Robins Kaplan L.L.P., Los Angeles, CA.

For Viewsonic Corporation, Plaintiff: Jason C. Murray, LEAD ATTORNEY, Crowell & Moring LLP, Los Angeles, CA; Astor Henry Lloyd Heaven, III, Crowell and Moring LLP, Washington, DC; Daniel Allen Sasse, **[*84]** Crowell & Moring LLP, Irvine, CA; Deborah Ellen Arbabi, Crowell and Moring LLP, Irvine, CA; Jerome A. Murphy, Crowell & Moring LLP, Washington, DC; Kenneth S. Marks, Susman Godfrey LLP, Houston, TX; Matthew J. McBurney, Crowell & Moring LLP, Washington, DC; Robert Brian McNary, Crowell & Moring LLP, Los Angeles, CA; Samuel J Randall, Kenny Nachwalter PA, Miami, FL.

For YRC, INC., Creditor: Jeffrey M. Judd, Judd Law Group, San Francisco, CA.

For Chunghwa Picture Tubes, LTD. ("Chunghwa PT") is a Taiwanese company, Defendant: Joel Steven Sanders, LEAD ATTORNEY, Gibson, Dunn & Crutcher LLP, San Francisco, CA; Adam C. Hemlock, Weil Gotshal and Manges LLP, New York, NY; Austin Van Schwing, Gibson, Dunn & Crutcher LLP, San Francisco, CA; David C. Brownstein, Farmer Brownstein Jaeger LLP, San Francisco, CA; Jacob P. Alpren, Farmer Brownstein Jaeger LLP, San Francisco, CA; Joel Calcar Willard, Gibson, Dunn Crutcher LLP, San Francisco, CA; William S Farmer, Farmer Brownstein Jaeger LLP, San Francisco, CA; Rachel S. Brass, Gibson Dunn & Crutcher LLP.

For Chunghwa Picture Tubes (Malaysia) Sdn. Bhd. ("Chunghwa Malaysia") is a Malaysian company, Defendant: Joel Steven Sanders, LEAD ATTORNEY, Gibson, **[*85]** Dunn & Crutcher LLP, San Francisco, CA; Adam C. Hemlock, Weil Gotshal and Manges LLP, New York, NY; Austin Van Schwing, Gibson, Dunn & Crutcher LLP, San Francisco, CA; David C. Brownstein, Farmer Brownstein Jaeger LLP, San Francisco, CA; Jacob P. Alpren, Farmer Brownstein Jaeger LLP, San Francisco, CA; Rachel S. Brass, Gibson Dunn & Crutcher LLP, San Francisco, CA; William S Farmer, Farmer Brownstein Jaeger LLP, San Francisco, CA.

For Hitachi, Ltd., is a Japanese company, Defendant: Diane Leslie Webb, LEAD ATTORNEY, San Francisco, CA; Eliot A. Adelson, LEAD ATTORNEY, Kirkland & Ellis LLP, San Francisco, CA; John Clayton Everett, LEAD ATTORNEY, PRO HAC VICE, Jr., Morgan, Lewis & Bockius LLP, Washington, DC; Michelle Park Chiu, LEAD ATTORNEY, Morgan Lewis & Bockius LLP, San Francisco, CA; Scott A. Stempel, LEAD ATTORNEY, PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Christopher M. Curran, White & Case, Washington, DC; Douglas L Wald, Washington, DC; James Maxwell Cooper, Kessenick Gamma & Free LLP, San Francisco, CA; James Mutchnik, PRO HAC VICE, Chicago, IL; Jason Bruce Allen, Morgan, Lewis & Bockius LLP, San Francisco, CA; Jeffrey L. Kessler, Winston & Strawn LLP, New York, **[*86]** NY; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Katherine Hamilton Wheaton, PRO HAC VICE, Chicago, IL; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY; Thomas R. Green, United States Attorney's Office, Northern District of California, Oakkland, CA.

For Hitachi America, Ltd. ("Hitachi America") is a New York company, Defendant: Diane Leslie Webb, LEAD ATTORNEY, San Francisco, CA; Eliot A. Adelson, LEAD ATTORNEY, Kirkland & Ellis LLP, San Francisco, CA; Kent Michael Roger, LEAD ATTORNEY, Morgan Lewis & Bockius LLP, San Francisco, CA; Michelle Park Chiu, LEAD ATTORNEY, Morgan Lewis & Bockius LLP, San Francisco, CA; Scott A. Stempel, LEAD ATTORNEY, PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Christine S. Safreno, Morgan Lewis & Bockius, LLP, San Francisco, CA; D. Eric Shapland, Heller Ehrman White & McAuliffe LLP; James Maxwell Cooper, Kessenick Gamma & Free LLP, San Francisco, CA; James Mutchnik, **[*87]** PRO HAC VICE, Chicago, IL; Jason Bruce Allen, Morgan, Lewis & Bockius LLP, San Francisco, CA; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; Jonathan DeGooyer, Morgan Lewis & Bockius LLP, San Francisco, CA; Katherine Hamilton Wheaton, Chicago, IL; Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Rebecca Ann Falk, Morgan, Lewis & Bockius LLP, San Francisco, CA; Thomas R. Green, United States Attorney's Office, Northern District of California, Oakkland, CA.

For Hitachi Asia, Ltd. ("Hitachi Asia") is a Singaporean company, Defendant: Diane Leslie Webb, LEAD ATTORNEY, San Francisco, CA; Eliot A. Adelson, LEAD ATTORNEY, Kirkland & Ellis LLP, San Francisco, CA; John Clayton Everett, LEAD ATTORNEY, PRO HAC VICE, Jr., Morgan, Lewis & Bockius LLP, Washington, DC; Michelle Park Chiu, LEAD ATTORNEY, Morgan Lewis & Bockius LLP, San Francisco, CA; Scott A. Stempel, LEAD ATTORNEY, PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Adam C. Hemlock, Weil Gotshal and Manges LLP, New York, NY; Barack Shem Echols, PRO HAC VICE, Kirkland Ellis LLP, Chicago, IL; Christopher M. Curran, White & Case, Washington, DC; Douglas L Wald, Washington, DC; Ian T Simmons, **[*88]** O'Melveny & Myers LLP, Washington, DC; James Maxwell Cooper, Kessenick Gamma & Free LLP, San Francisco, CA; James Mutchnik, PRO HAC VICE, Chicago, IL; Jason Bruce Allen, Morgan, Lewis & Bockius LLP, San Francisco, CA; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Katherine Hamilton Wheaton, Chicago, IL; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Matthew J. Hertko, PRO HAC VICE, Jones Day, Chicago, IL; Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY; Thomas R. Green, United States Attorney's Office, Northern District of California, Oakkland, CA.

For Irico Group Corp. ("IGC") is a Chinese entity, Defendant: Joseph R. Tiffany, II, LEAD ATTORNEY, Pillsbury Winthrop Shaw Pittman LLP, Palo Alto, CA; Philip Andrew Simpkins, Littler Mendelson, Walnut Creek, CA; Terrence A. Callan, Pillsbury Winthrop Shaw Pittman LLP, San Francisco, CA.

For Irico Display Devices Co., Ltd. ("IDDC") is a Chinese entity, Defendant: **[*89]** Joseph R. Tiffany, II, LEAD ATTORNEY, Pillsbury Winthrop Shaw Pittman LLP, Palo Alto, CA; Philip Andrew Simpkins, Littler Mendelson, Walnut Creek, CA; Terrence A. Callan, Pillsbury Winthrop Shaw Pittman LLP, San Francisco, CA.

For LG Electronics, Inc. ("LGEI") is a South Korean entity, Defendant: Brad D. Brian, LEAD ATTORNEY, Munger Tolles & Olson LLP, Los Angeles, CA; Douglas L Wald, LEAD ATTORNEY, Washington, DC; Miriam Kim, LEAD ATTORNEY, Munger, Tolles & Olson, San Francisco, CA; Samuel R. Miller, LEAD ATTORNEY, Sidley Austin LLP, San Francisco, CA; Adam C. Hemlock, Weil Gotshal and Manges LLP, New York, NY; Benjamin Edward Waldin, PRO HAC VICE, Eimer Stahl LLP, Chicago, IL; Beth Harrison Parker, Arnold & Porter LLP, San Francisco, CA; Cathleen Hamel Hartge, Munger Tolles and Olson LLP, San Francisco, CA; Christopher M. Curran, White & Case, Washington, DC; D. Eric Shapland, Arnold & Porter LLP, Los Angeles, CA; Esteban Martin Estrada, Munger Tolles and Olson, Los Angeles, CA; Gregory J. Weingart, Munger, Tolles and Olson LLP, Los Angeles, CA; Hojoon Hwang, Munger Tolles & Olson LLP, San Francisco, CA; Ian T Simmons, O'Melveny & Myers LLP, Washington, DC; Jason Sheffield Angell, **[*90]** Freitas Angell & Weinberg LLP, Redwood Shores, CA; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; Jerome Cary Roth, Munger Tolles & Olson LLP, San Francisco, CA; Jessica Barclay-Strobel, Munger, Tolles and Olson LLP, Los Angeles, CA; Jessica Nicole Leal, Freitas Angell & Weinberg LLP, Redwood Shores, CA; John Clayton Everett, Jr., PRO HAC VICE, Morgan, Lewis & Bockius LLP, Washington, DC; John David Lombardo, Arnold & Porter LLP, Los Angeles, CA; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Marie L. Fiala, Sidley Austin LLP, San Francisco, CA; Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Nana Little, Arnold Porter, Los Angeles, CA; Nathan P. Eimer, Eimer Stahl LLP, Chicago, IL; Paul Lionel Yanosy, Jr, Sidley Austin LLP, San Francisco, CA; Robert E. Freitas, Freitas Angell & Weinberg LLP, Redwood Shores, CA; Robert Brooks Martin, III, Sidley Austin LLP, San Francisco, CA; Ronald Charles Redcay, Arnold & Porter LLP, Los Angeles, CA; Ryan M. Sandrock, **[*91]** Sidley Austin, LLP, San Francisco, CA; Sarah Hargadon, PRO HAC VICE, Eimer Stahl LLP, Chicago, IL; Scott A. Stempel, PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY; Susan Elizabeth Nash, Munger Tolles Olson LLP, Los Angeles, CA; Xiaochin Claire Yan, Munger Tolles and Olson, LLP, Los Angeles, CA; Bethany Woodard Kristovich, Munger Tolles and Olson LLP, Los Angeles, CA; Eric Daniel Mason, Arnold and Porter, Los Angeles, CA; James Cooper, Arnold & Porter; Jonathan Ellis Altman, Munger Tolles and Olson, Los Angeles, CA; Kim YoungSang, ARNOLD & PORTER LLP; Laura K Lin, Munger, Tolles and Olson LLP, San Francisco, CA; William David Temko, Munger, Tolles & Olson LLP, Los Angeles, CA; Wilson D. Mudge, Arnold and Porter LLP, Washington, DC; YongSang Kim.

For Matsushita Electric Industrial Co, Ltd., Defendant: Bambo Obaro, Weil, Gotshal and Manges, Redwood Shores, CA; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; Kris Hue Chau Man, Dewey & LeBoeuf LLP, San Francisco, CA.

For Panasonic Corporation of North America ("PCNA") is a Delaware corporation, Defendant: **[*92]** Alan Feigenbaum, LEAD ATTORNEY, Weil, Gotshal & Manges LLP, New York, NY; David L. Yohai, LEAD ATTORNEY, Weil, Gotshal, & Manges, LLP, New York, NY; Eva W. Cole, LEAD ATTORNEY, PRO HAC VICE, Winston & Strawn LLP, New York, NY; Kris Hue Chau Man, LEAD ATTORNEY, Dewey & LeBoeuf LLP, San Francisco, CA; Lucia Freda, LEAD ATTORNEY, Weil. Gotshal & Manges LLP; Michelle Lo, LEAD ATTORNEY, Dewey & LeBoeuf LLP, New York, NY; Richard H. Epstein, LEAD ATTORNEY, Sills Cummis Epstein & Gross PC, Newark, NJ; A. Paul Victor, Winston & Strawn LLP, New York, NY; Aldo A. Badini, Winston & Strawn LLP, New York, NY; Amy Lee Stewart, PRO HAC VICE, Rose Law Firm, Little Rock, AR; Andrew R. Tillman, Paine Tarwater Bickers & Tillman, Knoxville, TN; Bambo Obaro, Weil, Gotshal and Manges, Redwood Shores, CA; Christopher M. Curran, White & Case, Washington, DC; Craig Y. Allison, Bunsow, De Mory, Smith & Allison LLP, Redwood City, CA; David E. Yolkut, PRO HAC VICE, Weil, Gotshal and Manges LLP, New York, NY; Diana Arlen Aguilar, PRO HAC VICE, Weil, Gotshal and Manges, New York, NY; Douglas L Wald, Washington, DC; Gregory Hull, Law Offices of Steven A. Ellenberg, San Jose, CA; James F. Lerner, PRO HAC VICE, Winston **[*93]** & Strawn LLP, New York, NY; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; Jennifer Stewart, Winston and Strawn LLP, New York, NY; John Clayton Everett, PRO HAC VICE, Jr., Morgan, Lewis & Bockius LLP, Washington, DC; John M. Taladay, Baker Botts L.L.P., Washington, DC; John Selim Tschirgi, PRO HAC VICE, Winston and Strawn LLP, NYC, NY; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Joseph Richard Wetzel, King & Spalding, San Francisco, CA; Kajetan Rozga, PRO HAC VICE, New York, NY; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Kevin B. Goldstein, Weil, Gotshal and Manges LLP, Washington, DC; Lara Elvidge Veblen, PRO HAC VICE, Weil, Gotshal and Manges LLP, New York, NY; Margaret Anne Keane, DLA Piper LLP, San Francisco, CA; Marjan Hajibandeh, PRO HAC VICE, Weil, Gotshal and Manges LLP, New York, NY; Martin C. Geagan, PRO HAC VICE, Jr., Winston and Strawn LLP, New York, NY; Matthew Robert DalSanto, Winston and Strawn LLP, San Francisco, CA; Meaghan Parfitt Thomas-Kennedy, Weil Gotshal and Manges LLP, New York City, NY; Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Molly Donovan, Winston & Strawn LLP, New York, NY; Peter Edward **[*94]** Root, Kaye Scholer LLP, Palo Alto, CA; Ryan Michael Goodland, PRO HAC VICE, Weil, Gotshal and Manges LLP, New York, NY; Scott A. Stempel, PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Sofia Arguello, PRO HAC VICE, Winston and Strawn LLP, New York, NY; Steven A. Reiss, Weil Gotshal & Manges LLP, New York, NY; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY; Adam C. Hemlock, Weil Gotshal and Manges LLP, New York, NY; Molly M Donovan, Dewey & LeBoeuf LLP.

For Orion Electric Co., Ltd., Defendant: Anthony J. Viola, PRO HAC VICE, Edwards Angell Palmer & Dodge LLP, New York, NY; Barry J. Bendes, PRO HAC VICE, Edwards Angell Palmer & Dodge LLP, New York, PA; David W. Evans, Haight Brown & Bonesteel LLP, San Francisco, CA; Joseph Edward Czerniawski, PRO HAC VICE, Edwards Angell Palmer & Dodge LLP, New York, NY.

For Orion America, Inc., Defendant: Anthony J. Viola, PRO HAC VICE, Edwards Angell Palmer & Dodge LLP, New York, NY; Barry J Bendes, PRO HAC VICE, Edwards Angell Palmer & Dodge LLP, New York, NY; David W. Evans, Haight Brown & Bonesteel LLP, San Francisco, CA; Joseph Edward Czerniawski, PRO HAC VICE, Edwards **[*95]** Angell Palmer & Dodge LLP, New York, NY.

For Koninklijke Philips N.V. ("Royal Philips") is a Dutch entity, Defendant: Andreas Stargard, PRO HAC VICE, Baker Botts LLP, Washington, DC; Christopher M. Curran, White & Case, Washington, DC; David Michael Lisi, Reed Smith LLP, Palo Alto, CA; Douglas L Wald, Washington, DC; Emily L. Maxwell, Esq., HOWREY LLP, San Francisco, CA; Erik T. Koons, Baker Botts LLP, Washington, DC; Ethan E. Litwin, Hughes Hubbard & Reed LLP, New York, NY; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; John Clayton Everett, PRO HAC VICE, Jr., Morgan, Lewis & Bockius LLP, Washington, DC; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Scott A. Stempel, PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY; Richard A. Ripley, RuyakCherian LLP, Washington, DC.

For Philips Electronics North America ("Philips America") is a Delaware corporation, Defendant: **[*96]** Gregory Hull, LEAD ATTORNEY, Law Offices of Steven A. Ellenberg, San Jose, CA; David Michael Lisi, Reed Smith LLP, Palo Alto, CA; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA.

For Samsung SDI Co., Ltd., formerly know as Samsung Display Device Co., Defendant: Bruce Cobath, PRO HAC VICE, Sheppard Mullin Richter & Hampton LLP, New York, NY; Christopher M. Curran, White & Case, Washington, DC; D. Eric Shapland, Arnold & Porter LLP, Los Angeles, CA; Douglas L Wald, Washington, DC; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; James Landon McGinnis, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; John Clayton Everett, PRO HAC VICE, Jr., Morgan, Lewis & Bockius LLP, Washington, DC; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Leo David Caseria, Sheppard Mullin Richter Hampton LLP, Los Angeles, CA; Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Scott A. Stempel, **[*97]** PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY; Tyler Mark Cunningham, Sheppard Mullin Richter & Hampton.

For Samsung SDI America, Inc. ("Samsung America") is a California corporation, Defendant: Adam C. Hemlock, Weil Gotshal and Manges LLP, New York, NY; Bruce Cobath, PRO HAC VICE, Sheppard Mullin Richter & Hampton LLP, New York, NY; Christopher M. Curran, White & Case, Washington, DC; Douglas L Wald, Washington, DC; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; James Landon McGinnis, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; John Clayton Everett, PRO HAC VICE, Jr., Morgan, Lewis & Bockius LLP, Washington, DC; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Mona Solouki, Sheppard Mullin **[*98]** Richter & Hampton LLP, San Francisco, CA; Scott A. Stempel, PRO HAC

VICE, Morgan, Lewis Bockius LLP, Washington, DC; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY; Tyler Mark Cunningham, Sheppard Mullin Richter & Hampton.

For Samtel Color, Ltd. ("Samtel") is a Indian company, Defendant: William Diaz, McDermott Will & Emery LLP, Irvine, CA.

For Toshiba Corporation ("TC") is a Japanese company, Defendant: Christopher M. Curran, LEAD ATTORNEY, White & Case, Washington, DC; Dana E. Foster, LEAD ATTORNEY, PRO HAC VICE, White and Case LLP, Washington, D.C., DC; Adam C. Hemlock, Weil Gotshal and Manges LLP, New York, NY; Aya Kobori, PRO HAC VICE, White and Case LLP, New York, NY; Bijal Vijay Vakil, White & Case LLP, Palo Alto, CA; Douglas L Wald, Washington, DC; George L. Paul, White & Case LLP, Washington, DC; Ian T Simmons, O'Melveny & Myers LLP, Washington, DC; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; Jeremy Kent Ostrander, White & Case LLP, Palo Alto, CA; John Clayton Everett, PRO HAC VICE, Jr., Morgan, Lewis & Bockius LLP, Washington, DC; John Mark Gidley, White & Case LLP, Washington, DC; John M. Taladay, **[*99]** Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Lucius Bernard Lau, White & Case LLP, Washington, DC; Michael E. Hamburger, White & Case LLP, New York, NY; Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Samuel J. Sharp, PRO HAC VICE, Washington, DC; Samuel James Sharp, White and Case LLP, Washington, DC; Scott A. Stempel, PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY; Tsung-Hui (Danny) Wu, PRO HAC VICE, White and Case LLP, Washington, DC; William H. Bave, III, PRO HAC VICE, New York, NY; Charise Naifeh, White & Case LLP; Matthew Frutig, White & Case LLP.

For Beijing-Matsushita Color CRT Company, Ltd. ("BMCC") is a Chinese company, Defendant: Terry Calvani, LEAD ATTORNEY, Freshfields Bruckhaus Deringer US LLP, Washington, DC; Adam C. Hemlock, Weil Gotshal and Manges LLP, New York, NY; Bruce C. McCulloch, Freshfields Bruckhaus Deringer US LLP, Washington, **[*100]** DC; Christine A. Laciak, Freshfields Bruckhaus Deringer US LLP, Washington, DC; Craig D. Minerva, Freshfields Bruckhaus Deringer US LLP, Washington, DC; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; Kate S. McMillan, Washington, DC; Michael Lacovara, Freshfields Bruckhaus Deringer US LLP, New York, NY; Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Richard Sutton Snyder, Freshfields Bruckhaus Deringer US LLP, Washington, DC.

For Matsushita Toshiba Picture Display Co., Ltd., Defendant: David L. Yohai, LEAD ATTORNEY, Weil, Gotshal, & Manges, LLP, New York, NY; Eva W. Cole, Winston & Strawn LLP, New York, NY; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY.

For LP Displays International, Ltd., fka LG.Philips Displays ("LP Displays"), Defendant: Jeremy James Calsyn, LEAD ATTORNEY, Cleary Gottlieb Steen & Hamilton LLP, Washington, DC; Michael Robert Lazerwitz, LEAD ATTORNEY, Cleary Gottlieb Steen & Hamilton, Washington, DC.

For LG Electronics U.S.A., Inc. ("LGEUSA") is a Delaware corporation, Defendant: Miriam Kim, LEAD ATTORNEY, Munger, Tolles & Olson, San Francisco, CA; Samuel R. Miller, LEAD ATTORNEY, Sidley Austin LLP, San Francisco, **[*101]** CA; Cathleen Hamel Hartge, Munger Tolles and Olson LLP, San Francisco, CA; Christopher M. Curran, White & Case, Washington, DC; Douglas L Wald, Washington, DC; Esteban Martin Estrada, Munger Tolles and Olson, Los Angeles, CA; Hojoon Hwang, Munger Tolles & Olson LLP, San Francisco, CA; Jason Sheffield Angell, Freitas Angell & Weinberg LLP, Redwood Shores, CA; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; Jerome Cary Roth, Munger Tolles & Olson LLP, San Francisco, CA; Jessica Barclay-Strobel, Munger, Tolles and Olson LLP, Los Angeles, CA; Jessica Nicole Leal, Freitas Angell & Weinberg LLP, Redwood Shores, CA; John Clayton Everett, PRO HAC VICE, Jr., Morgan, Lewis & Bockius LLP, Washington, DC; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Laura K Lin, Munger, Tolles and Olson LLP, San Francisco, CA; Marie L. Fiala, Sidley Austin LLP, San Francisco, CA; Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Nana Little, Arnold Porter, Los Angeles, CA; Paul **[*102]** Lionel Yanosy, Jr, Sidley Austin LLP, San Francisco, CA; Robert

E. Freitas, Freitas Angell & Weinberg LLP, Redwood Shores, CA; Robert Brooks Martin, III, Sidley Austin LLP, San Francisco, CA; Ryan M. Sandrock, Sidley Austin, LLP, San Francisco, CA; Scott A. Stempel, PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY; Xiaochin Claire Yan, Munger Tolles and Olson, LLP, Los Angeles, CA; Beth Harrison Parker, Bingham McCutchen LLP; D. Eric Shapland, Arnold & Porter LLP, Los Angeles, CA; Eric Daniel Mason, Arnold and Porter, Los Angeles, CA; John David Lombardo, Arnold & Porter LLP, Los Angeles, CA; Ronald Charles Redcay, Arnold & Porter LLP; William David Temko, Munger, Tolles & Olson LLP, Los Angeles, CA.

For Tatung Company of America, Inc. ("Tatung America") is a California corporation, Defendant: Bruce H. Jackson, LEAD ATTORNEY, Baker & McKenzie, San Francisco, CA; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; Joel Steven Sanders, Gibson, Dunn & Crutcher LLP, San Francisco, CA; Karen Sewell, PRO HAC VICE, Baker & McKenzie LLP, Chicago, Il; Michael W. Scarborough, **[*103]** Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Nancy Chung Allred, Baker & McKenzie LLP, San Francisco, CA; Patrick J. Ahern, PRO HAC VICE, Baker & McKenzie, Chicago, IL; Robert Walter Tarun, Baker & McKenzie LLP, San Francisco, CA; Roxane Busey, PRO HAC VICE, Baker & McKenzie LLP, Chicago, IL; Austin Van Schwing, Gibson, Dunn & Crutcher LLP; Joel Calcar Willard, Gibson, Dunn Crutcher LLP; Rachel S. Brass, Gibson Dunn & Crutcher LLP, San Francisco, CA.

For LG Philips Display USA, Inc., Defendant: Hojoon Hwang, Munger Tolles & Olson LLP, San Francisco, CA.

For Philips Electronics North America Corporation ("PENAC") is a Delaware corporation, Defendant: Charles M Malaise, LEAD ATTORNEY, Washington, DC; David T. Emanuelson, LEAD ATTORNEY, Baker Botts L.L.P.; Eric Berman, LEAD ATTORNEY, Baker Botts L.L.P., Washington, DC; Richard A. Ripley, LEAD ATTORNEY, PRO HAC VICE, RuyakCherian LLP, Washington, DC; Adam C. Hemlock, Weil Gotshal and Manges LLP, New York, NY; Christopher M. Curran, White & Case, Washington, DC; David Michael Lisi, Reed Smith LLP, Palo Alto, CA; Douglas L Wald, Washington, DC; Emily L. Maxwell, Esq., HOWREY LLP, San Francisco, CA; Ethan E. Litwin, Hughes Hubbard **[*104]** & Reed LLP, New York, NY; Gregg Aaron Myers, Piatnicia Law, San Jose, CA; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; John Clayton Everett, PRO HAC VICE, Jr., Morgan, Lewis & Bockius LLP, Washington, DC; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Joseph A. Ostoyich, Howrey LLP, Washington, DC; Joseph Song, Morgan, Lewis & Bockius LLP, San Francisco, CA; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Marc Howard Kallish, Roetzel & Andress LPA, Chicago, IL; Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Richard P. Sobiecki, PRO HAC VICE, Baker Botts LLP, Washington, DC; Scott A. Stempel, PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Stephen M. Ng, PRO HAC VICE, Baker Botts LLP, Washington, DC; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY; Tiffany Belle Gelott, PRO HAC VICE, Baker Botts LLP, Washington, DC; Van H. Beckwith, PRO HAC VICE, Baker Botts L.L.P., Dallas, TX; Andreas Stargard, PRO HAC VICE, Baker Botts **[*105]** LLP, Washington, DC; Erik T. Koons, Baker Botts LLP.

For Samsung Electronics Co Ltd ("SEC") is a South Korean company, Defendant: Ian T Simmons, LEAD ATTORNEY, O'Melveny & Myers LLP, Washington, DC; Michael Frederick Tubach, LEAD ATTORNEY, O'Melveny & Myers LLP, San Francisco, CA; Courtney C Byrd, PRO HAC VICE, Washington, DC; David Kendall Roberts, O'Melveny and Myers LLP, Washington, DC; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Kevin Douglas Feder, O'Melveny and Myers LLP, Washington, DC; Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Anton Metlitsky; David Roberts, O'Melveny & Myers LLP; Haidee L. Schwartz, O'Melveny & Myers LLP, Washington, DC.

For Samsung Electronics America, Inc. ("SEAI") is a New York corporation, Defendant: Ian T Simmons, LEAD ATTORNEY, O'Melveny & Myers LLP, Washington, DC; Michael Frederick Tubach, LEAD ATTORNEY, O'Melveny & Myers LLP, San Francisco, CA; Benjamin Gardner Bradshaw, O'Melveny & Meyers LLP, Washington, DC; Courtney C Byrd, PRO HAC VICE, Washington, DC; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; Kent Michael Roger, Morgan **[*106]** Lewis & Bockius LLP, San Francisco, CA; Kevin Douglas Feder, O'Melveny and Myers LLP, Washington, DC; Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San

Francisco, CA; Anton Metlitsky; David Roberts, O'Melveny & Myers LLP; Haidee L. Schwartz, O'Melveny & Myers LLP, Washington, DC; James Landon McGinnis, Sheppard Mullin Richter & Hampton LLP.

For Toshiba America Electronics Components, Inc ("TAEP") is headquartered in Irvine, California, Defendant: Bernadette Shawan Gillians, LEAD ATTORNEY, Buist Moore Smythe and McGee, Charleston, SC; Christopher M. Curran, LEAD ATTORNEY, White & Case, Washington, DC; George L. Paul, LEAD ATTORNEY, White & Case LLP, Washington, DC; Lucius Bernard Lau, LEAD ATTORNEY, White & Case LLP, Washington, DC; William C. Cleveland, LEAD ATTORNEY, Buist Moore Smythe and McGee, Charleston, SC; Adam C. Hemlock, Weil Gotshal and Manges LLP, New York, NY; Aya Kobori, PRO HAC VICE, White and Case LLP, New York, NY; Bijal Vijay Vakil, White & Case LLP, Palo Alto, CA; Douglas L Wald, Washington, DC; Ian T Simmons, O'Melveny & Myers LLP, Washington, DC; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; John Clayton Everett, PRO HAC VICE, Jr., Morgan, **[*107]** Lewis & Bockius LLP, Washington, DC; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Samuel J. Sharp, PRO HAC VICE, Washington, DC; Samuel James Sharp, White and Case LLP, Washington, DC; Scott A. Stempel, PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY; William H. Bave, III, PRO HAC VICE, New York, NY; Charise Naifeh, White & Case LLP; Dana E. Foster, White and Case LLP, Washington, D.C., DC; Matthew Frutig, White & Case LLP.

For Toshiba America Information Systems, Inc. ("TAIP") is headquartered in Irvine, California, Defendant: Bernadette Shawan Gillians, LEAD ATTORNEY, Buist Moore Smythe and McGee, Charleston, SC; Christopher M. Curran, LEAD ATTORNEY, White & Case, Washington, DC; George L. Paul, LEAD ATTORNEY, White & Case LLP, Washington, DC; Lucius Bernard Lau, LEAD ATTORNEY, White **[*108]** & Case LLP, Washington, DC; William C. Cleveland, LEAD ATTORNEY, Buist Moore Smythe and McGee, Charleston, SC; Adam C. Hemlock, Weil Gotshal and Manges LLP, New York, NY; Aya Kobori, PRO HAC VICE, White and Case LLP, New York, NY; Bijal Vijay Vakil, White & Case LLP, Palo Alto, CA; Ian T Simmons, O'Melveny & Myers LLP, Washington, DC; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; Jeremy Kent Ostrander, White & Case LLP, Palo Alto, CA; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Michael E. Hamburger, White & Case LLP, New York, NY; Samuel J. Sharp, PRO HAC VICE, Washington, DC; Samuel James Sharp, White and Case LLP, Washington, DC; Tsung-Hui (Danny) Wu, PRO HAC VICE, White and Case LLP, Washington, DC; William H. Bave, III, PRO HAC VICE, New York, NY; Charise Naifeh, White & Case LLP; Dana E. Foster, White and Case LLP, Washington, D.C., DC; Matthew Frutig, White & Case LLP.

For Toshiba America, Inc ("Toshiba America") is a Delaware corporation, Defendant: Christopher M. Curran, LEAD ATTORNEY, White & Case, Washington, DC; George L. Paul, LEAD ATTORNEY, White & Case LLP, Washington, DC; Lucius Bernard Lau, LEAD ATTORNEY, White & Case LLP, Washington, **[*109]** DC; Adam C. Hemlock, Weil Gotshal and Manges LLP, New York, NY; Aya Kobori, PRO HAC VICE, White and Case LLP, New York, NY; Bijal Vijay Vakil, White & Case LLP, Palo Alto, CA; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; Jeremy Kent Ostrander, White & Case LLP, Palo Alto, CA; Michael E. Hamburger, White & Case LLP, New York, NY; Samuel J. Sharp, PRO HAC VICE, Washington, DC; Samuel James Sharp, White and Case LLP, Washington, DC; Tsung-Hui (Danny) Wu, PRO HAC VICE, White and Case LLP, Washington, DC; William H. Bave, III, PRO HAC VICE, New York, NY; Charise Naifeh, White & Case LLP; Dana E. Foster, White and Case LLP, Washington, D.C., DC.

For MT Picture Display Co., LTD, fka Matsushita Toshiba Picture Display Co., Ltd. ("MTPD") is a Japanese entity, Defendant: Lucia Freda, LEAD ATTORNEY, Weil. Gotshal & Manges LLP; A. Paul Victor, Winston & Strawn LLP, New York, NY; Aldo A. Badini, Winston & Strawn LLP, New York, NY; Bambo Obaro, Weil, Gotshal and Manges, Redwood Shores, CA; Christopher M. Curran, White & Case, Washington, DC; Craig Y. Allison, Bunsow, De Mory, Smith & Allison LLP, Redwood City, CA; David E. Yolkut, PRO HAC VICE, Weil, Gotshal and Manges LLP, New York, NY; **[*110]** Diana Arlen Aguilar, PRO HAC VICE, Weil, Gotshal and Manges, New York, NY; Douglas L Wald, Washington, DC; Eva W. Cole, Winston & Strawn LLP, New York, NY; Gregory Hull, Law Offices of Steven A. Ellenberg, San Jose, CA; Gregory Hull, Law Offices of Steven A. Ellenberg, San Jose, CA; James F. Lerner, PRO HAC VICE, Winston & Strawn LLP, New York, NY; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY;

Jennifer Stewart, Winston and Strawn LLP, New York, NY; John Clayton Everett, PRO HAC VICE, Jr., Morgan, Lewis & Bockius LLP, Washington, DC; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Kajetan Rozga, PRO HAC VICE, New York, NY; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Kris Hue Chau Man, Dewey & LeBoeuf LLP, San Francisco, CA; Lara Elvidge Veblen, PRO HAC VICE, Weil, Gotshal and Manges LLP, New York, NY; Margaret Anne Keane, DLA Piper LLP, San Francisco, CA; Martin C. Geagan, PRO HAC VICE, Jr., Winston and Strawn LLP, New York, NY; Matthew Robert DalSanto, Winston and Strawn LLP, San Francisco, CA; Meaghan Parfitt Thomas-Kennedy, Weil Gotshal and Manges LLP, New York City, NY; Michelle Park Chiu, **[*111]** Morgan Lewis & Bockius LLP, San Francisco, CA; Molly Donovan, Winston & Strawn LLP, New York, NY; Peter Edward Root, Kaye Scholer LLP, Palo Alto, CA; Scott A. Stempel, PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Sofia Arguello, PRO HAC VICE, Winston and Strawn LLP, New York, NY; Steven A. Reiss, Weil Gotshal & Manges LLP, New York, NY; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY; Adam C. Hemlock, Weil Gotshal and Manges LLP, New York, NY; David L. Yohai, Weil, Gotshal, & Manges, LLP.

For MT Picture Display Corporation of America (New York), Defendant: Gregory Hull, Law Offices of Steven A. Ellenberg, San Jose, CA; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; Kris Hue Chau Man, Dewey & LeBoeuf LLP, San Francisco, CA; Steven A. Reiss, Weil Gotshal & Manges LLP, New York, NY.

For Samsung SDI Co., Defendant: Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA.

For Thomson S.A., Defendant: Calvin Lee Litsey, LEAD ATTORNEY, Faegre Baker Daniels LLP, East Palo Alto, CA; Jason de Bretteville, LEAD ATTORNEY, Stradling Yocca Carlson & Rauth, Newport Beach, CA; Robert Andrew **[*112]** Sacks, LEAD ATTORNEY, Sullivan & Cromwell LLP, Los Angeles, CA; Brendan P. Cullen, Sullivan & Cromwell LLP, Palo Alto, CA; Kathy L. Osborn, Faegre Baker Daniels LLP, Indianapolis, IN; Laura Kabler Oswell, Sullivan & Cromwell LLP, Palo Alto, CA.

For Samsung SDI Co. Ltd, fka Samsung Display Device Company ("Samsung SDI") is a South Korean company, formerly known as Samsung Display Device Co., Defendant: Adam C. Hemlock, Weil Gotshal and Manges LLP, New York, NY; Bruce Cobath, PRO HAC VICE, Sheppard Mullin Richter & Hampton LLP, New York, NY; Christopher M. Curran, White & Case, Washington, DC; Douglas L Wald, Washington, DC; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Ian T Simmons, O'Melveny & Myers LLP, Washington, DC; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; John Clayton Everett, PRO HAC VICE, Jr., Morgan, Lewis & Bockius LLP, Washington, DC; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Michelle Park Chiu, Morgan Lewis & Bockius **[*113]** LLP, San Francisco, CA; Scott A. Stempel, PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY; James Landon McGinnis, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Tyler Mark Cunningham, Sheppard Mullin Richter & Hampton.

For Samsung SDI Co., Ltd., Defendant: Bruce Cobath, PRO HAC VICE, Sheppard Mullin Richter & Hampton LLP, New York, NY; Christopher M. Curran, White & Case, Washington, DC; Douglas L Wald, Washington, DC; Dylan Ian Ballard, San Francisco, CA; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Helen Cho Eckert, Sheppard Mullin Richter & Hampton LLP, Los Angeles, CA; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; John Clayton Everett, PRO HAC VICE, Jr., Morgan, Lewis & Bockius LLP, Washington, DC; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Leo David Caseria, Sheppard Mullin Richter Hampton LLP, Los Angeles, CA; Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San **[*114]** Francisco, CA; Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Mona Solouki, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Scott A. Stempel, PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY; James Landon McGinnis, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Tyler Mark Cunningham, Sheppard Mullin Richter & Hampton.

For Toshiba America Consumer Products, LLC ("TACP") is a limited liability company, is headquartered in Wayne, New Jersey, Defendant: Christopher M. Curran, LEAD ATTORNEY, White & Case, Washington, DC; George L. Paul, LEAD ATTORNEY, White & Case LLP, Washington, DC; Lucius Bernard Lau, LEAD ATTORNEY, White & Case LLP, Washington, DC; Adam C. Hemlock, Weil Gotshal and Manges LLP, New York, NY; Aya Kobori, PRO HAC VICE, White and Case LLP, New York, NY; Bijal Vijay Vakil, White & Case LLP, Palo Alto, CA; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Ian T Simmons, O'Melveny & Myers LLP, Washington, DC; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; Jeremy Kent Ostrander, **[*115]** White & Case LLP, Palo Alto, CA; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Michael E. Hamburger, White & Case LLP, New York, NY; Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Samuel J. Sharp, PRO HAC VICE, Washington, DC; Samuel James Sharp, White and Case LLP, Washington, DC; Tsung-Hui (Danny) Wu, PRO HAC VICE, White and Case LLP, Washington, DC; William H. Bave, III, PRO HAC VICE, New York, NY; Charise Naifeh, White & Case LLP; Dana E. Foster, White and Case LLP, Washington, D.C., DC; Matthew Frutig, White & Case LLP.

For TVP International (USA), Inc, Defendant: Curt Holbreich, LEAD ATTORNEY, Sidley Austin LLP, San Francisco, CA; Mark D. Marino, LEAD ATTORNEY, Kirkpatrick & Lockhart Preston Gates Ellis, Newark, NJ.

For Koninklijke Philips N.V., aka Royal Philips Electronics N.V. ("Royal Philip") is a Dutch company, also known as Royal Philips Electronics N.V., Defendant: Andreas Stargard, LEAD ATTORNEY, PRO HAC VICE, Baker Botts LLP, Washington, DC; Charles M Malaise, Washington, DC; Christopher M. Curran, White & Case, Washington, DC; Douglas L Wald, Washington, DC; Emily L. Maxwell, Esq., HOWREY LLP, San Francisco, CA; **[*116]** Erik T. Koons, Baker Botts LLP; Ethan E. Litwin, Hughes Hubbard & Reed LLP, New York, NY; Gregg Aaron Myers, Piatnicia Law, San Jose, CA; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; John Clayton Everett, PRO HAC VICE, Jr., Morgan, Lewis & Bockius LLP, Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Joseph Song, Morgan, Lewis & Bockius LLP, San Francisco, CA; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Scott A. Stempel, PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY; John M. Taladay, Baker Botts L.L.P., Washington, DC; Richard A. Ripley, RuyakCherian LLP, Washington, DC.

For Matsushita Toshiba Picture Display Co., Ltd., also known as MT Picture Display Co., Ltd., Defendant: Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY.

For MT Picture Display, Defendant: Adam C. Hemlock, Weil Gotshal and Manges LLP, New York, NY.

For Thomas S.A., Defendant: Calvin Lee Litsey, LEAD ATTORNEY, Faegre Baker Daniels LLP, East Palo Alto, CA; Jason de Bretteville, **[*117]** Stradling Yocca Carlson & Rauth, Newport Beach, CA.

For Panasonic Corporation, fka Matsushita Electric Industrial Co., Ltd. ("MEI"), is a Japanese entity, Defendant: David L. Yohai, LEAD ATTORNEY, Weil, Gotshal, & Manges, LLP, New York, NY; Gregory Hull, LEAD ATTORNEY, Law Offices of Steven A. Ellenberg, San Jose, CA; Lucia Freda, LEAD ATTORNEY, Weil. Gotshal & Manges LLP; A. Paul Victor, Winston & Strawn LLP, New York, NY; Aldo A. Badini, Winston & Strawn LLP, New York, NY; Amy Lee Stewart, PRO HAC VICE, Rose Law Firm, Little Rock, AR; Bambo Obaro, Weil, Gotshal and Manges, Redwood Shores, CA; Christopher M. Curran, White & Case, Washington, DC; Craig Y. Allison, Bunsow, De Mory, Smith & Allison LLP, Redwood City, CA; David E. Yolkut, PRO HAC VICE, Weil, Gotshal and Manges LLP, New York, NY; Diana Arlen Aguilar, PRO HAC VICE, Weil, Gotshal and Manges, New York, NY; Douglas L Wald, Washington, DC; Eva W. Cole, Winston & Strawn LLP, New York, NY; Gregory Hull, Law Offices of Steven A. Ellenberg, San Jose, CA; James F. Lerner, PRO HAC VICE, Winston & Strawn LLP, New York, NY; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; Jennifer Stewart, Winston and Strawn LLP, New York, NY; **[*118]** John Clayton Everett, PRO HAC VICE, Jr., Morgan, Lewis & Bockius LLP, Washington, DC; John M. Taladay, Baker Botts L.L.P., Washington, DC; John Selim Tschirgi, PRO HAC VICE, Winston and Strawn LLP, NYC, NY; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Kajetan Rozga, PRO HAC VICE, New York, NY; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Kevin B. Goldstein, Weil, Gotshal and Manges LLP, Washington, DC; Kris Hue Chau Man, Dewey & LeBoeuf LLP, San Francisco, CA; Lara Elvidge Veblen, PRO HAC VICE, Weil, Gotshal and Manges LLP, New York, NY; Margaret Anne Keane, DLA Piper LLP, San Francisco, CA; Marjan Hajibandeh, PRO HAC VICE, Weil, Gotshal and Manges LLP, New York, NY; Martin C. Geagan, PRO

HAC VICE, Jr., Winston and Strawn LLP, New York, NY; Meaghan Parfitt Thomas-Kennedy, Weil Gotshal and Manges LLP, New York City, NY; Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Molly Donovan, Winston & Strawn LLP, New York, NY; Molly M Donovan, PRO HAC VICE, Winston & Strawn LLP, New York, NY; Peter Edward Root, Kaye Scholer LLP, Palo Alto, CA; Ryan Michael Goodland, PRO HAC VICE, Weil, Gotshal and Manges LLP, New York, NY; Scott A. Stempel, PRO **[*119]** HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Sofia Arguello, PRO HAC VICE, Winston and Strawn LLP, New York, NY; Steven A. Reiss, PRO HAC VICE, Weil Gotshal & Manges LLP, New York, NY; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY; Adam C. Hemlock, Weil Gotshal and Manges LLP, New York, NY.

For Daewoo International Corporation ("Daewoo International") is a corporation organized under the laws of Korea, Defendant: Jane E. Willis, LEAD ATTORNEY, Ropes & Gray LLP, Boston, MA; Thad Alan Davis, LEAD ATTORNEY, Gibson, Dunn & Crutcher LLP, San Francisco, CA.

For Daewoo Electronics Corporation, fka Daewoo Electronics Company, Ltd. ("Daewoo Electronics") is a corporation organized under the laws of South Korea, formerly known as Daewoo Electronics Company Ltd., Defendant: Jeffrey Jay Lederman, Winston & Strawn LLP, San Francisco, CA.

For Hitachi Displays, Ltd. ("Hitachi Displays") is a Japanese company, also known as Japan Display Inc, Defendant: Diane Leslie Webb, LEAD ATTORNEY, San Francisco, CA; Eliot A. Adelson, LEAD ATTORNEY, Kirkland & Ellis LLP, San Francisco, CA; John Clayton Everett, LEAD ATTORNEY, PRO HAC **[*120]** VICE, Jr., Morgan, Lewis & Bockius LLP, Washington, DC; Scott A. Stempel, LEAD ATTORNEY, PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Christopher M. Curran, White & Case, Washington, DC; Douglas L Wald, Washington, DC; Ian T Simmons, O'Melveny & Myers LLP, Washington, DC; James Maxwell Cooper, Kessenick Gamma & Free LLP, San Francisco, CA; James Mutchnik, PRO HAC VICE, Chicago, IL; Jason Bruce Allen, Morgan, Lewis & Bockius LLP, San Francisco, CA; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Katherine Hamilton Wheaton, PRO HAC VICE, Chicago, IL; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY; Thomas R. Green, United States Attorney's Office, Northern District of California, Oakkland, CA.

For Hitachi Electronic Devices (USA) ("HEDUS") is a Delaware corporation, Defendant: Eliot A. Adelson, LEAD ATTORNEY, Kirkland & Ellis LLP, San Francisco, CA; John Clayton **[*121]** Everett, LEAD ATTORNEY, PRO HAC VICE, Jr., Morgan, Lewis & Bockius LLP, Washington, DC; Scott A. Stempel, LEAD ATTORNEY, PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Diane Leslie Webb, San Francisco, CA; James Maxwell Cooper, Kessenick Gamma & Free LLP, San Francisco, CA; James Mutchnik, Chicago, IL; Jason Bruce Allen, Shearman & Sterling LLP, San Francisco, CA; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; Katherine Hamilton Wheaton, Chicago, IL; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA.

For LG Electronics Taiwan Taipei Co., Ltd. ("LGETT") is a Taiwanese entity, Defendant: Beth Harrison Parker, LEAD ATTORNEY, Bingham McCutchen LLP; D. Eric Shapland, LEAD ATTORNEY, Arnold & Porter LLP, Los Angeles, CA; Eric Daniel Mason, LEAD ATTORNEY, Arnold and Porter, Los Angeles, CA; Hojoon Hwang, LEAD ATTORNEY, Munger Tolles & Olson LLP, San Francisco, CA; John David Lombardo, LEAD ATTORNEY, Arnold & Porter LLP, Los Angeles, CA; Miriam Kim, LEAD ATTORNEY, Munger, Tolles & Olson, San Francisco, CA; Ronald Charles Redcay, LEAD ATTORNEY, Arnold & Porter LLP; Ryan M. Sandrock, LEAD ATTORNEY, Sidley Austin, LLP; Cathleen Hamel Hartge, Munger Tolles and **[*122]** Olson LLP, San Francisco, CA; Esteban Martin Estrada, Munger Tolles and Olson, Los Angeles, CA; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; Jerome Cary Roth, Munger Tolles & Olson LLP, San Francisco, CA; Jessica Barclay-Strobel, Munger, Tolles and Olson LLP, Los Angeles, CA; Marie L. Fiala, Sidley Austin LLP, San Francisco, CA; Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Nana Little, Arnold Porter, Los Angeles, CA; Robert E. Freitas, Freitas Angell & Weinberg LLP, Redwood Shores, CA; Robert Brooks Martin, III, Sidley Austin LLP, San Francisco, CA; Samuel R. Miller, Sidley Austin LLP, San Francisco, CA; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Bethany Woodard Kristovich, Munger Tolles and Olson LLP, Los Angeles, CA; Jonathan Ellis Altman, Munger

Tolles and Olson, Los Angeles, CA; Laura K Lin, Munger, Tolles and Olson LLP, San Francisco, CA; William David Temko, Munger, Tolles & Olson LLP, Los Angeles, CA.

For Philips Electronics Industries (Taiwan), Ltd. ("Philips Taiwan") is a Taiwanese company, Defendant: Ethan E. Litwin, Hughes Hubbard & Reed LLP, New York, NY; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; **[*123]** Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA.

For Philips da Amazonia Industria Electronica Ltda. ("Philips Brazil") is a Brazilian company, Defendant: David Michael Lisi, Reed Smith LLP, Palo Alto, CA; Ethan E. Litwin, Hughes Hubbard & Reed LLP, New York, NY; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA.

For Samsung SDI (Malaysia) Sdn Bhd. ("Samsung Malaysia") is a Malaysian corporation, Defendant: Bruce Cobath, PRO HAC VICE, Sheppard Mullin Richter & Hampton LLP, New York, NY; Christopher M. Curran, White & Case, Washington, DC; Douglas L Wald, Washington, DC; Dylan Ian Ballard, San Francisco, CA; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Helen Cho Eckert, Sheppard Mullin Richter & Hampton LLP, Los Angeles, CA; Ian T Simmons, O'Melveny & Myers LLP, Washington, DC; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; John Clayton Everett, PRO HAC VICE, Jr., Morgan, Lewis & Bockius LLP, Washington, DC; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Leo **[*124]** David Caseria, Sheppard Mullin Richter Hampton LLP, Los Angeles, CA; Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Mona Solouki, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Scott A. Stempel, PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY; Tyler Mark Cunningham, Sheppard Mullin Richter & Hampton, San Francisco, CA; James Landon McGinnis, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA.

For Samsung SDI Mexico S.A. de C.V. ("Samsung SDI Mexico") is a Mexican company, Defendant: Adam C. Hemlock, Weil Gotshal and Manges LLP, New York, NY; Bruce Cobath, PRO HAC VICE, Sheppard Mullin Richter & Hampton LLP, New York, NY; Christopher M. Curran, White & Case, Washington, DC; Douglas L Wald, Washington, DC; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Ian T Simmons, O'Melveny & Myers LLP, Washington, DC; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; John Clayton Everett, PRO HAC VICE, Jr., Morgan, Lewis & **[*125]** Bockius LLP, Washington, DC; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Mona Solouki, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Scott A. Stempel, PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY; James Landon McGinnis, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Tyler Mark Cunningham, Sheppard Mullin Richter & Hampton.

For Samsung SDI Brasil Ltda. ("Samsung SDI Brazil") is a Brazilian company, Defendant: Bruce Cobath, PRO HAC VICE, Sheppard Mullin Richter & Hampton LLP, New York, NY; Christopher M. Curran, White & Case, Washington, DC; Douglas L Wald, Washington, DC; Dylan Ian Ballard, San Francisco, CA; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Helen Cho Eckert, Sheppard Mullin Richter & Hampton LLP, Los Angeles, CA; Ian **[*126]** T Simmons, O'Melveny & Myers LLP, Washington, DC; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; John Clayton Everett, PRO HAC VICE, Jr., Morgan, Lewis & Bockius LLP, Washington, DC; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Leo David Caseria, Sheppard Mullin Richter Hampton LLP, Los Angeles, CA; Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Mona Solouki, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Scott A. Stempel, PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY; James Landon McGinnis, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Tyler Mark Cunningham, Sheppard Mullin Richter & Hampton.

For Shenzhen Samsung SDI Co. Ltd ("Samsung SDI Shenzhen") is a Chinese company, Defendant: Adam C. Hemlock, Weil Gotshal and Manges LLP, New York, NY; Bruce Cobath, PRO HAC VICE, Sheppard Mullin Richter & Hampton **[*127]** LLP, New York, NY; Christopher M. Curran, White & Case, Washington, DC; Douglas L Wald, Washington, DC; Dylan Ian Ballard, San Francisco, CA; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Ian T Simmons, O'Melveny & Myers LLP, Washington, DC; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; John Clayton Everett, PRO HAC VICE, Jr., Morgan, Lewis & Bockius LLP, Washington, DC; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Leo David Caseria, Sheppard Mullin Richter Hampton LLP, Los Angeles, CA; Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Mona Solouki, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Scott A. Stempel, PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY; James Landon McGinnis, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Tyler Mark Cunningham, Sheppard Mullin Richter **[*128]** & Hampton.

For Tianjin Samsung SDI Co., Ltd. ("Samsung SDI Tianjin") is a Chinese company, Defendant: Bruce Cobath, PRO HAC VICE, Sheppard Mullin Richter & Hampton LLP, New York, NY; Christopher M. Curran, White & Case, Washington, DC; Douglas L Wald, Washington, DC; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; John Clayton Everett, PRO HAC VICE, Jr., Morgan, Lewis & Bockius LLP, Washington, DC; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Mona Solouki, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Scott A. Stempel, PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY; James Landon McGinnis, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Tyler Mark Cunningham, Sheppard Mullin Richter **[*129]** & Hampton.

For Toshiba America Consumer Products, Inc. ("TACPI") is a company that is headquartered in Lebanon, Tennessee, Defendant: John Mark Gidley, White & Case LLP, Washington, DC.

For Philips Electronics Industries (Taiwan), Ltd. ("Philips Electronics Taiwan") is a Taiwanese company, Defendant: David Michael Lisi, Reed Smith LLP, Palo Alto, CA; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA.

For Samsung SDI America, Inc. ("Samsung SDI America") is a California corporation, Defendant: Adam C. Hemlock, Weil Gotshal and Manges LLP, New York, NY; Christopher M. Curran, White & Case, Washington, DC; Douglas L Wald, Washington, DC; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; John Clayton Everett, PRO HAC VICE, Jr., Morgan, Lewis & Bockius LLP, Washington, DC; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Scott A. Stempel, PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Steven Alan Reiss, Weil, Gotshal & Mangesl **[*130]** LLP, New York, NY; Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP.

For Hitachi Electronic Devices (USA), Inc. ("HEDUS") is a Delaware corporation, Defendant: Diane Leslie Webb, LEAD ATTORNEY, San Francisco, CA; Michelle Park Chiu, LEAD ATTORNEY, Morgan Lewis & Bockius LLP, San Francisco, CA; Adam C. Hemlock, Weil Gotshal and Manges LLP, New York, NY; Barack Shem Echols, PRO HAC VICE, Kirkland Ellis LLP, Chicago, IL; Christopher M. Curran, White & Case, Washington, DC; Douglas L Wald, Washington, DC; Eliot A. Adelson, Kirkland & Ellis LLP, San Francisco, CA; James Maxwell Cooper, Kessenick Gamma & Free LLP, San Francisco, CA; James Mutchnik, Chicago, IL; Jason Bruce Allen, Morgan, Lewis & Bockius LLP, San Francisco, CA; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; John Clayton Everett, Jr., Morgan, Lewis & Bockius LLP, Washington, DC; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Katherine Hamilton Wheaton, Chicago, IL; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Scott A. Stempel, Morgan, Lewis Bockius LLP, Washington, DC; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, **[*131]** CA; Steven Alan Reiss, Weil, Gotshal & Mangesl

LLP, New York, NY; Thomas R. Green, United States Attorney's Office, Northern District of California, Oakkland, CA.

For Samtel Color Ltd., Defendant: William Diaz, LEAD ATTORNEY, McDermott Will & Emery LLP, Irvine, CA.

For Beijing Matsushita Color Crt Company, LTD., Defendant: Adam C. Hemlock, Weil Gotshal and Manges LLP, New York, NY; Richard Sutton Snyder, Freshfields Bruckhaus Deringer US LLP, Washington, DC.

For Hitachi America, Ltd, Defendant: Eliot A. Adelson, LEAD ATTORNEY, Kirkland & Ellis LLP, San Francisco, CA; Adam C. Hemlock, Weil Gotshal and Manges LLP, New York, NY; Barack Shem Echols, PRO HAC VICE, Kirkland Ellis LLP, Chicago, IL; Ian T Simmons, O'Melveny & Myers LLP, Washington, DC; James Maxwell Cooper, Kessenick Gamma & Free LLP, San Francisco, CA; James Mutchnik, PRO HAC VICE, Chicago, IL; Jason Bruce Allen, Morgan, Lewis & Bockius LLP, San Francisco, CA; Katherine Hamilton Wheaton, Chicago, IL; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Matthew J. Hertko, PRO HAC VICE, Jones Day, Chicago, IL.

For Hitachi Asia, Ltd., Defendant: Eliot A. Adelson, LEAD ATTORNEY, Kirkland & Ellis LLP, San Francisco, **[*132]** CA; Adam C. Hemlock, Weil Gotshal and Manges LLP, New York, NY; Christopher M. Curran, White & Case, Washington, DC; Douglas L Wald, Washington, DC; Ian T Simmons, O'Melveny & Myers LLP, Washington, DC; James Maxwell Cooper, Kessenick Gamma & Free LLP, San Francisco, CA; Jason Bruce Allen, Morgan, Lewis & Bockius LLP, San Francisco, CA; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; John Clayton Everett, Jr., Morgan, Lewis & Bockius LLP, Washington, DC; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Scott A. Stempel, PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY.

For Hitachi Displays, Ltd., also known as Japan Display Inc, Defendant: Eliot A. Adelson, LEAD ATTORNEY, Kirkland & Ellis LLP, San Francisco, CA; Adam C. Hemlock, Weil Gotshal and Manges LLP, New York, NY; Barack Shem Echols, PRO HAC VICE, Kirkland Ellis LLP, Chicago, IL; Christopher M. Curran, White **[*133]** & Case, Washington, DC; Douglas L Wald, Washington, DC; Ian T Simmons, O'Melveny & Myers LLP, Washington, DC; James Maxwell Cooper, Kessenick Gamma & Free LLP, San Francisco, CA; James Mutchnik, Chicago, IL; Jason Bruce Allen, Morgan, Lewis & Bockius LLP, San Francisco, CA; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; John Clayton Everett, Jr., Morgan, Lewis & Bockius LLP, Washington, DC; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Katherine Hamilton Wheaton, Chicago, IL; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Matthew J. Hertko, PRO HAC VICE, Jones Day, Chicago, IL; Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Scott A. Stempel, PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY.

For Hitachi Electronic Devices (USA), Defendant: Eliot A. Adelson, LEAD ATTORNEY, Kirkland & Ellis LLP, San Francisco, CA; Ian T Simmons, O'Melveny & Myers LLP, Washington, DC; James **[*134]** Maxwell Cooper, Kessenick Gamma & Free LLP, San Francisco, CA; James Mutchnik, PRO HAC VICE, Chicago, IL; Jason Bruce Allen, Morgan, Lewis & Bockius LLP, San Francisco, CA; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; Katherine Hamilton Wheaton, PRO HAC VICE, Chicago, IL; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Matthew J. Hertko, PRO HAC VICE, Jones Day, Chicago, IL; Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA.

For Hitachi Ltd., Defendant: Eliot A. Adelson, LEAD ATTORNEY, Kirkland & Ellis LLP, San Francisco, CA; Adam C. Hemlock, Weil Gotshal and Manges LLP, New York, NY; Barack Shem Echols, PRO HAC VICE, Kirkland Ellis LLP, Chicago, IL; Christopher M. Curran, White & Case, Washington, DC; Douglas L Wald, Washington, DC; Ian T Simmons, O'Melveny & Myers LLP, Washington, DC; James Maxwell Cooper, Kessenick Gamma & Free LLP, San Francisco, CA; James Mutchnik, PRO HAC VICE, Chicago, IL; Jason Bruce Allen, Morgan, Lewis & Bockius LLP, San Francisco, CA; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; John Clayton Everett, Jr., Morgan, Lewis **[*135]** & Bockius LLP, Washington, DC; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Katherine Hamilton Wheaton, PRO HAC VICE, Chicago, IL; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Matthew J. Hertko, PRO HAC VICE, Jones Day, Chicago, IL; Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Scott A. Stempel, PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY.

For Koninklijke Philips N.V., Defendant: "KPNV" Charles M Malaise, LEAD ATTORNEY, Washington, DC; David T. Emanuelson, LEAD ATTORNEY, Baker Botts L.L.P.; Eric Berman, LEAD ATTORNEY, Baker Botts L.L.P., Washington, DC; Adam C. Hemlock, Weil Gotshal and Manges LLP, New York, NY; Christopher M. Curran, White & Case, Washington, DC; Douglas L Wald, Washington, DC; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; John Clayton Everett, PRO HAC VICE, Jr., Morgan, Lewis & Bockius LLP, Washington, DC; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Joseph A. **[*136]** Ostoyich, Howrey LLP, Washington, DC; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Marc Howard Kallish, Roetzel & Andress LPA, Chicago, IL; Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Richard P. Sobiecki, PRO HAC VICE, Baker Botts LLP, Washington, DC; Scott A. Stempel, PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Stephen M. Ng, PRO HAC VICE, Baker Botts LLP, Washington, DC; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY; Tiffany Belle Gelott, PRO HAC VICE, Baker Botts LLP, Washington, DC; Van H. Beckwith, PRO HAC VICE, Baker Botts L.L.P., Dallas, TX; Erik T. Koons, Baker Botts LLP.

For LG Electronics Taiwan Taipei Co., Ltd., Defendant: Beth Harrison Parker, LEAD ATTORNEY, Bingham McCutchen LLP; D. Eric Shapland, LEAD ATTORNEY, Heller Ehrman White & McAuliffe LLP, Los Angeles, CA; Douglas L Wald, LEAD ATTORNEY, Washington, DC; Eric Daniel Mason, LEAD ATTORNEY, Arnold and Porter, Los Angeles, CA; James Cooper, LEAD ATTORNEY, Arnold & Porter; John David Lombardo, LEAD ATTORNEY, Arnold **[*137]** & Porter LLP, Los Angeles, CA; Marie L. Fiala, LEAD ATTORNEY, Sidley Austin LLP; Miriam Kim, LEAD ATTORNEY, Munger, Tolles & Olson, San Francisco, CA; Robert Brooks Martin, LEAD ATTORNEY, III, Sidley Austin LLP; Ronald Charles Redcay, LEAD ATTORNEY, Arnold & Porter LLP; Ryan M. Sandrock, LEAD ATTORNEY, Sidley Austin, LLP, San Francisco, CA; Samuel R. Miller, LEAD ATTORNEY, Sidley Austin LLP; Sharon D. Mayo, LEAD ATTORNEY, Arnold & Porter LLP, San Francisco, CA; Wilson D. Mudge, LEAD ATTORNEY, Arnold and Porter LLP, Washington, DC; Adam C. Hemlock, Weil Gotshal and Manges LLP, New York, NY; Esteban Martin Estrada, Munger Tolles and Olson, Los Angeles, CA; Hojoon Hwang, Munger Tolles & Olson LLP, San Francisco, CA; Ian T Simmons, O'Melveny & Myers LLP, Washington, DC; Jerome Cary Roth, Munger Tolles & Olson LLP, San Francisco, CA; Jessica Barclay-Strobel, Munger, Tolles and Olson LLP, Los Angeles, CA; Kim YoungSang, ARNOLD & PORTER LLP; William David Temko, Munger, Tolles & Olson LLP, Los Angeles, CA.

For LG Electronics USA, Inc., Defendant: D. Eric Shapland, LEAD ATTORNEY, Arnold & Porter LLP, Los Angeles, CA; Douglas L Wald, LEAD ATTORNEY, Washington, DC; Eric Daniel Mason, LEAD ATTORNEY, **[*138]** Arnold and Porter, Los Angeles, CA; Miriam Kim, LEAD ATTORNEY, Munger, Tolles & Olson, San Francisco, CA; William David Temko, LEAD ATTORNEY, Munger, Tolles & Olson LLP, Los Angeles, CA; Adam C. Hemlock, Weil Gotshal and Manges LLP, New York, NY; Cathleen Hamel Hartge, Munger Tolles and Olson LLP, San Francisco, CA; Esteban Martin Estrada, Munger Tolles and Olson, Los Angeles, CA; Gregory J. Weingart, Munger, Tolles and Olson LLP, Los Angeles, CA; Hojoon Hwang, Munger Tolles & Olson LLP, San Francisco, CA; Ian T Simmons, O'Melveny & Myers LLP, Washington, DC; Jason Sheffield Angell, Freitas Angell & Weinberg LLP, Redwood Shores, CA; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; Jerome Cary Roth, Munger Tolles & Olson LLP, San Francisco, CA; Jessica Barclay-Strobel, Munger, Tolles and Olson LLP, Los Angeles, CA; Jessica Nicole Leal, Freitas Angell & Weinberg LLP, Redwood Shores, CA; Robert E. Freitas, Freitas Angell & Weinberg LLP, Redwood Shores, CA; Xiaochin Claire Yan, Munger Tolles and Olson, LLP, Los Angeles, CA; Beth Harrison Parker, Bingham McCutchen LLP; Bethany Woodard Kristovich, Munger Tolles and Olson LLP, Los Angeles, CA; James Cooper, Arnold & Porter; John David **[*139]** Lombardo, Arnold & Porter LLP, Los Angeles, CA; Jonathan Ellis Altman, Munger Tolles and Olson, Los Angeles, CA; Kim YoungSang, ARNOLD & PORTER LLP; Laura K Lin, Munger, Tolles and Olson LLP, San Francisco, CA; Marie L. Fiala, Sidley Austin LLP, San Francisco, CA; Robert

Brooks Martin, III, Sidley Austin LLP, San Francisco, CA; Ronald Charles Redcay, Arnold & Porter LLP; Ryan M. Sandrock, Sidley Austin, LLP, San Francisco, CA; Samuel R. Miller, Sidley Austin LLP, San Francisco, CA; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Wilson D. Mudge, Arnold and Porter LLP, Washington, DC; YongSang Kim.

For MT Picture Display Co., LTD, Defendant: Adam C. Hemlock, LEAD ATTORNEY, Weil Gotshal and Manges LLP, New York, NY; David L. Yohai, LEAD ATTORNEY, Weil, Gotshal, & Manges, LLP, New York, NY; Lucia Freda, LEAD ATTORNEY, Weil. Gotshal & Manges LLP; A. Paul Victor, Winston & Strawn LLP, New York, NY; Aldo A. Badini, Winston & Strawn LLP, New York, NY; Amy Lee Stewart, PRO HAC VICE, Rose Law Firm, Little Rock, AR; Bambo Obaro, Weil, Gotshal and Manges, Redwood Shores, CA; Christopher M. Curran, White & Case, Washington, DC; Craig Y. Allison, Bunsow, De Mory, Smith & Allison LLP, Redwood **[*140]** City, CA; Diana Arlen Aguilar, PRO HAC VICE, Weil, Gotshal and Manges, New York, NY; Douglas L Wald, Washington, DC; Eva W. Cole, Winston & Strawn LLP, New York, NY; Gregory Hull, Law Offices of Steven A. Ellenberg, San Jose, CA; James F. Lerner, PRO HAC VICE, Winston & Strawn LLP, New York, NY; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; Jennifer Stewart, Winston and Strawn LLP, New York, NY; John Clayton Everett, PRO HAC VICE, Jr., Morgan, Lewis & Bockius LLP, Washington, DC; John M. Taladay, Baker Botts L.L.P., Washington, DC; John Selim Tschirgi, PRO HAC VICE, Winston and Strawn LLP, NYC, NY; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Kevin B. Goldstein, Weil, Gotshal and Manges LLP, Washington, DC; Lara Elvidge Veblen, PRO HAC VICE, Weil, Gotshal and Manges LLP, New York, NY; Marjan Hajibandeh, PRO HAC VICE, Weil, Gotshal and Manges LLP, New York, NY; Martin C. Geagan, PRO HAC VICE, Jr., Winston and Strawn LLP, New York, NY; Meaghan Parfitt Thomas-Kennedy, Weil Gotshal and Manges LLP, New York City, NY; Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Michelle **[*141]** Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Molly Donovan, Winston & Strawn LLP, New York, NY; Molly M Donovan, Dewey & LeBoeuf LLP; Ryan Michael Goodland, PRO HAC VICE, Weil, Gotshal and Manges LLP, New York, NY; Scott A. Stempel, PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Sofia Arguello, PRO HAC VICE, Winston and Strawn LLP, New York, NY; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY.

For Panasonic Corporation, Defendant: David L. Yohai, LEAD ATTORNEY, Weil, Gotshal, & Manges, LLP, New York, NY; Lucia Freda, LEAD ATTORNEY, Weil. Gotshal & Manges LLP; Adam C. Hemlock, Weil Gotshal and Manges LLP, New York, NY; Amy Lee Stewart, PRO HAC VICE, Rose Law Firm, Little Rock, AR; Bambo Obaro, Weil, Gotshal and Manges, Redwood Shores, CA; Christopher M. Curran, White & Case, Washington, DC; Craig Y. Allison, Bunsow, De Mory, Smith & Allison LLP, Redwood City, CA; Douglas L Wald, Washington, DC; Eva W. Cole, Winston & Strawn LLP, New York, NY; Gregory Hull, Law Offices of Steven A. Ellenberg, San Jose, CA; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; Jennifer Stewart, Winston and Strawn **[*142]** LLP, New York, NY; John Clayton Everett, PRO HAC VICE, Jr., Morgan, Lewis & Bockius LLP, Washington, DC; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Martin C. Geagan, PRO HAC VICE, Jr., Winston and Strawn LLP, New York, NY; Matthew Robert DalSanto, Winston and Strawn LLP, San Francisco, CA; Meaghan Parfitt Thomas-Kennedy, Weil Gotshal and Manges LLP, New York City, NY; Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Molly Donovan, Winston & Strawn LLP, New York, NY; Scott A. Stempel, PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Sofia Arguello, PRO HAC VICE, Winston and Strawn LLP, New York, NY; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY.

For Panasonic Corporation of North America, Defendant: David L. Yohai, LEAD ATTORNEY, Weil, Gotshal, & Manges, LLP, New York, NY; Lucia Freda, LEAD ATTORNEY, Weil. Gotshal & Manges LLP; Amy Lee Stewart, PRO HAC VICE, Rose Law Firm, Little **[*143]** Rock, AR; Bambo Obaro, Weil, Gotshal and Manges, Redwood Shores, CA; Christopher M. Curran, White & Case, Washington, DC; Craig Y. Allison, Bunsow, De Mory, Smith & Allison LLP, Redwood City, CA; Diana Arlen Aguilar, PRO HAC VICE, Weil, Gotshal and Manges, New York, NY; Douglas L Wald, Washington, DC; Gregory Hull, Law Offices of Steven A. Ellenberg, San Jose, CA; James F. Lerner, PRO HAC VICE, Winston & Strawn LLP, New York, NY; Jeffrey L. Kessler, Winston & Strawn LLP, New

York, NY; Jennifer Stewart, Winston and Strawn LLP, New York, NY; John Clayton Everett, PRO HAC VICE, Jr., Morgan, Lewis & Bockius LLP, Washington, DC; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Lara Elvidge Veblen, PRO HAC VICE, Weil, Gotshal and Manges LLP, New York, NY; Martin C. Geagan, PRO HAC VICE, Jr., Winston and Strawn LLP, New York, NY; Meaghan Parfitt Thomas-Kennedy, Weil Gotshal and Manges LLP, New York City, NY; Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Scott A. Stempel, **[*144]** PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Sofia Arguello, PRO HAC VICE, Winston and Strawn LLP, New York, NY; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY.

For Philips Electronics Industries (Taiwan), Ltd., Defendant: David Michael Lisi, Reed Smith LLP, Palo Alto, CA; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA.

For Philips Electronics North America, Defendant: Charles M Malaise, LEAD ATTORNEY, Washington, DC; Jon Vensel Swenson, LEAD ATTORNEY, Baker Botts L.L.P., Palo Alto, CA; David Michael Lisi, Reed Smith LLP, Palo Alto, CA; John M. Taladay, Baker Botts L.L.P., Washington, DC; Joseph A. Ostoyich, Howrey LLP, Washington, DC; Erik T. Koons, Baker Botts LLP.

For Philips da Amazonia Industria Electronica Ltda., Defendant: Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA.

For Samsung Electronics America, Inc., Defendant: David Kendall Roberts, O'Melveny and Myers LLP, Washington, DC; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; James Landon McGinnis, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA.

For Samsung Electronics Co., Ltd, Defendant: Ian T Simmons, **[*145]** LEAD ATTORNEY, O'Melveny & Myers LLP, Washington, DC; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA.

For Samsung SDI (Malaysia) SDN BHD, Defendant: Adam C. Hemlock, Weil Gotshal and Manges LLP, New York, NY; Bruce Cobath, PRO HAC VICE, Sheppard Mullin Richter & Hampton LLP, New York, NY; Christopher M. Curran, White & Case, Washington, DC; Douglas L Wald, Washington, DC; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Helen Cho Eckert, Sheppard Mullin Richter & Hampton LLP, Los Angeles, CA; Ian T Simmons, O'Melveny & Myers LLP, Washington, DC; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; John Clayton Everett, PRO HAC VICE, Jr., Morgan, Lewis & Bockius LLP, Washington, DC; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Leo David Caseria, Sheppard Mullin Richter Hampton LLP, Los Angeles, CA; Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Michelle Park Chiu, Morgan Lewis & Bockius LLP, San **[*146]** Francisco, CA; Mona Solouki, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Scott A. Stempel, PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY; Tyler Mark Cunningham, Sheppard Mullin Richter & Hampton; James Landon McGinnis, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA.

For Samsung SDI America, Inc., Defendant: Bruce Cobath, PRO HAC VICE, Sheppard Mullin Richter & Hampton LLP, New York, NY; Christopher M. Curran, White & Case, Washington, DC; Douglas L Wald, Washington, DC; Dylan Ian Ballard, San Francisco, CA; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Helen Cho Eckert, Sheppard Mullin Richter & Hampton LLP, Los Angeles, CA; Ian T Simmons, O'Melveny & Myers LLP, Washington, DC; James Landon McGinnis, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; John Clayton Everett, PRO HAC VICE, Jr., Morgan, Lewis & Bockius LLP, Washington, DC; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Kent **[*147]** Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Leo David Caseria, Sheppard Mullin Richter Hampton LLP, Los Angeles, CA; Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Mona Solouki, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA;

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For Samsung SDI Brasil LTDA, Defendant: Adam C. Hemlock, Weil Gotshal and Manges LLP, New York, NY; Bruce Cobath, PRO HAC VICE, Sheppard Mullin Richter & Hampton LLP, New York, NY; Christopher M. Curran, White & Case, Washington, DC; Douglas L Wald, Washington, DC; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Helen Cho Eckert, Sheppard Mullin Richter & Hampton LLP, Los Angeles, CA; Ian T Simmons, O'Melveny & Myers LLP, Washington, DC; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; John Clayton Everett, PRO HAC VICE, Jr., Morgan, Lewis & Bockius LLP, **[*148]** Washington, DC; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Leo David Caseria, Sheppard Mullin Richter Hampton LLP, Los Angeles, CA; Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Mona Solouki, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Scott A. Stempel, PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY; James Landon McGinnis, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Tyler Mark Cunningham, Sheppard Mullin Richter & Hampton.

For Samsung SDI Co., Ltd., Defendant: Bruce Cobath, PRO HAC VICE, Sheppard Mullin Richter & Hampton LLP, New York, NY; Christopher M. Curran, White & Case, Washington, DC; Douglas L Wald, Washington, DC; Dylan Ian Ballard, San Francisco, CA; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Helen Cho Eckert, Sheppard Mullin Richter & Hampton LLP, Los Angeles, **[*149]** CA; Ian T Simmons, O'Melveny & Myers LLP, Washington, DC; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; John Clayton Everett, PRO HAC VICE, Jr., Morgan, Lewis & Bockius LLP, Washington, DC; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Leo David Caseria, Sheppard Mullin Richter Hampton LLP, Los Angeles, CA; Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Mona Solouki, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Scott A. Stempel, PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY; James Landon McGinnis, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Tyler Mark Cunningham, Sheppard Mullin Richter & Hampton.

For Samsung SDI Mexico S.A. de C.V., Defendant: Bruce Cobath, PRO HAC VICE, Sheppard Mullin Richter & Hampton LLP, New York, NY; Christopher M. Curran, White & Case, Washington, DC; Douglas L Wald, Washington, **[*150]** DC; Dylan Ian Ballard, San Francisco, CA; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Helen Cho Eckert, Sheppard Mullin Richter & Hampton LLP, Los Angeles, CA; Ian T Simmons, O'Melveny & Myers LLP, Washington, DC; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; John Clayton Everett, PRO HAC VICE, Jr., Morgan, Lewis & Bockius LLP, Washington, DC; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Leo David Caseria, Sheppard Mullin Richter Hampton LLP, Los Angeles, CA; Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Mona Solouki, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Scott A. Stempel, PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY; James Landon McGinnis, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Tyler Mark Cunningham, Sheppard Mullin Richter & Hampton.

For Samtel Color, **[*151]** Ltd., Defendant: William Diaz, McDermott Will & Emery LLP, Irvine, CA.

For Shenzhen Samsung SDI Co. LTD., Defendant: Adam C. Hemlock, Weil Gotshal and Manges LLP, New York, NY; Bruce Cobath, PRO HAC VICE, Sheppard Mullin Richter & Hampton LLP, New York, NY; Christopher M. Curran, White & Case, Washington, DC; Douglas L Wald, Washington, DC; Dylan Ian Ballard, San Francisco, CA; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Helen Cho Eckert, Sheppard Mullin

Richter & Hampton LLP, Los Angeles, CA; Ian T Simmons, O'Melveny & Myers LLP, Washington, DC; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; John Clayton Everett, PRO HAC VICE, Jr., Morgan, Lewis & Bockius LLP, Washington, DC; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Leo David Caseria, Sheppard Mullin Richter Hampton LLP, Los Angeles, CA; Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Mona Solouki, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Scott A. Stempel, PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Sharon D. Mayo, **[*152]** Arnold & Porter LLP, San Francisco, CA; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY; James Landon McGinnis, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Tyler Mark Cunningham, Sheppard Mullin Richter & Hampton.

For Tianjin Samsung SDI Co., Ltd., Defendant: Adam C. Hemlock, Weil Gotshal and Manges LLP, New York, NY; Bruce Cobath, PRO HAC VICE, Sheppard Mullin Richter & Hampton LLP, New York, NY; Christopher M. Curran, White & Case, Washington, DC; Douglas L Wald, Washington, DC; Dylan Ian Ballard, San Francisco, CA; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Helen Cho Eckert, Sheppard Mullin Richter & Hampton LLP, Los Angeles, CA; Ian T Simmons, O'Melveny & Myers LLP, Washington, DC; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; John Clayton Everett, PRO HAC VICE, Jr., Morgan, Lewis & Bockius LLP, Washington, DC; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Leo David Caseria, Sheppard Mullin Richter Hampton **[*153]** LLP, Los Angeles, CA; Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Mona Solouki, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Scott A. Stempel, PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY; James Landon McGinnis, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Tyler Mark Cunningham, Sheppard Mullin Richter & Hampton.

For Toshiba America Consumer Products, Inc., Defendant: Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Samuel J. Sharp, PRO HAC VICE, Washington, DC; William H. Bave, III, PRO HAC VICE, New York, NY.

For Toshiba America Electronics Components, Inc, Defendant: Adam C. Hemlock, Weil Gotshal and Manges LLP, New York, NY; Aya Kobori, PRO HAC VICE, White and Case LLP, New York, NY; Christopher M. Curran, White & Case, Washington, DC; Dana E. Foster, White and Case LLP, Washington, D.C., DC; Douglas L Wald, Washington, DC; Ian T Simmons, O'Melveny & Myers LLP, Washington, DC; Jeffrey L. Kessler, Winston & **[*154]** Strawn LLP, New York, NY; Jeremy Kent Ostrander, White & Case LLP, Palo Alto, CA; John Clayton Everett, PRO HAC VICE, Jr., Morgan, Lewis & Bockius LLP, Washington, DC; John Mark Gidley, White & Case LLP, Washington, DC; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Lucius Bernard Lau, White & Case LLP, Washington, DC; Michael E. Hamburger, White & Case LLP, New York, NY; Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Samuel J. Sharp, PRO HAC VICE, Washington, DC; Samuel James Sharp, White and Case LLP, Washington, DC; Scott A. Stempel, PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY; Tsung-Hui (Danny) Wu, PRO HAC VICE, White and Case LLP, Washington, DC; William H. Bave, III, PRO HAC VICE, New York, NY; Charise Naifeh, White & Case LLP; Matthew Frutig, White & Case LLP.

For Toshiba America Information Systems, Inc., Defendant: Aya Kobori, PRO HAC VICE, White and Case LLP, New York, NY; Christopher M. Curran, White **[*155]** & Case, Washington, DC; Dana E. Foster, White and Case LLP, Washington, D.C., DC; Ian T Simmons, O'Melveny & Myers LLP, Washington, DC; John Mark Gidley, White & Case LLP, Washington, DC; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Lucius Bernard Lau, White & Case LLP, Washington, DC; Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Samuel J. Sharp, PRO HAC VICE, Washington, DC; Samuel James Sharp, White and Case LLP, Washington, DC; William H. Bave, III, PRO HAC VICE, New York, NY; Charise Naifeh, White & Case LLP; Matthew Frutig, White & Case LLP.

For Toshiba America, Inc, Defendant: Aya Kobori, PRO HAC VICE, White and Case LLP, New York, NY; Christopher M. Curran, White & Case, Washington, DC; Dana E. Foster, White and Case LLP, Washington, D.C., DC; Ian T Simmons, O'Melveny & Myers LLP, Washington, DC; John Mark Gidley, White & Case LLP, Washington, DC; Lucius Bernard Lau, White & Case LLP, Washington, DC; Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Samuel J. Sharp, PRO HAC VICE, Washington, DC; Samuel James Sharp, White and Case LLP, Washington, DC; William H. Bave, III, PRO HAC VICE, **[*156]** New York, NY; Charise Naifeh, White & Case LLP.

For Toshiba Corporation, Defendant: Aya Kobori, PRO HAC VICE, White and Case LLP, New York, NY; Dana E. Foster, White and Case LLP, Washington, D.C., DC; Douglas L Wald, Washington, DC; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; John Clayton Everett, PRO HAC VICE, Jr., Morgan, Lewis & Bockius LLP, Washington, DC; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Samuel J. Sharp, PRO HAC VICE, Washington, DC; Scott A. Stempel, PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY; William H. Bave, III, PRO HAC VICE, New York, NY; Christopher M. Curran White & Case George L. Paul Lucius Bernard Lau, White & Case LLP, Washington, DC; Matthew Frutig, White & Case LLP.

For Mitsubishi Electric Corporation, Defendant: Brent Caslin, LEAD ATTORNEY, Jenner & Block LLP, Los Angeles, CA; Terrence Joseph Truax, LEAD ATTORNEY, Jenner **[*157]** & Block LLC, Chicago, IL; Adam C. Hemlock, Weil Gotshal and Manges LLP, New York, NY; Charles B. Sklarsky, PRO HAC VICE, Jenner and Block, LLP, Chicago, IL; Gabriel A. Fuentes, Jenner & Block, LLP, Chicago, IL; Harold A. Barza, Quinn Emanuel Urquhart & Sullivan, LLP, Los Angeles, CA; Kevin Yoshiwo Teruya, Quinn Emanuel Urquhart and Sullivan LLP, Los Angeles, CA; Michael T. Brody, Jenner & Block LLP, Chicago, IL; Molly McGrail Powers, Jenner And Block LLP, Chicago, IL; Ryan Seth Goldstein, Quinn Emanuel Urquhart & Sullivan LLP, Tokyo Japan; Shaun M. Van Horn, Jenner And Block LLP, Chicago, IL.

For Thomson Consumer Electronics, Inc., also known as Technicolor USA, Inc., Defendant: Calvin Lee Litsey, LEAD ATTORNEY, PRO HAC VICE, Faegre Baker Daniels LLP, East Palo Alto, CA; Adam C. Hemlock, Weil Gotshal and Manges LLP, New York, NY; Anna Marie Konradi, PRO HAC VICE, Faegre Baker Daniels LLP, Indianapolis, IN; Emily E. Chow, PRO HAC VICE, Faegre Baker Daniels LLP, Minneapolis, MN; Jeffrey Scott Roberts, PRO HAC VICE, Faegre Baker Daniels, Denver, CO; Kathy L. Osborn, PRO HAC VICE, Faegre Baker Daniels LLP, Indianapolis, IN; Laura Kabler Oswell, Sullivan & Cromwell LLP, Palo Alto, CA; Ryan **[*158]** M Hurley, Indianapolis, IN; Stephen Michael Judge, Faegre Baker Daniels LLP, South Bend, IN; Robert Andrew Sacks, Sullivan & Cromwell LLP.

For Thomson S.A., also known as Technicolor SA, Defendant: Calvin Lee Litsey, LEAD ATTORNEY, Faegre Baker Daniels LLP, East Palo Alto, CA; Robert Andrew Sacks, LEAD ATTORNEY, Sullivan & Cromwell LLP, Los Angeles, CA; Adam C. Hemlock, Weil Gotshal and Manges LLP, New York, NY; Anna Marie Konradi, PRO HAC VICE, Faegre Baker Daniels LLP, Indianapolis, IN; Calvin L. Litsey, PRO HAC VICE, Faegre Baker Daniels LLP, East Palo Alto, CA; Emily E. Chow, PRO HAC VICE, Faegre Baker Daniels LLP, Minneapolis, MN; Jason de Bretteville, Stradling Yocca Carlson & Rauth, Newport Beach, CA; Jeffrey Scott Roberts, PRO HAC VICE, Faegre Baker Daniels, Denver, CO; Kathy L. Osborn, PRO HAC VICE, Faegre Baker Daniels LLP, Indianapolis, IN; Ryan M Hurley, Indianapolis, IN; Stephen Michael Judge, Faegre Baker Daniels LLP, South Bend, IN.

PT.MT Picture Display Indonesia, Defendant, Pro se.

For PT.MT Picture Display Indonesia, Defendant: Craig Y. Allison, Bunsow, De Mory, Smith & Allison LLP, Redwood City, CA.

For Technologies Displays Americas LLC, formerly known as Thomson Displays **[*159]** Americas LLC, Defendant: Arthur Slezak Gaus, LEAD ATTORNEY, Dillingham Murphy, LLP, San Francisco, CA; Adam C. Hemlock, Weil Gotshal and Manges LLP, New York, NY; Donald Arthur Wall, PRO HAC VICE, Squire Patton Boggs (US) LLP, Phoenix, AZ; Ellen Tobin, PRO HAC VICE, Curtis, Mallet-Provost, Colt Mosle LLP, New York, NY; Jeffrey Ira

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For Technicolor S.A, formerly known as Thomson S.A., Defendant: Calvin L. Litsey, LEAD ATTORNEY, Faegre Baker Daniels LLP, East Palo Alto, CA; Anna Marie Konradi, Faegre Baker Daniels LLP, Indianapolis, IN; Calvin Lee Litsey, Faegre Baker Daniels LLP, East Palo Alto, CA; Stephen Michael Judge, Faegre Baker Daniels LLP, South Bend, IN.

For Technicolor USA, Inc., formerly known as Thomson Consumer Electronics, Inc., Defendant: Calvin L. Litsey, LEAD ATTORNEY, Faegre Baker Daniels LLP, East Palo Alto, CA; Anna Marie Konradi, Faegre Baker Daniels LLP, Indianapolis, IN; Calvin Lee Litsey, Faegre Baker Daniels LLP, East Palo Alto, CA; Stephen Michael Judge, Faegre Baker Daniels LLP, South **[*160]** Bend, IN.

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For Donnie Clifton, Objector: Jan Leigh Westfall, LEAD ATTORNEY, Law Offices of Jan Westfall, Menifee, CA.

For Josie Saik, Objector: George Cochran, LEAD ATTORNEY, louisville, ky.

For Carroll Cut-Rate Furniture, Miscellaneous: Jeff D Friedman, Hagens Berman Sobol Shapiro LLP, Berkeley, CA.

For Douglas A. Kelley, as Chapter 11 Trustee for Petters Company, Inc. and related entities, and as Receiver for Petters Company, LLC and related entities, Miscellaneous: James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Philip J Iovieno, Boies, Schiller & Flexner LLP, Albany, NY; William A. Isaacson, Boies Schiller & Flexner, Washington, DC.

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For State of Oregon, Intervenor: Tim David Nord, Oregon Department of Justice, Salem, OR.

Judges: MARTIN QUINN, SPECIAL MASTER.

Opinion by: MARTIN QUINN

Opinion

REPORT AND RECOMMENDATION OF SPECIAL MASTER RE MOTIONS (1) TO APPROVE INDIRECT PURCHASER PLAINTIFFS' SETTLEMENTS WITH THE PHILLIPS, PANASONIC, HITACHI, TOSHIBA, SAMSUNG SDI, TECHNICOLOR, AND TECHNOLOGIES DISPLAYS AMERICAS DEFENDANTS, AND (2) FOR A WARD OF ATTORNEYS' FEES, REIMBURSEMENT OF LITIGATION EXPENSES, AND INCENTIVE AWARDS TO CLASS REPRESENTATIVES

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I. INTRODUCTION

Faced with evaluating a settlement for an all-cash, no-reversion fund of $576,750,000, by all accounts the second-largest indirect purchaser settlement ever, it is tempting to wave a broad brush of approval over the terms and to humbly bless counsel's request for fees. Instead, the Special Master has required extensive briefing, conducted oral argument, and reviewed hundreds of pages of fee and expense billings. Faults were found, and these recommendations reflect both the features of this settlement to be applauded and those to be criticized.

Indirect Purchaser Plaintiffs ("Plaintiffs" or "IPPs") in this matter are seeking an order approving class action settlements with the Phillips,[1] Panasonic,[2] Hitachi,[3] Toshiba,[4] Samsung SDI[5] and Thomson and TDA Defendants[6] (the "Settling Defendants") totaling $541,750,000 pursuant to *Rule 23(e) of the Federal Rules of Civil Procedure* (the "Proposed Settlements"), which states:

> "(e) SETTLEMENT, VOLUNTARY DISMISSAL, OR COMPROMISE. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise: **[*176]**
> "(1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.
> "(2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.
> "(3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.
>
> "(4) If the class action was previously certified under *Rule 23(b)(3)*, the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.
> "(5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval."

Fed.R.Civ.P. Rule 23(e). Plaintiffs filed a Motion for Preliminary Approval of Class Action Settlement on May 29, 2015, which the Court granted on July 9, 2015.[7] Docket Nos. 3861, 3906. Specifically, the Court granted Plaintiffs' motion for preliminary approval of the settlement, it preliminarily certified the Settlement Class, it preliminarily found that the prerequisites to a class action under *Rule 23* were satisfied, it preliminarily **[*177]** approved the plan of distribution, and it approved the form of notice. Plaintiffs then filed a Motion for Award of Attorneys' Fees, Reimbursement of Litigation Expenses, and Incentive Awards to Class Representatives on September 23, 2015. Docket No. 4071.

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[1] The settling Philips entities include Koninklijke Philips N.V. (fin/a Koninklijke Philips Electronics N.V.), Philips Electronics North America Corporation, Philips Taiwan Limited (fin/a Philips Electronics Industries (Taiwan), Ltd.), and Philips do Brasil Ltda. (f/n/a Philips da Amazonia Industria Electronica Ltda.)

[2] The settling Panasonic entities include Panasonic Corporation (f/k/a Matsushita Electric Industrial Co., Ltd.), Panasonic Corporation of North America, and MT Picture Display Co., Ltd.

[3] The settling Hitachi entities include Hitachi, Ltd., Hitachi Asia, Ltd., Hitachi America, Ltd., Hitachi Electronic Devices (USA), Inc., and Hitachi Displays, Ltd. (n/k/a Japan Display Inc.).

[4] The settling Toshiba entities include Toshiba Corporation, Toshiba America, Inc., Toshiba America Information Systems, Inc., Toshiba America Consumer Products, L.L.C., and Toshiba America Electronic Components, Inc.

[5] The settling Samsung entities include Samsung **[*178]** SDI Co. Ltd., Samsung SDI America, Inc., Samsung SDI Brasil, Ltd., Tianjin Samsung SDI Co. Ltd., Shenzhen Samsung SDI Co., Ltd., SDI Malaysia Sdn. Bhd., and SDI Mexico S.A. de C.V.

[6] The settling Thomson and TDA entities include Technicolor SA (f/k/a Thomson SA) and Technicolor USA, Inc. (f/k/a Thomson Consumer Electronics, Inc.) and Technologies Displays Americas LLC (f/k/a Thomson Displays Americas LLC).

[7] This motion and court order did not include the Thomson and TDA settlement since that settlement was not entered into until June 10, 2015, after the motion for preliminary approval was filed.

If approved, these settlements will resolve all federal and state-law claims against the Settling Defendants of all indirect purchasers of CRTs in the United States during the period March 1, 1995 through November 25, 2007. These claims stem from an alleged conspiracy to fix prices for CRT products indirectly purchased from Defendants. CRT products are defined in the Settlement Agreements to mean cathode ray tubes of any type, (*i.e.*, color display tubes, color picture tubes and monochrome display tubes) and products containing cathode ray tubes. A CRT is a display technology used in televisions, **[*179]** computer monitors and other specialized applications. Color display tubes ("CDTs") were used to manufacture computer monitors while color picture tubes ("CPTs") were used to manufacture televisions.

The Proposed Settlements are contingent upon the certification by the Court of a Settlement Class, which, as proposed by Plaintiffs, includes a "Nationwide Class" of indirect purchasers of CRT products and "Statewide Damages Classes" of indirect purchasers of CRT products seeking money damages under the laws of 21 states and the District of Columbia (collectively the "Settlement Class"). Approval of the Proposed Settlements also involves approval of the IPPs plan of allocation.

II. REFERENCE TO THE SPECIAL MASTER

On September 24, 2015, the Court, pursuant to *Federal Rule of Civil Procedure 53*, appointed the Special Master "to supervise and preside over all 'designated post-trial matters,'" including "assisting the Court with the approval of the pending settlements in the Indirect-Purchaser Cases, the determination of a fair, reasonable, and adequate aggregate award of attorneys' fees and the reimbursement of expenses to all plaintiffs' counsel, a fair and reasonable division of the aggregate award among plaintiffs' counsel, **[*180]** and service awards to the named plaintiffs, including any objections to these matters, and dealing with any other matters that the Court may direct him to undertake." Order Appointing Special Master, pp. 2, 3 (Docket No. 4077) ["Appointment Order"]. In the Appointment Order, the Court provided the Special Master with the following authority under *Rule 53(c)*: setting "the date, time and place for all hearings, [] presid[ing] over hearings (whether telephonic or in-person), [] tak[ing] evidence, [] conduct[ing] telephonic conferences to resolve disputes arising during depositions, [] recommend[ing] contempt sanctions to the Court, and [] issu[ing] orders awarding non-contempt sanctions, including, without limitation, the award of attorneys' fees, as provided by *Rules 37* and *45*." *Id.*, p.5. The Court also ordered that the Special Master "file any written orders, findings, and/or recommendations with the Court via the Court's Electronic Case Filing ('ECF'), and that such filing "shall fulfill the Special Master's duty to serve his orders on the parties." *Id.*, p.6.

III. SUMMARY OF CONCLUSIONS

1. The Court should approve certification of the settlement class.
2. The compensation to the class is fair, reasonable and adequate.

3. The Plan of Allocation is fair, reasonable and adequate **[*181]** as to class members in the Statewide Damages Classes.
4. The Plan of Allocation is fair, reasonable and adequate as to class members in the Nationwide Class from non-repealer states even though they receive no monetary compensation.
5. The Plan of Allocation is fair, reasonable and adequate as to class members in the Nationwide Class from the three omitted repealer states (Massachusetts, Missouri and New Hampshire) even though they receive no monetary compensation.

6. The Plan of Allocation is **not** fair, reasonable and adequate insofar as it fails to address satisfaction of the terms of the Chunghwa settlement. Lead Counsel is directed to submit a plan that addresses how to correct the identified due process problem, what, if any, additional notice may be required, and a timeline for the Court to address this problem.
7. Notice to the class was reasonable, appropriate under the circumstances, and met due process standards.

8. All objections other than those with respect to the treatment of the Chunghwa settlement are overruled.

9. Attorneys' fees should be awarded to IPP counsel in the amount of $173,250,000, which is equal to 30% of the settlement fund. Class counsel's lodestars should be **[*182]** computed at current billing rates which total $90,075,076.90. Their lodestars should be reduced by 10% across-the-board to account for inefficiencies and work that did not benefit the class, which results in an adjusted lodestar of $81,067,569. The resulting lodestar multiplier is just under 2.14.

10. The request for approval of litigation expenses in the amount of $7,634,372.50 should be approved.

11. Incentive awards should be approved in the amounts of $15,000 for the 25 court-approved Class Representatives and $5,000 for an additional 15 persons who were not approved by the court but acted as state representatives for a period of time.

IV. FACTUAL AND PROCEDURAL HISTORY[8]

A. Litigation History

Plaintiffs filed their original complaints in various federal courts throughout the country in late 2007 and early 2008. The Judicial Panel on Multidistrict Litigation transferred all related indirect purchaser actions to the Northern District of California, where they were consolidated with similar class actions by direct purchaser plaintiffs. On **[*183]** May 9, 2008 the Court appointed Mario N. Alioto of Trump, Alioto, Trump & Prescott, LLP as Interim Lead Counsel. Docket No. 47.

The United States Department of Justice ("DOJ") intervened early in the case and requested a stay of all merits discovery pending its criminal investigation. The parties negotiated a Stipulated Order with the DOJ that provided for a stay of all merits discovery until September 12, 2009. Docket No. 379. Pursuant to the DOJ's requests, this stay was extended on several occasions. Docket Nos. 425, 590, 798.

Plaintiffs filed their consolidated amended complaint on March 16, 2009. Docket No. 437. The Defendants filed motions to dismiss that were denied in part and granted in part, with leave to amend certain state law claims. Docket No. 665. On May 10, 2010, Plaintiffs filed their Second Consolidated Amended Complaint. Docket No. 716. Defendants filed a joint motion to dismiss on various state-law grounds that was denied in part and granted in part, with leave to amend certain state law claims. Docket No. 799. On December 11 , 2010, Plaintiffs filed their Third Consolidated Amended Complaint. Docket No. 827. Defendants answered Plaintiffs' complaint on January 26, **[*184]** 2011. Plaintiffs filed their Fourth Consolidated Amended Complaint on January 10, 2013. Docket No. 1526.

On April 20, 2011, Defendants and Plaintiffs filed a stipulation providing that Plaintiffs would withdraw the finished-CRT-products-conspiracy allegations from their complaint. Docket No. 895. The Court entered an order to that effect on April 22, 2011. Docket No. 904.

The DOJ's stay of merits discovery was partially lifted on March 8, 2010 and Defendants began their rolling production of documents. Most of the Defendant groups comprise multiple entities located around the world. Because many of the Defendants are no longer involved in the CRT business, Plaintiffs traveled to several storage facilities both in the United States and abroad to manually search Defendants' paper records for relevant documents and employed technical experts to restore backup tapes and servers containing relevant information. Plaintiffs also subpoenaed documents and data from the U.S. and Dutch bankruptcy trustees of a former manufacturer of CRTs — LG Philips Displays. In addition, Plaintiffs subpoenaed and negotiated productions of documents and data from over 50 third party retailers, distributors and **[*185]** CRT television and monitor manufacturers. (Alioto Decl. dtd. 5/29/15 in Support of Motion for Preliminary Approval of Settlements, ¶ 11, Docket No. 3862) ["Alioto Decl. I"]

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[8] The following factual and procedural recitation is relevant to the discussion of both approval of the settlement and the request for fees and expenses.

In response to discovery requests, Defendants produced millions of documents and voluminous data sets. These were loaded into a web-based electronic database and reviewed and analyzed by a team of over 50 attorneys, including attorneys fluent in Korean, Chinese, Japanese and Dutch. In order to use these foreign language documents in the litigation, Plaintiffs obtained certified translations and addressed Defendants' objections to the certified translations. Plaintiffs also retained economists to review and analyze the documents and data and prepare expert reports in support of class certification, liability and damages. Alioto Decl. I, ¶ 12.

Plaintiffs filed their motion for class certification, along with the Declaration of Janet S. Netz, Ph.D., on October 1, 2012. Docket No. 1388. The Special Master held a hearing on the motion and recommended that the Court grant Plaintiffs' motion for class certification and deny Defendants' motion to strike Dr. Netz' expert report. Docket Nos. 1742, 1743. On September 24, 2013, **[*186]** the Honorable Samuel Conti adopted the Special Master's Reports and Recommendations and certified 22 state-wide classes of indirect purchasers of CRTs. Docket No. 1950. The Ninth Circuit Court of Appeals denied the Defendants' petition to appeal the District Court's order. Docket No. 2283.

Merits depositions began in December, 2012. Each of the 24 class representatives was deposed by Defendants, and Plaintiffs took over 30 depositions of Defendants under *F.R.C.P. 30(b)(6)* as well as over 70 merits depositions of defense witnesses. Several of these depositions took place in Taiwan, Korea, Mexico and England. There have also been numerous other depositions of expert witnesses, third party resellers of finished products containing CRTs and witnesses for the Direct Action Plaintiffs ("DAPs").[9] Dr. Netz, Plaintiffs' expert economist, was deposed five times during the course of the litigation. Alioto Decl. I, ¶ 15.

Plaintiffs **[*187]** thereafter began preparing for trial, which was originally scheduled to begin on March 9, 2015.[10] The parties exchanged expert reports on liability and damages starting in April, 2014 and continuing through September, 2014. These included opening, opposition, rebuttal and sur-rebuttal reports from 17 expert witnesses, all of whom were deposed, some multiple times, regarding their reports. Merits discovery closed on September 5, 2014 but some discovery continued after that cut-off date.

On November 7, 2014, the Defendants filed 36 motions for summary judgment. Eleven of those were directed specifically at Plaintiffs' claims. These motions were fully briefed before the Proposed Settlements were executed. The motions have been withdrawn in light of the Settlements.

The parties then also exchanged trial exhibit lists, witness lists, deposition designations, jury instructions and special verdict forms. They also filed 64 motions *in limine* and other pretrial motions. These motions were briefed in varying degrees before the Proposed Settlements were executed. Pursuant to the Proposed Settlements, the Settling Defendants **[*188]** have provisionally withdrawn all of the motions pending against Plaintiffs. Docket Nos. 3801, 3802, 3812, 3851, 3852. Alioto Decl. I, ¶ 16-19.

B. Department of Justice Activity

The purported underlying global conspiracy that formed the basis of the Proposed Settlements was investigated by the Antitrust Division of the United States Department of Justice ("DOJ"). On February 10, 2009, a federal grand jury in San Francisco issued a two-count indictment against C.Y. Lin, the former Chairman and CEO of Defendant Chunghwa Picture Tubes, Ltd., for his participation in a global conspiracy to fix the prices of CRTs used in computer monitors and televisions. That was the first indictment to be issued in the DOJ's investigation into the CRT industry.

The Department of Justice also entered into a criminal plea agreement with Samsung SDI that resulted in a $32 million criminal fine. This agreement encompassed only one type of CRT, however (CDTs for monitors), that was sold to four U.S. customers during a portion of the alleged class period.

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[9] The DAPs are another group of plaintiffs in this case that purchased CRT Products directly from defendants. They include computer and television manufacturers such as Dell and Sharp and retailers such as Target, Best Buy and Costco. The DAPs joined this litigation between 2011 and 2014.

[10] By Order dated February 9, 2015, the Court vacated the trial date. Docket No. 3515.

C. Other Regulatory Action

A multinational investigation into defendants' purported price fixing also commenced in November 2007. For example, on November 8, 2007, **[*189]** antitrust authorities in Europe, Japan and South Korea raided the offices of manufacturers of CRTs as part of an international investigation of alleged price fixing. And MT Picture Display Co., Ltd., the CRT unit of Defendant Panasonic, was raided by Japan's Fair Trade Commission in November, 2007. Defendant Samsung SDI Co., Ltd. was also raided by South Korea's Fair Trade Commission, which started an investigation into Samsung's CRT business. On November 21, 2007, Defendant Royal Philips publicly disclosed that it too was subject to one or more investigations into anticompetitive conduct in the CRT industry.

In its 2008 Annual Report, Defendant Toshiba reported that "[t]he Group is also being investigated by the [European] Commission and/or the U.S. Department of Justice for potential violations of competition laws with respect to semiconductors, LCD products, cathode ray tubes (CRT) and heavy electrical equipment." And on May 6, 2008, the Hungarian Competition Authority ("HCA") announced its own investigation into the purported CRT cartel.

On October 19, 2013, the European Commission issued findings in a Summary Decision pertaining to its CRT price fixing investigations. These findings **[*190]** were made available to the public on December 23, 2014.

D. Settlement Activity

Throughout the litigation, the parties engaged in settlement negotiations. On April 18, 2011, Plaintiffs entered into a settlement with Chunghwa Picture Tubes, Ltd. for $10,000,000 cash. The Court granted Preliminary Approval of this settlement on August 9, 2011 and Final Approval on March 22, 2012. Docket Nos. 992, 1105. Pursuant to this settlement's terms, Chunghwa's counsel provided IPP Counsel with information regarding the conspiracy during a series of in-person meetings in February, 2009. Alioto Decl. dtd. 9/23/15, Docket No. 4071-1, ¶ 101 ["Alioto Decl. II"]

On May 18, 2013, Plaintiffs entered into a settlement with LG Electronics, Inc. and LG Electronics USA, Inc. for $25,000,000 cash. The Court granted Preliminary Approval of this settlement on December 9, 2013 and Final Approval on April 18, 2014. Docket Nos. 2248, 2542. Pursuant to this settlement, LG's counsel provided IPP Counsel with an oral proffer of evidence. In addition, IPP counsel interviewed two cooperating LG witnesses. Alioto Decl. II, ¶ 105.

Plaintiffs then entered into settlements with additional Settling Defendants as follows: Phillips **[*191]** on January 26, 2015 for $175,000,000, Panasonic on January 28, 2015 for $70,000,000, Hitachi on February 19, 2015 for $28,000,000, Toshiba on March 6, 2015 for $30,000,000, Samsung SDI on April 1, 2015 for $225,000,000, and Thomson and TOA on June 10, 2015 for $13,750,000. The specific terms of each of these settlements will be discussed in more detail below.

These settlements were reached in a year of negotiations commencing in early 2014. Two skilled mediators assisted the parties - the Honorable Vaughn Walker (Ret.) and the Honorable Fem Smith (Ret.). The total Settlement Fund recovered on behalf of the IPP class members is $576,750,000 plus accrued interest. There are no coupons or vouchers and there will be no reversion or refund to any defendant under any circumstances. In addition, no *cy pres* distribution is contemplated. Alioto Decl. II, ¶ 107-112.

IPPs filed their motions for preliminary approval of the Proposed Settlements on May 29, 2015. Docket No. 3861. The Court granted preliminary approval on July 9, 2015. Docket No. 3906.

Notice was thereafter published in accordance with the Preliminary Approval Order, which consisted of the following actions:

Direct mailed/emailed notice **[*192]** to more than ten million unique addresses;
Publication notice in magazines and newspapers;
Digital notice via paid advertisements on Google, Facebook, and other popular websites;

English and Spanish press releases carried by almost 300 domestic and foreign websites;
Notice to the Attorney General of the United States and the Attorneys General of all 50 states;
Publication on the CRT settlement website. Alioto Decl. I, ¶ 38-42, Exh. F & G.

E. Procedures Before the Special Master

As noted, *supra*, the Special Master was appointed on September 24, 2015. Thereafter, multiple iterations of scheduling orders were set forth, but the following schedule for filing motions, objections, responses thereto, the Special Master's Report and Recommendation, and other pleadings was ultimately stipulated to and approved:

(1) October 6, 2015: all objections to Proposed Settlements and attorneys' fees to be submitted to the Court
(2) November 20, 2015:[11] submission of all briefs in opposition to the objections
(3) December 9, 2015: submission of all Objectors' reply briefs to opposition[12]
(4) December 22, 2015: submission of Lead Counsel's response to Objectors' reply briefs[13]

(5) December 29, 2015: submission of Lead Counsel's **[*193]** response to California Attorney General's Supplemental Statement of Interest
(6) January 4, 2016: submission of California Attorney General's reply to Lead Counsel's response to Supplemental Statement of Interest
(7) January 5, 2016 at 10:00 a.m.: oral argument before Special Master at the San Francisco office of JAMS
(8) January 13, 2016 at 12:00 p.m.: submission of briefs pertaining to issues concerning the Chunghwa settlement and other issues raised at and after the January 5, 2016 hearing
(9) January 29, 2016: deadline for the Special Master to file Report & Recommendation
(10) February 12, 2016: deadline for objections to Report & Recommendation
(11) February 23, 2016: Deadline for oppositions to objections
(12) March 15, 2016: hearing on final approval of settlement and aggregate attorneys' fees/costs and incentive awards.[14]

Eleven objections were filed with regard to the Proposed Settlements and attorneys' fees as was one supplemental objection. Docket Nos. 4099, 4101/4125, 4106, 4111, 4112, 4113, 4115/4116, 4119, 4120, 4128, and 4144.[15] Two objectors later moved to withdraw their objections. Docket Nos. 4130, 4165.[16]

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[11] On November 18, 2015, the Court issued an order reminding the parties that, pursuant to the Court's previous order at page 6 of Docket No. 4077, "motions and other papers directed to the attention of the Special Master are to be served on him but not, in the first instance, to be filed with the Court." Docket No. 4195. Following that Order, the Special Master arranged **[*194]** for all communications, other than routine e-mails about ministerial matters, to be filed with him using the JAMS Electronic Filing System called "Case Anywhere." Docket No. 4201.

[12] On December 11, 2015, objectors Josef Cooper and Francis Scarpulla filed a motion with the Court asking to be appointed Co-Lead Counsel in this case to represent all consumers with claims in the "non-repealer" states. Docket No. 4241. At the January 5, 2016 hearing, when asked about this motion and whether it could render the Special Master's Report and Recommendation moot if granted, Messrs. Cooper and Scarpulla represented that this should not be the case since, if their request is granted, they envisioned only making the same arguments that they have made here in the context of their objections but now they would merely be making those arguments in their new capacity. The Court is scheduled to hear this motion on February 18, 2016.

[13] Reply briefs from Lead Counsel were not considered in the Court's original scheduling order. *See* Docket No. 4185. However, Lead Counsel requested the opportunity to file a reply briefs on December 13, 2015 because the Objectors' reply briefs had gone "far beyond replying to the **[*195]** IPP's initial submissions and raise[d] a number of new matters." The Special Master granted Lead Counsel's request on December 14, 2015, permitting Lead Counsel to file responsive briefs, not to exceed 20 pages, by December 23, 2015. In that order, the Special Master delineated the five specific issues that Lead Counsel could address in his responsive briefing. On December 14, 2015, Mr. Scarpulla requested that he be allowed to file a sur-reply if Lead Counsel were to be permitted to submit further reply briefs. The Special Master denied Mr. Scarpulla's request.

[14] The Special Master reserved jurisdiction on the issue of allocation of attorneys' fees to decide after the Court issues its final award on approval of the settlement and attorneys' fees/costs and incentive awards.

On November 20, 2015, IPPs submitted two briefs: (1) IPP's Motion for Final Approval of Settlements; and (2) IPP's Reply Re: Motion for Award of Attorneys' Fees, Reimbursement of Litigation Expenses and Incentive Awards to Class Representatives, in which Counsel for the IPPs seeks to reduce the Proposed Settlements by $192,250,000 for payment of attorneys' fees, $7,670,525.57 for payment of litigation expenses, and $450,000 for payment of incentive awards to the Class Representatives and additional named plaintiffs. No *cy pres* payments are contemplated in the Proposed Settlements. Each of these briefs was accompanied by various declarations and exhibits.

Multiple reply briefs were filed by the Objectors on December 9, 2015 as was a Supplemental Statement of Interest by the California Attorney General seeking to, *inter alia*, move the deadline for filing claims in IPP settlement from **[*197]** December 7, 2015 to June 30, 2016. One late reply brief was filed on December 15, 2015, but the Special Master denied this objector's motion for leave to file this late reply. Docket No. 4263, affirmed by the Court at Docket No. 4274. As noted, *supra*, because some of the replies raised new issues that were not raised in the previously-filed objections, the Special Master permitted Lead Counsel to file a responsive brief on December 23, 2015 pertaining to the following five specific issues: (1) the release without compensation of class members in certain states (section II of the Cooper/Scarpulla brief)[17]; (2) issues relating to the Chungwa settlement (section III of the Cooper/Scarpulla brief, and section B.2 of the St. John brief); (3) alleged defects in notice (section IV in the Cooper/Scarpulla brief); (4) the disproportionate size of the Samsung and Phillips settlements (section C of the St. John brief); and (5) the failure to pursue claims of class members in Massachusetts and Missouri (section II.C of the Moore brief). Lead Counsel was also permitted to respond to the California Attorney General's Supplemental Statement of Interest on December 29, 2015. On January 4, 2016, the **[*198]** Attorney General filed a Reply and a supporting supplemental declaration.

On January 5, 2016, the Special Master heard oral argument on the pending motions and objections. At that argument, several new issues were raised and various issues were complicated by new and additional argument. The Special Master therefore requested that Lead Counsel and some of the objectors make certain submissions in order to supplement the record.

All proceedings before the Special Master have been filed on Case Anywhere, the JAMS e-filing program, in accordance with the Court's order, with a few inadvertent immaterial exceptions and routine e-mails about scheduling and other ministerial matters. The Special Master's orders have also been filed on the Court's ECF system. The Special Master has had conversations with Lead Counsel, the California Attorney General's counsel

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[15] One Supplemental Objection was filed at Docket 4144 by the same objectors who filed an objection at Docket 4119.

[16] One objection, by Objector **[*196]** Johnson (Docket No. 4128), was received on 10/16/15 after the 10/9/15 deadline. The Special Master has considered it notwithstanding the late filing. The objection of Saik (Docket No. 4140) was filed late, on 10/24/15, but admissible evidence confirmed that it was delivered to the Clerk's office on 10/9/15.

[17] Lead Counsel contends that Messrs. Scarpulla and Cooper lack standing to object to the Proposed Settlements since they are not members of the class and they are bringing the objections on behalf of the IPPs as a whole rather than on behalf of an individual class member client. Messrs. Scarpulla and Cooper contend that as class counsel they have standing in light of their fiduciary duty to act in the best interests of the class. *See In re TracFone Unlimited Serv. Plan. Litig., 112 F. Supp. 3d 993, 2015 WL 4051882, at * 11 (N.D.Cal. July 2, 2015)* (objector has no legal standing to object to a settlement unless he can demonstrate that he is an aggrieved class member); *but see* ***Staton v. Boeing Co., 327 F.3d 938, 960 (9th Cir. 2003)*** ("class counsel ultimately owe their fiduciary responsibility to the class as a I whole and are therefore not bound by the views of the named plaintiffs regarding any settlement"). The Special Master concludes that the proper approach is to consider the arguments set forth in their briefs in furtherance of the Court's fiduciary duty to the class to assure that the settlement is fair. *See Rodriguez v. Disner, 688 F.3d 645, 656 (9th Cir. 2012)*; *In re Pet Food Products Liab. Litig. 629 F.3d 333, 349 (3d Cir. 2010)* ["trial judges bear the important responsibility of protecting absent class members," and must be "assur[ed] that the settlement represents adequate compensation for the release **[*199]** of the class claims."]; *Ehrheart v. Verizon Wireless, 609 F.3d 590, 593 (3d Cir. 2010)* [stressing that "[t]he purpose of *Rule 23(e)* is to protect the unnamed members of the class," and that a "district court acts as a fiduciary" for absent class members].

and certain objector counsel concerning such issues as scheduling, procedures, and supplying material for the Special Master's review.

v. TERMS OF SETTLEMENT AGREEMENTS

The Proposed Settlements resolve all federal and state-law claims **[*200]** brought by Plaintiffs against the Settling Defendants stemming from the Settling Defendants' alleged conspiracy to fix prices for CRT Products indirectly purchased from them. The Proposed Settlements would obligate the Settling Defendants to pay a total of $541,750,000. If approved, these six Proposed Settlements — along with the two previously-approved settlements— would result in the Defendants making total settlement payments of $576,750,000 to indirect purchasers of CRTs.[18] Most of the Proposed Settlements also contain cooperation provisions. These provisions would require Settling Defendants to provided specified cooperation to IPPs in the prosecution of any continuing litigation.

The Proposed Settlements are contingent upon the certification by the Court of a Settlement Class, which, as proposed by Plaintiffs, includes a "Nationwide Class" of indirect purchasers of CRT Products and "Statewide Damages Classes" of indirect purchasers of CRT Products seeking **[*201]** money damages under the laws of 21 states and the District of Columbia (collectively the "Settlement Class").

Specifically, the Proposed Settlements defines the Settlement Classes as follows:[19]

> NATIONWIDE CLASS
>
> All persons and or entities who or which indirectly purchased in the United States for their own use and not for resale, CRT Products manufactured and/or sold by the Defendants, or any subsidiary, affiliate, or alleged co-conspirator thereof, at any time during the period from March 1, 1995 through November 25, 2007. Specifically excluded from this Class are claims on behalf of Illinois persons (as defined by *740 ILCS 10/4*) for purposes of claims under *740 Ill. Comp. Stat§ 10/7(2)*, Oregon natural persons (as defined by *ORS 646.705 (2)*) for purposes of claims under *ORS § 646.775(1)*, and Washington persons (as defined by *RCW 19.86.080*) for purposes of claims under *RCW 19.86.080 (1)*. Also specifically excluded from this Class are the Defendants; the officers, directors or employees of any Defendant; any entity in which any Defendant has a controlling interest; and, any affiliate, legal representative, heir or assign of any Defendant. Also excluded are named co-conspirators, any federal, state or local government entities, any judicial officer presiding over this action and the members **[*202]** of his/her immediate family and judicial staff, and any juror assigned to this action.[20]
>
> INDIRECT PURCHASER STATE CLASSES:[21]
>
> All persons and or entities in Arizona, California, District of Columbia, Florida, Iowa, Kansas, Maine, Michigan, Minnesota, Mississippi, New Mexico, New York, North Carolina, North Dakota, South Dakota, Tennessee,

[18] The Settlement Amounts have been deposited into an escrow account and invested. If the Settlements are finally approved, any interested earned thereon (together with the Settlement Amounts) will become part of the Settlement Fund.

[19] It should be noted that the Proposed Settlement Class is identical to the class preliminarily approved by the Court with respect to the settlements at issue here (Docket No. 3906) as well as the Settlement Class finally approved by the Court in conjunction with IPP's settlement with LG (Docket No. 2542). The LG Court-approved settlement also involved an identical release of all claims nationwide.

[20] Residents of **[*204]** Illinois, Oregon and Washington are excluded from the Nationwide Class because the Attorneys General of those states are suing the Defendants on behalf of residents of those states.

[21] All of the Indirect Purchaser State Classes are the same except that three states — Hawaii, Nebraska and Nevada — have slightly shorter damages periods because the statutes allowing indirect purchasers to bring an antitrust claim for damages in these three states were enacted after March 1, 1995, the beginning of the alleged Class Period. The Court dismissed claims based on purchases made prior to the enactment of these statutes on the grounds that the state legislatures did not intend the statutes to apply retroactively. *See* *In Re: Cathode Ray Tube (CRT) Antitrust Litig., 738 F.Supp.2d 1011, 1025-26 (N.D.Cal. 2010)*.

> Vermont, West Virginia, and Wisconsin who or which indirectly purchased for their own use and not for resale, CRT Products manufactured and/or sold by the Defendants, or any subsidiary, affiliate, or alleged co-conspirator thereof, at any time during the period from March 1, 1995 through November 25, 2007.
> All persons and entities in Hawaii who or which indirectly purchased for their own use and not for resale CRT Products manufactured and/or sold by the Defendants, or any subsidiary, affiliate, or alleged co-conspirator thereof, at any time from June 25, 2002 through November 25, 2007.
>
> All persons and entities in Nebraska who or which indirectly purchased for their own use and not for resale CRT Products manufactured and/or sold by the Defendants, or any subsidiary, affiliate, or alleged co-conspirator thereof, at any time from July 20, 2002 through November **[*203]** 25, 2007.
> All persons and entities in Nevada who or which indirectly purchased for their own use and not for resale CRT Products manufactured and/or sold by the Defendants, or any subsidiary, affiliate, or alleged co-conspirator thereof, at any time from February 4, 1999 through November 25, 2007.
> Specifically excluded from these Classes are the Defendants; the officers, directors or employees of any Defendant; any entity in which any Defendant has a controlling interest; and, any affiliate, legal representative, heir or assign of any Defendant. Also excluded are named co-conspirators, any federal, state or local government entities, any judicial officer presiding over this action and the members of his/her immediate family and judicial staff, and any juror assigned to this action.[22]

Plaintiffs propose to compensate members of the Indirect Purchaser State Class from the $541,750,000 Settlement Fund according to the proposed plan of distribution under which qualifying claimants are eligible to receive a distribution from the Settlement Fund based on the number and type of CRT Products purchased, as documented in the proposed claim form. In exchange for this compensation under the Proposed Settlements, IPPs agreed to the following global release:

> "Any and all claims, demands, judgments, actions, suits, causes of action, whether class, individual, or otherwise (whether or not any Class Member has objected to the settlement or makes a claim upon or participates in the Settlement Fund, whether directly, representatively, derivatively, or in any other capacity) that Releasors, or each of them, ever had, now has, or hereafter can, shall, **[*206]** or may have on account of, or in any way arising out of, any and all known and unknown, foreseen and unforeseen, suspected or unsuspected injuries, damages, and consequences thereof in any way arising out of or relating in any way to any act or omission of the Panasonic Releases (or any of them) or any other entity concerning the manufacture, supply, distribution, sale or pricing of CRT Products up to the date of execution of this Agreement, including but not limited to any conduct alleged, and causes of action asserted or that could have been alleged or asserted, in complaints filed in this Action, including those arising under any federal, state, or foreign antitrust, unfair competition, unfair practices, price discrimination, unitary pricing, unjust enrichment, contract, or trade practice law (the "Released Claims")."

Thus, IPPs and class members will release all federal and state-law claims against a Settling Defendant whose settlement becomes final, "concerning the manufacture, supply, distribution, sales or pricing of CRT Products...", although the release does not include claims for product defect, personal injury or breach of contract. Class members release their claims for **[*207]** injunctive relief through the Execution Dates of the Proposed Settlements Agreements only. And as will be discussed in more detail, members of the Nationwide Class who are not also members of any Statewide Damages Class will not receive any monetary compensation.

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[22] It should be noted that the Court has already certified 22 indirect purchaser state classes which are defined similarly to the Indirect Purchaser State Classes proposed here (Docket Nos. 1742 and 1950). The Settlement Class proposed here is different in that the Class that was already certified: (1) requires that the Indirect Purchaser State Class Members be residents of the respective States, whereas here, the Settlement Class requires only that the purchase was made in one of **[*205]** the States; (2) is limited to televisions and monitors containing CRTs, whereas the Settlement Class here includes CRTs, televisions and monitors containing CRT and other products containing CRTs; and (3) consists of the Indirect Purchaser State Classes defined above, whereas the Settlement Class here also includes the Nationwide Class.

Plaintiffs also propose that notice to Class members would be accomplished by a notice program designed by Joseph Fisher ("Fisher") of The Notice Company. The notice program includes direct mail and e-mail notice to millions of corporations and individual consumers, as well as published notice in newspapers, magazines and online. The notice also directs interested persons to the website, *www.CRTclaims.com*, where they can find additional detailed information. *See, infra at VIIC*, for detailed description of Notice Program.

VI. CERTIFICATION OF SETTLEMENT CLASS

Before deciding whether the Proposed Settlements should be approved, the Court must first decide whether to finally certify the Settlement Classes. In order to certify a class, the proposed class and proposed class representatives must meet the four prerequisites listed in *Rule 23(a)* — numerosity, commonality, typicality and adequacy of representation. They must also meet one of the **[*208]** three requirements set forth in *Rule 23(b)*.

There is a key difference in this *Rule 23* evaluation when certifying a class for the purpose of litigating claims and when certifying a class for purposes of settlement, as is the case here. As was pointed out in the Report and Recommendation in *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation, Master File No. M-02-1486-PJH (MDL No. 148), DRAM Docket No. 2132, 2013 U.S. Dist. LEXIS 188116 (N.D.Cal. January 8, 2013)*:[23]

> Because of the pivotal role and ensuing consequences of the class certification decision, trial courts must conduct a "rigorous analysis" of *Rule 23* 's prerequisites. *Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 131 S.Ct. 2541, 2551-52, 180 L.Ed.2d 374 (2011)*; *In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 315-21 (3d Cir. 2008)*; *In re Initial Pub. Offering Sec. Litig., 471 F.3d 24, 31-42 (2d Cir. 2006)*. The same analytical rigor is required for litigation and settlement certification, but some inquiries essential to litigation class certification are no longer problematic in the settlement context. A key question in a litigation class action is manageability—how the case will or can be tried, and whether there are questions of fact or law that are capable of common proof. But the settlement class presents no management problems because the case will not be tried. Conversely, other inquiries assume heightened importance and heightened scrutiny because of the danger of conflicts of interest, collusion, **[*209]** and unfair allocation. *See* *Amchem, 521 U.S. at 620, 117 S.Ct. 2231* ("[O]ther specifications of the Rule [23]—those designed to protect absentees by blocking unwarranted or overbroad class definitions—demand undiluted, even heightened, attention in the settlement context.").

Id. at p.59 (quoting *Sullivan v. DB Investments, Inc., 667 F.3d 273, 334-35 (3d Cir. 2011)*.

None of the objectors, except Donnie Clifton, (Docket No. 4099, pp.5-7), directly challenges the first three prerequisites set forth in *Rule 23(a)*. Indeed, there is really no legal basis for such a challenge since (1) it is undisputed that millions of people in the United States purchased CRT Products during the class period; thus, the Class readily satisfies the numerosity requirements of *Rule 23*; (2) there are undeniably questions of law and fact common to the Class, including whether the Defendants engaged in a price-fixing conspiracy that injured Plaintiffs when they paid more for CRT Products than they would have absent the alleged price-fixing conspiracy; thus, the commonality prong of *Rule 23(a)* has been satisfied; and **[*210]** (3) it is clear that the claims of the representative Plaintiffs are typical of the claims of the class members because they all indirectly purchased CRT Products at supra-competitive levels as a result of the alleged price-fixing conspiracy during the relevant time period. In fact, the Special Master has already found as much in his previous Report and Recommendation to the Court on class certification, which involved classes similar in composition to the Settlement Class, and the Court subsequently adopted that Report on Recommendation on September 19, 2013. *See* Class R&R, pp. 15-17, 19, Docket No. 1742; *see also* Docket No. 1950 (Order adopting Class R&R).

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[23] Neither the Report & Recommendation in *DRAM* nor the Court's approval of that Report & Recommendation can be found on Westlaw. The Special Master will therefore cite directly from the docket version of this document throughout this Report & Recommendation.

Some objectors have directly challenged the fourth prong of *Rule 23(e)* — adequacy of the representation. These objectors are not arguing that there was any collusion in reaching the Proposed Settlement, but, for example, in their objections, Rockhurst University, Gary Talewsky, and Harry Garavanian contend that Class Counsel "failed to adequately represent the Nationwide Class's interests in securing any value for the release of their claims, and in fact seems to have had a conflict with multiple states, or with at least the Massachusetts **[*211]** and Missouri classes." Docket No. 4113, p.7. Laura Townsend Fortman and John Finn also argued in their objections that there is a conflict of interest between Lead Counsel and the Nationwide Class because Lead Counsel settled claims on behalf of the damages states but then agreed to a broad release of the claims of class members in non-damage states who receive no consideration. (Docket No. 4111); *see also* Clifton Reply to Opposition to Objections, p.2 ("class counsel abandoned all efforts to represent them [all class members] in the settlement negotiations").

While these objections will be addressed in more detail below, it is at least worth briefly mentioning at this juncture that the Special Master has seen nothing in the abundance of evidence that has been introduced in these approval proceedings or through his copious interactions with Class Counsel to indicate that Class Counsel, and in particular Lead Counsel, has failed to provide all Class Members adequate representation, that Class Counsel has any conflict of interest, or that the Class Representatives are not part of the class or that they do not possess the same interest and suffer the same injury as the class members. ***[*212]*** *See* *Amchem Products, Inc. v. Windsor, 521 U.S. 591, 594-95, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)*. Indeed, as noted, *supra*, the representative plaintiffs' interests are directly aligned with those of other members of the Class — the representative plaintiffs were damaged as a result of defendants' allegedly unlawful conduct, and the plaintiffs would have had to prove the same wrongdoing as the absent class members to establish liability. *See* *Pet Food, 629 F.3d at 349*.

The mere fact that "relief varie[s] among the different groups of class members [does] not demonstrate ... conflicting or antagonistic interests within the class" or adequacy of representation issues. *In re Ins. Brokerage Antitrust Litig., 579 F.3d 241, 272 (3d Cir. 2009)*. Nor does the fact that the settlement fund allocates a larger percentage of the settlement to certain class members. "Instead, the different allocations reflect the relative value of the different claims." *See* *Pet Food, 629 F.3d at 347*. The Special Master is therefore satisfied that this prerequisite has been met. The objectors have failed to demonstrate inadequate representation or any conflict of interest.[24]

IPPs have also satisfied *Rule 23(b)(3)*'s predominance and superiority criteria. The *Rule 23(b)* predominance inquiry is "readily met in certain cases alleging violations of the antitrust laws." *Amchem, 521 U.S. at 615* (quoting *Fed.R.Civ.P. 23(b)(3)*). Indeed, "[i]n price-fixing cases, courts repeatedly have held that the existence of the conspiracy is the predominant issue and warrants certification even where significant individual issues are present." *Thomas & Thomas Rodmakers, Inc. v. Newport Adhesives and Composites, Inc., 209 F.R.D. 159, 167 (C.D.Cal. 2002)*.

Such is the case here where the existence of an alleged CRT conspiracy and defendants' **[*214]** acts in furtherance of the alleged conspiracy are the predominant common questions. The existence of potential individualized damage issues does not alter this fact since courts in this district have recognized that "classes were certified ... regardless whether some members of the class negotiated price individually, or whether — as here — differences among product type, customer class, and method of purchase existed." *In re Dynamic Random Access Memory (DRAM) Antitrust Litig., 2006 U.S. Dist. LEXIS 39841, 2006 WL 1530166, at *9 (N.D.Cal. June 5, 2006)*. This is true even if there are individual state law issues, as long as the common issues still outweigh the individual ones. *Waste Mgmt. Holdings, Inc. v. Mowbray, 208 F.3d 288, 296 (1st Cir. 2000)*; *see also* *Sullivan, 667 F.3d at*

[24] Objectors Scarpulla and Cooper point to language in Lead Counsel's November 19, 2015, motion brief in which Lead Counsel stated that "Lead Counsel was appointed to represent the interests of purchasers in the 22 indirect purchaser state classes. He has no duty to represent **[*213]** purchasers in other states." Motion for Final Approval, p. 43, n.71. Objectors take this quote out of context. Lead Counsel was not stating that he never advanced the interests of the Nationwide class in this litigation. Instead, he was merely explaining that, during the litigation phase of the case, he had "no duty to represent" members of the Nationwide Class for purposes of approaching attorneys general about pursuing potential *parens patriae* actions. Lead Counsel sufficiently explained this distinction in his Reply brief. There, he notes that at the settlement stage, he had a duty to represent all members of the proposed settlement class vigorously which, as the Special Master has observed, is exactly what Lead Counsel did.

301, 303 ("predominance is not considered deficient merely because claims were subject to the [varying] laws of fifty states..."; instead, "in the settlement context, variations in state antitrust, consumer protection and unjust enrichment laws did not present the types of insuperable obstacles that could render class litigation unmanageable ... since a settlement would eliminate the principal burden of establishing the elements of liability under disparate laws." (internal quotations omitted).

Here, issues that are common to the class predominate — all IPPs are alleged to have paid overcharges that were caused by the defendants' alleged price-fixing **[*215]** activities. This militates in favor of final certification of the Settlement Class.

With regard to superiority, there is no doubt that the damages of most individual class members are relatively small compared to the cost of litigation, making it difficult for individual class members to adjudicate their claims individually. And even if plaintiffs were to individually proceed to litigation, the court system would then be overwhelmed by the burden of hundreds of thousands of separate actions. IPPs, therefore, have met their burden with regard to the requirements of *Rule 23(b)*.

In light of the above, the Special Master recommends that the Court finally approve the Settlement Classes. All of the prerequisites to a class action under *Federal Rule of Civil Procedure 23* are satisfied for settlement purposes.

VII. APPROVAL OF PROPOSED SETTLEMENTS

A. Fairness of Compensation to Class

A class action may not be dismissed, compromised or settled without the express approval of the Court. *Fed.R.Civ.P. 23(e)*. Approval is a three-step process: (1) certification of a settlement class and preliminary approval of the Proposed Settlements; (2) notice to the class; and (3) final approval at a Fairness Hearing, following notice, left to the sound discretion of the trial **[*216]** judge. *See* *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc., 221 F.R.D. 523, 525 (C.D.Cal. 2004)*; *Ellis v. Naval Air Rework Facility, 87 F.R.D. 15, 18 (N.D.Cal. 1980)* aff'd, *661 F.2d 939 (9th Cir. 1981)*. The Court may issue final approval of a class settlement "only after a hearing and on finding that it is fair, reasonable, and adequate." *Fed.R.Civ.P. 23(e)(2)*; *In re Bluetooth Headset Prods. Liab. Litig., 654 F.3d 935, 946 (9th Cir. 2011)*. *Rule 23(e)*'s primary concern is "the protection of those class members, including the named plaintiffs, whose rights may not have been given due regard by the negotiating parties." *Officers for Justice v. Civil Serv. Comm'n of the City and Cnty. of San Francisco, 688 F.2d 615, 624 (9th Cir. 1982)*.

In considering final approval of a proposed settlement the Court's discretion is guided by the following factors: (1) the strength of the plaintiffs' case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of class members to the Proposed Settlements. *Churchill Vill., LLC v. Gen. Elec., 361 F.3d 566, 575 (9th Cir. 2004)*. "This list is not exhaustive, and different factors may predominate in different factual contexts." *Torrisi v. Tucson Elec. Power Co., 8 F.3d 1370, 1376 (9th Cir. 1993)*. Indeed, the Ninth Circuit has observed that the district court's determination in approving a settlement is nothing more than "an amalgam of delicate balancing, gross approximations and rough **[*217]** justice." *Officers for Justice, 688 F.2d at 625*. But in general, there is a strong judicial policy favoring class settlements. *Class Plaintiffs v. Seattle, 955 F.2d 1268, 1276 (9th Cir. 1992)*. Voluntary conciliation and settlement are the preferred means of dispute resolution. *Officers for Justice, 688 F.2d at 625*.

Looking at the Proposed Settlements through this legal lens, the Special Master is satisfied that they meet these standards.

1. Strength of IPP's Case

While a proposed settlement is not to be judged against a hypothetical or speculative measure of what might have been achieved by the negotiators in this case, *see* *Officers for Justice, 688 F.2d at 625*, there is no doubt that the

IPPs would have faced substantial hurdles had the parties not agreed to settlement. Not only would IPPs have had to prove that certain Defendants participated in the conspiracy, they would have also had to prove injury and damages on a class-wide basis. In addition, IPPs would have had to prove that the conspiracy had an impact in the United States; they would have had to show application of the Foreign Trade Antitrust Improvements Act of 1982; and they would have had to address withdrawal and statutes of limitations defenses. Many of these issues are unsettled and contested. This is not to say that the IPPs would not have prevailed, but their burden would have been an onerous **[*218]** one, to say the least. This factor, therefore, weighs strongly in favor of approving the Proposed Settlements.

2. Risk, Expense and Complexity of the Litigation

The record is clear that this antitrust litigation, which has spanned eight years and several continents, alleging a global conspiracy that began more than 20 years ago, has required great effort, expense and risk to the IPPs and their counsel. As noted, *supra*, class counsel engaged in extensive discovery efforts at both the class certification and merits stages. These efforts included ongoing meet and confers, expert discovery involving 17 expert witnesses, and the review of millions of pages of documents, many of which were in Korean, Japanese or Chinese and required certified translations.

Class certification was also quite arduous, complex and time-consuming, taking more than two years. And not only did Class Counsel have to take depositions, review documents and work with experts during this time frame, they also had to defend against Defendants' Daubert motion to strike IPP's expert reports.

And finally, at the summary judgment stage, the IPPs had to respond to the eleven motions (out of 36) that Defendants had filed against **[*219]** them, and they had to coordinate with other plaintiff groups on responses to the other motions that remained. These motions raised difficult and complex legal and factual issues regarding the FTIA, antitrust standing, withdrawal from the conspiracy and other dispositive issues.

There was obviously great risk to IPPs in continuing with this litigation. "Antitrust litigation in general, and class action litigation in particular, is unpredictable." *In re NASDAQ Mkt.-Makers Antitrust Litig., 187 F.R.D. 465, 475 (S.D.N.Y. 1998)*. "The 'best' case can be lost and the 'worst' case can be won, and juries may find liability but no damages. None of these risks should be underestimated." *In re Superior Beverage/Glass Container Consol. Pretrial, 133 F.R.D. 119, 127 (N.D.Ill. 1990)*. IPPs faced the risk of losing this litigation since proving liability was going to be complicated. This amplified the risk that IPPs might not recover anything for their efforts.

"Generally, unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results." *Ching v. Siemens Indus., Inc., 2014 U.S. Dist. LEXIS 89002, 2014 WL 2926210, at *4 (N.D.Cal. June 27, 2014)*. Immediate receipt of money through settlement, even if lower than what could potentially be achieved through ultimate success on the merits, has value to a class, especially when compared to risky and costly continued litigation. *See* *LaGarde v. Support.com, Inc., 2013 U.S. Dist. LEXIS 42725, 2013 WL 1283325, at *4 (N.D.Cal. Mar. 26, 2013)*.

While collection **[*220]** may not have been as high a hurdle here given the size and wealth of the Settling Defendants, they are foreign companies against whom collection efforts may be complex and expensive.

The Special Master is satisfied that the factor of risk and complexity weighs in favor of settlement.

3. Amount Offered in Settlement

This factor is generally considered the most important because the critical component of any settlement is the amount of relief obtained by the class. *Bayat v. Bank of the West, 2015 U.S. Dist. LEXIS 50416, 2015 WL 1744342, at *4 (N.D.Cal. Apr. 15, 2015)*.

Here, as cash consideration for the Proposed Settlements, Defendants have deposited $541,750,000 into an escrow account. The Chunghwa and LG settlements bring that total to $576,750,000. No objector has disputed that this may well be the second largest cash recovery ever obtained on behalf of indirect purchasers. In addition, IPPs obtained valuable cooperation from Defendants, in varying degrees, that will potentially enable them to prosecute the action against, and obtain higher recoveries from the remaining Defendants. This factor favors approval of the Proposed Settlements considerably.

Objector Douglas W. St. John argues that the "vastly disproportionate size of the Samsung and Philips settlements," demonstrates that the **[*221]** smaller settlements against other defendants were unfair. St. John Reply in Support of Objection, pp. 9-11. While St. John attempts to cast this argument in terms of the settlement's fairness, it is really a challenge to Lead Counsel's request for attorneys' fees and is addressed head-on *infra* at VIII.B.3. To the extent that this objection challenges the adequacy of the settlement, the Special Master rejects it. Lead Counsel has provided evidence that the market shares of both Samsung and Philips increased during the litigation and that their settlement amounts are roughly proportionate to their market shares, their core roles in the conspiracy and the evidence against them. IPP Reply re Final Approval of Settlements, dtd. 12/23/15, p. 17. (filed on Case Anywhere).

4. Extent of Discovery and Stage of Proceedings

This factor "evaluates whether 'the parties have sufficient information to make an informed decision about settlement.'" *Larsen v. Trader Joe's Company, 2014 U.S. Dist. LEXIS 95538, 2014 WL 3404531, at *5 (N.D.Cal. July 11, 2014)*. Formal discovery is not a requirement for final settlement approval; "[r]ather, the court's focus is on whether the parties carefully investigated the claims before reaching a resolution." *Bellinghausen v. Tractor Supply Co., 306 F.R.D. 245, 257 (N.D.Cal. 2015)*.

Here, significant discovery was already completed by the time the parties **[*222]** reached their settlement agreements. IPPs and their experts had already searched, reviewed and analyzed millions of pages of documents and voluminous data sets produced by defendants, the DAPs and third parties, and various parties to the litigation had already taken over 250 depositions. In addition, the parties had already exchanged expert reports on liability and damages, including opening, opposition, rebuttal and sur-rebuttal reports from 17 expert witnesses, all of whom were deposed, often multiple times, regarding the reports that they had prepared.

In anticipation of trial, the parties had also exchanged trial exhibit lists, witness lists, deposition designations, jury instructions and special verdict forms. They had also filed 64 motions *in limine* and other pretrial motions. These motions were briefed in varying degrees before the Proposed Settlements were executed.

In light of this extensive discovery (and preparation for trial), IPP counsel were in a solid position to assess the value of the case. This factor weighs heavily in favor of settlement.

5. Experience and Views of Lead Counsel

"Parties represented by competent counsel are better positioned than courts to produce a **[*223]** settlement that fairly reflects each party's expected outcome in litigation." *Rodriguez v. West Publishing Corp., 563 F.3d 948, 967 (9th Cir. 2009)*. Consequently, "'[t]he recommendations of plaintiffs' counsel should be given a presumption of reasonableness.'" *In re Omnivision Techns., Inc., 559 F.Supp.2d 1036, 1043 (N.D.Cal. 2008)*; *Ellis, 87 F.R.D. at 18* ("[T]he fact that experienced counsel involved in the case approved the settlement after hard-fought negotiations is entitled to considerable weight" when approving a settlement agreement); *see also* *In re Paine Webber Ltd. Partnerships Litig., 171 F.R.D. 104, 125 (S.D.N.Y.)* aff'd sub nom. *In re Paine Webber Inc. Ltd. Partnerships Litig., 117 F.3d 721 (2d Cir. 1997)*.

Here, it is undisputed that Lead Counsel and counsel for Defendants are experienced litigators, that Lead Counsel oversaw and was involved in every aspect of this litigation and that Lead Counsel had a thorough understanding of the evidence and all of the claims and defenses involved in this case. *See* Docket 4073-1 (Lead Counsel CV). It engenders further confidence that Hon. Vaughn Walker and Hon. Fem Smith provided their experienced input into the parties' settlement negotiations.

This factor therefore militates in favor of approval of the Proposed Settlements.

6. Government Participation

The Class Action Fairness Act, or "CAFA," requires that notice of a settlement be given to state and federal officials and provides those officials a window of time to comment. 28 U.S.C. § 1715(b). "Although CAFA does not create **[*224]** an affirmative duty for either state or federal officials to take any action in response to a class action settlement, CAFA presumes that once put on notice, state or federal officials will raise any concerns that they may have during the normal course of the class action settlement procedures." Garner v. State Farm Mutual Automobile Ins. Co., 2010 U.S. Dist. LEXIS 49477, 2010 WL 1687832, at *14 (N.D.Cal. Apr. 22, 2010).

Here, the Department of Justice and all state attorneys general received CAFA notices of these settlements from each of the settling defendants. Other than the California Attorney General, who filed a Statement of Interest asserting various conditional objections, no other governmental official has raised any concern regarding the settlements. This fact favors approval of the Proposed Settlements. *See* In re LinkedIn User Privacy Litig., 309 F.R.D. 573, 2015 WL 5440975, at *1 (N.D.Cal. Sept. 15, 2015).

With regard to the California Attorney General's Statement of Interest, which the Attorney General supplemented on December 9, 2015, the Attorney General raised the following concerns: (1) the notice program that IPPs implemented was insufficient to assure that California natural persons had a fair and equitable opportunity to claim from the Proposed Settlements, particularly since the notice program did not utilize television advertising; (2) reimbursement on claims should be capped at single **[*225]** rather than trebled damages; (3) a residual *cy pres* fund should be established for the benefit of natural persons in the state-specific damages classes; and (4) the final date for filing claims should be extended to June 30, 2016 in order to increase claims from natural persons and efficiently coordinate California state and federal proceedings.

With regard to extension of the claim deadline, the Special Master issued a Report and Recommendation on January 6, 2016 (Docket No. 4281), recommending that the Court extend the claim deadline for California natural persons only to June 30, 2016, and that Lead Counsel for the IPP's give notice of such extension on the IPP claim website. With regard to the concerns about the adequacy of notice, at the January 5, 2016, hearing the Special Master ordered Lead Counsel to produce data concerning claims that have been received to date.

The Special Master rejects the requests of the Attorney General as to inadequacy of notice, establishment of a *cy pres* fund, and applying a damage cap based on single rather than treble damages. As to notice, the Attorney General acknowledges that the notice program satisfied due process and Rule 23. While the Attorney General **[*226]** advocates for a more "optimal" notice program that would have included television advertising, the Attorney General has cited no persuasive authority for the proposition that television advertising is required, particularly when the rest of the notice program had a sufficiently expansive reach. *See* In re Google Referrer Header Privacy Litig., 87 F.Supp.3d 1122, 1138 (N.D.Cal. 2015).

As to *cy pres* the Second Circuit in Masters v. Wilhelmina Model Agency, Inc., 473 F.3d 423 (2d Cir. 2007) rejected an approach similar to the Attorney General's proposal. The Second Circuit found that the district court had erred in allowing a *cy pres* distribution without considering a distribution of excess funds as treble damages to the class. Id. at 436. The Attorney General has cited no case that holds that *cy pres* should take precedence over treble damages.

As to capping claims at single rather than treble damages, the Attorney General relies on In re Lupron Mktg. & Sales Practices Litig., 677 F.3d 21, 26 (1st Cir. 2012) but *Lupron* is plainly distinguishable. In *Lupron*, the court approved the district court's decision to make a *cy pres* distribution instead of using the residual funds to award treble damages. Id. at 34. But in that case claimants had already received distributions of 167% of their damages. In the end, whether to pay residual funds as treble damages to claimants, or to create a *cy pres* fund, is within the discretion of class counsel **[*227]** and ultimately the Court. Where in doubt, it is proper to favor payment of residual sums to class members. Masters, 473 F.3d at 436.

7. Reaction of Class Members to the Proposed Settlements

IPP's Notice Program reached millions of consumers who purchased CRT televisions and computers. *See* Fisher Decl., ¶ 18. Only 11 objections (with a total of 22 individual objectors) and five requests for exclusion were received.

Two objections have since been withdrawn, and two of the requests for exclusion were by DAPs that are already pursuing their own cases. Moreover, two of the objections — those from Paul Palmer (which was withdrawn) and Douglas St. John — are directed at fees only; they do not challenge the sufficiency of the settlement.

These numbers strongly favor approval of the settlement. While a settlement may be approved even if a large number of class members object, when objections come from only a smattering of class members this provides strong support for the fairness of its terms. *See Ellis, 87 F.R.D. at 18*; *see also Nat'l Rural Telecomm. Coop., 221 F.R.D. at 529* ("It is established that the absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class settlement action are favorable to the class **[*228]** members."). Further, when the class involves large corporations that are intimately familiar with civil litigation, the inference of class support when there are only a few objectors is enhanced. *See In re Linerboard Antitrust Litig., 321 F.Supp.2d 619, 629 (E.D.Pa. 2004)*.

8. The Proposed Settlements are Fair, Reasonable and Adequate

In summary, the Special Master is satisfied that all criteria for evaluating the Proposed Settlements have been satisfied, and concludes that the terms of the Proposed Settlements are fair, reasonable and adequate. The proposals were not hastily arrived at and there is not a shred of evidence in the record suggesting the existence of collusion between the negotiators. *See Officers for Justice, 688 F.2d at 627*. Further, the Proposed Settlements have been reached after meaningful discovery and after arms-length negotiations that were conducted by capable counsel. They are, therefore, presumptively fair. *See In re Heritage Bond Litig., 2005 U.S. Dist. LEXIS 13555, 2005 WL 1594403, at *9 (C.D.Cal. June 10, 2005)*; *In re Tableware Antitrust Litig., 484 F.Supp.2d 1078, 1079 (N.D.Cal. 2007)* (quoting *In re General Motors Corp., 55 F.3d 768, 784 (3d Cir. 1995)* ("This preliminary determination establishes an initial presumption of fairness.") Therefore, objectors bear the burden of establishing that the settlement is not fair, reasonable and adequate. *See United States v. Oregon, 913 F.2d 576, 581 (9th Cir. 1990)*. Objectors have not come close to carrying that burden.

The Special Master now addresses the proposed plan of allocation.

B. Fairness of Allocation Plan **[*229]**

Approving a plan for the allocation of a class settlement fund is governed by the same legal standards that apply to approving the settlement terms: the distribution plan must be "fair, reasonable and adequate." *In re Citric Acid Antitrust Litig., 145 F.Supp.2d 1152, 1154 (N.D.Cal. 2001)* A plan of allocation that reimburses class members based on the type and extent of their injuries is generally reasonable. *See id.*; *Omnivision, 559 F.Supp.2d at 1045*. Indeed, in this District, a "*pro-rata* [plan] for allocation has been used in many antitrust cases." *In re TFT-LCD (Flat Panel) Antitrust Litig., 2011 U.S. Dist. LEXIS 154288, 2011 WL 7575004, at *4 (N.D.Cal. Dec. 27, 2011)*; *see also In re Vitamins Antitrust Litig., 2000 U.S. Dist. LEXIS 8931, 2000 WL 1737867, at *6 (D.D.C. Mar.31, 2000)*; *In re Lloyds' Am. Trust Fund Litig., 2002 U.S. Dist. LEXIS 22663, 2002 WL 31663577, at *19 (S.D.N.Y. Nov.26, 2002)*; *PaineWebber, 171 F.R.D. at 135*.

1. Summary of Allocation Plan

IPP class members will of course obtain compensation only for the overcharges they paid on CRT products, not for the entire purchase price. IPPs propose to compensate members of the Indirect Purchaser State Class according to a plan of distribution that allows qualifying claimants to claim their pro-rata share of the Settlement Fund based on the total number of valid claims filed and on the number and type of CRT Products that each claimant purchased during the class period.[26] For example, the Settlement Administrator will initially compute the straight pro-rata distribution of the available Settlement Fund among all claims product purchases, with claims for Standard CRT Televisions (televisions with a **[*230]** screen size of less than 30 inches) receiving a weight of 1, Large CRT

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[26] All Statewide Damages class members will be required to complete a claim form containing: (i) contact information; (ii) verification of membership in one of the Statewide Damages Classes; (iii) the number and type of each CRT Product purchased during the class period; and (iv) an attestation under penalty of perjury that the information provided is accurate. All claimants will be subject to auditing and requests for documentation of purchases by the Settlement Administrator.

Televisions (televisions with a screen size of 30 inches or larger) receiving a weight of 4.3, and CRT Computer Monitors receiving a weight of 3. As Lead Counsel explains, the weighting of the different CRT Products in this manner is necessary to reflect the relative harm to purchasers of those products as set forth by the data produced by Plaintiffs' expert, Dr. Janet Netz. Alioto Decl. I, ¶ 44-45.

For example, the data produced in this case shows that the CRTs used in televisions with a screen size of 30 inches or larger were significantly more expensive than the CRTs used in televisions less than 30 inches. *Id.*, ¶¶44, 45. It therefore became **[*231]** necessary to create two categories for CRT televisions (Standard CRT Televisions and Large CRT Televisions) to ensure that purchasers of Large CRT Televisions are properly compensated. *Id.*, ¶45. In addition, based on Dr. Netz' findings that the overcharge on monitor tubes was more than twice the overcharge on television tubes, it is appropriate to give greater weight to CRT Computer Monitors than Standard CRT televisions. *Id.*, ¶46. However, the data produced in this case also shows that Large CRT Televisions contain the largest, most expensive CRTs. On average, they are approximately twice the size and four times the price of CRTs used in monitors. So, even though Dr. Netz found the overcharge percentage on television tubes to be less than for monitor tubes, the average dollar overcharge is greater for Large CRT Televisions than for CRT Computer Monitors. *Id.*, ¶47.

When allocating the settlement funds, the Settlement Administrator will also determine a minimum payment amount. Lead Counsel contends that, based on historical claim rates, it is expected that there will be sufficient funds to distribute a minimum payment of at least $25 to eligible class members who submit a valid claim **[*232]** form. This will incentivize small purchasers to file a claim despite the fact that their straight pro-rata distribution amount would be relatively small and will ensure that small claimants (*i.e.*, most individual consumers) receive meaningful compensation for their participation in the claims process. Lead Counsel contends that he will seek the Court's approval for the minimum payment amount when the data from the actual claims process is available. *Id.*, ¶48.

The Settlement Administrator will also apply a maximum payment amount of three times the estimated money damages per claimant, thereby recognizing the potential that the IPP class may have obtained an award of treble damages.

Upon final approval, none of the Settlement Fund will revert to any defendant. And as discussed further below, members of the Nationwide Class who are not also members of any Statewide Damages Class will not receive any monetary compensation. *Id.*, ¶50.

2. Treatment of Class Members in the Non-Repealer States

Basically, only claimants from the 21 states and District of Columbia in the Indirect Purchaser State Classes will get money. Members of the Nationwide Class who are not also members of the 22 State Classes **[*233]** will release their claims for injunctive relief, equitable monetary relief and damages without obtaining any monetary consideration. Several objectors contend that this arrangement is not fair, reasonable and adequate. *See* Docket No. 4111 (Fortman/Finn objection), pp.2-6; Docket No. 4112 (Williams), pp.11-12; Docket No. 4116 (Cooper/Scarpulla objection), pp.2-5; Docket No. 4144 (Gianasca, *et al* objection), pp.3-5. Lead Counsel maintains that releasing these claims is appropriate because they are either completely speculative or have absolutely no value. This is a highly contentious issue that warrants significant attention.

As the Court well knows, non-repealer states are states that have failed to enact repealer statutes to reject the holding of *Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*. In *Illinois Brick*, almost 40 years ago the Supreme Court prohibited the "offensive" use of pass-on evidence to establish antitrust liability, which has effectively barred a downstream customer from showing under federal law that he had paid an illegal overcharge passed-on to him by an upstream purchaser of the defendants' product. Following *Illinois Brick*, approximately half the states by either statutes or court decisions re-conferred on **[*234]** indirect purchasers the right to recover for pass-on overcharges under state antitrust laws and/or consumer protection statutes. States that have passed such laws are known in the trade as "repealer" states, while the remaining states are known as "non-repealer" states. Here, 26 of the 29 states that are excluded from the Indirect Purchaser State Classes are non-repealer states. The other three states — Massachusetts, New Hampshire and Missouri — are repealer states that were omitted from the State Classes for various reasons. They will be addressed separately.

a. Claims raised in the operative Fourth Consolidated Amended Complaint

Objectors contend that Class Counsel made but failed to pursue claims for various kinds of relief on behalf of class members in non-repealer states. Lead Counsel responds that claims for monetary compensation for non-repealer states were never asserted. Thus, we begin by examining the claims actually asserted.

Plaintiffs representing the 22 Indirect Purchaser State Classes filed their consolidated amended complaint on March 16, 2009. On May 10, 2010, Plaintiffs filed their Second Consolidated Amended Complaint, and on December 11, 2010, Plaintiffs filed their **[*235]** Third Consolidated Amended Complaint. Plaintiffs filed their Fourth Consolidated Amended Complaint on January 10, 2013, the currently operative complaint.

In their Fourth Consolidated Amended Complaint, Plaintiffs brought the following claims on behalf of themselves, the Indirect Purchaser State Classes, and the Nationwide Class. Docket No. 1526, ¶¶243-244. (1) Violation of *Section 1 of the Sherman Act*, seeking injunctive relief pursuant to Section 16 of the Clayton Act, *15 U.S.C. § 26* on behalf of Plaintiffs and the Nationwide Class, *id.*, ¶¶247-256; (2) Violation of State Antitrust Statutes, seeking "all forms of relief available" under each state's statute for Plaintiffs and the members of each State Class, *id.* ¶¶257-278; (3) Violation of State Consumer Protection and Unfair Competition Statutes, seeking relief for (a) Plaintiffs and members of the Indirect Purchaser Class from Florida, Hawaii, Nebraska, New Mexico, North Carolina and Vermont for "all relief available" under these state's statutes, *id.* ¶¶282-285, 287-288; (b) equitable relief, such as restitution and disgorgement, for California plaintiffs and the members of the California Indirect Purchaser Class, *id.*, ¶281; (c) "actual damages" for injuries to New **[*236]** York plaintiffs and members of the New York Indirect Purchaser Class, *id.*, ¶286; and (4) Unjust Enrichment and Disgorgement of Profits, seeking disgorgement of profits resulting from overpayments and establishment of a constructive trust for plaintiffs and members of the Indirect Purchaser Class from Arizona, California, District of Columbia, Iowa, Maine, Michigan, New Mexico and South Dakota. *Id.*, ¶¶289-292.

The prayer for relief seeks to "recover damages, as provided by the state antitrust, consumer protection, and unfair competition laws alleged herein, and that a joint and several judgments in favor of Plaintiffs and the Classes be entered against the Defendants in an amount to be trebled in accordance with such laws." *Id.*, p.95.C. "Plaintiffs and the Classes" also seek to "be awarded restitution, including disgorgement of profits obtained by Defendants as a result of its acts of unfair competition and acts of unjust enrichment." *Id.*, p.96.E.

The parties dispute whether the Fourth Amended Consolidated Complaint alleged a nationwide disgorgement and unjust enrichment claim. Plaintiffs point to the specific language in the Fourth Claim for Relief that limited such relief to class members from the enumerated **[*237]** eight states. *See id.*, ¶¶289-292 . Objectors Scarpulla and Cooper, however, point to the broader language in the prayer for relief, which states that "Plaintiffs and the Classes" seek restitution, including disgorgement of profits..." *Id.*, p.96.E (emphasis added). The Special Master concludes that the better reading of these conflicting allegations is to allow the specific to govern the general — the intent of the pleaders seems clearly to have been to limit the equitable relief to the eight listed states, but by mistake they did not conform the broad language of the prayer accordingly. However, as shown below, this argument is unimportant because, whether or not claims for equitable monetary relief were asserted on behalf of class members in non-repealer states, such claims are valueless.

b. Release of injunctive relief claims

The Proposed Settlement releases all claims for injunctive relief on behalf of the Nationwide Class. Thus, class members in the 26 non-repealer states (and the 3 omitted repealer states discussed below) release their injunctive relief claims for no consideration.

The Special Master notes out of the box that the Court has already approved an identical release of all claims **[*238]** nationwide in connection with the earlier IPP settlement with LG. *See* Docket Nos. 2542, 2511. No objections were raised to that release. This precedent is certainly instructive.

Lead Counsel argues that the release of non-repealer state class members' injunctive relief claims without payment is fair, reasonable and adequate since those claims are not viable. The Special Master agrees. As IPPs explain, "[n]o one disputes that the CRT market is dying and almost all manufacturers, including all of the alleged conspirators, have left the market, making it very unlikely that the alleged conduct could recur in the future." Motion for Final Approval of Settlements, p.32. The unlikelihood of future violations makes an injunction basically worthless, and probably impossible to obtain. *See* *Parker v. Time Warner Entm't Co., L.P., 631 F.Supp.2d 242, 262 (E.D.N.Y. 2009)* ["A claim which cannot be proven is worth essentially nothing. Consideration of nothing for releasing a worthless claim is therefore fair, reasonable, and adequate."]; *Nguyen v. Radient Pharmaceuticals Corp., 2014 U.S. Dist. LEXIS 63312, 2014 WL 1802293, at *7 (C.D.Cal. May 6, 2014)* [approving plan of allocation in a securities class action over objection that certain claims were released without compensation]. As this case progressed it became clear that (1) the conspiracy was no longer in effect, and (2) the conduct was **[*239]** unlikely to recur because Defendants no longer made or sold any meaningful volume of CRT products in the United States. An antitrust injunction, therefore, would have had little or no practical value to class members. Moreover, an antitrust injunction would have been difficult to obtain since IPPs could not show a likelihood of future harm. *See* *United States v. Or. State Med. Soc'y, 343 U.S. 326, 333-34, 72 S. Ct. 690, 96 L. Ed. 978 (1952)* ["The sole function of an action for injunction is to forestall future violations ... We agree with the trial court that conduct discontinued in 1941 does not warrant issuance of an injunction in 1949."] Although the injunctive relief claims here were essentially valueless, defendants are legitimately entitled to a global release from any potential injunctive relief-styled "nuisance" claim. *See* *Sullivan, 667 F.3d at 310*.

Messrs. Scarpulla and Cooper also suggest that, as in *DRAM*, Lead Counsel could have sought an injunction requiring Defendants to establish a compliance program for their officers and employees regarding U.S. federal and state antitrust laws. *See* Scarpulla/Cooper 12/9/15 Reply Br., p. 12 (citing *DRAM*, Docket No. 2132, *supra*, pp. 32-33). Such an education program 20 years after this conspiracy began would have been of little practical value to the class. Class Counsel **[*240]** here did not seek such transparently useless relief, and under the circumstances — particularly since the Court has already approved without objection a settlement on the same terms — release of such claims for non-repealer state class members without monetary consideration was fair, reasonable and adequate.

c. Release of claims for equitable monetary relief

As discussed above, the Special Master thinks that a fair reading of the Fourth Complaint is that it did not assert a claim for restitution or disgorgement under state laws on behalf of the non-repealer states. But whether the Fourth Complaint asserted such claim or not, the same question remains: Is it fair to have not asserted or released such claims on behalf of the non-repealer states without monetary compensation? The answer turns on whether such a state law claim would have been viable in light of *Illinois Brick* and its progeny.

Everyone here agrees that "the effect of *Illinois Brick* was to eliminate federal antitrust recovery for the vast majority of indirect purchasers of price-fixed goods and services." *See* Scarpulla/Cooper Reply in Support of Objections, p.16; *see also DRAM*, Docket No. 2132, p.82. The issue is whether a **[*241]** state law claim for equitable relief can replace the federal claim barred by *Illinois Brick*.

The case law is clear and consistent in holding that such state law claims are not permissible in indirect purchaser cases. *In re Digital Music Antitrust Litig., 812 F.Supp.2d 390, 412 (N.D.Cal. 2009)* [unjust enrichment claims under Arkansas, Virginia, Montana and Puerto Rico law barred]; *In re K-Dur Antitrust Litigation, No. CIV.A. 01-1652 (JAG), 2008 U.S. Dist. LEXIS 71768, 2008 WL 2660780, at *5 (D.N.J. Feb. 28, 2008)* [unjust enrichment claim barred because it was based on the same facts and as the state antitrust claims which were not permitted under Pennsylvania, New Jersey or Delaware law]; *Aikens v. Microsoft Corp., 159 Fed. Appx. 471, 477 (4th Cir. 2005)* [unjust enrichment claim barred as attempt to circumvent the prohibition against indirect purchaser claims under Louisiana ***antitrust law***]; *Sickles v. Cabot Corp., 379 N.J. Super. 100, 877 A.2d 267, 277 (N.J.Super.Ct. 2005)* ["[T]o permit an indirect purchaser ... to recast his antitrust claim as a consumer fraud violation would undermine the standing requirements of the AT A and would ' essentially permit an end run around the policies allowing only direct purchasers to recover under the Antitrust Act.'"]. Finally, in *In re New Motor Vehicles Canadian Export Antitrust Litig., 350 F.Supp.2d 160 (D.Me. 2004)*, the court opined: "For those states that have maintained the *Illinois Brick* prohibition on indirect purchaser recovery, I conclude that it would subvert the statutory scheme to allow these same indirect purchasers to secure, for the statutory violation, restitutionary relief **[*242]** at common law (or in equity).")." *Id. at 211*.

Scarpulla and Cooper contend that there is a "growing body of law recognizing the viability of Clayton Act equitable monetary claims for indirect purchasers arising from violations of *Section 1 of the Sherman Act*." However, their "growing body" of law consists of two cases that are plainly distinguishable and a misreading of a Special Master's report in *DRAM*.

In *United States v. Keyspan Corp. , 763 F.Supp.2d 633 (S.D.N.Y. 2011)*, the Department of Justice was permitted to seek disgorgement of revenues as a remedy for Sherman Action violations as part of a consent decree because "absent disgorgement, the Government is without recourse to remedy *Keyspan 's* anticompetitive conduct." *Id. at 638-640*. And in *TFT-LCD (Flat Panel) Antitrust Litig., No. C 10-4346 SI, 2011 U.S. Dist. LEXIS 76562, 2011 WL 2790179, at *4 (N.D.Cal. July 12, 2011)*, the court, relying on *Keyspan*, concluded that disgorgement was available to the State of Oregon in its indirect purchaser case given "the expansive grant of authority to seek equitable relief under the Oregon Antitrust Statute." Both these cases involve governmental enforcement efforts and are thus distinguishable from the private indirect purchaser action here. Objectors' reliance on these cases is therefore unpersuasive.

In *DRAM*, Special **[*243]** Master Renfrew concluded that "the presence of purchasers with claims arising under both repealer and non-repealer state antitrust and consumer protection statutes presents no impediment to a finding that common questions predominate and the Indirect Purchaser Settlement Class satisfies the requirements of *Rule 23(b)(3)*." *DRAM*, Docket No. 2132, p.84. Special Master Renfrew did not analyze whether non-repealer state consumer protection claims for equitable relief were viable. He merely said that lumping together claims of class members from both repealer and non-repealer states did not destroy predominance. Objectors' reliance on Judge Renfrew's allusion to *Illinois Brick* in *DRAM*, therefore, assumes too much and is unpersuasive.

As with the injunctive claims, the LG settlement released without monetary compensation any equitable monetary relief claims for non-repealer state class members. No objection was raised. Docket Nos. 2542, 2511. This strongly supports the appropriateness of the same ruling with respect to the Proposed Settlements.

Faced with the overwhelming case law barring state law claims for equitable relief that attempt to evade *Illinois Brick* and state laws barring such antitrust claims, **[*244]** Class Counsel reasonably concluded that actively pursuing such a claim would have been quixotic. If such claims were worth little or nothing, releasing them without compensation does not render the Proposed Settlements unfair, unreasonable or inadequate. *Parker, 631 F.Supp.2d at 262* ["A claim which cannot be proven is worth essentially nothing. Consideration of nothing for releasing a worthless claim is therefore fair, reasonable, and adequate."]; *Omnivision, 559 F.Supp.2d at 1045* ["It is reasonable to allocate the settlement funds to class members based on the extent of their injuries or the strength of the claims on the merits."]; *Booth v. Strategic Realty Trust, Inc., No. 13-cv-04921, 2015 U.S. Dist. LEXIS 140723, 2015 WL 6002919, at *7 (N.D.Cal. Oct. 15, 2015)* (Tigar, J.) (same). *See also* *Nguyen, 2014 U.S. Dist. LEXIS 63312, 2014 WL 1802293*, in which the court approved a plan of allocation although certain claims were released without compensation, noting: "It is reasonable to allocate the settlement funds to class members based on the extent of their injuries or the strength of their claims on the merits. The record shows that it is very unlikely that the in-and-out traders could have proved recoverable damages." (internal citations omitted). As the *Nguyen* court explained:

> "Counsel has also litigated this case thoroughly and aggressively from the start and utilized **[*245]** expert input to determine the extent of damage and calculation of the instant settlement. The Court sees no reason to disagree with their judgment of their own case on this record, and finds it is highly unlikely the in-and-out traders could prove any damages caused by Radient's alleged misrepresentation. *The Objector is correct that proving in-and-out claims is not impossible, but there is no evidence that the in-and-out traders in this case could have done so. On this basis, the plan of allocation reasonably does not include values for in-and-out shares. The plan of allocation reasonably and fairly represents injuries and claims on the merits*."

*2014 U.S. Dist. LEXIS 63312, [WL] at *8* (emphasis added)

For these reasons the Special Master concludes that Class Counsel made a justifiable decision to exclude or at least not to actively pursue claims of equitable monetary belief on behalf of non-repealer state class members. The Nationwide Class' release of these claims is fair, adequate and reasonable.

d. Release of claims for damages

Objectors also challenge Lead Counsel's valuation of the damage claims of the purchasers in the non-repealer states. They argue that, "[n]ot only do these class members have standing to assert that their **[*246]** claims fall into an exception to *Illinois Brick*, they also have standing to argue that *Illinois Brick* should be reconsidered in light of 38 years of developments in the law, economic theory and the analytical tools available to demonstrate pass-on damages." *Id.*

Objectors' position fails for two reasons. First, they do not explain, or cite to any persuasive legal authority that explains, what an "exception" to *Illinois Brick* would be. Second, assessing value to a claim based on the hope that the Supreme Court may reverse 38 years of jurisprudence is to chase an illusion. Lead Counsel had no duty to assert frivolous, hypothetical claims foreclosed by existing law because someday maybe the law will change. As was noted at the January 5, 2016 hearing, while Objectors' arguments provide fascinating speculation for a law review article,[27] they do not realistically inform the very practical decision in a class action which claims have merit. The Nationwide Class' release of claims for monetary damages is fair, reasonable and adequate.

3. Treatment of Class Members in Omitted Repealer States: **[*247]** Massachusetts, Missouri, New Hampshire

Various Objectors challenge the fairness of the Plan of Allocation because Nationwide Class members from Massachusetts, Missouri and New Hampshire were not included in the Indirect Purchaser State Classes. The situation in each state is now addressed.

a. Massachusetts

Massachusetts plaintiffs were initially part of the State Damage Class. They asserted a claim under the Massachusetts Consumer Protection Statute, Mass. Gen. Laws Ch. 93A. However, on February 5, 2010, Special Master Legge found that plaintiffs had failed to plead an essential element of prior notification of defendants, and dismissed the claims with leave to amend. Docket No. 597, pp.29-30. Class Counsel's Second Amended Complaint again failed to plead this element (presumably because no notification had been given), and Special Master Legge dismissed the claim with prejudice in October 2010. Docket Nos. 716, 768, pp.12-14, 796. Massachusetts was omitted from subsequent complaints. Docket Nos. 827, 1526.

Attorneys Bonsignore and Moore, on behalf of their Objector clients, contend (1) that Lead Counsel should have advised potential Massachusetts plaintiffs that their claims had been **[*248]** dismissed so they could file Direct Action Suits, and (2) that they represented Massachusetts clients who could have served as class representatives. As to notice, Lead Counsel did provide adequate notification in the settlement notices that were sent for both the Chunghwa and LG settlements. *See* Docket Nos. 1063-1, 1063-2, 2511, 2512. As to potential clients who did not assert claims, nothing prevented Mr. Bonsignore or Ms. Moore from proffering fully vetted and qualified plaintiffs to serve as class representatives. If Lead Counsel failed to include their proffered clients, they could themselves, within the almost two years remaining in the limitations period, have initiated direct actions that could have been joined with the MDL. Mr. Bonsignore claims that his client Gianasca was truly "vetted [and] ready to serve" as a representative plaintiff. Docket No. 4144, p.4. Mr. Alioto swears that he "never refused to add a viable plaintiff to this case. I have never excluded a viable plaintiff from this case. I have never committed to add a viable plaintiff to this case and then not done so." Alioto Decl in Support of IPP Motion for Final Approval, dtd. 11/19/15, ¶28 (filed on Case Anywhere.) **[*249]** ["Alioto Decl. III"] Having reviewed the documents claiming to show that Mr. Bonsignore proffered a viable plaintiff, the Special Master concludes that Mr. Alioto's version of the facts is more credible.

[27] *See, e.g.*, Objectors' law review-styled discussion at pages 18-20 of their December 9, 2015 Reply brief.

Since Massachusetts claims are now barred by the applicable statute of limitations, no claims can now be added.

b. Missouri

In Missouri, IPPs never asserted a claim because, according to Lead Counsel, no Missouri plaintiff came forward to represent a Missouri class. Special Master Legge had already ruled that each state-specific class must have a named plaintiff in order to proceed. *See* Docket No. 768, pp.5-6; Docket No. 799 (Order adopting R&R). Mr. Bonsignore again claims that he presented Lead Counsel with a viable Missouri class representative in March 2012. Lead Counsel states that he has no record of these communications. Alioto Decl. III, ¶40. Mr. Bonsignore's supplemental filing attached an e-mail purporting to offer a Mr. Perriman as a client. But the document was not authenticated and lacks any indication that Perriman ever purchased any CRT products. Docket No. 4144-5. Once again, the Special Master concludes that Lead Counsel's recitation is more credible.

c. New Hampshire

[*250] As with the Missouri claim, IPPs never asserted a New Hampshire claim because no New Hampshire plaintiff came forward to represent a New Hampshire class. *See* Docket No. 768, pp.5-6; Docket No. 799 (Order adopting R&R). Moreover, another e-mail that Mr. Bonsignore provides to demonstrate that he notified Lead Counsel of a viable New Hampshire class representative contains no showing of when the possible client bought a CRT product or that she had proof of purchase. Docket No. 4144-3. Moreover, the e-mails are dated March, 2012 by which time the 3-year statute of limitations on the New Hampshire Consumer Protection Act (*N.H. Rev. Stat. § 358-A:2*) had run.

d. Summary

In the end, it is hypothetically possible that Lead Counsel could have scoured these three states to dredge up a plaintiff, although the Special Master does not believe that was his duty. But the explanation of the difficulties of locating viable plaintiffs is plausible, and counsel for Objectors do not explain why they did not institute direct actions if Lead Counsel indeed failed or refused to join viable plaintiffs. The objections to the settlement on this basis are without merit.

4. The Plan of Allocation with Regard to the Members of the Nationwide Class Who Are Not Members of the Indirect Purchaser State Classes is Fair, Adequate and Reasonable

This plan of allocation is fair, reasonable and adequate as to these members of the Nationwide Class who are not eligible for monetary compensation because Lead Counsel made reasonable, rational, good-faith valuations of the strength of potential claims in non-repealer states based on governing law, and as to the omitted repealer states Lead Counsel did not fail in **[*251]** his responsibilities to pursue any viable claims from those states. This plan of allocation was already approved by this Court without objection in the LG settlement. Class members in these categories who are unsatisfied with the Proposed Settlements had the opportunity to opt out and pursue their own legal remedies. Courts routinely hold that the opt-out remedy is sufficient to protect class members who are unhappy with the negotiated class action settlement terms. *Klee v. Nissan N. Am., Inc. , 2015 U.S. Dist. LEXIS 88270, 2015 WL 4538426, at *8 (C.D.Cal. July 7, 2015)*.

5. Objections to Plan of Allocation Based on Chunghwa Settlement

Plaintiffs entered into a settlement with Chunghwa Picture Tubes, Ltd. for $10,000,000 cash. The Court granted preliminary approval of that settlement on August 9, 2011 and final approval on March 22, 2012. Docket Nos. 992, 1105. Although the Chunghwa settlement constitutes a tiny percentage of the total settlement funds in this case, Objectors have raised two troublesome due process issues as to whether the terms of the Chunghwa settlement conflict with the current proposed Plan of Allocation. Cooper/Scarpulla Reply in Support of Objections to IPP Plaintiffs' Motion for Approval of Settlements, dtd. 12/9/15, pp. 24-27 (filed on Case Anywhere). The two purported **[*252]** conflicts are: (1) the Chunghwa settlement permits resellers of CRT products to recover damages but the current Plan of Allocation does not, and (2) the Chunghwa settlement distributes the net settlement proceeds to 24 states pro rata in accordance with their respective populations in 2000, but the current Plan of Allocation distributes funds pro rata to all eligible claimants without regard to state populations.

Lead Counsel's motion for preliminary approval of the Chunghwa settlement "propose[d] that distribution of settlement funds be deferred until the termination of the case" and that Lead Counsel would "address any allocation issues which arise at that time as well." Docket No. 884, at 18. The preliminary approval Order for the Chunghwa settlement states that "[t]he distribution of the Net Settlement Fund shall be deferred until a later date" and that "Plaintiffs shall propose a method of distribution at that time, which shall be subject to court approval." Docket No. 993, at ¶11. The long form notice of the Chunghwa settlement under heading 10 ("When can I get a payment?") reads as follows:

> "No money will be distributed to Settlors yet. The lawyers will pursue the lawsuit against the Non-Settling **[*253]** Defendants to see if any future settlements or judgments can be obtained in the case and then be distributed together to reduce expenses. It is possible that money will be distributed to organizations who are, as nearly as practicable, representatives of the interests of indirect purchasers of CRT Products instead of Settlors themselves if the cost to process claims would result in small payments to Settlors."

Chunghwa Notice, p.4, Q.10.

Notice was duly given to the Chunghwa Class that stated, as detailed below, that the net funds after payment of attorney's fees and costs would be distributed to all indirect purchasers, including resellers, and to the states pro rata based on their populations. Ultimately, the Final Judgment confirmed the terms of the settlement and stated,

> "Without affecting the finality of this Judgment in any way, this Court retains continuing jurisdiction over: (a) implementation of this settlement and any distribution to Class Members pursuant to further orders of this Court; and (b) disposition of the Settlement Fund..." Docket 1106, ¶10.

The currently proposed settlements define members in the Nationwide Class and in the Indirect Purchaser State Classes as indirect **[*254]** purchasers who purchased CRT Products "for their own use and <u>not for resale</u>. (emphasis added)". Chunghwa, however, negotiated a release on behalf of a Nationwide Class of indirect purchasers that includes resellers as well as end-buyers. Docket No. 884-1 at Ex. 1, ¶1; *see also* Long Form of Notice at Exhibit A, Fisher Chunghwa Notice Declaration, p. 4:

> "**7. How do I know if I am one of the Settlors?** The Settlement Class ('Settlors') includes any person or business that indirectly bought in the U.S. (excluding claims under the Washington Unfair Business Practices and Consumer Protection Act) from March 1, 1995 through November 25, 2007, any CRT Product made by the Defendants. <u>Both consumers and resellers are included in the Settlement Class</u> ... (emphasis added)."

Long and Short Forms of Notice at Exhibits A & B of Fisher Chunghwa Notice Declaration, Docket No. 1063.

In addition, the current proposed Plan of Allocation compensates class members using a pro-rata approach per claim. That is, class members in the 22 Indirect Purchaser States will all be treated the same when it comes to distributing the settlement money. However, in Chunghwa funds will be distributed on a pro rata basis to " **[*255]** [e]ach State listed in the operative complaint for which damage claims are being asserted, plus the states of Illinois and Oregon." Docket No. 993, ¶10, Chunghwa Preliminary Approval Order. The Order continues, stating: "[e]ach state's pro rata share will be determined by computing its population as a percentage of the total population of all states," and "[e]ach of the states shall receive its allocable share at a future date to be approved by the Court." *Id.* The Order contains a chart listing the percentage of the Net Settlement Fund to be distributed to each state.[28] Similarly, the Chunghwa Notice to class members explains the following: "Regardless of whether the money is distributed to organizations or the Settlors themselves, the money will first be allocated amongst the 24 states listed on page 1 of this notice, so that each state receives its pro rata share. Each state's pro rata share shall be determined by computing its population as a percentage of the total population of all 24 states using census figures from the year 2000." Long Form Notice, Ex. A, Fisher Chunghwa Notice Declaration, at 4, Docket No. 1063.

In contrast, the current Plan of Allocation makes no such geographical distinctions. Rather, it provides that "qualifying claimants will be eligible to claim their pro-rata share of the Settlement Fund based on the number of

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[28] The Net Settlement Fund consists of the $10 million total, less 25% for attorneys' fees, **[*256]** litigation expenses, notice and claim expenses. The Net Settlement Fund is to be a minimum of $5 million.

valid claims filed, and the number and type of CRT Products each claimant purchased during the class period." Lead Counsel's Memo, pp.22-23. Further, the current settlement excludes payment of the claims of Illinois, Oregon and Washington on behalf of their residents, but in Chunghwa the Court ordered that the states of Illinois and Oregon are to be allocated 8.59% and 2.37% of the Chunghwa Net Settlement Fund. Docket No. 993, at ¶10.

These apparent inconsistencies are relevant to the question of whether the plan of allocation satisfies due process concerns. The Court has finally approved and entered final judgment on the Chunghwa settlement that provides approximately $5,000,000 in compensation, in part for resellers and pursuant to a state-by-state pro rata distribution. Notice has been given of that settlement. IPP counsel now ask the Court to approve a settlement **[*257]** that pays nothing to resellers and distributes all funds, including the Chunghwa Net Settlement Fund, pro rata to all claimants. This discrepancy raises due process concerns as to both the Chunghwa class and the current Settlement class. The Chunghwa class has been told that their settlement funds will be distributed in part to resellers and pro rata by state. But if the current Plan of Allocation is adopted, the Chunghwa notice will have been inaccurate. The current Proposed Settlement class has been told that all $576,750,000, net of fees and expenses, will be distributed to them pro rata by claimant. Thus, it will contradict that notice if, as Lead Counsel may be proposing (see below), $5 million or any sum were carved out of the $576,500,000 to compensate the Chunghwa class.

Lead Counsel contends there is no fatal inconsistency between the two settlements. First, he notes that the last sentence of the Chunghwa Long Form Notice tells Chunghwa class members that they may ultimately receive nothing. ("It is possible that money will be distributed to organizations who are, as nearly as practicable, representatives of the interests of indirect purchasers of CRT Products instead of Settlors **[*258]** themselves if the cost to process claims would result in small payments to Settlors.") But that sentence clearly contemplates that class members would receive nothing if a *cy pres* distribution were made. No *cy pres* payment is currently contemplated. Therefore, that sentence cannot be considered adequate notice to the Chunghwa class that their distribution scheme may simply change.

Second, Lead Counsel notes that resellers along with everyone else got notice of the current settlement but that no resellers (who tend to be large, sophisticated corporations) have objected to the current settlement. That is a fair point, but the absence of an objection does not cure a due process problem if one exists.

Third, Lead Counsel seems to intend somehow to carve out funds from the current settlement to comply with the terms of the Chunghwa settlement. In briefing on this issue, he states,

> "Once the final Chunghwa Net Settlement Fund is known, the money will be allocated amongst the 24 states in accordance with Paragraph 10 of the Chunghwa Preliminary Approval Order. The Illinois and Oregon AGs will receive their states' pro rata shares (based on a Net Settlement Fund of $5 million, their shares will **[*259]** be $429,500 and $118,500 respectively). The other 22 states will receive their pro rata shares as part of the pro rata distribution to claimants in those states." Alioto ltr. of 1/13/16 to Special Master, p. 5, fn. 12 (filed on Case Anywhere)

But this falls well short of providing a satisfactory solution. It does not address the problem that the current settlement class will be shortchanged by whatever amount is carved out to satisfy the Chunghwa settlement terms. And it is unclear as to whether there is to be a carve out for the 22 states other than Illinois and Oregon, or whether their Chunghwa compensation will be deemed to have been received by the contemplated pro rata distribution to all claimants. More clarity is needed.

The Special Master has tried hard to find a solution to these Chunghwa issues that will not disrupt approval of this settlement. It is absurd to allow a $5,000,000 tail (the Chunghwa Net Settlement Fund) to wag a $576,750,000 dog. After all, we are talking about .8% of the current settlement fund. However, due process is due process, and final judgments cannot simply be ignored. One approach would be to rely on the language in the Chunghwa final judgment in which **[*260]** the Court reserved jurisdiction to order how the Chunghwa settlement funds are to be distributed. However, the Special Master cannot in good conscience recommend that the Court rely on this linguistic wiggle room to simply wipe out significant features of the Chunghwa allocation plan. Another approach would be to rely on the case law that permits a district court to make *de minimis* alterations in a class settlement allocation plan without providing additional notice. *In re Groupon Mktg. Sales Practices Litig.*, 593 Fed. App. 699,701 (9th Cir. 2015) [court permitted to eliminate a $75,000 *cy pres* contribution from an $8.5 settlement fund without further notice]. However, again the Special Master does not think that disregarding material terms of a prior noticed and finally approved settlement can fairly be termed *de minimis*, even though the amount at issue here is small in relation to the total settlement.

Accordingly, the allocation plan must be disapproved until the Chunghwa problem is corrected. Lead Counsel is directed to propose a detailed plan to correct the due process problems discussed above: a plan that makes crystal clear how he proposes to satisfy the terms of the Chunghwa **[*261]** settlement, what (if any) corrective notice he intends to provide and to whom, and a timeline for the Court to deal with this problem.

C. Reasonableness of Notice Plan

Objectors raised several issues with regard to the notice program, including (1) the age and income profile of recipients (Cooper/Scarpulla — Docket No. 4115, Gianasca, *et al* — Docket No. 4119, Rockhurst University, *et al* — Docket No. 4113); (2) notice to foreign residents (Cooper/Scarpulla — Docket No. 4115, Gianasca, *et al* — Docket No. 4119, Rockhurst University, *et al*; (3) notice to non-English speakers (Cooper/Scarpulla — Docket No. 4115, Gianasca, *et al* — Docket No. 4119); (4) the supposed need for televised notice (Cooper/Scarpulla — Docket No. 4115, Gianasca, *et al* — Docket No. 4119, Rockhurst University, *et al* — Docket No. 4113); and (5) the terms of the notice provided to the nationwide class (Rockhurst University, *et al* — Docket No. 4113, Johnson — Docket No. 4128). The California Attorney General also raised a concern about the adequacy of notice to California natural persons, which was discussed at VII.A.6 above.

Rule 23(c)(2)(B) requires "the best notice that is practicable under the circumstances, including individual notice **[*262]** to all members who can be identified through reasonable effort." *Fed.R.Civ.P. 23(c)(2)(B)*. Such notice must "clearly and concisely state in plain, easily understood language," the nature of the action, the class definition, and class members' right to exclude themselves from the class, among other things. *Fed.R.Civ.P. 23(c)(2)(B)*. Further, before granting final approval to a proposed class settlement, the court must "direct notice in a reasonable manner to all class members who would be bound by the proposal." *Fed.R.Civ.P. 23(e)(1)*. While *Rule 23* requires that reasonable efforts be made to reach all class members, it does not require that each individual actually receive notice. *Silber v. Mabon, 18 F.3d 1449, 1454 (9th Cir. 1994)*; *see also* *Rannis v. Recchia, 380 Fed. Appx. 646, 650 (9th Cir. 2010)*. The Notice Program for the Proposed Settlements meets these standards.

Credible evidence demonstrates that older individuals, those with lower incomes, non-English speakers, foreign residents, non-Internet users, residents of states excluded from the damage recovery, etc. — were not ignored by the Notice Program. Lower-income and/or older class members were notified by way of newspapers, magazine, and website announcements. Joseph Fisher specifically explains how publications that were included in the Notice Program have significant low-income readership. Fisher Decl., **[*263]** ¶5b (*TV Guide* where 30% of readers have incomes less than $30,000 and *Parade Magazine*, where 21 % of readers have incomes less than $30,000). Non-Internet users were also sufficiently notified by publishing in *TV Guide, Parade, American Profile, The Wall Street Journal, USA Today, The New York Times, San Francisco Chronicle, El Nueva Dia, People, Time*, and *Sports Illustrated*. Fisher Decl. Reporting on Class Notice, pp. 8-9.

Foreign residents who were in a position to purchase CRT products in the United States during the Class Period fall squarely within the notice efforts. The Summary Notice was published as a press release in 78 foreign-based media outlets in 15 countries, including Canada and Mexico. *See* Fisher Decl., ¶3. Nonresidents living in border regions — particularly those capable of entering the United States for purposes of purchasing a television or computer — are likely to use the internet just like everyone else; thus, they were subject to digital outreach. The impact of these efforts is demonstrated by the fact that claims have already been submitted in this Proposed Settlements by non-U.S. persons with addresses in numerous foreign countries including Canada, Costa Rica, **[*264]** Germany, Great Britain, Israel, Iceland and Spain. *Id.*, ¶3c.

Specific efforts were made to notify non-English speaking class members. A Spanish language version of the Summary Notice just discussed was disseminated and picked up by 81 media outlets in the United States and abroad. *Id.*, ¶5d. And over 33 million impressions were generated across the Google ad-serving network from advertisements on Google Spanish. *Id.*

Objectors also criticize the lack of televised notice. However, IPPs explain there was good reason to forego television advertising. "As television viewership becomes increasingly fragmented over hundreds of alternative television stations, with many viewers 'cutting their cords' to cable altogether and downloading their television content commercial free via the internet, the choice to use alternative forms of media to reach indirect purchasers of CRT Products is an entirely defensible decision." IPPs Response to Cal. Att. Gen., p.4. In short, on a cost-benefit basis the decision to replace television ads with alternative effective methods was entirely defensible. *See U.S. v. Oregon, 913 F.2d at 581*.

Courts acknowledge that, while there will always be alternative ways to provide notice to a class, all methods **[*265]** of notice are not required in all cases. *See Google Referrer Header Privacy Litig., 87 F.Supp.3d at 1138*. Thus, Rockhurst University's belief that "a New Media notice campaign may not be the appropriate manner to notice the claimant class herein" does not mean that its proposed "Old Media" campaign is better or legally required. *See id.* Perfection is not the standard when it comes to delivering notice of a class action settlement. Rather, *Rule 23* merely requires "reasonable efforts to reach as many class members as possible through either individual or publication means." *Silber, 18 F.3d at 1454*.

This was accomplished here. As the Fisher Declaration explains, CRT class members were notified through a carefully designed combination of (1) direct mailed/emailed notice to more than ten million unique addresses (including many of the largest institutional end-users of CRTs) (Fisher Decl., ¶¶8-9; (2) publication notice in magazines and newspapers with collective readership of more than 150 million (*id.*, ¶10); (3) digital notice via paid advertisements on Google, Facebook, and other popular websites (*id.*, ¶¶ 11-12); (4) English and Spanish press releases carried by almost 300 domestic and foreign websites with a total potential audience of over 72 million; and (5) the CRT settlement **[*266]** website, which has received more than 537,000 unique visitors. Collectively, these efforts reached an estimated 83% of class members with an estimated frequency of 3.1 (*id.*, ¶18d), which is well-within the acceptable range. *See* "Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide," Federal Judicial Center (2010) at 3 (available at *http://www.fjc.gov/public/pdf.nsf/lookup/NotCheck.pdf/$file/NotCheck.pdf* (explaining that a court should consider "whether all the notice efforts together will reach a high percentage of the class.").

Objectors Scarpulla and Cooper challenge Fisher's contention the notice campaign reached approximately 83% of class members. They claim that the paid print-media portion of the notice plan would reach only 58% of the target group of potential class members. But Mr. Fisher persuasively explained that his reach and frequency calculations for print media were based on survey data from *GjK MRI*, and for digital media were based on survey data from *comScore*. Fisher Decl., ¶3. No legitimate argument has been proffered that challenges the legitimacy of these two data sources. Moreover, Fisher explains that his calculation properly adjusted for the estimated overlap between print and digital media. The estimated reach for the class demographic **[*267]** for print media was 57% and the estimated reach for digital media was 61%. The two percentages were not added together as objectors maintain. Rather, the overlap between print and digital was eliminated, resulting in a net reach of 83%. *Id.*

Cooper and Scarpulla also asked the Special Master to engage a neutral expert to report on the effectiveness of the notice given in this litigation. The Special Master finds this unnecessary in light of the persuasive evidence before him to conclude that the Notice Program that has been implemented is fair, adequate and reasonable under the tenets of *Rule 23*. Objectors could have, but did not, submit any contrary expert evidence. "In all cases the court should strike an appropriate balance [in determining the type of notice] between protecting class members and making *Rule 23* workable." *In re Domestic Air Transp. Antitrust Litig., 148 F.R.D. 297, 335 (N.D.Ga. 1993)*. The notice program appropriately achieved that balance.

Rockhurst University and Johnson challenge the clarity of the notice's wording. Docket Nos. 4113 and 4128. The Special Master finds these objections unpersuasive. The notice clearly explained (1) the class definitions for both the "Statewide Damages Classes" and the "Nationwide Class"; (2) the nature of the "release [of] **[*268]** the injunctive relief claims of consumers ... [in] the Nationwide Class; and (3) that "[o]nly members of the Statewide Damages Classes are eligible to receive a payment." *See* Notice at 1, 6, 7. Therefore, Rockhurst University's objection is without merit. Johnson's complaints that the notice did not adequately set forth with precision every mechanic of the claims process and state exactly how much money each class member would receive are misplaced. *Rule 23* requires only that notice provide sufficient detail "to alert those with adverse viewpoints to investigate and to come forward and be heard." *In re Online DVD-Rental Antitrust Litig., 779 F.3d 934, 946 (9th Cir. 2015)*. The Detailed Notice here accomplished that. Section 9 of the Detailed Notice states:

> "Payments will be determined on a pro rata basis. This means that payment amounts will be based on the number of valid claims filed, as well as on the number and type of CRT Product(s) purchased: Standard CRT Television (screen size of less than 30 inches); Large CRT Television (screen size of 30 inches or larger); or CRT Computer Monitor."
>
> ***
>
> "At this time, it is unknown how much money each Class Member will recover. It is expected that a minimum payment of $25 will be made to all Statewide Damages Class Members who submit a valid claim. **[*269]** The maximum payment will be three times the estimated money damages for each claimant."

Id., ¶9.

The settlement website — *www.CRTclaims.com* — questions 12 and 13 of the "Frequently Asked Questions" state:

> FAQ 12: "Do I need to supply documentation or proof of what I purchased?"
>
> Answer: "Not with your original claim submission, but the Settlement Administrator may request it at a later time, so save any documentation/proof of purchase."
>
> FAQ 13: "What if I don't have any documentation?"
>
> Answer: "You don't need any documentation to file your claim. So don't let that stop you. Only if the Settlement Administrator ever asks for documentation will you need to provide it. The Settlement Administrator understands the difficulty of maintaining records from more than a decade ago. If the Settlement Administrator does request documentation, you can send a letter explaining what proof if any you have of the purchases you've claimed and it will be reviewed on a case-by-case basis. There is a chance that you may still get paid even if you don't have any documentation."

Id.

The Special Master recommends that all notice objections be overruled.

D. Other Objections to Approval

1. Objection Based on Perceived **[*270]** Strength of State Laws

Objector Clifton argues that the settlements are unfair because they fail to give preference to class members residing in states with strong consumer protection laws, such as California. He argues that the settlement fund should be distributed not pro rata, but instead "should be allocated in a way that tracks the differences in various states' consumer protection and antitrust laws," citing *In re Relafen Antitrust Litig., 231 F.R.D. 52 (D.Mass. 2005)*. Docket No. 4099, pp.3-4.

The problem with Clifton's objection is that this approach was expressly rejected in *Sullivan, 667 F.3d at 327-28*. There, the Third Circuit agreed that there would be substantial imprecision "in weighing class member claims based on the relative strength of different state law claims." *Id.* (internal quotations omitted). The court added: "[i]t may be entirely reasonable to apply the same damages calculation to claimants from all states because ... it is purely speculative that claimants from indirect purchaser states could anticipate a greater recovery than claimants from other states." (*Id.* (internal quotations omitted). "We can find no support in our case law for differentiating within a class based on the strength or weakness of the theories of recovery." *Id.*

Moreover, as in *Sullivan* ***[*271]*** , each class member here suffered the same injury (*i.e.* overcharging), so a pro rata distribution makes sense. *See also DRAM*, Docket No. 2132 ["any weighted distribution plan may ultimately tum on subjective views as to the relative merits and relative importance of aspects of the totality of a class member's released claims, and spawn an ancillary round of litigation among class member objectors about who should get how much and on what basis."].

Clifton also asserts that the state-specific class representatives did not advocate for compensation based "on the relative strengths of their states' consumer protection laws." Docket No. 4099, p.5. But he does not dispute that every class representative was represented by counsel whose adequacy he does not challenge. Clifton has not met his burden of proving his assertions challenging the reasonableness of this class action settlement. *See* *Oregon, 913 F.2d at 581*.

In light of the above, the Special Master recommends that Clifton's objections relating to the perceived strength of various States' laws be OVERRULED.

2. Objections based on Inadequate Representation

Various objectors argue that the Indirect Purchaser State Classes and the Nationwide Class were not adequately **[*272]** represented by the class representatives and IPP Counsel. *See* Docket No. 4113 (Rockhurst Univ., *et al* Objection, pp. 3-7); *see also* Scarpulla/Cooper Reply, 12/9/15. However, evidence and persuasive legal authority in support of their position is lacking.

To satisfy constitutional due process concerns, absent class members must be afforded adequate representation before entry of a judgment that binds them. *Hanlon v. Chrysler Corp., 150 F.3d 1011, 1020 (9th Cir. 1998)*. The fulcrum of the adequacy requirement is an alignment of interests and incentives between the representative plaintiffs, counsel, and the absent class members. *See* *Hopson v. Hanesbrands Inc., 2009 U.S. Dist. LEXIS 33900, 2009 WL 928133, at *4* ["Representation is adequate if: (1) the class representative and counsel do not have any conflicts of interest with other class members; and (2) the representative plaintiff and counsel will prosecute the action vigorously on behalf of the class."].

For the reasons stated, the Special Master concludes that Class Counsel and the class representatives all provided adequate representation, and there was no conflict of interest requiring the creation of subclasses or separate counsel. The Special Master recommends that all objections to the Proposed Settlements on these grounds be OVERRULED.

VIII. APPROVAL OF REQUEST FOR [*273] ATTORNEYS' FEES

A. Request for Attorneys' Fees

IPP class counsel ask the court to follow a percentage-of-the-fund approach and approve an award of $192,250,000, which is one-third (33%) of the $576,750,000 settlement fund. They have incurred a lodestar at historic billing rates of $83,753,999.05 ($90,075,076.90 at current billing rates). Therefore, the requested fee award represents a multiplier of approximately 2.3. [IPP Fee Motion, p. 1 [Dkt. 4071]; Compendium of IPP Counsel Declarations, pp. 1-2 [Dkt. 4073]

The following objections were made to the fee request: (1) Docket No. 4099 — objection by Donnie Clifton; (2) Docket No. 4106 - objection by Douglas St. John; (3) Docket No. 4111 — objection by John Finn and Laura Townsend Fortman; (4) Docket No. 4112 — objection by Dan L. Williams & Co.; (5) Docket No. 4115: -- objection by Francis Scarpulla and Josef Cooper; (6) Docket No. 4119 — objection by Anthony Gianasca, *et al*; (7) Docket No. 4128 — by Elizabeth Kimberly Johnson; (8) Docket No. 4140 — by Josie Saik.

B. Methodology for Reviewing Request

The "common fund doctrine" permits attorneys who recover a fund for the benefit of the class to obtain "a reasonable attorney's fee from the **[*274]** fund as a whole." *Boeing Co. v. Van Gemert, 444 U.S. 472, 478, 100 S.*

Ct. 745, 62 L. Ed. 2d 676 (1980). The court has the independent obligation to ensure that the award of fees, as well as the settlement itself, is reasonable. *In re Bluetooth. 654 F.3d at 949*.

In the Ninth Circuit a court may apply either a lodestar or a percentage-of-the-fund method in calculating the appropriate fee award. *Vizcaino v. Microsoft Corp., 290 F.3d 1043 (9th Cir. 2002)*; *In re Bluetooth, 654 F.3d at 942*; *McGee v. China Electric Motor, Inc.,812 F.3d 734, 2016 U.S. App. LEXIS 679, No. 13-56903, 1/15/2016*. In common fund cases there are cogent advantages to using the percentage-of-the-fund method in view of the subjectivity of a lodestar and the tendency of a pure lodestar approach to create incentives for counsel to spend unnecessary time on a case. The lodestar figure is calculated by multiplying the reasonable number of hours spent and adequately documented by prevailing counsel times a reasonable hourly rate. Using the percentage calculation, the court typically begins with the 9th Circuit "benchmark" of 25%, and then explains what special circumstances justify a deviation upward or downward from that benchmark. *In re Bluetooth, 654 F.3d at 942*; *Six Mexican Workers v. Ariz. Citrus Growers, 904 F.2d 1301, 1311 (9th Cir. 1990)*; *Keirsay v. eBay, Inc., 2014 U.S. Dist. LEXIS 21371, 2014 WL 644738 (N.D.Cal. Feb. 18, 2014)* [Tigar, J.] Courts are further encouraged to guard against unreasonable results by cross-checking the method used against a second method. *Vizcaino, 290 F.3d at 1050*; *In re Bluetooth, 654 F.3d at 944*. The Ninth Circuit has repeatedly approved beginning **[*275]** with a percentage analysis and cross-checking it against a lodestar with a multiplier if appropriate. *Online DVD-Rental Antitrust Litig., 779 F.3d 934, 955 (9th Cir. 2015)*; *Vizcaino, 290 F.3d at 1050*.

Objectors Scarpulla and Cooper (Docket No. 4115 and Reply dtd. 12/9/15, e-filed with JAMS] argue that the court should apply a pure lodestar approach because there are "serious problems with time and expenses." They make four arguments. First, they maintain that a percentage approach will unduly reward inefficient counsel and those who lack experience in antitrust class actions, while a lodestar approach will properly reward skilled firms and penalize those who were "learning on the job" or did not put funds at risk to cover ongoing expenses. Second, they argue that the billing records here show sloppy and potentially inaccurate timekeeping practices (e.g., block billing, use of minimum quarter-hour increments, handwritten entries), which call for an across-the-board reduction in the lodestar. Third, they argue that Lead Counsel used poor judgment in engaging three firms in Fall 2014 as special trial counsel to prepare and try the case commencing in March 2015. Fourth, they argue that Lead Counsel wasted time and resources in an unnecessary dispute with the California Attorney General **[*276]** regarding discovery and the settlement with Phillips in California's *parens patriae* case in state court.

None of the Scarpulla/Cooper objections are a basis to employ a pure lodestar approach. Indeed, if their criticisms of billing practices in this case were correct, the court should be reluctant to rely entirely on allegedly inaccurate and padded billing records that contain charges for unproductive time. Their objections are, however, a good reason to use a lodestar as a check against a percentage of the fund - with appropriate scrutiny of the billing records. As discussed in detail below, the Special Master agrees that the total lodestar and the requested percentage should be adjusted downward because of various factors. Moreover, when it comes to allocating the total approved fee among the various class counsel firms, more meticulous scrutiny to each firm's billing will take note of a particular firm's inefficiency, inexperience or bad judgment.

Therefore, the Special Master concludes that the proper approach to assessing the total attorney's fee award in this case is to begin with the 9th Circuit benchmark of 25%, to determine whether there are grounds to adjust it upwards as IPP **[*277]** Counsel request, or downward based on Objectors' criticisms, and to cross-check the resulting percentage against the lodestar after adjusting it for any factors such as inefficiency. The Special Master also follows the Ninth Circuit's direction to apply current, not historic, rates in order to account for the delay of up to eight years for some firms in receiving payment. *Fischel v. States Life Assur. Soc., 307 F.3d 997 (9th Cir. 2002)*; *McGee* at p. 10.

C. Legal Standards for Approval

Although expressed in different terms in various 9th Circuit cases, it is accepted that a court should employ the following criteria to determine the fairness of a requested fee award in a common fund case: the results achieved for the class; the complexity of the case and the risk and expense to counsel of litigating it; the skill, experience and performance of counsel, both plaintiff and defense; the contingent nature of the fee and the fees awarded in comparable cases. *Vizcaino, 290 F.3d at 1048-1049*; *In re Bluetooth, 654 F.3d at 942*; *see also* *Kerr v. Screen Actors Guild, Inc., 526 F.2d 67, 70 (9th Cir. 1975)* [listing the "Kerr factors"] Failure to consider the Kerr factors, which are the same as those in *Vizcaino* and *Bluetooth* in different words, is an abuse of discretion. *McGee* at p. 9. The most critical factor in evaluating the reasonableness of a fee request is the degree of success in achieving results for the class. **[*278]** *Hensley v. Eckerhart, 461 U.S. 424, 434-436, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983)*; *In re Bluetooth, 645 F.3d at 942*. The Special Master now examines how each of those factors weighs in this case with respect to a deviation from the 25% benchmark.

1. Results Achieved for the Class, Including Non-Cash Benefits

IPP counsel note that the settlement amount of $576,750,000 is the second-largest monetary recovery in any indirect purchaser price fixing case (after the *LCD* case). No one disputes that characterization. This entire sum, net of fees, incentive payments and expenses, will be paid *pro rata* to class members filing proper claims. There will be no reversion of surplus funds to defendants. There will be no *cy pres* distribution. The settlement also provides for non-monetary compensation in the form of cooperation agreements which will assist IPP counsel in concluding their actions against remaining defendants. Alioto Decl. II, ¶31

Three benchmarks offer enlightening comparisons to the result obtained by IPP counsel. First, the settlement amount is about 20% of the potential damages of $2.78 billion as estimated by plaintiff's expert, Dr. Netz. It is approximately nine times the $61 million estimate by one defense expert. (The other defense experts estimated damages at zero.) Alioto Decl. II, ¶34. **[*279]** Given the risks and the complexity of the case (see VIII.C.2 below and VII.A.1 & 2 above), and in particular the challenge of formulating a credible calculation of pass-through overcharges, the settlement represents an extraordinary achievement. Second, the settlement amount dwarfs the $32 million criminal fine obtained by the Department of Justice against Samsung, the only party against whom DOJ brought a criminal proceeding. Third, the settlement measures up well against the $1.1 billion settlement achieved by the IPP's in the *LCD* case, where the conspiracy was of more recent origin, not decades old, and the DOJ obtained criminal fines of about $894 million against many defendants who pleaded guilty.

Certain objectors are critical of the settlement amount. They note that it is only 20% of the damage estimate by IPP's expert, and only about 7% of that amount trebled. They compare that result to the $1.1 billion IPP settlement in *LCD* which was closer to 50% of its expert's damage figure. But *LCD* and this case are only partially comparable. The *LCD* conspiracy was much more recent, so proof problems were far easier. And the Justice Department obtained dozens of guilty pleas, which eased **[*280]** the path to finding of liability for the IPP's. In the end, the $576,000,000 figure speaks for itself. Only one other price fixing case has settled for more.

Objector St. John belittles the result on two grounds: first, the result was in large part attributable not to the efforts of IPP counsel, but to the Chunghwa settlement, the Samsung guilty plea and factual findings entered by the European Commission, and second, the very large settlement obtained from Samsung and LPD (a combination of Philips and LG) shows that the settlements with other defendants for much lower amounts were inadequate. St. John Objection Docket No. 4106, and Reply, e-filed with JAMS 12/9/15, pp. 4-11.

Chunghwa: The IPPs settled with Chunghwa in April 2009 for $10 million in cash. Alioto Decl. II, ¶10. In moving for approval IPP counsel represented that Chunghwa's agreement to cooperate was of great value, and St. John argues that IPP counsel is judicially estopped from claiming that Chunghwa's cooperation was of minimal help. St. John's position is without merit. IPP counsel persuasively demonstrated that, while it appeared in 2009 that the cooperation might be of great help, circumstances changed as discovery **[*281]** progressed. Chunghwa could provide little information about large CPTs or about the circumstances of the conspiracy in the United States, and many of the Chunghwa meeting reports proved unhelpful. IPP Reply II, e-filed with JAMS 12/23/15, pp. 13-14. It is noteworthy that it took four years after the Chunghwa settlement for IPPs to obtain another settlement, which suggests that Chunghwa's cooperation was not of overwhelming assistance.

Samsung guilty plea: Samsung pled guilty in 2011. This plea established the existence of the conspiracy. But it did nothing to lessen IPP's challenges to obtain class certification, obtain, translate and organize evidence from many foreign defendants, beat back repeated legal motions, and prove pass-through and a credible damage claim. To suggest that the Samsung guilty plea meaningfully detracts from the quality of IPP counsel's efforts to produce the settlement is ludicrous.[29]

European Commission: St. John argues that the European Commission's adoption of a Statement **[*282]** of Objections in 2009 and its Summary Decision in 2013 provided the real impetus for defendants to settle. He argues that a 2014 Delaware state court decision, *Vichi v. Koninklijke Philips Elec., N.V., 85 A.3d 725 (Del.Ch. 2014)*, accepted EC findings as preclusive. IPP counsel cogently refute this argument. The evidentiary value of a Statement of Objections is highly debatable, and the Summary Decision which might have been of value was not made public until December 2014, only a few months before the conclusion of the settlements. Moreover, IPP counsel correctly note critical distinguishing factors in *Vichi:* it was a fraud case not an antitrust case; it involved conduct in Europe not the United States.

In summary, in any long complex litigation each day brings either good news — and surely the Chunghwa settlement, the guilty plea and the EC rulings count as good news for the IPP's — or bad news. But such news, good or bad, rarely replaces or significantly detracts from the effort and skill that litigation counsel must employ to produce an extraordinary result. It is the height of Monday-morning quarterbacking, not sound legal analysis or common sense, for St. John to suggest that IPP's result was generated in a meaningful way by these three factors **[*283]** as opposed to counsel's eight-year sustained efforts.

Disproportionate Samsung/Philips Settlements: Samsung settled for $225,000,000; Philips[30] settled for $175,000,000. The remaining defendants settled for amounts between $10-70 million. Lead Counsel responds to this objection by pointing to the market shares of Samsung and Philips. By 2004 Samsung held 29% of the CRT market and 42% of the CDT market. Philips/LPD's market share was 27% for CRTs and 32% for CDTs. Their shares of the U.S. market were even higher," and lead Counsel believes there was strong evidence of their conspiratorial activity within the U.S. These factors account for the higher settlement amounts.

There is no evidence that, because whopping settlements were obtained against two defendants, Class Counsel sold out the class by agreeing to lowball settlements with the others. Class Counsel would have no incentive to act in such a fashion. The settlements were mediated by two respected experienced mediators who were former federal judges. St. John's objection lacks any factual basis or common sense. **[*284]**

Given the extraordinarily large settlement amount, this factor weighs heavily in favor of an upward adjustment of the Ninth Circuit 25% benchmark for attorneys' fees.

2. Risk, Expense and Complexity of Case

No objector seriously questions the risk and complexity of the IPP case. Most notably, the alleged conspiracy was 20 years old, which greatly complicated the obtaining of evidence. Storage facilities with paper documents had to be searched in a number of countries; backup tapes had to be restored; witnesses were dead or unavailable; one defendant had been in bankruptcy. Since most of the evidence consisted of foreign language documents, IPP's had to arrange for certified translations. Each deposition of a foreign language witness was twice as long as normal because of the need for translation.

Class certification, particularly given recent appellate decisions[31], is a severe hurdle. Demonstrating that the IPPs' expert had a valid methodology for proving overcharges generally, and pass-through damages in particular, on a class-wide basis is fraught with risk. Several class actions in the Northern District have failed to obtain certification

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[29] IPP counsel notes correctly that a DOJ prosecution of one defendant actually helps other defendants who argue that their non-prosecution demonstrates their innocence. Alioto Reply Decl. ¶4.

[30] The settling entity was actually LPD, a combination of Philips and LG, whom the IPPs held responsible for Philips's liability.

[31] *Comcast v. Behrend, 569 U.S. 27, 133 S.Ct. 1426, 185 L. Ed. 2d 515 (2013)*; *In re Rail Freight Fuel Surcharge Antitrust Litig., 725 F.3d 244, 406 U.S. App. D.C. 371 (D.C. Cir. 2013)* [vacating class certification in light of *Comcast*]

based on comparable problems, two of them rejecting **[*285]** the analysis of Dr. Janet Netz, IPPs' expert in this case.[32]

IPPs faced also a Daubert motion that challenged the methodology of their key expert, Dr. Netz. Although they prevailed, doing so was far from certain. The Special Master recalls well the briefing and hearing of that motion, during which defendants made exceedingly persuasive arguments for disallowing the testimony.

Litigation involving international price-fixing cartels has become more challenging in light of the FTAIA, which has also been the subject of recent appellate rulings not favorable to plaintiffs.[33]

IPPs took about 100 depositions of defendants and defended 24 depositions of their class representatives. Millions of pages of documents were produced.

As trial approached, defendants filed 36 summary judgment motions, of which 11 were directed at the IPP case. All motions had to be coordinated with other MDL plaintiffs. Dozens of motions in limine were filed.

As for expense, 28 class counsel firms paid assessments to the fund for managing the case. **[*286]** Objector Scarpulla notes that they also made use of funds from the Chunghwa and LG settlements that occurred early on. Nonetheless, $2,405,000 was contributed from the pockets of class counsel to litigate the case, every dollar of which was at risk if they were unsuccessful.

Some of the risk and complexity here go with the territory in any price-fixing class action. However, given the age of the conspiracy and the recent unfavorable appellate precedents, this factor weighs slightly in favor of an upward adjustment of the 25% Ninth Circuit benchmark for attorney's fees.

3. Quality of Representation, Plaintiff and Defense

Notwithstanding the criticisms leveled at Lead Counsel by several objectors, the Special Master concludes that the entire record of the litigation viewed fairly demonstrates that Class Counsel managed this case diligently and efficiently for the benefit of the class, with the exceptions noted below.

Several objectors claimed that Lead Counsel, Mario Alioto, lacked experience as a lead counsel and had never tried an antitrust case. Mr. Alioto provided ample evidence of his 30 years of experience in antitrust cases, including acting as lead counsel and in trials. Alioto Decl. **[*287]** II, 11/19/15, ¶21. There is substantial evidence, most persuasively from the other highly experienced class counsel who worked with him for eight years, that Mr. Alioto managed the case effectively.

The prosecution of the case was divided in a sensible way among class counsel firms, both by defendant and by task. A few examples will suffice. Straus & Boies led the foreign language team to organize the translation and review of the thousands of foreign language documents and also was responsible for discovery against Samsung. Kirby McInerney defended all discovery against class representatives, as well as taking 12 Samsung depositions and leading discovery against Direct Action Plaintiffs. Zelle Hofmann managed discovery against Panasonic/MTPD. Andrew Anderson handled Hitachi discovery; Bramson Plutzik managed Toshiba discovery; Cooper & Kirkham managed Philips discovery; Glancy Prongay & Murray handled LG Electronics discovery. Document review was similarly coordinated among a number of firms. (Alioto Decl. III, ¶8-14). And so on. As much as is reasonably possible in such a complex case, this division of labor tended to reduce duplication.

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[32] *In re Graphics Processing Antitrust Litig., 253 F.R.D. 478 (N.D.Cal. 2008)* (Alsup, J.) [Neff analysis rejected]; *In re Flash Memory Antitrust Litig., 2010 U.S. Dist. LEXIS 66466, 2010 W.L. 233208 (N.D.Cal., C070086, 6/9/10)* (Armstrong, J.) [Neff analysis rejected]; *In re Optical Disk Drive Antitrust Litig., 303 F.R.D. 311 (N.D.Cal. 2014)* (Seeborg, J.)

[33] E.g., *Motorola Mobility LLC v. AU Optronics Corp., 775 F.3d 816 (7th Cir. 2015)*

According to his co-counsel, Lead Counsel was **[*288]** superb at coordinating the class effort so that the team remained united in its objectives, and avoided squabbling over strategy, finances, personalities, and the like. For example:

> Donald Perelman, Fine, Kaplan and Black: "...Fine Kaplan was in a unique position to evaluate the quality, organization and cohesiveness of the law firms that put together this case. In short, we were extremely impressed.... On the most important front, the quality of the work product was outstanding.... From an organizational standpoint, the case was effectively managed.... Finally, the CRT team was cohesive. Lead counsel clearly was in charge but the other firms had the freedom and confidence to innovate, rather than simply follow order. This level of collegiality and cooperation does not always exist in case like this...." IPP Reply Re: Motion for Award of Attorneys' Fees, etc., dtd. 11/15/15, Exh. A.
>
> Paul Novak, Milberg LLP: Throughout the course of this litigation, my observations are that IPP Counsel constructively and cohesively worked together.... IPP Reply, Exh. B
>
> Robert J. Gralewski, Kirby McInerney: I can attest that Lead Counsel ran the CRT case extremely capably and economically....In terms of **[*289]** costs, I have never worked on a case where Lead Counsel was more careful to avoid excessive or unnecessary litigation expenses....Lead Counsel was laser-focused on the CRT case and its intricate legal issues from the case's inception to its conclusion....During settlement negotiations, I believe Lead Counsel sought to extract maximum value from the remaining Defendants....IPPs' core team included some of the finest antitrust class action lawyers in the country." IPP Reply, Exh. D.
>
> Nathan Cihlar, Straus & Boies: [Lead Counsel's firm] effectively managed this litigation and met the case needs by identifying and working with a core group of experienced counsel. A network that was established that facilitated the constant exchange of information and routed assignments to firms depending on who was in the best position to assist. From beginning to end, firms were called upon to fill roles within their expertise. The management system ensured that each assignment was done efficiently.... IPP Reply, Exh. E.

The ability to lead a cohesive and collaborative team is the single most important attribute of a Lead Counsel in a huge MDL litigation. Lead Counsel need not be Clarence Darrow reborn — **[*290]** plenty of skilled courtroom lawyers will step forward to try the case. Lead Counsel must instead embody General Eisenhower who succeeded at Normandy because he could shape the disparate American, English, French and other forces and huge egos into a cohesive force with a common objective. The evidence is overwhelming that Lead Counsel pulled this off.

Before addressing the Objectors' criticisms, the Special Master notes that three troublesome issues have arisen with Class Counsel's plan of allocation: the limitation of monetary compensation to class members from *Illinois Brick* repealer states; the failure to obtain class representatives from three repealer states, Massachusetts, Missouri and New Hampshire; and disparities between the allocation plan for these Proposed Settlements and the Chungwa allocation plan. The Special Master has concluded that the first two problems are surmountable. But the Chunghwa situation needs to be corrected. It is hard to avoid the conclusion that more attention to detail and foresight on the part of Lead Counsel might have averted or mitigated at least some of these problems. No one is perfect, particularly with the clarity of hindsight looking back over **[*291]** eight fraught years of difficult litigation. The Special Master has been clear that the fact these issues arose does not mean that the representation of the IPP class was ineffective or infected with conflicts of interest. It was not. But these factors do tarnish somewhat the glow of success that Lead Counsel might otherwise bathe in.

Objectors criticize the quality of the representation for the following basic reasons: Lead Counsel engaged three "trial" firms in the last months of the case to lead the trial team; Lead Counsel wasted time arguing with the California Attorney General; monetary compensation was restricted to the Statewide Litigation class of 22 states; too many class counsel firms were joined.

Three "Trial" Firms

In approximately October 2014 Lead Counsel engaged three very experienced antitrust trial counsel: Freedman Boyd et. al.; Fine Kaplan and Black; and Hulett Harper Stewart. Joe Goldberg of Freedman Boyd had just completed his work as lead trial counsel in the *Urethanes Antitrust Litigation*, one of the very few price fixing cases to go to trial, which brought home a verdict of over $1 billion. Fine Kaplan was co-lead counsel in that case. Alioto Decl. III, ¶22. Mr. **[*292]** Alioto states that he made "a reasoned judgment" that additional trial expertise was needed, that he saved money by engaging the firms only in the last five months before trial, and that doing so enhanced settlement leverage with defendants who could see that Class Counsel would be ready for trial. (Alioto Decl. III, ¶22-23). Objector Scarpulla is highly critical of this decision, noting that other experienced trial counsel were on the team and that getting the three new firms up to speed wasted money.

The Special Master has examined the time records of the three "trial" firms. The records, both the summaries attached to their declarations and the raw contemporaneous billing entries, do not exhibit undue wasted or unproductive time.

Freedman Boyd: 88% of the time was recorded by Joe Goldberg himself (42% of the time @ $425/hr.), two other lawyers (28% of the time @ $275 and $250/hr.), and one paralegal (18% of the time @ $100/hr.). The total time was 1,734 hours at a total charge of $554,666, at an average billing rate of $319/hr. Mr. Goldberg worked basically full time (734 hours) for 4 months, with support from two other lawyers and a paralegal. Getting the full attention of a senior **[*293]** courtroom trial lawyer with part-time support of two other lawyers and a paralegal is as efficient as legal staffing gets.

Fine Kaplan: Staffing here was broader: about 5 partners billing $450-750/hr, two associates billing $250/hr. and a paralegal. They recorded 5,382 hours at a charge of $2.625 million at an average billing rate of $487/hr. This firm did the workhorse part of trial preparation: selecting exhibits, motions in limine, assembling deposition testimony, and the like.

Hulett Harper: Very lean staffing: one partner at $675/hr. and one associate at $475/hr. recorded 80% of the time. The total time was 1,141 hours at a total charge of $634,696, at an average billing rate of $556/hr. The work focused on selecting deposition excerpts and preparing legal briefs.

The trial preparation that these three firms did would have had to be done by some other lawyers had they not been on board. And their "getting up to speed" recorded time was actually quite minimal. The firms each started working about October 10, 2014, and by early to mid-November they were performing hard-core trial preparation, not "getting up to speed." A reasonable estimate would be that each of the firms expended **[*294]** about 50-7 5 hours in "getting up to speed." Given the added focus, intensity and recent trial experience they brought to the potential trial, the Special Master concludes that Mr. Alioto's "reasoned judgment" was appropriate. After all, no one would accuse British barristers who practice in precisely this model — entering a case near trial with their sole obligation being to prepare the case for courtroom presentation — of "wasting" resources.

Dispute with California AG

Objector Scarpulla is also critical of Lead Counsel for an overall failure to cooperate with the California Attorney General, and specifically for a dispute that arose over the California AG's settlement with Philips in the state court *parens* action. As to the purported broader breakdown in cooperation, Mr. Scarpulla provided no details except to refer to Special Master Vaughn Walker's suggestion that Mr. Scarpulla try to mediate the relationship between Mr. Alioto and the California AG. Neither Mr. Scarpulla nor Asst. Attorney General Varanini provided any further details. So the Special Master cannot give credence to a criticism that is not backed up by factual detail in the record.

The dispute over the Philips settlement **[*295]** was real, but it demonstrates appropriate caution rather than incompetence or poor judgment by Lead Counsel. Philips took the position that its settlement in the state *parens* case would estop California members of the IPP class from obtaining relief against it in the federal case. No one — not Lead Counsel nor the California AG — thought this position had any merit. The California AG promised to represent in court that no estoppel would result. But Mr. Alioto concluded he needed to file a formal objection in state court to the Philips settlement to obtain a ruling from the California court that no estoppel would result. In the end, the state judge refused to issue such an "advisory opinion," and the federal case proceeded without disruption to settlement against Philips for the second largest amount of all the defendants.

In hindsight, could this dispute have been avoided or handled more adroitly with some saving of attorney time? Perhaps. But facing a potential loss of any damages attributable to California purchasers from a key target defendant, Lead Counsel acted prudently in taking every step to avoid an estoppel result. Whether this was "belt and suspenders" activity, or legitimate **[*296]** prudence, falls under the heading of reasonable litigation judgment. The Special Master will not engage in 20-20 hindsight to criticize Lead Counsel's actions here.

No monetary compensation to Nationwide Class

For the reasons discussed in detail, *infra*. at VII.B.2, the Special Master concludes that Lead Counsel made a legitimate decision, solidly based in law, to limit monetary compensation to class members from *Illinois Brick* repealer states. Certainly it is possible for an adroit legal mind to concoct a legal pathway for class members in non-repealer states to recover some claim for monetary relief. Certainly it is possible that, if pressed harder, defendants might have agreed to larger settlements to effectuate a nationwide monetary recovery. But relying on abstract legal ingenuity unsupported by existing case law and second-guessing settlement negotiations are not solid bases on which to criticize a perfectly well-founded decision by Lead Counsel that non-repealer class members had no viable claim. The Special Master concludes this was not a failure of effective representation, and it did not create a conflict of interest for Lead Counsel.

Too many class counsel

There were about 50 **[*297]** class counsel firms in this case. In *LCD* there were 116 firms. A large number were basically local counsel for class representatives from the 22 repealer states and District of Columbia. The rest were an assortment of the country's leading antitrust firms who commonly appear in MDL price fixing cases. As noted above, regardless of the number of firms, the case was managed efficiently and cost-effectively. This criticism of Lead Counsel's representation has no merit.

This factor does not weigh in favor of an increase or decrease from the Ninth Circuit 25% benchmark for attorney's fees.

4. Contingent Nature of Fees

There is no dispute that IPP counsel's compensation for eight years of work on this case was entirely contingent. They received not a dollar of compensation in the interim for 183,000 hours of work, and they were at continuous risk of receiving little or nothing had the result proved unfavorable. As a reminder, in the *LCD* case direct action plaintiff Best Buy went to trial against Toshiba and recovered a small verdict which was entirely offset by Toshiba's prior settlements. Thus, Best Buy recovered nothing and its counsel's fees were dramatically reduced by the court to a figure **[*298]** far below their lodestar. Alioto Decl. I, ¶93. This same risk of a zero recovery was borne for up to eight years by IPP counsel here.

The Ninth Circuit has directed courts to account for the delay class counsel experience in receiving their fees. There are two methods of doing this: (1) apply current rather than historic billing rates, or (2) apply historic rates with a prime interest rate adjustment. *McGee* at p. 11. Here the Special Master elects to apply current billing rates. Therefore, the applicable lodestar requested by class counsel is $90,075,076.90.

Not only did IPP counsel risk receiving no compensation for many years, but they put at risk $2,405,000 of their own money in assessments paid to the Litigation Expense Fund to cover the enormous expense of experts, translation and the like. See Section IX below.

Courts have repeatedly recognized that to induce attorneys to accept the risk of little or no recovery it is appropriate to award reasonable fees that often include a multiplier over their lodestar. Omnivision., 559 F.Supp.2d at 1047.

Given the 8-year duration of the case, the significant out-of-pocket expense at risk, and the risks of non-recovery noted above, this factor weighs strongly in favor of an increase from the [*299] Ninth Circuit 25% benchmark for attorney's fees.

5. Fees Awarded in Comparable Cases

Comparing the percentages and the lodestar multipliers awarded to counsel in other cases turns out to be far less useful as a metric than one might imagine. Plaintiffs such as class counsel here can list a number of cases with awards in the 25-35% range with multipliers all over the lot. *In re Vitamins Antitrust Litig., 2001 U.S. Dist. LEXIS 25067, 2001 WL 34312839, at *10 (D.D.C. July 16, 2001)* [34.06% of $359,438,032]; *In re IPO Secs. Litig.*, 672 F.Supp.2d 467, 516 (D.Del. 2009) [1/3 of $510,253,000); *In re Checking Account Overdraft Litig., 830 F.Supp.2d 1330, 1367 (S.D.Fla. 2011)*. And objectors have their own list of cases with awards being reduced to 6-12%. *E.g., Wal-Mart Stores, Inc. v. Visa U.S.A., Inc., 396 F.3d 96 (2d Cir. 2005)* [reduced fee from 18% to 6.5%]; *Domestic Air Transport, 148 F.R.D. 297* [6-10% appropriate in megafund case]. Both sides cite to scholarly studies of fee awards. Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical L. Stud. 811, 838-839, 842-844 (2010) ["Fitzpatrick"]; Theodore Eisenberg & Geoffrey P. Miller, *Attorneys Fees and Expenses in Class Action Settlements: 1993-2008*, 7 J. Empirical L. Stud. 248 (2010) "["Eisenberg"]. IPP's expert, Richard Pearl, has offered his opinions. Decl. of Richard Pearl, ¶21. Docket No. 4071-15. Upon close examination, many of the cases are significantly distinguishable on their facts from this case. Some of the decisions that are trotted **[*300]** out repeatedly are now 10-15 years old or from other jurisdictions with differing perspectives toward fee awards. Therefore, the Special Master has endeavored to focus on decisions from the Ninth Circuit and when possible from the Northern District, in reasonably similar cases from fairly recent years.

This case presents the familiar problem of how to determine a reasonable fee award in a megafund case, that is one with a recovery of $100 million to over $1 billion. Some cases, though not in the Ninth Circuit, prescribe the use of an inverse scale: the higher the megafund, the lower the percentage for the fee. However, the Ninth Circuit has expressly rejected any hard rule that megafund cases are to be treated differently, although size of the fund is one factor the court should consider. *Vizcaino, 290 F.3d at 1047* [declining to accept the principle that the award decreases as the fund increases]. The most effective way to control a percentage recovery in a megafund case is to compare it to the lodestar multiplier that it would generate. For example, in *Gutierrez v. Wells Fargo Bank, 2015 U.S. Dist. LEXIS 67298, 2015 WL 2438274 (N.D.Cal., C-07-5923, May 21, 2015)*, Judge Alsup reduced a fee request from 25% of the $203 million fund to 9% because the 25% benchmark percentage would have **[*301]** yielded a multiplier of 10.38, which Judge Alsup termed "ridiculous." The result was to approve a 9% award that gave the two class firms multipliers of 2 and 5.5. Similarly, in *Wal-Mart Stores 396 F.3d 96*, the court reduced an award from the requested percentage of 18% to 6.5% on a $3.05 billion fund, largely because the 18% fee would have represented a multiplier of 9.68, which the court found excessive. The resulting 6.5% fee produced a 3.5 multiplier, which the Second Circuit concluded compared favorably with other awards, citing *In re Cendant Corp PRIDES Litig., 243 F.3d 722, 742 (3d Cir. 2001)* [multiplier of 1.35-2.99 common in megafunds] and *NASDAQ Market-Makers, 187 F.R.D. at 489* [multipliers of 3-4.5 are common].

The recent thorough discussion of fee awards by Judge Koh in *In re High-Tech Employees Antitrust Litig., 2015 U.S. Dist. LEXIS 118052, 2015 WL 5158730 (N.D.Cal. No. 11-cv-2509, Sept. 2, 2015)* is highly instructive. The settlement in that case produced a common fund of $415 million, plus $20 million in prior settlements. Two groups of law firms together asked for an award of $90.6 million in fees (including $5 million awarded from prior settlements). The requests together amounted to 20.8% of the total $435 million in settlements. The lodestar was $18.2 million, so the fee request would have produced a 4.97 multiplier. Judge Koh decided to use a lodestar approach, with a percentage cross-check. **[*302]** [34] She reasoned that anything close to the 25% benchmark would

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[34] The truth is that whether to start with a lodestar and use a percentage cross-check, or to proceed vice versa, is truly a matter of comfort and gut sense for the particular case rather than a real methodological difference.

grant the lawyers a multiplier at levels above 4 which she found to be "unusual" and "far from the norm". 2015 U.S. Dist. LEXIS 118052, [WL] at *8. Also, having supervised the case for four years Judge Koh was in a good position to examine and adjust the billings as appropriate.

Judge Koh ultimately adjusted billings, and allowed a fee of $45 million, which produced a 2.5 multiplier. She noted that was well within the range of 1-4 in which 83% of the 24 class settlements discussed in *Vizcaino* fell. *See* Vizcaino, 290 F.3d at 1051 n. 6; High-Tech, 2015 U.S. Dist. LEXIS 118052, 2015 WL 5158730, at *11. She then proceeded to perform a percentage check. The approved fee amounted to 10.5% of the settlement, which Judge Koh found to be within the reasonable ranges calculated by the two leading academic studies, *Fitzpatrick* [mean and median percentages for $250-500 million settlements were 17.8% and 19.5%] and *Eisenberg* [mean and median figures were 12% and 10.2].

Closer to home Judge Tigar has just approved an award of fees to the Direct Purchaser **[*303]** class counsel in this very case that represents 30% of the settlement amount. [Dkt. 4311].

In summary, there is solid authority that a 25% award is presumptively reasonable; that many cases — including megafunds — award fees in the 25-33% range; that many others award fees in the 8-12% range; and that academic studies show mean and median ranges of 10-20%. Here three factors point strongly in favor of a fee somewhat in excess of the 25% benchmark: the 8-year duration of the case, the extraordinary risk undertaken by any group of indirect purchaser class counsel in the present uncertain state of antitrust and class action law, and the unarguably superb result of recovering for the indirect purchasers the second largest indirect purchaser price fixing settlement in history. Having performed the required analysis and considered the relevant authorities, the Special Master concludes that a fee award of 30% of the settlement fund, or $173,025,000, is appropriate.

D. Lodestar Comparison

1. Billing Rates

The average billing rate for all class counsel at current rates is $492/hr. ($90,075,076 / 183,000 hrs.). The billing rate would be $450 at historic rates.[35] After the recommended lodestar 10% **[*304]** adjustment, *infra* at pp. 73-74, the billing rate would be only $443 at current rates ($81,067,569.20 / 183,000 hrs.) and $412 at historic rates ($75,378,559 / 183,000 hrs.).

Lead Counsel arbitrarily capped the rate for document review at $350 per hour and $400 for foreign language documents. Alioto Decl. I, ¶118.

It requires little discussion to conclude that these billing rates are reasonable and responsible. Lead Counsel began billing at $875 in 2015, but from 2007 forward he billed at $750/hr. Compared to the rates charged by counsel for defendants (e.g., Gibson Dunn, White & Case, Sheppard Mullin, Baker Botts, Winston & Strawn, Cooley), Lead Counsel's rates were low. Pearl Supp. Decl., dtd. 11/6/15, ¶10, 11. With the exception of a very few lawyers, class counsel's billing rates did not exceed $800, and never exceeded $1,000. Courts in the Northern District have repeatedly approved billing rates in the range seen in this case. O'Bannon v. Natl. Collegiate Athletic Assn., 114 F. Supp. 3d 819, 2015 WL 4274370 [approving rates of $370-985 for attorneys]; Wynn v. Chanos, 2015 U.S. Dist. Lexis 80062 (N.D.Cal. June 19, 2015) [approving rates of $570-1085 for attorneys]; Banas v. Volcano Corp., 47 F.Supp.3d 957 (N.D.Cal 2014) [approving rates of $355-1095]; TFT-LCD, 2013 U.S. Dist. LEXIS 49885, 2013 WL 1365900, at *7 (N.D.Cal. Apr. 3, 2013) [approving rates of **[*305]** $417-1000]. See Pearl Decl., ¶28-37, surveying cases and firms.

The Special Master recommends that the objections to the billing rates of Class Counsel be overruled.

2. Hours

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[35] Objector Westfall said that the average billing rate of $879 was excessive, but he used the wrong number for total recorded hours.

IPP counsel recorded 183,000 hours in this case through May 2015. Although Lead Counsel and a handful of other firms have and will invest many hundreds of uncompensated hours after May 2015 in obtaining approval of the settlement, administering the distribution of funds, dealing with objectors, and other post-settlement tasks, Lead Counsel determined to request fees only through May 2015. Providing compensation adequate to cover hours after May 2015 is necessary in determining a fair fee.

All 183,000 hours are detailed in declarations submitted by each of the 50 class counsel firms. Those declarations break down the hours by year, by timekeeper, and into 12 categories I of activities (research, motions, depositions, trial preparation, etc.) In addition, the Special Master has been provided the raw billing entries for every firm. The Special Master has carefully reviewed every declaration, and has reviewed a sample of about 50 months of contemporaneous billing entries from a range of about eight class counsel firms. **[*306]**

Objectors assert without much in the way of evidence or authority that 183,000 hours was excessive for a case that settled on the courthouse steps after eight years. Lead Counsel has explained in convincing detail the effort necessary. Alioto Decl. I. This explanation is supported by the lists of 11 motions to dismiss, 51 third-party subpoenas, 21 discovery motions, 25 class representative depositions, 72 percipient defendant depositions, 68 third-party and DAP depositions, 31 expert depositions, 32 *Rule 30(b)(6)* depositions, 36 summary judgment motions, 64 motions in limine, 17 experts, four groups of plaintiffs (IPP, DPP, Attorney General, and Direct Action). Alioto Decl. II, Exs. 1-12. In comparison, counsel in *LCD* expended 313,000 hours over six years, or about 70% more time. [Alioto Decl. I, ¶16]

The Special Master concludes from his review of declarations and time entries that time was recorded in a professional, detailed manner by almost all lawyers. One does observe that, as the age of the lawyer increases (and approaches the age of the Special Master), the time recording habits deteriorate. Thus, almost every entry for one respected senior attorney reads merely "trial prep." Another lawyer **[*307]** with many decades of experience made handwritten time entries which appear a trifle haphazard. However, these are isolated cases, and the Special Master has no reason to believe that there was any widespread padding of time or failure to keep contemporaneous records. Objector Bonsignore has offered unsupported hearsay that Mr. Alioto told him that he did not keep contemporaneous records. Mr. Alioto has denied this (*see* Alioto Supp. Decl. in Support of IPP Motion for Award of Fees, dtd. 11/19/15, ¶27), and his daily billing entries, albeit handwritten, give every impression of having been made contemporaneously.

Lead Counsel appointed an Audit Committee of a few leading class counsel to review the time of every firm. As a result, the time of some firms was reduced. The Special Master deems it unnecessary to review the work of the Audit Committee since he reviewed declarations and raw billing records.

Lead Counsel gave direction that lawyers were not to record time for in-house multi-lawyer conferences. Alioto Decl. II, ¶118. However, many of the billing records contain entries for just such conferences. It is simply unreasonable to expect a case of this nature to be litigated for eight **[*308]** years without conferences among counsel, and there is no reason to think such conferences did not generally benefit the class. Nonetheless, class counsel on occasion clearly did not follow this rule.

In evaluating attorney time entries, the two most telling factors are the number of attorneys from a single firm performing the majority of the work, and the evidence of unnecessary duplication of effort (multiple lawyers attending a deposition, excessive number of document reviewers, etc.). The billing entries here showed that for the most part the case was staffed in a reasonably "lean and mean" manner. For most firms, 75% or more of the work was performed by 2-3 lawyers consistently over the eight years. As noted above, Lead Counsel divided tasks so that each of the core firms had responsibility for a defendant or for an activity (e.g., foreign language translation). Duplication of efforts was thus minimized. Thirteen firms did virtually nothing, billing less than $75,000 each. Another nineteen firms billed less than $1 million. Thus, the real work of the case was limited to about sixteen firms that billed over $2 million. This management of attorney time compares favorably with the **[*309]** division of labor in *LCD* based on the Special Master's involvement in that case.

Objector Williams criticizes the lodestar because depositions were stayed for about two years at the request of the Department of Justice. Docket No. 4112. The time records show a significant drop in billings during the stay, in many firms to almost nothing, so there is no indication that counsel were padding their bills while the case was stayed. Also, the stay ultimately increased the challenges of obtaining documents and finding witnesses who could remember anything.

Objector Scarpulla maintains that the categories into which time entries were broken down are too broad. But the exact same categories were used in *LCD* where Mr. Scarpulla was co-lead counsel.

Objector Scarpulla also criticized the use of block billing[36] and quarter-hour increments to record time. As to block billing, the Special Master's review of actual billing entries shows that this occurred but not to any egregious extent. Having himself recorded time for almost 50 years, the Special Master is aware how silly it is to insist (as insurance companies sometimes do) on showing a specific amount of time on each action taken during a day. *See* ***[*310]*** *O'Bannon, 114 F. Supp. 3d 819, 2015 WL 4274370, at *6-7* [refusing to reduce fee for block billing, noting that "[b]lock billing is a typical practice in this district, and blocked bills have been found to provide a sufficient basis for calculating a fee award."] As to quarter-hour increments, this is also a common practice that *O'Bannon* said had been allowed by courts in the Ninth Circuit. *114 F. Supp. 3d 819, [WL] at *7-8*

Objector St. John criticized billing contract attorneys at market rates applicable to permanently hired attorneys, the application of a multiplier to their time, and the lack of resumes for some contract attorneys at Lead Counsel's firm. [Docket No. 4106, at 19]. Lead Counsel responded adequately to these points. First, contract attorneys on this case were largely fluent in Chinese, Japanese or Korean and were essential for reviewing and selecting documents and providing backup translation at depositions. In any event, the legal community now commonly uses contract attorneys. There is not the slightest justification to downgrade their billing rates or not apply a multiplier to them. Lead Counsel **[*311]** has provided the missing resumes for contract lawyers from his firm. Alioto Decl. III.

In summary, the Special Master finds that class counsel's billing records appear highly reliable and detailed and that the time spent and the rates charges were reasonable for a case of this complexity. However, in any case of this length and magnitude there are bound to be inefficiencies and wasted time for which it is appropriate to make an across-the-board reduction to the lodestar. (IPP counsel in the *LCD* case self-imposed a 20% reduction across-the-board.) Moreover, as noted above, some criticism is merited for a rocky relationship between IPP counsel and the California Attorney General and for features of the allocation plan that have provoked controversy. Accordingly, to ensure that the lodestar truly represents hard compensable time expended for the benefit of the class, the Special Master concludes that an across-the-board reduction of 10% should be applied. This reduces the lodestar at current rates from $90,075,076.90 to $81,067,569.20.

The resulting multiplier ($173,250,000 / $81,067,569) is just under 2.14. It is below the 2.5 multiplier approved by Judge Koh in *High-Tech.* It is also well **[*312]** within the 1-4 range in the *Vizcaino* survey of 24 decisions. *290 F.3d at 1052-1054*. It is within the range of the 2 and 5 multipliers used by Judge Alsup in *Gutierrez*. And most importantly, this multiplier represents a fair but not a windfall return for the generally superb job done by IPP counsel in this case.

IX. APPROVAL OF REQUEST FOR LITIGATION EXPENSES

IPP's ask for approval of reimbursement to counsel of $7,634,372.50. This total consists of three categories: $2,405,000 contributed to the Litigation Expense Fund by assessments on class counsel, $733,494.48 in individual firm unreimbursed expenses, and approval of the expenditure of an additional $4,495,878.02 from settlement proceeds placed in the Future Expense Fund. IPP's original request for reimbursement was reduced by the elimination of $36,153.07 of unreimbursed expenses claimed by class counsel pursuant to a recent re-audit of

[36] Block billing is the inclusion in a single time entry of multiple activities during a single day without breaking out how much time the attorney spent on each activity.

those expenses as described below. The amounts spent and to be spent from the Litigation Expense Fund and the Future Expense Fund cover expert fees, reporter fees, translation costs and the like. Reimbursable expenses incurred by class counsel consist of copying charges, travel expenses, legal research, etc.

No one has **[*313]** objected to approval of these expenses. Notwithstanding the absence of objection, the Special Master has performed a sufficient review to satisfy himself of the appropriateness of the request.

The categories of expenses are listed in detail. Compendium of Attorney Declarations, Docket No. 4073; Alioto Decl. II, ¶130, 134.

Lead Counsel appointed an Audit Committee of several firms to review and verify the expenses, assisted by an accounting firm Alioto Decl. IV, ¶27.

More recently, now cognizant of the scrupulous review that the court gave to the expense request of Direct Purchasers, Lead Counsel conducted another review of all the expense requests of every class counsel firm and eliminated questionable items. Examples of those are: first and business class airfare, charges for more leg room on a flight, alcoholic beverage charges, amounts with no backup invoices, copying charges exceeding $.20/page, amounts not matching invoices. It appears to the Special Master that the review was meticulous and conservative — more conservative, in fact, than he would have been in assessing the same expenses. Alioto ltr. dtd. 1/7/16 to Special Master, e-filed at JAMS.

Lead Counsel have offered to provide **[*314]** the Special Master with all the backup expense invoices, or to sample them. But given the review conducted by Lead Counsel, the lack of any objection and the cost-benefit calculation of investing that time, the Special Master declined to conduct a more in-depth review.

The Special Master recommends that the request to approve reimbursement to counsel and the expenditure of settlement proceeds for legitimate litigation expenses be approved.

X. APPROVAL OF INCENTIVE AWARDS TO CLASS REPRESENTATIVES

IPP's request incentive awards of $15,000 to all 25 court-appointed Class Representatives[37], and $5,000 for an additional 15 named plaintiffs who were not appointed by the court but acted as state representatives for a period of time[38]. The total requested incentive award is $450,000, which is .07% of the settlement fund.

No one has objected to this request.

These requested awards are within the range commonly approved in this District. *See* *Moore v. Verizon Communications, Inc., 2013 U.S. Dist. LEXIS 122901, 2013 WL 4610764, No. C-09-1823 SBA, at *15 (N.D.Cal. Aug. 28, 2013)* ["[i]n this district, a $5,000 payment is presumptively reasonable."] The non-appointed state representatives maintained claims for several years until they were replaced for strategic reasons. Some (e.g., Frank Warner and Samuel Nasto) were deposed, and all searched for documentation and worked on discovery responses. *See,* *LCD III, 2013 U.S. Dist. LEXIS 49885, 2013 WL 1365900, at * 17* [granting incentive payments of $7,500 to non-appointed representatives]. The Court-appointed representatives, both individuals and small businesses, all gave depositions, all produced documents, all responded to written discovery, some submitted declarations, and some worked with counsel to prepare trial testimony. A $15,000 award is entirely reasonable.

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[37] Brian Luscher, Jeffrey Figone, Steven Ganz, Lawyer's Choice Suites, Inc., David Rooks, Daniel Riebow, Travis Burau, Southern Office Supply, Inc., Kerry Lee Hall, Lisa Reynolds, David Norby, Barry Kushner, Charles Jenkins, Steven Fink, Gloria Comeaux, Craig Stephenson, Janet Ackerman, Louise Wood, Patricia Andrews, Gary Hanson, Jeff Speaect, Albert Sidney Crigler, Margaret Slagle, **[*315]** John Larch, and Brigid Terry.

[38] Frank Warner, Samuel Nasto, Carman Gonzales, Dana Ross, Ryan Rizzo, Misti Walker, Conrad Carty, Bedrock Management Company, Inc., Brady Lane Cotton, Colleen Sobotka, Steven Hawley, Daniel Hergert, Chad Klebs, Donna Marie Ellingson, and Jerry Cook.

See, *LCD I, 2011 U.S. Dist. LEXIS 154287, 2011 WL 7575003, at *2* [granting incentive payments of $15,000 to Court-appointed representatives]. **[*316]**

The Special Master recommends approval of the requested incentive awards.

XI. CONCLUSION

Good cause appearing, the Special Master recommends that the Court order as follows:

1. Approve certification of the settlement class.
2. Find that the compensation to the certified IPP class is fair, reasonable and adequate.
3. Find that the plan of allocation is fair, reasonable and adequate as to class members in the Statewide Damages Classes.
4. Find that the plan of allocation is fair, reasonable and adequate as to class members in the Nationwide Class from non-repealer states even though they receive no monetary compensation.
5. Find that the plan of allocation is fair, reasonable and adequate as to class members in the Nationwide Class from the three omitted repealer states (Massachusetts, Missouri and New Hampshire) even though they receive no monetary compensation.

6. Find that the plan of allocation is **not** fair, reasonable and adequate insofar as it fails to address satisfaction of the terms of the Chunghwa settlement. Direct Lead Counsel to submit a plan that addresses how to correct the identified due process problem, what, if any, additional notice may be required, and a timeline for the Court **[*317]** to address this problem.
7. Find that notice to the class was reasonable, appropriate under the circumstances, and met due process standards.
8. Overrule all objections other than those with respect to the treatment of the Chunghwa settlement.
9. Award attorneys' fees to IPP counsel in the amount of $173,250,000, which is equal to 30% of the settlement fund. Compute class counsel's lodestars at current billing rates which total $90,075,076.90. Reduce class counsel's lodestars by 10% across-the-board to account for inefficiencies and work that did not benefit the class, which results in an adjusted lodestar of $81,067,569 and a multiplier of just under 2.14.
10. Approve the request for approval of litigation expenses in the amount of $7,634,372.50.
11. Approve incentive awards in the amounts of $15,000 for the 25 court-approved Class Representatives and $5,000 for an additional 15 representatives who were not approved by the Court but acted for a period of time.

DATED: JANUARY 28, 2016

/s/ Martin Quinn

MARTIN QUINN

SPECIAL MASTER

End of Document

Van Ornum v. AMA

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

January 28, 2016, Decided; January 29, 2016, Filed

Case No. 2:14-cv-921-RJS-EJF

Reporter
2016 U.S. Dist. LEXIS 44805 *

SANDRA CK VAN ORNUM, Plaintiff, v. AMERICAN MEDICAL ASSOCIATION, et al., Defendants.

Subsequent History: Adopted by, Dismissed without prejudice by, Motion denied by, As moot, Motion dismissed by, As moot *Van Ornum v. AMA, 2016 U.S. Dist. LEXIS 42695 (D. Utah, Mar. 30, 2016)*

Motion denied by, Request denied by, As moot *Van Ornum v. AMA, 2016 U.S. Dist. LEXIS 111027 (D. Utah, Aug. 19, 2016)*

Magistrate's recommendation at *Van Ornum v. AMA, 2017 U.S. Dist. LEXIS 164259 (D. Utah, Mar. 13, 2017)*

Magistrate's recommendation at *Van Ornum v. AMA, 2017 U.S. Dist. LEXIS 164269 (D. Utah, Mar. 16, 2017)*

Magistrate's recommendation at *Van Ornum v. AMA, 2017 U.S. Dist. LEXIS 164256 (D. Utah, Mar. 17, 2017)*

Magistrate's recommendation at *Van Ornum v. AMA, 2017 U.S. Dist. LEXIS 164263 (D. Utah, Mar. 20, 2017)*

Magistrate's recommendation at *Van Ornum v. AMA, 2017 U.S. Dist. LEXIS 164261 (D. Utah, Mar. 22, 2017)*

Magistrate's recommendation at *Van Ornum v. AMA, 2017 U.S. Dist. LEXIS 164264 (D. Utah, Mar. 22, 2017)*

Magistrate's recommendation at *Van Ornum v. AMA, 2017 U.S. Dist. LEXIS 164272 (D. Utah, Mar. 22, 2017)*

Magistrate's recommendation at *Van Ornum v. AMA, 2017 U.S. Dist. LEXIS 164258 (D. Utah, Apr. 21, 2017)*

Magistrate's recommendation at *Van Ornum v. AMA, 2017 U.S. Dist. LEXIS 164265 (D. Utah, June 21, 2017)*

Magistrate's recommendation at *Van Ornum v. AMA, 2017 U.S. Dist. LEXIS 164257 (D. Utah, July 14, 2017)*

Magistrate's recommendation at *Van Ornum v. AMA, 2017 U.S. Dist. LEXIS 164260 (D. Utah, July 14, 2017)*

Core Terms

allegations, undersigned, personal jurisdiction, service of process, websites, nationwide, general jurisdiction, forum state, immunization, purposefully, RECOMMENDS, nurses, food, motion to dismiss, contacts, venue, antitrust, anti trust law, residents, contact information, medical treatment, alleged injury, ear infection, associations, metabolism, quotations, courts, Reply, minimum contact, Microorganism

Counsel: **[*1]** Sandra C.K. Van Ornum, Plaintiff, Pro se, PROVO, UT.

For American Medical Association, American Dental Association, American Hospital Association, Defendants: Conrad S. Kee, LEAD ATTORNEY, JACKSON LEWIS PLLC, SALT LAKE CITY, UT.

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For Allergan, Defendant: Lauren E. Hosler, LEAD ATTORNEY, STOEL RIVES, SALT LAKE CITY, UT.

For Hawaii Pacific Health System, Defendant: Nathan R. Sumbot, Timothy C. Houpt, LEAD ATTORNEYS, JONES WALDO HOLBROOK & MCDONOUGH (SLC), SALT LAKE CITY, UT.

For Kuakini Health System, Defendant: Jose A. Abarca, LEAD ATTORNEY, STOEL RIVES, SALT LAKE CITY, UT.

For William Goodhue, M.D., Defendant: Curtis Edwin Sherwood, LEAD ATTORNEY, PRO HAC VICE, DEPT OF THE CORPORATION COUNSEL CITY & COUNTY OF HONOLULU, HONOLULU, HI; Heather S. White, LEAD ATTORNEY, Danica N. Cepernich, SNOW CHRISTENSEN & MARTINEAU, SALT LAKE CITY, UT.

Judges: EVELYN J. FURSE, United **[*2]** States Magistrate Judge. District Judge Robert J. Shelby.

Opinion by: EVELYN J. FURSE

Opinion

REPORT AND RECOMMENDATION

Each of the Defendants filed Motions to Dismiss raising the same defenses and arguments under *Federal Rule of Civil Procedure 12(b)*. The Defendants urge the Court to dismiss *pro se* Plaintiff Sandra C. K. Van Ornum's claims. Based on the Motions, the undersigned[1] RECOMMENDS the Court dismiss Ms. Van Ornum's claims against the Defendants without prejudice because the Court appears to lack personal jurisdiction over any of the Defendants. The Complaint fails to state facts sufficient to allege either general or specific personal jurisdiction over any of the Defendants.[2] The undersigned LIFTS the stay in this case upon the filing of this Report and Recommendation. (*See* ECF No. 62.)

BACKGROUND

On December 22, 2014, Ms. Van Ornum filed a *pro se* complaint against the American Medical Association (AMA), American Dental Association (ADA), American Hospital Association **[*3]** (AHA), Monsanto Company (Monsanto), Eli Lily and Company (Eli Lily), Pfizer Inc. (Pfizer), Abbott Laboratories (Abbott), Allergan Inc. (Allergan), Hawaii Pacific Health System, Kuakini Health System, and Dr. William Goodhue. (ECF No. 1.) On March 24, 2015, Ms. Van Ornum filed an Amended Complaint prior to service of any Defendant. (ECF No. 4.) A few days later, Ms. Van Ornum filed a Motion for Leave to File Amended Complaint, (ECF No. 5), which the undersigned granted, (ECF No. 6). Following that order, Ms. Van Ornum filed the Amendment to Amended Complaint (hereinafter, "Complaint"). (ECF No. 7.) The undersigned deems this filing the operative Complaint.

Ms. Van Ornum alleges that the Defendants collectively violated the *First* and *Fourteenth Amendments*, along with the following statutes: *42 U.S.C. § 2000bb-1* (Religious Freedom Restoration Act (RFRA)); *42 U.S.C. §§ 1983* &

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[1] On January 5, 2015, District Judge Robert J. Shelby referred this case to the undersigned Magistrate Judge under *28 U.S.C. § 636(b)(1)(B)*. (ECF No. 3.)

[2] Pursuant to *DUCiv R 7-1(f)*, the undersigned finds oral argument unnecessary and will make its recommendation based on the Complaint and written memoranda.

1985(3) (Civil Rights Act); *18 U.S.C. § 1595(a)* (Trafficking Victims Protection Act (TVPA)); *18 U.S.C. § 3663A* (Mandatory Victims Restitution Act (MVRA)); *15 U.S.C. §§ 1*, *2* & *3* (Sherman Antitrust Act); *15 U.S.C. § 15(a)* (Clayton Act); *42 U.S.C. § 2000d, et seq.* (Title VI of the Civil Rights Act); and *Hawaii Rev. Stat. § 28-94* (remedies for elder abuse). (*See* Compl. 49-50, ECF No. 7.) The Complaint opens with seven pages of abbreviations that Ms. Van Ornum uses as shorthand for terms, parties, and concepts **[*4]** central to her case. (Compl. 2-8, ECF No. 7.) Unfortunately, Ms. Van Ornum's copious use of these abbreviations makes her Complaint extremely difficult to understand.[3] From what the undersigned can glean from the Complaint, Ms. Van Ornum appears to allege that the Defendants — who Ms. Van Ornum abbreviates as "Ds" and defines as "M&D: licensed hospitals, et seq. physicians, surgeons, nurses & dieticians, assistance [sic], persons who hold the authority & title of HCP" — have collectively interfered with her practice of "primitive nutritional wisdom," abbreviated by Ms. Van Ornum as "PNW," through "science, education, welfare & human service in all State & US Territory [sic]." (*See id.* at 4, 7, 13-14.)

Ms. Van Ornum further defines "M&D" as "'Medical & its Dentistry' trade & commerce," and "HCP" as

> 'Health care provider' a person who have [sic] the knowledge of the science of DW&FC, REH; *(1)* C&B from DW&FC, REH; *(2)* provide their patients & caregivers w/ the knowledge of the SCI; *(3)* establish orchards, **[*5]** vineyard, & herbs grown in EWE; *(4)* quality distillers at any person's affordable means; *(5)* establish sufficient number of HCP or caregiver for public "health", education, welfare & human service[.]

(*Id.* at 4-6.) Ms. Van Ornum defines "DW&FC" as "'Distilled water & FC': ***(1)*** distilled water; ***(2)*** a carbohydrate food w/in the MEL; ***(3)*** a protein food w/in the MEL; ***(4)*** a fat foods [sic] w/in the MEL; & ***(5)*** 'Microorganisms' chemically changing: ***(a)*** (SP2) to 'monosaccharide'; ***(b)*** (SP3) to , amino acids; ***(c)*** (SP4) to fatty acids." (*Id.* at 4.) "FC" signifies "Food combining a meal w/in the metabolic enzyme limitation," and "MEL" means "'Metabolic enzyme limitation', DW&FC 'microorganism' chemically changing CC into its SC, part 1 of 'metabolism.'" (*Id.* at 4, 6.) Ms. Van Ornum defines "REH" as "'Recognized emergency herbs', herbs grown in an EWE," with "EWE" signifying "Earthworm environment." (*Id.* at 7, 4.) "C&B" means "'Choice & benefits': 'metabolism', NF, 'physiologic', PNW, LE," (*id.* at 3), and "SCI" refers to

> 'Substantive content of information': the knowledge of ***(1)*** patient's 'health keys'; ***(2)*** RDX& RX history: ***(3)*** NF; ***(4)*** the actions of Hg, AM against NF & AR; ***(5)*** 7ET; ***(6)*** the actions of IS against 'immunologic' response; ***(7)*** the science **[*6]** & art of DW&FC, REH, its C&B; ***(7)*** 'metabolism'; ***(8)*** the differences between: ***(a)*** TS from SC&MN; ***(b)*** LSN from MN; ***(b)*** REH from 'pharmaco' or surgical TP; ***(c)*** calcium carbonate from fluoride carbonate TBG; ***(d)*** EWE from CA: ***(e)*** MN composition ratio of human from animal; ***(f)*** raw from cook food; ***(g)*** HCP from Ds; ***(h)*** et seq., respectively;

(*Id.* at 7-8.) Ms. Van Ornum uses "SP" to signify "Subparagraph." (*Id.* at 8.) "CC" means "'Complex compound' of either Protein food, Carbohydrate food, Fat food." (*Id.* at 3.) "SC" means "'Simpler compound' ***(1)*** monosaccharide; ***(2)*** amino acids, ***(3)*** fatty acid." (*Id.* at 7.) The definitions continue on and on.

The majority of Ms. Van Ornum's allegations consist of chronological notations on Ms. Van Ornum's physical conditions and medical treatment, as well as those of her parents and her children. Starting in 1900 and continuing through 2013, Ms. Van Ornum recounts the alleged medical treatment (or mistreatment) she and her parents received in Hawaii, Guam, the Philippines, and Vietnam. (*See id.* at 18-48.) Starting in 1987, Ms. Van Ornum also recounts episodes of medical treatment in Provo, Utah and California. (*See id.* at 28-30.) In 2004, Ms. Van Ornum moved with her children to Provo, Utah, (*id.* at 36), but the vast majority **[*7]** of the alleged medical treatment, even after 2004, occurs in Hawaii, where Ms. Van Ornum was born and raised. (*See id.* at 18-48.) Ms. Van Ornum's parents have both died, (*see id.* at 27, 46), and Ms. Van Ornum attempts to bring claims on their behalf. (*See id.* at 49-50.) Though Ms. Van Ornum does connect some factual statements to specific Defendants at times,[4] Ms. Van

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[3] To assist the Court and the parties in fully comprehending her claims, the undersigned suggests Ms. Van Ornum use complete words and sentences instead of acronyms to articulate her allegations in the future.

Ornum directs the bulk of her allegations and claims for relief at the Defendants collectively. (*See, e.g., id.* at 30, 38-42, 49-51.)

Essentially, Ms. Van Ornum alleges that the Defendants, as nationwide organizations engaged in commerce and state-based healthcare providers, have acted "under color of authority and color of the law" in interfering with Ms. Van Ornum's practice of primitive nutritional wisdom, part of her and her family's religion. (*See id.* at 13-14.) Furthermore, Ms. Van Ornum seems to allege that the Defendants have orchestrated her family's poor health outcomes and committed various crimes as a result, **[*8]** including kidnapping, elder and child abuse, exploitation, murder, human trafficking, and abuse of the law and legal process. (*See id.*)

DISCUSSION

Each Defendant moved to dismiss Ms. Van Ornum's Complaint. The Defendants argue variations of five defenses: (1) that Ms. Van Ornum fails to meet *Rule 8(a)*'s pleading requirements; (2) that the Court should dismiss Ms. Van Ornum's claims for lack of personal jurisdiction; (3) that Ms. Van Ornum failed to state any claim upon which the Court can grant relief; (4) that Ms. Van Ornum did not properly serve process; and (5) that venue is improper in Utah. *See Fed. R. Civ. P. 12(b)(2)*, *(6)*, *(5)*, & *(3)*.

Defendants Eli Lilly and Pfizer filed the first Motion to Dismiss on April 30, 2015. (ECF No. 9.) On May 20, 2015, Ms. Van Ornum filed a "Motion with Particularity" that responded to the points in Eli Lilly and Pfizer's Motion. (ECF No. 16.) On June 8, 2015, Eli Lilly and Pfizer replied with a Notice to Submit and opposed all other relief Ms. Van Ornum sought in her Motion with Particularity. (ECF No. 28.) Eli Lilly and Pfizer also opposed Ms. Van Ornum's Motion directly. (ECF No. 27.) The undersigned regards the Motion with Particularity not as a motion but rather as a timely filed Opposition **[*9]** and finds Eli Lilly and Pfizer's Motion became fully briefed on June 8, 2015. (*See* ECF No. 28.)

On May 15, 2015, Defendant Hawaii Pacific Health System ("Hawaii Pacific") filed the next Motion to Dismiss, arguing only that the Court should dismiss Ms. Van Ornum's claims for insufficient service and lack of personal jurisdiction. (ECF No. 14.) Ms. Van Ornum failed to respond to this Motion within the twenty-eight days provided by the local rules. *See DUCiv R 7-1(b)(3)(A)* ("A memorandum opposing motions filed pursuant to *Fed. R. Civ. P. 12(b)* . . . must be filed within twenty-eight (28) days after service of the motion or within such time as allowed by the court.") Therefore, the undersigned finds that Ms. Van Ornum waived her opportunity to contest Hawaii Pacific's arguments and RECOMMENDS granting Hawaii Pacific's Motion to Dismiss (ECF No. 14) without prejudice. *See DUCiv R 7-1(d)*.

The AMA, ADA, and AHA jointly moved to dismiss Ms. Van Ornum's claims on May 29, 2015. (ECF No. 23.) During June 2015, Allergan (ECF No. 29), Kuakini Health System (ECF No. 36), Abbott (ECF No. 45), and Monsanto (ECF No. 46) also filed Motions to Dismiss. Each Motion argued, among other things, for dismissal of the claims under **[*10]** *Rule 12(b)(2)* because Ms. Van Ornum failed to plead sufficient facts to support personal jurisdiction over the respective Defendants. (*See* Eli Lily & Pfizer Mot. 6-7, ECF No. 9; AMA, ADA, & AHA Mot. 7-8, ECF No. 23; Allergan Mot. 5, ECF No. 29; Kuakini Health System Mot. 3-4, ECF No. 36; Abbott Mot. 6-7, ECF No. 45; Monsanto Mot. 7-8, ECF No. 46.) Each of the Defendants, except for the AMA, ADA, and AHA, also argued that Utah is not the proper venue for this action because the majority of the alleged events occurred in Hawaii. (*See* Eli Lily & Pfizer Mot. 7, ECF No. 9; Allergan Mot. 5, ECF No. 29; Kuakini Health System Mot. 4, ECF No. 36; Abbott Mot. 7, ECF No. 45; Monsanto Mot. 8, ECF No. 46.)

On July 1, 2015, Ms. Van Ornum responded to all of these Motions in one Opposition. (Pl.'s Opp'n to Defs.' Mot. to Dismiss ("Opp'n"), ECF No. 51.) Ms. Van Ornum alleges that the Defendants have conspired to restrain Ms. Van

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[4] *See, e.g.*, Compl. 18 ("5. Ds #3 D/p: w/ ETYK;..."). Ms. Van Ornum uses these acronyms to refer to Defendant #3, the AHA, in a "doctor patient relationship, direct, indirect & consequential" with Ethel T. Y. Kurihara (ETYK), Ms. Van Ornum's mother. (*See* Compl. 4, 9, ECF No. 7.)

Ornum's free exercise of primitive nutritional wisdom, and she attempts to supplement her Complaint with facts in her Opposition to demonstrate that the Court has jurisdiction over the Defendants and that venue properly lies in Utah. (*See* Opp'n 3-18, 24-26, ECF No. 51.) The AMA, ADA, AHA, **[*11]** Allergan, Kuakini Health System, Abbott, Eli Lily, and Pfizer timely replied reiterating the same dismissal arguments. (*See* AMA, ADA, & AHA's Reply 3-4, ECF No. 52; Allergan's Reply 3, ECF No. 56; Kuakini Health System's Reply 4-5, ECF No. 57; Eli Lily, Abbott, & Pfizer's Reply 4-5, ECF No. 61.)

On July 17, 2015, Ms. Van Ornum filed a surreply, entitled "Memorandum in Opposition to Defendants [sic] Motion to be Dissmiss [sic]." (ECF No. 59.) However, the Rules do not provide for surreplies, absent the Court's permission. *DUCiv R 7-1(b)(2)(A)*. Ms. Van Ornum failed to seek leave of the court to file a surreply; therefore, the undersigned disregards this filing.

On July 20, 2015, the undersigned entered a stay to allow the undersigned to address the outstanding Motions. (ECF No. 62.) After the stay, Ms. Van Ornum served the final Defendant, Dr. William Goodhue. (ECF No. 65.) On August 20, 2015, Dr. Goodhue filed a Motion to Dismiss on the same bases as the other Defendants. (ECF No. 66.) Ms. Van Ornum has not had an opportunity to oppose that Motion, but the ruling on the fully briefed Motions to Dismiss applies with equal force to Dr. Goodhue's Motion. Ms. Van Ornum will have the opportunity **[*12]** to raise any novel issues regarding Dr. Goodhue in any Objection she may file to this Report and Recommendation.

I. Personal Jurisdiction

"Because a court without jurisdiction over the parties cannot render a valid judgment, [the Court] must address Defendants' personal jurisdiction argument before reaching the merits of the case." *OMI Holdings, Inc. v. Royal Ins. Co. of Canada, 149 F.3d 1086, 1090 (10th Cir. 1998)*.

Ms. Van Ornum proceeds *pro se*; thus, the Court must liberally construe her pleadings. *Dudnikov v. Chalk & Vermilion Fine Arts, Inc., 514 F.3d 1063, 1073 & n.7 (10th Cir. 2008)*. However, the Court cannot act as an advocate for a *pro se* litigant, who must comply with the fundamental requirements of the Federal Rules of Civil Procedure. *Kay v. Bemis, 500 F.3d 1214, 1218 (10th Cir. 2007)*.

As the Plaintiff, Ms. Van Ornum "bears the burden of establishing personal jurisdiction over the defendant[s]." *Kuenzle v. HTM Sport-Und Freizeitgerate AG, 102 F.3d 453, 456 (10th Cir. 1996)* (quotation omitted). To meet this burden on a motion to dismiss where the Court receives only affidavits and written materials, Ms. Van Ornum need only make a prima facie showing of personal jurisdiction. *Id.* (citation omitted). "The plaintiff may make this prima facie showing by demonstrating, via affidavit or other written materials, facts that if true would support jurisdiction over the defendant[s]." *OMI Holdings, 149 F.3d at 1091*. The undersigned takes as true all "plausible, non-conclusory, and non-speculative" facts and resolves factual disputes in **[*13]** favor of Ms. Van Ornum. *Dudnikov, 514 F.3d at 1070* (citation omitted).

A federal court considering whether it has personal jurisdiction over a defendant must determine "'(1) whether the applicable statute potentially confers jurisdiction by authorizing service of process on the defendant and (2) whether the exercise of jurisdiction comports with due process.'" *Trujillo v. Williams, 465 F.3d 1210, 1217 (10th Cir. 2006)* (quoting *Peay v. BellSouth Med. Assistance Plan, 205 F.3d 1206, 1209 (10th Cir. 2000))*. As discussed above, Ms. Van Ornum pleads causes of action under the *First* and *Fourteenth Amendments of the United States Constitution* as well as a number of federal laws — including RFRA, the Civil Rights Acts, TVPA, MVPA — and a claim under *Hawaii Rev. Stat. § 28-94*. None of these statutes confers nationwide service of process in this context. *See* *Trujillo, 465 F.3d at 1217* (noting that *§ 1983* does not provide for nationwide service of process); *42 U.S.C. §§ 2000bb to 2000bb-4*; *42 U.S.C. §§ 2000d to 2000d-4a*; *18 U.S.C. §§ 1589-1594*; *18 U.S.C. § 3663A*; *Hawaii Rev. Stat. § 28-94*; *Marsh v. Kitchen, 480 F.2d 1270, 1271-73 (2d Cir. 1973)* (noting no nationwide service where not explicitly set forth, including *Bivens*-type actions).

However, Ms. Van Ornum also seeks relief from all of the Defendants under the Sherman and Clayton Acts, for which *15 U.S.C. § 22* confers nationwide service of process and thus potentially personal jurisdiction upon federal district courts to adjudicate antitrust claims. (Compl. 50-51, ECF No. 7; *15 U.S.C. § 22*.) Therefore, the undersigned will first analyze personal jurisdiction arising from Ms. Van Ornum's antitrust claims.

A. The Sherman [*14] and Clayton Acts

Ms. Van Ornum seeks treble damages under the antitrust laws for injuries she sustained in her "business" and "property." (*See* Compl. 49-50, ECF No. 7.) *15 U.S.C. § 15(a)* provides:

> [a]ny person . . . injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages . . . sustained, and the cost of suit, including a reasonable attorney's fee.

To facilitate enforcement of the federal antitrust laws, *15 U.S.C. § 22* authorizes expansive venue and service of process on a corporate defendant:

> Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

Thus, the Clayton Act provides for nationwide service of process against defendant corporations in private civil antitrust suits. *See, e.g.,* ***[*15]*** *Phone Directories Co. v. Contel Corp., 786 F. Supp. 930, 942 (D. Utah 1992)* ("[S]ervice of process is authorized by the nationwide service of process provision at § 12 of the Clayton Act."); *In re Auto. Refinishing Paint Antitrust Litig., 358 F.3d 288, 293 (3d Cir. 2004)* ("It is undisputed that the second clause authorizes nationwide, indeed worldwide, service of process on a defendant corporation in federal antitrust litigation."); *Daniel v. Am. Bd. of Emergency Med., 428 F.3d 408, 422 (2d Cir. 2005)*; *GTE New Media Services Inc. v. BellSouth Corp., 199 F.3d 1343, 1350, 339 U.S. App. D.C. 332 (D.C. Cir. 2000)*; *Go—Video, Inc. v. Akai Elec. Co., Ltd., 885 F.2d 1406, 1413 (9th Cir. 1989)*.

However, *15 U.S.C. § 22* only applies to corporations, not individual defendants or "other entities that simply share common attributes with corporations," such as unincorporated or voluntary associations. *World Skating Fed'n v. Int'l Skating Union, 357 F. Supp. 2d 661, 664 (S.D.N.Y. 2005)*; *see* *California Clippers, Inc. v. U.S. Soccer Football Ass'n, 314 F. Supp. 1057, 1061, 1065 (N.D. Cal. 1970)* (interpreting earlier version of statute noting that the Clayton Act's service of process provision does not apply to unincorporated associations); *McManus v. Tato, 184 F. Supp. 958, 959 (S.D.N.Y. 1959)* (interpreting earlier version of statute finding the Clayton Act's "specificity necessarily excludes individuals and voluntary associations from those amenable to extraterritorial service"). Therefore, the Court cannot obtain jurisdiction over Dr. Goodhue, an individual, through the antitrust nationwide service provision.

Of the remaining Defendants, Monsanto, Eli Lilly, Pfizer, Allergan, Abbott, and Kuakini Health System are domestic corporations amenable to service of process under this provision. (*See* Monsanto Mot. 2, ECF No. 46; Eli Lilly & Pfizer Mot. 7, ECF No. 9; **[*16]** Allergan Mot. 5, ECF No. 29; Abbott Mot. 6, ECF No. 45; Kuakini Health System Mot. 4, ECF No. 36.) However, the corporate status of the AMA, ADA, and AHA do not appear on the face of the pleadings or written memoranda. In her Complaint, Ms. Van Ornum describes the AMA, ADA, and AHA as representing all licensed providers in their respective professions (medicine, dentistry, and hospitals and healthcare networks) and alleges that each has its headquarters in Chicago, IL. (*See* Compl. 9, ECF No. 7.) In her Opposition, Ms. Van Ornum further characterizes the AMA, ADA, and AHA as lobbying organizations and membership associations. (*See* Opp'n 9-11, ECF No. 51.) Meanwhile, the AMA, ADA, and AHA identify themselves as professional membership organizations in their Motion to Dismiss and state that neither the AMA, ADA, nor AHA is incorporated in Utah or has its principle places of business in Utah. (*See* AMA, ADA, & AHA Mot. 5, 8, ECF No. 23.) In making all inferences in favor of the Plaintiff, Ms. Van Ornum, the undersigned will assume the AMA, ADA, and AHA are corporations and will continue the jurisdictional analysis under the nationwide service of process provision as to them as well as Monsanto, **[*17]** Eli Lilly, Pfizer, Allergan, Abbott, and Kuakini Health System (the "corporate Defendants").

The federal antitrust laws allow a plaintiff to serve process in any district a defendant corporation inhabits or may be found. *See* 15 U.S.C. § 22. Currently, a circuit split exists regarding how to interpret section 22. *See* 1B Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** ¶ 271d (4th ed. 2013) (discussing circuit split); Robert L. Haig, Bus. & Commercial Litig. in Fed. Cts. § 67:57 (3d ed. 2011) (same). The D.C., Second, and Seventh Circuits have taken the position that because the venue clause in section 22 comes before the service of process clause, a court must read the nationwide service of process clause as limited to those actions having proper venue as defined by section 22. GTE New Media Servs., 199 F.3d at 1351; Daniel, 428 F.3d at 423-24; KM Enters., Inc. v. Glob. Traffic Techs., Inc., 725 F.3d 718, 730 (7th Cir. 2013). The Third and Ninth Circuits hold that venue and jurisdiction represent two separate inquiries that Congress did not intend to merge and therefore read the nationwide service of process clause as a stand-alone proposition. In re Auto. Refinishing Paint Antitrust Litig., 358 F.3d 288, 294-97 (3d Cir. 2004); Action Embroidery Corp. v. Atl. Embroidery, Inc., 368 F.3d 1174, 1178-80 (9th Cir. 2004). The Tenth Circuit has not weighed in on this debate. Rather than attempt to determine which interpretation of section 22 the Tenth Circuit would adopt, the undersigned will proceed to the jurisdictional analysis as if Ms. Van Ornum had pled **[*18]** venue sufficiently, making the remainder of the analysis the same under either interpretation.

Even assuming nationwide service of process over the corporate Defendants, the Court must determine whether suing the Defendants in Utah "accords with the minimal constitutional requirements of due process" under the Fifth Amendment. Klein v. Cornelius, 786 F.3d 1310, 1318 (10th Cir. 2015). Where a plaintiff brings a federal question under a statute providing nationwide service of process,

> "the Fifth Amendment requires the plaintiff's choice of forum to be fair and reasonable to the defendant." To defeat federal jurisdiction, a *defendant* must establish that the "chosen forum will make litigation ... gravely difficult and inconvenient" or, in other words, the forum district burdens the defendant with "constitutionally significant inconvenience." We look to non-exclusive factors in considering whether defendants have met this burden, such as (1) the extent of contact with the forum state, (2) the inconvenience of having to litigate in a foreign jurisdiction, (3) judicial economy, (4) the probable situs of the discovery proceedings, and (5) the nature of the defendant's activities and its impact beyond his state's borders.

Id. (quoting Peay, 205 F.3d at 1212) (emphasis added). In this case, the corporate **[*19]** Defendants have simply asserted a lack of jurisdiction without addressing these factors. In fact, no Defendant even mentioned the issue of jurisdiction under the antitrust laws. The Defendants may have neglected this analysis because of their assessment of the merits of the antitrust claims and/or the case generally. (*See* Eli Lily & Pfizer Mot. 4-5, ECF No. 9; AMA, ADA, & AHA Mot. 4-6, ECF No. 23; Allergan Mot. 3, ECF No. 29; Kuakini Health System Mot. 3, ECF No. 36; Abbott Mot. 5-6, ECF No. 45; Monsanto Mot. 4, ECF No. 46.) However, the Court must address jurisdiction before reaching the merits of a claim even in cases where the Court could more easily resolve the merits question. Montoya v. Chao, 296 F.3d 952, 955 (10th Cir. 2002).

Based on the undersigned's limited understanding of Ms. Van Ornum's claims and the memoranda submitted, litigating this case in Utah would appear to burden the corporate Defendants with "constitutionally significant inconvenience." Neither the Complaint nor the Opposition alleges meaningful contact with Utah by the corporate Defendants. Discovery will likely occur primarily in Hawaii or perhaps in districts where the corporate Defendants have their headquarters, none of which includes Utah. Because the **[*20]** corporate Defendants do not have their headquarters or base of operations in Utah according to the Complaint, they will have to find counsel from Utah to litigate on their behalves, having had no alleged prior dealings in the state. If the corporate Defendants wish to participate or attend the judicial proceedings, they will need to send people from Illinois, Washington, D.C., Missouri, Indiana, New York, Texas, New Jersey, and Hawaii. (Opp'n at 9-16, ECF No. 51.) As to judicial economy, Ms. Van Ornum attempts to tie all of these Defendants and claims together and bring them in one district. However, the unification of all of these Defendants and claims seems to create further problems for the Court in understanding who did what to whom when and with what consequences. Thus, the unification appears to diminish judicial economy. With the exception of Kuakini Health System, all of the other corporate Defendants engage in activities with impacts throughout the United States. Nonetheless, without more understanding of how each Defendant connects to Ms. Van Ornum and Utah, the undersigned doubts the existence of personal jurisdiction. Thus, the undersigned finds that exercising antitrust **[*21]** jurisdiction on this record likely does not comport with the *Fifth Amendment Due Process Clause*.

B. Utah's Long Arm Statute

Additionally, the Court could have jurisdiction under the other federal statutes pled that do not, by themselves, confer nationwide service of process, pursuant to *Federal Rule of Civil Procedure 4(k)(1)(A)* and Utah's long-arm statute. *See* *Dudnikov, 514 F.3d at 1070* (noting where federal statutes at issue do not provide nationwide service of process, the court considers the law of the forum state). Because Utah's long-arm statute confers the maximum jurisdiction allowed by due process of law, *Utah Code Ann. § 78B-3-201(3)*, "the first, statutory, inquiry effectively collapses into the second, constitutional, analysis." *Dudnikov, 514 F.3d at 1070*. Thus, whether the Court has personal jurisdiction over any of the Defendants turns on whether the exercise of jurisdiction over each Defendant comports with the *Fourteenth Amendment's Due Process Clause*. *See* *Klein, 786 F.3d at 1318* (distinguishing *14th Amendment* analysis from *5th Amendment* analysis).

For jurisdiction over a nonresident defendant to comport with due process, "minimum contacts between the defendant and the forum State" must exist. *Trujillo, 465 F.3d at 1217-18* (quoting *Intercon, Inc. v. Bell Atl. Internet Solutions, Inc., 205 F.3d 1244, 1247 (10th Cir. 2000))*. "Because a state's sovereignty is territorial in nature, a defendant's contacts with the forum state must be sufficient such that, notwithstanding its lack of physical presence in the state, the state's exercise **[*22]** of sovereignty over it can be described as fair and just." *Dudnikov, 514 F.3d at 1070*. A plaintiff can show the case meets the *Fourteenth Amendment* minimum contacts standard in either of two ways:

> First, a court may exercise *specific* jurisdiction if a defendant has purposefully directed his activities at residents of the forum . . . *and* the litigation results from alleged injuries that arise out of or relate to those activities. Second, a court may exercise *general* jurisdiction where the defendant's contacts, while not rising to the level of the traditional notion of presence in the forum state, are nonetheless continuous and systematic.

Kuenzle, 102 F.3d at 455 (emphasis in original) (citations and quotations omitted). If the Court finds it has either specific or general jurisdiction over a Defendant, the case against that Defendant satisfies the "minimum contacts" standard. *See* *OMI Holdings, 149 F.3d at 1091*. Yet even where a court finds that the defendant meets the minimum contacts standard, the court must still inquire as to whether the exercise of personal jurisdiction over the defendant comports with "'traditional notions of fair play and substantial justice.'" *Id.* (quoting *Asahi Metal Indus. Co., Ltd. v. Superior Ct. of Cal., 480 U.S. 102, 113, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987))*.

1. Specific Jurisdiction

A court may assert specific jurisdiction over a defendant where "the defendant **[*23]** has 'purposefully directed' his activities at residents of the forum, and the litigation results from alleged injuries that 'arise out of or relate to' those activities." *Burger King v. Rudzewicz, 471 U.S. 462, 472, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985)* (quotations omitted). In deciding whether a defendant has minimum contacts sufficient to create specific jurisdiction, courts apply a two-part test. "[F]irst . . . the out-of-state defendant must have 'purposefully directed' its activities at residents of the forum state, and second . . . the plaintiff's injuries must 'arise out of' defendant's forum-related activities." *Dudnikov, 514 F.3d at 1071* (citing *Burger King, 471 U.S. at 472*). In analyzing a defendant's "purposefully directed" activities, the Court looks for allegations showing (a) an intentional action by the defendant, (b) expressly aimed at Utah, (c) with the defendant's knowledge that the brunt of the injury would be felt in Utah. *Id. at 1072*; *see accord* *Walden v. Fiore, 571 U.S. ___, 134 S. Ct. 1115, 188 L. Ed. 2d 12 (2014)*. In addition, a plaintiff's allegations must demonstrate that the alleged injuries "arise out of" the defendant's forum-related activities by showing a causal link between the defendant's contacts and the injuries at issue. *Dudnikov, 514 F.3d at 1078-79*.

Here, Ms. Van Ornum has not alleged any facts in the Complaint or her Opposition suggesting that any one of the Defendants has **[*24]** expressly aimed actions at Utah or that such intentional actions caused Ms. Van Ornum's alleged injuries.

As to the associations, Ms. Van Ornum alleges that the AMA "represent[s] all license doctor [sic] of medicine & surgeon (MD), osteopathic doctor (DO), optometrist, nurses, dietitian, et seq." (Compl. 9, ECF No. 7.) In her Opposition, Ms. Van Ornum adds that the AMA represents members licensed in Utah "to delivery [sic] health and human services," publishes a weekly journal, and maintains a website with contact information accessible from Utah. (Opp'n 9, 25, ECF No. 51.) Next, Ms. Van Ornum alleges that the ADA "represent[s] all doctor [sic] of dental surgeons (DDS), et seq.," and that during 2006, in either Hawaii or Utah, the ADA "removes most of the amalgam & substantive amount of enamel, dentin, pulp, physically restraining SCK [Ms. Van Ornum] to dentistry reconstruction." (Compl. 9, 37, ECF No. 7.) Ms. Van Ornum elaborates in her Opposition that the ADA maintains a website with contact information accessible from Utah. (Opp'n 25, ECF No. 51.) Finally, Ms. Van Ornum alleges that the AHA "represents defendants' hospitals, health care networks." (Compl. 9, ECF No. 7.) In her Opposition, Ms. Van Ornum **[*25]** states that the AHA "communicates with state hospital associations" and that the AHA maintains a website with contact information accessible from Utah. (Opp'n 11, 25, ECF No. 51.)

Ms. Van Ornum also claims, "AMA, ADA, AHA members or partnership with Intermountain Health Care Inc, have events to demonstrate in section H, among the other times, in consequential of the accident effecting the State of Utah." (Opp'n 19, ECF No. 51; *see* Compl. 28-29, 36-37, ECF No. 7.) Ms. Van Ornum's Opposition claims the "accident" occurred in Utah. (Opp'n 18 ("The accident effected the State of Utah in 1953;"), ECF No. 51.) The Complaint never describes the alleged accident, and instead the Opposition refers the Court back to the Complaint paragraphs describing medical events allegedly occurring in Utah. (Opp'n 19, ECF No. 51.) Neither the Complaint nor the Opposition says who or what the accident involved or how Ms. Van Ornum's claims arise from any actions in Utah by the Defendants.

These allegations do not provide grounds for finding that the AMA, ADA, or AHA purposefully directed activities toward Utah related to the alleged injuries in this case. Nor does the AMA, ADA, and AHA's maintenance of their **[*26]** respective websites with contact information accessible in Utah constitute action expressly aimed at Utah. While the existence of a website can confer jurisdiction over a defendant, "[c]ourts analyze the level and type of activity conducted on the website in question to determine jurisdiction." *iAccess, Inc. v. WEBcard Techs., Inc., 182 F. Supp. 2d 1183, 1186 (D. Utah 2002)*. "A passive website that does no more than make information available cannot by itself form the basis of jurisdiction." *Id. at 1187*. Rather, "[c]ourts require 'something more' than a website's existence that indicates the defendant purposefully directed its activities in a substantial way toward the forum state," such as entering into contracts with residents in the forum. *Id.*; *see Soma Med. Int'l v. Standard Chartered Bank, 196 F.3d 1292, 1299 (10th Cir. 1999)* (finding a passive website does not demonstrate purposeful availment). Here, Ms. Van Ornum simply states that people can access the websites in Utah and that the websites contain contact information for the AMA, ADA, and AHA. Without any further evidence as to the activities conducted through the websites, let alone any allegations that connect the AMA, ADA, or AHA's internet activity to the claims in this case, the allegations fail to establish specific jurisdiction over the AMA, ADA, or AHA. Ms. Van Ornum has not alleged the websites **[*27]** provide anything more than passive information. *Soma, 196 F.3d at 1299*.

While Ms. Van Ornum does not specifically connect allegations in the Complaint to Monsanto, Eli Lilly, Pfizer, Allergan, or Abbott, Ms. Van Ornum does make general observations in her Opposition about those companies' national presence and specific businesses. (*See, e.g.*, Opp'n 12 (alleging "[Monsanto] products are used in hospitals, et seq., the only produce available in food stores, including health food stores, farms, et seq;"), 13 (alleging "[Eli Lilly] products are used in hospitals, et seq., physicians offices or prescribe [sic] and provided by the members of the American Pharmacist Association;"), 14 (alleging Pfizer sells numerous medications as "one of the world's largest pharmaceutical companies"), 15 (alleging Allergan, another pharmaceutical company, "promote [sic] their product on Cable by fraud and provide AAA members business;"), ECF No. 7.) These broad allegations, lacking a direct tie to Utah, fail to show that Monsanto, Eli Lilly, Pfizer, Allergan, or Abbott purposefully directed any activities relevant to this case toward Utah.

Ms. Van Ornum further alleges that Kuakini Health System (Kuakini) is a "health care provider" **[*28]** in Honolulu, Hawaii. (Compl. 9, ECF No. 7.) At various points in her Complaint, Ms. Van Ornum alleges Kuakini gave her and her family medical treatment (or mistreatment), though all of Kuakini's actions appear to have occurred in Hawaii. For example, Ms. Van Ornum recounts medical treatment by Kuakini in 1984 in Oahu, Hawaii, referring to Kuakini as "D10," herself as "SCK," and her parents as "RYK" and "ETYK," (*see* Compl. 8, 7, 4 (defining acronyms), ECF No. 7):

> ***(24)*** RX: emergency medical services transport RYK to D10 & follow D10-ERRX instructions: ***(25)*** Mar 31st, Ds D/p w/ ETYK & RYK; RDX: OA; Diagnostic tests; ***(26)*** D10-RX: blood transfusion, cytosar 20mg; ***(27)*** Apr 1st D10-RX: cytosar 20mg discontinue; ***(28)*** D10-RX: Decadron at high doses IV, IP; 010-RDX: code-2 status; ***(29)*** Apr2nd Ds JSS cause RYK's intra cerebral hemorrhages; acute mycloblastic, leukemia; severe thrombocytopenia death; ***(30)*** DPEP denied for RYK; ETYK, her parents, SCK & posterity's "serious harm" continues;

(Compl. 25-27, ECF No. 7.) In 2010, Ms. Van Ornum recounts further treatment by Kuakini in Oahu, Hawaii:

> ***(17)*** May15th ETYK's "anxiety" become SCK's concern; ***(a)*** SCK, ETYK & siblings go to D10 w/ SCK's DGPOA to obtain **[*29]** the knowledge of ETYK's SCI: ***(b)*** D10 refuse; ***(c)*** After D10 learns that ETYK & SCK had stopped OO-M&D & is complying w/ "metabolism" & restoring NF; ***(d)*** D10-RDX: low LSN sodium; ***(e)*** RX: create a hostile environment against SCK's w/ held consent to RX: ***(f)*** D10-RX: from 2:08 am to 6:45 am, HIPAA-IV-RX; ***(g)*** refused to stop; ***(h)*** disclose ETYK's "healthy key" after HIPAA-IV-RX; ***(18)*** 2012 D10 release medical records w/o the knowledge of ETYK's "health keys", justification of their conduct . . .
>
> . . . .
>
> . . . ***(24)*** May 19th D10 report to APS & diagnose "DW&FC, REH, C&B" is a neglect treatment/maltreatment;

(Compl. 42-44.)[5] Ms. Van Ornum also alleges Kuakini caused her paternal grandfather's stroke in 1944 in Hawaii. (Compl. 18, ECF No. 7.) These allegations do not provide any basis for finding Kuakini purposefully directed activity toward Utah, or even that any of Kuakini's alleged treatment occurred in Utah.

Ms. Van Ornum alleges that Dr. Goodhue, D #11 or D #12, is "a citizen & resident of Honolulu Hawaii, defendants' medical **[*30]** examiner, contracted with the City and County of Honolulu, Hawaii." (Compl. 1, 10, ECF No. 7.) In her Opposition, Ms. Van Ornum states further allegations as to Dr. Goodhue that occurred in Hawaii:

> ***(1)*** in 2011 [Dr. Goodhue] was a contracted deputy chief medical examiner for the Department of Medical Examiner, ***(A)*** acting under authority and under color of the *HRS §841-3*, §842-14 laws, until 2015, ***(B)*** fully aware that her 2010 medical records is where to find the cause of Nov. 6th, 2010th [sic] fall and 2011th [sic] death; ***(C)*** fully aware of the constitution, nature and usage of HPH, KHS, paramedics (Nov. 6th, 2010, Jan. 6th, 2011) HIPAA treatments or procedures, from May 10, 2010 (Section H, paragraphs 74 and 75, subparagraph (A)(16);

(Opp'n 17, ECF No. 51.) The allegations as to Dr. Goodhue's position as a medical examiner in Hawaii and action under Hawaiian law fail to show that Dr. Goodhue purposefully directed any activities toward Utah.

Finally, Ms. Van Ornum notes that Monsanto, Eli Lilly, Pfizer, Allergan, Abbott, Kuakini Health System, and Dr. Goodhue each maintain their respective websites with contact information accessible from Utah. (Opp'n 25, ECF No. 51.) However, as discussed above, Ms. Van **[*31]** Ornum has not pled any facts showing that the websites provide anything more than passive information. *Soma, 196 F.3d at 1299*.

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[5] The undersigned notes that these excerpts typify Ms. Van Ornum's allegations, both against individual Defendants, such as Kuakini, as well as against the Defendants generally.

Overall, Ms. Van Ornum's Complaint contains vague and often confusing or unintelligible allegations of actions and medical statuses. (*See, e.g.*, Compl. 18-49, ECF No. 7.) Most of the actions appear to have occurred in Hawaii, not Utah, over the course of many decades, and Ms. Van Ornum does not tie the factual allegations to any actions by the Defendants directed at Utah. Rather, Ms. Van Ornum speaks of the disparate corporate and individual Defendants as a whole, using the abbreviation "Ds" to make general allegations of conduct as to all of the Defendants at once. (*See, e.g.*, Compl. 13-14, ECF No. 7.) Ms. Van Ornum recounts some healthcare-related events that occurred in Utah in her Complaint at pages 28 to 29 and 36 to 37, in paragraphs 41 to 43, 47, 66, and 69. These allegations do not clearly relate to any actions by the Defendants purposefully directed at Utah.

Again, an example of Ms. Van Ornum's allegations illustrates the problem the Court faces in understanding Ms. Van Ornum's claims:

> 41. PROVO, UTAH — ***(a)*** July, 1987 "nurses" & PCP D/p w/ BC; ***(1)*** "nurses" RX: immunization, **[*32]** IS; ***(2)*** PCP-RDX: fever, ear infection; ***(3)*** RX: AM; ***(4)*** SCK: MM also;
>
> 42. 1988 *(P42-45)*, Provo, UTAH, ***(a)*** "nurses" & PCP D/p w/ BC; ***(1)*** "nurses" RX: immunization, IS; ***(2)*** PCP-RDX: fever, ear infection; ***(3)*** SCK: MM also; ***(4)*** continues regularly according to immunization schedule;
>
> 43. Provo, UTAH, Ds D/p w/ SCK-1975-1D, AD; ***(a)*** PCP-RDX: 7ET at stage 4 between neck and chest; ***(1)*** RX: AM cream; RDX: harmful NF spread up & down from its origin; ***(2)*** SCK stops AM application; ***(3)*** apply a REH plaster on the infected site; PN eliminate harmful NF out through the skin; repair damaged skin membrane:
>
> . . . .
>
> 47. PROVO, UTAH ***(a)*** Ds D/p w/ BC: ***(1)*** "nurses"-RX: mandatory immunization-IS; ***(2)*** SCK: MM also; ***(3)*** PCP-RDX: fever/ear infection; ***(4)*** PCPRX: AM; ***(5)*** SCK: MM also; ***(6)*** SCK: BC stop breathing while sleeping, turn blue; ***(7)*** SCK: called 911, SCK is instructed to press BC tummy slightly; BC begins breathing again;
>
> 48. Paramedic transport SCK/BC to UV; ***(a)*** UV D/p w/ BC *(SP(1)-(3)*: RX: anti-epilepsy pharmaco; ***(1)*** SCK withhold consent; ***(2)*** UV-ER report SCK of child abuse; neighbor stops investigation; ***(3)*** SCK: MM; ***(4)*** "Nurses"-RX: immunization-IS *(SP(4)-(15))*; ***(5)*** PCP-RDX: fever ear infection; ***(6)*** RX: AM; **[*33]** ***(7)*** SCK: MM also; ***(8)*** RDX: seizure: ***(9)*** SCK: MM; ***(10)*** "Nurses"-RX: immunization-IS; ***(11)*** D1-RDX: fever-ear infection; ***(13)*** SCK: stop AM: ***(13)*** SCK: REH & MM; ***(14)*** SCK: provide SC & PN remove infection; ***(15)*** After "nurses" learn of BC immunization history, stop immunization; ***(16)*** SCK: immunization stops, ear infection stops; ***(17)*** AM cream cost $30+, herbal root is less than .89 cents; herbal syrup less than $10; ***(18)*** Today the price of herbs have double in price & "pharmaco" is a free;

(Compl. 28-29, ECF No. 7.) Even when the Court "translates" just one of the above paragraphs, the allegations prove no more comprehensible:

> 41. PROVO, UTAH — ***(a)*** July, 1987 "nurses"[6] & {"primary care "physician"} {Doctor patient relationship, direct, indirect & consequential} w/ {"Biological child"}; ***(1)*** "nurses" {immunization, ["Immuno-suppression" "suppression of immunologic"[7]], [Anti-microorganism (ex. Chemotherapy, Penicillin, Antibiotic, TS, immunization, herbicide, pesticide, et seq.): as to the science & art of disrupting or destroying ("Normal flora", a population of "microorganisms" (microbe, germs) that normally grows on & within our body. We live in balance with these <normal flora>. <Normal flora> **[*34]** is beneficial, because it crowds out & prevent [sic] the growth of other harmful varieties or "organism". "Microorganism" that are normally harmless becoming "pathogenic" when the <normal flora> is disrupted or destroyed. "Organism" means anything having "life". Mircro [sic] means

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[6] Ms. Van Ornum defines "Nurse" as "a graduate person who has the knowledge of SCI, are supervised by a 'physician', concerning public 'health', welfare, education[.]" (Compl. 6, ECF No. 7.)

[7] Ms. Van Ornum defines "Immunologic" as "the response of white blood cells destroying & engulfing 'pathogen'," with "pathogen" meaning "a 'microorganism' normally harmless becoming 'pathogenic'" and "pathogenic" referring to "a parasite[.]" (Compl. 5, 7, ECF No. 7.)

> small life, cells. "Microorganism" manufacture micro-nutrients w/ the <"Atomic energy", the source of potential energy carrying the electrical charge, "vitality"> called SC&MN[8])], [Laboratory synthesized nutrition (ex. mineral, vitamin, hormone, etc) w/o the (atomic energy)] or surgical ["Treatment or Procedure"], diagnostic procedures}: immunization, {"Immuno-suppression" "suppression of immunologic"}; ***(2)*** {"primary care "physician"}-{Identify early sign(s) or symptom(s) of ["Disease" & "Disorder", 2 set of parallel "physio-pathologic"[9] syn.], "health keys";[10]}: fever, ear infection; ***(3)*** {immunization, ["Immuno-suppression" "suppression of immunologic"], [Anti-microorganism (ex. Chemotherapy, Penicillin, Antibiotic, TS, immunization, herbicide, pesticide, et seq.): as to the science & art of disrupting or destroying (Normal flora)], [Laboratory synthesized nutrition (ex. mineral, vitamin, hormone, etc) w/o the **[*35]** (atomic energy)] or surgical ["Treatment or Procedure"], diagnostic procedures}: {Anti-microorganism (ex. Chemotherapy, Penicillin, Antibiotic, TS, immunization, herbicide, pesticide, et seq.): as to the science & art of disrupting or destroying [Normal flora]}; ***(4)*** {Sandra CK Van Ornum, plaintiff, surviving "victims"}: {"Mother's milk"} also;

(*See* Compl. 3-8 for definitions of acronyms, ECF No. 7 (lacking a definition of TS).) While these events may have occurred in Utah, the undersigned cannot determine how they relate to any of Ms. Van Ornum's claims.

Ms. Van Ornum's allegations of an accident in Utah also lack any context or description and do not show that any of the Defendants purposefully directed activities at Utah or that Ms. Van Ornum's injuries arise from that accident. (*See* Opp'n 18-19, ECF No. 51.) Thus, Ms. Van Ornum's Opposition does not assist the Court in finding specific jurisdiction over the Defendants.

In addition, Ms. Van Ornum mistakenly states that the Court will have personal jurisdiction over the Defendants when she serves them with a copy of the Complaint and waiver of service. (*See* Compl. 11, ECF No. 7.) A defendant's waiver of service of a summons does not waive any objection to personal jurisdiction or venue by that defendant. *Fed. R. Civ. P. 4(d)(5)*. Therefore, mere service does not necessarily establish personal jurisdiction.

Because Ms. Van Ornum does not set forth facts alleging how each **[*37]** Defendant purposefully directed its actions at Utah and how those actions connect to her alleged injuries, Ms. Van Ornum fails to make a prima facie showing of specific jurisdiction over the Defendants.

2. *General Jurisdiction*

In the absence of specific jurisdiction, a plaintiff can attempt to assert general jurisdiction over an out-of-state defendant; however, the court must find greater contacts with the forum state than those required for specific jurisdiction. *Kuenzle, 102 F.3d at 458* (citation omitted). "[B]ecause general jurisdiction is not related to the events giving rise to the suit, courts impose a more stringent minimum contacts test, requiring the plaintiff to demonstrate the defendant's 'continuous and systematic general business contacts.'" *OMI Holdings, 149 F.3d at 1091* (quoting *Metropolitan Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 567 (2d Cir. 1996))* (internal quotation marks omitted); *see* *Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408, 416, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984)*.

The Supreme Court's recent holding in *Daimler AG v. Bauman* clarified the parameters of general jurisdiction. *571 U.S. __, 134 S. Ct. 746, 187 L. Ed. 2d 624 (2014)*; *see* *Parlant Tech. v. Bd. of Educ., No. 2:12-CV-417-BCW, 2014 U.S. Dist. LEXIS 139064, 2014 WL 4851881, at *4 (D. Utah Sept. 29, 2014)*. The Supreme Court noted that courts exercise general ("all-purpose") jurisdiction paradigmatically in those forums where a court would fairly regard an

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[8] Ms. Van Ornum defines "SC" as "'Simpler compound' ***(1)*** monosaccharide; ***(2)*** amino acids, ***(3)*** fatty acid;; [sic]" and "MN" as "'Micro-nutrition', 2nd stage of 'metabolism'," with "metabolism" **[*36]** defined at length and with further abbreviations in the Complaint. (Compl. 6, 7, ECF No. 7.)

[9] Ms. Van Ornum defines "Physio-pathologic" as "altered bodily function in disease, 'immunologic'[.]" (Compl. 7, ECF No. 7.)

[10] Ms. Van Ornum defines "health keys" as "***(1)*** metabolism, ***(2)*** acid-balance, ***(3)*** calcium-phosphorous ratio[.]" (Compl. 5, ECF No. 7.)

individual or corporate defendant as "at home," such as an individual's state of domicile or a corporation's **[*38]** state of incorporation or principal place of business. *Daimler, 134 S. Ct. at 760* (quotations omitted). Beyond the "paradigm bases" for general jurisdiction, the Court clarified that to assert general jurisdiction over an out-of-state corporate defendant, the corporation must have affiliations with the forum state "so continuous[ly] and systematic[ly] as to render [the corporation] essentially at home in the forum State." *Id. at 761* (quotations omitted). Courts appropriately require significantly more contacts before finding general jurisdiction than specific because general jurisdiction allows any plaintiff to sue a defendant in that forum for all claims where subject matter jurisdiction exists. *See id. at 751* (noting "a court may assert jurisdiction over a foreign corporation 'to hear any and all claims against [it]' only when the corporation's affiliations with the State in which suit is brought are so constant and pervasive 'as to render [it] essentially at home in the forum State.'" (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 131 S. Ct. 2846, 2851, 180 L. Ed. 2d 796 (2011))*).

In considering whether a defendant's contacts with the forum suffice to create general jurisdiction where the defendant does not reside, the Tenth Circuit, prior to *Daimler*, considered the following factors:

> "(1) whether the corporation solicits business in the **[*39]** state through a local office or agents; (2) whether the corporation sends agents into the state on a regular basis to solicit business; (3) the extent to which the corporation holds itself out as doing business in the forum state, through advertisements, listings or bank accounts; and (4) the volume of business conducted in the state by the corporation."

Kuenzle, 102 F.3d at 457 (quoting *Trierweiler v. Croxton & Trench Holding Corp., 90 F.3d 1523, 1533 (10th Cir. 1996))*. This list is non-exhaustive. *See Trierweiler, 90 F.3d at 1533* ("In assessing contacts with a forum, courts have considered *such factors as* . . .") (emphasis added) (citation omitted); *Wise v. Lindamood, 89 F. Supp. 2d 1187, 1193 (D. Colo. 1999)* (citation omitted) ("[T]he *Trierweiler* factors are neither exhaustive nor necessarily determinative of the general personal jurisdiction inquiry.").

Ms. Van Ornum has not alleged the paradigm bases of general jurisdiction. Dr. Goodhue lives in Hawaii, not Utah. Meanwhile, none of the corporate defendants is incorporated in Utah or has its principle place of business in Utah. Nor has Ms. Van Ornum presented factual allegations suggesting that any of the Defendants' affiliations with Utah qualify as "so continuous or systematic" as to render the Defendants "at home" in Utah. *See Daimler, 134 S. Ct. at 761 n. 19* ("It is one thing to hold a corporation answerable for operations in the forum State . . . quite **[*40]** another to expose it to suit on claims having no connection whatever to the forum State.").

In her Opposition, Ms. Van Ornum states that the "Court has general, general personal, specific, long-arm or personal jurisdiction" over each of the Defendants, (Opp'n 9-17, ECF No. 51), and attempts to add more jurisdictional facts to her pleadings, such as including the websites of each Defendant and alleging that people can access the websites from Utah. (*Id.* at 25.) These details do not suggest business activities "so constant and pervasive" as to make the corporations "at home" in Utah. *See Daimler, 134 S. Ct. at 751* (quoting standard). Thus, on this record, the undersigned cannot conclude this Court has general jurisdiction over any of these Defendants.

In sum, Ms. Van Ornum has failed to plead facts establishing that the Court could exercise either specific or general personal jurisdiction over any of the Defendants. Finding no basis to exercise personal jurisdiction, the undersigned need not address the potential for supplemental jurisdiction over the Hawaii statutory claim.

RECOMMENDATION

For the reasons stated above, the undersigned RECOMMENDS the Court dismiss Ms. Van Ornum's claims against the Defendants without prejudice, **[*41]** granting Defendants' Motions (ECF Nos. 9, 14, 23, 29, 36, 45, 46, 66). Based on Ms. Van Ornum's pleadings and supporting materials, the Court lacks personal jurisdiction over the Defendants in this case. The undersigned further RECOMMENDS that the Court find as moot Defendant Hawaii Pacific's second Motion to Dismiss, (ECF No. 39), due to the undersigned's prior recommendation that the Court grant Hawaii Pacific's first Motion to Dismiss, (ECF No. 14). The undersigned also RECOMMENDS that the Court terminate Ms. Van Ornum's Motion for Particularity because it functions as an Opposition and not a Motion. (ECF No. 16.)

The Court will send copies of this Report and Recommendation to the parties who the Court hereby notifies of their right to object to the same. The Court further notifies the parties that they must file any objection to this Report and Recommendation with the clerk of the court, pursuant to *28 U.S.C. § 636(b)* and *Fed. R. Civ. P. 72(b)*, within fourteen (14) days of service thereof. Failure to file objections may constitute waiver of objections upon subsequent review.

DATED this 28th day of January, 2016.

BY THE COURT:

/s/ Evelyn J. Furse

EVELYN J. FURSE

United States Magistrate Judge

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Garrison v. Oracle Corp.

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

February 2, 2016, Decided; February 2, 2016, Filed

Case No. 14-CV-04592-LHK

Reporter

159 F. Supp. 3d 1044 *; 2016 U.S. Dist. LEXIS 13118 **; 2016-1 Trade Reg. Rep. (CCH) P79,514

GREG GARRISON, et al., Plaintiffs, v. ORACLE CORPORATION, Defendant.

Prior History: Garrison v. Oracle Corp., 2015 U.S. Dist. LEXIS 31301 (N.D. Cal., Mar. 13, 2015)

Core Terms

Plaintiffs', secret agreement, accrual, allegations, employees, hire, fraudulent concealment, email, default, accrued, recruiting, lawsuits, statute of limitations, documents, conspiracy, misleading, parties, Sherman Act, continuing violation, affirmative act, concealment, discovery rule, limitations period, motion to dismiss, overt act, tolling, conversations, antitrust, solicit, anticompetitive conduct

Counsel: **[**1]** For Greg Garrison, individually and on behalf of all others similarly situated, Plaintiff: Bonny E. Sweeney, Christopher L. Lebsock, Michael D. Hausfeld, Hausfeld LLP, San Francisco, CA; Braden Alexander Beard, Hausfeld, Washington, DC; Bryce Aaron Dodds, Tyler Jay Belong, Jeffrey Lee Hogue, Hogue & Belong, San Diego, CA; David Roger Markham, Janine Renee Menhennet, Maggie K. Realin, Peggy J. Reali, The Markham Law Firm, San Diego, CA; Debra Hurst, Kyle Van Dyke, Hurst and Hurst, San Diego, CA; Julie Corbo-Ridley, Julie Corbo Ridley, Kyle Mark Van Dyke, Hurst & Hurst, San Diego, CA; Melinda R. Coolidge, HAUSFELD LLP, San Francisco, CA.

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For Oracle **[**2]** Corporation, a Delaware corporation, Defendant: Daniel Murray Wall, Sarah Meyers Ray, LEAD ATTORNEYS, Latham & Watkins LLP, San Francisco, CA; Deborah Kay Miller, Oracle USA, Inc. Legal Department, Redwood Shores, CA; Dorian Estelle Daley, Redwood City, CA; Elyse Miriam Greenwald, Latham and Watkins LLP, Boston, MA; James C. Maroulis, Oracle Corporation, Redwood Shores, CA; Jesse McKeithen, Latham and Watkins LLP, San Francisco, CA.

For Intuit Inc., Movant: Catherine Tara Zeng, Jones Day, Palo Alto, CA.

For Google Inc., Interested Party: Anne M Selin, LEAD ATTORNEY, Mayer Brown LLP, Palo Alto, CA.

Judges: LUCY H. KOH, United States District Judge.

Opinion by: LUCY H. KOH

Opinion

[*1051] ORDER GRANTING DEFENDANT'S MOTION TO DISMISS WITH PREJUDICE

Re: Dkt. Nos. 110, 137, 138

Plaintiffs Greg Garrison ("Garrison"), Deborah Van Vorst ("Van Vorst"), and Sastry Hari ("Hari") (collectively, "Plaintiffs") bring this putative class action against Defendant Oracle Corporation ("Oracle") for alleged violations of federal and California antitrust laws. ECF No. 105 (Second Amended Complaint, or "SAC").[1] Before the Court is Oracle's motion to dismiss. ECF No. 110. Having considered the parties' submissions, the relevant law, and the record **[**3]** in this case, the Court hereby GRANTS Oracle's motion to dismiss with prejudice.

I. BACKGROUND

A. Factual Background

1. The Parties

Oracle is a Delaware corporation with its principal place of business in Redwood Shores, California. SAC ¶ 22. The world's second-largest software producer by revenue, Oracle specializes in developing and marketing computer hardware systems and enterprise software products, including its own brands of database management systems. *Id.* ¶ 23.

Plaintiffs are former employees of Oracle. *Id.* ¶¶ 16, 18, 20. Garrison worked for Oracle as a senior account manager from **[*1052]** "approximately December 2008 to June 2009." *Id.* ¶¶ 16-17. Van Vorst worked for Oracle as a sales operations manager and business analyst from "approximately 2009 to August 2012." *Id.* ¶¶ 18-19. Hari was a senior manager of quality assurance at Oracle from "approximately the middle of 2012 to November 2013." *Id.* ¶¶ 20-21.

Plaintiffs seek to represent the following classes:

> All natural persons who were employed by Oracle on a salaried basis in the technical, creative, and/or research and **[**4]** development fields in the United States from May 10, 2007 to the present. Excluded from the Class are: retail employees, corporate officers, members of the boards of directors, and senior executives of Oracle.
> All natural persons who were employed by Oracle on a salaried basis in a manager level or above position, for product, sales, or general and administrative roles in the United States at any time from May 10, 2007 to the present. Excluded from the Class are: retail employees[,] corporate officers, members of the boards of directors, and senior executives of Oracle.

Id. ¶ 64.

2. *In re High-Tech Employee Antitrust Litigation*

Here, Plaintiffs allege that Oracle conspired with Google, Inc. ("Google"), Intuit Inc. ("Intuit"), Adobe Systems, Inc. ("Adobe"), International Business Machines Corp. ("IBM") and "various other technology companies," as well as with non-technology based companies and recruiting companies, to fix and suppress employee compensation. SAC ¶¶ 2-3. As the factual and procedural history of *In re High-Tech Employee Antitrust Litigation* ("*High-Tech*"), No. 11-CV-02509, as well as the U.S. Department of Justice's ("DOJ") investigations and complaints, are relevant to

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[1] Unless otherwise indicated, all ECF references are from the docket of No. 14-04592 in the Northern District of California.

this **[**5]** action, the Court briefly summarizes the background of that litigation below. *See* SAC ¶¶ 48, 50-53 (discussing DOJ investigation).

From 2009 to 2010, DOJ's Antitrust Division investigated the employment and recruitment practices of various Silicon Valley technology companies, including Adobe, Apple Inc. ("Apple"), Intel Corp. ("Intel"), Intuit, and Google. *See* *High-Tech, 856 F. Supp. 2d 1103, 1109 (N.D. Cal. 2012)*. DOJ filed its complaint against Adobe, Apple, Google, Intel, Intuit, and Pixar on September 24, 2010. *Id.* On December 21, 2010, DOJ filed another complaint against Lucasfilm Ltd. ("Lucasfilm"). *See* No. 11-2509, ECF No. 93-4. The defendants in these two lawsuits stipulated to proposed final judgments in which they agreed that DOJ's complaints had stated claims under federal ***antitrust law*** and agreed to be "enjoined from attempting to enter into, maintaining or enforcing any agreement with any other person or in any way refrain from . . . soliciting, cold calling, recruiting, or otherwise competing for employees of the other person." *High-Tech, 856 F. Supp. 2d at 1109-10* (quoting Adobe Proposed Final Judgment at 5). The U.S. District Court for the District of Columbia entered the stipulated proposed final judgments on March 17, 2011, and June 2, 2011, respectively. *Id. at 1110*.

Private plaintiffs filed five separate **[**6]** state court actions between May and July 2011. Following removal, transfer to San Jose to the undersigned judge, and consolidation as *In re High Tech Employee Antitrust Litigation*, the *High-Tech* plaintiffs filed a consolidated amended complaint on September 13, 2011. *Id. at 1112-13*. In their complaint, the *High-Tech* plaintiffs alleged antitrust claims against their employers, claiming that the defendants had conspired "to fix and suppress employee compensation and to restrict employee mobility." *Id. at 1108*. More specifically, the *High-Tech* **[*1053]** plaintiffs alleged a conspiracy comprised of "an interconnected web of express bilateral agreements." *Id. at 1110*. One such agreement, the "Do Not Cold Call" agreement, involved one company placing the names of another company's employees on a "Do Not Cold Call" list and instructing its recruiters not to cold call the employees of the other company. *Id.* In addition to the "Do Not Cold Call" agreements, the *High-Tech* plaintiffs alleged that Pixar and Lucasfilm entered into express, written agreements (1) not to cold call each other's employees; (2) to notify the other company whenever making an offer to an employee of the other company; and (3) not to engage in "bidding wars." *Id. at 1111*.

On **[**7]** May 17, 2013, the *High-Tech* plaintiffs publicly filed a number of documents in support of their supplemental motion for class certification. No. 11-2509, ECF Nos. 418, 428. One of those documents was an internal Google memo describing Google's hiring protocols and practices as of "1.7.2008." No. 11-2509, ECF No. 428-10 at GOOG-HIGH-TECH-00059839. At one point, the Google memo refers to certain companies on the "'Restricted Hiring' list," including Microsoft, Novell, Sun Microsystems, and, as relevant here, Oracle. *Id.* Although DOJ began investigating Oracle with the *High-Tech* defendants in 2009, DOJ concluded its investigation into Oracle without filing a lawsuit on October 29, 2014. SAC ¶ 53.

3. Alleged Conspiracy in the Instant Lawsuit

Plaintiffs allege a conspiracy among Oracle, other technology companies, the technology departments of non-technology-based companies, and recruiting companies "to fix and suppress employee compensation, and impose unlawful restrictions on employee mobility." SAC ¶¶ 2-4, 9. As part of this conspiracy, Oracle allegedly entered into a series of anti-solicitation "Secret Agreements." *Id.* ¶ 2. Other than the senior executives who "actively managed and enforced" **[**8]** the Secret Agreements, Oracle employees "were not apprised of any of these Secret Agreements and did not consent to this restriction on their mobility of employment." *Id.* ¶¶ 34, 57.

Plaintiffs allege three types of Secret Agreements. First, Oracle allegedly established a "no hire" list, on which Oracle placed companies that entered into a reciprocal agreement with Oracle not to solicit each other's employees. *Id.* ¶¶ 26-27. Plaintiffs do not further define the terms of the "no hire" agreements, so it is unclear whether the "no hire" agreements alleged here include all of the activities alleged in *High-Tech*: (1) not to cold call each other's employees, (2) to notify the other company whenever making an offer to an employee of the other company, and (3) not to engage in "bidding wars." *See* *High-Tech, 856 F. Supp. 2d at 1111*.

Second, Plaintiffs allege that Oracle formed "gentlemen's agreements" when the CEOs of "certain companies" would agree orally not to solicit one another's employees. SAC ¶ 6. According to Plaintiffs, "gentlemen's agreements" were often not added to the "no hire" list. *Id.* ¶ 31. Third, Plaintiffs allege a "Restricted Hiring Agreement" between Oracle and Google. *Id.* ¶ 5. The Restricted Hiring Agreement **[**9]** between Oracle and Google was the sole Secret Agreement alleged in Garrison's original complaint. *See* *Garrison v. Oracle Corp., No. 14-CV-04592-LHK, 2015 U.S. Dist. LEXIS 53653, 2015 WL 1849517, at *2 (N.D. Cal. Apr. 22, 2015)*.

Now, the SAC specifically identifies the following Secret Agreements:

• In an email dated March 30, 2006, Oracle's Director of Recruiting stated that Oracle had a "gentleman's agreement with IBM whereby both companies would not solicit each other's **[*1054]** consultants." SAC ¶ 30; *see also id.* ¶ 44 (January 16, 2008 email from Oracle's Director of Recruiting, who told an Oracle recruiter to stop soliciting employees from IBM). The SAC does not allege the date that Oracle entered into the agreement with IBM.

• In May 2007, Oracle and Google entered into a Restricted Hiring Agreement: "Not to pursue manager level and above candidates for Product, Sales, or [General and Administrative] roles—even if they have applied to [any of the other companies who are parties to the Restricted Hiring Agreement]." *Id.* ¶ 32 (second alteration in original). A Google employee confirmed the Restricted Hiring Agreement in an October 9, 2007 email: "I would like to make sure there is no confusion around our Restricted Hiring Rule: We are not to pursue any PSG&A [Product, Sales, **[**10]** General, and Administrative] candidate at the manager level or above from Microsoft, Novell, Oracle, or Sun." *Id.* ¶ 33 (alteration in original) (emphases omitted).

• In a June 4, 2007 email, Oracle's Director of Recruiting memorialized an agreement with Deloitte: "Please get a note out to our team that no emails of this kind and no solicitation voicemails should be left for Deloitte candidates or to any other candidates who we have no-hire agreements with." *Id.* ¶ 40.

• In an email dated November 30, 2007, a VP at Oracle contacted Oracle's HR department and stated "pls confirm that we can put Micros on a no hire list." *Id.* ¶ 42. The SAC does not specify whether Micros was added to the "no hire" list.

• By March 19, 2009, Oracle and Adobe came to an agreement "not to directly or indirectly solicit employees from any company on the 'no hire' list." *Id.* ¶ 47. Plaintiffs allege that Adobe was not added to the "no hire" list but had a "gentleman's agreement" with Oracle. *Id.* ¶ 28.

• On December 29, 2009, Oracle added CoreTech, Inc. ("CoreTech") to the "no hire" list. *Id.* ¶ 49. Plaintiffs allege that CoreTech's inclusion on the "no hire" list was scheduled to end on September 4, 2012. *Id.*

• At **[**11]** unspecified dates, Oracle added Texas Instruments, Honeywell, Novell, and Novartis to the "no hire" list. *Id.* ¶ 27.

• At an unspecified date, Oracle and recruiting company Riviera Partners agreed that Riviera Partners would "not perform job placement services for Oracle employees." *Id.* ¶ 55. This agreement was in place at least in 2014, when Riviera Partners told a former Senior Director at Oracle that Riviera Partners could not place the former Oracle employee due to Riviera Partners's agreement with Oracle. *Id.*

• At an unspecified date, Oracle added Intuit to the "no hire" list. *Id.* ¶ 27. In an undated email, an Intuit recruiting employee expressed concern about hiring a consultant, asking "can we make an offer to him after he signs on as a consultant and not be in violation of non-solicitation clauses from Oracle (where he is employed)?" *Id.* ¶ 29 (emphases omitted).

• Hewlett-Packard and Xerox were "part of the conspiracy at some time from 2007 through 2015." *Id.* ¶ 75. Plaintiffs do not allege when Oracle entered into an agreement with either Hewlett-Packard or Xerox, or the content of any such agreements.

Altogether, Plaintiffs identify around 15 companies with which Oracle allegedly **[**12]** entered **[*1055]** into a Secret Agreement. Plaintiffs further point to "scores and scores" and a "plethora" of other companies with Secret Agreements with Oracle. *Id.* ¶¶ 7, 27. Plaintiffs do not identify these companies, or the content or date of these companies' Secret Agreements with Oracle. Plaintiffs allege that "Oracle continued to enter into new Secret Agreements with companies" and to ratify the Secret Agreements "well into 2012." *Id.* ¶ 49. However, the last year that Plaintiffs allege that Oracle entered into a specific Secret Agreement is 2009. *See generally* SAC.

Plaintiffs additionally allege that Oracle ensured that its employees and other companies adhered to the "no hire" list. For example, internally, Oracle disseminated the "no hire" list to "key human resource and recruiting personnel" in June 2007. *Id.* ¶ 31; *see also id.* ¶ 41 (June 8, 2007 email from Oracle's Director of Recruiting to the "recruiting team," stating, "While we have no written policy concerning non-solicitation of our partners' employees; our policy is and continues to be that **we do not directly solicit from our partners**. . . . Our partners have the same arrangement with Oracle"). Externally, Oracle could allegedly **[**13]** fine other companies for violating a Secret Agreement. *Id.* ¶¶ 35-36. Additionally, Oracle allegedly threatened companies with baseless lawsuits "as a means to punish them for breaching the Secret Agreement." *Id.* ¶¶ 37-39.

According to Plaintiffs, the effect of the Secret Agreements was to depress the salaries of "all employees of participating companies." *Id.* ¶ 60. In a restricted hiring market, Oracle and the other companies with Secret Agreements faced decreased pressure to match or better a rival's employment offer to an employee. *Id.* Thus, the Secret Agreements "fix[ed] the compensation of the employees of participating companies at artificially low levels." *Id.* ¶ 61. Moreover, depressing the wages of "top tier employees" also allegedly suppressed the wages of all employees underneath the top tier employees. *Id.* ¶ 60.

4. Statute of Limitations Allegations

The SAC adds a new section titled "Statute of Limitations," which alleges that Plaintiffs' claims were timely filed for two reasons: (1) Oracle's conspiracy was a continuing violation of the antitrust laws until at least 2013; and (2) Oracle fraudulently concealed the conspiracy from Plaintiffs until 2013. Plaintiffs' specific allegations **[**14]** as to each theory follow.

a. Continuing Violation

Plaintiffs allege that "Oracle's conspiracy was a continuing violation through which Oracle repeatedly invaded Plaintiffs' and Plaintiff Class' interests by adhering to, enforcing, and reaffirming the anticompetitive" Secret Agreements. SAC ¶ 73. First, Plaintiffs allege that "Oracle continued to enter into new Secret Agreements with companies . . . well into 2012." *Id.* ¶ 49. Second, Plaintiffs allege that, during their collective employment with Oracle from 2009 to 2013, neither Plaintiff Van Vorst nor Plaintiff Hari was solicited by any technology company with which Oracle had a Secret Agreement. *Id.* ¶¶ 18, 20, 77, 80. Third, all Plaintiffs were unable to find employment in the technology industry after leaving Oracle, allegedly due to the Secret Agreements. *Id.* ¶¶ 74-81. Plaintiff Van Vorst specifically alleges that, during the end of her employment with Oracle, she applied to "technology companies, including those with which Oracle had entered a Secret Agreement," and was not hired by said companies. *Id.* ¶ 78.

b. Fraudulent Concealment

Plaintiffs allege that Oracle fraudulently concealed the conspiracy in two ways, which prevented Plaintiffs **[**15]** from filing their claims on time. First, Plaintiffs allege that Oracle affirmatively aimed "to **[*1056]** avoid dissemination of the [S]ecret [A]greements and restrict the knowledge to the smallest possible group within Oracle." *Id.* ¶ 101; *see also id.* ¶ 109 (knowledge of the Secret Agreements was allegedly "confined to only the most senior executives and the most senior employees from its human resources and recruiting departments"). As "representative" of this corporate policy, Plaintiffs highlight a January 17, 2008 email by Oracle's Director of

Recruiting telling an Oracle recruiter, "DO NOT email any employees of our partners or employees on our no-hire list—period." *Id.* ¶ 98, 101. Plaintiffs also point to a February 12, 2008 email by an Oracle employee to "the HR department" allegedly "attaching a 'No Hire' list, and directing them to not forward, but to call if they have any questions." *Id.* ¶ 100. Additionally, Plaintiffs allege that Oracle required DOJ to redact any publicly filed or disclosed documents that Oracle produced during the DOJ investigation, "so as not to publicly reveal the substance of the Secret Agreements and the specific companies involved." *Id.* ¶ 104. Because of Oracle's active concealment **[**16]** of the Secret Agreements, Plaintiffs allegedly received notice of the Secret Agreements only when certain documents were unsealed during the *High-Tech* litigation on May 17, 2013. *Id.* ¶¶ 105-106.

Second, Plaintiffs allege that Oracle misled Plaintiffs into believing their compensation was competitive. Plaintiff Garrison alleges that "an Oracle human resource employee" falsely informed Garrison that "Oracle's commission structure was competitive with other technology companies." *Id.* ¶ 90. Plaintiff Hari alleges that he was "directed by a senior executive to inform his team of subordinates that their compensation levels at Oracle were highly competitive and that they should be very pleased with the level of compensation Oracle offered." *Id.* According to Plaintiff Hari, the statement was false because Oracle was actively suppressing compensation levels by way of the Secret Agreements. *Id.* Further, Plaintiffs allege that "Class members repeatedly asked Oracle about how compensation was determined," but Oracle responded misleadingly that compensation was "competitive." *Id.* ¶ 97. According to Plaintiffs, in these conversations about compensation Oracle "never once admitted that it had any **[**17]** agreements with any other company not to solicit one another's employees." *Id.* ¶ 103.

In addition to these alleged misrepresentations, Plaintiffs claim that Oracle's public filings with the Securities and Exchange Commission ("SEC") have been misleading. *Id.* ¶¶ 92-94. For example, Oracle's 2008 filing stated "We may be unable to hire enough qualified employees or we may lose key employees. . . . In the software industry, there is substantial and continuous competition for highly skilled business, product development, technical and other personnel. . . . We may also experience increased compensation costs that are not offset by either improved productivity or higher prices." *Id.* ¶ 93 (emphases omitted). Plaintiffs aver that Oracle made substantially identical statements in Oracle's 10-K SEC filings from 2010 to 2013. *Id.* ¶ 94. Plaintiffs also highlight Oracle's employee handbook, which from 2008 to 2014 stated, "Oracle commits rigorously to observing applicable antitrust or competition laws of all countries or organizations." *Id.* ¶¶ 85-87.

B. Procedural History

In light of the relationship between the instant case and *High-Tech*, the Court briefly summarizes the relevant procedural history **[**18]** in *High-Tech* before turning to the instant case.

1. *High-Tech*

The *High-Tech* defendants removed the first state court action on May 23, 2011. **[*1057]** No. 11-2509, ECF No. 1. The last state court action in the *High-Tech* litigation was removed on July 19, 2011. No. 11-2509, ECF No. 41. The *High-Tech* cases were reassigned to the undersigned judge on August 5, 2011. No. 11-2509, ECF No. 60. The *High-Tech* cases were consolidated on September 12, 2011. No. 11-2509, ECF No. 64. The First Consolidated Amended Complaint was filed on September 13, 2011. No. 11-2509, ECF No. 65. On April 18, 2012, the Court granted in part and denied in part the *High-Tech* defendants' joint motion to dismiss and denied Lucasfilm's motion to dismiss. No. 11-2509, ECF No. 119. On April 5, 2013, the Court granted in part and denied in part the *High-Tech* plaintiffs' motion for class certification with leave to amend. No. 11-2509, ECF No. 382. The Court granted the *High-Tech* plaintiffs' supplemental motion for class certification on October 24, 2013. No. 11-2509, ECF No. 531. On November 13, 2013, the *High-Tech* defendants filed a Rule 23(f) petition before the Ninth Circuit, requesting permission to appeal this Court's October 24, 2013 **[**19]** class certification order. No. 13-80223 (9th Cir.), ECF No. 1. The Ninth Circuit denied the defendants' petition on January 14, 2014. No. 13-80223 (9th Cir.), ECF No. 18.

In the interim, three of the *High-Tech* defendants—Intuit, Lucasfilm, and Pixar—reached an early settlement with the plaintiffs. On September 21, 2013, the *High-Tech* plaintiffs filed a motion for preliminary approval of a proposed class action settlement as to defendants Intuit, Lucasfilm, and Pixar. No. 11-2509, ECF No. 501. On October 30, 2013, the Court granted preliminary approval. No. 11-2509, ECF No. 540. The Court granted final approval as to that settlement on May 16, 2014. No. 11-2509, ECF No. 915. The Court entered a final judgment with regards to Lucasfilm, Pixar, and Intuit on June 9, 2014. No. 11-2509, ECF No. 936. At the request of Intuit, the Court entered an amended final judgment on June 20, 2014. No. 11-2509, ECF No. 947.

The remaining *High-Tech* defendants—Adobe, Apple, Google, and Intel—filed individual motions for summary judgment, and joint motions for summary judgment and to strike certain expert testimony on January 9, 2014. No. 11-2509, ECF Nos. 554 (Intel), 556 and 557 (joint motions), 560 (Adobe), **[**20]** 561 (Apple), 564 (Google). The Court denied the *High-Tech* defendants' individual motions for summary judgment on March 28, 2014. No. 11-2509, ECF No. 771. On April 4, 2014, the Court granted in part and denied in part the *High-Tech* defendants' motion to strike, and denied the defendants' joint motion for summary judgment. No. 11-2509, ECF No. 788.

On May 22, 2014, the *High-Tech* plaintiffs filed a motion for preliminary approval of class action settlement as to the remaining defendants. No. 11-2509, ECF No. 920. On August 8, 2014, the Court denied the *High-Tech* plaintiffs' motion for preliminary approval and concluded that the proposed settlement did not fall "within the range of reasonableness." No. 11-2509, ECF No. 974 at 30. On September 4, 2014, the *High-Tech* defendants filed a petition for a writ of mandamus with the Ninth Circuit. No. 14-72745 (9th Cir.), ECF No. 1. On September 22, 2014, the Ninth Circuit found that the petition "raises issues that warrant a response," and ordered briefing. No. 14-72745 (9th Cir.), ECF No. 2. On January 13, 2015, the *High-Tech* defendants filed correspondence with the Ninth Circuit referring to a new proposed settlement agreement. No. 14-72745 **[**21]** (9th Cir.), ECF No. 21. On January 30, 2015, the defendants filed an unopposed motion to dismiss the petition, which the Ninth Circuit granted on February 2, 2015. No. 14-72745 (9th Cir.), ECF Nos. 23, 24.

[*1058] On January 15, 2015, the *High-Tech* plaintiffs filed a motion for preliminary approval of class action settlement as to the remaining defendants. No. 11-2509, ECF No. 1032. In this second proposed class action settlement, the parties had reached a settlement amount exceeding the previously rejected settlement by approximately $90.5 million. *Id.* at 1. Following a fairness hearing on March 2, 2015, the Court granted preliminary approval to the January 2015 settlement agreement on March 3, 2015. No. 11-2509, ECF Nos. 1051, 1054. The Court held a final approval hearing on July 9, 2015. No. 11-2509, ECF No. 1096. Plaintiffs' counsel completed their supplemental briefing on attorney's fees and potential opt outs on July 24, 2015. ECF Nos. 1108, 1109. On September 2, 2015, the Court granted final approval of the class action settlement and entered final judgment with regard to Adobe, Apple, Google, and Intuit. No. 11-2509, ECF Nos. 1111, 1113.

2. Instant Lawsuit

Plaintiff Garrison filed the class action **[**22]** complaint on October 14, 2014. ECF No. 1. On October 22, 2014, the Court related this action to *High-Tech*. ECF No. 6. After initially answering the complaint on November 10, 2014, ECF No. 9, Oracle filed an amended answer on December 1, 2014, ECF No. 12.

On January 5, 2015, Oracle filed a motion for judgment on the pleadings, ECF No. 17, which the Court granted on April 22, 2015, ECF No. 72. The Court found that Garrison's claims were time barred under the applicable statutes of limitations, and that Garrison had failed to adequately plead a "continuing violation" or "fraudulent concealment" theory to toll the statutes of limitations. *See* *Garrison, 2015 U.S. Dist. LEXIS 53653, 2015 WL 1849517, at *9*. The dismissal was without prejudice, as the Court determined that Garrison might be able to allege sufficient facts to support his continuing violation or fraudulent concealment theories. *Id.*

On May 22, 2015, Garrison filed an amended complaint. ECF Nos. 98 (conditionally sealed); 102 (unredacted). After the Court approved a stipulation for Garrison to file a second amended complaint, ECF No. 104, Garrison, along with additional plaintiffs Van Vorst and Hari, filed the SAC on June 5, 2015, ECF No. 105. The SAC asserts causes of action under the following **[**23]** statutes: (1) Section 1 of the Sherman Act, *15 U.S.C. § 1*; (2) California's Cartwright Act (the "Cartwright Act"), *Cal. Bus. & Prof. Code § 16720 et seq.*; (3) California's Unfair Competition Law ("UCL"), *Cal. Bus. & Prof. Code § 17200 et seq.*; and (4) *California's Business & Professions*

Code § 16600 et seq. ("*Section 16600*"). SAC ¶¶ 111-142. Plaintiffs seek damages, pre- and post-judgment interest, attorneys' fees and expenses, and a permanent injunction. *Id.* at 29.

Oracle filed the instant motion to dismiss on June 25, 2015. ECF No. 110 ("Mot."). Oracle renews the argument that Plaintiffs' claims are untimely, and also moves to dismiss for failure to state a claim on the merits. *See id.* Oracle also filed a request for judicial notice. ECF No. 111. On July 15, 2015, the Court granted a stipulation to strike one paragraph of the SAC. ECF No. 113. On July 22, 2015, Plaintiffs opposed the motion to dismiss, ECF No. 114 ("Opp."), and filed a request for judicial notice, ECF No. 114-1. Oracle replied on August 13, 2015. ECF No. 125 ("Reply"). On December 4, 2015, Plaintiffs filed an ex parte motion to supplement the record and to stay proceedings pending Plaintiffs' anticipated motion to compel compliance with a subpoena. ECF No. 138. Plaintiffs also filed a motion to seal materials associated with the motion to supplement the record. ECF No. 137. Although **[*1059]** Oracle **[**24]** was not served with the ex parte motion, Oracle filed an opposition on December 7, 2015. ECF No. 139. As of the date of this order, Plaintiffs have not filed the anticipated motion to compel.

On December 17, 2015, the Court ordered the parties to file supplemental briefing. ECF No. 144. The Court noted that the parties, in the original briefing, did not dispute that Plaintiffs' claims accrued under the default accrual rules by 2009, at the latest, and thus that Plaintiffs' claims were untimely absent an exception to the default accrual rules or a tolling doctrine. *Id.* The Court asked the parties to address whether Plaintiff Hari's employment at Oracle impacts the statutes of limitations analysis. *Id.* On January 5, 2016, the parties filed simultaneous briefs in response to the Court's order. ECF Nos. 148 (Oracle's supplemental brief); 149 (Plaintiffs' supplemental brief). Plaintiffs filed an administrative motion to file Plaintiffs' supplemental brief and associated documents under seal. ECF No. 150. On January 15, 2016, the parties filed simultaneous reply briefs. ECF Nos. 153 (Oracle's reply); 155 (Plaintiffs' reply).

II. LEGAL STANDARD

A. Rule 12(b)(6)

Rule 8(a)(2) of the Federal Rules of Civil Procedure requires a complaint to include "a short and **[**25]** plain statement of the claim showing that the pleader is entitled to relief." A complaint that fails to meet this standard may be dismissed pursuant to *Rule 12(b)(6)*. *Rule 8(a)* requires a plaintiff to plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. "The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.*

For purposes of ruling on a Rule 12(b)(6) motion, the Court "accept[s] factual allegations in the complaint as true and construe[s] the pleadings in the light most favorable to the nonmoving party." *Manzarek v. St. Paul Fire & Marine Ins. Co., 519 F.3d 1025, 1031 (9th Cir. 2008)*. The Court, however, need not accept as true allegations contradicted by judicially noticeable facts, *see Shwarz v. United States, 234 F.3d 428, 435 (9th Cir. 2000)*, and it "may look beyond the plaintiff's complaint to matters of public record" without converting the Rule 12(b)(6) motion into a motion for summary judgment, *Shaw v. Hahn, 56 F.3d 1128, 1129 n.1 (9th Cir. 1995)*. Nor must the Court "assume the truth of legal conclusions merely because they are cast in the form of factual allegations." *Fayer v. Vaughn, 649 F.3d 1061, 1064 (9th Cir. 2011)* (per curiam). Mere "conclusory allegations of **[**26]** law and unwarranted inferences are insufficient to defeat a motion to dismiss." *Adams v. Johnson, 355 F.3d 1179, 1183 (9th Cir. 2004)*.

B. *Rule 9(b)*

Claims sounding in fraud or mistake are subject to the heightened pleading requirements of *Federal Rule of Civil Procedure 9(b)*, which require that a plaintiff alleging fraud "must state with particularity the circumstances constituting fraud." *Fed. R. Civ. P. 9(b)*; *see also* *Kearns v. Ford Motor Co., 567 F.3d 1120, 1124 (9th Cir. 2009)*. To satisfy the heightened standard under *Rule 9(b)*, the allegations must be "specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend **[*1060]** against the charge and not just deny that they have done anything wrong." *Semegen v. Weidner, 780 F.2d 727, 731 (9th Cir. 1985)*. Thus, claims sounding in fraud must allege "an account of the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentations." *Swartz v. KPMG LLP, 476 F.3d 756, 764 (9th Cir. 2007)* (per curiam) (citation omitted). "A plaintiff must set forth what is false or misleading about a statement, and why it is false." *In re GlenFed, Inc. Sec. Litig., 42 F.3d 1541, 1548 (9th Cir. 1994)* (en banc), *superseded by statute on other grounds as stated in* *SEC v. Todd, 642 F.3d 1207, 1216 (9th Cir. 2011)*. However, "intent, knowledge, and other conditions of a person's mind" need not be stated with particularity, and "may be alleged generally." *Fed. R. Civ. P. 9(b)*.

C. Leave to Amend

If the court concludes that the complaint should be dismissed, **[**27]** it must then decide whether to grant leave to amend. Under *Rule 15(a) of the Federal Rules of Civil Procedure*, leave to amend "shall be freely given when justice so requires," bearing in mind "the underlying purpose of *Rule 15* . . . [is] to facilitate decision on the merits, rather than on the pleadings or technicalities." *Lopez v. Smith, 203 F.3d 1122, 1127 (9th Cir. 2000)* (en banc) (citation omitted). Nonetheless, a district court may deny leave to amend a complaint due to "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [and] futility of amendment." *See* *Leadsinger, Inc. v. BMG Music Publ'g, 512 F.3d 522, 532 (9th Cir. 2008)*.

III. DISCUSSION

Oracle moves to dismiss Plaintiffs' complaint on four grounds: (1) all of Plaintiffs' claims are barred by the applicable statute of limitations; (2) Plaintiffs fail to state a Sherman Act claim because Plaintiffs fail to adequately allege an agreement between Oracle and Google or a conspiracy among Oracle and other companies; (3) Plaintiffs are ineligible for restitution or disgorgement under the UCL; and (4) Plaintiffs, as former Oracle employees, lack standing to seek injunctive and declaratory relief. Mot. at 7-25. As the Court concludes below that **[**28]** Plaintiffs' claims are time barred, the Court need not reach the remainder of Oracle's arguments.

As a preliminary matter, the Court addresses the parties' requests for judicial notice and Plaintiffs' ex parte motion to supplement the record and to stay the ruling. The Court then turns to the statutes of limitations applicable to Plaintiffs' claims. Next, the Court considers Plaintiffs' arguments that an exception to the default accrual rules or a tolling doctrine renders Plaintiffs' claims timely.

A. Motions for Judicial Notice, to Supplement the Record, and to Stay the Ruling

1. Judicial Notice

Although a district court generally may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion, the Court may take judicial notice of documents referenced in the complaint, as well as matters in the public record, without converting a motion to dismiss into one for summary judgment. *See* *Lee v. City of L.A., 250 F.3d 668, 688-89 (9th Cir. 2001)*, *overruled on other grounds by* *Galbraith v. Cty. of Santa Clara, 307 F.3d 1119, 1125-26 (9th Cir. 2002)*. In addition, the Court may take judicial notice of matters that are either "generally known within the trial court's territorial jurisdiction" or **[*1061]** "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." *Fed. R. Evid. 201(b)*.

Oracle requests **[**29]** that the Court take judicial notice of documents incorporated by reference into the SAC, including emails quoted or relied upon in SAC ¶¶ 29, 33, 36, 40, 45, 47, 49, 98-100; Oracle documents quoted or relied upon in SAC ¶¶ 84-110; and deposition testimony relied upon in SAC ¶ 54. Oracle also requests judicial notice of matters of public record (complaints and final judgments in federal district courts), and a newspaper article. Plaintiffs request the Court take judicial notice of certain matters of public record (an official government document in a DOJ file, and complaints and final judgments in federal district courts). These documents are appropriate for judicial notice. *See* *Coto Settlement v. Eisenberg, 593 F.3d 1031, 1038 (9th Cir. 2010)* (materials incorporated by reference into the complaint); *Von Saher v. Norton Simon Museum of Art at Pasadena, 592 F.3d 954, 960 (9th Cir. 2009)* (the fact that information was published in news articles); *Lee, 250 F.3d at 689-90* (matters of public record). Accordingly, the Court GRANTS the parties' unopposed requests for judicial notice. *See* ECF Nos. 111, 114-1.

2. Plaintiffs' Ex Parte Motion to Supplement the Record and to Stay the Ruling

On Friday evening, December 4, 2015—almost four months after the completion of briefing in the instant motion—Plaintiffs filed an ex parte motion to supplement the record and to stay **[**30]** the Court's ruling on the instant motion pending an anticipated motion to compel documents from the defendants and the counsel for the plaintiffs in the *High-Tech* litigation. ECF No. 138 (noting the motion to compel is "set to be filed next week"). Plaintiffs seek to supplement the record with numerous documents allegedly discovered after the completion of the briefing on the instant motion, which Plaintiffs claim demonstrate Oracle's alleged antitrust violations and fraudulent concealment. Plaintiffs filed a corresponding motion to file the documents under seal. ECF No. 137. Although Oracle was not served with Plaintiffs' filings, and did not have access to the documents that Plaintiffs filed conditionally under seal, Oracle filed an opposition on December 7, 2015. ECF No. 139. As of the date of this order, Plaintiffs have not filed the anticipated motion to compel documents from the parties involved in the *High-Tech* litigation.

Civil Local Rule 7-10 provides that a party may file an ex parte motion "only if a statute, Federal Rule, local rule or Standing Order authorizes the filing of an ex parte motion," unless otherwise ordered by the Court. *Civ. L.R. 7-10*. The Rule also provides that the ex parte motion **[**31]** "must include a citation to the statute, rule or order which permits the use of an ex parte motion to obtain the relief sought." *Id.* Plaintiffs' ex parte motion does not cite to any authority permitting the filing of an ex parte motion. Nor does Plaintiffs' motion provide any reason for filing ex parte. Accordingly, the Court STRIKES Plaintiffs' motion. *See* *Civ. L.R. 7-10*; *cf.* *Bertuccio v. San Benito Cty., No. 13-CV-01339-LHK, 2013 U.S. Dist. LEXIS 69356, 2013 WL 2147421, at *3 (N.D. Cal. May 15, 2013)* ("None of Plaintiffs' motions identified any authorization for her ex parte communications. This alone would justify denial . . . ."). The Court DENIES as moot Plaintiffs' corresponding motion to file under seal.[2]

[*1062] Even if the Court were to consider Plaintiffs' motion, however, the Court would decline to supplement the record or stay the instant ruling. First, the proffered documents would not alter the Court's statutes of limitations analysis. The proffered documents all refer to conduct from 2006 to 2009. However, as discussed below, Plaintiffs' claims are untimely unless Plaintiffs allege actions by Oracle after October 14, 2010—i.e., within four years of the filing of the complaint on October 14, 2014. Additionally, the documents do not show fraudulent concealment by

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[2] The Court notes that Plaintiffs also apparently failed to comply with the Court's local rules when filing the motion to seal. When seeking to file under seal a document designated as confidential by the opposing party or a non-party, *Civil Local Rule 79-5(e)* requires Plaintiffs to file a declaration identifying the document sought to be sealed and the designating party. *Civ. L.R. 79-5(e)*. Plaintiffs did not identify non-parties Google or IBM in Plaintiffs' required declaration. *See* ECF No. 137-1. However, on December 9, 2015, Oracle informed the Court that Plaintiffs sought to seal documents designated **[**32]** as confidential by Google and IBM. ECF No. 141. On December 14, 2015, Google filed a declaration stating that Plaintiffs sought to seal documents designated as confidential by Google, and that Google was informed by Oracle's counsel that Plaintiffs sought to seal these documents. ECF No. 143. IBM has not filed a response to Plaintiffs' motion to seal, and it is not clear to the Court whether Plaintiffs informed IBM that Plaintiffs sought to file documents designated by IBM as confidential.

Oracle. Rather, the documents are consistent with the fraudulent-concealment allegations and judicially-noticed documents already in the record. **[**33]** Thus, the proffered documents would not render Plaintiffs' claims timely.

Second, on a motion to dismiss, the Court does not look beyond the pleadings to evidence presented by the parties, and Plaintiffs do not assert that the proffered documents are proper subjects of judicial notice. *See* Manzarek, 519 F.3d at 1030-31 (noting that on a motion to dismiss, the district court may "generally consider only allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice"). There is therefore no basis for the Court to consider the proffered documents.

Third, the majority of "newly discovered" documents proffered by Plaintiffs were, according to a declaration by Oracle, produced by June 2015, a month before Plaintiffs filed their opposition to the instant motion. *See* ECF Nos. 140, 141. Plaintiffs offer no reason for their multiple-month delay in seeking to supplement the record or to stay the case to conduct further discovery. *See generally* ECF No. 138. It appears that Plaintiffs' motion was not triggered by new discovery in this case, but by the Court's November 23, 2015 dismissal of virtually identical allegations brought by the same Plaintiffs' counsel against **[**34]** Microsoft. *See* Ryan v. Microsoft ("Ryan II"), No. 14-CV-04634-LHK, 147 F. Supp. 3d 868, 2015 U.S. Dist. LEXIS 158944, 2015 WL 7429495, at *18-19 (N.D. Cal. Nov. 23, 2015). Additionally, Plaintiffs offer no authority that discovery from a third party, sought after briefing on a motion to dismiss was completed, justifies a stay of that motion. Nor have Plaintiffs filed the anticipated motion to compel that forms the basis of Plaintiffs' motion to stay, although Plaintiffs have had over two months to do so. Accordingly, Plaintiffs have not shown good cause to supplement the record or to stay the instant ruling.

B. Four-Year Statute of Limitations

Plaintiffs do not dispute that Plaintiffs' claims under the Sherman Act, Cartwright Act, UCL, and Section 16600 are all subject to a four-year statute of limitations. *See* Garrison, 2015 U.S. Dist. LEXIS 53653, 2015 WL 1849517, at *6 (applying-four year statute of limitations) (citing 15 U.S.C. § 15b (Sherman Act); Cal. Bus. & Prof. Code § 16750.1 (Cartwright Act); Cal. Bus. & Prof. Code § 17208 (UCL); Cal. Civ. Proc. Code § 343 (catch-all limitations statute applicable to *Section 16600*); *see also* Ryan v. Microsoft **[*1063]** Corp. ("Ryan I"), No. 14-CV-04634-LHK, 2015 U.S. Dist. LEXIS 47753, 2015 WL 1738352, at *10-12 (N.D. Cal. Apr. 10, 2015) (concluding that these four statutes are each subject to a four-year limitations period). Because the original complaint was filed on October 14, 2014, *see* ECF No. 1, Plaintiffs must allege either that the causes of action accrued after October 14, 2010, or that the statutes of limitations were tolled until at least October 14, 2010, in **[**35]** order to plead timely claims.

C. Accrual of Plaintiffs' Claims under the Default Accrual Rules

The parties agree that all of Plaintiff Garrison's and Plaintiff Van Vorst's claims accrued under the default accrual rules by 2009, at the latest. *See, e.g.*, ECF No. 148, at 1 (Oracle claiming that the "statute of limitations began to run no later than 2009 and expired in 2013"); ECF No. 150, at 3 (Plaintiffs stating that Garrison's and Van Vorst's claims accrued when Garrison and Van Vorst were injured by Oracle's alleged misconduct between 2007-2009). Accordingly, an exception to the default accrual rules or a tolling doctrine must apply in order for Garrison's and Van Vorst's claims to be timely.

The parties dispute when Plaintiff Hari's claims accrued under the default accrual rules, and thus whether an exception to the default accrual rules or a tolling doctrine is necessary to render Hari's claims timely. In order to determine the accrual of Hari's claims under the default accrual rules, the Court must first review the history of the parties' dispute over the accrual of Hari's claims.

In briefing Oracle's motion for judgment on the pleadings, the parties did not dispute that, for Garrison's **[**36]** federal Sherman Act claim and three California state law claims, under the default accrual rules, "the applicable statutes of limitations began to run in May 2007 (i.e., when Plaintiff alleges Oracle and Google entered into the Agreement)." Garrison v. Oracle Corp., No. 14-CV-04592-LHK, 2015 U.S. Dist. LEXIS 53653, 2015 WL 1849517, at

*6 (N.D. Cal. Apr. 22, 2015). Accordingly, the parties agreed that an exception to the default accrual rules or a tolling doctrine was necessary for all of Garrison's claims to be timely. *Id.*

In the SAC, Plaintiffs allege new Secret Agreements, in addition to the alleged 2007 agreement between Oracle and Google. The SAC also adds Hari as a named plaintiff. ECF No. 105. Highlighting the new Secret Agreements, Oracle argues in the instant motion to dismiss that, according to the default accrual rules, Plaintiffs' Sherman Act and state law claims accrued by 2009, which is the latest date that Plaintiffs allege that Oracle entered a specific Secret Agreement. Mot. at 7; Reply at 2. Thus, according to Oracle, the statutes of limitations for all of Plaintiffs' claims expired in 2013 absent an exception to the default accrual rules or a tolling doctrine. Reply at 2.

In Plaintiffs' opposition to the instant motion to dismiss, Plaintiffs do not **[**37]** dispute Oracle's contention that Plaintiffs' Sherman Act and state law claims accrued in 2009, at the latest. *See generally* Opp. Nor do Plaintiffs analyze when Plaintiffs' claims accrued according to the default accrual rules. Rather, Plaintiffs assert that an exception to the default accrual rules or a tolling doctrine applies and thus renders Plaintiffs' claims timely. *See id.*

Neither party separately addressed Hari's claims in the briefing on the instant motion to dismiss. Thus, the Court requested supplemental briefing on whether Hari's employment at Oracle, which began in 2012, impacts the statute of limitations analysis. ECF No. 144. In the order requesting supplemental briefing, the Court summarized its understanding of the parties' positions on the accrual of Plaintiffs' **[*1064]** claims under the default accrual rules. First, the Court noted that the parties agreed, in the briefing for the motion for judgment on the pleadings, that the federal and state statutes of limitations began to run in May 2007. *See id.* Next, the Court noted Plaintiffs' failure to dispute Oracle's contention, in the instant motion to dismiss, that Plaintiffs' Sherman Act and state law claims accrued by 2009. ***[**38]*** *See id.* Finally, the Court noted that the parties have not disputed that Plaintiffs' claims are untimely absent an exception to the default accrual rules or a tolling doctrine. *See id.*

In the requested supplemental briefing, the parties do not contest the Court's understanding of the parties' positions. *See generally* ECF Nos. 148, 150, 153, 155. However, Plaintiffs now argue that Hari's claims are timely under the default accrual rules, without any exceptions to the default accrual rules or tolling. According to Plaintiffs, Hari's claims did not accrue until 2012, when Hari was hired by Oracle and injured through the receipt of an artificially depressed salary from Oracle. ECF Nos. 150, 155. Specifically, Plaintiffs state that Hari began working for Oracle in 2012 when Oracle acquired the company for whom Hari worked. *See* ECF No. 150, at 2. As in Plaintiffs' original briefing, Plaintiffs' two supplemental briefs fail to address the state law default accrual rules. Instead, Plaintiffs' supplemental briefs focus entirely on the federal default accrual rule for Hari's Sherman Act claim, and cite only federal case law. *See* ECF No. 150, at 2-3; ECF No. 155. Similarly, Oracle's two supplemental **[**39]** briefs focus on the accrual of Hari's Sherman Act claim. *See generally* ECF Nos. 148, 153. Oracle argues that Hari's Sherman Act claim accrued by 2009, when Oracle allegedly committed the anticompetitive conduct that depressed the labor market in which Hari participated. Oracle asserts that Hari's state law claims accrued at the same time as Hari's Sherman Act claim. *See* ECF No. 148, at 4 n.2.

Accordingly, in four rounds of briefing—the opposition to the motion for judgment on the pleadings, the opposition to the instant motion to dismiss, and the two supplemental briefs—Plaintiffs assume that Plaintiffs' state law claims accrue at the same time as Plaintiffs' Sherman Act claims. Plaintiffs have never distinguished the accrual of Plaintiffs' state law claims from the accrual of Plaintiffs' Sherman Act claim under the default accrual rules. By contrast, Oracle has repeatedly asserted that Plaintiffs' Sherman Act and state law claims accrue at the same time. In the supplemental briefing, both parties focus on the federal default accrual rule for Sherman Act claims to determine the accrual of Hari's state law and Sherman Act claims.

Under California law, the general accrual rule is the "last **[**40]** element rule," where a claim accrues "'when [it] is complete with all of its elements'—those elements being wrongdoing, harm, and causation." *Pooshs v. Philip Morris USA, Inc., 51 Cal. 4th 788, 797, 123 Cal. Rptr. 3d 578, 250 P.3d 181 (2011)* (quoting *Norgart v. Upjohn Co., 21 Cal. 4th 383, 397, 87 Cal. Rptr. 2d 453, 981 P.2d 79 (1999))*. The California Supreme Court has held that federal interpretations of the Sherman Act are instructive in interpreting California's Cartwright Act. *Aryeh v. Canon Bus. Solutions, Inc., 55 Cal. 4th 1185, 1195, 151 Cal. Rptr. 3d 827, 292 P.3d 871 (2013)*. Given the *Aryeh* court's guidance and the parties' exclusive focus on the default accrual rule for Hari's Sherman Act claim, the Court addresses Hari's Sherman Act claim to resolve when Hari's Sherman Act and California law claims accrued under the default accrual rules. *See* *In re Animation Workers Antitrust Litig. ("Animation Workers I"), 87 F. Supp. 3d 1195, 1208 n.10* ***[*1065]*** *(N.D. Cal. 2015)* (considering timeliness of Sherman Act claim to resolve both Sherman and Cartwright Act statutes of limitations); *GSI Tech., Inc. v. Cypress Semiconductor Corp., No. 5:11-cv-03613 EJD, 2012 U.S. Dist. LEXIS 93888, 2012 WL 2711040, at *8 (N.D. Cal. July 6, 2012)* (interpreting Sherman Act and Cartwright Act claims together for statutes of limitations purposes); *Stanislaus Food Prods. Co. v. USS-POSCO Indus., No. CV F 09-0560 LJO SMS, 2010 U.S. Dist. LEXIS 92236, 2010 WL 3521979, at *13 (E.D. Cal. Sept. 3, 2010)* (applying same accrual rules to Sherman Act and Cartwright Act claims).

Plaintiffs contend that, under the default accrual rule for a Sherman Act claim, Hari's **[**41]** claims accrued at the time Hari experienced injury from Oracle's anticompetitive conduct. ECF No. 150, at 2-3. According to Plaintiffs, Hari was not injured until 2012, when Oracle paid Hari an artificially depressed salary. *Id.* Oracle counters that Hari's claims accrued at the time of the anticompetitive conduct, and thus Hari's claims accrued in 2009, at the latest, when Oracle entered into the last alleged Secret Agreement. ECF No. 148, at 2-5. Oracle also argues that Hari was injured in 2009, at the latest, because Hari was in the allegedly affected labor market working at another technology company that was acquired by Oracle in 2012, and thus received a depressed salary prior to Hari's employment with Oracle. *Id.*; ECF No. 150, at 4 (referring to Hari's LinkedIn account to confirm Hari's previous employment). Finally, Oracle claims that Plaintiffs "have consistently alleged that they suffered an injury and their claims accrued at the time of Oracle's allegedly anticompetitive conduct." ECF No. 148, at 4.

The Court agrees with Oracle that Hari's Sherman Act claim accrued by 2009 under the default accrual rule. The Court finds the Ninth Circuit's recent decision in *Samsung Elecs. Co. v. Panasonic Corp., 747 F.3d 1199, 1202-03 (9th Cir. 2014)*, *cert. denied* ***[**42]*** *, 135 S. Ct. 1157, 190 L. Ed. 2d 912 (2015)*, to be instructive. In *Samsung*, Panasonic Corporation, Panasonic Corporation of North America, and SD-3C, LLC (collectively, "Panasonic") allegedly entered into anticompetitive agreements in 2003 and 2006 to charge a royalty for certain manufacturers producing SD cards. *Id. at 1201*. When Samsung Electronics Company ("Samsung") began to manufacture SD cards in 2006, Samsung paid the requested royalty to Panasonic. *Id. at 1202*. Samsung filed suit in 2010 and alleged that Panasonic's agreements violated the Sherman Act. *Id.*

Samsung was not in the SD market at the time of Panasonic's initial anticompetitive agreement, and thus "the harm to Samsung challenged in this suit was speculative at the time of the initial wrong." *Id. at 1204-05*. However, the Ninth Circuit did not find that Samsung's claim accrued, under the default accrual rules, when Samsung began to pay royalties in 2006. *See* *id. at 1202-05*. Rather, the Ninth Circuit held that the continuing violation and speculative damages exceptions to the default accrual rules were necessary to render Samsung's claims timely. *Id. at 1203-05* (noting that the 2006 agreement was a continuing violation, and that the speculative damages exception applies when damages are not clear at the "time of the initial **[**43]** act"). Under the Ninth Circuit's reasoning, Samsung's claim accrued—absent an exception to the default accrual rules—at the time of Panasonic's anticompetitive conduct in 2003. *See* *id. at 1203-04*. Therefore, in the Ninth Circuit, Sherman Act claims accrue under the default accrual rules at the time of the alleged anticompetitive conduct. *See id.; see also* *Pace Indus., Inc. v. Three Phoenix Co., 813 F.2d 234, 237 (9th Cir. 1987)* ("A cause of action in antitrust accrues each time a plaintiff is injured by an act of the defendant and the statute of limitations *runs from the commission of the act*." (emphasis added) (citing **[*1066]** *Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 338, 91 S. Ct. 795, 28 L. Ed. 2d 77 (1971)))*; *Oliver v. SD-3C LLC, 751 F.3d 1081, 1087 (9th Cir. 2014)* (noting that, under the Clayton Act, "the limitations period may start to run after the defendant's initial violation of the ***antitrust law***," if an exception applies).

The Court acknowledges that some courts, including this Court, have stated that Sherman Act claims accrue "at the time of injury." *See* *Animation Workers I, 87 F. Supp. 3d at 1216*; *see also* *Detrick v. Panalpina, Inc., 108 F.3d 529, 538 (4th Cir. 1997)* (noting that "under the antitrust accrual rule, the statute of limitations is triggered by the date of the injury alone"). However, these courts were determining whether to apply a discovery rule of accrual to the plaintiff's claims. *See* *Animation Workers I, 87 F. Supp. 3d at 1208* (rejecting argument that accrual began "at the time that Plaintiffs discovered, or reasonably **[**44]** should have discovered[,] their injuries"); *Detrick, 108 F.3d at 538* (discussing the "injury discovery" rule applied by the Ninth Circuit in RICO actions). In neither case did the timeliness of the plaintiff's claims turn on whether accrual began at the time of injury or the time of the alleged anticompetitive conduct, and thus the courts were not presented with the arguments made by the parties in the instant case. Additionally, this Court is bound by the Ninth Circuit's decision that, absent an exception, a Sherman Act claim accrues at the time of the anticompetitive conduct. *See* [Samsung, 747 F.3d at 1202-05](#).

In the instant case, Oracle's alleged anticompetitive conduct is entering into the Secret Agreements. *See* SAC ¶¶ 2-6, 113-116, 120-121, 124. Plaintiffs allege that Oracle first entered into a Secret Agreement in 2006. *Id.* ¶ 30. This Secret Agreement, and others later formed by Oracle, allegedly depressed compensation in the labor market for technology and management employees. SAC ¶¶ 9, 60-61. If each subsequent Secret Agreement entered into by Oracle constituted a new antitrust violation, then Hari's Sherman Act claim could have accrued as late as 2009, the last year in which Plaintiffs allege that a specific new Secret Agreement **[**45]** was entered into by Oracle. *See generally* SAC. Accordingly, the statute of limitations for Hari's Sherman Act claim began to run, under the default accrual rules, by 2009. *See* *Samsung, 747 F.3d at 1202-05*. As noted above, the Court finds that—in light of Plaintiffs' assumption that Hari's California law claims and Sherman Act claims accrue at the same time—Hari's California law claims also accrued by 2009. The statutes of limitations expired four years later, in 2013, a year before the complaint was filed on October 14, 2014. Thus, as with Garrison's and Van Vorst's claims, Hari's claims are untimely unless an exception to the default accrual rules or a tolling doctrine applies.

In hopes of avoiding the time bar, Plaintiffs offer the following five arguments: (1) Plaintiffs are entitled to statutory tolling under *15 U.S.C. § 16(i)*; (2) Oracle committed a "continuing violation"; (3) Oracle fraudulently concealed Oracle's anticompetitive conduct; (4) the California "discovery rule" applies to the UCL claim; and (5) the California "continuous accrual" rule applies to the California claims.[3] The Court addresses each argument in turn.

[*1067] D. Tolling under *Section 16(i)*

Plaintiffs contend that the statutes of limitations are tolled by four past DOJ proceedings: (1) the DOJ investigation into Oracle, from 2009 until October 2014; (2) and (3) the DOJ's lawsuits against Adobe and Lucasfilm, which Plaintiffs treat collectively, from September 24, 2010 to June 3, 2012; and (4) the DOJ's lawsuit against eBay, from November 16, 2012 to September 2, 2014.[4] Plaintiffs rely on *15 U.S.C. § 16(i)*, which provides:

> Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations **[**47]** of any of the antitrust laws, but not including an action under section 15a of this title, the running of the statute of limitations in respect to every private or State right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however*, That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 or 15c of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued.

15 U.S.C. § 16(i).

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[3] The Court notes that Plaintiffs do not argue that the speculative damages exception, discussed by the **[**46]** Ninth Circuit in *Samsung*, applies to Plaintiffs' claims. In the instant case, after Plaintiffs have twice amended the complaint and had multiple opportunities to brief the issue, "[t]he Court is not inclined to manufacture arguments on Plaintiff[s'] behalf." *Kiland v. Boston Scientific Corp., No. C 10-4105 SBA, 2011 U.S. Dist. LEXIS 35901, 2011 WL 1261130, at *7 (N.D. Cal. Apr. 1, 2011)* (citing *Indep. Towers of Wash. v. Washington, 350 F.3d 925, 929 (9th Cir. 2003)* ("Our adversarial system relies on the advocates to inform the discussion and raise the issues to the court.")). Accordingly, the Court addresses only the exceptions to the default accrual rules and the tolling doctrines raised in Plaintiffs' original and two supplemental briefs.

[4] In Plaintiffs' brief, they argue that the *eBay* litigation tolls their claims until September 2, 2014. However, the DOJ proceeding against eBay ended on September 2, 2014. *Section 16(i)* provides that the statute of limitations is "suspended during the pendency thereof *and for one year thereafter*." (emphasis added). Oracle suggests that Plaintiffs seek to toll the statutes of limitations until September 2, 2015. *See* Reply at 5.

In other words, to receive tolling under *§ 16(i)* a private plaintiff must show that the plaintiff's **[**48]** antitrust suit is "based in whole or in part on any matter complained of" in a government antitrust proceeding. *Id.; see also Charley's Tour & Transp., Inc. v. Interisland Resorts, Ltd., 618 F. Supp. 84, 86 (D. Haw. 1985)* (noting "[t]he plaintiff bears the burden of showing that the two suits are based in whole or in part" on the same matter) (citing *Akron Presform Mold Co. v. McNeil Corp., 496 F.2d 230, 233 (6th Cir. 1974))*. To determine whether a private suit is "based in whole or in part on any matter complained of" in prior government action, the Court is "limited to a comparison of the two complaints on their face." *Chipanno v. Champion Int'l Corp., 702 F.2d 827, 832 (9th Cir. 1983)* (quoting *Leh v. Gen. Petroleum Corp., 382 U.S. 54, 59, 86 S. Ct. 203, 15 L. Ed. 2d 134 (1965))*.

A private plaintiff "is not required to allege that the same means were used to achieve the same objectives of the same conspiracies by the same defendants." *Leh, 382 U.S. at 59*. However, there must be a "real relation" between the government and private causes of action. *Id.* "The real relation test is met where the conspiratorial acts of the defendants are intertwined with and fundamentally the same" as those alleged in the government's filed lawsuits. *See Charley's Tour, 618 F. Supp. at 86*. Factors that courts have considered to assess a "real relation" include the "substantial identity of parties," *Leh, 382 U.S. at 63*, whether Plaintiffs have alleged "a conspiracy that included the objectives, means, time span, and geographic scope of **[*1068]** the conspiracy alleged in the government suit" and whether **[**49]** "evidence adduced in the trial of the government suit would be of practical assistance to plaintiffs," *Chipanno, 702 F.2d at 832*. For example, *§ 16(i)* "tolls the statute of limitations against all participants in a conspiracy which is the object of a Government suit, whether or not they are named as defendants or conspirators therein." *Zenith Radio Corp., 401 U.S. at 336*.

Plaintiffs first contend that the DOJ investigation into Oracle tolls the statutes of limitations. According to Plaintiffs, DOJ opened an investigation into Oracle in 2009 when DOJ began investigating other technology companies for unlawful recruiting practices. Opp. at 3. DOJ informed Oracle that DOJ would not pursue a case against Oracle on October 29, 2014, more than two weeks after Plaintiffs filed the instant action. ECF No. 114-1 Ex. A.

At the outset, the Court notes that Plaintiffs spend only a single sentence arguing that the DOJ investigation into Oracle tolls the statutes of limitations. Opp. at 7-8. Plaintiffs rely solely on *Dungan v. Morgan Drive-Away, Inc., 570 F.2d 867, 871 (9th Cir. 1978)*, in which the Ninth Circuit noted that "[t]he initiation of an investigation or a decision to prosecute more comfortably fits the statutory language than does empanelling the grand jury." However, the Ninth Circuit proceeded to say that to begin tolling upon the initiation **[**50]** of an investigation or upon a decision to prosecute "would introduce great uncertainty in fixing the time at which the suspension period commences" and "would frustrate the statute-of-repose purpose of *section 16(i)*." *Id.* The Ninth Circuit therefore *declined* to select the initiation of a government investigation as the trigger for the start of *§ 16(i)* tolling. *Id.*

Instead, courts have used the date on which the government filed a complaint as the date on which statutory tolling began. *See Leh, 382 U.S. at 59-63* (giving tolling effect from the time that the government filed a complaint); *Minn. Mining & Mfg. Co. v. N.J. Wood Finishing Co., 381 U.S. 311, 313, 85 S. Ct. 1473, 14 L. Ed. 2d 405 (1965)* (giving tolling effect from the date Federal Trade Commission filed a proceeding); *Chipanno, 702 F.2d at 832-33* (giving tolling effect from the date government filed a complaint); *In re Scrap Metal Antitrust Litig., No. 1:02 CV 0844, 2006 U.S. Dist. LEXIS 75873, 2006 WL 2850453, at *22 (N.D. Ohio Sept. 30, 2006)* (noting "more than a government investigation is needed to activate *§ 16(i)*"); *see also* Areeda and Hovenkamp, ***Antitrust Law***: An Analysis of Antitrust Principles and Their Application, § 321 (2014) (stating that *§ 16(i)* "is not triggered by . . . government proceedings falling short of the filing of a complaint"). This view is consistent with the instruction of the U.S. Supreme Court and the Ninth Circuit that the private and government proceedings are to be **[**51]** compared by examining "*the two complaints* on their face." *Chipanno, 702 F.2d at 832* (emphasis added) (quoting *Leh, 382 U.S. at 59*). In 2014, DOJ "closed its investigation of [Oracle] relating to potential agreements among certain firms regarding employee recruiting," without filing a complaint. ECF No. 114-1 Ex. A. Because DOJ never filed a complaint against Oracle, Plaintiffs are not entitled to *§ 16(i)* tolling based on the DOJ's investigation of Oracle.

Plaintiffs additionally seek tolling under *§ 16(i)* for the pendency of three government-filed lawsuits: *United States v. Adobe Sys., Inc.*, No. 10-CV-1629 (D.D.C.), *United States v. Lucasfilm, Inc.*, No. 10-CV-2220 (D.D.C.), and *United States v. eBay, Inc.*, No. 12-CV-5869 (N.D. Cal.). To receive statutory tolling for the pendency of these lawsuits, Plaintiffs must show that these lawsuits are "based in whole or in part on the same matter" as the instant **[*1069]** lawsuit. *Charley's Tour, 618 F. Supp. at 86*. Plaintiffs argue that the three government-filed lawsuits and the instant lawsuit have many similarities: the agreements alleged in each of the lawsuits seek wage suppression; the "means" of each of the lawsuits were non-solicitation agreements implemented in part through "no hire" lists; Google, Adobe, and Intuit, which allegedly **[**52]** entered anti-solicitation agreements with Oracle, were defendants in *Adobe*; and there is an overlap in time between the alleged conspiracies. Opp. at 9. However, Plaintiffs do not point to specifics in any complaint and do not conduct a "comparison of the [] complaints on their face." *Chipanno, 702 F.2d at 832*.

The Court first notes that there is no overlap between the parties in the government-filed lawsuits and the instant lawsuit. The *Adobe* defendants were Adobe, Apple, Google, Intel, Intuit, and Pixar. ECF No. 111-11. The sole defendant in *Lucasfilm* was Lucasfilm. ECF No. 114-1 Ex. B. The sole defendant in *eBay* was eBay. *Id.* Ex. E. Oracle was not a defendant in any of the three government-filed lawsuits.

Moreover, not one of the complaints in the three government-filed lawsuits mentions Oracle. The *Adobe* complaint alleges five substantially similar agreements, each between two companies: (1) Apple and Google, (2) Apple and Adobe, (3) Apple and Pixar, (4) Google and Intel, and (5) Google and Intuit. ECF No. 111-11. The two companies in each agreement agreed not to "cold call" each other's employees. *Id.* The *Adobe* complaint does not mention any other technology company. Oracle was not a party to any of these agreements, **[**53]** and none of the alleged agreements restricted any of the named companies from hiring employees from Oracle. *Id.*

Similarly, the *Lucasfilm* complaint alleged an agreement between Lucasfilm and Pixar "not to cold call, not to make counteroffers under certain circumstances, and to provide notification when making employment offers to each other's employees." ECF No. 114-1 Ex. B. The *Lucasfilm* complaint does not mention any other technology companies.

Likewise, the *eBay* complaint alleges that eBay and Intuit "agreed not to recruit each other's employees" and "eBay agreed not to hire Intuit employees, even those that approached eBay for a job." *Id.* Ex. E. The complaint further alleges direct communications between eBay CEO Meg Whitman and Founder and Chairman of the Executive Committee at Inuit Scott Cook. *See id.* The *eBay* complaint does not mention any other technology companies.

Because the conspiracies alleged in the *Adobe, Lucasfilm*, and *eBay* complaints do not involve Oracle, Plaintiffs' allegations of misconduct by Oracle in the instant lawsuit are not "intertwined with and fundamentally the same as those alleged in the government action[s]." *Charley's Tour, 618 F. Supp. at 86*. As noted, the government-filed lawsuits and the instant **[**54]** lawsuit lack "substantial identity of the parties." *Leh, 382 U.S. at 63*. Additionally, Plaintiffs have not shown that "evidence adduced in the trial of the government suit would be of practical assistance to plaintiffs," as there is no need for Plaintiffs to prove the existence of any of the agreements in *Adobe, Lucasfilm*, or *eBay*. *Chipanno, 702 F.2d at 832*; *see also* *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig., 782 F. Supp. 481, 486 (C.D. Cal. 1991)* (finding no factual overlap from the government lawsuit when the government lawsuit was based on anticompetitive conduct in different geographic area than that alleged in the private lawsuit).

Plaintiffs rely heavily on the similarity between the kinds of alleged anticompetitive behavior, namely the existence of anti-solicitation agreements in both the **[*1070]** instant lawsuit and the three government-filed lawsuits. However, "the pendency of separate and distinct actions that the government filed against other [related companies] that were never alleged to be a part of a conspiracy" does not toll the statute of limitations for a private suit against a related company. *See* *Aurora Enters., Inc. v. Nat'l Broad. Co., 688 F.2d 689, 693 (9th Cir. 1982)*; *see also* *Chipanno, 702 F.2d at 830, 833* (finding *§ 16(i)* applied when plaintiffs sued three of the four defendants in prior government proceeding and alleged a conspiracy that included the objectives, means, time span, and geographic scope **[**55]** of the conspiracy alleged in the government suit); *see also* *Novell, Inc. v. Microsoft Corp., 505 F.3d 302, 322 (4th Cir. 2007)* (rejecting application of *§ 16(i)* when some of the private suit's counts alleged a different market than the government suit). Oracle was not a "participant[] in a conspiracy which is the object of a Government suit." *Zenith Radio Corp., 401 U.S. at 336*. Consequently, Plaintiffs have not met their burden of showing a "real relation" between the three government-filed lawsuits and the instant lawsuit, and are not entitled to statutory tolling. *See* *Leh, 382 U.S. at 59*; *Novell Inc. v. Microsoft Corp., 505 F.3d 302, 322 (4th Cir. 2007)* ("[W]e do not believe *§ [16(i)]* should be construed to permit private plaintiffs to 'sit on their rights' and to assert, years after the traditional statute of limitations has run, 'claims so much broader than those asserted by the government that they open entirely new vistas of litigation.'").

E. Continuing Violation

Under the "continuing violation" theory, "each overt act that is part of the [antitrust] violation and that injures the plaintiff . . . starts the statutory period running again, regardless of the plaintiff's knowledge of the alleged illegality at much earlier times." *Klehr v. A.O. Smith Corp., 521 U.S. 179, 189, 117 S. Ct. 1984, 138 L. Ed. 2d 373 (1997)* (internal quotation marks omitted); *see also* *Pace, 813 F.2d at 237* ("A continuing violation is one in which the plaintiff's interests are repeatedly invaded and a cause of **[**56]** action arises each time the plaintiff is injured."). In the Ninth Circuit, an overt act restarts the statute of limitations in an antitrust action if it: (1) is "a new and independent act that is not merely a reaffirmation of a previous act"; and (2) "inflict[s] new and accumulating injury on the plaintiff." *Samsung, 747 F.3d at 1202* (internal quotation marks omitted).

The Court previously determined that Plaintiff Garrison's original complaint failed to allege a continuing violation because "the bald assertion that '[Oracle's] conspiracy was a continuing violation through which [Oracle] repeatedly invaded Plaintiff and Plaintiff Class' interests by adhering to, enforcing, and reaffirming the anticompetitive agreements described herein' is insufficient to show a continuing violation." *Garrison, 2015 U.S. Dist. LEXIS 53653, 2015 WL 1849517, at *7*. The Court noted, "the complaint is largely bereft of *any* dates or details with regards to Oracle's specific conduct" and "there are no allegations of any new or independent actions taken by Oracle after October 14, 2010—i.e., within four years of the filing date of this complaint—that caused Plaintiff any new or accumulating injury." *Id.* The Court further explained, "Plaintiff has simply failed to allege any facts indicating *when* the **[**57]** supposed continuing violations took place, let alone that they took place on or after October 14, 2010." *Id.* The Court cautioned Plaintiffs that "failure to cure the deficiencies identified" would result in a dismissal with prejudice. *2015 U.S. Dist. LEXIS 53653, [WL] at *9*.

Plaintiffs assert that the SAC fixes the deficiencies in the original complaint by alleging: (1) Oracle entered new Secret Agreements and added companies to the **[*1071]** "no hire" list "well into 2012," SAC ¶ 49; (2) Oracle adhered to, enforced, and reaffirmed the Secret Agreements, *id.* ¶ 73; and (3) Plaintiffs were not solicited by other companies while working at Oracle and could not find employment outside of Oracle until 2015, *id.* ¶¶ 74-81.[5]

A review of the allegations in the SAC again fails to reveal any specific conduct by Oracle during the limitations period. Although Plaintiffs allege that Oracle continued to enter into new Secret Agreements and add companies to the "no hire" list "well into 2012," Plaintiffs fail to identify a single new agreement after 2009. *See generally* SAC. Although the Court accepts "factual allegations in the complaint as true," *Manzarek, 519 F.3d at 1031*, the Court need not accept as true "allegations that are merely conclusory," *In re Gilead Scis Sec. Litig., 536 F.3d 1049, 1055 (9th Cir. 2008)*. The Court's order granting Oracle's motion for judgment on the pleadings found that "the complaint is largely bereft of *any* dates or details with regards to Oracle's specific conduct," and explicitly warned Plaintiffs that they must allege details regarding "any new or independent actions taken by Oracle after October 14, 2010" in order to plead a continuing violation. *See* *Garrison, 2015 U.S. Dist. LEXIS 53653, 2015 WL 1849517, at *7*. Nonetheless, Plaintiffs' SAC—which is **[**59]** the third complaint filed in this case—does not identify any information as to an agreement entered into by Oracle after 2009, including the companies involved or the dates of

[5] Plaintiffs expressly disclaim that Oracle's hiring of Hari in 2012 constitutes a continuing violation. *See* ECF No. 155, at 3. The Court agrees that Oracle's hiring of Hari is not an "overt act" sufficient to trigger the continuing violation theory. Even if Oracle hired Hari at an artificially depressed salary, the salary was based on alleged anticompetitive actions taken by Oracle prior to the limitations period. *See* *In re Multidistrict Vehicle Air Pollution, 591 F.2d 68, 71-72 (9th Cir. 1979)* (holding that the defendants' refusal during the limitations period to purchase afterburner devices from **[**58]** a particular company did not constitute an overt act because the defendants' refusal was based on an agreement entered into prior to the limitations period). Thus, Oracle's hiring of Hari is not "a new and independent act that is not merely a reaffirmation of a previous act." *See* *Samsung, 747 F.3d at 1202*.

formation. Plaintiffs' conclusory allegations are insufficient to allege that Oracle formed a new Secret Agreement after 2009. *See In re Gilead Scis, 536 F.3d at 1055* (noting courts do not need to accept allegations that are "merely conclusory").

Similarly, all of Plaintiffs' allegations about Oracle's enforcement of the Secret Agreements are undated or pre-date 2009. *See* SAC ¶¶ 26, 31, 41, 43 (discussing Oracle's dissemination of the "no hire" list and adherence to the Secret Agreements in 2007 and 2008); *id.* ¶¶ 35-39 (discussing Oracle's enforcement of the Secret Agreements in 2007 and 2008). Plaintiffs do allege that the 2009 "no hire" CoreTech agreement, for example, was not set to terminate until 2012. *Id.* ¶ 49. However, Plaintiffs need to do more than merely allege a continuing violation—they must also allege an overt act:

> A continuing violation is one in which the plaintiff's interests are repeatedly invaded and a cause of action arises each time the plaintiff is injured. *However, even when a plaintiff alleges a continuing violation, an overt* ***[**60]*** *act by the defendant is required* to restart the statute of limitations and the statute runs from the last overt act.

Pace, 813 F.2d at 237 (emphasis added) (citations omitted); *see also Samsung, 747 F.3d at 1202-03* (explaining that an overt act must be "a new and independent act that is not merely a reaffirmation of a previous act"). Merely carrying out during the limitations period a final, binding decision **[*1072]** made prior to the limitations period does not qualify as a new overt act. *See In re Multidistrict Vehicle Air Pollution, 591 F.2d 68, 71-72 (9th Cir. 1979)* (holding that the defendants' refusal during the limitations period to purchase afterburner devices from a particular company did not constitute an overt act because the defendants' refusal was based on an agreement entered into prior to the limitations period). Plaintiffs fail to allege any new and independent actions by Oracle to enforce the 2009 CoreTech agreement—or any other agreement—during the limitations period.

In opposition, Plaintiffs rely on *Samsung, 747 F.3d 1199*, *Columbia Steel Casting Co. v. Portland Gen. Elec. Co., 111 F.3d 1427, 1444-45 (9th Cir. 1996)*, and *Hennegan v. Pacifico Creative Serv., Inc., 787 F.2d 1299, 1300-01 (9th Cir. 1986)*. Opp. at 10. From these cases, Plaintiffs argue that each act by Oracle to enforce, renew, or expand the Secret Agreements was an overt act that restarted the limitations period. *Id.* at 10-11. However, Plaintiffs' argument misses the fact that Plaintiffs have simply failed to allege any acts of enforcement, renewal, **[**61]** or expansion after 2009.

Lastly, the Court turns to Plaintiffs' allegations that they were not solicited by other companies while working at Oracle and were unable to find meaningful employment after leaving Oracle. SAC ¶¶ 74-82. Plaintiffs argue that they "are entitled to the inference at the pleading stage that this was because of those agreements." Opp. at 11. Plaintiffs additionally point to the experience of one former Oracle employee, who was told by the recruiting company Riviera Partners that it could not place the former employee because Riviera Partners had an agreement with Oracle not to perform job placement services for Oracle employees. *Id.* ¶ 55. Oracle counters that the failure of other companies to solicit, hire, or place Plaintiffs cannot be an overt act *by Oracle*. Mot. at 10; Reply at 8 n.9.

The Court agrees with Oracle that Plaintiffs have not alleged any overt acts by Oracle after 2009, as required by Ninth Circuit law. *See Pace, 813 F.2d at 237* (holding that "even when a plaintiff alleges a continuing violation, an overt act *by the defendant* is required to restart the statute of limitations" (emphasis added)). Plaintiffs contend that any overt act by co-conspirators should be imputed to Oracle, **[**62]** and cite two cases holding that co-conspirators may be held jointly and severally liable for damages caused by violations of the antitrust laws. Opp. at 11 (citing *Beltz Travel Serv., Inc. v. Int'l Air Transp. Ass'n, 620 F.2d 1360, 1367 (9th Cir. 1980)*; *In re K-Dur Antitrust Litig., 338 F. Supp. 2d 517, 538 (D.N.J. 2004))*. However, these cases do not address the continuing violation theory nor what constitutes an "overt act," and Plaintiffs offer no substantive argument to apply these cases to the continuing violation context. As Plaintiffs have provided no basis for the Court to conclude that Oracle committed an overt act, the Court concludes that Oracle has not committed a continuing violation based on the acts of other companies.

Because Plaintiffs do not allege an overt act by Oracle during the limitations period, the Court finds that Plaintiffs have failed to plead a continuing violation—namely, that Oracle engaged in a "new and independent act that is not merely a reaffirmation of a previous act," which "inflict[ed] new and accumulating injury" on Plaintiffs.[6] *See* Samsung, 747 F.3d at 1202.

[*1073] F. Fraudulent Concealment

The purpose of fraudulent concealment is to prevent a defendant from "concealing a fraud . . . until such a time as the party committing the fraud could plead the statute of limitations to protect it." *In re Animation Workers Antitrust Litig. ("Animation Workers II"), No. 14-CV-04062-LHK, 123 F. Supp. 3d 1175, 2015 U.S. Dist. LEXIS 111262, 2015 WL 4974343, at *13 (N.D. Cal. Aug. 20, 2015)* (quoting *Bailey v. Glover, 88 U.S. (21 Wall.) 342, 349, 22 L. Ed. 636 (1874))*. Thus, "[a] statute of limitations may be tolled if the defendant fraudulently concealed the existence of a cause of action in such a way that the plaintiff, acting as a reasonable person, did not know of its existence." *Hexcel Corp. v. Ineos Polymers, Inc., 681 F.3d 1055, 1060 (9th Cir. 2012)*. The plaintiff bears the burden of pleading and proving fraudulent concealment. *Conmar v. Mitsui & Co. (U.S.A.), Inc., 858 F.2d 499, 502 (9th Cir. 1988)*. To plead fraudulent concealment, the plaintiff must allege that: (1) the defendant took affirmative acts to mislead the plaintiff; (2) the plaintiff did not have "actual or constructive knowledge of the facts giving rise to [his] claim" as a result of the defendant's affirmative acts; and (3) the plaintiff acted diligently in trying to uncover the facts giving rise to his claim. *Hexcel, 681 F.3d at 1060*.

Moreover, allegations of fraudulent concealment must be pled with particularity. *Conmar, 858 F.2d at 502*. Although "it is generally inappropriate to resolve the **[**64]** fact-intensive allegations of fraudulent concealment at the motion to dismiss stage," *In re Rubber Chemicals Antitrust Litig., 504 F. Supp. 2d 777, 789 (N.D. Cal. 2007)*, Plaintiffs nevertheless must allege specific factual allegations of fraudulent concealment to survive a motion to dismiss, *In re Transpacific Passenger Air Transp. Antitrust Litig., No. C 07-5634 CRB, 2011 U.S. Dist. LEXIS 49853, 2011 WL 1753738, at *20-21 (N.D. Cal. May 9, 2011)*. "Conclusory statements are not enough." *Conmar, 858 F.2d at 502*.

In granting Oracle's motion for judgment on the pleadings, the Court rejected Plaintiff Garrison's argument that Oracle had an affirmative duty to disclose Oracle's participation in the alleged conspiracy. The Court then identified two deficiencies in Garrison's allegations of affirmative acts. First, the Court found that Garrison failed "to allege sufficient facts showing the 'who, what, where, when, and how' of Oracle's alleged fraudulent concealment." *See* *Garrison, 2015 U.S. Dist. LEXIS 53653, 2015 WL 1849517, at *8*. Specifically, the Court explained that Garrison's allegation about Oracle's "pretextual, incomplete, or materially false and misleading explanations for hiring, recruiting, and compensation decisions made under the conspiracy" was "conclusory," "devoid of factual content" and did "not satisfy *Rule 12(b)(6)*'s pleading standard, much less *Rule 9(b)*'s heightened pleading standard." *Id.* Second, the Court found that Garrison alleged only passive concealment, not "affirmative acts" of concealment. *Id.* Because **[**65]** the Court found that Plaintiffs failed to allege affirmative acts, the Court did not have to reach whether Garrison had "actual or constructive knowledge" or "acted diligently."

Plaintiffs now concede that Oracle did not have a duty to disclose its allegedly illegal behavior. *See* Opp. at 13-15. Thus, Plaintiffs acknowledge that they must plead "affirmative acts to mislead" by Oracle. Plaintiffs contend that they have alleged four categories of "affirmative acts" sufficient to demonstrate fraudulent concealment: (1) "efforts by Oracle to limit access to and circulation of documents reflecting its secret agreements"; (2) "attempts **[*1074]** by Oracle in the DOJ proceedings and follow-on private litigation to conceal portions of key documents from public scrutiny through excessive redactions and overbroad confidentiality agreements"; (3) individual conversations about compensation where "Oracle misled the Plaintiffs themselves"; and (4) "misleading oral and written statements issued by Oracle during the limitations period," including Oracle's employee handbook and SEC filings. Opp. at 13-14. Oracle counters that (1) the allegations are insufficient under *Rule 9(b)*; (2) Plaintiffs have pled passive and not active concealment; and **[**66]** (3) Plaintiffs did not rely on any misleading statements by Oracle. Mot. at 13-18; Reply at 9-11. The Court addresses Oracle's arguments in turn.

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[6] The Court reiterates that this result is the same even if the Court were to consider the documents submitted by Plaintiffs in their procedurally improper ex parte motion to supplement the record. *See* ECF No. 138. None of the proffered documents reveal specific Secret Agreements, or actions by **[**63]** Oracle to ratify existing Secret Agreements, after 2009.

1. *Rule 9(b)*

Having reviewed the SAC, the Court finds that the allegations for two categories of "affirmative acts" fail to meet the heightened pleading standard of *Rule 9(b)*. First, Plaintiffs fail to sufficiently allege affirmative acts of concealment during the DOJ proceedings. Second, Plaintiffs fail to sufficiently allege misleading conversations between Oracle personnel and Plaintiffs. After addressing these two categories, the Court will then address Plaintiffs' remaining two categories of overt acts: efforts by Oracle to maintain secrecy and the public statements by Oracle about compensation.

a. DOJ Proceedings

Plaintiffs argue that Oracle's conduct during the DOJ investigation was an affirmative act of fraudulent concealment because "Oracle refused to produce any documents without first securing agreements that the document production would not be publicly filed or disclosed, including requiring that any documents that were publicly filed or disclosed would be heavily redacted so as not to publicly reveal the substance of the Secret Agreements and the **[**67]** specific companies involved." SAC ¶ 104.

Plaintiffs do not cite, and the Court is not aware of, any case holding that agreements with DOJ to redact the public versions of documents properly produced during a government investigation are acts of fraudulent concealment. Furthermore, Plaintiffs do not provide the "who, what, where, when, and how" for any of the alleged document production or related agreements. *See* *Swartz, 476 F.3d at 764*. Plaintiffs point to no specific document or set of documents that was improperly withheld or redacted. Instead, Plaintiffs make only the conclusory allegation that Oracle took these actions "between 2009 and 2013, all with the intent of preventing the disclosure of its Secret Agreements." *Id.* Plaintiffs also fail to "set forth what is false or misleading" about the redactions. *GlenFed, 42 F.3d at 1548*. Here, Plaintiffs fail to allege any facts that could lead this Court to conclude that Oracle redacted documents during the DOJ investigation in a fraudulent or misleading way, let alone facts that could pass muster under *Rule 9(b)*. *See* *Garrison, 2015 U.S. Dist. LEXIS 53653, 2015 WL 1849517, at *8* ("This conclusory allegation devoid of factual content does not satisfy *Rule 12(b)(6)*'s pleading standard, much less *Rule 9(b)*'s heightened pleading standard.").

b. Misleading Conversations with Plaintiffs [68]**

Similarly, the Court finds insufficient under *Rule 9(b)* Plaintiffs' allegations that Oracle's misleading statements on compensation to Plaintiffs and class members constitute affirmative acts of fraudulent concealment. For instance, Plaintiff Garrison alleges that "an Oracle human resource employee" falsely informed Garrison that "Oracle's commission structure was competitive with other technology companies." SAC ¶ 90. Plaintiff Hari alleges that he was "directed by a senior executive **[*1075]** to inform his team of subordinates that their compensation levels at Oracle were highly competitive and that they should be very pleased with the level of compensation Oracle offered." *Id.* Plaintiffs further allege that, "many times" during the class period, "Class members repeatedly asked Oracle about how compensation was determined," but Oracle responded misleadingly that compensation was "competitive" without admitting the Secret Agreements. *Id.* ¶¶ 97, 103. The SAC provides no further information about to whom Plaintiffs spoke at Oracle, where these conversations took place, the date or time of the alleged conversations, or the content of the conversations.

The Court previously admonished Plaintiffs that, to **[**69]** plead fraudulent concealment in accordance with *Rule 9(b)*, Plaintiffs must allege "an account of the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentations." *Garrison, 2015 U.S. Dist. LEXIS 53653, 2015 WL 1849517, at *8* (quoting *Swartz, 476 F.3d at 764*). However, the SAC still fails to allege the "who, what, where, when, and how" of Oracle's allegedly misleading conversations with Plaintiffs and class members. For example, the SAC does not specify the identity of the parties who allegedly made false representations to Plaintiffs, beyond broad descriptors like "an Oracle human resource employee," a "senior executive," and "Oracle." SAC ¶¶ 90, 97. Plaintiffs additionally do not specify the time, date, or place of the allegedly misleading conversations. *See* Neubronner v. Milken, 6 F.3d 666, 672 (9th Cir. 1993). ("The complaint must specify such facts as the times, dates, places, benefits received, and other details of the alleged fraudulent activity."). Without more specific information as to who spoke to Plaintiffs when, Plaintiffs have not given Oracle sufficient notice of what conversations Plaintiffs allege were fraudulent. As such, Oracle is hindered in its ability to adequately defend against the accusation through the testimony of the Oracle employees **[**70]** involved. *See* Swartz, 476 F.3d at 764 ("To comply with Rule 9(b), allegations of fraud must be specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge."); *see also* Das v. WMC Mortg. Corp., 831 F. Supp. 2d 1147, 1166 (N.D. Cal. 2011) ("Plaintiffs, for instance, did not plead with the requisite particularity the name of the AmNet employee who concealed material facts . . . . As such, Plaintiffs have failed to sufficiently allege the circumstances constituting the alleged fraudulent concealment."). As this Court stated in its previous order, such conclusory allegations are insufficient to pass muster under Rule 9(b). *See* Garrison, 2015 U.S. Dist. LEXIS 53653, 2015 WL 1849517, at *8.

2. Allegations of Oracle's Efforts at Secrecy

Plaintiffs allege that Oracle's efforts to maintain the secrecy of the Secret Agreements constitute affirmative acts of fraudulent concealment. Specifically, Plaintiffs allege that Oracle aimed "to avoid dissemination of the [S]ecret [A]greements and restrict the knowledge to the smallest possible group within Oracle." SAC ¶ 101. Plaintiffs additionally allege that knowledge of the Secret Agreements was "confined to only the most senior executives and the most senior employees from [Oracle's] human resources and recruiting departments." *Id.* ¶ 109. **[**71]** Oracle counters that Plaintiffs' factual allegations reveal "that Oracle's hiring policies and agreements, as well as its 'no-hire' list, were disseminated broadly to Oracle's human resources and other employees, and were anything but secret." Mot. at 13. Oracle also argues that Plaintiffs' secrecy allegations amount to passive concealment, at most. *Id.* at 13-14.

In this circuit, "affirmative acts" must consist of more than mere passive **[*1076]** concealment. *See* Volk v. D.A. Davidson & Co., 816 F.2d 1406, 1415-16 (9th Cir. 1987). Affirmative conduct need not be "separate and apart" from acts in furtherance of the underlying conspiracy, but plaintiffs must plead more than acts that "by nature are self-concealing." *Id.* (citing Conmar, 858 F.2d at 505) (brackets omitted). Thus, the mere "failure to own up to illegal conduct" in response to an inquiry about whether the defendant engaged in illegal antitrust activity is not sufficient for fraudulent concealment, and to find otherwise "would effectively nullify the statute of limitations in these cases." Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp., 828 F.2d 211, 218-19 (4th Cir. 1987); *see also* Conmar, 858 F.2d at 505 (citing favorably Pocahontas, 828 F.2d at 218).

In reviewing the SAC, the Court agrees with Oracle that Oracle's alleged efforts at secrecy do not plead fraudulent concealment. Plaintiffs' specific factual allegations contradict Plaintiffs' general allegations about **[**72]** Oracle's efforts at secrecy. In the SAC, Plaintiffs excerpt over a dozen emails from Oracle employees discussing the "no hire" list or alleged Secret Agreements. These emails reveal that Oracle employees spoke openly about the "no hire" list and the gentleman's agreements, both within Oracle and with other companies. *Id.* ¶¶ 30-31, 36, 40-47, 98-100; *see also id.* ¶ 26 (noting HR webpage lists "works for company on the Do Not Hire List" as a reason for rejecting a candidate). For instance, as "representative" of Oracle's "corporate policy" of secrecy, Plaintiffs highlight a January 17, 2008 email by Oracle's Director of Recruiting ordering an Oracle recruiter, "DO NOT email any employees of our partners or employees on our no-hire list." *Id.* ¶¶ 98, 202. In another email, the Director of Recruiting writes "to her recruiting team" that "our policy is and continues to be that **we do not directly solicit from our partners**. What this means is that we **do not** send email solicitations; we **do not** solicit by phone." *Id.* ¶ 41 (emphases in original).[7] Plaintiffs do not explain how these emails fraudulently concealed the Secret Agreements

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[7] Oracle denies that the "no hire" list is unlawful, and argues that the identified non-solicitation agreements are either unilateral policies by Oracle not to hire from its business partners or are narrowly tailored and ancillary to legitimate business interests.

from Plaintiffs. If anything, these emails suggest the opposite—namely, **[**73]** that Oracle openly spoke about the Secret Agreements to ensure that Oracle employees adhered to the "no hire" list. *See* Garrison, 2015 U.S. Dist. LEXIS 53653, 2015 WL 1849517, at *9.

Moreover, the emails in the SAC reveal that, rather than restrict knowledge of the Secret Agreements to a limited number of employees, Oracle shared the "no hire" list with numerous people: at least the "HR department," "key human resource and recruiting personnel," the "recruiting team," and Oracle's Director of Consulting. SAC ¶¶ 31, 41, 100; ECF No. 111-5. Of the dozen emails in the SAC, only one email was marked do not forward. *Id.* ¶ 100.[8] The **[*1077]** "do not forward" email was not confined to a limited group of senior executives, but rather was sent "to the HR department" by an "Oracle employee." *Id.* (February 12, 2008 email allegedly **[**74]** "attaching a 'No Hire' list, and directing them to not forward, but to call if they have any questions"). Thus, Plaintiffs' allegations show that Oracle did not limit knowledge of the Secret Agreements "to only the most senior executives and the most senior employees from [Oracle's] human resources and recruiting departments" as Plaintiffs allege. *Id.* ¶ 109

By comparison, in *Animation Workers II*, the Court found that the plaintiffs had alleged affirmative acts to keep the conspiracy secret. The *Animation Workers II* plaintiffs alleged that the defendants took efforts to avoid sending emails related **[**75]** to the non-solicitation agreements, to avoid writing down the details of the non-solicitation agreements, and to eliminate any paper trail relating to the agreements by using a code name for the agreements. *Animation Workers II, 2015 U.S. Dist. LEXIS 111262, 2015 WL 4974343, at *19*. These allegations of secrecy in *Animation Workers II* detailed the specific conduct taken by the defendants to disguise the conspiracy. For example, the complaint in *Animation Workers II* alleged that one of the defendants, Lucasfilm, "made affirmative efforts to eliminate a paper trail regarding its code-named 'DNR' agreements. In an October 2009 'Recruiting Staff Meeting Summary,' Lucasfilm staff emphasized in bolded, all-caps lettering that all discussions of 'DNR' needed to be conducted over the phone: 'DNR questions CALL Steve. If you see an email forward to Steve and one of our lawyers.'" *Animation Workers II*, Second Consolidated Amended Class Action Compl., ECF No. 121 ¶ 138.

Similarly, in *Lithium Ion* a district court found fraudulent concealment when defendants took affirmative steps to destroy evidence of the conspirators' secret meetings, avoided memorializing conversations, and used secret codes to refer to coconspirators and topics. *See* *In re Lithium Ion Batteries Antitrust Litig., No. 13-MD-2420, 2014 U.S. Dist. LEXIS 7516, 2014 WL 309192, at *16 (N.D. Cal. Jan. 21, 2014)*. **[**76]** The *Lithium Ion* plaintiffs supported their allegations by quoting specific examples of the defendants' affirmative acts to keep the conspiracy secret, such as an email in which the representative of one of the defendants "asked that the recipients of his email . . . 'destroy this e-mail immediately.'" No. 13-2420, Second Consolidated Amended Compl., ECF No. 415 ¶ 219.

Here, by contrast, Plaintiffs fail to allege affirmative acts of concealment. Unlike the *Animation Workers II* and *Lithium Ion* plaintiffs, Plaintiffs put forth no specific factual allegations that Oracle took steps to keep employees from discussing the Secret Agreements, that Oracle attempted to eliminate a paper trail for the Secret Agreements, that Oracle avoided memorializing the Secret Agreements in writing, that Oracle used code names, or that Oracle employees avoided discussing the "no hire" list orally or in writing.

Additionally, Plaintiffs have not alleged that Oracle instructed supervisors or Human Resources personnel to respond to inquiries about compensation with a misleading, fraudulent, or pretextual response. At best, Plaintiffs allege only that Oracle's senior executives and members of the **[**77]** human resources and recruiting departments did not disclose the Secret Agreements to Plaintiffs. That is insufficient to allege "affirmative acts" of concealment.

Mot. at 4, 20-22. Oracle further argues that the "no hire" list reflects the tracking of permissible non-solicitation agreements that DOJ requires of the *Adobe* and *eBay* defendants. *Id.* at 3-4.

[8] Plaintiffs also allege that an Adobe employee sent an email about a "no hire" agreement to an Oracle employee from the Adobe employee's private email account. SAC ¶ 47. However, Plaintiffs do not argue that the *Adobe employee's* act should constitute fraudulent concealment by Oracle. Additionally, Plaintiffs fail to allege that the use of a private email account was unusual at Adobe. *See* *Animation Workers II, 2015 U.S. Dist. LEXIS 111262, 2015 WL 4974343, at *8* (plaintiffs averred that the defendants "sometimes communicated about the conspiracy over personal email accounts instead of employer accounts," which was a "sharp deviation from standard business practice").

Animation Workers I, 87 F. Supp. 3d at 1216 ("That Defendants did not affirmatively disclose the details of their allegedly unlawful conspiracy to Plaintiffs is neither surprising nor sufficient to constitute 'affirmative **[*1078]** steps to mislead.'" (citing Conmar, 858 F.2d at 505)).[9]

3. Reliance on Misleading Statements

The Court turns to Plaintiffs' remaining allegations, that Oracle made misleading public statements in Oracle's employee handbook and its SEC filings.[10] In the annual employee handbook, for example, Oracle stated that "Oracle commits rigorously to observing applicable antitrust or competition laws of all countries or organization." SAC ¶ 85; *see also id.* ¶¶ 84, 86, 89-91 (discussing employee handbook). In Oracle's annual SEC filings, Oracle stated, "In the software industry, **[**79]** there is substantial and continuous competition for highly skilled business, product development, technical and other personnel. . . . We may also experience increased compensation costs that are not offset by either improved productivity or higher prices." *Id.* ¶¶ 93-94 (emphases omitted). Plaintiffs allege that the SEC filings were false or misleading because Oracle was committing antitrust violations that enabled Oracle to reduce compensation expenses. *Id.* ¶ 95-96.

The Court recently found that similar allegations were insufficient to establish fraudulent concealment. *See* Ryan II, 2015 U.S. Dist. LEXIS 158944, 2015 WL 7429495, at *18-19. The Court is not aware of, and Plaintiffs do not cite, any case **[**80]** finding that a defendant's statements in routine public filings that the defendant obeys antitrust laws and participates in a competitive market alone suffice to show fraudulent concealment, absent other evidence that the defendant attempted to conceal its alleged antitrust behavior. *Id.* Rather, in the Ninth Circuit an affirmative act of denial of wrongdoing constitutes an affirmative act of fraudulent concealment only "if the circumstances make the plaintiff's reliance on the denial reasonable." Conmar, 858 F.2d at 505.[11]

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[9] In Plaintiffs' procedurally improper ex parte motion to supplement the record, and in Plaintiffs' supplemental briefing on the accrual of Hari's claims, Plaintiffs argue that the Court should find fraudulent concealment based on the actions of Google. *See* ECF No. 138 Ex. B; ECF No. 149, at 6-7. Plaintiffs appear to argue that, even in the absence of sufficient allegations that Oracle itself fraudulently concealed the Secret Agreements, the Court may find fraudulent concealment based entirely on actions of concealment taken by Google. As noted above, the Court struck Plaintiffs' ex parte motion. However, even if the Court were to consider, and accept, Plaintiffs' argument, the Court would find that Plaintiffs' ex parte motion does not sufficiently allege fraudulent concealment by Google that may be imputed to Oracle. **[**78]** The documents attached to Plaintiffs' ex parte motion reveal Google employees openly discussing a restricted hiring policy. *See* ECF No. 138 Ex. B. The documents do not reveal that Google took steps to keep employees from discussing the restricted hiring policy, that Google sought to destroy evidence of the restricted hiring policy, or that Google avoided discussing the restricted hiring policy in writing. There are also no allegations about fraudulent concealment by Google in the SAC. Accordingly, the Court's conclusion that Plaintiffs have not sufficiently pled fraudulent concealment would not be altered were the Court to consider the documents from Plaintiffs' ex parte motion.

[10] Plaintiffs also allege that Oracle continues to mislead the public about the Secret Agreements because an Oracle spokeswoman stated on October 14, 2014 that "Oracle was deliberately excluded from all prior litigation filed in this matter because all the parties investigating the issue concluded there was absolutely no evidence that Oracle was involved." *Id.* ¶ 108. Regardless of whether this statement misleads the public, the statement was made after Plaintiffs filed the instant action and thus could not have fraudulently concealed Plaintiffs' claims.

[11] Other courts have found that misleading statements constitute affirmative acts of fraudulent concealment only if Plaintiffs allege actual reliance upon the allegedly misleading statements. *See* Block v. Toyota Motor Corp., 5 F. Supp. 3d 1047, 1061 (D. Minn. 2014) (finding no fraudulent concealment based on allegedly false public statements where plaintiffs did not show that they were aware of the public statements); In re Magnesium Oxide Antitrust Litig., Civ. No. 10-5943 (DRD), 2011 U.S. Dist. LEXIS 121373, 2011 WL 5008090, at *23 (D.N.J. Oct. 20, 2011) ("Implicit in the notion that a plaintiff's inquiry was misled or relaxed by an act of concealment is that the plaintiff relied on that act of concealment. . . . Here, Plaintiffs make no allegations that they were misled by Defendants' concealment of the alleged conspiracy and therefore have failed to meet the second element of fraudulent concealment."). **[**81]** The Court observes that Plaintiffs do not allege that they ever read, let alone relied on, Oracle's SEC filings. *See* Animation Workers I, 87 F. Supp. 3d at 1217 (noting "Plaintiffs simply offer no factual allegations

[*1079] Plaintiffs here rely solely upon *Lithium Ion, 2014 U.S. Dist. LEXIS 7516, 2014 WL 309192*, to support the argument that Oracle's allegedly misleading public statements constitute affirmative acts of fraudulent concealment. However, *Lithium Ion* did not hold that the defendants' public, putatively false statements were sufficient on their own to support an allegation of fraudulent concealment. Instead, "[i]t was the combination of those misleading, pretextual statements and the affirmative efforts taken to destroy evidence of the conspiracy or otherwise keep the conspiracies secret that supported the respective plaintiffs' fraudulent concealment allegations." *Animation Workers II, 2015 U.S. Dist. LEXIS 111262, 2015 WL 4974343, at *18*. Specifically, the allegations in *Lithium Ion* that the defendants attempted to conceal their conspiracy by destroying documents, instructing employees not to memorialize conversations, and **[**82]** using code names constituted circumstances that rendered the plaintiffs' reliance on the defendants' public statements reasonable. *See* *Lithium Ion, 2014 U.S. Dist. LEXIS 7516, 2014 WL 309192, at *16* (describing how the *Lithium Ion* defendants "instruct[ed] the recipient of documents or emails to destroy, delete, or discard them after reading, instruct[ed] personnel to refrain from memorializing conversations, and used code to refer to particular entities or topics"); *see also* *Conmar, 858 F.2d at 505* (denial of antitrust violations is an affirmative act of fraudulent concealment only "if the circumstances make the plaintiff's reliance on the denial reasonable").

Similarly, in *Animation Workers II*, the plaintiffs made ample allegations of affirmative acts of fraudulent concealment that rendered reliance upon the defendants' allegedly misleading public filings with the SEC reasonable. *2015 U.S. Dist. LEXIS 111262, 2015 WL 4974343, at *10*. These included allegations that the *Animation Workers II* defendants' Human Resources departments were exchanging voluminous information about salary ranges and bonuses and colluding to fix compensation. *2015 U.S. Dist. LEXIS 111262, [WL] at *6-7*. For example, the *Animation Workers II* plaintiffs alleged that the defendants held meetings at which they "set the parameters of a compensation survey" that "provides wage and salary ranges for the studios' technical **[**83]** or artistic positions, broken down by position and experience level." *2015 U.S. Dist. LEXIS 111262, [WL] at *6*. The *Animation Workers II* plaintiffs further alleged that after participating in these meetings fixing compensation, Pixar circulated annual "talking points" memos instructing managers on how to explain compensation. *2015 U.S. Dist. LEXIS 111262, [WL] at *9*. These "talking points" memos allegedly did not mention Pixar's agreements colluding with Pixar's competitors to fix salary ranges, and the 2007 "talking points" memo specifically instructed managers to explain that "one of the main reasons" compensation increases were low was in order to "fund additional benefit programs." *Id.* The plaintiffs alleged that Pixar's president similarly sent a company-wide email justifying the modest compensation increases **[*1080]** as a result of the company's construction of a new child-care center. *Id.*

The *Animation Workers II* plaintiffs additionally alleged that they had discussed their compensation with specific, named individuals, and provided the dates, method of communication, and content of these conversations. *Id.* The *Animation Workers II* plaintiffs alleged that in these specifically identified conversations, the individuals with whom they spoke did not mention the collusive **[**84]** salary agreements. *Id.* The *Animation Workers II* plaintiffs also alleged that the defendants took efforts to avoid sending emails related to the non-solicitation agreements, to avoid writing down the details of the non-solicitation agreements, and to eliminate any paper trail relating to the agreements by using a code name for the agreements. *2015 U.S. Dist. LEXIS 111262, [WL] at *8*. Further, the *Animation Workers II* plaintiffs alleged that the defendants made affirmative misrepresentations in their public statements and filings during the DOJ investigations and made unjustified or misleading sealing motions in order to improperly seal documents that did not satisfy the requirements for sealing. *2015 U.S. Dist. LEXIS 111262, [WL] at *10-11*. On top of all of these allegations, the plaintiffs alleged that the defendants falsely stated in their public filings that they engaged in competitive hiring. *2015 U.S. Dist. LEXIS 111262, [WL] at *10*. This Court found that the plaintiffs' allegations in combination were adequate to render reliance upon the allegedly misleading SEC filings reasonable. *Id.*; *see also* *In re TFT-LCD (Flat Panel) Antitrust Litig., 586 F. Supp. 2d 1109, 1119 (N.D. Cal. 2008)* (defendants provided "numerous specific pretextual reasons for inflated prices" and also kept conspiracy secret).

In the instant case, on the other hand, Plaintiffs have not alleged circumstances that would **[**85]** render their reliance on Oracle's allegedly misleading public statements reasonable. Plaintiffs' allegations of allegedly

with regards to . . . Plaintiffs' reliance on such information"). Though the Court need not resolve whether Plaintiffs must allege actual reliance, the Court is skeptical that Plaintiffs could satisfy any actual reliance requirement.

misleading conversations with Oracle employees and of efforts by Oracle to conceal the conspiracy during the DOJ investigation do not satisfy *Rule 9(b)*, and Plaintiffs' allegations of efforts to keep the conspiracy secret by avoiding disseminating information about the Secret Agreements is contradicted by the numerous emails quoted by Plaintiffs in which Oracle freely discussed the "no hire" list and gentleman's agreements. Unlike the plaintiffs in *Animation Workers II* and *Lithium Ion*, Plaintiffs here have not alleged that Oracle used a code name to refer to the alleged anti-solicitation agreements or that Oracle instructed employees not to discuss the anti-solicitation agreements by email. Plaintiffs provided just a single example of an Oracle email that was labeled do not forward. Additionally, Plaintiffs have not alleged that Oracle instructed supervisors or Human Resources personnel to respond to inquiries about compensation with a misleading, fraudulent, or pretextual response.[12] Plaintiffs have not alleged that **[*1081]** Oracle intentionally provided a false justification for **[**86]** why compensation was not higher, or that Oracle's supervisors and Human Resources personnel would have known about the effect of the anti-solicitation agreements on compensation.

Thus, Plaintiffs are left solely with the allegation that Oracle falsely represented in public filings that it abides by antitrust laws and engages in a competitive market. However, absent *any* evidence of pretextual justifications for compensation or of steps taken by Oracle to conceal the agreements, the public filings are inadequate, on their own, to satisfy Plaintiffs' burden to show that Oracle took affirmative acts to fraudulently conceal the alleged conspiracy. *See* *Hexcel, 681 F.3d at 1060* ("[The plaintiff] carries the burden of pleading and proving fraudulent concealment; it must plead facts showing that [the defendant] affirmatively misled it, and that [the plaintiff] had neither actual **[**88]** nor constructive knowledge of the facts giving rise to its claim despite its diligence in trying to uncover those facts." (emphasis omitted) (alterations in original)); *see also* *Retail Wholesale & Dep't Store Union Local 338 Ret. Fund v. Hewlett-Packard Co., 52 F. Supp. 3d 961, 970 (N.D. Cal. 2014)* (noting, in securities regulation context, that "a code of ethics is inherently aspirational; it simply cannot be that every time a violation of that code occurs, a company is liable under federal law for having chosen to adopt the code at all"). Accordingly, Plaintiffs have failed to plead fraudulent concealment.

G. Discovery Rule

Plaintiffs contend that the discovery rule applies to delay the accrual of their UCL claim. Opp. at 9. The UCL prohibits "any unlawful, unfair or fraudulent business act or practice." *Cal. Bus. & Prof. Code § 17200*. Plaintiffs allege that Oracle violated the UCL by entering into "illegal Secret Agreements to suppress wages of their respective workforce by restricting the ability of its managerial employees from attaining employment with the other technology companies." SAC ¶ 129. Plaintiffs further allege that these acts "were unfair, unlawful, and or unconscionable, both in their own right and because they violated the Sherman Act and the Cartwright Act." *Id.* ¶ 130.

In California, the discovery rule postpones accrual of **[**89]** a claim until the plaintiff discovers, or has reason to discover, the cause of action. *Clemens v. DaimlerChrysler Corp., 534 F.3d 1017, 1024 (9th Cir. 2008)*. Thus,

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[12] Plaintiffs argue that the documents submitted with Plaintiffs' procedurally improper ex parte motion reveal Oracle exchanged compensation information with competitors. First, Plaintiffs include an email from an Adobe employee asking Oracle and other technology companies to participate in a survey regarding the equity options given to employees. *See* ECF No. 138 Ex. B. However, the email itself indicates that Oracle had not responded to the request for information. *See id.* Second, Plaintiffs point to a document listing compensation information for Director and Vice President positions at four companies that Oracle received from a "confidential source." *Id.* Given that the proposed class excludes corporate officers and senior Oracle executives, it appears that this compensation information is not relevant to Plaintiffs' allegations. *See* SAC ¶ 64 (providing class definition). Moreover, Garrison, Van Vorst, and Hari were not corporate officers or senior executives, and thus this compensation information would not **[**87]** apply to them. Further, Plaintiffs fail to allege that Oracle used this information to create pretextual reasons for Plaintiffs' compensation, or to conceal the Secret Agreements. Plaintiffs thus fail to explain how Oracle fraudulently concealed the Secret Agreements or why Plaintiffs' reliance on Oracle's SEC filings was reasonable. Accordingly, even if the Court were to consider the documents submitted in Plaintiffs' ex parte motion, the Court would not find that Plaintiffs adequately alleged fraudulent concealment.

according to Plaintiffs, their UCL claim did not accrue until Plaintiffs "discovered" the claim on May 17, 2013, when Plaintiffs gained access to documents from the *High-Tech* litigation that allegedly indicated that Oracle was party to Secret Agreements. Opp. at 9. Plaintiffs acknowledge that this Court determined in *Animation Workers I* and *Ryan I* that the discovery rule does not apply to UCL claims that arise purely out of anticompetitive conduct, like Plaintiffs' claim here. *Id.* at 9 & n.2. The Court dismissed as time barred the complaints in both *Animation I* and *Ryan I*, yet Plaintiffs rely on the same arguments that the Court rejected in both of those cases. *See* Opp. at 9-10; *see also* Ryan II, 2015 U.S. Dist. LEXIS 158944, 2015 WL 7429495, at *20-21 (rejecting application of discovery rule to UCL claim). The Court remains unpersuaded.

[*1082] Plaintiffs argue that *Aryeh v. Canon Bus. Solutions, Inc., 55 Cal. 4th 1185, 151 Cal. Rptr. 3d 827, 292 P.3d 871 (2013)*, calls for the application of the discovery rule here. However, *Aryeh* does not require the application of the discovery rule to all UCL claims. *See* *Aryeh, 55 Cal. 4th at 1196*. Rather, the *Aryeh* court explained that the "UCL is a chameleon," and whether the discovery rule may apply is determined by "the nature of the right sued upon." *See id.* Under *Cal. Code Civ. Proc. § 338(d)*, "the discovery rule **[**90]** applies to fraud actions." *See* *E-Fab, Inc. v. Accountants, Inc. Servs., 153 Cal. App. 4th 1308, 1318, 64 Cal. Rptr. 3d 9 (2007)* (citing *Cal. Code Civ. Proc. § 338(d)*). Thus, the *Aryeh* court held that the discovery rule might be appropriate for UCL claims based on allegations of fraud, but the discovery rule does not apply to UCL claims based purely on allegations of unfair competition. *See* *Aryeh, 55 Cal. 4th at 1196* (citing approvingly *M&F Fishing, Inc. v. Sea-Pac Ins. Managers, Inc., 202 Cal. App. 4th 1509, 1531-32, 136 Cal. Rptr. 3d 788 (2012)* (nature of UCL unfair competition claim rendered discovery rule inappropriate)).

Applying *Aryeh*, this Court has already concluded that the discovery rule does not apply to UCL claims similar to the UCL claim alleged here. *See* *Animation Workers I, 87 F. Supp. 3d at 1210-11*. In *Animation Workers I*, the plaintiffs based their UCL claim on the defendants' "efforts to limit competition for and suppress compensation of their employees" and the defendants' agreement "to restrict competition for class members' services through anti-solicitation agreements and agreements to set and fix the compensation of class members." *See* No. 14-4062, Consolidated Amended Class Action Compl., ECF No. 63 ¶ 143. The Court concluded that these allegations were allegations purely of anticompetitive conduct and not allegations of fraud. *Animation Workers I, 87 F. Supp. 3d at 1210-11*. Therefore, the Court held that the discovery rule did not apply to the *Animation Workers I* plaintiffs' UCL claim. *Id.; see also* *Ryan II, 2015 U.S. Dist. LEXIS 158944, 2015 WL 7429495, at *20-21* (declining **[**91]** to apply the discovery rule to similar allegations of anticompetitive conduct).

In the instant case, the conduct alleged as the basis for Plaintiffs' UCL claim consists of Oracle's attempts to suppress the wages of Oracle employees by entering into non-solicitation Secret Agreements with other companies. SAC ¶ 129. These allegations are equivalent to the allegations in *Animation Workers I* that the *Animation Workers I* defendants took "efforts to limit competition for and suppress compensation of their employees" and "agreed to restrict competition for class members' services through anti-solicitation agreements and agreements to set and fix the compensation of class members." No. 14-4062, Consolidated Amended Class Action Compl., ECF No. 63 ¶ 143. Like the allegations in *Animation Workers I*, Plaintiffs' UCL claim allegations are purely of anticompetitive behavior.

Although elsewhere in the SAC Plaintiffs allege that Oracle engaged in fraudulent concealment, Plaintiffs' UCL claim does not mention fraudulent concealment or any alleged act of fraudulent concealment by Oracle as a basis for the alleged UCL violation. *See* SAC ¶¶ 126-133 (Plaintiffs' UCL claim). Indeed, Plaintiffs do not specify **[**92]** any fraudulent conduct by Oracle that violates the UCL. Moreover, the Court concludes above that the SAC does not sufficiently allege fraudulent concealment. *See supra*. Thus, the SAC does not include allegations of fraud sufficient to support application of the discovery rule to Plaintiffs' UCL claim. Because Plaintiffs' UCL claim is based solely on Oracle's **[*1083]** alleged anticompetitive conduct, the discovery rule does not apply. *See* *Ryan II, 2015 U.S. Dist. LEXIS 158944, 2015 WL 7429495, at *20-21* (rejecting application of discovery rule to UCL claim similar to the one in the instant case); *Animation Workers I, 87 F. Supp. 3d at 1210-11* (same).

H. Continuous Accrual

The Court turns to Plaintiffs' argument that the Court should apply the California "continuous accrual" rule to Plaintiffs' state law claims. Under "continuous accrual," "a series of wrongs or injuries may be viewed as each triggering its own limitations period, such that a suit for relief may be partially time-barred as to older events but timely as to those within the applicable limitations period."[13] *Aryeh, 55 Cal. 4th at 1192*. "[S]eparate, recurring invasions of the same right can each trigger their own statute of limitations." *Id. at 1198*. "Generally speaking, continuous accrual applies whenever there is a continuing or recurring obligation: 'When an obligation or liability arises **[**93]** on a recurring basis, a cause of action accrues each time a wrongful act occurs, triggering a new limitations period.'" *Id. at 1199* (quoting *Hogar Dulce Hogar v. Cmty. Dev. Comm'n, 110 Cal. App. 4th 1288, 1295, 2 Cal. Rptr. 3d 497 (2003))*.

Accordingly, California courts have held that disputes regarding monthly billing and payments qualify for continuous accrual, with each month triggering a new limitations period. *See, e.g., id. at 1200-01* (allegations of unlawful charges in monthly bills were recurring obligations); *Tsemetzin v. Coast Fed'l Sav. & Loan Ass'n, 57 Cal. App. 4th 1334, 1344, 67 Cal. Rptr. 2d 726 (1997)* (monthly rent payments owed were a recurring obligation); *Armstrong Petroleum Corp. v. Tri-Valley Oil & Gas Co., 116 Cal. App. 4th 1375, 1388-89, 11 Cal. Rptr. 3d 412 (2004)* (monthly payments on a gas and oil lease created a recurring obligation). However, if the alleged recurring injuries during the limitations period "arose out of a single transaction" that occurred before the limitations period, the continuous accrual rule does not apply. *State ex rel. Metz v. C.C.C. Info. Servs., Inc., 149 Cal. App. 4th 402, 418, 57 Cal. Rptr. 3d 156 (2007)*. Thus, allegedly fraudulent statements and admissions **[**94]** following an inaccurate valuation in an insurance claim did not trigger new limitations periods under the continuous accrual rule because all of the false statements arose out of the same insurance valuation, which occurred before the limitations period. *Id.*

In the instant case, Plaintiffs contend that Oracle had a "continuing obligation not to collude with competitors to restrict free competition for engineers and managers that was susceptible to being breached each time a Secret Agreement was entered into or renewed or reaffirmed." Opp. at 13. The Court first observes that the SAC fails to allege this continuing duty. *See generally* SAC. Additionally, Oracle's duty "not to collude with competitors" bears little relation to the monthly payments or monthly bills that California courts have found to be periodic, recurring obligations warranting continuous accrual. *See Metz, 149 Cal. App. 4th at 418* (holding that continuous accrual **[*1084]** does not apply where "[the plaintiff's] action does not involve a recurring obligation or any such period payment obligations"); *see also Aryeh, 55 Cal. 4th at 1200-01* (applying continuous accrual to dispute over monthly bills); *Tsemetzin, 57 Cal. App. 4th at 1344* (applying continuous accrual to dispute over monthly rent payments); *Armstrong Petroleum, 116 Cal. App. 4th at 1388-89* (applying continuous accrual **[**95]** to dispute over monthly lease payments). The SAC contains no allegations of unlawful behavior by Oracle about any similar periodic transactions. *See generally* SAC.

More importantly, even if Oracle breached a continuing duty each time that Oracle "entered into or renewed or reaffirmed" a Secret Agreement, Plaintiffs have failed to allege that Oracle took any of these actions during the limitations period. Although Plaintiffs allege that Oracle continued to enter into new Secret Agreements and add companies to the "no hire" list "well into 2012," Plaintiffs fail to identify a single new agreement after 2009. *See generally* SAC. As discussed above, in the section on the continuing violation theory, although the Court accepts "factual allegations in the complaint as true," *Manzarek, 519 F.3d at 1031*, the Court need not accept as true "allegations that are merely conclusory." *In re Gilead Scis, 536 F.3d at 1055*. Here, Plaintiffs offer no facts about what companies formed post-2009 Secret Agreements with Oracle, much less when those Secret Agreements took place. Similarly, all of Plaintiffs' allegations about Oracle's "reaffirmation" or enforcement of the Secret Agreements are undated or pre-date 2009. This includes Plaintiffs' allegations that Oracle **[**96]** disseminated the "no hire" list and abided by the Secret Agreements internally, *see* SAC ¶¶ 26, 31, 41, 43 (listing dates in 2007 and 2008), and that Oracle threatened other companies with fines or lawsuits to ensure adherence to the Secret Agreements, *id.* ¶¶

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[13] The continuous accrual rule is similar to the continuing violation theory. "However, unlike the continuing violation doctrine, which renders an entire course of conduct actionable, the theory of continuous accrual supports recovery only for damages arising from those breaches falling within the limitations period." *See Aryeh, 55 Cal. 4th at 1199*. Whether Plaintiffs have sufficiently alleged a continuing violation is discussed above. *See supra*.

36-39 (listing dates in 2007 and 2008). Thus, Plaintiffs have failed to identify any "separate, recurring invasions" of Plaintiffs' rights after 2009, and the continuous accrual rule does not apply. *See* Aryeh, 55 Cal. 4th at 1198.

I. Leave to Amend

As Plaintiffs have failed to allege any applicable exception to the default accrual rules or tolling doctrine, the Court concludes that Plaintiffs' claims are time barred. Under Rule 15(a) of the Federal Rules of Civil Procedure, leave to amend "shall be freely given when justice so requires," bearing in mind "the underlying purpose of Rule 15 to facilitate decisions on the merits, rather than on the pleadings or technicalities." Lopez, 203 F.3d at 1127 (alterations omitted). The Court may deny leave to amend due to "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [and] futility of amendment." *See* Leadsinger, 512 F.3d at 532.

In the instant case, the **[**97]** Court's April 22, 2015 order dismissed Plaintiffs' claims as untimely and noted that "the complaint is largely bereft of *any* dates or details with regards to Oracle's specific conduct." *See* Garrison, 2015 U.S. Dist. LEXIS 53653, 2015 WL 1849517, at *9. The Court's April 22, 2015 order stated that "failure to cure the deficiencies identified in this Order will result in a dismissal with prejudice." *Id.* Plaintiffs then filed a first amended complaint on May 28, 2015, ECF No. 102, and the SAC on June 5, 2015, ECF No. 105. The SAC has failed to cure the timeliness deficiencies—even after Plaintiffs had months of discovery, received all of the documents that Oracle **[*1085]** produced to DOJ during the DOJ investigation, filed an opposition to the motion to dismiss, submitted additional evidence in a procedurally improper ex parte motion, and filed two supplemental briefs. The Court finds that permitting further amendment would be futile. The Court also finds that giving Plaintiffs yet another opportunity to amend their complaint to address the statutes of limitations would cause undue delay and would unduly prejudice Oracle by requiring Oracle to file repeated motions to dismiss. Therefore, the Court's dismissal of Plaintiffs' SAC is with prejudice. *See* Leadsinger, 512 F.3d at 532.

IV. [**98] CONCLUSION

For the foregoing reasons, the Court GRANTS Oracle's motion to dismiss with prejudice.

IT IS SO ORDERED.

Dated: February 2, 2016

/s/ Lucy H. Koh

LUCY H. KOH

United States District Judge

[EDITOR'S NOTE: The following court-provided text does not appear at this cite in F. Supp. 3d.]

[*none] JUDGMENT

The Court has dismissed the Second Amended Complaint with prejudice. Accordingly, the Clerk of the Court shall enter judgment in favor of Defendant. The Clerk shall close the case file.

IT IS SO ORDERED.

Dated: February 2, 2016

/s/ Lucy H. Koh

LUCY H. KOH

United States District Judge

In re Processed Egg Prods. Antitrust Litig.

United States District Court for the Eastern District of Pennsylvania

February 2, 2016, Decided; February 3, 2016, Filed

No. 08-md-2002

Reporter

2016 U.S. Dist. LEXIS 12604 *; 2016-1 Trade Reg. Rep. (CCH) P79,486; 2016 WL 410279

IN RE: PROCESSED EGG PRODUCTS ANTITRUST LITIGATION; THIS DOCUMENT APPLIES TO: ALL DIRECT PURCHASER ACTIONS

Subsequent History: Motion granted by, Class certification granted by, Settled by, in part *In re Processed Egg Prods. Antitrust Litig., 2016 U.S. Dist. LEXIS 85853 (E.D. Pa., June 30, 2016)*

Prior History: *In re Processed Egg Prods. Antitrust Litig., 312 F.R.D. 171, 2015 U.S. Dist. LEXIS 152967 (E.D. Pa., 2015)*

Core Terms

eggs, conspiracy, shell, purchasers, predominate, class certification, alleged conspiracy, prices, cage, antitrust, producers, questions, damages, lawsuit, legislative scheme, class issue, conspirators, memorandum, effective, briefing, subclass, supplemental briefing, terminated, entities, changes, cut-off, factors, parties

Counsel: **[*1]** For Sandra A. Jeskie, Special Master: SANDRA A. JESKIE, LEAD ATTORNEY, DUANE, MORRIS LLP, Philadelphia, PA USA.

Judges: GENE E.K. PRATTER, United States District Judge.

Opinion by: GENE E.K. PRATTER

Opinion

MULTIDISTRICT LITIGATION

MEMORANDUM

PRATTER, J.

I. INTRODUCTION

In September 2015, the Court granted in part the Motion for Class Certification by a putative class of direct purchasers of eggs ("Direct Purchaser Plaintiffs"—referred to frequently as "Plaintiffs" in this memorandum) who alleged that the nation's major egg producers conspired to control and limit the supply of eggs in order to increase egg prices. *In re Processed Egg Products Antitrust Litig., 310 F.R.D. 134, 2015 WL 5610834 (E.D. Pa. 2015)*, opinion amended and superseded by *In re Processed Egg Products Antitrust Litig., No. 08-MD-2002, 312 F.R.D. 171, 2015 U.S. Dist. LEXIS 152967, 2015 WL 7067790 (E.D. Pa. Nov. 12, 2015)* (hereinafter "*Class Cert. I* at __").[1] The Court granted the Plaintiffs' motion as to a subclass of purchasers of shell eggs and denied as to a subclass of purchasers of egg products. *Class Cert. I, 2015 U.S. Dist. LEXIS 152967, [WL] at *29*. At that time, however, the Court required additional briefing in order to determine the appropriate cut-off date for the shell egg class. Both the Direct Purchaser Plaintiffs and the Defendants submitted simultaneous briefing on October 16, 2015. (Doc. Nos. 1333 & 1334). The Court has reviewed this briefing, **[*2]** as well as the record excerpts submitted by both sides, and now returns to address the limited issue of the proper cut-off date for the Direct Purchaser Plaintiff Shell Egg Class.

For the reasons outlined below, the Court holds that the proper cut-off date for the Shell Egg Class is December 31, 2008.

II. DISCUSSION

A summary of the relevant factual background and the class certification standard under *Rule 23* appears, in detail, in the Court's *Class Cert I* opinion. It is not necessary to rehash that information here, except to the extent that specific issues may bear upon the Court's holding.

The parties were asked to provide support for the length of their respective proposed class periods for the shell egg class. *Class Cert I., 2015 U.S. Dist. LEXIS 152967, [WL] at *29*. Having reviewed the submissions, the Court perceives that the parties appear to dispute two specific issues: (1) whether the record supports an inference that the conspiracy continued after the lawsuit was filed in 2008 and (2) whether the impact of certain **[*3]** events which took place after 2008 would prevent issues of fact and law common to the class to continue to predominate over individual issues. Given the Court's holding in *Class Cert I* analyzing the *Rule 23* factors, and given the limited scope of the apparent dispute as to the class period, the Court will incorporate its analysis from the prior opinion and address only these two disputed issues in determining the proper length of the class period.

1. Length of Conspiracy

The alleged conspiracy to increase egg prices artificially by reducing the supply of shell eggs came to light in late 2008. Def. Memo at 1 (Doc. No. 1333); *see* John R. Wilke, *Federal Prosecutors Probe Food-Price Collusion*, Wall Street Journal, Sept. 23, 2008 at A1. The Plaintiffs contend, however, that the Defendants continued to conspire, even in the face of numerous lawsuits, until at least December 31, 2013. Pl. Memo at 2 (Doc. No. 1334).

The Plaintiffs' position is that, once a conspiracy has been shown to exist, each participant's involvement in the conspiracy continues until such time as the participant can prove it has withdrawn. Each participant seeking to prove withdrawal must show that he or she "took affirmative action **[*4]** to defeat or disavow the purpose of the conspiracy" and without such action "liability continues for all action in furtherance of the conspiracy by other conspirators." Pl. Memo at 6 (citing *United States v. Cont'l Grp., 603 F.2d 444, 466-67 (3d Cir. 1979)*; *United States v. Mayes, 512 F.2d 637, 642 (6th Cir. 1975)*; *United States v. Brown, 332 F.3d 363, 374 (6th Cir. 2003))*. The Plaintiffs argue that the evidence presented by the Defendants in conjunction with their opposition to the class certification motion fails to show any such affirmative withdrawal. Consequently, they argue, the Court must assume the conspiracy continued even long after the lawsuit was filed.[2]

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[1] The Court filed an Amended Memorandum and Order on November 12, 2015 (Doc. Nos. 1346 & 1347) to correct certain typographical errors. This Amended Memorandum and Order did not alter the substance of the Court's earlier ruling.

[2] The Plaintiffs, in their supplemental briefing, cite to a number of cases for support of this argument. In *United States v. Con'l Grp.*, the Third Circuit Court of Appeals held that evidence of certain competitive activity among alleged co-conspirators does not prevent the court from finding the existence of a conspiracy. *603 F.2d at 467* (citing *United States v. Socony-Vacuum Oil Co.,*

At this stage of the litigation, the Court need not delve into determining whether **[*5]** any of the Defendants have adequately shown they are entitled to an affirmative defense of withdrawal, or whether a conspiracy has been proven to actually exist. *See Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 131 S. Ct. 2541, 2551, 180 L. Ed. 2d 374 (2011)*. Rather, the task is to determine whether the requirements of *Rule 23* have been satisfied and, by extension, whether proof of the existence of the alleged conspiracy after 2008 is a question appropriate for class treatment. While the rigorous analysis required under *Rule 23* will frequently require some overlap with the merits of the underlying claim (thus challenging judicial line-drawing capacities), the Court is prohibited from engaging in a "free-ranging" merits inquiry and should consider merits questions at this stage only to the extent they are relevant to determining whether the prerequisites of class certification have been met. *See Class Cert I, 2015 U.S. Dist. LEXIS 152967, [WL] at *3*; *Wal-Mart, 131 S. Ct. at 2551, n. 6*; *Amgen Inc. v. Connecticut Ret. Plans & Trust Funds, 133 S. Ct. 1184, 1194, 185 L. Ed. 2d 308 (2013)*. The focus of the *Rule 23* analysis is determining the existence of common *questions*, rather than determining the answers to those questions. *In re Linerboard Antitrust Litig., 305 F.3d 145, 152 (3d Cir. 2002)* ("[A]t the class certification stage, 'the Court need not concern itself with whether Plaintiffs can prove their allegations regarding common impact; the Court need only assure itself that Plaintiffs' attempt to prove their allegations will predominantly involve **[*6]** common issues of fact and law.'") (quoting *Lumco Indus., Inc. v. Jeld-Wen, Inc., 171 F.R.D. 168, 174 (E.D. Pa. 1997))*.

In order to determine whether there are such common questions, the Court must analyze the relevant elements of the underlying offense which the plaintiff would need to establish in order to prove the existence of an antitrust conspiracy post-2008. *See Amgen, 133 S. Ct. at 1195*. "The gist of the crime of conspiracy to violate the Sherman Act is the agreement itself." *United States v. U.S. Gypsum Co., 600 F.2d 414, 417 (3d Cir. 1979)*. To determine whether the scope of a conspiracy is continuing, one must look to whether the agreement allegedly entered into "contemplates bringing to pass continuous results that will not continue without the continuous cooperation of the conspirators to keep it up." *Id.* (citing *United States v. Kissel, 218 U.S. 601, 607, 31 S. Ct. 124, 54 L. Ed. 1168 (1910)*. A conspiracy "to maintain high and stable prices" has been found to satisfy that requirement. *Id.*

The Third Circuit Court of Appeals' *Gypsum* decision is instructive. There, the appeals court considered whether the United States could establish the existence of a continuing antitrust conspiracy to fix the price of gypsum. The conspiracy itself was alleged to have started prior to the relevant statute of limitations cut-off but then to have continued into the statutory period. *600 F.2d at 417*. The Court ultimately determined that there were **[*7]** sufficient acts in furtherance of the conspiracy during the statutory period to allow a jury to conclude the conspiracy continued in the statutory period. *Id. at 418*. The Court noted that "there is no requirement that the Government prove a new agreement in the statutory period." *Id. at 418*.

As in *Gypsum*, the object of the Defendants' alleged conspiracy here was to maintain high and stable prices of shell eggs. *See* Direct Purchaser Plaintiffs' Memorandum in Support of Motion for Class Certification, 9-12 (May 30, 2014) (Doc. No. 979) (hereinafter "Motion for Class Cert. at __"). In order to accomplish this, the participants are alleged to have agreed to suppress egg production through a variety of means, including the UEP Certified Program. Motion for Class Cert. at 16. The Plaintiffs argue (and Defendants do not dispute) that the UEP Certified Program continued after the lawsuit at issue was filed in 2008. Pl. Memo at 6; Def. Memo at 6. Despite the fact that the Court did not require fact discovery after 2008, the Plaintiff's briefing and exhibits do indicate that the UEP Certification program continued through 2013 and included the same types of instrumentalities as are alleged to have characterized the **[*8]** conspiracy pre-2008. *See* Animal Husbandry Guidelines for U.S. Egg Laying Flocks, 2014 Edition, United Egg Producers.[3] As this Court pointed out in its prior opinion, the Plaintiffs have shown that the existence and impact of the instrumentalities of the conspiracy can be issues appropriate for class certification. *See Class Cert I, 2015 U.S. Dist. LEXIS 152967, [WL] at *10-11*. The Defendants here have provided no basis for arguing that the question of the existence of a conspiracy or the implementation of the UEP Certified Program, post-2008, cannot be treated on a class wide basis.

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310 U.S. 150, 225 n.59, 60 S. Ct. 811, 84 L. Ed. 1129 (1940)). Similarly, the mere cessation by a co-conspirator of activity in furtherance of the conspiracy is not sufficient to establish withdrawal. *Id.* Withdrawal is an affirmative defense, and the defendant must prove that it "took affirmative action to defeat or disavow the purpose of the conspiracy." *Id. 466*.

[3] Attached as Exhibit 1 to Doc. No. 1334 (filed under seal).

The Defendants' principle counter argument revolves around the assertion that the initiation of the lawsuit in 2008 fundamentally altered the nature of the conspiracy.[4] Def. Memo at 7. The Defendants argue that "a conspiracy should not be presumed to continue when the surrounding circumstances have changed significantly. Def. Memo at 7 (citing Areeda & Hovenkamp, ***Antitrust Law****: An Analysis of Antitrust Principles and Their Application* at ¶ 1421b3, 164 (3d ed. 2010)). Absent secrecy, they argue, no such conspiracy could have survived.

As a preliminary matter, while an antitrust conspiracy's success frequently depends **[*10]** upon the conspirators' ability to conceal the conspiracy itself, secrecy is not an element of the antitrust claim and the Defendants do not provide any authority that the initiation of a lawsuit, without more, is sufficient to terminate a conspiracy. *See In re Magnesium Oxide Antitrust Litig., No. CIV. 10-5943 DRD, 2011 U.S. Dist. LEXIS 121373, 2011 WL 5008090, at *21 (D.N.J. Oct. 20, 2011)* (citing *In re Aspartame Antitrust Litig., No. 06-1732, 2007 U.S. Dist. LEXIS 16995, 2007 WL 5215231, at *5 (E.D.Pa. Jan.18, 2007)* and *In re Mercedes—Benz, 157 F. Supp. 2d at 372*). The simple fact that the conspiracy was uncovered in 2008 would not prevent the Court from finding that the conspiracy continued post-2008 for purposes of class certification.

The Court also finds that the parties have failed to establish that the initiation of the lawsuit in 2008 alone constitutes a sufficiently significant changed circumstance in order to justify holding that the conspiracy necessarily terminated at that point. Professors Areeda and Hovenkamp, cited in the Defendants' brief, note that some positive evidence of abandonment is necessary to find that an antitrust conspiracy had ceased. Def. Memo at 7; *see* Areeda & Hovenkamp, *supra.* And while Professors Areeda and Hovenkamp suggest that in certain instances significant changes to the circumstances of the conspiracy can create **[*11]** the presumption that an ongoing conspiracy, once proven, has terminated, they do not propose a rule that is applied. Indeed, they note that in any event such circumstances would need to be "very significant." *See* Areeda & Hovenkamp, *supra; Basle Theatres, Inc., v. Warner Bros. Pictures Distributing Corp., 168 F. Supp. 553 (W.D. Pa. 1958)*.

In *Basle*, the exemplar case that Areeda and Hovenkamp describe in their treatise, the court held that a variety of changes to the motion pictures market over the course of an alleged 20-year conspiracy among Pittsburgh-area film distributors to maintain a uniform system of movie first runs did not serve to create a presumption that the conspiracy had terminated. *Basle, 168 F. Supp. at 558*. These changes in the market included increases in admission prices at Pittsburgh area theaters, increases in the length of time movies were shown during initial runs, the prices of films, closures of certain theaters, population shifts in the area, declines in theater attendance, and even one of the defendants leaving the industry altogether. *Id.*

The Defendants here have not articulated why the post-2008 events would have sufficiently altered the market or the conspiracy so as to create a presumption that the conspiracy terminated in 2008 for purposes of the *Rule 23* analysis.

This, however, does not end the analysis. Even **[*12]** if common evidence can show the continued existence of the alleged conspiracy, the Plaintiffs must also establish that issues of fact or law applicable to their proposed shell egg subclass predominate over individual issues after 2008.

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[4] The Defendants also argue that the Plaintiffs are unable to rely on record **[*9]** evidence to support the existence of a conspiracy extending past 2008. The lawsuits which make up this current multidistrict litigation were filed at the end of 2008. In 2009, the Court issued a case management order which relieved the parties of an obligation to preserve documents generated after December 31, 2008 pending the parties' joint proposal regarding preservation of documents. (Doc. No. 24). The parties attempted to provide a joint proposal as to their respective preservation obligations, but ultimately this proved unsuccessful and the Court appointed a special master to review the parties' respective positions and issue a report and recommendation. (Doc. No. 63). This was filed on March 9, 2009 (Doc. No. 71) and subsequently adopted (Doc. No. 83). The report stated that the parties had no obligation to preserve records created before January 1, 1999 and after December 31, 2008. (Doc. No. 83 at 9.) In 2013, however, the parties agreed to exchange post-2008 transactional data and supplement it on an ongoing basis. (Doc. No. 829). This data was used by Dr. Rausser in his model, discussed *infra.*

2. Predominance Post-2008

At the class certification stage, it is the plaintiff's burden to show that all the requisite elements of *Rule 23* have been met. *In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 311 (3d Cir. 2008)*, *as amended* (Jan. 16, 2009). The Court has already found that the Plaintiffs have put forward sufficient evidence to establish the requisite elements of *Rule 23* for the shell egg subclass for the period 2004 through 2008. *See* *Class Cert I, 2015 U.S. Dist. LEXIS 152967, [WL] at *25*. The Plaintiffs' argument in their supplementary memorandum is that the analysis applicable to evaluating the class from 2004 through 2008—principally the analysis of Dr. Rausser—is equally applicable post-2008. For the reasons discussed above, the Court does not disagree that common evidence conceivably could show the existence of a conspiracy existing after 2008. The Defendants, however, have raised two issues in their supplemental memorandum disputing predominance of class issues after 2008.

First, the Defendants argue that certain Plaintiffs continued to purchase UEP Certified Eggs after **[*13]** they became aware of the alleged conspiracy and, in certain circumstances, even *required* any eggs they purchased be UEP Certified. The Defendants argue that the fact that Plaintiffs continued to purchase UEP eggs after the conspiracy came to light compels the Court to engage in an individual analysis of the motivations of these Plaintiffs and that such an individualized inquiry would overwhelm any common class issues. The Court, however, does not find these arguments, in and of themselves, compelling.

As noted above, a plaintiff's ignorance or awareness of the existence of a conspiracy is not an element that need be proven in order to establish that conspiracy's existence. *See generally* *Angelico v. Lehigh Valley Hosp., Inc., 184 F.3d 268, 275 (3d Cir. 1999)* (listing the elements of a *Section 1* violation under the rule of reason test). To the extent that the Defendants argue that their liability for post-2008 purchases depends in some way upon a determination of the Plaintiffs' awareness of the conspiracy—and in turn that this defeats predominance—they are mistaken as to the requirements of the law.

On the other hand, however, the fact that certain Plaintiffs *required* UEP Certified eggs during the 2008 to 2013 period, could raise individualized issues of fact or **[*14]** law as to whether those Plaintiffs suffered cognizable antitrust injuries. *See* Def. Memo at 10 (Doc. No. 1333) (citing *Columbia Broad. Sys. Inc., v. Am. Soc. of Composers, Authors & Publishers, 620 F.2d 930, 936 (2d Cir. 1980)* (noting that in the context of non-per se violations of *§1 of the Sherman Act*, customer preference in favor of an allegedly trade-restraining practice may indicate no violation)). The factual showing by the Defendants, however, is somewhat thin. For example, the Defendants' briefing has not provided the Court with any indication of how many Plaintiffs had such requirements. *See* Def. Memo at 6. In fact, the brief references only a single instance where Plaintiff Purchasers affirmatively required UEP Certified eggs over cheaper alternatives post-2008. *See* Def. Memo at 9.

The fact that certain Plaintiffs may have required producers supply them with UEP certified eggs does not, on its own, alter the underlying nature of the conspiracy or its alleged impact on supply and prices. *Rule 23(b)(3)* contemplates that certain individual issues may exist among class members, despite a court finding that class issues predominate. *See* *Neale v. Volvo Cars of N. Am., LLC, 794 F.3d 353, 371 (3d Cir. 2015)* ("[T]he presence of individual questions does not per se rule out a finding of predominance."); 7AA Fed. Prac. & Proc. Civ. § 1778 (3d ed.) (explaining that the Court may find **[*15]** that class issues predominate even if certain issues remain to be tried separately or individual affirmative defenses exist). At this point, the Defendants have merely raised the possibility that a subset of one of the Plaintiff's damages may need to be reduced to account for the fact that this Plaintiff may not have suffered antitrust injury for the entire conspiracy period. "Although the calculation of individual damages is necessarily an individual inquiry, the courts have consistently held that the necessity of this inquiry does not preclude class action treatment where class issues predominate." *In re Cmty. Bank of N. Virginia, 418 F.3d 277, 305-06 (3d Cir. 2005)*; *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions, 148 F.3d 283, 315 (3d Cir. 1998)* (citing *Eisenberg v. Gagnon, 766 F.2d 770, 786 (3d Cir.1985))* ("While individual questions may arise during the course of this litigation, we agree with the district court that the presence of individual questions does not per se rule out a finding of predominance. In particular, the 'presence of individual questions as to the reliance of each investor does not mean that the common questions of law and fact do not predominate.'") In light of the Court's analysis in *Class Cert I*, the Court cannot conclude that this argument by the Defendants, on its own, defeats a finding that class issues predominate post-2008.

There is another—and in **[*16]** the Court's view, more compelling—issue raised by the Defendants in their supplemental briefing, however. Defendants argue that, starting in 2008, state regulatory regimes governing cage space limitations began to be implemented in certain egg producing states.[5] The existence of such regulatory regimes would have an impact on the ability of Dr. Rausser's model to accurately calculate damages for the entire class, should the Court extend the class through 2013, as Dr. Rausser would contend.

In *Class Cert I*, the Court analyzed whether Dr. Gordon Rausser's damages model supported a finding that class issues predominate with respect to whether the alleged conspiracy had an impact on all members of the shell eggs subclass and consequently whether the requirements of *Rule 23(b)(3)* had been satisfied. Ultimately, the Court determined that the Plaintiffs could use common evidence to demonstrate that "(a) Defendants made efforts to reduce the supply of eggs and thereby raise the price of eggs; (b) the egg market was structured so that the alleged conspiracy to restrict the supply of eggs, if successful, would have caused all, or virtually all, Direct Purchaser Plaintiffs to pay higher prices than they would have absent the conspiracy; and (c) the conspiracy was successful in raising prices." *Class Cert I, 2015 U.S. Dist. LEXIS 152967, [WL] at *9*. Based upon its review of Dr. Rausser's model, the Court found that the **[*18]** Plaintiffs could show, using evidence common to the class, that shell egg prices were higher as a result of the conspiracy than they would have been otherwise. *Class Cert I, 2015 U.S. Dist. LEXIS 152967, [WL] at *16*. In order to show this, Dr. Rausser, performed a regression analysis where he attempted to identify, and control for, all the relevant factors influencing the price of shell eggs over time. Having done so, he determined that the amount of price increases he was unable to control for were the result of the alleged conspiracy. *Class Cert I, 2015 U.S. Dist. LEXIS 152967, [WL] at *16-17*. In *Class Cert I*, we noted that the Defendants had not "quibbled" with the logic of Dr. Rausser's theory. *Class Cert I, 2015 U.S. Dist. LEXIS 152967, [WL] at *17*. Rather, they argued that under *Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1428, 185 L. Ed. 2d 515 (2013)*, the Plaintiffs must first show the decrease in egg production and then measure this decrease on the price of eggs.

Given the arguments raised by the Defendants regarding Dr. Rausser, in *Class Cert I* the Court analyzed the requirement of *Comcast* in detail in order to determine whether Dr. Rausser's model sufficiently measured the extent to which the alleged conspiracy caused an antitrust impact on all the alleged class members. *Class Cert I, 2015 U.S. Dist. LEXIS 152967, [WL] at *17*. The Court ultimately determined that Dr. Rausser's model proposed in this matter was distinguishable from the model at issue in *Comcast*—specifically **[*19]** because none of the pre-2008 modes of conduct challenged by the Defendants here were alleged to be lawful. *2015 U.S. Dist. LEXIS 152967, [WL] at *18*. The Court noted, however, that Dr. Rausser could face a *Comcast* problem if "(a) certain conduct [was] found to have occurred; and (b) that conduct had an impact on the price of eggs; but (c) that conduct was not legally cognizable vis-à-vis the class." *2015 U.S. Dist. LEXIS 152967, [WL] at *18 n. 15*.

While the Court found no *Comcast* problem as to the pre-2008 class, the Defendants' supplemental briefing in opposition to class certification appears to have raised such an issue with regards to the post-2008 conspiracy. Def. Motion Opposing Class Cert at 3-4 (Doc No. 1333). The Defendants argue that from December 2008 onward, a number of different egg producing states passed legislation which had the effect of legislating minimum cage size

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[5] While this issue was alluded to in the initial briefing, the Court did not incorporate it into the analysis of the class pre-2008 because there did not appear to be any substantial regulatory regimes in place. The Defendants' initial round of briefing regarding class certification only made reference to legislation passed in California in 2008. Def. Memo Opposing Class Cert at 34 (citing prop 2, *Cal Health & Safe Code Ann. 25990*). Notably, however, this argument focused on challenging the adequacy of Dr. Rausser's model to show the conspiracy's impact on the egg market. Given this single example, the Court did not find that Dr. Rausser's failure to incorporate it into his model was sufficient to defeat predominance. *Class Cert I, 2015 U.S. Dist. LEXIS 152967, [WL] at *21, n. 17*. The Defendants' **[*17]** supplemental briefing on this issue, however, is substantially more comprehensive as to post-2008 legislative action and indicates that multiple state legislatures were pursuing—and implementing—separate legislative schemes regarding laying hen welfare which would have had the effect of reducing the size of flocks. Def. Memo at 7.

requirements. The Defendants, in their supplemental briefing, have pointed to at least four separate state legislative schemes that were on the books between 2008 and 2013 which provided minimum cage space requirements for eggs either produced or sold in state. The Defendants have also pointed to one additional state—California—which was phasing in cage space requirements during this period. This presents **[*20]** a substantially different question vis-à-vis predominance post 2008 than what was discussed in the Defendants' initial round of briefing.

The Defendants' have identified the following state legislative schemes germane to this issue. In 2009, Arizona became the first state to require compliance with UEP guidelines, followed in 2012 by Oregon and Washington. *See* *Arizona Admin. Code § R3-2-907* (effective Oct 2009); *Or. Rev. Stat § 632.840(1)(c)* (effective Jan. 2012) and *Or. Admin R. 603-018-0005-0010* (2012); *Wash. Rev Code § 69.25.065 (1)(a)* (effective Aug. 2012). In 2011, Ohio, the second largest egg producing state, formally enacted a moratorium on the construction of new egg production facilities housing layers in battery cages, *Ohio Admin. Code 901:12-9-03 (F)(6)* (effective September 2011), required farms provide 57 square inches per laying hen and prohibited food-withdrawal molting, Ohio Admin Code 901:12-9-03(C) (effective September 2011). Finally, in 2008, California passed Proposition 2, which prohibited any cage which prevented hens from "[l]ying down, standing up, and fully extending [their] limbs" or "turning around freely." This requirement had an effective date of January 2015. Legislation passed in 2010 extended the Prop 2 requirement to all eggs sold within California. Michigan passed similar restrictions on eggs produced in-state in **[*21]** 2009. *Mich. Comp. Laws § 287.746(2)* (passed October 2009; effective March 31, 2010).

The significance of such legislation to the class certification analysis was previewed in the Court's discussion of *Comcast* in *Class Cert I*. *See* *2015 U.S. Dist. LEXIS 152967, [WL] at *18 n. 15*. The Court found that there was no indication that the Defendants engaged in conduct which had an impact on the price of eggs but which was not legally cognizable vis-à-vis the class prior to 2008. The existence, however, of multiple state legislative schemes in place after 2008, mandating producers impose cage-space limitations, would create the possibility that the effect of the Defendants' conduct post-2008 could not be measured using Dr. Rausser's proposed model.

As a preliminary matter, the existence of multiple state legislative schemes impacting a proposed class is certainly a means of defeating predominance. *See e.g.* *Amchem Products, Inc. v. Windsor, 521 U.S. 591, 624, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)*. Typically, however, the significance of such multiple schemes relates to choice of law questions, such as when a proposed class involves application of state law to claims of members from a number of different jurisdictions. *See* Newberg on Class Actions § 4:61 (5th ed.). While the Court here does not face a choice of law problem, the existence of multiple state legislative **[*22]** schemes in place between 2008 and 2013 could have had the effect of decreasing flock size, but for reasons unrelated to the conspiracy. The Defendants argue that such issues would operate to reduce supply in a manner indistinguishable from the effect of the UEP guidelines. Dr. Rausser's model, however, does not control for the impact of state legislative schemes on the impact of egg prices post-2008.

Dr. Rausser performed a regression analysis using the Defendants' transactional data from February 1997 to December 2013 to measure the effect of anticompetitive behavior on the price of shell eggs. Rausser Report at 91. He concluded that the price of shell eggs between September 2000 and December 2013 was "significantly elevated" due to the anti-competitive behavior of the Defendants. In order to discern this correlation, he employed the concept of "ceteris paribus" or "holding all other relevant factors fixed" in order to determine the relation between the hypothesized causal variable and the effect. *See* Rausser Report at 88, n. 312. The salient factors which he identified included "product characteristics, product packaging, supply costs, customer size, custom type, brand label, and **[*23]** seasonability." Rausser Report at 82-83. Based upon his analysis, Dr. Rausser determined that between 65% and 66% of the price variability of shell eggs could be attributed to changes in these identified variables. *Id.* at 84. The other 34% to 35% of price variation, Dr. Rausser concludes, must be due to the supply reducing behavior of the conspirators.

This model does not, however, account for changes in regulatory requirements imposed by state governments upon producers. As discussed above, these began to be passed in 2008. While Dr. Rausser's decision to leave out a variable to account for state regulatory activity may not have impacted his regression analysis for the period between 2000 and 2008, his decision presents a problem for the Court when attempting to apply his analysis to the period from 2008 to 2013. As in *Comcast*, the Plaintiffs here would only be entitled to recover damages resulting from the antitrust impact of the alleged conspiracy. *Comcast, 133 S.Ct. at 1433*. Once states began passing regulations imposing cage space limits on producers, it can no longer be said definitively that the 34% to 35% of price variation Dr. Rausser cannot control for using his common factors analysis, must be attributed to **[*24]** conspiratorial behavior. The model fails to specify, after 2008, what component of the alleged price increase is attributable to unlawful antitrust behavior as opposed to imposition of lawful state regulatory schemes. In much the same way the Supreme Court found impermissible in *Comcast*, the price variance Dr. Rausser attributes to the conspiracy intermingles lawful and unlawful behavior between 2008 and 2013. *See id. at 1434*.

For this reason, the Court finds that while the Plaintiffs have established that the Rausser Model is capable of quantifying the damages attributable to Defendants' anticompetitive behavior for 2004 through 2008, the model cannot adequately quantify damages for 2009 through 2013.

III. CONCLUSION

For the reasons outlined above, the Court finds that the Rausser Model fails to take into account the effect of state legislative schemes instituted after the lawsuit was filed which regulate animal welfare standards in the shell egg industry. Given that the Rausser Model cannot reliably show damages resulting from the alleged conspiracy on a class wide basis after December 31, 2008, the Court finds that the proper class cutoff date for the shell egg subclass is December 31, 2008.

[*25] Therefore, based upon the reasoning articulated in *Class Cert I*, as well as the reasoning articulated above, the Court will certify the following class of shell egg purchasers:

> All individuals and entities that purchased shell eggs produced from caged birds in the United States directly from Defendants during the Class Period from September 24, 2004 through December 31, 2008.
> Excluded from the Class are the Defendants, their co—conspirators, and their respective parents, subsidiaries, and affiliates, as well as any government entities. Also excluded from the Class are purchasers of "specialty" shell eggs (such as "organic," "certified organic," "free range," "cage free", "nutritionally enhanced," or "vegetarian fed") and purchasers of hatching eggs, which are used by poultry breeders to produce breeder stock or growing stock for laying hens or meat.

* * *

An appropriate Order follows.

BY THE COURT:

/s/ Gene E.K. Pratter

GENE E.K. PRATTER

United States District Judge

MULTIDISTRICT LITIGATION

ORDER

AND NOW, this 2nd day of February, 2016, upon consideration of Direct Purchaser Plaintiffs' Motion for Class Certification (Doc. No. 978), the Court's Memorandum and Order Granting the Motion for Class Certification in Part and Denying the Motion in Part and directing the parties to submit supplemental briefing **[*26]** addressing the appropriate length of the shell egg class (Doc. Nos. 1324 & 1325), as well as the supplemental briefing submitted by the parties (Doc. Nos. 1333 & 1334), it is **hereby ORDERED** that:

1. The following class of shell egg purchasers is hereby certified pursuant to *Federal Rule of Civil Procedure 23(a)* and *23(b)(3)*:

All individuals and entities that purchased shell eggs produced from caged birds in the United States directly from Defendants during the Class Period from September 24, 2004 through December 31, 2008.

Excluded from the Class are the Defendants, their co—conspirators, and their respective parents, subsidiaries, and affiliates, as well as any government entities. Also excluded from the Class are purchasers of "specialty" shell eggs (such as "organic," "certified organic," "free range," "cage free", "nutritionally enhanced," or "vegetarian fed") and purchasers of hatching eggs, which are used by poultry breeders to produce breeder stock or growing stock for laying hens or meat.

2. The following entities are hereby appointed as class representatives:

T.K. Ribbing's Family Restaurant, LLC;
John A. Lisciandro d/b/a/Lisciandro's Restaurant;
Eby-Brown Company LLC; and
Karetas Foods, Inc.

3. The following individuals are **[*27]** appointed as class counsel to the shell egg class:

Mindee J. Reuben, Lite DePalma Greenberg, LLC;
Michael D. Hausfeld, Hausfeld LLP;
Stanley D. Bernstein, Bernstein Liebhard LLP; and
Stephen D. Susman, Susman Godfrey LLP.

BY THE COURT:

/s/ Gene E.K. Pratter

GENE E.K. PRATTER

United States District Judge

Manitou N. Am. v. McCormick Int'l

Court of Appeals of Michigan

February 2, 2016, Decided

No. 324063

Reporter

2016 Mich. App. LEXIS 198 *; 2016-1 Trade Reg. Rep. (CCH) P79,521; 2016 WL 439354

MANITOU NORTH AMERICA, INC., Plaintiff-Counterdefendant-Appellant, v MCCORMICK INTERNATIONAL, LLC, Defendant-Counterplaintiff-Appellee.

Notice: THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Subsequent History: Motion granted by *Manitou N. Am., Inc. v. McCormick Int'l, LLC, 877 N.W.2d 724, 2016 Mich. LEXIS 686 (Mich., Apr. 25, 2016)*

Leave to appeal denied by *Manitou N. Am. v. McCormick Int'l, LLC, 500 Mich. 855, 883 N.W.2d 761, 2016 Mich. LEXIS 1732 (Sept. 6, 2016)*

Motion granted by *Manitou N. Am., Inc. v. McCormick Int'l, LLC, 885 N.W.2d 302, 2016 Mich. LEXIS 2040 (Mich., Sept. 29, 2016)*

Prior History: [*1] Ionia Circuit Court. LC No. 2007-025692-CZ.

Core Terms

telehandlers, counterclaim, sales, dealers, damages, manufactured, antitrust, telescopic, non-solicitation, trial court, per se violation, lost profits, remittitur, summary disposition, percent, marketplace, speculative, anticompetitive, customers, inventory, costs, exclusive territory, million in damages, authorized dealer, anti trust law, rule of reason, lost sales, competitors, award damages, Sherman Act

Judges: Before: OWENS, P.J., and MURPHY and HOEKSTRA, JJ.

Opinion

PER CURIAM.

Plaintiff Manitou North America, Inc. (Manitou NA), appeals as of right a judgment entered by the trial court, pursuant to a jury-trial verdict, awarding defendant McCormick International, LLC (McCormick), $1.3 million in damages on McCormick's counterclaim under the Michigan Farm and Utility Equipment Act (MFUEA), *MCL 445.1451 et seq.*, and $3.85 million in damages on McCormick's counterclaim under the Michigan Antitrust Reform Act (MARA), *MCL 445.771 et seq.* We affirm the verdicts to the extent that they found MFUEA and MARA violations, and we affirm the damage award with respect to the MARA violation. However, we vacate and remand for remittitur proceedings in regard to the damage award relative to the MFUEA violation, as it was based on an overly speculative claim of lost profits.

This case concerned the manufacture, distribution, and sale of telescopic handlers, or telehandlers, which look like forklifts and perform similar functions, but are more versatile in that they have a telescopic boom that can be extended forward and upward. Manitou NA distributed telehandlers designed and manufactured by its parent company, **[*2]** Manitou BF S.A. (Manitou France), to a network of dealers throughout the United States.[1] On October 19, 2000, McCormick and Manitou NA entered into a dealer marketing agreement, making McCormick an authorized dealer of Manitou NA products, including telehandlers. Pursuant to a side agreement dated October 24, 2000, which was signed by Mr. Denis McCormick[2] and Manitou NA's regional sales manager, McCormick became an exclusive dealer of Manitou telehandlers in a territory spanning the state of Michigan, northern Indiana, and the greater Toledo, Ohio area. Mr. McCormick testified at trial consistently with this document, as did Manitou NA's regional sales manager during his deposition, which was read into the trial record. Additionally, at summary disposition, McCormick presented an affidavit by a former dealer representative for Manitou NA who averred that "it was [his] understanding that McCormick had an exclusive territory for the sale of Manitou telescopic handler and forklift products comprised of Michigan, northern-Indiana and northwest-Ohio." With respect to the October 24, 2000 exclusivity or side agreement, it provided that "McCormick must achieve at least a 2 1/2 [percent] market **[*3]** share by the end of the year 2001 and increase sales by at least 10 [percent] each year after that." Mr. McCormick testified that sales and any increases were to be measured in terms of revenue generated by the sale of telehandlers. He further testified to having to commit to an initial purchase of 42 telehandlers from Manitou NA at a cost of $2 million.

There was evidence that McCormick achieved a market share of five percent in 2001, doubling the 2 1/2 percent requirement, on telehandler revenue of $1.69 million (profit of $404,375 after costs). In 2002, McCormick had telehandler revenue of only $755,780 (profit of $141,968 after costs), thereby failing to increase sales by at least 10 percent from the 2001 level and instead losing sales. In 2003, McCormick had telehandler revenue of $804,724 (profit of $160,063 after costs), which, while representing a small increase from 2002, was still less than half of the telehandler revenue generated in 2001. McCormick specifically attributed the decrease in sales in 2002 and 2003, as **[*4]** compared to those in 2001, to Manitou NA directly providing telehandlers to Osentoski Farm Equipment, Inc., in Bad Axe, Michigan,[3] and to a 2002 agreement between Manitou France and competitor OmniQuip. Under this agreement, OmniQuip began distributing certain Manitou telehandlers, described by Mr. McCormick as his "bread and butter" models, to OmniQuip dealers in Michigan who competed against McCormick. The arrangement between Manitou France and OmniQuip ended in 2004. In 2004, McCormick rebounded and had telehandler revenue of approximately $1.6 million (profit of $303,862 after costs). Mr. McCormick testified that sales in 2004 would have been higher and would have eclipsed the 10-percent mark, the base of which was set in 2001,[4] except that OmniQuip was clearing out its inventory and selling telehandlers at reduced prices. McCormick's counterclaim under the MFUEA was based on an alleged change in competitive circumstances, absent good cause, from those circumstances that existed under the 2000 McCormick-Manitou NA agreement, which change was caused, in part, by the improper deals with OmniQuip and Osentoski.[5]

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[1] Any reference to "Manitou" in this opinion encompasses both Manitou NA and Manitou France.

[2] Denis McCormick, along with his wife, Jane McCormick, owned McCormick.

[3] There was evidence showing that McCormick had been selling telehandlers to **[*5]** Osentoski at a lower than normal profit margin, with Osentoski then selling the telehandlers to consumers. McCormick viewed Osentoski as a sub-dealer of telehandlers. However, Osentoski subsequently began purchasing telehandlers directly from Manitou NA for resale, cutting McCormick out of the picture.

[4] Using the $1.69 million revenue figure from 2001 as the base, a 10-percent upward progression, had it been met, would have produced $1.85 million in revenue for 2002, $2.04 million in revenue for 2003, $2.24 million in revenue for 2004, $2.47 million in revenue for 2005, and $2.72 million in revenue for 2006. Mr. McCormick's testimony supported these calculations.

[5] *MCL 445.1457a(1)*, which is part of the MFUEA, provides, in pertinent part, that "[a] supplier shall not terminate, cancel, fail to renew, or substantially change the competitive circumstances of an agreement without good cause." Mr. McCormick testified that two or three other dealers were also apparently selling Manitou telehandlers within McCormick's exclusive territory.

In July 2004, an OEM Supply Agreement was executed by Manitou NA, Manitou France, and Gehl Company, forming a strategic alliance between Manitou and Gehl.[6] We shall discuss in **[*6]** detail below the substance of this agreement, which McCormick claimed violated the MFUEA by increasing telehandler competition against McCormick in its contracted-for exclusive territory via numerous Gehl dealers now being able to sell Manitou designed or manufactured telehandlers, while also preventing McCormick from purchasing and reselling Gehl telehandlers or acting as a Gehl dealer in violation of the MARA. In 2005, McCormick had telehandler revenue of nearly $2.3 million (profit of $442,328 after costs). However, Mr. McCormick testified that he still did not meet the 10-percent sales increase requirement (see footnote 4), that nearly half of its 2005 sales were permissibly made outside of McCormick's exclusive territory in response to Hurricane Katrina, and that there were actually significantly fewer telehandler sales in 2005 than in 2004 with respect to McCormick's exclusive territory, which reduction Mr. McCormick blamed on the 2004 OEM Supply Agreement.[7] And in 2006, McCormick had telehandler revenue of only $606,983 (profit of $186,050 after costs), which decrease was also attributed to the 2004 agreement. The 2004 agreement between Manitou NA, Manitou France, and Gehl served, **[*7]** in conjunction with the earlier OmniQuip deal and Osentoski arrangement, as additional support for McCormick's MFUEA counterclaim, and the 2004 agreement was the sole basis of McCormick's MARA counterclaim.

In early 2007, McCormick terminated the 2000 dealer agreement with Manitou NA, complaining about the negative impact of the 2004 OEM Supply Agreement on sales and the failure of support from Manitou NA in connection with telehandler parts, service, and pricing. **[*8]** In July 2007, Manitou NA filed suit against McCormick, seeking declaratory relief with regard to the parties' rights and obligations under the MFUEA, mainly on the question whether McCormick's inventory had to be repurchased by Manitou NA, and alleging breach of contract for nonpayment with respect to one telehandler that McCormick had acquired from Manitou NA in 2006.[8] In September 2007, McCormick filed its MFUEA counterclaim and, on leave to amend granted by the trial court, McCormick added the MARA counterclaim in September 2010.[9] The trial court entertained a slew of motions for summary disposition, denying most of them, and the case subsequently went to trial on McCormick's MFUEA and MARA counterclaims, where the jury found in favor of McCormick on both counts. Judgment on the jury verdict was later entered by the trial court on March 31, 2014. McCormick was awarded $1.3 million in damages on the MFUEA counterclaim, $3.85 million in damages on the MARA counterclaim, $175,980 in attorney fees, $73,469 in taxable costs, and $527,667 in judgment interest. The trial court denied Manitou NA's motions for new trial, judgment notwithstanding the verdict, and remittitur.

Manitou NA argues on appeal that McCormick's MARA counterclaim was time-barred, that the MARA counterclaim should have been analyzed under the rule of reason, that the MARA counterclaim failed as a matter of law given that McCormick did not adequately plead or prove an antitrust injury, that McCormick's evidence on damages should have been excluded as a discovery sanction, that the MFUEA lost-profit damages were too speculative to support the $1.3 million award, that there was no loss associated with the MARA counterclaim, and that the trial court, minimally, should have granted Manitou NA's post-trial motion for remittitur.

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[6] The agreement indicated that "Manitou France is a world-leading company in the field of designing, manufacturing and marketing telescopic handlers for the construction, agricultural and industrial markets, and Manitou N.A. is its subsidiary responsible for the distribution of such products in the US market." The agreement identified Gehl as "a leading company in the field of designing, manufacturing and marketing compact equipment, including telescopic handlers, for the construction and agricultural markets[.]" Gehl had hundreds more authorized dealers in the United States than Manitou.

[7] Mr. McCormick testified that it was in the second half of 2005 that the full implementation of the 2004 agreement started impacting his business.

[8] The breach of contract **[*9]** claim was eventually settled by the parties, and in November 2008, the trial court granted summary disposition in favor of Manitou NA on its request for declaratory relief, concluding that Manitou NA had no obligation under the MFUEA to repurchase inventory from McCormick.

[9] McCormick went out of business in 2008, allegedly due to the unlawful conduct and actions by Manitou NA.

We shall initially address Manitou NA's arguments that the MARA counterclaim should have been analyzed under the rule of reason and that it failed as a matter of law given that McCormick did **[*10]** not adequately plead or prove an antitrust injury. *MCL 445.772* provides, in pertinent part, that "[a] contract . . . between 2 or more persons in restraint of . . . trade or commerce in a relevant market is unlawful." A "person threatened with injury or injured directly or indirectly in his or her business . . . by a violation of [the MARA] may bring an action for . . . actual damages sustained by reason of a violation of this act, and, as determined by the court, interest on the damages from the date of the complaint, taxable costs, and reasonable attorney's fees." *MCL 445.778(2)*. *MCL 445.784(2)* states that "[i]t is the intent of the legislature that in construing all sections of [the MARA], the courts shall give due deference to interpretations given by the federal courts to comparable antitrust statutes, including, without limitation, the doctrine of per se violations and the rule of reason." Comparable to § 2 of the MARA (*MCL 445.772*), the Sherman Act, *15 USC 1 et seq.*, provides, in relevant part, that "[e]very contract . . . in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." *15 USC 1*. Accordingly, we must give due deference, in construing *MCL 445.772*, to federal court decisions interpreting *15 USC 1*.

In *United States v Topco Assoc, Inc, 405 U.S. 596, 607-608; 92 S Ct 1126; 31 L Ed 2d 515 (1972)*, the United States **[*11]** Supreme Court, construing *§ 1* of the Sherman Act, observed:

> The history underlying the formulation of the antitrust laws led this Court to conclude . . . that Congress did not intend to prohibit all contracts, nor even all contracts that might in some insignificant degree or attenuated sense restrain trade or competition. In lieu of the narrowest possible reading of *§ 1*, the Court adopted a "rule of reason" analysis for determining whether most business combinations or contracts violate the prohibitions of the Sherman Act. An analysis of the reasonableness of particular restraints includes consideration of the facts peculiar to the business in which the restraint is applied, the nature of the restraint and its effects, and the history of the restraint and the reasons for its adoption.
> While the Court has utilized the "rule of reason" in evaluating the legality of most restraints alleged to be violative of the Sherman Act, it has also developed the doctrine that certain business relationships are per se violations of the Act without regard to a consideration of their reasonableness. . . . .
>
> It is only after considerable experience with certain business relationships that courts classify them **[*12]** as per se violations of the Sherman Act. One of the classic examples of a per se violation of *§ 1* is *an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition. Such concerted action is usually termed a "horizontal" restraint*, in contradistinction to combinations of persons at different levels of the market structure, e.g., manufacturers and distributors, which are termed "vertical" restraints. This Court has reiterated time and time again that horizontal territorial limitations . . . are naked restraints of trade with no purpose except stifling of competition. Such limitations are per se violations of the Sherman Act. [Citations, quotation marks, and parenthetical omitted; emphasis added; final ellipsis in original.]

Here, the July 2004 OEM Supply Agreement between Manitou NA, Manitou France, and Gehl Company, as relevant to the MARA counterclaim, provided:

> Non-Solicitation. During the term of this Agreement and for a period of two years thereafter, neither party shall either solicit any then still authorized dealer that is handling products manufactured by the other party on the date of this Agreement to begin handling **[*13]** *competing telescopic handlers* manufactured by the former party or enter into any agreement under which such dealer would begin to do so; provided, however, that nothing herein shall preclude either party from entering into any such agreement with any authorized dealer that on the date of this Agreement is handling products manufactured by both of the parties. [Emphasis added.]

This contract provision clearly constituted a horizontal restraint on trade and per se violation of the MARA, entailing an agreement between manufacturers/distributors at the same level of the market structure not to compete against each other relative to certain telehandlers and particular dealers, including McCormick, which was a Manitou NA, but not a Gehl, authorized dealer, thereby reducing telehandler competition at various business sites. See *United States v Coop Theatres of Ohio, Inc, 845 F2d 1367, 1373 (CA 6, 1988)* ("In sum, we find that the so-called 'no-solicitation' agreement [between movie theater booking agents] . . . is undeniably a type of customer allocation scheme which courts have often condemned in the past as a *per se* violation of the Sherman Act.").[10] Accordingly, contrary to Manitou NA's argument, the rule of reason was not implicated in this case. However, establishment **[*14]** of a per se violation of the MARA does not mean that an antitrust injury was shown. In *Atlantic Richfield Co v USA Petroleum Co, 495 U.S. 328, 344; 110 S Ct 1884; 109 L Ed 2d 333 (1990)*, the United States Supreme Court held that proof of an antitrust injury and of a per se violation are distinct matters that must be established independently. The Court elaborated:

> Conduct in violation of the antitrust laws may have three effects, often interwoven: In some respects the conduct may reduce competition, in other respects it may increase competition, and in still other respects effects may be neutral as to competition. The antitrust injury requirement ensures that a plaintiff can recover only if the loss stems from a competition-*reducing* aspect or effect of the defendant's behavior. The need for this showing is at least as great under the *per se* rule as under the rule of reason. Indeed, insofar as the *per se* rule permits the prohibition of efficient practices in the name of simplicity, the need for the antitrust injury requirement is underscored. Procompetitive or efficiency-enhancing aspects of practices that nominally violate the antitrust laws may cause serious harm to individuals, but this kind of harm is the essence of competition and should play no role in the definition of antitrust **[*15]** damages. [*Id. at 343-344* (citation, quotation marks, and alteration bracket omitted).[11]]

To show an antitrust injury, a party must prove that the claimed loss flowed from an anticompetitive aspect of the contract or conspiracy, not aspects that were neutral or beneficial to competition, even if there was a per se violation of the antitrust laws. *Pool Water Prod v Olin Corp, 258 F3d 1024, 1034 (CA 9, 2001)*. "'It is well established that the antitrust laws are only intended to preserve competition for the benefit of consumers.'" *Id.* (citation omitted); see also *King Drug Co of Florence, Inc v Smithkline Beecham Corp, 791 F3d 388, 405 (CA 3, 2015)* ("***Antitrust law*** is designed to protect consumers from arrangements that prevent competition in the marketplace."). The antitrust laws were enacted to protect competition, not competitors. *Brunswick Corp v Pueblo Bowl-O-Mat, Inc, 429 U.S. 477, 488; 97 S Ct 690; 50 L Ed 2d 701 (1977)*.[12]

Manitou NA contends that McCormick failed to adequately allege an antitrust injury in its amended counterclaim. We disagree. In regard to its MARA restraint-of-trade counterclaim, McCormick alleged, in pertinent part, as follows:

> 47. At the time of the Agreement [2004 OEM Supply Agreement between Manitou and Gehl], Manitou sold telescopic handlers in Michigan.
>
> 48 At the time of the Agreement[,] Gehl sold or was preparing to sell telescopic handlers in Michigan.
>
> 49. At the time of the Agreement, McCormick was an authorized dealer of Manitou equipment, including telescopic handlers.
>
> 50. Through . . . the Agreement, Manitou and Gehl Corporation sought to restrain one another from entering into relationships with then existing authorized dealers of the other party.
>
> 51. As a direct result of the Agreement, McCormick was prohibited from becoming an authorized dealer or reseller of Gehl telescopic handlers.
>
> WHEREFORE, McCormick requests judgment in its favor and against Manitou for all damages allowable pursuant to the [MARA] . . . .

These allegations **[*17]** reflected a claim by McCormick that the 2004 agreement caused it to suffer an antitrust injury, given that the non-solicitation aspect of the agreement, which constituted a per se violation of the MARA and

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[10] Although *Coop Theatres* was a criminal case brought under the Sherman Act, the conclusion that the booking agents' "no-solicitation" agreement was a per se violation of *§ 1* of the Sherman Act would be equally applicable in the context of a civil action. The MARA also contains criminal penalties for violations of § 2 of the MARA. *MCL 445.779*.

[11] The jury here was instructed in accordance with the antitrust-injury principles enunciated in *Atlantic Richfield*.

[12] Given the precedent, we reject McCormick's argument, which does not allude to any **[*16]** supporting authority, that the relevant consumer or marketplace pertained to telehandler dealers, not consumers purchasing telehandlers from dealers.

was thus inherently anticompetitive, precluded McCormick from purchasing Gehl telehandlers and reselling them to patrons, resulting in MARA damages. Under the 2004 agreement, consumers seeking to purchase telehandlers who visited or made inquiries through either Manitou-only or Gehl-only authorized dealers were limited in their selection because of the non-solicitation component of the agreement that effectively allocated markets/dealers. For example, consistently with the agreement, if a prospective customer seeking a certain type of telehandler that was manufactured and distributed by both Manitou and Gehl ("competing telescopic handlers") went to a Gehl-authorized dealer, who was not authorized to also sell Manitou telehandlers, the customer would not be able to purchase a Manitou telehandler at that location; this would be reflective of reduced competition. And, here, McCormick's claimed injury, at least for purposes of its MARA claim, stemmed from this competition-reducing aspect **[*18]** of the 2004 agreement — Gehl telehandlers could not be purchased by McCormick and then resold to McCormick's patrons; McCormick could not become a Gehl dealer. This bar to having a business relationship with Gehl directly and negatively impacted McCormick's sales and its ability to survive in the marketplace. While perhaps McCormick's MARA counterclaim could have provided some further elaboration in describing the antitrust injury, the specific allegations that were included reasonably informed Manitou NA of the nature of the claim that Manitou NA was called on to defend. *MCR 2.111(B)(1)*.[13]

Manitou NA next contends that McCormick's MARA counterclaim should have been summarily dismissed because of a failure to submit documentary evidence sufficient to create a genuine issue of material fact relative to showing an antitrust injury. Manitou NA had argued that McCormick conceded at the summary disposition stage that the 2004 agreement injected additional competition into the marketplace. We initially take note of some relevant procedural history in this case. In September 2010, Manitou NA filed a motion for summary disposition with respect to McCormick's MARA counterclaim,[14] arguing, in part, that McCormick had failed to allege an antitrust injury, *MCR 2.116(C)(8)*. The trial court rejected that argument and denied the motion in March 2011. In May 2011, McCormick filed a motion for partial summary disposition, arguing that the 2004 Manitou-Gehl **[*20]** agreement constituted a per se horizontal restraint of trade in violation of the MARA and should be recognized as such as a matter of law. In response to McCormick's motion, Manitou NA argued that McCormick had conceded in answers to interrogatories, which were attached to Manitou NA's brief, that the 2004 agreement had increased competition in the marketplace to McCormick's detriment. We shall momentarily discuss the interrogatory answers. On the same day in May 2011 that McCormick filed its motion for partial summary disposition, Manitou NA filed a new motion for summary disposition relative to McCormick's MARA counterclaim, this time arguing under *MCR 2.116(C)(10)* that McCormick had failed to create a genuine issue of material fact in regard to showing an antitrust injury. McCormick filed a response brief and attached documentary evidence, contending that an antitrust injury had been sufficiently shown for purposes of surviving summary disposition under *MCR 2.116(C)(10)*. We shall address McCormick's argument and evidence below. The trial court denied both motions.[15]

With respect to the answers to interrogatories, McCormick indeed indicated, when asked to identify and describe its MARA injury, that the 2004 agreement "injected additional competition into McCormick's marketplace." However,

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[13] We would also point out an interesting distinction between the MARA and the Sherman Act. As indicated above, *MCL 445.778(2)* authorizes an action for damages when a person is "injured directly *or indirectly* in his or her business . . . by a violation of [the MARA]." (Emphasis added.) *Section 15* of the Sherman Act authorizes an action for damages when a person is "injured in his business or property by reason of anything forbidden in the antitrust laws." *15 USC 15(a)*. The Sherman Act does not reference *indirect* injuries. To the extent that the anticompetition or competition-reducing aspect of the 2004 agreement, i.e., the non-solicitation provision, **[*19]** *indirectly* caused injury to McCormick, the MARA would appear to provide relief in the form of damages. However, the jury was ultimately instructed, on the basis of federal law, that McCormick had to establish a direct injury to its business. There is no issue on appeal concerning the instruction, and our analysis does not rely on an indirect antitrust injury.

[14] McCormick had also pursued a "monopoly" counterclaim under the MARA, *MCL 445.773*, which was eventually dismissed and never resurrected, and our discussion in this **[*21]** opinion regarding McCormick's MARA counterclaim pertains solely to the MARA restraint-of-trade claim alleged by McCormick and presented to the jury.

[15] During the trial, the trial court altered its decision in regard to whether the 2004 agreement constituted a per se horizontal restraint of trade in violation of the MARA, concluding that it did as a matter of law.

McCormick further stated in its answer that the 2004 agreement also "prevent[ed] McCormick from seeking competitive trade advantage in the marketplace on its own through Gehl." It is important to understand and grasp that the 2004 Manitou-Gehl agreement had language that was anticompetitive or competition-reducing in nature — the non-solicitation provision discussed above — and language that could be viewed as injecting or increasing competition in the marketplace, which served, in part, as the basis of McCormick's MFUEA counterclaim. Aside from the non-solicitation clause, the 2004 agreement also provided:

> [Each] of **[*22]** the parties wishes to expand the scope of the line of telescopic handlers that it can offer to its customers by purchasing from the other certain telescopic handlers that differ from those currently in its line of telescopic handlers . . . .
>
> [Manitou] France and Gehl have contemporaneously entered into a Manufacturing License, Technical Assistance and Supply Agreement . . . under which Gehl has acquired the right to manufacture in the U.S. two models of telescopic handler families designed by Manitou . . . for sale by Gehl under its own trade names and trademarks . . . .

The 2004 agreement called for Manitou to manufacture products and parts for sale to Gehl and for Gehl to manufacture products and parts for sale to Manitou under various parameters set forth in the agreement. The agreement also essentially required any products and parts designed or manufactured by one of the parties, but ultimately destined for distribution by the other party to its dealers, to be painted and labeled in accordance with the demands of the receiving or distributing party, subject to the requirements of federal law and regulations concerning the identification of a manufacturer, although "no more conspicuous **[*23]** than required." For example, a telehandler manufactured by Manitou, or a telehandler designed by Manitou but manufactured by Gehl, which was to eventually be distributed by Gehl to dealers, had to be painted yellow, which was Gehl's color, while, flipping the scenario, a telehandler to eventually be distributed by Manitou had to be painted red. These contractual provisions in the 2004 agreement effectively opened the door for at least ten Gehl dealers in McCormick's Manitou-exclusive territory to begin selling, at a substantially lower price given various incentives offered to Gehl dealers, certain Gehl-branded telehandlers that were actually designed and/or manufactured by Manitou, destroying McCormick's competitive edge and injuring its business. The theory underlying McCormick's MFUEA counterclaim was based, in part, on these competition-injecting or competition-enhancing provisions of the 2004 agreement that substantially changed the competitive circumstances enjoyed by McCormick under its 2000 dealer marketing agreement with Manitou NA; these provisions could not, however, support the MARA counterclaim. But the MARA counterclaim was based on the separate non-solicitation provision **[*24]** found in the 2004 agreement.[16]

In its brief opposing Manitou NA's motion for summary disposition under MCR 2.116(C)(10) relative to the MARA counterclaim and the antitrust injury issue, McCormick argued that the non-solicitation clause in the 2004 agreement prevented "retail dealers such as McCormick from entering into any agreements to sell the competing party's telescopic handlers." McCormick also maintained that it suffered a direct injury as a result of the non-solicitation clause, where McCormick was not given the opportunity to purchase and resell Gehl telehandlers. In the affidavit by the former dealer representative for Manitou NA, he averred that in or around the summer or early fall of 2005, "McCormick needed inventory of telescopic handlers and . . . attempted to purchase ten (10) such units from Gehl . . ., as the units were the same as those provided by Manitou . . . ." The former representative further averred that he had **[*25]** personal knowledge that Manitou NA contacted a Gehl representative "and instructed Gehl that it could not make any such sale of telescopic handler[s] . . . to McCormick[,]" and that, "[a]s a result, Gehl refused to sell the telescopic handlers to McCormick, and subsequently, McCormick had no inventory for resale to customers." An affidavit by Mr. McCormick was also submitted for purposes of summary disposition, and he averred that he "contacted Gehl in or around 2005/6 to purchase telescopic handlers for resale[,]" that it was his "understanding from Gehl that Manitou . . . had contacted [Gehl] to prevent any sale of units to [McCormick] because [he] was a Manitou dealer[,]" and that, as a result, McCormick "lost [a] 10 unit sale to a prospective customer." This evidence was sufficient to create a genuine issue of material fact regarding whether McCormick suffered an antitrust injury

[16] As noted in McCormick's appellate brief, "[t]he injury suffered from the non-solicitation provision [was] different from that caused by Manitou's decision to sell its telehandlers in McCormick's exclusive territory through Gehl[,]" and "[t]he latter claim was raised under MFUEA."

arising out of or stemming from the non-solicitation clause in the 2004 agreement, which clause was an anticompetitive provision and a per se violation of the MARA.[17] We note that at trial, Mr. McCormick testified that he attempted to purchase telehandlers from Gehl and to become a Gehl dealer, but he was blocked by Manitou **[*26]** NA in light of the 2004 agreement. When Mr. McCormick was asked what kind of effect this had on his overall business, he responded, "It destroyed it."

Manitou NA's arguments effectively confuse and blend together the two different claims raised by McCormick, one under the MARA and one under the MFUEA. Although McCormick could not compete, in part, because the 2004 agreement essentially allowed Gehl dealers in McCormick's territory to start selling Manitou designed or manufactured telehandlers that were branded as Gehl telehandlers, resulting in increased competition and lower prices in the marketplace from a consumer's perspective, this aspect of the 2004 agreement served to support the MFUEA claim. On the other hand, McCormick's inability to compete as caused by the MARA violation resulted from the non-solicitation clause in the 2004 agreement, where McCormick was prevented from purchasing and reselling Gehl telehandlers and from becoming a Gehl dealer. And the non-solicitation clause did not increase competition in the marketplace from a consumer's perspective; rather, it decreased **[*28]** competition, as explained earlier in this opinion, and McCormick's MARA injury stemmed from the non-solicitation clause. In sum, we reject Manitou NA's arguments that the rule of reason applied and that McCormick had failed to adequately allege and factually support an antitrust injury.

Next, with respect to whether the MARA counterclaim should have been dismissed on the basis of the four-year statute of limitations governing the action, *MCL 445.781(2)*, which had indeed expired by the time McCormick amended its counterclaim in September 2010 to add the MARA allegations, we find it unnecessary to delve into the arguments regarding whether a discovery rule applied. We conclude that the amendment of the counterclaim to add the MARA count related back to the date of the original filing of the counterclaim, September 2007, at which time the limitations period had not elapsed relative to a MARA claim.

Although the relation-back issue was not reached by the trial court given its conclusion that the discovery rule applied to toll the limitations period, McCormick nevertheless did raise the issue at oral argument on its motion to amend the counterclaim, and Manitou NA argued in its summary disposition brief **[*29]** that the amended counterclaim could not relate back to the filing of the original counterclaim. We find that the issue was adequately preserved for appellate review.[18] *MCR 2.118(D)* provides, in pertinent part:

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[17] We review de novo a trial court's ruling on a motion for summary disposition. *Loweke v Ann Arbor Ceiling & Partition Co, LLC, 489 Mich 157, 162; 809 NW2d 553 (2011)*. With respect to the well-established principles governing the analysis of a motion for summary disposition brought pursuant to *MCR 2.116(C)(10)*, this Court in *Pioneer State Mut Ins Co v Dells, 301 Mich App 368, 377; 836 NW2d 257 (2013)*, stated:

> In general, *MCR 2.116(C)(10)* provides for summary disposition when there is no genuine issue regarding any material fact and the moving party is entitled to judgment or partial judgment as a matter of law. A motion brought under *MCR 2.116(C)(10)* tests the factual support for a party's claim. A trial court may grant a motion for summary disposition under *MCR 2.116(C)(10)* if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ. The trial court is not permitted to assess credibility, weigh the evidence, or resolve factual disputes, and if material evidence **[*27]** conflicts, it is not appropriate to grant a motion for summary disposition under *MCR 2.116(C)(10)*. A court may only consider substantively admissible evidence actually proffered relative to a motion for summary disposition under *MCR 2.116(C)(10)*. [Citations and quotation marks omitted.]

[18] We also note that "this Court may overlook preservation requirements if the failure to consider the issue would result in manifest injustice, if consideration is necessary for a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented[.]" *Smith v Foerster-Bolser Constr, Inc, 269 Mich App 424, 427; 711 NW2d 421 (2006)*. All three of these bases support examining and resolving the relation-back issue, even had the matter been unpreserved.

> An amendment that adds a claim or defense relates back to the date of the original pleading if the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth, or attempted to be set forth, in the original pleading.

In *Doyle v Hutzel Hosp, 241 Mich App 206, 215; 615 NW2d 759 (2000)*, this Court, quoting *LaBar v Cooper, 376 Mich 401, 406; 137 NW2d 136 (1965)*, observed:

> "The amendment relates back to the date of the original pleading and, therefore, is not barred by limitations, whenever the claim or defense asserted in the amendment arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth **[*30]** in the original pleading. *It is thus beside the point that the amendment introduces new facts, a new theory, or even a different cause of action, so long as it springs from the same transactional setting as that pleaded originally*. The new test satisfies the basic policy of the statute of limitations, because the transactional base of the claim must still be pleaded before the statute runs, thereby giving defendant notice within the statutory period that he must be prepared to defend against all claims for relief arising out of that transaction." [Quotation marks omitted; emphasis in *LaBar*.]

Here, the transaction from which McCormick's MARA counterclaim arose was the 2004 OEM Supply Agreement, which also served as the transactional setting, in part, for the MFUEA counterclaim that was filed back in September 2007. Thus, while being a different cause of action or new theory, the MARA counterclaim nevertheless sprung from the same transactional setting as that pleaded originally relative to the MFUEA counterclaim. Accordingly, the filing of the amended counterclaim adding the MARA count in September 2010 related back to the original filing of the MFUEA counterclaim in September 2007, **[*31]** rendering the MARA counterclaim timely under the applicable four-year statute of limitations. The MARA counterclaim was not time-barred.

We now address the various arguments posed by Manitou NA challenging the damages awarded by the jury and the trial court's rejection of its post-trial motions attacking the damage awards. Manitou NA first argues that the award of $1.3 million in damages on the MFUEA counterclaim was based on an overly speculative claim of lost profits. McCormick's theory of damages was predicated on alleged lost profits for the years 2002 through 2006, as calculated by determining the profit that annually would have been earned had McCormick increased its sales by 10 percent each year as required by the 2000 exclusivity or side agreement. Mr. McCormick testified that, but for the improper agreements or arrangements between Manitou and Osentoski, OmniQuip, Gehl, and possibly two or three other dealers, McCormick would have indeed increased its sales by 10 percent each year. The heart of Manitou NA's appellate argument is that there was no foundation for Mr. McCormick's testimony that sales would have increased by 10 percent annually. Manitou NA complains that McCormick **[*32]** failed to present evidence showing actual lost telehandler sales to competitors in an amount necessary to support the claim that the 10-percent mark would have been reached in the years at issue. In an associated remittitur argument, Manitou NA maintains that there was evidence that Osentoski purchased nine telehandlers directly from Manitou NA during the relevant timeframe, which would have garnered $45,000 in profits for McCormick had McCormick dealt the telehandlers to Osentoski, and that McCormick lost only two Manitou telehandler sales to OmniQuip dealers, which cost McCormick $24,000 in lost profits.[19] And Manitou NA contends, accurately so, that there was no evidence of particular lost telehandler sales to Gehl dealers. Therefore, according to Manitou NA, McCormick had, at most, $69,000 in lost-profit damages relative to the MFUEA counterclaim. Additionally, Manitou NA contends that McCormick's telehandler business was a new business and that projecting future lost profits based solely on the excellent sales figures for 2001 was entirely speculative.[20]

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[19] The record, and specifically the trial testimony of Mr. McCormick and Timothy Osentoski, supports Manitou NA's contentions. There **[*33]** was evidence that McCormick had made $5,000 in profit per telehandler sale to Osentoski and $12,000 in profit per telehandler sale to others.

[20] Manitou NA accepts the proposition that, in certain circumstances, a business owner can testify and establish lost profits with respect to the business, but only where there is a proper foundation and an adequate sales history.

In *Health Call of Detroit v Atrium Home & Health Care Servs, Inc, 268 Mich App 83, 96; 706 NW2d 843 (2005)*, this Court discussed damage principles:

> The general rule is that remote, contingent, and speculative damages cannot be recovered in Michigan in a tort action. A plaintiff asserting a cause of action has the burden of proving damages with reasonable certainty, and damages predicated on speculation and conjecture are not recoverable. Damages, however, are not speculative simply because they cannot be ascertained with mathematical precision. Although the result may only be an approximation, it is sufficient if a reasonable basis for computation exists. Moreover, the law will not demand that a plaintiff show a higher degree of certainty than the nature of the case permits. [L]ost profits are recoverable as damages on proper proof. . . . [W]hen the nature of a case permits only an estimation of damages or a part of the damages with certainty, **[*34]** it is proper to place before the jury all the facts and circumstances which have a tendency to show their probable amount. Furthermore, the certainty requirement is relaxed where damages have been established but the amount of damages remains an open question. Questions regarding what damages may be reasonably anticipated are issues better left to the trier of fact. [Citations and quotation marks omitted.]

"In order to recover prospective profits, a plaintiff must establish proof of lost profits with a reasonable degree of certainty." *Joerger v Gordon Food Serv, Inc, 224 Mich App 167, 175; 568 NW2d 365 (1997)*. "[E]ven if lost profits are difficult to calculate and speculative to some degree, they are still allowed as an item of loss." *Health Call, 268 Mich App at 104*.

While Mr. McCormick testified that the reason McCormick did not hit the annual 10 percent increase in sales was the infringement upon its exclusive territory by Osentoski, OmniQuip, Gehl, and others, as permitted and authorized by Manitou under agreements or arrangements with those dealers, the only evidence specifically identifying actual "lost" sales of Manitou telehandlers by the competing dealers during the relevant timeframe revealed that Osentoski purchased nine telehandlers directly from Manitou and then sold them to customers **[*35]** and that OmniQuip dealers sold two Manitou telehandlers to customers.[21] And these lost sales fell woefully short of supporting the claim that McCormick would have increased its sales by 10 percent each year but for Manitou NA's unlawful conduct.[22] There was no evidence whatsoever of the number of sales made by Gehl dealers relative to Manitou designed or manufactured telehandlers, let alone evidence that McCormick lost particular customers and sales to Gehl dealers. Mr. McCormick did not testify that he had personal knowledge of specific lost sales that, if added to actual sales, would have amounted to a 10 percent increase in annual sales for the years at issue. Instead, Mr. McCormick's testimony about lost sales and the 10-percent figure was framed in generalities and was vague and anecdotal.

Absent testimony by Mr. McCormick or another witness alluding to personal knowledge of particular lost **[*36]** sales or the specific number of Manitou telehandler sales actually made by the competing dealers, it was paramount for McCormick to present, minimally, some type of documentary evidence showing telehandler sales transacted by Gehl and OmniQuip dealers and Osentoski sufficient to support the 10-percent-increase theory. While there was general testimony by Mr. McCormick about the sale of Manitou manufactured or designed telehandlers by competing dealers within McCormick's exclusive sales territory, there was ultimately only evidence showing, with particularity, 11 sales of Manitou telehandlers by competitors. In its appellate brief, McCormick fails to direct our attention to evidence in the record showing actual sales beyond those 11. It was wholly inadequate to rely on evidence that simply referred to sales by competitors, such as Gehl dealers, without providing details and particulars regarding, at a minimum, the number of sales. There was no foundational support for McCormick's assertion that telehandler sales would have increased by 10 percent annually but for Manitou NA's violation of the MFUEA. The $1.3 million damage award was ultimately predicated on an overabundance of conjecture **[*37]** and speculation and not established by a reasonable certainty. The award did not constitute permissible approximation,

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[21] On cross-examination, Mr. McCormick testified that, as to OmniQuip, he was only personally aware of two lost sales to OmniQuip dealers and that there were no McCormick business documents showing lost sales to OmniQuip dealers.

[22] Mr. McCormick testified that the average telehandler sold for $60,000.

as there was no reasonable basis for the computation. Our ruling does not demand mathematical precision; rather, it demands the presentation of some minimal evidence on actual lost sales.

We agree with the general proposition that, given the fluctuations in revenue as viewed in correlation with the 2002 and 2004 agreements that violated the MFUEA, it is reasonable to infer that McCormick's sales were probably negatively affected by the injection of competition concerning the sale of Manitou telehandlers. However, the *true or reasonably certain extent* of that impact, i.e., the *true or reasonably certain amount* of the lost profits, could only be measured by evidence reflecting or revealing the number of actual lost sales or the number of Manitou manufactured or designed telehandlers sold by competitors in McCormick's exclusive sales territory. For example, had McCormick submitted evidence that Gehl dealers within McCormick's exclusive territory had sold 50 Manitou designed or manufactured telehandlers during the pertinent timeframe comparable to those sold by McCormick, **[*38]** one could reasonably surmise, when considered in conjunction with Mr. McCormick's testimony, that McCormick was deprived of revenue and profits on the sale of those 50 telehandlers. But no such evidence was presented.

McCormick argues that the $1.3 million verdict should stand because Manitou NA failed to present an expert on damages to counter McCormick's damage request and because Manitou NA engaged in only cursory cross-examination of Mr. McCormick. These arguments lack merit, as it was McCormick that had the burden of establishing lost-profit damages, not Manitou NA. *Health Call, 268 Mich App at 96*. McCormick also contends that Manitou NA's "complaints about the lack of specific evidence about lost sales should [be] rejected outright as sheer chutzpah." McCormick presents this argument on the basis that it had made discovery requests to Manitou NA seeking the production of reports of telehandler sales in McCormick's exclusive territory for 2001 through 2007, but Manitou NA responded that it did not possess any such documents. And the trial court denied McCormick's motion to compel production. McCormick further argues that, in a second effort, it attempted to subpoena such documents shortly before trial; however, **[*39]** Manitou NA again indicated that it did not possess the reports.[23] We fail to see the relevancy of McCormick's argument, especially given that McCormick never appealed the denial of the motion to compel production or challenged the response to the subpoena; McCormick does not contend that the reports actually existed. Moreover, Manitou NA was certainly not the only source or avenue relative to obtaining information regarding Manitou telehandler sales by competitors in McCormick's exclusive territory. See *MCR 2.310(B)(1)* and *(D)* (discovery document requests to nonparties). Finally, McCormick maintains that, under the 2000 exclusivity or side agreement, Manitou NA expected that McCormick would increase its sales by 10 percent each year. First, this was not an expectation, but a requirement. And regardless of whether it was an expectation or a requirement, the provision, in and of itself, certainly did not establish and was not evidence that the 10-percent threshold was actually met.

MCR 2.611(E)(1) provides:

> If the court finds that the only error in the trial is the inadequacy or excessiveness of the verdict, it may deny a motion for new trial on condition that within 14 days the nonmoving party consent in writing to the entry of judgment in an amount found by the court to be the lowest (if the verdict was inadequate) or highest (if the verdict was excessive) amount the evidence will support.

Remittitur is justified when a jury verdict is excessive, i.e., when the amount awarded is greater than the highest amount supported by the evidence. *Heaton v Benton Constr Co, 286 Mich App 528, 539; 780 NW2d 618 (2009)*. The $1.3 million damage award on the MFUEA counterclaim was greater than the highest amount supported by the evidence, and the trial court abused its discretion in denying Manitou NA's motion for remittitur relative to the MFUEA damages. *Id. at 538*. At most, the evidence **[*41]** supported an award based on the lost profits associated

[23] We note that Manitou NA did provide McCormick with information regarding the number of telehandlers that Manitou NA shipped to the state of Michigan for each of the years spanning 2000 through 2009 and the total dollar amount **[*40]** of those sales. McCormick, however, did not utilize this information at trial. In seeking to quash the subpoena, Manitou NA did indicate that if its computer system were mined or explored, the information on territorial sales could probably be pieced together, but there were no existing or prepared reports as characterized by McCormick in its subpoena. McCormick did not pursue the matter.

with the 11 telehandler sales discussed above, $69,000. Accordingly, we vacate the $1.3 million damage award and remand for remittitur proceedings consistent with our ruling and MCR 2.611(E)(1).

Next, Manitou NA challenges the $3.85 million award in damages with respect to the MARA counterclaim, arguing that the award bore no conceivable relationship to a MARA violation. We disagree. "[A]n antitrust plaintiff's damages should reflect the difference between its performance in a hypothetical market free of all antitrust violations and its actual performance in the market infected by the anticompetitive conduct." Nat'l Farmers' Org, Inc v Associated Milk Producers, Inc, 850 F2d 1286, 1306 (CA 8, 1989). In Brunswick Corp, 429 U.S. at 489, the United States Supreme Court stated:

> Plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be the type of loss that the claimed violations would be likely to cause. [Citation, quotation marks, and ellipsis omitted.]

The anticompetitive conduct here arose **[*42]** from the non-solicitation clause in the 2004 agreement and precluded McCormick from participating in the sale of Gehl telehandlers. The $3.85 million award was based on lost business income, which was reflected, at least to the extent of $3.82 million, on the 2008 tax return for Mr. and Mrs. McCormick. More specifically, Schedule C (Profit or Loss from Business), as attached to the return, indicated that there was business income of $1,555,700, that the cost of goods sold was $4,434,339, and that there was "other income" of $10,316. Adding together the income and subtracting the cost of goods resulted in a negative gross income of $2,868,323. Next, total business expenses amounted to $951,793, which was added to the negative gross income of $2,868,323, resulting in a business loss of $3,820,116. Mr. McCormick testified that the $1,555,700 amount represented the income generated by selling the equipment in McCormick's inventory after the bank called in the note on McCormick's line of credit that had financed the purchase of the equipment. Mr. McCormick further testified that the $4,434,339 amount represented the cost of the liquidated equipment. Mr. McCormick testified that the MARA **[*43]** violation absolutely destroyed the business.

The jury was instructed that "[b]usiness valuation is not an acceptable measure of damages in this case[,]" which was consistent with a pretrial decision made by the trial court in which the court ruled that McCormick would not be "permitted to introduce any evidence of damages concerning the value of its business[.]" In its order denying Manitou NA's motion for remittitur, the trial court rejected Manitou NA's argument that the $3.85 million award effectively constituted business-valuation damages. The court found that the dollar amounts in the 2008 income tax return "provided an appropriate basis for the [j]ury's verdict." We agree with this assessment; the loss from liquidation of McCormick's inventory was not the same as damages predicated on a business valuation.[24] Furthermore, we conclude, contrary to Manitou NA's appellate argument, that there was a sufficient correlation or causal connection between the MARA violation and the business loss attributable to the liquidation of McCormick's equipment. Absent the ability to engage in the telehandler marketplace through the sale of Gehl telehandlers, many of which were now being manufactured or designed by **[*44]** Manitou, as precluded by the non-solicitation provision in the 2004 OEM Supply Agreement, McCormick could no longer carry on business and was forced to liquidate its inventory. Mr. McCormick's testimony, along with the testimony of others, supports this conclusion. McCormick's actual performance in the market, as infected by the anticompetitive conduct, was to cease performance. And the business-loss injury was of the type that the MARA was intended to prevent and flowed from Manitou NA's unlawful acts.

Manitou NA argues that there was only evidence that Gehl would not accept McCormick's request **[*45]** to purchase 10 telehandlers, which was entirely insufficient to support the $3.85 million award, and which would only

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[24] Moreover, the trial court ultimately allowed the jury to consider the business loss identified in the 2008 tax return in assessing damages, and, except for a discovery-sanction argument, Manitou NA has not challenged that decision on appeal, nor does it argue that the 2008 tax return was irrelevant and thus should not have been admitted into evidence. We do agree with Manitou NA that the business loss reflected in the 2008 tax return did not represent lost profits, but, despite the mischaracterization at times by McCormick's counsel, the loss was nonetheless a proper measure of MARA damages.

have supported an award of lost profits on 10 unconsummated sales. This argument misses the whole point with respect to the relevance of the rejected purchase of 10 telehandlers from Gehl. The evidence helped establish that the non-solicitation provision in the 2004 agreement was indeed going to be honored by Manitou NA and Gehl, making it futile for McCormick to attempt any more purchases of Gehl telehandlers or to become a Gehl dealer, leading McCormick to close down its shop and liquidate its inventory.

Manitou NA complains that the $951,793 in business expenses listed in the 2008 tax return, which amount increased the overall business loss, had no connection to the MARA violation, as it simply pertained to ordinary expenses that would have been incurred regardless of any MARA violation. First, examination of the tax return does not necessarily support this proposition. And Mr. McCormick did testify that the total loss identified on the tax return was tied to the liquidation of the inventory. Moreover, Manitou NA's argument would not justify vacating the entire award, **[*46]** and Manitou NA does not argue that remittitur is necessary relative to the business expenses. Likewise, Manitou NA does not contend that remittitur is necessary on the basis that the $3.85 million award exceeded the $3.82 million amount reflected in the 2008 tax return. Instead, Manitou NA's remittitur argument is based solely on the 10 lost telehandler sales. However, as discussed earlier, this is not a valid ground to reduce the damage award, as those lost sales revealed that McCormick would not be able to sell telehandlers through Gehl under the 2004 agreement, creating a loss that went way beyond the lost profit on those 10 telehandlers.

In sum, we affirm the verdicts to the extent that they found MFUEA and MARA violations, and we affirm the damage award with respect to the MARA violation. However, we vacate and remand for remittitur proceedings under *MCR 2.611(E)(1)* in regard to the damage award relative to the MFUEA violation, as it was based on an overly speculative claim of lost profits.[25]

Affirmed in part, vacated and remanded in part. We do not retain jurisdiction. Neither party having fully prevailed on appeal, we decline to award taxable costs under *MCR 7.219*.

/s/ Donald S. Owens

/s/ William B. Murphy

/s/ Joel P. Hoekstra

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[25] With respect to Manitou NA's argument that the trial court should have excluded McCormick's evidence on damages as a discovery sanction, given its last minute change in its approach to damages, including discarding **[*47]** the employment of its expert and his damage computations, the argument was not preserved below and we need not address it. *Booth Newspapers, Inc v Univ of Mich Bd of Regents, 444 Mich 211, 234; 507 NW2d 422 (1993)* ("Issues raised for the first time on appeal are not ordinarily subject to review."). Moreover, on examination of the record and contemplation of the pertinent factors, exclusion of the evidence as a discovery sanction would not have been justified. *Dean v Tucker, 182 Mich App 27, 32-33; 451 NW2d 571 (1990)*. That said, our ruling should not be viewed as approving of McCormick's actions. Additionally, with regard to the damages related to McCormick's MFUEA claim and Manitou NA's assertion that the jury improperly awarded gross lost profits instead of net lost profits, the issue has been rendered moot in light of our ruling on the MFUEA damages. Further, this issue was also unpreserved below.

Shahinian v. Medical Staff of Los Robles Hosp. & Med. Ctr.

United States District Court for the Central District of California

February 2, 2016, Decided; February 2, 2016, Filed

Case No. 2:14-cv-09516-SVW-JPR

Reporter

2016 U.S. Dist. LEXIS 190539 *

Hrayr Shahinian et al v. The Medical Staff of Los Robles Hospital and Medical Center et al

Prior History: *Shahinian v. Medical Staff of Los Robles Hosp. & Med. Ctr., 2015 U.S. Dist. LEXIS 190464 (C.D. Cal., Oct. 8, 2015)*

Core Terms

skull, antitrust, surgery, staff, surgical, sterilization, cleaning, patients, Sherman Act, privileges, endoscopic, supplemental jurisdiction, relevant market, invasive, motion to dismiss, state law claim, allegations, termination, protocols, conspire, anti trust law, recommendation, post-surgical, pre-surgical, Defendants', conspiracy

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

Attorneys for Defendants: Not Present.

Judges: STEPHEN V. WILSON, UNITED STATES DISTRICT JUDGE.

Opinion by: STEPHEN V. WILSON

Opinion

CIVIL MINUTES - GENERAL

Proceedings: IN CHAMBERS ORDER GRANTING DEFENDANTS' MOTION TO DISMISS IN PART [38]

Introduction

As a general rule, leave to amend should be freely given. *See* *Fed. R. Civ. P. 15(a)*. But when an amendment would be futile, as demonstrated by repeated failure to cure deficiencies, then it is within the Court's power to dismiss a claim with prejudice. *See* *Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962)*. This is such a case. A motion to dismiss is particularly sensible in an antitrust case because the costs of discovery can be prohibitive. *Rutman Wine Co. v. E. & J. Gallo Winery, 829 F.2d 729, 738 (9th Cir. 1987)*. Despite several opportunities to plead a plausible antitrust violation, Plaintiffs have failed to do so. A plaintiff "simply cannot turn what amounts to an employment grievance by a single doctor into a federal antitrust claim by alleging that he was excluded from the market." *Rowell v. Valleycare Health Sys., No. C 10-02816 CRB, 2010 U.S. Dist. LEXIS 113213, 2010 WL 4236797, at *4 (N.D. Cal. Oct. 21, 2010)*.

Background

On December 11, 2014, plaintiffs Hrayr Shahinian ("Shahinian") and Skull Base Medical Group, Inc. ("SBMG") (collectively, the "Plaintiffs") filed a complaint against the Los Robles Regional Medical Center ("LRRMC"),[1] its medical staff, its board of trustees, and three individual **[*2]** physicians (collectively, the "Defendants"). *See* Compl.

In Plaintiffs' First Amended Complaint ("FAC"), they alleged four claims: (1) intentional interference with economic relations; (2) negligent interference with economic relations; (3) violation of common law right to fair procedure; and (4) unreasonable restraint of trade in violation of *§ 1 of the Sherman Act*. *See* FAC. On October 8, 2005, the Court dismissed Plaintiffs' Sherman Act claim, finding that Plaintiffs did not plead sufficient nonconclusory facts to render their Sherman Act claim facially plausible. *See* Dkt. 33. The Court granted Plaintiffs leave to amend, and they duly filed a second amended complaint, alleging the same claims and adding a claim for violation of California whistleblower laws. *See* SAC.

On December 14, 2015, Defendants brought a motion to dismiss the SAC under *Rule 12(b)(6)*. Dkt. 38. Defendants argue that Plaintiffs fail to state a claim under federal ***antitrust law*** for a host of reasons and also request that the Court dismisses Plaintiffs' state law claims *See id.*

For the reasons stated below, the Court grants the motion to dismiss with respect to Plaintiffs' Sherman Act claim and dismisses Plaintiffs' state law claims **[*3]** pursuant to *28 U.S.C. § 1367(c)(3)*.

Legal Standard

A motion to dismiss under *Rule 12(b)(6)* challenges the legal sufficiency of the claims stated in the complaint. *See Fed. R. Civ. Proc. 12(b)(6)*. To survive a motion to dismiss, the plaintiff's complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal, 556 U.S. at 678*. A complaint that offers mere "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." *Id.*; *see also Moss v. U.S. Secret Service, 572 F.3d 962, 969 (9th Cir. 2009)* (citing *Iqbal, 556 U.S. at 678*).

In reviewing a *Rule 12(b)(6)* motion, a court "must accept as true all factual allegations in the complaint and draw all reasonable inferences in favor of the nonmoving party." *Retail Prop. Trust v. United Bhd. of Carpenters & Joiners of Am., 768 F.3d 938, 945 (9th Cir. 2014)*. Thus, "[w]hile legal conclusions can provide the complaint's framework, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Iqbal, 556 U.S. at 679*.

Where a complaint is dismissed, "leave to amend should be granted 'unless the court determines **[*4]** that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency.'" *DeSoto v. Yellow Freight Sys., Inc., 957 F.2d 655, 658 (9th Cir. 1992)* (quoting *Schreiber Distrib. Co. v. Serv-Well Furniture Co., 806 F.2d 1393, 1401 (9th Cir. 1986))*. "In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be 'freely given.'" *Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962)*; *see also Sharkey v. O'Neal, 778 F.3d 767, 774 (9th Cir. 2015)* (abuse of discretion to not apply *Foman* factors).

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[1] Plaintiffs named Los Robles Hospital & Medical Center as a defendant but have since renamed this defendant.

A district court's supplemental jurisdiction over state law claims is governed by 28 U.S.C. § 1367. Turner v. Hawaii First Inc., 903 F. Supp. 2d 1037, 1048 (D. Haw. 2012). Supplemental jurisdiction exists when there is a claim conferring federal jurisdiction and the state claims form part of the same case or controversy. *See* § 1367(a). The ultimate lack of merit of the federal claim does not preclude a federal district court from hearing supplemental claims Brady v. Brown, 51 F.3d 810, 816 (9th Cir. 1995). When a court dismisses federal claims for failure to state a claim, it retains subject-matter jurisdiction and discretion to exercise supplemental jurisdiction. Arbaugh v. Y&H Corp., 546 U.S. 500, 514, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (2006).

But under § 1367(c)(3) a district court may decline supplemental jurisdiction when it "has dismissed all claims over **[*5]** which it has original jurisdiction." § 1367(c)(3). And the court should usually decline to exercise supplemental jurisdiction when all the federal claims are dismissed before trial. Gini v. Las Vegas Metro. Police Dep't, 40 F.3d 1041, 1046 (9th Cir. 1994). "To decline jurisdiction under § 1367(c)(3), the district court must first identify the dismissal that triggers the exercise of discretion and then explain how declining jurisdiction serves the objectives of economy, convenience and fairness to the parties, and comity." Trs. of Constr. Indus. & Laborers Health & Welfare Trust v. Desert Valley Landscape & Maint., Inc., 333 F.3d 923, 925, 64 Fed. Appx. 60 (9th Cir. 2003). If the court determines that it should not retain supplemental jurisdiction, the court should dismiss the state claims without prejudice. Gini, 40 F.3d at 1046.

Statement of Facts

Dr. Shahinian

The allegations in the SAC largely mirror those in the FAC. Dr. Shahinian is a licensed physician, experienced in advanced methods of endoscopic skull base surgery.[2] *See* SAC ¶¶ 1, 11-20. He has pioneered new techniques in treating skull base disorders, is nationally and internationally recognized as one of the first surgeons in the world to use endoscopic skull base surgery, and founded SBMG. *Id.* ¶¶ 11, 16.

In 1996, Cedars-Sinai Medical Center recruited Shahinian to establish and head its Division of Skull Base Surgery and to direct its Skull Base Institute. *Id.* ¶ 17. After he relocated to California, **[*6]** he also helped to establish the Skull Base Institute, one of the country's largest practices specializing in minimally-invasive endoscopic skull base and brain tumor surgery. *Id.*

Shahinian Recruited to the Division of Skull Base Surgery

In around 2008, Shahinian started practicing skull base surgery exclusively at Thousand Oaks Surgical Hospital. *Id.* ¶ 21. In around 2012, LRRMC purchased Thousand Oaks Surgical Hospital and insisted that Shahinian transfer his practice and his entire team to the Los Robles Hospital main campus. *Id.* LRRMC recruited Shahinian to head the Division of Skull Base Surgery, within its Department of Surgery (the "Division"). *Id.* Under his agreement with LRRMC, Shahinian would also assist with the design, development, and promotion of a surgical program for treating skull base disorders. *Id.*

Defendants failed to implement proper cleaning and sterilization protocols for the LRRMC staff. *Id.* ¶ 26. From late May of 2013 to June 27, 2014, Shahinian performed skull base surgery exclusively at LRRMC. *Id.* ¶ 22. While Shahinian was performing surgeries at LRRMC, the LRRMC staff was responsible for sterilizing his instruments and maintaining a clean environment. *Id.* ¶ 26. **[*7]** The risk of infection to patients increases significantly if surgery and recovery take place in unsterile environment. *Id.* ¶ 24. And cleanliness is of particular importance in brain surgery. *Id.* Nonetheless, Defendants did not take the proper precautions to prevent patient infections. *Id.* ¶ 26.

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[2] Skull base surgery, with its minimally invasive and endoscopic approaches, typically results in a third to a quarter of the complication rates of traditional neurosurgery. SAC ¶ 23.

Surgical Site Infections Increase Due to Inadequate Cleaning and Sterilization

Starting in 2013, Shahinian began to notice an unusual increase in surgical site infections ("SSI") in his patients. *Id.* ¶ 27. The historical average for SSI was approximately 1%. *Id.* The SSI rates reached their highest levels in January 2014, with six SSIs from twelve surgeries. *Id.* This corresponded with LRRMC's decision to dramatically cut back on the hours of its housekeeping staff. *Id.* Because Shahinian did not experience similar rates of SSI at Thousand Oaks Surgical Hospital, and because the processes, procedures, protocols, equipment and instruments that he and his personal staff utilized at LRRMC were identical to those used at Thousand Oaks Surgical Hospital, Shahinian suspected that the cause of the increase in SSI was a failure of the LRRMC staff to properly and adequately clean and sterilize the pre-surgical, **[*8]** surgical and post-surgical environments, including instruments, equipment, operating rooms and intensive care unit rooms. *Id.*

Defendants Refuse to Implement Proper Cleaning and Sterilization Protocols

Once Shahinian became aware of the increased rate of SSIs, he repeatedly voiced his concerns to the staff and leadership at LRRMC that cleaning and sterilization were inadequate. *Id.* ¶ 28. He offered on several occasions to have his own staff take over the responsibility of cleaning and sterilizing the pre-surgical, surgical, and post-surgical environments from the LRRMC staff. *Id.* His complaints and offers were ignored or met with hostility. *Id.* In particular, after confronting the chief executive officer for LRRMC on multiple occasions, she became irate. *Id.* Finally, after weeks of pressure, LRRMC purported to conduct a "root cause analysis" that was supposedly aimed at determining the cause of the increase in SSI. *Id.* ¶ 29. He was told by the LRRMC staff that the results of the "root cause analysis" were somehow inconclusive. *Id.* He did not accept this answer and continued to urge the LRRMC staff and leadership to recognize that the underlying cause of the SSI was a failure to provide **[*9]** clean and sterile pre-surgical, surgical, and post-surgical environments. *Id.*

Inadequate Cleaning and Sterilization Caused SSI Rate Increase

In late January 2014, Shahinian convinced LRRMC to permit him to create a protocol for his own team, as well as the LRRMC staff, to clean and sterilize the pre-surgical, surgical and post-surgical environments. *Id.* ¶ 30. His rigorous cleaning and sterilization protocols were implemented in February 2014. *Id.* From early February to late June 2014, the rate of SSI was dramatically reduced. *Id.* ¶ 31. This demonstrated that the SSI rate could be brought to within an acceptable range if LRRMC followed Shahinian's cleaning and sterilization protocols. *Id.* Shahinian reported the cessation of the SSI issue to the LRRMC staff and leadership in May and June 2014 and told them that it was clear that the problem had been the dirty pre-surgical, surgical, and post-surgical environments. *Id.* ¶ 32.

Retaliation

LRRMC terminated the Division in June 2014. Shahinian was never advised of any concerns about the Division aside from the SSI rates for his patients. *Id.* ¶ 33. But in the middle of June 2014, Shahinian was notified for the first time that the LRRMC staff was **[*10]** recommending that the Division be closed and that the Board of Trustees ("BOT") would soon be holding a special meeting to vote to close the Division based on this recommendation. *Id.* ¶ 34. He was not present at the time the LRRMC staff reached its recommendation, nor was he at all notified about or involved with that decision. *Id.* He was also not provided with any information about the basis for the Staff's supposed recommendation. *Id.* Shahinian was not invited to participate in the BOT meeting and insisted that he be permitted to address the BOT. *Id.* Shahinian drafted a short letter to the BOT which he read at the meeting and left for their further review. In the letter Shahinian tried to address what he thought was the purported basis for the LRRMC staff's recommendation to close the Division — i.e. the temporary increase in SSI rates in his patients. *Id.* ¶ 35.

Nonetheless, on or around June 27, 2014, Shahinian received a letter from the CEO of LRRMC informing him that the Division was being closed immediately, which would result in the termination of his skull base surgical privileges. *Id.* ¶ 36. Subsequently, the Division was in-fact closed and Shahinian's skull base surgical privileges **[*11]** revoked. *Id.* Defendants have not restored Shahinian's member and clinical privileges. *Id.*

Injury to Shahinian's Patients

The termination of the Division has been an extremely difficult experience for Shahinian, his patients, and his staff. *Id.* ¶ 37. At the time the Division was closed he had a pipeline of approximately ninety-two patients that required surgical intervention. *Id.* Some of them travelled all the way to California only to be told that the Division had been abruptly shut down and others were reluctantly referred to other institutions where much more invasive and less effective approaches were being practiced. *Id.* His staff's compensation at the Skull Base Institute had to be substantially reduced due to the Division's termination and, as a result, several of them quit and found jobs elsewhere. *Id.*

Exclusion from the Market for Skull Base Surgery

After the closure of the Division, Shahinian applied for privileges at over thirty other medical institutions. *Id.* ¶ 38. Because of the closure of the Division, all of his applications were declined. *Id.* In fact, even hospitals where Shahinian had maintained privileges for almost a decade, declined to allow him to continue to practice. **[*12]** *Id.* Meanwhile, LRRMC negotiated with two separate neurosurgical practices to provide services at LRRMC, including one which also performed minimally invasive skull surgeries. *Id.*

Discussion

Antitrust Standing

A party wishing to bring a private antitrust action must establish antitrust standing. *American Ad Mgmt., Inc. v. Gen. Tel. Co. of Cal., 190 F.3d 1051, 1054 & n.3 (9th Cir. 1999)*. *Section 1* of the Sherman Act does not provide a private right of action, *see* *15 U.S.C. § 1*, so private parties wishing to bring a claim under the Sherman Act must do so pursuant to the authorization in *section 4 of the Clayton Act*. Under *§ 4*, "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . ." *15 U.S.C. § 15(a)*. Read literally, this would provide an expansive private right of action but courts have limited the scope of *§ 4* through the doctrine of antitrust standing. *See* *Amarel v. Connell, 102 F.3d 1494, 1507 (9th Cir. 1997)*. Thus, courts balance at least five factors to determine whether a plaintiff has antitrust standing:

> (1) the nature of the plaintiff's alleged injury; that is, whether it was the type the antitrust laws were intended to forestall;
> (2) the directness of the injury;
> (3) the speculative measure of the harm;
>
> (4) the risk of duplicative recovery; and
>
> (5) the complexity in apportioning damages.

American Ad, 190 F.3d at 1054. Generally, **[*13]** "[n]o single factor is decisive." *R.C. Dick Geothermal Corp. v. Thermogenics, Inc., 890 F.2d 139, 146 (9th Cir. 1989)* (en Banc). But a plaintiff must make a showing of antitrust injury to establish standing. *Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 110 n.5, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986)*.

A plaintiff must adequately allege antitrust injury to have antitrust standing. *See, e.g., American Ad, 190 F.3d at 1055*. "Plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*. The Ninth Circuit holds that a plaintiff must plead sufficient facts to establish five elements of an antitrust injury:

(1) unlawful conduct;
(2) causing an injury to the plaintiff;
(3) that flows from that which makes the conduct unlawful;

(4) that is of the type the antitrust laws were intended to prevent; and

(5) the injured party is a participant in the same market as the alleged malefactors.

See Somers v. Apple, Inc., 729 F.3d 953, 963 (9th Cir. 2013).

Section 1 of the Sherman Act

Section 1 of the Sherman Act provides in part that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." *15 U.S.C. § 1*. "Thus, to establish a claim under *§ 1 of the Sherman Act*, the plaintiff must show 1) that there was a contract, combination, or conspiracy; 2) that the **[*14]** agreement unreasonably restrained trade under either a per se rule of illegality or a rule of reason analysis; and 3) that the restraint affected interstate commerce." *Bhan v. NME Hosps., Inc., 929 F.2d 1404, 1410 (9th Cir. 1991)*.

Plaintiffs' Antitrust Theory

Plaintiffs allege that Defendants contracted, combined and conspired with one another and others to terminate the Division and withdraw Shahinian's privileges. SAC ¶ 62. Defendants purportedly took this action to exclude Shahinian from the market for "minimally invasive endoscopic skull base surgery" by "effectively preventing" Shahinian from offering his services in Los Angeles and across "several states." *Id.* ¶ 63. These actions have harmed Shahinian personally and "[m]ore importantly, Defendants have deprived the public of free and open competition for minimally invasive, endoscopic skull base surgery services." *Id.* ¶ 64. Plaintiffs argue that Shahinian was such a significant participant in the market that his exclusion necessarily inflicted harm to competition in the market. *Id.* ¶ 65. Shahinian's ability to practice has been harmed because his ability to practice in Los Angeles has been "restricted" by Defendants. *Id.* ¶ 66. After LRRMC terminated his privileges, other medical institutions "followed **[*15]** LRRMC's example" and refused to grant or renew his privileges after the closure of the Division. *Id.* ¶ 38.

Analysis

Plaintiffs fail to allege a plausible antitrust theory. As Defendants argue, Plaintiffs lack antitrust standing because they have not sufficiently pled an antitrust injury. It is axiomatic that the Sherman Act protects competition, not competitors. *See Brown Shoe Co. v. United States, 370 U.S. 294, 320, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*. Plaintiffs attempt to argue around this difficulty with the conclusory finding that Shahinian was a "major participant" in the relevant market. But if the purported antitrust injury is the loss of Shahinian's privileges, Plaintiffs must also be able to allege why that loss was significant to the competition within that market.

Indeed, "a section one claimant may not merely recite the bare legal conclusion that competition has been restrained unreasonably." *Les Shockley Racing, Inc. v. Nat'l Hot Rod Ass'n, 884 F.2d 504, 508 (9th Cir. 1989)*. In order to sufficiently allege antitrust injury a plaintiff must "sketch the outline of the antitrust violation with allegations of supporting factual detail." *Id.* Thus, typically a plaintiff must offer "proof of the relevant geographic and product markets and demonstration of the restraint's anticompetitive effects within those markets." *Id.* A plaintiff may avoid market **[*16]** analysis where the plaintiff offers "proof of actual detrimental competitive effects such as output decreases or price increases." *Id.*; *see also* *Perry v. Rado, 504 F. Supp. 2d 1043, 1047 (E.D. Wash. 2007)* *aff'd*, *343 F. App'x 240 (9th Cir. 2009)* ("In the absence of a showing that the market as a whole has been affected, the fact one competitor must practice elsewhere is not an antitrust injury.").

Plaintiffs cannot plead cognizable market harm.[3] Plaintiffs allege that relevant market is the market for "minimally invasive endoscopic skull base surgery." The geographic scope of the market is ill defined, but Plaintiffs allege that over ninety percent of Shahinian's patients do not reside in California, much less the Los Angeles area. *See* SAC ¶ 62. In fact Plaintiffs suggest that the market may actually be global in scale.[4] *See id.* ¶¶ 63. As in *Perry*, "Plaintiffs offer no particular factual allegations that other [skull base surgeons], besides [Dr Shahinian], have been excluded from the relevant market; that patients in the relevant market are unable to find alternatives to the Defendants for [skull base surgery] needs; that Plaintiffs are incapable of competing in the relevant market; or that there has been an anticompetitive increase in the price of [skull base surgery] services **[*17]** in the relevant market " *504 F. Supp. 2d at 1049*. Further, Plaintiffs do not allege that patients were unable to obtain surgical intervention or that the price of surgery increased. *See* SAC ¶ 37. Even accepting that some patients chose "more invasive and less effective" alternatives in the immediate aftermath of the closure of the Division, there is simply no allegation of competitive harm to the "minimally invasive endoscopic skull base surgery" market.

Further, Plaintiffs do not allege that Shahinian was unable to perform skull base procedures at another facility in the region or that he is not currently performing skull base surgery at another facility.[5] The fact that some other institutions "followed LRRMC's example" is too attenuated from Defendants' alleged conspiracy to be attributable to their conduct. *See, e.g.,* *In re WellPoint, Inc. Out-of-Network UCR Rates Litig., 903 F. Supp. 2d 880, 904 (C.D. Cal. 2012)* ("Injuries that are derivative from the alleged conduct or where causation is highly speculative are not an appropriate basis for an antitrust claim."). Thus, Shahinian cannot state an antitrust injury on the basis of his inability to perform endoscopic skull base surgeries at LRRMC.[6] *See* *Rowell, 2010 U.S. Dist. LEXIS 113213, 2010 WL 4236797, at *4*. Accordingly, the Court finds that Plaintiffs lack antitrust standing.

Even if Plaintiffs **[*18]** had antitrust standing, they fail to plausibly allege a conspiracy to exclude Plaintiffs from the market. A plaintiff's *§ 1* complaint must "answer the basic questions: who, did what, to whom (or with whom), where, and when?" *Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1048 (9th Cir. 2008)*. This is because a naked assertion of conspiracy "gets the complaint close to stating a claim, but without some further factual enhancement it stops short of the line between possibility and plausibility . . . ." *Twombly, 550 U.S. at 557*. The SAC does not identify which of the Defendants allegedly contracted, combined, or conspired to exclude Plaintiffs from the relevant market. At most, Plaintiffs offer in their opposition that lain agreement to conspire was reached among and between the Defendants,

[3] While the Court assumes that Plaintiffs can prove the facts that they have alleged, it does not assume that Plaintiffs can prove facts or theories that they have not alleged. *See* *Jack Russell Terrier Network of N. Ca. v. Am. Kennel Club, Inc., 407 F.3d 1027, 1035 (9th Cir. 2005)*.

[4] Plaintiffs make no effort to define the relevant market with the specificity required even at this stage of litigation. *See* ***Tanaka v. Univ. of S. California, 252 F.3d 1059, 1063 (9th Cir. 2001)***.

[5] Plaintiffs alleged that many medical institutions have denied Shahinian's applications for privileges since the closure of the Division and some institutions where he previously held privileges have also revoked his privileges. Shahinian has not alleged that he holds no privileges in the Los Angeles area, much less in the surrounding states or elsewhere within the geographical scope of the relevant market.

[6] Plaintiffs have not alleged facts that demonstrate Defendants are a participant in the same market. Plaintiffs have only alleged that Defendants were negotiating with two neurosurgical practices to provide services at LRRMC, and one of those potential partnerships was with a group that performed "minimally invasive skull surgeries." SAC ¶¶ 38, 66. Even assuming that if Defendants eventually contracted with these providers to provide a service within the relevant market, Plaintiffs do not allege that Defendants actually retained either of these practices. *See generally* SAC. Thus it is far from clear that LRRMC was actually in the relevant market.

roughly sometime between 2008 and 2014, under which they would exclude Plaintiffs from this market in order to reduce or eliminate competition when they entered the skull base market on their own." Dkt. 41, 6. This showing does not offer the "factual enhancement" necessary to push an allegation from possible to plausible. *See Twombly, 550 U.S. at 557*.

Finally, Plaintiffs have not alleged that any of the Defendants have the divergent interests necessary to have the capacity to conspire under the Sherman Act. Whether **[*19]** different defendants are separate entities within under *§ 1 of the Sherman Act* depends on "whether the entities alleged to have conspired maintain an 'economic unity,' and whether the entities were either actual or potential competitors." *Jack Russell Terrier Network, 407 F.3d at 1034*. Plaintiffs assert that whether Defendants have the capacity to conspire together "could perhaps be interesting in a summary judgment setting." Dkt. 41, 6. But this misconstrues their burden. The Court need not accept Plaintiffs' legal conclusion simply because it must accept their factual assertions. Here, Plaintiffs plead no facts that are probative of an independent economic incentive. *E.g. Oltz v. St. Peter's Cmty. Hosp., 861 F.2d 1440, 1450 (9th Cir. 1988)* (finding that "anesthesiologists were independent contractors pursuing their personal economic interests"). Because nothing in Plaintiffs' SAC supports the conclusion that any of the Defendants acted with an independent economic incentive, Plaintiffs "have articulated a claim that only involves activity occurring within a single enterprise" and does not state a claim under *§ 1 of the Sherman Act*.[7] *Jack Russell Terrier Network, 407 F.3d at 1036*.

Having found that Plaintiff cannot plead a plausible antitrust claim, despite multiple opportunities to do so, the Court also finds **[*20]** that retaining supplemental jurisdiction is not appropriate. The state law claims in this case require significantly different legal and factual determinations than were implicated by Plaintiffs' Sherman Act claim. Given that a state court would be more familiar with Plaintiffs' state law claims and the early stage in the proceedings, the Court finds that these matters are better suited to state court.

Order

For the aforementioned reasons, the Court GRANTS Defendants' motion to dismiss [38] with respect to Plaintiffs' Sherman Act claim WITH PREJUDICE.

Plaintiffs' state law claims are dismissed WITHOUT PREJUDICE.

Defendants' special motion to strike [40] is DENIED AS MOOT.[8]

The hearing scheduled to take place on February 9, 2016 is VACATED and OFF-CALENDAR.

IT IS SO ORDERED.

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[7] The Court also finds that Plaintiffs' *§ 1* theory does not make economic sense. *See, e.g., Universal Grading Serv. v. eBay, Inc., No. C-09-2755 RMW, 2012 U.S. Dist. LEXIS 2325, 2012 WL 70644, at *5 (N.D. Cal. Jan. 9, 2012)*. Plaintiffs' theory appears to revolve around LRRMC's parent company's ability to implement identical programs across their facilities in twenty states. *See* SAC ¶¶ 66; Dkt. 41, 6. Plaintiffs offer no rationale as to why "restricting" Shahinian's ability to practice at LRRMC would plausibly allow Defendants to increase profits in a manner that they could not have done with Shahinian in place at LRRMC. If Defendants had designs to create copycat Divisions in other locations throughout the United States, it would have been far easier for Defendants to retain Shahinian at LRRMC. At LRRMC, Defendants could have used Shahinian's expertise in this rapidly developing technique. Instead, by suspending his privileges and dissolving the Division, it appears more likely that Defendants created a potential competitor.

[8] It is appropriate to dismiss a pending anti-SLAPP motion as moot when a court dismisses state law claims under *§ 1367(c)*. *See, e.g., Sikhs for Justice "SFJ", Inc. v. Facebook, Inc., 144 F. Supp. 3d 1088, 2015 WL 7075696, at *7 (N.D. Cal. Nov. 13, 2015)*; *Gingery v. City of Glendale, No. CV 14-1291 PA (AJWX), 2014 U.S. Dist. LEXIS 107598, 2014 WL 10987395, at *6 (C.D. Cal. Aug. 4, 2014)*.

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United States ex rel. Nargol v. DePuy Orthopaedics, Inc.

United States District Court for the District of Massachusetts

February 2, 2016, Decided; February 2, 2016, Filed

Civil Action No. 12-10896-FDS

Reporter

159 F. Supp. 3d 226 *; 2016 U.S. Dist. LEXIS 12205 **; 93 Fed. R. Serv. 3d (Callaghan) 1819

UNITED STATES OF AMERICA et al. ex rel. ANTONI NARGOL and DAVID LANGTON, Plaintiffs, v. DEPUY ORTHOPAEDICS, INC., DEPUY, INC., and JOHNSON & JOHNSON SERVICES, INC., Defendants.

Subsequent History: Reconsideration denied by *United States ex rel. Nargol v. DePuy Orthopaedics, Inc., 2016 U.S. Dist. LEXIS 48403, 2016 WL 1430008 (D. Mass., Apr. 11, 2016)*

Affirmed in part and vacated in part by, Remanded by *United States ex rel. Nargol v. DePuy Orthopaedics, Inc., 865 F.3d 29, 2017 U.S. App. LEXIS 13540, 2017 WL 3167622 (1st Cir. Mass., July 26, 2017)*

Motion granted by, in part, Motion denied by, in part *United States v. DePuy Orthopaedics, Inc., 2020 U.S. Dist. LEXIS 119626, 2020 WL 3840900 (D. Mass., July 8, 2020)*

Dismissed by, Motion granted by *United States v. DePuy Orthopaedics, Inc., 2021 U.S. Dist. LEXIS 234782, 2021 WL 5831626 (D. Mass., Nov. 10, 2021)*

Request denied by, Motion granted by, in part, Motion denied by, in part *United States ex rel. Nargol v. Depuy Orthopaedics, Inc., 2021 U.S. Dist. LEXIS 234768, 2021 WL 5827750 (D. Mass., Dec. 8, 2021)*

Costs and fees proceeding at, Sanctions disallowed by, Motion granted by, in part *United States v. Depuy Orthopaedics, Inc., 2022 U.S. Dist. LEXIS 12035, 2022 WL 203654 (D. Mass., Jan. 24, 2022)*

Decision reached on appeal by *United States ex rel. Nargol v. Depuy Orthopaedics, Inc., 2023 U.S. App. LEXIS 13559 (1st Cir. Mass., May 18, 2023)*

Core Terms

alleges, metal, false claim, implant, clearance, products, certification, hip-replacement, surgeons, liner, hip, motion to dismiss, manufacturing, diametrical, obligated, patients, stem, regulation, defects, contracts, femoral, reimbursement, health-care, percent, orders, unseal, metal-on-metal, fraudulent, condition of payment, specifications

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Judges: F. Dennis Saylor IV, United States District Judge.

Opinion by: F. Dennis Saylor IV

Opinion

[*230] **MEMORANDUM AND ORDER ON MOTION TO DISMISS**

SAYLOR, J.

This is a *qui tam* action alleging the submission of false claims to government **[**2]** health-care programs for a defective hip-replacement device. Relators Dr. Antoni Nargol and Dr. David Langton, who are expert witnesses in a related products-liability case involving the same device, have brought suit against defendants DePuy Orthopaedics, Inc., DePuy, Inc., and Johnson & Johnson Services, Inc.[1] DePuy manufactured and sold, among other hip-replacement devices, the Pinnacle metal-on-metal total hip-replacement device ("Pinnacle MoM"). The second amended complaint alleges that DePuy directly submitted and indirectly caused third parties to submit false claims for payments to government health-care programs for the Pinnacle MoM. According to the second amended complaint, the claims were false because DePuy made numerous misrepresentations to the FDA and surgeons concerning, among other things, the Pinnacle MoM's failure rates.

The relators filed the original complaint in this action under seal on May 18, 2012. On December 2, 2013, the relators filed a first amended complaint. The government declined to intervene on July 29, 2014. On June 5, 2015, the Court granted the relators' **[*231]** request to file a second **[**3]** amended complaint ("SAC"). Although the 168-page SAC alleges that DePuy made numerous misrepresentations about two of their devices——the ASR device and the Pinnacle MoM device——the specific counts in the SAC seek damages only as to the latter device. The SAC alleges claims of (1) causing false or fraudulent claims for payment to be presented to the United States in violation of *31 U.S.C. § 3729(a)(1)(A)* (Count One); (2) knowingly making, using, or causing to be made or used false records or statements material to a false or fraudulent claim paid by the United States in violation of *31 U.S.C. § 3729(a)(1)(B)* (Count Two); (3) conspiracy to violate the FCA in violation of *31 U.S.C. § 3729(a)(1)(C)* (Count Three); and (4) violations of various state and municipal analogues to the Federal FCA (Counts Four through Thirty-Seven).

DePuy has moved to dismiss the SAC under *Fed. R. Civ. P. 12(b)(6)* for failure to state a claim upon which relief can be granted and under *Fed. R. Civ. P. 9(b)* for failure to satisfy the heightened pleading requirements for fraud. The relators have since moved to unseal the SAC, and DePuy has assented to that motion while requesting that documents concerning the motion to dismiss also be unsealed. Finally, while they have not formally filed a motion to amend the SAC, the relators contend **[**4]** in the conclusion of their opposition memorandum, sur-reply, and a post-hearing supplemental filing that they should be granted leave to amend and file a third amended complaint.

The essence of a *False Claims Act* violation is making, or causing the making, of one or more false claims—that is, claims for payment—against the United States. The statute provides large awards to *qui tam* relators as an incentive to bring such cases. The prospect of such an award may also, however, provide an incentive for individuals to try to convert virtually any set of allegations arising out of a defective product or faulty service into an FCA case. That is particularly true in the medical field, where the government purchases medical supplies and

[1] For clarity, the defendants will be referred to collectively as "DePuy."

services on a large scale through Medicare, Medicaid, the VA, and other health-care programs. Normally, it requires no great leap of logic to conclude that if a medical device or a pharmaceutical is defective, the government must have purchased that product in great quantities, and therefore the manufacturer must have caused, directly or indirectly, the submission of false claims.

In order to avoid so-called "parasitic" claims, and to try to guard against misuse **[**5]** of the FCA, the First Circuit has construed the statute fairly strictly. In doing so, the court has emphasized that the statute "attaches liability, not to the underlying fraudulent activity or to the government's wrongful payment, but to the claim for payment." *United States v. Rivera, 55 F.3d 703, 709 (1st Cir. 1995)*. Among other things, FCA complaints must satisfy the particularity requirements of *Fed. R. Civ. P. 9(b)*. The law requires relatively specific allegations of false claims, rather than generalized allegations based on supposition and logic; the relator must set forth with particularity the "who, what, when, where, and how" of actual claims that are alleged to be false. *United States ex rel. Ge v. Takeda Pharm. Co., 737 F.3d 116, 123 (1st Cir. 2013)*.

Here, the SAC includes hundreds of paragraphs of allegations, covering dozens of pages, of claimed fraudulent activity by DePuy. That satisfies one of the components of an FCA claim, but it does not satisfy them all. As set forth below, the allegations as to specific claims for payment for the specific device actually at issue in this case are sparse indeed. For **[*232]** that reason, and the other reasons set forth below, DePuy's motion to dismiss will be granted.

The relators' request for leave to amend the SAC and file a third amended complaint will be denied. The present case is nearly **[**6]** four years old, has had three iterations of the complaint, and has seen the desks of three judges in this district. The relators have had ample opportunity to file a complaint that complies with the requirements of *Rule 9(b)*, and have failed to do so. Finally, the parties' motions to unseal the SAC and other filings related to the motion to dismiss will be granted.

I. Background

The facts summarized below are set forth in the SAC unless otherwise noted.

A. Factual Background

1. The Parties

Relator Dr. Antoni Nargol is an orthopedic surgeon residing in the United Kingdom. (SAC ¶ 63). In 2003 he became one of the earliest British adopters of the Pinnacle MoM device, and DePuy invited him to be on its "Pinnacle user group team." (SAC ¶ 66). Dr. Nargol served as a testifying expert for the plaintiffs in *Strum v. DePuy Orthopaedics, Inc. and Premier Orthopaedic Sales, Inc.*, No. 2011 L 009352 2404 (Cook Cty., Ill., Cir. Ct.) ("*Strum* litigation"). (SAC ¶ 68). Dr. Nargol also provided expert assistance to the plaintiffs' executive committee in *Kransky v. DePuy, Inc.*, No. BC 456086 (Cal. Sup. Ct.), in which the plaintiffs' allegations focused on perceived design defects in the "ASR," a device that is similar **[**7]** to the one at issue in this case, the Pinnacle MoM. (SAC ¶ 68). Dr. Nargol also served as a fact witness in *Herlihy-Paoli v. DePuy Orthopaedics, Inc.*, No. 3:11-CV-04975-K (N.D. Tex.) ("*Herlihy-Paoli* litigation"). (SAC ¶ 68).

Relator Dr. David Langton is an orthopedic surgeon residing in the United Kingdom. (SAC ¶ 69). Dr. Langton has performed research on failed hip-replacement surgeries and devices, including the Pinnacle MoM device. (SAC ¶ 70). The United States Food and Drug Administration ("FDA") has retained Dr. Langton as a consultant regarding "failure rates and dimensions of MoM products sold in the United States, including the Pinnacle." (SAC ¶ 72). Dr. Langton served as an expert witness in the *Strum* litigation and as a fact witness in the *Herlihy-Paoli* litigation. (SAC ¶ 72). According to the SAC, both the relators had personal experience in implanting the Pinnacle MoM device in their patients and began to alert defendants of the device's defects in 2009. (SAC ¶ 24).

Defendant DePuy Orthopaedics, Inc. is a designer, manufacturer, and distributor of orthopedic products that is based in Warsaw, Indiana. (SAC ¶ 73). DePuy Orthopaedics manufactured the Pinnacle MoM device. (SAC **[**8]** ¶ 73). DePuy Orthopaedics is a wholly-owned subsidiary of Delaware-based DePuy, Inc., which in turn is a subsidiary of New Jersey-based Johnson & Johnson Services, Inc. (SAC ¶¶ 75-77).

2. Government Health-Care Programs

Medicare is a health-insurance program administered by the United States Department of Health and Human Services ("HHS"). (SAC ¶ 85). Medicare provides payment for, among other things, medical services and equipment to persons over 65 years of age and those who are 18 years of age or older and are eligible for disability benefits. (SAC ¶ 82). For inpatient treatment, Medicare reimburses hospitals and other treating facilities through Medicare Part A. (SAC ¶ 83). For outpatient treatment, Medicare reimburses physicians and health-care providers through Medicare Part B. (SAC ¶ 83).

[*233] Under the Medicare program, "no payment may be made under Part A or Part B for any expenses incurred for items or services which . . . are not reasonable and necessary for the diagnosis or treatment of illness or injury or to improve the functioning of the malformed body member." (SAC ¶ 84) (citing *42 U.S.C. § 1395y(a)(1)(A)*). To satisfy that standard, providers must provide, among other things, economical medical services, **[**9]** along with evidence that the service will be of a quality that meets professionally recognized standards of healthcare and will be supported by evidence of medical necessity and quality. (SAC ¶ 84) (citing *42 U.S.C. § 1320c-5(a)(1-3)*). The SAC alleges that Medicare reimbursed qualified individuals for the purchase of the Pinnacle MoM device and the surgical procedures necessary to implant the device. (SAC ¶ 99).

Medicaid is a health-insurance program administered by HHS jointly with agencies in each state. (SAC ¶ 100). It is designed to assist states in providing medical services, medical equipment, and prescription drugs for low-income persons who qualify for the program. (SAC ¶ 100). The SAC alleges that Medicaid, like Medicare, reimbursed qualified individuals for the purchases of the Pinnacle MoM device and the surgical procedures necessary to implant the device. (SAC ¶ 104).

The United States Department of Veterans Affairs ("VA") provides medical assistance, including comprehensive coverage for hip replacement, to military veterans. (SAC ¶ 105). The SAC alleges that DePuy "sold its Pinnacle hip implants directly to the VA." (SAC ¶ 106). The National Contract Service ("NCS)" provides the VA with acquisition **[**10]** support for medical equipment and pharmaceuticals. (SAC ¶ 112). According to the SAC, "NCS is also responsible for national committed-use contracts and standardized blanket purchase agreements established against the Federal Supply Schedule Program." (SAC ¶ 112). Medical equipment and supplies contracts are governed by the Federal Supply Schedule Group 65 Part II Section A. (SAC ¶ 115). That contract states that a "[c]ontractor warrants and implies that the items delivered hereunder are merchantable and fit for use of the particular purpose described in this contract," and that "[a]ll offerors must be in compliance with *Section 510(k)* of the Federal Food, Drug, and Cosmetic Act for those medical device products intended to be delivered to the Government." (SAC ¶¶ 116-17).[2] The 65 II A contract also requires the contractor to notify the Assistant Director of the National Acquisition Center and various other officials if it sells a VA facility a product that "(1) requires modification, (2) is removed or recalled by the contractor or manufacturer due to defects in the product or potential dangers to patients, or (3) is subject to a suggested or mandatory modification, removal, or recall by a regulatory or official agency." **[**11]** (SAC ¶ 120).

The Civilian Health and Medical Program of the United States, now known as TRICARE, provides benefits for health-care services furnished to members of the U.S. military and their family members. (SAC ¶ 124). TRICARE

[2] The 65 II A contract further states that the general controls of the FD&C Act controlling medical devices "are the baseline requirements that apply to all medical devices necessary for marketing, proper labeling and monitoring [ ] performance once the device is on the market." (SAC ¶ 119).

pays for medical devices and surgeries for its beneficiaries, including total hip-replacement devices like the Pinnacle MoM. (SAC ¶ 125).

3. FDA Regulations Governing Medical Devices

The SAC contains significant detail concerning the FDA regulations governing **[*234]** medical devices that need not be fully detailed here. (*See generally* SAC ¶¶ 127-66). The FDA, which protects and promotes the public health through regulation of medical devices and pharmaceuticals, has three risk-based regulatory classifications for medical devices. (SAC ¶¶ 127-28). The Pinnacle MoM device was a Class III device and subject to the most stringent level of regulation imposed by the FDA. (SAC ¶¶ 129-30). There **[**12]** are only two ways by which a manufacturer can seek FDA approval for a new Class III medical device: the premarket approval ("PMA") process and the "*510(k)*" clearance process. (SAC ¶ 131). The "more onerous" PMA process requires, among other things, a full report of all information known to the manufacturer concerning investigations into the device's safety. (SAC ¶ 131). In contrast, under the 510(k) process, the manufacturer is required to demonstrate only that the device is "substantially equivalent in terms of safety and effectiveness to an existing FDA-approved device." (SAC ¶ 131) (citing *21 C.F.R. § 807.92(a)(3)*). A device is substantially equivalent if, when comparing it to the predicate, it has both the same intended use and the same technological characteristics as the predicate. (SAC ¶ 133). A device with different technological characteristics can be considered substantially equivalent only if the information submitted to the FDA does not raise new questions of safety and demonstrates that the device is at least as safe and effective as the predicate device. (SAC ¶ 133).

4. The Pinnacle MoM Device

Before the alleged defects in DePuy's Pinnacle MoM device came to light, another DePuy hip-replacement **[**13]** device, the ASR, suffered from alleged defects and was the subject of many products-liability lawsuits. (SAC ¶¶ 56-57). Those actions were ultimately the subject of an MDL proceeding in the Northern District of Ohio. (SAC ¶¶ 56-57). The SAC includes numerous references to ASR defects and allegedly fraudulent behavior by DePuy in connection with that device. (*See, e.g.*, SAC ¶¶ 15, 24, 31-33, 35, 37-39, 42, 45, 47, 54-58, 64-66, 68, 71-72, 130, 184, 189, 190-91, 199, 238, 246, 262, 327). Those allegations, however, are not particularly relevant to the relators' claims in this case, which is solely focused on the Pinnacle device——and more specifically, the Pinnacle MoM device comprised of a metal head and metal liner, as explained below.

Hip-replacement devices replace the bone components of a hip joint, including the ball (femoral head) and socket (acetabulum). (SAC ¶¶ 167-69). A hip-replacement device generally includes four components: (1) a femoral stem; (2) a femoral head; (3) an acetabular cup; and (4) a liner that fits inside the cup and interacts with the head. (SAC ¶ 170). In metal-on-metal hip-replacement devices, the head, cup, and liner are all metal; MoM devices are expected **[**14]** to last longer than devices comprised of ceramic or polyethylene. (SAC ¶ 169). The space between the head and cup is referred to as "diametrical clearance." (SAC ¶ 179). Bodily fluid fills in the diametrical clearance between the head and cup to prevent friction and wear caused by the two pieces rubbing together. (SAC ¶ 180).

Under the brand of "DePuy Orthopaedics Pinnacle Hip Solutions," DePuy marketed three head-on-liner categories of Pinnacle devices: "metal-on-metal, ceramic-on-polyethylene, and metal-on-polyethylene." (SAC ¶ 176; Def. Mem. Ex. C at 5).[3] **[*235]** DePuy offered three types of Pinnacle heads: (1) aSphere M-Spec and M-Spec (both

[3] The Court will consider two sets of DePuy marketing materials along with the facts as alleged in the SAC. First, it will consider Exhibit C attached to DePuy's motion to dismiss: the 2011 "Pinnacle Hip Solutions Compatibility Guide," a marketing document that DePuy provided to health-care providers. Second, the Court will consider Exhibit D attached to DePuy's motion to dismiss: the 2008 "Design Rationale" for Pinnacle products. On motions to dismiss, courts can properly take into account (1) documents the authenticity of which are not disputed by the parties; (2) documents that are official public records; (3) documents central to plaintiffs' claim; or (4) documents sufficiently referred to in **[**16]** the complaint. *Watterson v. Page, 987 F.2d 1, 3 (1st Cir.*

metal); (2) Standard Metal (metal); and (3) BIOLOX delta (ceramic). (Def. Mem. Ex. C at 3). DePuy offered three types of Pinnacle liners: (1) Ultamet and Ultamet XL (both metal); (2) Marathon (polyethylene); and (3) AltrX (polyethylene). (Def. Mem. Ex. C at 3). The Standard Metal head was not compatible with Pinnacle metal liners; it could be used only with polyethylene liners. (*Compare* Def. Mem. Ex. C at 8, *with* Def. Mem. Ex. C at 10, 16). Thus, there was one combination of Pinnacle components that combined to create a Pinnacle MoM device: an aSphere **[**15]** M-Spec or M-Spec metal head with an Ultamet or Ultamet XL metal liner. (SAC ¶ 176; Def. Mem. Ex. C at 3). The Pinnacle device——consisting of a head, cup, and liner——could be used with a variety of separate DePuy femoral stems, including the CORAIL stem, the SUMMIT stem, the AML stem, the TRI-LOCK stem, and the S-ROM stem. (*See* Def. Mem. Ex. D at 29). But those stems were not part of the Pinnacle MoM device, as they could be used with other DePuy hip-replacement devices, such as the ASR. (*Id.*).

As alleged in Counts One through Thirty-Seven of the SAC, the relators seek recovery under *31 U.S.C. § 3729(a)(1)(A)-(C)* for claims involving only DePuy's Pinnacle MoM device (which must use an M-Spec head and an Ultamet liner).

On December 13, 2000, the FDA approved the Pinnacle Ultamet 36mm metal liner as part of the 510(k) approval process, based on "substantial equivalence with the DePuy Ultima Unipolar Adapter Sleeves ("Ultima"), cited as the Ultamet's predicate device." (SAC ¶ 177). The diametrical clearance set forth in the Ultamet's 510(k) application was in the "40-80 **[**17]** micron tolerance band." (SAC ¶ 181).[4] According to the SAC, DePuy purposely manufactured the Pinnacle MoM device with a lower diametrical clearance than other devices. (SAC ¶ 183). It marketed the Pinnacle MoM's lower diametrical clearance under the theory that as diametrical clearance decreases, the volume of fluid lubricating the joint increases. (SAC ¶ 183). The SAC alleges that when diametrical **[*236]** clearance is small, "the consequences of any deformation of the cup, even if slight, are dire for the patient." (SAC ¶ 183). When DePuy added the 36mm Ultamet liner to its Pinnacle product line in 2005, DePuy advised the FDA that the diametrical clearance dimension was not 40-80 microns, but was in fact 80-120 microns. (SAC ¶ 186). The SAC alleges that the FDA, upon learning of the inaccuracy, "specifically advised DePuy that, had it known that the 36mm liner's dimensions were not as DePuy had represented, the device would not have been granted a 'substantial equivalence' waiver . . . . Instead, DePuy would have had to make a full application for PMA." (SAC ¶ 187).

5. DePuy's Allegedly Fraudulent Acts Involving the Pinnacle Device

The relators allegedly learned of the defects in the ASR and Pinnacle MoM devices through their own work with the hip implants. (SAC ¶¶ 24, 47). They began reporting those defects to DePuy in 2007, and continued to do so through 2011. (SAC ¶¶ 24, 47). Those defects included (1) surface wear resulting in metal ion exposure causing patient necrosis (tissue death), metallosis (metallic staining of tissues), and osteolysis (degradation of the bone) (SAC ¶ 29); (2) "diametrical clearance" and "taper trunnion" defects causing high device-failure rates (SAC ¶ 42); and (3) femoral neck fractures at high rates. (SAC ¶ 45).

1993); *see also* *Romani v. Shearson Lehman Hutton, 929 F.2d 875, 879 n.3 (1st Cir. 1991)* (considering securities-offering documents submitted by defendants with motion to dismiss for claim of securities fraud); *Fudge v. Penthouse Int'l, Ltd., 840 F.2d 1012, 1014-15 (1st Cir. 1988)* (considering allegedly libelous article submitted by defendants with motion to dismiss).

Here, the SAC refers to DePuy's "marketing materials" and other documents that it provided to health-care providers numerous times. (*See, e.g.*, SAC ¶¶ 9, 165, 183, 232, 252, 419). Moreover, the documents were publicly-distributed marketing materials. Accordingly, Exhibits C and D are documents whose authenticity is not disputed, are central to the relators' claims, and are sufficiently referred to in the SAC.

[4] DePuy manufactured liners and heads at a specified "nominal" size. (SAC ¶ 182). Along with a nominal size, each component was **[**18]** assigned an upper and lower tolerance, representing the "permissible diametrical clearance measurements of the manufactured component." (SAC ¶ 182). The acceptable range of diameter measurements for each component is plus or minus 10 microns (0.010 millimeters) from the nominal size; accordingly, "the complete range of acceptable deviation [for a device] is 20 microns for each component." (SAC ¶ 182).

The SAC includes nearly fifty pages detailing DePuy's allegedly fraudulent actions in concealing those defects **[**19]** while pursuing FDA approval for the Pinnacle MoM device, marketing the device to surgeons, and selling the device to government health-care programs. (*See generally* SAC ¶¶ 201-412). The Court will not detail every allegation of DePuy's claimed improper conduct, many of which are irrelevant to the Pinnacle MoM device and the present FCA claims. The Court will, however, attempt to summarize the allegations, which fall into two broad categories.

First, the SAC alleges that DePuy knowingly made material false statements and omissions to the FDA and to medical providers about the "specifications, manufacturing process, safety, and failure rates" of its Pinnacle MoM device. (SAC ¶ 201). Those false statements, according to the SAC, "armed and induced surgeons to make similar certifications when seeking reimbursement from the [g]overnment" and "had a natural tendency to influence the [g]overnment's payment for the Pinnacle devices." (SAC ¶ 203). The SAC identifies nine sub-categories of materially false statements that DePuy made to the FDA and surgeons. The SAC alleges that but for those false statements, the FDA would not have approved the device and "surgeons would not have utilized Pinnacle hip replacements or **[**20]** certified them to government health programs as reasonable and medically necessary." (SAC ¶ 256).

1. The SAC alleges that "in official communications with the FDA, DePuy falsely represented that Pinnacle implants had a 96 percent to 96.5 percent success rate." (SAC ¶ 204). Specifically, it alleges that on June 27, 2012, a DePuy director gave a presentation to the FDA's Orthopedic and Rehabilitation Devices Panel of the Medical Devices Advisory Committee. (SAC ¶ 205). The purpose of that meeting was to "seek expert scientific and clinical opinion on the risks and benefits of these types of devices based on available scientific data." (SAC ¶ 205). At the meeting, the DePuy director told the panel that "Ultamet metal-on-metal articulation is performing consistent with or better than other metal-on-metal products: 4 to 4.5 percent cumulative revision rate at five years, regardless of head size." **[*237]** (SAC ¶ 206). According to the SAC, as of February 29, 2012, DePuy's own internal database showed that "metal Pinnacle hips" had a cumulative revision rate of 15 percent after five years of use. (SAC ¶ 207). The SAC alleges that "had DePuy truthfully stated its internal results indicating a 15 percent **[**21]** revision rate at five years, the FDA would likely not have continued to clear the product for the market . . . [and] the government would likely have discontinued use of the Pinnacle device for government health-care recipients." (SAC ¶ 210). When the FDA approved the Pinnacle for implantation in patients, the FDA stated "[i]t is, however, [DePuy's] responsibility to determine if the change [or] modification to the device or its labeling could significantly affect the device's safety or effectiveness and thus require submission of a new *510(k)*." (SAC ¶ 211).

2. The SAC alleges that "DePuy made false statements to surgeons claiming that Pinnacle boasted a 99.9 percent success rate" and that those statements caused surgeons to submit false claims to the government. (SAC ¶ 212). Specifically, it alleges that DePuy began circulating marketing materials in 2007 that touted a 99.9 percent success rate for "Pinnacle products" based on data and research that was "conducted and written up by DePuy itself and funneled to a third-party author to create the appearance of impartiality." (SAC ¶¶ 212-13). It alleges that DePuy continued to advertise this false figure until 2013, even though its internal **[**22]** data showed a 15 percent cumulative revision rate as early as February 29, 2012. (SAC ¶¶ 228-29).

3. The SAC alleges that DePuy made false statements to surgeons "claim[ing] that the Pinnacle device's low diametrical clearances created a benefit to patients that distinguished the devices from competing products." (SAC ¶ 233). Beginning in early 2010, the relators conducted research on a "large volume of failed Pinnacle . . . implants" and concluded that the device suffered from a "diametrical clearance defect" such that "the diametrical clearance of the [ ] device was considerably lower than the specification required by the FDA." (SAC ¶ 238). After the research, the relators repeatedly alerted DePuy executives about the improper clearances. (SAC ¶¶ 245-48). DePuy, in apparently undated marketing materials to surgeons, touted that the Pinnacle's "cup-to-head bearing clearance, enhances the potential for fluid lubrication and minimizes wear to maximize survivorship." (SAC ¶ 250). According to the SAC, "DePuy knew that patients were not obtaining the purported benefits of Pinnacle's low diametrical clearances" and "was fully aware that many patients and

surgeons——most notably Dr. Nargol——were complaining **[**23]** of high ion rates and high failure rates." (SAC ¶ 255).

4. The SAC alleges that even though "DePuy knew that its devices were responsible for dangerous concentrations of metal ions in the bloodstreams of patients," it told the FDA that "metal ions were not a source of concern for metal-on-metal patients." (SAC ¶ 257). In the June 2012 presentation to the FDA, the DePuy director said that the Pinnacle generated "metal wear debris" in patients' bloodstreams in "low amounts." (SAC ¶ 258). The SAC alleges that surgeons began notifying DePuy "as early as 2001 that metal ions generated **[*238]** by metal-on-metal implants were a cause for concern." (SAC ¶ 260).

5. The SAC alleges that DePuy made false statements to surgeons about the causes of the Pinnacle MoM's high failure rates. Specifically, "[b]eginning in 2009, Dr. Nargol repeatedly contacted DePuy to warn it of explosive growth in the number of Pinnacle hip revision surgeries he was performing." (SAC ¶ 269). According to the SAC, DePuy told Dr. Nargol that the "problems resulted from his implantation technique." (SAC ¶ 270). At the time, "DePuy knew . . . that the problems in Dr. Nargol's patients stemmed from device defects, not from [his] surgical methods" **[**24]** because, in part, other surgeons were "experiencing and notifying DePuy of widespread failures with the Pinnacle implant." (SAC ¶¶ 271-72).

6. The SAC alleges that DePuy made false statements to surgeons about the Pinnacle MoM's angle of inclination in its use instructions. (SAC ¶ 276). It cites an internal DePuy e-mail written by an engineer expressing confusion about the proper angle of inclination for the Pinnacle's cup positioning. (SAC ¶ 277). Accordingly, the SAC alleges, "DePuy did not know the proper angle of implantation for Pinnacle hips, and [ ] any recommendation it made in its manuals disseminated to hospitals and surgeons was therefore false." (SAC ¶ 278).

7. The SAC alleges that DePuy "intentionally withheld disclosure of the Pinnacle's diametrical clearance manufacturing defects to [the] FDA, contrary to its FDA-mandated obligation to report them in an updated 510(k) application." (SAC ¶ 280). In 2000, DePuy submitted its 510(k) application along with various certifications that it "conducted a reasonable search of all information known or otherwise available about the types and causes of safety and effectiveness problems that have been reported for metal-on-metal hip **[**25]** systems." (SAC ¶ 282). On July 26, 2005, a DePuy regulatory-affairs associate wrote to the FDA attaching a chart "replac[ing] the chart originally included as Exhibit 4 of the submission, which contained a miscalculation." (SAC ¶ 286). The SAC alleges "[o]n information and belief, the 'corrected' 2005 table contained measurements or analysis of measurements of DePuy's devices that DePuy learned were not accurate." (SAC ¶ 287).[5] On August 5, 2005, a member of the FDA cautioned DePuy that it would be the company's "responsibility to determine if the change or modification to the device or its labeling could significantly affect the device's safety or effectiveness and thus require submission of a new *510(k)*." (SAC ¶ 291). According to the SAC, that notification "imposed an affirmative obligation on DePuy to provide the FDA with updated information," and even when the relators notified DePuy of the Pinnacle diametrical clearance issues beginning in **[*239]** 2008, "[o]n information and belief, DePuy never corrected its July 26, 2005 submissions to reflect Relator Langton's measurements." (SAC ¶¶ 292-96).

8. The SAC alleges that DePuy "intentionally withheld disclosures of the Pinnacle device's taper trunnion and surface **[**26]** roughness defects in presentations to the FDA." (SAC ¶ 300). The alleged "taper trunnion" defect concerns the area where the end of the femoral stem (the trunnion) is inserted into the area of the head (the taper); that taper trunnion "is not meant to move and thus should not generate any wear." (SAC ¶¶ 188-89). However, the SAC alleges that the relators discovered a defect in the Pinnacle device where, due in part to the large head size of the Pinnacle, the "taper toggles against the trunnion, causing the release of metal debris." (SAC ¶ 190). The alleged "surface roughness" defect also concerns the taper trunnion area of the

[5] Also in 2005, DePuy's director of regulatory affairs wrote an e-mail to DePuy's global vice president of clinical research, indicating that the regulatory submission "stretch[ed] the *510(k)* idea to its limits" and further elaborated, "I can see how the FDA looked at it. They want clinical data for metal-on-metal, and we changed the material, the **[**28]** size and 'diametrical clearance,' then tested a device that is different than the subject of the *510(k)*." (SAC ¶ 288).

device, but involves friction between the trunnion, which is designed to be rough, and the taper, which is designed to be smooth. (SAC ¶ 195). The SAC alleges that the relators discovered a defect in many Pinnacle devices where the surface of the taper was rough and created friction with the trunnion, which in turn caused friction and release of metal debris. (SAC ¶ 197). The relators allege that they notified DePuy of the two defects beginning in 2011 and continued to do so into 2012. (SAC ¶¶ 305-06). The SAC alleges that DePuy willfully omitted any discussion **[**27]** of the reported taper trunnion and surface roughness defects during the June 2012 meeting with the FDA. (SAC ¶¶ 307-10).
9. The SAC alleges that "DePuy intentionally failed to disclose adverse events to the FDA." (SAC ¶ 312). On June 7, 2011, following an Establishment Inspection of DePuy's Indiana facility, the FDA issued a report concluding that DePuy had "delayed reporting adverse [Pinnacle] MoM events by five months to three-and-a-half years, well beyond the acceptable timeframe under FDA regulations." (SAC ¶ 314). The report also noted that DePuy failed to investigate complaints involving the possible failure of its device to meet production specifications; a DePuy employee stated that the company received approximately 450 complaints per month about hip-replacement devices but that DePuy assigned only one employee to investigate them. (SAC ¶ 315).

Second, the SAC alleges that DePuy knowingly caused the submission of direct claims for "medical devices with dimensions materially different than those the government bargained for." (SAC ¶ 201). The SAC identifies three sub-categories of DePuy's allegedly materially false statements or omissions that caused the government to pay for "nonconforming, nonfunctioning, and unsafe devices that would not have been purchased but for DePuy's fraudulent conduct." (SAC ¶ 325).

1. As detailed above, the SAC alleges that DePuy knowingly or recklessly disregarded evidence, allegedly first provided to it by the relators, that the Pinnacle MoM's nonconforming diametrical clearances were causing device failures. (SAC ¶¶ 327-32). It alleges that DePuy was on notice of the Pinnacle MoM's improper measurement testing procedures as early as 2009, when it acquired a competitor and began to use its own "state-of-the-art measuring equipment." **[*240]** (SAC ¶ 335). In June 2010, after the relators notified DePuy of the Pinnacle's improper clearance measurements, a DePuy employee e-mailed Dr. Langton, **[**29]** stating that if DePuy concluded from the relators' research that its MoM parts "were out of specification," the company would "need to notify patients if [DePuy] had made a serious manufacturing error." (SAC ¶ 338). In its 2011 report, the FDA found that "33 Pinnacle metal liners were out of conformance" because they "fell below the lower specification limit" for diametrical clearance. (SAC ¶ 342). The FDA report notified DePuy that "[t]he production capabilities for the Pinnacle MoM liners and MoM femoral heads at the Leeds facility should be reviewed." (SAC ¶ 343). According to the SAC, "DePuy continued to manufacture Pinnacle components with full knowledge that the manufacturing process was producing yet more parts with the same conformance issues." (SAC ¶ 343). The SAC also alleges "on information and belief" that DePuy provided the FDA with statistical analyses about the failure rates of its Pinnacle device that excluded "critical analyses [that] relators provided to DePuy." (SAC ¶ 345). After the FDA expanded the scope of its request to include data back to January 2007, the SAC alleges that DePuy "responded by producing very little data." (SAC ¶ 348). According to the SAC, "DePuy's **[**30]** failure to conduct and report such statistical analyses violated *21 C.F.R. § 820.250*, which requires statistical analysis to assess trending." (SAC ¶ 350). It also alleges that because DePuy employed only one person to "review and analyze the approximately 450 complaints received per month," it "willfully ignored and mischaracterized the causes of the[ ] complaints in order to avoid its obligation to adequately verify and validate its manufacturing processes." (SAC ¶¶ 355-56). It alleges that DePuy's "failure to respond to relators' complaints regarding the clearance deformities" violated *21 C.F.R. § 820.198(a)*, which establishes a duty to "maintain adequate procedures for receiving, reviewing, and evaluating complaints." (SAC ¶ 357).

2. The SAC alleges that beginning in 2005, DePuy "knowingly or recklessly failed to adopt adequate process validation methods" that were "necessary to consistently manufacture [ ] Pinnacle devices within specification." (SAC ¶ 358). It alleges that the "relators, with additional expert assistance, have determined that DePuy's inspection and testing procedures were unable to verify whether DePuy's Pinnacle devices [were] manufactured within their required specifications," both for diametrical **[**31]** clearance and surface roughness. (SAC ¶¶ 359-60). It alleges that DePuy, by failing to ensure that its manufacturing process was

capable of producing devices within required specifications, "produced, marketed, and sold . . . a device that [was] different than the subject of the *510(k)*" and caused the government to purchase devices that it would not have otherwise purchased without 510(k) approval. (SAC ¶¶ 363-65).

3. The SAC alleges that "DePuy's failure to implement validation procedures necessary to ensure consistent manufacture of products confirming to their specifications was material to the government's purchase of DePuy's Pinnacle devices." (SAC ¶ 397). Specifically, **[*241]** it alleges that the "FDA premised its post-market approval of the Pinnacle's diametrical clearance dimensions upon DePuy's representation that the Pinnacle's failure rates were comparable to those of its competitors," and without that approval, the government would not have approved the device for reimbursement. (SAC ¶ 397). When the FDA learned in 2005 that DePuy's 510(k) application in 2000 for the Ultamet 36mm liner contained incorrect diametrical clearance dimensions, it stated that "given this new information, **[**32]** the Pinnacle 36mm system would not have been cleared in 2000." (SAC ¶¶ 399-400). According to the SAC, the FDA "nevertheless did not require DePuy to file a supplemental *510(k)*, much less obtain PMA, expressly because DePuy represented that the device's failure rates were within industry standards." (SAC ¶ 401). But the SAC alleges that DePuy "was aware [at that time] that the Pinnacle substantially deviated from specifications and had disproportionately high failure rates," and "[i]n order to maintain FDA approval and continue to sell the Pinnacle, DePuy obscured this information from the FDA, medical providers, and the public for several years." (SAC ¶ 403).

In May 2013, DePuy announced that it would stop selling the Pinnacle MoM device as of August 2013. (SAC ¶ 55). More than 5,000 personal injury lawsuits involving the Pinnacle MoM device were eventually transferred to an MDL proceeding in the Northern District of Texas. (SAC ¶ 58).

The SAC alleges that "all claims made to the government for costs associated with the Pinnacle device at any time from DePuy's 510(k) application to the date the Pinnacle was withdrawn from the market constitute false claims under the FDA." (SAC ¶ 412).

Finally, **[**33]** the SAC twice refers to *42 U.S.C. § 1395y(a)(1)(A)*, which prohibits Medicare payments for treatments that are not "reasonable and necessary." The SAC alleges:

> Hospital certifications involving claims for Pinnacle hip implants were false because claim reimbursements for these products constituted payment for services which were "not reasonable and necessary for the diagnosis and treatment of illness or injury," in violation of *42 U.S.C. § 1395y(a)(1)(A)*. By marketing these products as safe, effective, and medically appropriate, and concealing overwhelming evidence to the contrary, DePuy willfully caused hospitals to file such false certifications when seeking Medicare reimbursement.
>
> . . . .
>
> DePuy caused physicians, hospitals and other providers to submit false certifications on all these forms concerning claims for Pinnacle hip surgery procedures. Surgeries to implant these irredeemably faulty devices were not "reasonable and necessary for the diagnosis and treatment of illness or injury," within the meaning of *42 U.S.C. § 1395y(a)(1)(A)*.

(SAC ¶¶ 88, 99).

6. Alleged False Claims

The SAC alleges that "the government directly purchased or reimbursed hundreds of thousands of Pinnacle products." (SAC ¶ 7). It alleges that DePuy made false statements that caused **[**34]** health-care providers to submit indirect false claims for the Pinnacle MoM to Medicare and Medicaid, and that DePuy itself also submitted direct false claims to the VA.

[*242] a. Alleged Indirect False Claims

The SAC alleges one representative indirect false claim and then supports that claim with statistical evidence of the Pinnacle sales to Medicare and Medicaid patients. (*See* SAC ¶¶ 413-72). As to the indirect claim, the SAC alleges:

> One such device was implanted into patient "F.I.". On or about November 12, 2007, patient F.I. was implanted with a DePuy Pinnacle hip implant by a surgeon at Stony Brook University Medical Center, 10 I Nicolls Road, Stony Brook, New York 11794. The surgeon was, upon information and belief, Dr. "J.N.". In November 2007, Mr. F.I. received Medicaid insurance through HealthFirst, a managed care organization that provides government-sponsored health insurance plans in New York.
>
> On information and belief, DePuy's surgical instructions and materials provided to Dr. J.N. regarding implantation of F.I. with the Pinnacle device represented that the device was a safe and effective hip implant device when implanted in accordance with such instructions.
>
> DePuy's product label **[**35]** accompanying the Pinnacle device stated that the product was indicated for use as the acetabular component in total hip-replacement procedures. On information and belief, under the heading "Information for Use," the product label stated that an "instrumentation system, as well as a system of trial components, is available to assure proper fit and alignment of the prosthesis" and that physicians should refer to the surgical technique manual on their use.
>
> Within the Pinnacle's packaging, DePuy provided surgeons with Instructions for Use ("IFU") of the product. The IFU contained numerous false statements regarding the safety and efficacy of the Pinnacle MoM. The IFU stated, "An instrument system, as well as system of trial components, is available to assure proper fit and alignment of the prosthesis." The IFU also instructed the surgeon to "refer to the appropriate surgical technique manual on the use of the instrument system." In reality, surgeons could not achieve a proper fit and alignment of the prosthesis by using DePuy's tools and instructions.
>
> Around the time of Mr. F. I.'s surgery, DePuy widely distributed the Ultamet Technical Monograph, a Pinnacle marketing material, throughout **[**36]** the United States. This pamphlet falsely stated that the Pinnacle MoM implants experienced reduced wear as compared to competing devices because of the purported benefit of their low diametrical clearances.
>
> At the time of Mr. F.I.'s surgery, other safe and effective alternatives were widely available on the market. As alleged above, DePuy's marketing materials and device operating instructions claimed that the ASR and Pinnacle's lower failure rates and diametrical clearance specifications were superior to those competing products[.]
>
> On information and belief, but for DePuy's false statements, Dr. J.N. would have chosen a different available device for the hip-replacement surgery he performed on Mr. F.I.
>
> . . . .
>
> As with Mr. F.I.'s ASR XL hip prosthesis, Mr. F.I's Pinnacle device quickly failed, as a result of manufacturing defects in the device, including nonconforming diametrical clearance dimensions. The failures resulted in great pain and suffering to F.I. and posed the possibility of additional revision surgery.
>
> Mr. F.I's implantation with a Pinnacle device was neither medically reasonable nor medically necessary, because of the unreasonably high possibility that the **[*243]** device would fail **[**37]** and release metal ions into Mr. F.I.'s blood stream. No reasonable physician would implant a hip-replacement device with a failure rate of 15 percent at five years.
>
> . . . .
>
> In order to obtain Government reimbursement in connection with the procedure, Stony Brook University Medical Center and Dr. J.N. certified that Mr. F.I.'s Pinnacle device was reasonable and medically necessary for his treatment under *42 U.S.C. § 1395y(a)(1)(A)*. This certification was false as the implantation of a defective device is not a medically reasonable treatment.
>
> Upon information and belief, on or about November 2007, Stony Brook University Medical Center submitted a claim to Medicaid for Mr. F.I.'s Pinnacle hip device and implant surgery. Medicaid paid for Stony Brook's hip device and implant surgery.
>
> New York Medicaid reimbursed approximately $34,000 in costs for the implantation of Mr. F.I.'s Pinnacle device.

> . . . .
>
> Without DePuy's false representations and warranties, Mr. F.I. would not have received a DePuy implant and the Government would not have expended funds on the device. If Dr. J.N. had been provided appropriate information showing the truth about the Pinnacle, Dr. J.N. would not have selected the Pinnacle implant for F.I's **[**38]** procedure. Similarly, had DePuy divulged what it knew about the Pinnacle, the Government would not have approved any claim for reimbursement for the costs of the system.

(SAC ¶¶ 414-20, 423-24, 426-28, 432).

According to the SAC, "over one million MoM hips were sold worldwide" during the times relevant to the complaint. (SAC ¶ 434). "Amongst the models manufactured at DePuy plants, the Pinnacle MoM Hip was one of the most widely used hip-replacement systems that remained in the international market place." (SAC ¶ 434). The SAC alleges that the United States "constitutes almost two-thirds of the world's orthopedic device market." (SAC ¶ 435). Over 300,000 hip-replacement surgeries were performed in the United States in 2010. (SAC ¶ 436). The SAC alleges that, "[a]ccordingly, it follows that hundreds of thousands of Pinnacle products were implanted in government health-care recipients and reimbursed by the government during the lifespan of the product." (SAC ¶ 437).

The SAC alleges that between 2005 and 2010, New York Medicaid paid for an average of approximately 1,280 claims each year for total hip-replacement devices. (SAC ¶ 438). New York State Medicaid paid approximately $52 million to cover its **[**39]** total cost for inpatient visits for those 1,280 claims, or $40,625 per claim. (SAC ¶ 439). In 2010, New York State's Federal Medical Assistance Percentage ("FMAP") was approximately 50 percent. (SAC ¶ 440). The SAC alleges that "[t]herefore, the United States paid an additional $52 million to cover its total cost for each inpatient visit for those 1,280 claims, or $40,625 per claim." (SAC ¶ 441). New York State Medicaid covers approximately 8 percent of all Medicaid beneficiaries in the United States; therefore, according to the SAC, "thousands more Medicaid patients received total hip-replacement devices in 2010, at a cost of hundreds of millions of dollars to the Plaintiff States and the United States." (SAC ¶ 442).

The SAC alleges that "[a]lthough the proportion of MoM hip-replacement devices on the United States market had begun to decline by 2010, according to the FDA, in 2010, a full 27 percent of all total hip-replacement surgeries were MoM device **[*244]** surgeries." (SAC ¶ 443). "During relevant periods, DePuy's two MoM hip implant products (the Pinnacle and the ASR XL) had captured 75 percent of the Metal on Metal hip-replacements market. Prior to 2010, the Pinnacle constituted roughly 50 percent of DePuy's **[**40]** MoM hip-replacement sales." (SAC ¶ 444). The SAC alleges that "[g]iven the August 2010 recall of the ASR, the Pinnacle would have constituted at least 70 percent of DePuy's Metal on Metal hip-replacement sales." (SAC ¶ 445). Therefore, according to the SAC, "between 2005 and 2010, nearly 850 Pinnacle devices were purchased by New York State Medicaid." (SAC ¶ 446). The relators estimate that the diametrical clearance defect affected 14.93 percent of "explant head[s]" and 50.41 percent of "explant liner[s]." (SAC ¶ 447). Thus, "relators estimate that nearly 425 Pinnacle devices bearing the diametrical clearance manufacturing defect would have been paid for by New York State Medicaid between 2005 and 2010." (SAC ¶ 448). Based on the alleged 14 percent five-year failure rate in Pinnacle's internal system, the relators allege that between 2005 and 2010, "nearly 130 Pinnacle devices paid for by New York State Medicaid would have failed in patients at [five] years." (SAC ¶ 451).

b. <u>Alleged Direct False Claims</u>

The SAC alleges that the VA entered into two contracts with DePuy "that include the sale of the Pinnacle hip implants." (SAC ¶ 474). The SAC alleges:

> On February 21, 2006, DePuy was awarded an Orthopaedics Implant **[**41]** contract worth $8,042,500 by the VA National Acquisition Center with the Procurement Instrument Identifier V797P-9 I 88. The VA Point of Contact for the contract was Deborah Koval.
>
> On April 29, 2011 DePuy entered into another Indefinite Delivery contract with the VA National Acquisition Center with the Procurement Instrument Identifier VA-797P-0263. The VA NAC Point of Contact was Timothy

> Richards and the DePuy Contract Point of Contact was Michelle Roberts. Since 2011, this contract has involved payment for dozens of Pinnacle components.

(SAC ¶¶ 476-77).

The SAC then alleges that the following twelve "purchases" by the VA are "representative claims" for purposes of the *False Claims Act*. (SAC ¶¶ 479-90).

> 479. [O]n January 18, 2011, VA employee Aryeh Lax from Los Angeles, California ordered a "SUMMIT FEMORAL STEM" and "ARTICUL/EZE METAL ON MET AL FEMORAL HEAD" from DePuy. This order obligated the VA to pay $3,358.38.
>
> 480. On January 30, 2011, Lax ordered a "SUMMIT FEMORAL STEM" and "ARTICUL/EZE METAL ON METAL FEMORAL HEAD" from DePuy. This order obligated the VA to pay $3,358.38.
>
> 481. On February 27, 2011, Lax ordered a Pinnacle product from DePuy. This order obligated the VA to pay $4,779.50. **[**42]**
>
> 482. On June 1, 2012, VA employee Scott Delancey from Grand Junction ordered a Pinnacle product from DePuy. This order obligated the VA to pay $3,967.00.
>
> 483. On September 29, 2011, VA employee Loretta Henry McLain from Los Angeles ordered a Pinnacle product from DePuy. This order obligated the VA to pay $8,712.14.
>
> 484. On September 27, 2012, VA employee Kami Wiggins from Martinsburg ordered a Pinnacle product from DePuy. This order obligated the VA to pay $15,228.50.
>
> 485. On September 28, 2007, Naval Medical Center employee Jojie Urrete from San Diego, California ordered a "Pinnacle **[*245]** metal on metal" device from DePuy. This order obligated the Navy to pay $8,000.00.
>
> 486. On February 22, 2008, Urrete ordered a "Summitt (sic) Pinnacle metal on metal" device from DePuy. This order obligated the Navy to pay $13,000.00.
>
> 487. On June 18, 2007, Department of the Army employee Ann Slagle from Tacoma, Washington ordered a "SUMMIT METAL ON METAL" device from DePuy. The Summit stem is one of the parts of the Pinnacle Hip replacement system. This order obligated the Army to pay $9,000.00.
>
> 488. On February 7, 2008, Naval Medical Center employee C. Johnson from San Diego, California ordered a "Srom Metal **[**43]** on Metal" device form DePuy. The S-Rom is a metal head used as a part of the Pinnacle Hip replacement system. This order obligated the Navy to pay $9,000.00.
>
> 489. On July 5, 2007, Department of the Army employee Amparo Hall from Tacoma, Washington ordered "SUMMIT METAL ON METAL SYS." The Summit stem is one of the parts of the Pinnacle Hip replacement system. This order obligated the Army to pay $10,000.00.
>
> 490. On July 12, 2007, Department of the Army employee Amparo Hall from Tacoma, Washington ordered "SUMMIT METAL ON METAL SYSTEM." The Summit stem is one of the parts of the Pinnacle Hip replacement system. This order obligated the Army to pay $10,000.00.

B. Procedural Background

On May 18, 2012, the relators filed the original complaint in this case under seal.[6] The complaint alleged, among other things, violations of the *False Claims Act*. The FCA claims were pursued by the relators on behalf of the United States as a *qui tam* action. The Court granted the relators' motion to file an amended complaint on December 2, 2013. On July 29, 2014, the government filed a notice declining to intervene in this case. On August 13, 2014, the case was partially unsealed. On May 4, 2015, the relators **[**44]** filed under seal a motion to file a second amended complaint. DePuy opposed that motion on May 26, 2015. On June 5, 2015, the Court granted the relators' motion to amend the complaint and deemed the SAC, effectively the relators' third complaint, as the operative complaint.

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[6] The case was initially assigned to Judge O'Toole, then was reassigned to this judge on August 10, 2012, then was reassigned to Judge Talwani on June 26, 2014, and finally reassigned back to this judge on October 8, 2014.

The SAC, which remains sealed, alleges claims of (1) causing false or fraudulent claims for payment to be presented to the United States in violation of *31 U.S.C. § 3729(a)(1)(A)* (Count One); (2) knowingly making, using, or causing to be made or used false records or statements material to a false of fraudulent claim paid by the United States in violation of *31 U.S.C. § 3729(a)(1)(B)* (Count Two); (3) conspiracy to violate the FCA in violation of *31 U.S.C. § 3729(a)(1)(C)* (Count Three); and (4) violations of various state analogues to the FCA (Counts Four through Thirty-Seven).

On June 29, 2015, DePuy filed a motion to dismiss. DePuy contends that the relators' FCA claims fail to state a claim for which relief can be granted under *Fed. R. Civ. P. 12(b)(6)*, and that they also fail to satisfy the pleading **[**45]** requirements of *Fed. R. Civ. P. 9(b)*. DePuy also contends that **[*246]** the conspiracy and state-law FCA claims should be dismissed for the same reasons.

On August 24, 2015, the relators moved to unseal the SAC. DePuy assented to that motion on September 2, 2015, but requested that other documents also be unsealed, including (1) the relators' motion to unseal the SAC, their accompanying memorandum of law and exhibits, and DePuy's response and accompanying exhibits; and (2) all documents and filings related to DePuy's motion to dismiss.

II. Legal Standard

On a motion to dismiss, the Court "must assume the truth of all well-plead[ed] facts and give . . . plaintiff the benefit of all reasonable inferences therefrom." *Ruiz v. Bally Total Fitness Holding Corp., 496 F.3d 1, 5 (1st Cir. 2007)* (citing *Rogan v. Menino, 175 F.3d 75, 77 (1st Cir. 1999))*. To survive a motion to dismiss, the complaint must state a claim that is plausible on its face. *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. That is, "[f]actual allegations must be enough to raise a right to relief above the speculative level, . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id. at 555* (citations omitted). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Twombly, 550 U.S. at 556*). Dismissal is appropriate **[**46]** if the facts as alleged do not "possess enough heft to show that plaintiff is entitled to relief." *Ruiz Rivera v. Pfizer Pharms., LLC, 521 F.3d 76, 84 (1st Cir. 2008)* (alterations omitted) (internal quotation marks omitted).

III. Analysis

A. Counts One and Two: Federal FCA Claims

Counts One and Two of the SAC allege violations of the FCA. Under the FCA, it is unlawful for a person or entity to (1) knowingly present, or cause to be presented, a false or fraudulent claim for payment or approval to the United States, (2) knowingly make, use, or cause to be made or used, a false record or statement material to a false or fraudulent claim; or (3) conspire to commit a violation of the statute. *31 U.S.C. §§ 3729(a)(1)(A)-(C)*. To be actionable under the FCA, a false statement must be material to a false claim——that is, the false statement must "hav[e] a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property." *United States ex rel. Loughren v. Unum Grp., 613 F.3d 300, 307 (1st Cir. 2010)* (quoting *31 U.S.C. § 3729(b)(4)*).

Private persons, known as relators, can file civil *qui tam* actions on behalf of the United States against persons or entities who violate the act. *31 U.S.C. § 3730(b)*. The government can intervene in a *qui tam* action and assume primary responsibility over it. *Id. §§ 3730(b)(2)*, *(b)(4)*, *(c)(1)*. The relator is eligible to collect a portion of any damages awarded in a *qui tam* ***[**47]*** action, whether or not the government intervenes. *Id. § 3730(d)*.

1. *Rule 9(b)*

DePuy contends that the FCA claims should be dismissed because the SAC does not satisfy the pleading requirements of *Fed. R. Civ. P. 9(b)*. That rule requires that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." *Fed. R. Civ. P. 9(b)*. The heightened pleading requirements of *Rule 9(b)* apply to claims brought under all three subsections of the FCA. *United States ex rel. Ge v. Takeda Pharm. Co., 737 F.3d 116, 123-24* **[*247]** *(1st Cir. 2013)*.[7] The First Circuit explained the reasoning for applying those requirements to FCA claims in *United States ex rel. Duxbury v. Ortho Biotech Products, L.P.* ("*Duxbury II*"): "Although [the FCA's] financial incentive encourages would-be relators to expose fraud, it also attracts parasitic relators who bring FCA damages claims based on information within the public domain or that the relator did not otherwise discover." *719 F.3d 31, 33 (1st Cir. 2013)* (citations and internal quotation marks omitted). "For those reasons, there are a number of limitations on *qui tam* actions, including the particularity requirements of *Rule 9(b)*." *Ge, 737 F.3d at 123* (citing *Duxbury II, 719 F.3d at 33*).

a. <u>Direct Claims</u>

For allegations of direct false claims under *31 U.S.C. § 3729(a)(1)(A)*, "[r]elators are required to set forth with particularity the 'who, what, when, where, and how' of the alleged fraud." *Ge, 737 F.3d at 123* (quoting *United States ex rel. Walsh v. Eastman Kodak Co., 98 F. Supp. 2d 141, 147 (D. Mass. 2000))*. "Because FCA liability attaches only to false *claims*, merely alleging facts related to a defendant's alleged *misconduct* is not enough. Rather, a complaint based on *§ 3729(a)(1)(A)* must 'sufficiently establish that false claims were submitted for government payment' as a result of the defendant's alleged misconduct." *Id. at 124* (emphasis in original) (quoting *United States ex rel. Rost v. Pfizer, Inc., 507 F.3d 720, 733 (1st Cir. 2007))*. Indeed, "[e]vidence of an actual false claim is the *sine qua non* of a *False Claims Act* violation." *United States ex rel. Karvelas v. Melrose-Wakefield Hosp., 360 F.3d 220, 225 (1st Cir. 2004)* (internal citations omitted), *abrogated on other grounds by Claudio-De Leon v. Sistema Universitario Ana G. Mendez, 775 F.3d 41 (1st Cir. 2014)*; *see also United States v. Rivera, 55 F.3d 703, 709 (1st Cir. 1995)* ("[T]he [FCA] statute attaches liability, not to the underlying fraudulent activity or to the government's wrongful payment, but to the claim for payment.").

As the First Circuit explained in *Ge* concerning the particularity requirement for pleading false claims:

> A relator must provide details that identify particular false claims for payment that were submitted to the government. In a case such as this, details concerning the dates of the claims, the content of the forms or bills **[**49]** submitted, their identification numbers, the amount of money charged to the government, the particular goods or services for which the government was billed, the individuals involved in the billing, and the length of time between the alleged fraudulent practices and the submission of claims based on those practices are the types of information that may help a relator to state his or her claims with particularity. These details do not constitute a checklist of mandatory requirements that must be satisfied by each allegations included in a complaint. However, we believe that some of this information for at least some of the claims must be pleaded in order to satisfy *Rule 9(b)*.

737 F.3d at 124 (internal quotation marks and alterations omitted) (quoting *Karvelas, 360 F.3d at 232-33*); *see also United States ex rel. Escobar v. Universal Health Servs., 780 F.3d 504, 515 (1st Cir. 2015)* (noting that while there was no "mandatory checklist" **[*248]** to satisfy the particularity requirement, relators "succeeded in linking their allegations of fraud to specific claims for payment" because the complaint "allege[d] twenty-seven separate dates on which claims were submitted in connection with Yarushka's care, each time including the relevant billing codes, amount invoiced, and the name of the [ ] staff member who provided the treatment for which reimbursement **[**50]** was sought"), *cert. granted*, *136 S. Ct. 582, 193 L. Ed. 2d 465 (2015)*.

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[7] "We recognize that . . . the 'presentment' requirement applies only to . . . *subsection (a)(1)(A)* claims and not . . . *subsection (a)(1)(B)* or *subsection (a)(1)(C)* claims. However, *Rule 9(b)*'s particularity requirement applies with full force **[**48]** to all three subsections [of the FCA]." *Ge, 737 F.3d at 124-25 n.5*.

Here, the SAC alleges that the VA purchased twelve hip devices directly from DePuy pursuant to two procurement contracts. (SAC ¶¶ 473-90). Those alleged false claims, however, do not satisfy *Rule 9(b)*'s heightened pleading requirements.

First, ten of the twelve alleged claims do not allege with sufficient particularity that the VA purchased the specific DePuy product that is the sole focus of this action: the Pinnacle MoM hip-implant device. (*See* SAC ¶¶ 494, 500). As described above, DePuy manufactured Pinnacle devices that had various combinations of head, liner, and cup materials, including "metal-on-metal, ceramic-on-polyethylene, or metal-on-polyethylene." (SAC ¶¶ 176-77; Def. Mem. Ex. C at 5). The alleged defects concern the interaction of a metal head with a metal liner in a Pinnacle device. There was only one head and liner combination of Pinnacle parts that produced a Pinnacle metal-on-metal, or MoM, device: a M-Spec or aSphere M-Spec head with an Ultamet or Ultamet XL liner. (SAC ¶¶ 176-77; Def. Mem. Ex. C at 3).

Before turning to the specific alleged false claims, the Court notes that the SAC uses the terms "Pinnacle" and "MoM" inconsistently. In paragraph **[**51]** 6, the SAC states that "Relators Antoni Nargol and David Langton——world-renowned experts on hip-implant products——allege that DePuy submitted false claims for payment for one of DePuy's MoM devices: the Pinnacle Acetabular Hip System ('Pinnacle')." (SAC ¶ 6). It is unclear whether the relators intended to define "Pinnacle" to mean "the Pinnacle Acetabular Hip System" (which comprises metal, ceramic, and polyethylene products) or to mean the metal-on-metal subset of Pinnacle devices. Seven paragraphs later, relators use the specific term "MoM." (*See* SAC ¶ 13) ("In one June 2010 email, a top DePuy executive admitted to Dr. Langton that, were DePuy to conclude from Relators' research that its MoM parts 'were out of specification,' the Company would 'need to notify patients if we have made a serious manufacturing error.'"). And in the 200-paragraph section detailing the alleged DePuy misrepresentations, relators use the term "MoM" consistently. (*See, e.g.*, SAC ¶¶ 201, 248, 259, 273, 277, 279, 307, 310-11, 314, 316, 319-20, 334, 338, 340, 343-44, 348-49, 351-52, 361, 379, 395-96). The complaint thus seems to make clear that the only relevant fraudulent activity involved Pinnacle metal-on-metal **[**52]** devices. But in the section that alleges the proposed false claims, the relators use vague terms such as "Pinnacle products" or refer to products that are not a part of the Pinnacle system at all.

i. <u>Paragraphs 479-480</u>

> *479. [O]n January 18, 2011, VA employee Aryeh Lax from Los Angeles, California ordered a "SUMMIT FEMORAL STEM" and "ARTICUL/EZE METAL ON METAL FEMORAL HEAD" from DePuy. This order obligated the VA to pay $3,358.38*.
>
> *480. On January 30, 2011, Lax ordered a "SUMMIT FEMORAL STEM" and "ARTICUL/EZE METAL ON METAL FEMORAL HEAD" from DePuy. This order obligated the VA to pay $3,358.38*.

Depuy's marketing materials demonstrate that the "Summit femoral stem" is **[*249]** not a Pinnacle product, and even the relators appear to concede that it is not part of the Pinnacle MoM device. (*See* SAC ¶ 396) ("[T]he surface roughness manufacturing defect also affects devices *other than the Pinnacle MoM* . . . . These affected devices include DePuy's S-ROM, SUMMIT, CORAIL, and AML hip replacement products." (emphasis added)). The "Articul/eze metal-on-metal femoral head" does not appear to be a Pinnacle component because the only Pinnacle metal heads were the "aSphere M-Spec," the "M-Spec," and the "Standard Metal." **[**53]** (*Compare* SAC ¶¶ 176-77, *and* Def. Mem. Ex. C at 3, *with* SAC ¶¶ 479-80). Furthermore, neither paragraph mentions a DePuy Pinnacle liner, much less an Ultamet metal liner. Thus, even assuming the Articul/eze head is metal and part of the Pinnacle device——which it is not——those paragraphs allege only part of a MoM device and ignore the liner. Finally, paragraphs 479 and 480 allege only "orders." They do not allege that those orders formed the basis of any actual claims that were presented to the VA.

ii. <u>Paragraphs 481-484</u>

> *481. On February 27, 2011, Lax ordered a Pinnacle product from DePuy. This order obligated the VA to pay $4,779.50*.
>
> *482. On June 1, 2012, VA employee Scott Delancey from Grand Junction ordered a Pinnacle product from DePuy. This order obligated the VA to pay $3,967.00*.
>
> *483. On September 29, 2011, VA employee Loretta Henry McLain from Los Angeles ordered a Pinnacle product from DePuy. This order obligated the VA to pay $8,712.14*.
>
> *484. On September 27, 2012, VA employee Kami Wiggins from Martinsburg ordered a Pinnacle product from DePuy. This order obligated the VA to pay $15,228.50*.

A "Pinnacle product" could refer to any combination of DePuy's three Pinnacle heads and three **[**54]** Pinnacle liners. (Def. Mem. Ex. C at 3). Only a "M-Spec" head and "Ultamet" liner combined to create the Pinnacle MoM device. It is therefore unclear whether any of the products in question are even metal-on-metal devices. Also, the prices alleged in paragraphs 481 through 484 vary significantly. If those four "Pinnacle products" were all Pinnacle MoM devices, one would expect the prices to be at least somewhat similar. And as noted above, paragraphs 481 through 484 allege only "orders," not claims.

iii. <u>Paragraphs 487-490</u>

> *487. On June 18, 2007, Department of the Army employee Ann Slagle from Tacoma, Washington ordered a "SUMMIT METAL ON METAL" device from DePuy. The Summit stem is one of the parts of the Pinnacle Hip replacement system. This order obligated the Army to pay $9,000.00*.
>
> *488. On February 7, 2008, Naval Medical Center employee C. Johnson from San Diego, California ordered a "Srom Metal on Metal" device form DePuy. The S-Rom is a metal head used as a part of the Pinnacle Hip replacement system. This order obligated the Navy to pay $9,000.00*.
>
> *489. On July 5, 2007, Department of the Army employee Amparo Hall from Tacoma, Washington ordered "SUMMIT METAL ON METAL SYS." The Summit **[**55]** stem is one of the parts of the Pinnacle Hip replacement system. This order obligated the Army to pay $10,000.00*.
>
> *490. On July 12, 2007, Department of the Army employee Amparo Hall from Tacoma, Washington ordered "SUMMIT METAL ON METAL SYSTEM." The Summit stem is one of the parts of the Pinnacle Hip replacement system. **[*250]** This order obligated the Army to pay $10,000.00*.

Confusingly, paragraphs 487, 489, and 490 allege that the Summit femoral stem is part of the "Pinnacle Hip replacement system." But as noted above, even the relators allege elsewhere in the SAC that the Summit stem is a different product from the Pinnacle MoM device. (*See* SAC ¶ 396). In fact, Summit stems could be used with entirely different hip-replacement systems, such as the ASR. (Def. Mem. Ex. D at 29). Paragraph 488 alleges an order of a S-Rom metal femoral head and alleges that the S-Rom was part of the "Pinnacle Hip replacement system." But DePuy's marketing materials, which the SAC incorporates, show that S-Rom heads were not part of the Pinnacle system. (Def. Mem. Ex. C at 3).

Thus, paragraphs 479 through 484 and 487 through 490 do not even allege that DePuy presented false claims to the VA for the only device relevant **[**56]** to this action, nor do they plead those "orders" with sufficient particularity to satisfy *Rule 9(b)*. Only two of the twelve direct orders alleged in the SAC actually refer to a Pinnacle MoM device—the two alleged in paragraphs 485 and 486. (SAC ¶¶ 485-86).

iv. Paragraphs 485-486

> *485. On September 28, 2007, Naval Medical Center employee Jojie Urrete from San Diego, California ordered a "Pinnacle metal on metal" device from DePuy. This order obligated the Navy to pay $8,000.00*.
>
> *486. On February 22, 2008, Urrete ordered a "Summitt (sic) Pinnacle metal on metal" device from DePuy. This order obligated the Navy to pay $13,000.00*.

To plead direct false claims pursuant to *31 U.S.C. § 3729(a)(1)(A)*, a complaint must allege at least some hallmarks of particularity. The First Circuit has provided a non-exhaustive list, including

> details concerning the dates of the claims, the content of the forms or bills submitted, their identification numbers, the amount of money charged to the government, the particular goods or services for which the government was billed, the individuals involved in the billing, and the length of time between the alleged fraudulent practices and the submission of claims based on those practices . . . .

Karvelas, 360 F.3d at 228; *see* ***[**57]*** *also* *Ge, 737 F.3d at 124*. Following the decisions in *Karvelas* and *Ge*, several judges in this district have held that "[i]n cases where the defendant directly presents the claim to the government, the plaintiff must provide details identifying particular false claims submitted, including who filed the claims, the content of the claims, when such claims were submitted, where such claims were submitted, and how much it sought in payment." *United States ex rel. Westmoreland v. Amgen, Inc., 738 F. Supp. 2d 267, 275 (D. Mass. 2010)* (citing *Karvelas, 360 F.3d at 225*); *see also* *United States ex rel. Nowak v. Medtronic, Inc., 806 F. Supp. 2d 310, 352 (D. Mass. 2011)* (noting that relators must plead "which [of defendant's] personnel engaged in [the] conduct, where such conduct took place, which VA personnel were involved, [and] any specific fraudulent statements made to personnel at the Veterans Administration"). The two descriptions of "orders" set forth in paragraphs 485 and 486 fail to allege with sufficient particularity that DePuy presented false claims to the VA.

First, the allegations focus entirely on the actions of a Naval Medical Center employee and do not specifically allege any actions by DePuy concerning the orders. The SAC lists *orders* by the employee requesting a Pinnacle MoM product, but it **[*251]** does not include any details about alleged *claims* or any actions by DePuy employees in relation to the orders. **[**58]** Paragraphs 485 and 486 do not even allege that DePuy in fact filled the orders and delivered the devices to the Naval Medical Center. Nor are there any allegations that DePuy invoiced the VA for the ordered products or requested payment, other than the broad allegation that the orders "obligated the Navy to pay" certain amounts. The paragraphs do not allege an order number or any other source-identifying information about any particular claim. There is no indication that any DePuy employee solicited, processed, or even knew about those alleged orders.

Second, the allegations fail to allege any details about the products themselves and how they caused the claim in question (if there was a claim) to be *false*. There is no allegation, for example, that those two specific products actually failed, had to be replaced, or were otherwise defective. Indeed, paragraphs 485 and 486 do not even allege that the ordered products were in fact implanted in a patient, or when, where, and by which doctor. In short, the SAC pleads no specific details that would suggest that the two orders resulted in false claims.

The relators rely on *United States ex rel. Rodwell v. Excelitas Technologies, Corp., 2015 U.S. Dist. LEXIS 78508, 2015 WL 3766866 (D. Mass. June 16, 2015)*, in support of their contention that the complaint is sufficient. In **[**59]** *Rodwell*, the court denied the defendant's motion to dismiss on *Rule 9(b)* grounds even though the relator "d[id] not identify any particular claim or invoice submitted to the government." *2015 U.S. Dist. LEXIS 78508, [WL] at *6*. But in *Rodwell*, the relator identified specific contracts that the defendant had with the government, the specific terms of those contracts, and three batches of product orders that the government placed pursuant to those contracts, including the specific models of products ordered, specific quantities of each model ordered (more than one thousand in total), and the specific costs to the government. *Id.*

Here, however, the relators' allegations about DePuy's two alleged contracts are vague as to what products they covered, what their terms were, and whether DePuy presented the VA with any false claims for Pinnacle MoM devices pursuant to those contracts. Notably, the SAC does not connect the two contracts to any of the twelve alleged orders in paragraphs 479 through 490. The SAC generally describes the Federal Supply Schedule Service ("FSS") and Federal Supply Schedule Group 65 Part II Section A ("65 II A contract"). (SAC ¶¶ 114-15). But although the SAC describes the two VA contracts, it never actually alleges **[**60]** that DePuy had an FSS contract with the VA. (SAC ¶ 474). The SAC does not allege that either the 2006 "Orthopaedics Implant contract" (SAC ¶ 476) or the 2011 "Indefinite Delivery contract" (SAC ¶ 477) were FSS 65 II A contracts that would be governed by FDA regulations. Nor does the SAC include the contracts as attachments or quote relevant content from their terms. In fact, the SAC does not cite any terms of those specific alleged contracts at all. And finally, unlike in *Rodwell*, the SAC here contains no allegations about the specific products purchased pursuant to the contracts. In *Rodwell*, the relators included specific product models and quantities. Here, the SAC vaguely alleges that DePuy sold an unknown number of "Pinnacle Hip Implant products" under the contracts, without alleging that the contracts covered the sale of the Pinnacle MoM device. (SAC ¶ 478).

In sum, the SAC spends more than two hundred paragraphs detailing misrepresentations and false statements that DePuy **[*252]** allegedly made to the FDA and surgeons, including the relators themselves. (*See* SAC ¶¶ 201-412). It alleges in general terms that "the government directly purchased . . . hundreds of thousands of Pinnacle products." **[**61]** (SAC ¶ 7). But ten of the twelve allegedly false claims do not even refer to the only product relevant to this suit: the Pinnacle metal-on-metal device. For the two remaining "orders," the SAC fails to plead with sufficient particularity the who, what, when, where, and how of a single false claim that DePuy presented to the VA. Accordingly, the relators' claims pursuant to *31 U.S.C. § 3729(a)(1)(A)* will be dismissed for failure to meet the heightened pleading requirements of *Rule 9(b)*.

b. Indirect Claims

The SAC alleges that DePuy is liable under *31 U.S.C. § 3729(a)(1)(B)* because it made false statements and omissions that were material to the claims of third-party surgeons to government health-care programs such as Medicare and Medicaid. DePuy contends that the claim should be dismissed under *Rule 9(b)* because the SAC fails to allege any specific false claims and because it fails to suggest an inference of fraud beyond a mere possibility.

The First Circuit has distinguished pleading standards for direct claims, or sales to the government, which are governed by *31 U.S.C. § 3729(a)(1)(A)*, from indirect claims to the government where a defendant causes third-parties to submit false claims, which are governed by *31 U.S.C. § 3729(a)(1)(B)*. *See* *United States ex rel. Duxbury v. Ortho Biotech Prods., L.P., 579 F.3d 13, 29 (1st Cir. 2009)* ("*Duxbury I*"). "In a *qui tam* action in which the defendant is **[**62]** alleged to have induced third parties to file false claims with the government, a relator can satisfy this requirement by 'providing factual or statistical evidence to strengthen the inference of fraud beyond possibility without necessarily providing details as to each false claim.'" *Ge, 737 F.3d at 123-24* (quoting *Duxbury I, 579 F.3d at 29*). Thus, a *qui tam* complaint alleging that a defendant induced a third party to submit false claims to the government for reimbursement must allege two things to satisfy *Rule 9(b)*: (1) particular details of a scheme to cause the submission of false claims to the government; and (2) factual or statistical evidence that strengthens the inference of fraud on the government beyond a mere possibility. *Duxbury I, 579 F.3d at 29*.

The SAC pleads a single representative indirect claim in paragraph 414. The relators contend that, even standing alone without further support, the allegation is sufficient to defeat DePuy's motion to dismiss. Specifically, the SAC alleges that on November 12, 2007, patient "'F.I.' was implanted with a DePuy Pinnacle hip implant" by a surgeon in New York. (SAC ¶ 414). For the reasons explained above, such a claim does not meet the requirements of *Rule 9(b)*; it does not identify the specific Pinnacle MoM device that is **[**63]** the subject of the present controversy. Put another way, the SAC does not allege that the surgeon presented a claim to Medicaid for a Pinnacle MoM device, as opposed to a Pinnacle device with a ceramic head or a polyethylene liner.

Accordingly, without alleging any details as to a specific false claim for the relevant DePuy Pinnacle device, the relators must rely on the SAC's other factual and statistical evidence to strengthen the inference of fraud beyond a mere possibility. That evidence, however, fails to satisfy the requirements of Rule 9(b) as described by the First Circuit in *Ge* and *Duxbury I*.

In *Ge*, the relator's complaint alleged that the defendant pharmaceutical company had failed to file accurate and timely adverse event reports with the FDA, and **[*253]** that if it had done so, numerous claims for those pharmaceuticals would not have been submitted to the federal government. 737 F.3d at 119-21. The FCA claim was dismissed because the relator "made no attempt in her complaints to allege facts that would show that some *subset* of claims for government payment for the four subject drugs was rendered false as a result of [defendant's] alleged misconduct." *Id. at 124* (emphasis in original). "What is missing are any supporting **[**64]** allegations upon which her conclusion rests and any particulars." *Id.*

In contrast, the court in *Duxbury I* found that the complaint sufficiently alleged factual evidence to sustain an inference of fraud. *579 F.3d at 30*. The relator alleged that kickbacks provided by the defendant resulted in the submission of false claims by eight named health-care providers in the state of Washington. *Id.* The court concluded that those eight specific allegations were sufficient factual support to satisfy the requirements of Rule 9(b), although it described the matter as "a close call." *Id.*; *see also* *Ge, 737 F.3d at 124* (referring to the allegations in *Duxbury I* as "barely adequate").

In *Duxbury I*, the First Circuit quoted one of the specific allegations the plaintiff made in that case:

> In 1997-98 Western Washington Treatment Center in Olympia, Washington, received more than $5,000 of free commercially packaged ProCrit from [defendant] under the direction of Robert Ashe so that Western Washington could submit the free product for reimbursement to Medicare under the false and fraudulent certification that the provider had paid for the product. [Defendant] intended the free commercially packaged ProCrit to be a "cash equivalent" "kickback" to Western **[**65]** Washington in order to induce the provider to purchase ProCrit and to administer ProCrit at the "off-label" once a week dosing regiment. Western Washington was reimbursed by Medicare for the free commercially packaged ProCrit. As a result, [defendant] knowingly caused the presentation by Western Washington of these false claims to the United States Government.

579 F.3d at 30. The court concluded that the complaint's collection of eight specific examples of similar specificity, along with other allegations of the defendant's fraudulent scheme, were adequate (if "barely" so) to satisfy the requirements of Rule 9(b). *Id.* As the court noted, the plaintiff "identified, as to each of the eight medical providers (the who), the illegal kickbacks (the what), the rough time periods and locations (the where and when), and the filing of the false claims themselves." *Id.*

This Court has recently addressed another FCA case that presented a close call and found that the complaint satisfied the standards set forth in *Duxbury I* because the relator identified "one of defendants' sales representatives, the doctor, and the patient (the who), the specific misrepresentations made by the defendants (the what), time periods and locations **[**66]** (the where and when), and the filing of the false claims themselves." *See* *United States ex rel. Leysock v. Forest Labs., Inc., 55 F. Supp. 3d 210, 219 (D. Mass. 2014)*.

Here—setting aside for the moment the SAC's statistical allegations—the factual allegations in the SAC more closely resemble those rejected in *Ge* than those that were acceptable in *Duxbury I* and *Leysock*. In *Duxbury I*, the relator alleged that specific employees of the defendant received kickbacks from specific health-care providers *and* that the kickbacks resulted in a false claim. In *Leysock*, the relator alleged that specific physicians were the targets of defendants' off-label marketing and relied on that marketing, and alleged **[*254]** the specific dates that the physicians filled the prescriptions. The SAC here fails to connect the multiple allegations of DePuy's misrepresentations and omissions to any specific claims for payment. Nor does the SAC appear to identify a single physician who was a target of allegedly false DePuy marketing, identify a single physician who relied on that marketing, or identify a single physician who filed a false claim for the DePuy MoM device. The closest that the SAC comes to such specificity is "Dr. J.N." and "patient F.I.", but the SAC does not identify the specific representations or **[**67]** materials that the doctor received and relied upon, nor does it allege the specific DePuy device for which the doctor filed a claim. (*See* SAC ¶¶ 414-24).[8]

Furthermore, the SAC's unfocused and imprecise statistical evidence adds little to establish DePuy's fraud beyond a mere possibility. The SAC alleges that more than one million metal-on-metal devices were sold worldwide "[d]uring the times relevant to this complaint," and that in 2010, more than 300,000 "hip-replacement surgeries were performed in the United States." (SAC ¶¶ 434, 436). Therefore, according to the SAC, because "the Pinnacle MoM hip was one of the most widely used hip-replacement systems that remained in the international marketplace," as a matter of logic "it follows that hundreds of thousands of Pinnacle products were implanted in government healthcare recipients and reimbursed by the government during the lifespan of the product." (SAC ¶¶ 434, 437). Those statistical allegations are not sufficiently precise or consistent as to the geographical scope, time period, or product type to maintain an inference **[**68]** of fraud. The broad statistical claims made here could be made about virtually any successful medical device or product.[9]

Finally, to the extent that the relators contend that every indirect claim for reimbursement of the Pinnacle MoM device was false because the device's defects made **[**69]** it "not reasonable and necessary" under *42 U.S.C. § 1395y(a)(1)(A)*, such an argument must fail. Surely to survive a motion to dismiss pursuant to *Rule 9(b)* and *Rule 12(b)(6)*, the relators must do more than allege that a product's alleged defects automatically make it unreasonable and unnecessary. Such a theory of liability, if allowed to proceed, would convert almost any product-liability suit into one that also states a claim under the *False Claims Act*.

In short, the SAC is slightly more detailed than the complaint in *Ge*, which the First Circuit found to be inadequate under *Rule 9(b)*. It contains, however, almost no specific allegations as to actual false claims in comparison to the detailed eight claims in *Duxbury I*, which the First Circuit said was "barely adequate" and where dismissal was considered a "close call." Accordingly, DePuy's motion to dismiss will be **[*255]** granted as to the federal FCA claims (Counts One and Two) for failure to comply with the requirements of *Rule 9(b)*.

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

DePuy also contends that the relators' federal FCA claims pursuant to *§ 3729(a)(1)(A)-(B)*) should be dismissed for failure to state a claim under *Fed. R. Civ. P. 12(b)(6)*. Specifically, DePuy contends that the SAC fails to state a claim because even if it made misstatements about the Pinnacle MoM device, the relators **[**70]** fail to allege that those misstatements resulted in any claims that were actually "false" as the First Circuit interpreted the meaning of the term in *United States ex rel. Escobar v. Universal Health Services, 780 F.3d 504, 512 (1st Cir. 2015)*.[10]

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[8] It is also noteworthy that the allegations with regard to that order are based on mere "information and belief." (SAC ¶¶ 414-24).

[9] If the rule were otherwise, virtually any claim of misrepresentation or a product defect involving medical devices, pharmaceuticals, or other medical products could be brought as a *qui tam* action. Government health-care programs such as Medicare and Medicaid represent a huge portion of health-care expenditures in the United States. As a matter of logic, any scheme that causes unreasonable or unnecessary purchases of a product or service will almost certainly result in the submission of some false claim, by someone, somewhere, to the federal government. *Rule 9(b)*, however, requires something more than conclusory allegations that false claims must have resulted from the misconduct. *See* *Ge, 737 F.3d at 124* (stating that the court "reject[s] [the] approach" sought by the relator, which was "a *per se* rule that if sufficient allegations of misconduct are made, it necessarily follows that false claims and/or material false information were filed").

[10] DePuy also contends that the SAC fails to allege that DePuy made any false statements in submitting or causing third-parties to submit false claims that were "material" to the government's decision to reimburse the claim. In most cases, materiality issues are not appropriate for resolution on the pleadings because the element, as defined by the First Circuit, is highly dependent on the facts. *See, e.g.,* *Loughren, 613 F.3d at 308* (noting that "materiality in the FCA context involves a factual determination of the

After the Court held a hearing on DePuy's motion to dismiss, the Supreme Court, on December 3, 2015, granted a petition for review of the First Circuit's decision in *Escobar. See Universal Health Servs., Inc. v. United States, 136 S. Ct. 582, 193 L. Ed. 2d 465*. As explained more fully below, a complicated circuit split on the issues **[**71]** of (1) implied certification and (2) conditions of participation versus conditions of payment will continue to affect FCA cases until the Supreme Court issues its ruling in *Universal Health Services*. It does not appear that the Supreme Court has set a briefing schedule or argument date, and the Court very well could resolve some issues while reserving others for remand to the First Circuit. Thus, it appears unlikely that the FCA issues presented by *Escobar* and related cases in other circuits——namely, what suffices as a "false" claim——will be resolved within the next year. In any event, the Court has already reached a resolution of the relators' federal FCA claims on the independent grounds of *Rule 9(b)*. Accordingly, the Court will defer ruling on the *Rule 12(b)(6)* issues.

As noted, the *False Claims Act* proscribes "knowingly present[ing], or caus[ing] to be presented, a false or fraudulent claim for payment or approval" and "knowingly mak[ing], us[ing], or caus[ing] to be made or used, a false record or statement material to a false or fraudulent claim." *31 U.S.C. § 3729(a)(1)(A)-(B)*. To be actionable, a false or fraudulent claim or statement must also be material to the government's decision to pay a claim. *See Loughren, 613 F.3d at 307* ("We have long held that the FCA is subject to a judicially-imposed **[**72]** requirement that the allegedly false claim or statement be material.").

As one judge in this district has recently noted since the First Circuit's decision in *Escobar*, "[f]alse statements come in the full spectrum of shades of gray, and the *False Claims Act* provides little help to courts attempting to separate actionable ones from permissible ones." *United States ex rel. Bierman v. Orthofix Int'l, N.V., 113 F. Supp. 3d 414, 2015 U.S. Dist. LEXIS 91692, 2015 WL 4197551, at *3 (D. Mass. July 1, 2015)* (Zobel, J.). Some circuits have announced fixed rules to determine whether a claim is actionable by separating various types of false claims into categories. One such categorization divides claims and statements **[*256]** that are factually false (such as when a contractor does not provide the product for which reimbursement is sought) from those that are legally false (such as false certifications of compliance with statutes or regulations). *See, e.g., United States ex rel. Conner v. Salina Reg'l Health Ctr., Inc., 543 F.3d 1211, 1217 (10th Cir. 2008)*; *Mikes v. Straus, 274 F.3d 687, 696-97 (2d Cir. 2001)*.

But the disagreement among the circuits about the meaning of a false claim exists at two further levels of categorization. First, one categorization divides legally false statements into groups based on theories of "express" certification and "implied" certification. *See United States ex rel. Wilkins v. United Health Grp., Inc., 659 F.3d 295, 305-06 (3d Cir. 2011)* (collecting cases). Under the theory of express certification, a company faces liability under the FCA by fraudulently and expressly **[**73]** certifying compliance with a statute, regulation, or contractual provision when submitting a claim for payment. *Id.* Under the theory of implied certification, a company may face liability even if it did not certify compliance with a statute or regulation when submitting the claim, but instead made an earlier, more general certification. *Id.* The Seventh Circuit has recently adopted only express certification and rejected all theories of implied certification. *See United States v. Sanford-Brown, Ltd., 788 F.3d 696, 2015 WL 3541422, at *12 (7th Cir. 2015)* ("Although a number of other circuits have adopted the so-called doctrine of implied false certification . . . we decline to join them . . . ."). Other circuits however, including the First Circuit, have accepted, to varying degrees, the theory of implied certification.[11]

Second, the circuits that have accepted the implied certification theory are further divided. Every circuit to accept implied certification requires that compliance with a statute, regulation, or contractual provision that is allegedly violated must **[**74]** be a condition of payment by the government payor. There is disagreement among the circuits, however, as to whether a condition of payment must be expressly identified as such, or whether a statute, regulation, or contractual provision can be a condition of payment if it does not state that payment is conditioned on compliance. The Second and Sixth Circuits fall into the former category, concluding that a company impliedly

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weight that the decisionmaker would have given particular information"). Because the Court has resolved the present motion on the narrower issue of *Rule 9(b)*'s pleading requirements——along with the fact that *Escobar* would need to be resolved by the Supreme Court—— the Court will not address DePuy's second argument.

[11] Although the First Circuit has "eschewed distinctions" used by other circuits in describing types of FCA claims, as discussed below, it appears that the court in *Escobar* applied a theory of implied certification. *780 F.3d at 512*.

certifies compliance with a statute, regulation, or contractual provision for purposes of FCA liability only if the government expressly conditions payment on compliance. *See* Chesbrough v. VPA, P.C., 655 F.3d 461, 468 (6th Cir. 2011); Straus, 274 F.3d at 700-02. In other words, according to those circuits, the legal obligation in question must be explicitly designated as a condition of *payment*. Conversely, the First, Fourth, and D.C. Circuits do not require a legal obligation to be expressly identified as a condition of payment; instead, those circuits have found "implied conditions of payment"——sometimes referred to as conditions of participation——without explicit language in the relevant statute, regulation, or contract. *See* Escobar, 780 F.3d at 513-14; United States v. Triple Canopy, Inc., 775 F.3d 628, 636 (4th Cir. 2015); United States v. Science Apps. Int'l Corp., 626 F.3d 1257, 1269, 393 U.S. App. D.C. 223 (D.C. Cir. 2010) ("*SAIC*").

In *Escobar*, the First Circuit declared that it had "eschewed distinctions between factually and legally false **[**75]** claims, and those between implied and express certification theories, reasoning that they 'create artificial barriers that obscure and distort [the **[*257]** statute's] requirements.'" Escobar, 780 F.3d at 512 (quoting United States ex rel. Hutcheson v. Blackstone Med., Inc., 647 F.3d 377, 385 (1st Cir. 2011)). Instead, the court wrote that it takes "a broad view of what may constitute a false or fraudulent statement to avoid 'foreclos[ing] [False Claims Act] liability in situations that Congress intended to fall within the Act's scope,'" United States ex rel. Jones v. Brigham & Women's Hosp., 678 F.3d 72, 85 (1st Cir. 2012) (quoting Hutcheson, 647 F.3d at 387), "ask[ing] simply whether the defendant, in submitting a claim for reimbursement, knowingly misrepresented compliance with a material precondition of payment." Escobar, 780 F.3d at 512. As interpreted by the First Circuit, "preconditions of payment, which may be found in sources such as statutes, regulations, and contracts, need not be 'expressly designated.'" *Id.* (quoting Hutcheson, 647 F.3d at 387-88). "Rather, the question whether a given requirement constitutes a precondition to payment is a 'fact-intensive and context-specific inquiry,' involving a close reading of the foundational documents, or statutes and regulations, at issue." Id. at 512-13 (quoting New York v. Amgen Inc., 652 F.3d 103, 110 (1st Cir. 2011)).

In *Escobar*, the relators' daughter died while receiving treatment from unlicensed providers at a Massachusetts counseling center owned by Universal Health Services. Id. at 509. The relators alleged **[**76]** that the treatment facility violated the FCA because it, in submitting claims for payment, impliedly falsely represented that it had complied with various state regulations, including regulations concerning the licensing and supervision of providers. Id. at 510-11. The district court dismissed the complaint in its entirety for failure to plead the requisite element of falsity. United States ex rel. Escobar v. Universal Health Servs., Inc., 2014 U.S. Dist. LEXIS 40098, 2014 WL 1271757, at *7 (D. Mass. Mar. 26, 2014). The district court drew a distinction between requirements that MassHealth imposed on providers as conditions of payment, and those imposed as conditions to participation in the program in the first instance. 2014 U.S. Dist. LEXIS 40098, [WL] at *6 ("Violations of only a condition of participation will not suffice."). The district court concluded that only one of the regulations cited by the relators was a condition of payment, and for that regulation, it concluded that the relators had not plausibly alleged that the defendant had violated the provision. 2014 U.S. Dist. LEXIS 40098, [WL] at *11-12. The First Circuit reversed, finding that a regulation that the district court did not address was a condition of payment, and held that "[b]ecause [First Circuit] case law makes clear that a healthcare provider's noncompliance with conditions of payment is sufficient to establish the falsity of a claim for reimbursement, **[**77]** we need not address here whether the False Claims Act embraces a distinction between conditions of payment and conditions of participation." Escobar, 780 F.3d at 517. Nonetheless, the court further stated that "express certification" of compliance with a condition of payment is not required under the FCA. Id. at 514 n.14.

Thus, even though the First Circuit indicated that it would not entertain distinctions between express and implied certification, the defendant filed a petition for a writ of certiorari asking the Supreme Court to address issues of implied certification and conditions of payment. The Supreme Court granted review on two questions:

> (1) Whether the "implied certification" theory of legal falsity under the FCA—— applied by the First Circuit below but recently rejected by the Seventh Circuit——is viable; and
>
> (2) Whether, if the "implied certification" theory is viable, a government contractor's reimbursement claim can be legally "false" under that theory if the provider failed to comply **[*258]** with a statute, regulation, or

> contractual provision that does not state that it is a condition of payment, as held by the First, Fourth, and D.C. Circuits; or whether liability for a legally "false" reimbursement claim requires **[**78]** that the statute, regulation, or contractual provision expressly state that it is a condition of payment, as held by the Second and Sixth Circuits.

Universal Health Services, Inc. v. United States, 136 S. Ct. 582, 193 L. Ed. 2d 465 (2015).

Here, taking all of the SAC's allegations as true, it appears that DePuy's motion to dismiss on *Rule 12(b)(6)* grounds depends on the resolution of those two issues by the Supreme Court. Liberally construed, the SAC alleges that DePuy had two contracts to sell DePuy Pinnacle devices to the VA; that the contracts at least implicitly certified that the devices were sold pursuant to Federal Supply Schedule Group 65 Part II Section A, which requires that items are "merchantable and fit for use of the particular purpose described in th[e] contract" and "in compliance with *Section 510(k)* of the Federal Food, Drug, and Cosmetic Act"; and that the MoM device did not comply with those implied certifications. (SAC ¶¶ 117, 281-99, 474-78).

Thus, it appears that in order to address DePuy's motion to dismiss on *Rule 12(b)(6)* grounds, the Court would need to await a decision from the Supreme Court about the viability of the implied-certification theory——and in particular, the theory of implied certification adopted by the First Circuit in *Escobar*. Accordingly, the Court will reserve judgment as to **[**79]** those issues.

B. Count Three: FCA Conspiracy Claim

Count Three alleges that DePuy violated the FCA by conspiring with its own employees to defraud government health-care programs. The SAC alleges that "[a]s set forth above, all named defendants have conspired with its officers, agents, and employees to defraud the United States government by presenting false or fraudulent claims for payment in violation of *31 U.S.C. § 3729(a)(1)(C)*." (SAC ¶ 506). The SAC further alleges that "defendants conspired with its officers, agents, and employees authorizing them to take and conceal the actions set forth above." (SAC ¶ 507). DePuy contends that the conspiracy claim should be dismissed because a corporation cannot conspire with its officers and employees to violate the FCA.

Pursuant to *31 U.S.C. § 3729*, "any person who—(A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval; (B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim; [or] (C) conspires to commit a violation of subparagraph (A) [or] (B) . . . is liable" for a violation of the FCA.

Of course, a corporation can only violate the FCA through the actions of its agents **[**80]** and employees. If DePuy is violating the FCA, there is no meaningful distinction between the relators' claims in Counts One and Two for false or fraudulent claims, statements, and records and Count Three for conspiracy to defraud the government health-care programs.

It therefore does not make sense to permit a conspiracy claim under the FCA to proceed on the theory that DePuy has conspired with its officers and employees. This concept has been endorsed by the Supreme Court in ***antitrust law***. *See* *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 769, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)* (explaining that "officers **[*259]** of a single firm are not separate economic actors pursuing separate economic interests, so agreements among them . . . do not provide the plurality of actors imperative for a" conspiracy under *section 1* of the Sherman Act). Multiple courts have found that companies cannot conspire with their employees or agents in the FCA context. *See, e.g.,* *United States ex rel. Ruhe v. Masimo Corp., 929 F. Supp. 2d 1033, 1037-38 (C.D. Cal. 2012)* (holding that conspiracy claim failed to state a claim because a corporation cannot conspire with its own employees or agents); *United States ex rel. Head v. Kane & Co., 798 F. Supp. 2d 186, 201 (D.D.C. 2011)* (finding that a company could not have conspired with its employees to violate the FCA); *United States ex rel. Loughren v. Unumprovident Corp., 2008 U.S. Dist. LEXIS 123382, 2008 WL 4280133, at *3 (D. Mass. Sept. 15, 2008)* (dismissing FCA conspiracy claims during periods when defendants were corporate affiliates because parent and subsidiary **[**81]** corporation cannot conspire as a matter of law); *United States ex rel. Brooks* *v. Lockheed Martin Corp., 423 F. Supp. 2d 522, 528 (D. Md. 2006)* (finding that parent company and its two wholly-owned subsidiaries could not conspire among themselves to violate the FCA); *United States ex rel. Reagan v. East Tex. Med. Ctr. Reg'l Health-care Sys., 274 F. Supp. 2d 824, 856 (S.D. Tex. 2003)* (finding that a parent corporation cannot conspire with various components and subsidiaries to commit a conspiracy in violation of the FCA).

In short, although corporate employees could conspire with outside individuals, such as physicians, the conspiracy cannot be between the corporations and their officers and employees. Accordingly, DePuy's motion to dismiss the conspiracy claim (Count Three) will be granted.

C. Counts Four through Thirty-Seven: State FCA Claims

Counts Four through Thirty-Seven of the SAC allege violations of various state and municipal analogues to the federal FCA.[12] DePuy contends that those claims should be dismissed for the same reasons the federal FCA claims should be dismissed.

The First Circuit has noted that "[g]iven the substantive similarity of the state FCAs . . . and the federal FCA with respect to the provisions at issue in this litigation, the state statutes may be construed consistently with the federal act." *Amgen, 652 F.3d at 109*. Thus, **[**82]** *Rule 9(b)*'s heightened pleading requirements apply equally to allegations made pursuant to violations of a state FCA. *See, e.g., Nowak, 806 F. Supp. 2d at 357* ("In order to satisfy *Rule 9(b)*, [relator] must allege some specificity with respect to each asserted state and cannot rely upon generalized pleadings.").

Here, with two exceptions, the SAC's state FCA allegations do not even come close to satisfying the pleading requirements of *Rule 9(b)*. For 33 of the state-law FCA counts, the SAC contains identical language that "repeat[s] and reallage[s] each and every allegation contained in the paragraphs above as though fully set forth herein." (*See, e.g.*, SAC ¶ 509). With the exceptions of California[13] and New York, the SAC contains no allegations of fraudulent conduct or false claims for the Pinnacle MoM device beyond the repeated **[*260]** conclusory allegations found in the specific counts.

Moreover, the SAC's allegations concerning California are limited to a San Diego patient who allegedly ordered a Pinnacle MoM device and a "Summitt Pinnacle metal on metal" device through the VA on September 28, 2007. (SAC **[**83]** ¶¶ 485-86). For the reasons discussed above, those allegations are insufficient to meet the requirements of *Rule 9(b)*. Finally, the SAC's allegations about the one New York Medicaid patient who received a "Pinnacle hip implant"—— along with the related New York statistics——are insufficient to survive *Rule 9(b)* because they do not refer to the Pinnacle MoM device that is the subject of this litigation and do not raise an inference of fraud beyond mere possibility. (SAC ¶¶ 414-28, 438-55).

Accordingly, DePuy's motion to dismiss will be granted as to the state and municipal FCA claims (Counts Four through Thirty-Seven) for failure to comply with the requirements of *Rule 9(b)*.

D. Motion to Unseal

On August 24, 2015, the relators moved under seal to unseal the SAC. DePuy assented to that motion on September 2, 2015, but requested that certain other documents also be unsealed: (1) the relators' motion to unseal the SAC, the accompanying memorandum of law and exhibits, and DePuy's response and accompanying exhibits; and (2) all documents and filings relating to DePuy's motion to dismiss.

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[12] For these purposes, the District of Columbia will be considered a "state."

[13] California is the only state among the alleged false claims in paragraphs 479 through 490 where the SAC alleges an order of a Pinnacle MoM device. (*See* SAC ¶¶ 479-90).

Under the FCA, a *qui tam* relator must comply with the following pre-suit requirements:

> A copy of the complaint and written disclosure **[**84]** of substantially all material evidence and information the person possesses shall be served on the Government . . . . The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

31 U.S.C. § 3730(b)(2).

The relators filed the initial complaint under seal on May 18, 2012. Judge Talwani partially unsealed the case on August 12, 2014, but the complaint remained under seal. This Court denied a renewed motion to unseal the case on March 18, 2015, without prejudice. The SAC and documents relating to DePuy's motion to dismiss have remained under seal since.

The case has reached a point where unsealing the complaint and related documents is appropriate. Accordingly, both parties' motions to unseal certain documents will be granted and the Court directs the clerk to unseal the following docket number entries, including exhibits: Docket Nos. 145, 146, 152, 153, 159, 166, 172, and 177.

E. Leave to Amend

The relators filed the initial complaint in this case on May 18, 2012. **[**85]** The relators filed an amended complaint on December 2, 2013. On June 5, 2015, the Court granted, over the objection of DePuy, the relators' motion to amend the first amended complaint and file a second amended complaint. On June 29, 2015, DePuy filed its motion to dismiss. The relators have not filed a formal motion for leave to amend the SAC. However, in the conclusion section of their opposition to DePuy's motion to dismiss, filed on July 13, 2015, the relators conclude: "For all the foregoing reasons, defendants' motion to dismiss the SAC should be denied. In the alternative, relators should be granted leave to amend **[*261]** insofar as it may be necessary to plead additional facts to meet the standards of *Rule 12(b)(6)* and/or *9(b)*." (Relators' Mem. Opp. 30).[14]

The SAC will be dismissed with prejudice and the relators' request to file a fourth complaint will be denied. Relators filed their original complaint in 2012, three years after *Duxbury I* firmly established the FCA pleading requirements in the First Circuit. After amending their complaint twice, relators opposed DePuy's motion to dismiss instead of filing a request to amend the complaint a third time. Hedging their bets, at the very end of their opposition, relators requested leave to amend using boilerplate language. *See* *Ge, 737 F.3d at 128* ("[W]here, as here, a request to file an amended complaint consists of nothing more than 'boilerplate sentences stating the well-settled 'freely given' standard under which a request for leave to amend is generally analyzed,' a district court 'acts well within its discretion when completely disregarding the request.'" (quoting *Silverstrand Invs. v. AMAG Pharms., Inc., 707 F.3d 95, 107-08 (1st Cir. 2013)))*. Moreover, as the First Circuit has held in the context of post-judgment requests to amend a complaint, allowing relators to file a fourth complaint here after fully litigating the issues "would allow plaintiffs to pursue a case to judgment and then, if they lose, to reopen the case by amending their complaint to **[**87]** take account of the court's decision. Such a practice would dramatically undermine the ordinary rules governing the finality of judicial decisions, and should not be sanctioned in the absence of compelling circumstances." *James v. Watt, 716 F.2d 71, 78 (1st Cir. 1983)* (Breyer, J.).

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[14] The relators made similar requests in their sur-reply brief and post-hearing supplemental filing. (Docket Nos. 166, 179). The relators also contend that leave to amend should be granted because DePuy did not move to dismiss the SAC with prejudice. But DePuy explicitly did so, as noted on the first page of its motion to dismiss, filed on June 29, 2015. (Docket No. 145) ("Pursuant to *Federal Rules of Civil Procedure 9(b)* and *12(b)(6)*, Defendants . . . respectfully move to dismiss the relators' second **[**86]** amended complaint with prejudice.").

Despite full awareness of Rule 9(b)'s pleading standards, the relators—who are expert witnesses in related products-liability lawsuits against DePuy—have failed to plead with requisite particularity even a single false claim for the Pinnacle MoM device in their 168-page second amended complaint. The Federal Rules call for courts to "freely give leave [to amend] when justice so requires." Fed. R. Civ. P. 15(a)(2). Justice would not be served by granting relators' request to file a third amended complaint; rather, such a grant would prejudice the defendants and incentivize future unfair amendment tactics.

Accordingly, relators' request to file a third amended complaint is denied on the grounds of undue delay. *See* Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962) (noting that amendments may be denied on the basis of "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [and] **[**88]** futility of amendment"); United States ex rel. D'Agostino v. EV3, Inc., 802 F.3d 188, 195 (1st Cir. 2015) (noting that, even though the Rule 15 standard applied——instead of the Rule 16 good cause standard——to a relator's request to amend a *qui tam* complaint, "[l]et us be perfectly clear. We do not suggest that the district court will be compelled to grant the motion to amend on remand. After all, there are myriad reasons that might justify the denial **[*262]** of a motion for leave to amend, including undue delay, repeated failure to cure deficiencies, or futility." (citing Foman, 371 U.S. at 182)). "When 'considerable time has elapsed between the filing of the complaint and the motion to amend, the movant has [at the very least] the burden of showing some valid reason for his neglect and delay.'" In re Lombardo, 755 F.3d 1, 3 (1st Cir. 2014) (internal quotation marks omitted) (quoting Stepanischen v. Merchants Despatch Transp. Corp., 722 F.2d 922, 933 (1st Cir. 1983)). The First Circuit has "previously labeled as 'considerable time' warranting explanation, periods of fourteen months, fifteen months, and seventeen months." *Id.* (citations omitted) (citing Grant v. News Grp. Bos., Inc., 55 F.3d 1, 6 (1st Cir. 1995) (fourteen months); Acosta-Mestre v. Hilton Int'l of P.R., Inc., 156 F.3d 49, 51-52 (1st Cir. 1998) (fifteen months); Stepanischen, 722 F.2d at 933 (sixteen months)). The First Circuit has "also held that in assessing whether delay is undue, a court will take account of what the movant 'knew or should have known and what he did or should have done.'" Id. at 3-4 **[**89]** (quoting Invest Almaz v. Temple-Inland Forest Prods. Corp., 243 F.3d 57, 72 (1st Cir. 2001)). Delays for periods as short as eleven months, four months, and less than three months have been found to constitute undue delay. *See* Calderón-Serra v. Wilmington Trust Co., 715 F.3d 14, 19-20 (1st Cir. 2013) (eleven-month delay); Villanueva v. United States, 662 F.3d 124, 127 (1st Cir. 2011) (four-month delay); Kay v. N.H. Dem. Party, 821 F.2d 31, 34 (1st Cir. 1987) (less than three-month delay).

Here, the relators filed their original complaint in 2012, when they should have already been aware of the First Circuit's Rule 9(b) pleading standard in FCA cases. Since that time, they have amended the complaint twice. At the very latest, they should have been aware of the SAC's deficiencies when DePuy filed its motion to dismiss in June 2015. Instead, the relators vigorously litigated the motion, including the filing of a sur-reply and multiple post-argument supplemental briefs. Now, they wish to amend the complaint a third time. Considerable time has passed since the filing of the original complaint and since the relators were put on notice of the defects in the complaint, and the relators have not demonstrated a legitimate reason for their neglect and delay. Accordingly, the relators' request for leave to amend the SAC and file a third amended complaint will be denied.

IV. Conclusion

For the foregoing reasons, DePuy's motion to dismiss the second amended complaint with prejudice is GRANTED, and the clerk is hereby directed to unseal the docket entries indicated above. Relators' request for leave to amend its second amended complaint is DENIED.

[90] So Ordered**.

/s/ F. Dennis Saylor

F. Dennis Saylor IV

United States District Judge

Dated: February 2, 2016

G.U.E. Tech, LLC v. Panasonic Avionics Corp.

United States District Court for the Central District of California, Southern Division

February 4, 2016, Decided; February 4, 2016, Filed

Case No.: SACV 15-00789-CJC(DFMx)

Reporter
2016 U.S. Dist. LEXIS 188759 *; 2016 WL 6138422

G.U.E. TECH, LLC, Plaintiff, v. PANASONIC AVIONICS CORPORATION, Defendant.

Prior History: G.U.E. Tech, LLC v. Panasonic Avionics Corp., 2015 U.S. Dist. LEXIS 194011 (C.D. Cal., Sept. 15, 2015)

Core Terms

games, airlines, alleges, video game, pleaded, motion to dismiss, database, vendors, competitors, antitrust, Sherman Act, Lanham Act, deceit, misrepresentation, license, sells, conspiracy, violations, prices, cause of action, prospective economic relations, intentional interference, trade libel, restitution, distribute, horizontal, customers, monopoly, vertical, update

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Judges: CORMAC J. CARNEY, UNITED STATES DISTRICT JUDGE.

Opinion by: CORMAC J. CARNEY

Opinion

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS

I. INTRODUCTION

Plaintiff G.U.E. Tech, LLC ("G.U.E.") brings this action against Defendant Panasonic Avionics Corporation ("PAC") for (1) violations of §§ 1 and 2 of the Sherman Act, 15 U.S.C. § 1; (2) violations of the Cartwright Act, Cal. Bus. & Prof. Code § 16700, et seq.; (3) trade libel; (4) product disparagement under the Lanham Act, 15 U.S.C. § 1125(a)(1)(B); (5) fraud and deceit; (6) intentional interference with prospective economic relations; (7) violations of the California Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200, et seq.; and (8) restitution. After the Court granted in part and denied in part PAC's motion to dismiss the complaint, G.U.E. filed a First Amended

Complaint. Currently before the Court is PAC's **[*2]** motion to dismiss the First Amended Complaint for failure to state a claim. (Dkt. 31.) For the following reasons, that motion is GRANTED IN PART AND DENIED IN PART.[1]

II. FACTUAL AND PROCEDURAL BACKGROUND

G.U.E. is a software company that produces and licenses video games that airline passengers can play on in-flight entertainment ("IFE") systems installed in commercial aircraft. (Dkt. 25 ("First Amended Complaint" ("FAC")) ¶ 2.) PAC is the largest producer of those IFE systems, allegedly controlling approximately 75% of the IFE market (the "Systems Market"). (*Id.* ¶ 3.) G.U.E., by contrast, is one of a handful of significant companies in the market for games playable on IFE systems (the "Games Market"). (*Id.* ¶ 11.)

PAC maintains a content database—accessible to airlines that are customers of its IFE systems—which contains a list of video games compatible with PAC IFE systems. (FAC ¶ 204.) The only games included in the database are ones from PAC's "preferred," "authorized," or "approved" vendors. (*Id.*) To become such a vendor and have its games listed, a video game company must agree to give PAC 30% of its video game sales revenue, regardless of whether that revenue is derived from PAC-facilitated **[*3]** sales. (*Id.* ¶ 10.) A number of G.U.E.'s competitors—fellow video game producers and designers—have agreed to this arrangement and have their games listed in PAC's content database in exchange for surrendering 30% of their sales revenues to PAC (the "30% Agreement"). (*Id.* ¶ 13.) PAC has offered to sign a similar arrangement with G.U.E. twice, but G.U.E. has refused. (*Id.* ¶¶ 28; 31.) As a result, G.U.E.'s games are not listed in PAC's content database, and G.U.E. pursues alternative avenues for selling its games to airlines that use PAC's IFE systems. (*Id.* ¶ 31.)

Separately, G.U.E. alleges that PAC embarked on a "campaign to injure G.U.E. Tech's prospective business." (FAC ¶ 197.) G.U.E. claims that after it entered into negotiations with airlines interested in purchasing its games, PAC published "false or misleading representations" to those airlines in an attempt to sink the prospective deals. (*Id.* ¶ 221.) Specifically, PAC falsely represented to a number of potential G.U.E. customers that G.U.E.'s games would require very extensive testing before implementation on PAC's systems, or that the customers were only permitted to install games from PAC's approved list on their PAC IFE systems **[*4]** without extensive technical changes. (*See* FAC ¶¶ 285; 303.)

Based on these factual allegations, G.U.E. filed its complaint in May 2015. The initial complaint alleged a monopoly maintenance claim under *§ 2* of the Sherman Act, trade libel, intentional interference with prospective economic relations, violations of the UCL, and unjust enrichment. (*See* Dkt. 1.) PAC moved to dismiss for failure to state a claim, (Dkt. 16), and the Court granted its motion in part and denied it in part, (Dkt. 24.) The Court dismissed with leave to amend G.U.E.'s monopoly maintenance cause of action because G.U.E. failed to allege that it and PAC operated in the same market, or that it had suffered antitrust injury in the market PAC had monopolized. (*See* Dkt. 24 at 4-8.) It also dismissed G.U.E.'s unjust enrichment cause of action because unjust enrichment is not a standalone cause of action in California. (*Id.* at 14.) The Court denied PAC's motion, however, as to G.U.E.'s claims for trade libel, intentional interference with prospective economic relations, and violations of the UCL, ruling that those causes of action had been adequately pleaded to survive a motion to dismiss. (*Id.* at 9-14.) Subsequently, G.U.E. filed its First **[*5]** Amended Complaint. (*See generally* FAC.)

The FAC expands on G.U.E.'s factual allegations—it is 139 pages—and makes a number of important legal pivots. Most importantly, G.U.E. dramatically reworks its antitrust allegations by asserting two separate causes of action under the Sherman Act. First, it brings a group boycott/concerted refusal to deal claim under *§ 1* of the Sherman Act, alleging essentially that PAC conspired with G.U.E.'s competitors to deny it access to the Games Market. (FAC ¶¶ 429-45.) Second, G.U.E. asserts another monopoly maintenance claim under *§ 2* of the Sherman Act. But rather than allege that PAC leverages its monopoly of the *Systems Market* to maintain a monopoly in the *Games Market*,

[1] Having read and considered the papers presented by the parties, the Court finds this matter appropriate for disposition without a hearing. *See Fed. R. Civ. P. 78*; *Local Rule 7-15*. Accordingly, the hearing set for February 8, 2016 at 1:30 p.m. is hereby vacated and off calendar.

as it did in its original complaint, G.U.E. instead posits the existence of a "Distribution Market." The "Distribution Market" is just another name for PAC's content database, to which G.U.E. does not have access. (*Id.* ¶¶ 554-64.) G.U.E. alleges that PAC's exclusion of it from the Distribution Market permits it to maintain its monopoly in that market. G.U.E. also alleges that these actions violate the Cartwright Act, California's antitrust statute.

Next, the FAC adds a cause of action for **[*6]** product disparagement under the Lanham Act, as well as a cause of action for fraud/deceit, based on a handful of particular misrepresentations. Finally, G.U.E. reworks what was originally its "unjust enrichment" claim as a claim for restitution, as well as re-asserting the claims which were not dismissed from its original complaint (for trade libel, intentional interference with prospective economic relations, and violations of the UCL).

On November 16, 2015, PAC again moved to dismiss for failure to state a claim. It argues that G.U.E.'s state and federal antitrust claims are untenable for a number of reasons, that its new fraud claim is improperly pleaded, that it has not pleaded facts to support a Lanham Act claim, and that it cannot seek restitution. Finally, PAC argues that G.U.E.'s trade libel, UCL, and intentional interference with prospective economic relations claims should be dismissed insofar as G.U.E. seeks to expand them through the FAC. G.U.E. opposed the motion, (Dkt. 32), and PAC filed a reply, (Dkt. 33).

III. LEGAL STANDARD

A motion to dismiss under *Federal Rule of Civil Procedure 12(b)(6)* tests the legal sufficiency of the claims asserted in the complaint. The issue on a motion to dismiss for failure to state **[*7]** a claim is not whether the claimant will ultimately prevail, but whether the claimant is entitled to offer evidence to support the claims asserted. *Gilligan v. Jamco Dev. Corp., 108 F.3d 246, 249 (9th Cir. 1997)*. *Rule 12(b)(6)* is read in conjunction with *Rule 8(a)*, which requires only a short and plain statement of the claim showing that the pleader is entitled to relief. *Fed. R. Civ. P. 8(a)(2)*. When evaluating a *Rule 12(b)(6)* motion, the district court must accept all material allegations in the complaint as true and construe them in the light most favorable to the non-moving party. *Moyo v. Gomez, 32 F.3d 1382, 1384 (9th Cir. 1994)*. However, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*; *see also* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (stating that while a complaint attacked by a *Rule 12(b)(6)* motion to dismiss does not need detailed factual allegations, courts "are not bound to accept as true a legal conclusion couched as a factual allegation" (citations and quotes omitted)). Dismissal of a complaint for failure to state a claim is not proper where a plaintiff has alleged "enough facts to state a claim to relief that is plausible on its face." *Twombly, 550 U.S. at 570*. In keeping with this liberal pleading standard, the district court should grant the plaintiff leave to amend if the complaint can possibly be cured by additional factual **[*8]** allegations. *Doe v. United States, 58 F.3d 494, 497 (9th Cir. 1995)*.

IV. ANALYSIS

A. Sherman Act

1. *Section 1* Claim

Section 1 of the Sherman Act bans "contract[s]" and "conspirac[ies]" that unreasonably restrain trade. *See 15 U.S.C. § 1*. Among the proscribed agreements are "[g]roup boycotts, or concerted refusals by traders to deal with other traders," which have "long been held to be . . . forbidden" by the Sherman Act. *Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212, 79 S. Ct. 705, 3 L. Ed. 2d 741 (1959)*. Such agreements may be horizontal, vertical, or a combination of the two. Horizontal refusals to deal—i.e., agreements among competitors to boycott a particular firm or firms—are "inherently anticompetitive" and "violate the Sherman Act per se." *In re Musical Instruments and*

Equipment Antitrust Litig., 798 F.3d 1186, 1191 (9th Cir. 2015). Vertical refusals to deal—for example, between a manufacturer and a retailer—do not per se violate the Sherman Act and are instead subject to the "rule of reason," which examines an agreement for its anticompetitive effects. Id. at 1191-92. But, as the Ninth Circuit clarified, "the line between horizontal and vertical restraints can blur," and a single conspiracy to restrain trade "can involve both direct competitors and actors up and down the supply chain." Id. at 1192. Such conspiracies are sometimes describes as "hub-and-spoke" conspiracies. A hub-and-spoke conspiracy has three elements: "(1) a hub, such as a dominant purchaser; (2) spokes, such as competing manufacturers **[*9]** or distributors that enter into vertical agreements with the hub; and (3) the rim of wheel, which consists of horizontal agreements among the spokes." *Id.* Although the analogy to a wheel is useful, "homespun metaphors for complex economic activities only go so far," and § 1 "prohibits agreements that unreasonably restrain trade, no matter the configuration they take or the labels we give them." *Id.* Accordingly, even a hub-and-spoke conspiracy may be "broken into its constituent parts," and the resulting vertical and horizontal agreements can be analyzed either under the rule of reason (for the vertical ones, generally) or as violations per se (for the horizontal ones, generally). *Id.*

G.U.E. alleges that a number of its competitors—fellow game vendors—have entered into 30% Agreements with PAC, and that these agreements constitute a "concerted action among PAC and its co-conspirator 'preferred,' 'approved,' and 'authorized' vendors to eliminate pricing competition" and exclude G.U.E. from the Games Market. (FAC ¶ 432.) The result, G.U.E. argues, is that airlines face higher prices for video games than they would otherwise have to pay in a competitive market. (FAC ¶ 433.)

As an initial matter, **[*10]** G.U.E. lacks antitrust standing to challenge higher prices faced by airlines. Because it sells games to airlines, it stands only to benefit from the "price floor" that it alleges exists in the market for IFE video games. *See* Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 337, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990) (plaintiff lacked standing to sue over elevated prices because, as a competitor in the market, "higher . . . prices would have worked to [its] advantage . . . [a] competitor may not complain of conspiracies that . . . set minimum prices at *any* level") (emphasis in original).

But more fundamentally, G.U.E. has failed to allege any *concerted* action that could serve as the factual basis for the concerted refusal to deal claim that it asserts. Group boycotts or concerted refusals to deal involve "joint efforts by a firm or firms to disadvantage competitors," Nw. Wholesalers Stationers Inc. v. Pac. Stationery and Printing Co., 472 U.S. 284, 294, 105 S. Ct. 2613, 86 L. Ed. 2d 202 (1985), and not "case[s] of a single trader refusing to deal with another," Klor's, 359 U.S. at 212. There are *no* facts in the FAC that suggest that PAC agreed with individual game vendors to disadvantage G.U.E. Instead, the FAC makes clear that each individual vendor who accepted the 30% Agreement was incentivized to do so on its own terms; G.U.E. alleges that vendors "stood to benefit financially" from accepting the Agreement and that it would **[*11]** be "ruinous" not to do so. (FAC ¶¶ 11-12.) Indeed, the FAC pleads no facts suggesting that the vendors' decision to accept the 30% Agreement had anything to do with G.U.E. or its prospects at all. In other words, G.U.E. had not pleaded that it was actually boycotted by a group, or that its competitors *concertedly* refused to deal with it. This defect is fatal to its § 1 claim. PAC—and PAC alone—essentially offered G.U.E. inclusion in its customer Rolodex for a price. G.U.E. declined. G.U.E may not now convert its unwillingness to take PAC's deal into a claim under the federal antitrust laws by arguing that its competitors were in on the fix.[2]

One more issue requires resolution. Although the FAC clearly pleads a multiparty conspiracy under § 1, G.U.E. again shifts tack in its briefing papers and argues that PAC sells video games, and therefore that PAC's decision not to deal with G.U.E. is unlawful on its own terms as a horizontal agreement in restraint of trade. PAC, for its part, disputes that G.U.E. has actually pleaded that PAC sells games. In fact, G.U.E.'s representations on this issue are inconsistent. The FAC alleges, for example, that PAC "d[oes] not itself develop or even license video games." **[*12]** (FAC ¶ 204.) Instead, G.U.E. explains, PAC only *distributes* games designed by others. (*Id.* ¶ 554 ("Although PAC does not develop its own games, it distributes games to airlines using its proprietary software platform.") This telling

[2] Nor has G.U.E. alleged a vertical refusal to deal. On the contrary, G.U.E. clearly pleads PAC's eagerness to enter into a 30% Agreement with G.U.E. PAC is not refusing to deal with G.U.E.; it is simply insisting that it deal with G.U.E. and its competitors on equal terms. That is not an antitrust violation.

of the facts is consistent with other allegations in the FAC, which basically argue that although PAC does not make or sell its own games, it maintains an "IFE content database" which contains games developed by "preferred" or "approved" vendors, who pay for the privilege of having PAC promote their games. (*Id.* ¶ 556.)

Yet elsewhere in the FAC (and its briefing papers) G.U.E. backtracks and instead insists that PAC sells its own games. In ¶ 76 of the FAC, for example, G.U.E. alleges that PAC "publicly states . . . that it sells 'the [IFE] industry's broadest selection of next-general video games' playable on its gaming-capable systems, including 'over 200 [game] titles.'" As support for this allegation, G.U.E. offers two facts. The first is an attached printout of PAC's website. The website in fact states that PAC "*offers* the industry's broadest selection of next-generation video games." (Dkt. 32-2 at 2 (emphasis added).) And elsewhere the website clarifies **[*13]** that PAC is "building an ecosystem of developers" to develop "thousands of unique application[s]," including "content such as games," that would function on PAC's IFE systems. (*Id.* at 2-3.) These representations are consistent with G.U.E.'s allegations of a content *database* for which PAC charges for access. They are not consistent with the position that PAC develops or sells its own games, or even that it licenses them.

The second fact G.U.E. relies on for its allegation that PAC sells its own games is that in 2010, PAC and G.U.E. entered into a "Game Licensing Agreement," or "GLA." (FAC ¶ 124.) The GLA granted an exclusive license of G.U.E.'s video games to PAC, and while under license, the games were apparently to be promoted as "PAC Premium Games." (*Id.* ¶ 126.) Yet G.U.E. then explains that in September 2011, PAC terminated the GLA and instead offered G.U.E. a chance to enter into a 30% Agreement, which G.U.E. declined. (*Id.* ¶¶ 139; 150.) G.U.E. has not pleaded that PAC has licensed *any* video games since 2011, and none of the allegations underpinning its claims for relief date to the time period when PAC's model was to license other vendors' games rather than just manage a content database of selected games. **[*14]**

In sum, G.U.E. had not adequately pleaded that PAC sells its own games—and therefore that PAC competes in the Games Market with G.U.E. The facts alleged in the FAC are consistent with G.U.E.'s alternative story—that PAC only maintains a database of games, and that if it once licensed others' games, it stopped when it switched to its current database model. Accordingly, G.U.E. cannot assert a *§ 1* claim based on PAC's refusal to give G.U.E. free access to its content database.

Because G.U.E. has not alleged *any* facts indicating a concerted refusal to deal, and because it would not have antitrust standing to challenge elevated prices in any event, PAC's motion to dismiss its *§ 1* claim is GRANTED.

2. *Section 2* Claim

G.U.E.'s original *§ 2* claim failed because it did not adequately allege that it and PAC competed in the same market, and the Court rejected G.U.E.'s argument that PAC should be considered a competitor in the Games Market because it acted as a "gatekeeper" to that market.

G.U.E. attempts to remedy this defect by alleging an entirely new market—the "Distribution of PAC-compatible IFE video games market" (the "Distribution Market"). (FAC ¶ 556.) G.U.E. is trying to "distribute" video games to airlines, **[*15]** it argues, and PAC uses its content database to "distribute" games to airlines, so G.U.E. and PAC are in the same market after all, and G.U.E. can properly assert a *§ 2* claim. G.U.E. completes the claim by arguing that PAC has co-opted the Distribution Market through its content database, which G.U.E. alleges is now the "de facto" market for the distribution of IFE video games. Because G.U.E. is unwilling to pay for access to the content database, the argument goes, it has effectively been precluded from participation in the Distribution Market.

The alleged Distribution Market is a somewhat awkward attempt to define a market that contains both G.U.E. and PAC. As a result, the contours of the market are not entirely coherent. At one point, the FAC alleges that the Distribution Market is distinct from the Games Market "because access to airlines, rather than development or licensing of video games, was its critical focus." (FAC ¶ 209.) Yet if "access to airlines" is what is being sold in the Distribution Market, G.U.E. is not a participant at all—it sells games, not access. And, importantly, G.U.E. actually alleges facts that undercut this definition of the Distribution Market in the first **[*16]** place. According to the FAC, vendors "distribute" games to airlines in a number of different ways: through presentations at trade shows, (FAC ¶ 111), the use of third party sales agents, (FAC ¶ 110), and invitations from airlines, (FAC ¶ 113). The factual premise of the FAC is not that G.U.E. was precluded from access to airlines. Indeed, G.U.E. documents in considerable detail the access it had to airlines, including "demonstrations or presentations" to no fewer than 34 airlines, (FAC ¶ 214), an occasion on which it exchanged drafts of contracts with an airline, (FAC ¶ 294), and customer requests from three airlines for G.U.E. games to be added to their systems, (FAC ¶ 341). The *actual* factual premise of the FAC is that G.U.E. was able to distribute games to airlines but that PAC thwarted G.U.E.'s opportunities by lying about its games. That might be actionable misconduct, but it does not violate *§ 2*'s ban on monopoly maintenance.

Ultimately, the problems with G.U.E.'s attempted "Distribution Market" are fatal to its *§ 2* claim. When alleging the relevant market, a plaintiff asserting a *§ 2* claim must plead that "there are no other goods and services that are reasonably interchangeable with" **[*17]** the goods and services offered in the defined market. *Big Bear Lodging Ass'n v. Snow Summit, Inc., 182 F.3d 1096, 1105 (9th Cir. 1999)*. The "Distribution Market" clearly fails to meet this standard. Even if it is true that G.U.E. and PAC compete in a market to distribute games to airlines—a proposition that is somewhat doubtful in its own right—G.U.E. has not adequately pleaded that distribution of video games to airlines can *only* happen through PAC's content database. The numerous contacts it had with airlines, including contracts that were nearly consummated, allegedly but for PAC's misrepresentations, are in fact good evidence to the contrary. Having not alleged a relevant market, G.U.E.'s *§ 2* claim fails at the threshold, and it is DISMISSED.

G.U.E. has now had two different opportunities to plead an antitrust claim and has failed to do so, despite trying two significantly different *§ 2* claims and a *§ 1* claim that alleged a conspiracy absent any factual background. G.U.E.'s increasingly creative—and sometimes contradictory—market definitions and antitrust allegations persuade the Court that there is no Sherman Act claim to be found here. Amendment of these claims would therefore be futile, and they are DISMISSED WITH PREJUDICE.

B. Cartwright Act

G.U.E.'s claim under the **[*18]** Cartwright Act—California's state ***antitrust law***—is premised on the same alleged conspiracy among PAC and individual game vendors who accepted the 30% Agreement. It therefore falls victim to the same problems highlighted above: G.U.E. has not actually pleaded any concerted action on the part of PAC and the individual game vendors, and even if it had, it lacks antitrust standing to sue based on elevated prices. *See Lorenzo v. Qualcomm, Inc., 603 F. Supp. 2d 1291, 1302 (S.D. Cal. Mar. 3, 2009)* ("In order for a private plaintiff to have standing to sue under the Cartwright Act, the plaintiff must prove antitrust injury."); *see also Atl. Richfield, 495 U.S. at 337* (competitor who complained of higher prices from which it would benefit lacked antitrust injury).

C. Lanham Act

The Lanham Act prohibits making "false or misleading misrepresentation[s] of fact . . . in commercial advertising or promotion" which "misrepresent[] the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities." *15 U.S.C. 1125(a)*. For misrepresentations to be wrongful under the Lanham Act, they must be:

> 1) commercial speech; 2) by a defendant who is in commercial competition with the plaintiff; 3) for the purpose of influencing consumers to buy defendant's goods or services[; and] 4) . . **[*19]** . disseminated sufficiently to the relevant purchasing public to constitute advertising or promotion within that industry.

Rice v. Fox Broadcasting Co., 330 F.3d 1170, 1181 (9th Cir. 2003).

G.U.E. identifies four statements allegedly made by PAC or its employees which G.U.E. believes plead a Lanham Act claim. They are:

1. That "G.U.E. Tech's video games require significant operating system upgrades or changes just to run properly on PAC's gaming-capable IFE systems";

2. That "G.U.E. Tech's video games take 30 weeks or more to be integrated into and run on PAC's gaming-capable IFE systems";

3. That "[t]he integration of G.U.E. Tech's video games requires airlines to pay 'integration fees' to PAC that could total tens of thousands of dollars over and above the price of the games bought"; and

4. That G.U.E. Tech was not a 'preferred,' 'approved,' or 'authorized' IFE video game vendor for games playable on PAC's gaming-capable IFE systems."

(FAC ¶ 479.) But none of these allegations plead *any* of the requirements for a Lanham Act product disparagement claim. As an initial matter, "[t]he core notion of commercial speech is speech that does no more than propose a commercial transaction." *Rice, 330 F.3d at 1181*. But none of the alleged disparagements that G.U.E. identifies can reasonably be **[*20]** said to propose a commercial transaction at all, much less do no *more* than propose a commercial transaction. G.U.E. complains—perhaps with good reason—that PAC was telling airlines falsehoods about its games. But because PAC was not itself proposing a commercial transaction with those airlines, the cited statements do not qualify as commercial speech for the purpose of a Lanham Act claim. *See id.* (statements not made in "promotion or marketing" were not commercial speech).

But even if G.U.E. had adequately pleaded the commercial speech requirements, its Lanham Act claim would flounder on the remaining three requirements. For the reasons discussed above, G.U.E. has failed to plead facts plausibly suggesting that it and PAC were actually competitors in any relevant market, so PAC cannot be "a defendant who is in commercial competition with the plaintiff," *Rice, 330 F.3d at 1181*. Moreover, G.U.E. does not allege that any of the above statements were made in an effort to persuade the airlines to buy *PAC*'s services—again, because PAC did not provide any competing services. *See id.* (requiring that statements be made "for the purpose of influencing consumers to buy *defendant's* goods or services" (emphasis added)). **[*21]** And finally, G.U.E. has only identified private statements made by PAC or its representatives to a handful of individual airlines. These statements do not qualify as misrepresentations that have been "disseminated sufficiently to the relevant purchasing public to constitute advertising or promotion." *Id.* Indeed, G.U.E. does not plead that any of the statements were public at all, rather than private communications.

Ordinarily, an initial failed attempt to plead a cause of action would be met with leave to amend. However, because G.U.E. did not even allege its Lanham Act claim until its amended complaint (despite alleging the relevant statements in its initial complaint), and because G.U.E. has failed to plead even one element of a product disparagement claim, the Court concludes that amendment of this claim would be futile. Accordingly, G.U.E.'s Lanham Act claim is DISMISSED WITH PREJUDICE.

D. Fraud and Deceit

Next, G.U.E. advances a claim for fraudulent deceit under *Cal. Civ. Code §§ 1709* and *1710*. The elements of that claim are "(1) misrepresentation (false representation, concealment or known disclosure); (2) knowledge of falsity (scienter); (3) intent to induce reliance; (4) justifiable reliance; and (5) resulting **[*22]** damage." *Beijing Tong Ren Tang (USA) Corp. v. TRT USA Corp., No. C-09-00882 RMW, 2010 U.S. Dist. LEXIS 20510, 2010 WL 890048, at *2 (N.D. Cal. Mar. 8, 2010)*. "Making a promise without any intention of performing it constitutes deceit and satisfies the misrepresentation and scienter requirements." *Id.* Like all claims arising in fraud, claims for fraudulent deceit must be pleaded to the specificity requirements of *Rule 9(b)*. *Id.*

G.U.E.'s allegations underlying its fraud and deceit claims arise from something the parties refer to as "customer requests," or "CRs." Evidently, when an airline wanted to include a set of games on its PAC IFE systems, it would submit a CR to PAC. PAC would then send back a "CR quote," or estimate of how much the requested games and integration would cost. In 2014, G.U.E. and PAC initiated testing of G.U.E.'s games that would determine how compatible the games were with PAC IFE systems. (*See*, *e.g.*, FAC ¶ 275.) On three occasions, G.U.E. alleges, PAC personnel falsely represented to G.U.E. that once the relevant testing was complete, PAC would update its CR quotes to the airlines—i.e., provide the airlines with updated estimates of how much it would cost to integrate G.U.E. Tech's games, based on the results of the testing. (FAC ¶ 500.) Each time, G.U.E. **[*23]** alleges, PAC personnel actually had no intention of providing updated CR quotes, and were actually engaged in a campaign of misinformation behind the scenes to prevent G.U.E. from securing contracts with the airlines. (*Id.* ¶ 501.) G.U.E. provides detailed information on who made the relevant statements, and when. (FAC ¶ 500.) PAC concedes that this information means that the claim is adequately pleaded under *Rule 9(b)*. (Def.'s Mot. at 22.)

PAC moves to dismiss the deceit claim on two substantive grounds, however. First, PAC says, although G.U.E. has alleged that PAC never *intended* to fulfill its promise to update the CR quotes, G.U.E. fails to allege that PAC *did not in fact* update those CR quotes. In other words, PAC says, G.U.E. has failed to allege a misrepresentation at all. This argument both reads the FAC too narrowly and misunderstands the case law regarding how a plaintiff can plead a misrepresentation in the context of deceit. As explained above, alleging that a promise was made without any intention to perform "constitutes deceit and satisfies the misrepresentation and scienter requirements." *Beijing Tong Ren Tang, 2010 U.S. Dist. LEXIS 20510, 2010 WL 890048, at *2*. G.U.E. has therefore adequately pleaded those elements of its claim.

PAC adds, however, that **[*24]** G.U.E. has failed to plead that it justifiably relied on PAC's statements. Instead of taking it at its word, PAC says, G.U.E. should have communicated directly with its customers to ensure that the CR quotes were sent along, and that having failed to do so, G.U.E. "dropp[ed] the ball." (Def.'s Mot. at 22.) Not so. G.U.E. explains that it had no reason to believe PAC would lie about its willingness to update the CR quotes. It was justified in relying on PAC's alleged promise to convey the relevant information to the airlines, at least for the purposes of pleading the claim in the first place. As a result, PAC's motion to dismiss is DENIED as to G.U.E.'s fraud and deceit claim.

E. Restitution

G.U.E.'s next claim is a "quasi-contract" claim seeking restitution. As PAC points out, claims for restitution are appropriate when "the parties had an express contract, but it was procured by fraud or is unenforceable or ineffective for some reason," or when "the defendant obtained a benefit from the plaintiff by fraud, duress, conversion, or similar conduct." *Durell v. Sharp Healthcare, 183 Cal. App. 4th 1350, 1370, 108 Cal. Rptr. 3d 682 (Cal. Ct. App. 2010)*. The trouble is that neither of those things is alleged to have occurred here. G.U.E. alleges neither the existence of an express contract nor that **[*25]** PAC obtained some benefit from G.U.E. (Instead, G.U.E.'s complaint is essentially that PAC did not give it the benefit of "preferred" status, for free.) Rather than respond to this argument in its opposition, G.U.E. said nothing at all about its restitution claim. That claim has therefore been abandoned and is DISMISSED WITH PREJUDICE.

F. Remaining Claims

G.U.E.'s remaining claims are for trade libel, intentional interference with prospective economic relations, and violations of the UCL. PAC moved to dismiss these claims previously, but the Court determined that the claims were adequately pleaded and denied PAC's motion to dismiss them. PAC advances no new ground for dismissal, but instead complains that G.U.E. is attempting to "cast a broader net" and sweep additional factual allegations into those claims. (Def.'s Mot. at 23.) The Court finds no reason to believe that this is the case. The claims are adequately pleaded. PAC's motion to dismiss is therefore DENIED as to G.U.E.'s claims for trade libel, intentional interference with prospective economic relations, and violations of the UCL.

IV. CONCLUSION

For the foregoing reasons, PAC's motion to dismiss is GRANTED IN PART AND DENIED **[*26]** IN PART. G.U.E.'s Sherman Act claims, its Lanham Act claim, and its quasi-contract claim are all DISMISSED WITH PREJUDICE.

DATED: February 4, 2016

/s/ Cormac J. Carney

CORMAC J. CARNEY

UNITED STATES DISTRICT JUDGE

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It's My Party, Inc. v. Live Nation, Inc.

United States Court of Appeals for the Fourth Circuit

December 8, 2015, Argued; February 4, 2016, Decided

No. 15-1278

Reporter

811 F.3d 676 *; 2016 U.S. App. LEXIS 1882 **; 2016-1 Trade Reg. Rep. (CCH) P79,488

IT'S MY PARTY, INC.; IT'S MY AMPHITHEATRE, INC., d/b/a Merriweather Post Pavilion, Plaintiffs - Appellants, v. LIVE NATION, INC., Defendant - Appellee.

Prior History: [1]** Appeal from the United States District Court for the District of Maryland, at Baltimore. J. Frederick Motz, Senior District Judge. (1:09-cv-00547-JFM).

It's My Party, Inc. v. Live Nation, Inc., 88 F. Supp. 3d 475, 2015 U.S. Dist. LEXIS 19762 (D. Md., 2015)

Core Terms

promotion, artists, venues, concert, amphitheaters, products, antitrust, consumer, package, competitors, tours, anti trust law, district court, tied product, markets, seller, monopolization, coercion, regional, tying arrangement, tying product, market power, ticket sales, anticompetitive, advertising, arenas, buyer, definitions, vertical integration, music

LexisNexis® Headnotes

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

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

HN1[] **Entitlement as Matter of Law, Appropriateness**

Summary judgment is justified if there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(a)*. In reviewing a motion for summary judgment, the court must draw any permissible inference from the underlying facts in the light most favorable to the party opposing the motion.

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

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

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

HN2[] Actual Monopolization, Claims

The definition of a relevant market is a threshold issue for monopolization claims under *15 U.S.C.S. § 2*. Appreciable economic power in the tying market is a necessary feature of an illegal tying arrangement. In the absence of a plausible market definition, courts are hard pressed to discern the nature or extent of any anticompetitive injury that the plaintiff and other similarly situated parties may be suffering.

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

HN3[] Relevant Market, Geographic Market Definition

The relevant geographic market in antitrust cases is defined by the area within which the defendant's customers can practicably turn to alternative supplies if the defendant were to raise its prices.

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

HN4[] Relevant Market, Product Market Definition

Whether a product commands a distinct market depends on whether it is reasonably interchangeable with other products or the extent to which consumers will change their consumption of one product in response to a price change in another, i.e., the cross-elasticity of demand.

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

HN5[] Price Fixing & Restraints of Trade, Tying Arrangements

A tying arrangement is defined as an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product. Tying suppresses competition in two ways: First, the buyer is prevented from seeking alternative sources of supply for the tied product; second, competing suppliers of the tied product are foreclosed from that part of the market which is subject to the tying arrangement. What causes these anticompetitive harms and distinguishes tying from ordinary market behavior is not the mere bundling of two products together but rather the coercion of the consumer. The crux of tying lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms. No tie exists unless the customer was "coerced" into taking both products. If instead the buyer is free to decline the tied product or to purchase the two products separately, then by definition there is no unlawful tying.

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

HN6[] Price Fixing & Restraints of Trade, Tying Arrangements

For purposes of a tying arrangement claim, merely offering two products in a single package, allowing each to enhance the appeal of the other, is not itself coercive.

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

Evidence > Types of Evidence > Circumstantial Evidence

HN7[] **Price Fixing & Restraints of Trade, Tying Arrangements**

For purposes of a tying arrangement claim, even without direct evidence, a plaintiff can still prove coercion circumstantially.

Antitrust & Trade Law > Procedural Matters

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

HN8[] **Antitrust & Trade Law, Procedural Matters**

To prove an antitrust violation, a plaintiff must present evidence that tends to exclude the possibility of independent conduct consistent with competition. A successful tying claim in particular needs to rule out alternative market-based explanations for why the consumer might prefer to purchase the tied product along with the tying product.

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

HN9[] **Price Fixing & Restraints of Trade, Tying Arrangements**

For purposes of a tying arrangement claim, intrinsic superiority of the "tied" product will convince freely choosing buyers to select it over others without any coercion from the seller.

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

HN10[] **Price Fixing & Restraints of Trade, Tying Arrangements**

When items may be purchased separately in a competitive market, one seller's decision to sell the two in a single package imposes no unreasonable restraint on either market.

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

HN11[] **Actual Monopolization, Monopoly Power**

The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system.

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

HN12[] **Tying Arrangements, Sherman Act Violations**

In outlawing tying arrangements, Congress and the U.S. Supreme Court were originally concerned with egregious forms of leverage, such as tacking superfluous goods onto a patented product. That leverage was understandably seen as an unfair way for monopolists in one market to invade related markets. Yet even as the Court recognized that evil, it hastened to stress the value of offering "package sales" of multiple goods, conduct that is entirely consistent with the Sherman Act. What buyers often want is the purchase of several related products in a single competitively attractive package, especially where each component alone would hold comparatively little value.

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

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

HN13[ ] **Actual Monopolization, Anticompetitive & Predatory Practices**

Big is not invariably bad. An outsized market position may reflect nothing more than business success achieved through superior effort and sound strategy. After all, the purpose of ***antitrust law*** is to penalize anticompetitive practices, not competitive success. Even monopoly power, long considered a red flag in ***antitrust law***, can under certain circumstances be a legitimate advantage: Firms may acquire monopoly power by establishing an infrastructure that renders them uniquely suited to serve their customers. Compelling such firms to share the source of their advantage is in some tension with the underlying purpose of ***antitrust law***, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities.

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Judges: Before WILKINSON, NIEMEYER, and DIAZ, Circuit Judges. Judge Wilkinson wrote the opinion, in which Judge Niemeyer and Judge Diaz joined.

Opinion by: WILKINSON

Opinion

[*680] WILKINSON, Circuit Judge:

Plaintiff It's My Party, Inc. (IMP) contends that defendant Live Nation, Inc. (LN) has violated the Sherman Antitrust Act by engaging in monopolization, tying arrangements, and exclusive dealing in the music concert industry. The district court granted summary judgment to defendant LN. Because plaintiff has failed to define the relevant markets or to demonstrate any anticompetitive conduct, we affirm.

I.

A.

IMP and LN are competitors in the live music industry. Both promote concert **[**2]** tours and operate concert venues, but they differ in geographic reach. Plaintiff IMP is a regional player that promotes concerts and works with venues in the Washington, DC and Baltimore, MD area. Defendant LN is a national promoter that provides services to artists throughout the country. It owns, leases, or holds exclusive booking rights at venues across the United States. LN has expanded over time by acquiring other concert promoters as well as Ticketmaster, a major ticket sales and distribution company.

In addition to promoting concerts, IMP and LN both operate outdoor amphitheaters. IMP manages and operates Merriweather Post Pavilion in Columbia, Maryland, and LN owns Nissan Pavilion (now called Jiffy Lube Live) in Bristow, Virginia. Merriweather has a seating capacity of roughly 19,000 with 5,000 fixed seats, while Nissan has a capacity for 25,000 with 10,000 fixed seats. Concert venues range in size from small clubs with a capacity of about 1,000 to sports stadiums seating over 60,000.

Artists select venues based on their capacity, revenue potential, and the option of playing outdoors. The Washington-Baltimore area has a number of concert venues other than Merriweather and Nissan. **[**3]** Among the other venues are the Filene Center at Wolf Trap (7,000 person amphitheater), the First Mariner Arena (14,000 person arena), the Patriot Center (10,000 person arena), the Pier Six Pavilion (4,200 person amphitheater), and the Verizon Center (19,000 person arena). J.A. 1516. Notwithstanding the abundance of options, Merriweather has more than held its own. Between 2006 and 2012, it hosted an impressive line-up of prominent artists, including Bob Dylan, John Legend, Maroon 5, Nickelback, Nine Inch Nails, Sheryl Crow, Taylor Swift, The Black Eyed Peas, and The Fray. J.A. 827-40.

The basics of the music concert industry are easily described. IMP and LN compete for the business of artists, vying to promote their concerts and showcase them in their venues. Promoters, in negotiation with artists, work on financing concerts, arranging dates and locations, securing venues, and advertising. In terms of compensation, the artist typically receives either a minimum guaranteed payment or an agreed-upon percentage of the gross ticket sales.

Artists have two main options for organizing the individual concerts that make up their tours. One approach is to use a different local promoter for each **[**4]** location and secure venues through the promoters. Alternatively, an artist can work with a national promoter such as LN for most or all of the tour. The two options frequently offer different modes of compensation. "Artists who contract with one or a few national promoters to organize their tours often receive a guaranteed payment from the promoter based on the number of shows organized by that promoter. Artists who contract 'locally' and book with several promoters in various parts of the country will often receive instead a percentage **[*681]** of the gross ticket sales from each concert." *It's My Party, Inc. v. Live Nat., Inc., 88 F. Supp. 3d 475, 481 (D. Md. 2015)*.

B.

IMP was dissatisfied with the workings of the industry as described above. Plaintiff brought suit on March 5, 2009, alleging that LN had violated *§ 1* and *§ 2* of the Sherman Act and parallel Maryland ***antitrust law*** through monopolization, tying arrangements, and exclusive dealing. The result of LN's conduct, claims IMP, was the foreclosure of competition in the concert promotion and venue markets. The district court denied LN's motion to dismiss in July 2009 and an initial motion for summary judgment without prejudice in August 2012. Following briefing and argument, the court granted summary judgment in LN's **[**5]** favor in February 2015.

In a careful opinion, the district court declined to adopt IMP's definition of the promotion market and excluded the portion of its expert analysis defining the venue market. *It's My Party, 88 F. Supp. 3d at 485-88, 490-92*. The trial court also found insufficient evidence that LN had engaged in monopolization, tying, or any other anticompetitive behavior. Plaintiff's state law claims were deemed to fall in tandem with its federal ones. IMP now appeals.

Our standard of review is well settled. ***HN1***[] Summary judgment is justified if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*. "In reviewing a motion for summary judgment, the court must 'draw any permissible inference from the underlying facts in the light most favorable to the party opposing the motion.'" *Sylvia Dev. Corp. v. Calvert County, Md., 48 F.3d 810, 817 (4th Cir. 1995)* (quoting *Tuck v. Henkel Corp., 973 F.2d 371, 374 (4th Cir. 1992)* (citation omitted)).

II.

Plaintiff faces here the initial challenge of identifying exactly what market defendant is accused of monopolizing. *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 455-56, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993)* (discussing ***HN2***[] the definition of a relevant market as a threshold issue for monopolization claims under *§ 2*); *Eastman*

Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 464, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992) (treating "appreciable economic power in the tying market" as a "necessary feature of an illegal tying arrangement"). In the absence of a plausible **[**6]** market definition, courts are hard pressed to discern the nature or extent of any anticompetitive injury that plaintiff and other similarly situated parties may be suffering.

This case involves two separate but related markets: the market for concert promotion and the market for concert venues. In both, the relevant consumers are performing artists, who contract with promoters and venues to put on concerts. In its market definition analysis, IMP characterized the promotion market as national rather than local and restricted the venue market to major amphitheaters to the exclusion of other venues. As the district court recognized, these definitions were plainly designed to bolster IMP's monopolization and tying claims by artificially exaggerating LN's market power and shrinking the scope of artists' choices.

A.

To support its claims that LN was monopolizing the concert promotion market and tying promotion services to its venues, IMP had to first define the promotion market and demonstrate LN's market power therein. According to IMP, **[*682]** promoters compete nationally for contracts to promote performances anywhere in the country. By defining the market as national, IMP could more easily construe **[**7]** LN's nationwide network of promoters and venues as evidence of market power. In contrast, IMP could portray itself as a modest regional outfit whose resources pale in comparison. If instead the market were defined locally and narrowed to just the Washington-Baltimore area, then IMP would appear more evenly matched against LN's regional capacity. Unfortunately for plaintiff, its market definitions are blind to the basic economics of concert promotion.

HN3[] The relevant geographic market in antitrust cases is defined by the "area within which the defendant's customers . . . can practicably turn to alternative supplies if the defendant were to raise its prices." *E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc., 637 F.3d 435, 441 (4th Cir. 2011)*. Applied to this case, that inquiry focuses on the area within which artists can find alternative promoters if any one promoter were to increase its prices. The goal of concert promotion is of course to boost ticket sales. Therefore, artists' demand for promotion services is derivative of the public's demand for concert performances. Concertgoers will typically not travel out of their region to attend a concert in response to higher ticket prices in their area. *Heerwagen v. Clear Channel Commc'ns, 435 F.3d 219, 228 (2d Cir. 2006)*. Because the demand for concerts is local, promoters need to target their **[**8]** advertising to the area surrounding a particular venue. As the district court found in reviewing the record, "promoting shows is highly localized, and . . . most promoters promote in specific locations." *It's My Party, 88 F. Supp. 3d at 492*. "For example, Live Nation books the majority of its television advertising locally, with only about five percent spent on national advertising." *Id. at 491*.

These market dynamics favor promoters familiar with local media outlets and the local audience. An artist is unlikely to switch to a promoter based in Miami simply because a Baltimore promoter demands a bigger cut of the ticket sale proceeds. IMP sidesteps this point by focusing on the feasibility of promoting concerts from anywhere using modern technology. That technological capacity is useless, however, without the relevant local knowledge and local contacts. Indeed, IMP itself must be aware of that reality since it does not attempt to promote beyond its Washington-Baltimore base. Even a national promoter like LN is almost exclusively focused on local advertising and operates its promotion services through regional offices rather than a central hub. J.A. 2427. The ability of national promoters to coordinate cross-country tours does not **[**9]** change the fact that they provide services and compete for business on a local basis. *Heerwagen, 435 F.3d at 230*. In short then, the market for concert promotion is local, and the relevant competition in this case is between IMP and LN for the Washington-Baltimore area. The battle, in other words, is on IMP's own turf.

B.

IMP's definition of the venue market is similarly defective. It first confined the market to "major amphitheaters," large outdoor spaces suitable only for popular artists, while excluding clubs, arenas, stadiums, and other venues. Not content with that narrow definition of the venue market, IMP further specified that the amphitheaters must have a capacity of 8,000 or more, actually sell 8,000 or more tickets, and be in use only from May to September. Only two venues in the entire **[*683]** Washington-Baltimore area meet IMP's specifications -- the very two venues featured in this case, Merriweather and Nissan. IMP's approach is akin to defining a market to include tennis players who have won more than three Olympic gold medals and finding that only Venus and Serena Williams fit the bill.

This exercise in precise line-drawing "suits the needs of plaintiffs," as the district court observed. *It's My Party, 88 F. Supp. 3d at 488*. LN's market **[**10]** power appears magnified when the relevant market contains only two competitors, and any business taken away from Merriweather seems to flow directly to Nissan. But in its haste to stage this one-on-one showdown, IMP again casts sound economics aside.

HN4[] Whether a product, in this case amphitheaters, commands a distinct market depends on whether it is "reasonably interchangeable," *United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 395, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)*, with other products or the "extent to which consumers will change their consumption of one product in response to a price change in another, i.e., the 'cross-elasticity of demand.'" *Eastman Kodak Co., 504 U.S. at 469* (citations omitted) (quoting *E.I. du Pont de Nemours & Co., 351 U.S. at 400*). Here, IMP has not pointed to any record evidence demonstrating that artists are so likely to stick to amphitheaters in the event of a price increase that amphitheaters comprise their own market. Artists who prefer amphitheaters may nonetheless turn to a lower-priced substitute, which, after all, allows the show to go on. There is therefore an insufficient basis for excluding "reasonably interchangeable" venues such as similarly sized arenas or stadiums from the market definition.

Plaintiff has simply not carried its burden of showing that amphitheaters are the only place certain artists are willing **[**11]** to perform, irrespective of the monetary or logistical advantages of other concert locations. As the district court noted, "artists regularly perform at both amphitheaters and non-amphitheaters," and any "artist dissatisfied with Live Nation's conditioning of amphitheaters could simply perform at another venue." *It's My Party, 88 F. Supp. 3d at 497*. IMP's key evidence supporting its venue market definition -- a statistical analysis that purportedly shows that some artists prefer either amphitheaters or arenas -- fails to adequately consider cross-elasticity of demand between the two types of venues. IMP's reliance on this evidence is akin to claiming that Pepsi and Coke are in different markets because consumers generally prefer one or the other. Mere consumer preference does not indicate what Pepsi enthusiasts would do in response to an increase in its price. Similarly, a particular artist's preference for amphitheaters or arenas does not reveal what the artist would do if the cost of performing in an amphitheater began to rise.

In defending its market definition, IMP chides the district court for rigorously challenging its expert's analysis. But that court was not required to accept uncritically two market definitions **[**12]** -- a sweeping national promotion market and a cramped amphitheater-only venue market -- that coincidentally fit plaintiff's precise circumstances. No party can expect to gerrymander its way to an antitrust victory without due regard for market realities. See *E.I. du Pont de Nemours & Co., 637 F.3d at 442*.

III.

Lacking sound market definitions, IMP's monopolization and tying claims are left in **[*684]** a weakened state. Even assuming the plausibility of those definitions, however, plaintiff's allegations of anticompetitive conduct fail of their own accord. The bulk of IMP's case hinges on two closely related tying claims. First, plaintiff argues that artists who hire LN for its promotion services are compelled to perform at its Nissan venue. Second, LN allegedly will give artists access to its amphitheaters in other locations only if they choose Nissan for their Washington-Baltimore date. In these two claims, the tying products used to lure artists are promotion services and amphitheaters in other areas, whereas the tied product forced upon artists in both instances is Nissan. We will address the venue-to-promotion and venue-to-venue tying claims in that order.

A.

HN5[] A tying arrangement is "defined as an agreement by a party to sell one product **[**13]** but only on the condition that the buyer also purchases a different (or tied) product." *N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958)*. Tying suppresses competition in two ways: "First, the buyer is prevented from seeking alternative sources of supply for the tied product; second, competing suppliers of the tied product are foreclosed from that part of the market which is subject to the tying arrangement." *Advance Bus. Sys. & Supply Co. v. SCM Corp., 415 F.2d 55, 60 (4th Cir. 1969)*.

What causes these anticompetitive harms and distinguishes tying from ordinary market behavior is not the mere bundling of two products together but rather the coercion of the consumer. As the Supreme Court put it, the crux of tying lies in "the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms." *Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 12, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984)*, abrogated on other grounds by *Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28, 126 S. Ct. 1281, 164 L. Ed. 2d 26 (2006)* (emphasis added); accord Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law***: An Analysis of Antitrust Principles and Their Applications ¶ 1700i (3d ed. 1995) (deducing from longstanding case law that "no tie exists unless the customer was 'coerced' into taking both products"). If instead the buyer is free to decline the tied product **[**14]** or to purchase the two products separately, then by definition there is no unlawful tying. See *Times-Picayune Pub. Co. v. United States, 345 U.S. 594, 614, 73 S. Ct. 872, 97 L. Ed. 1277 (1953)* (stressing the importance of a "forced purchase"); *Stephen Jay Photography, Ltd. v. Olan Mills, Inc., 903 F.2d 988, 991 (4th Cir. 1990)* (same). That is precisely the case here.

While paying lip service to the tying case law, IMP proceeds to strip the doctrine of its core element of coercion. By its proffered definition, IMP argues that tying occurs any time a seller who has market power over product A offers it for sale together with product B. But ***HN6***[] merely offering two products in a single package, allowing each to enhance the appeal of the other, is not itself coercive. Otherwise, the seller would be guilty of anticompetitive conduct even if buyers in fact preferred and freely chose to buy product A and product B together and competitors were not foreclosed from selling alternatives to product B. Without the element of coercion, IMP's version of tying targets none of the anticompetitive harms animating the doctrine. *Advanced Bus. Sys. & Supply Co., 415 F.2d at 60* (outlining the **[*685]** harms to competitors and consumers). Without coercion -- i.e., without requiring the customer to buy product B when buying product A -- selling products A and B as a unit is simply one strategy for gaining an edge in a free marketplace. To allow **[**15]** tying doctrine to swell to the point of prohibiting such legitimate means of competition would make ***antitrust law*** its own worst enemy.

B.

A review of the facts in this case reveals IMP's reason for excising coercion from tying doctrine: plaintiff has no prospect of satisfying that element here. The record contains little basis for concluding that artists were coerced into taking the tied product, performances at Nissan, with the tying product, LN's promotion services. IMP cherry-picks excerpts of LN's communications, mostly internal emails, that discuss its negotiations with artists over concert tours and the Nissan venue. In no instance, however, did LN convey that an artist could not receive its promotion services unless it appeared at Nissan. In fact, several agents specifically denied being forced to put their artists in LN venues as part of their agreements with LN. J.A. 6556-57, 6580-82. In response, IMP conjectures that the "agents shaded their testimony for an entity who dictates whether their clients 'work.'" Appellant's Br. at 44-45. But if pure speculation by a competitor were enough to prove the opposite of what consumers describe is happening in the market, then antitrust **[**16]** defendants should surrender every time a rival files a complaint.

There is, moreover, ample evidence suggesting the exact opposite of what IMP seeks to prove, namely the absence of coercion and tying. Plaintiff's own analysis reveals that the tying product was sometimes sold without the tied product. Artists on LN-promoted national tours, the very artists who were supposedly strong-armed into performing at Nissan, in fact chose IMP-owned Merriweather fourteen percent of the time. J.A. 4630-31. Ten percent has been cited as the minimum benchmark for separate sales sufficient to rebut any inference of tying. 10 Areeda & Hovenkamp, supra, at 328, ¶ 1756b2. Without adopting that particular figure as the definitive baseline, we note that non-tied sales in this case exceed it sufficiently to cast doubt on any allegation of tying.

HN7[] Even without direct evidence, a plaintiff could still prove coercion circumstantially. See *Serv. & Training, Inc. v. Data Gen. Corp., 963 F.2d 680, 688 (4th Cir. 1992)*. Here, IMP relies on a regression analysis purporting to show that artists on national tours promoted by LN disproportionately perform at Nissan rather than Merriweather.

From that analysis, IMP infers that LN must be tying Nissan to its promotion services. For plaintiff, there could be no other reason for the **[**17]** artists' choice to pair an LN venue with LN promotion.

But that supposition likewise falls short. ***HN8***[] To prove an antitrust violation, a plaintiff must present evidence that "tends to exclude the possibility" of independent conduct consistent with competition. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)* (quoting *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984))*. A successful tying claim in particular needs to rule out alternative market-based explanations for why the consumer might prefer to purchase the tied product along with the tying product. See *Serv. & Training, Inc., 963 F.2d at 687-88*. In this case, IMP ignores a host of independent reasons that could have led **[*686]** artists on LN tours to freely choose Nissan.

One obvious explanation is that LN simply outcompeted IMP and gave artists better compensation to appear in LN venues. In one case, two artists declined Merriweather only after LN offered 100% of the gross ticket sales (minus expenses) to perform at Nissan and another LN amphitheater. J.A. 2716. In another instance, LN enticed a band to play at Nissan by adding $150,000 to the guaranteed payment for a slate of performances around the country. J.A. 6447-48. These differences in artist compensation offered by IMP and LN, clearly signs of competitive negotiations, were curiously missing from IMP's regression analysis. **[**18]**

Plaintiff also ignores the simple fact that it could have been more efficient for artists already on LN tours to work with the same concert promoter and venue operator for their Washington-Baltimore date. The artist may have dealt with LN on other occasions and come to appreciate the working relationship. More broadly, the national promoter holds distinct advantages over its regional competitor: it can offer tour packages combining a series of venues with promotion services in multiple locations. By contrast, IMP is limited to the Washington-Baltimore area, most likely a single stop on any given tour. Accepting a comprehensive and cost-effective package that happens to include Nissan is not tying -- it is simply a good deal for the consumer.

The final and perhaps most salient factor is that Nissan may be a superior venue to Merriweather. IMP scoffs at this idea, boasting that "Merriweather is an iconic amphitheater in a bucolic setting," whereas "Nissan is a concrete shell with horrific parking problems." Appellant's Br. at 42. Setting aside IMP's potential bias for its own venue, Nissan possesses at least some advantages. It carries the prestige and name recognition of being affiliated **[**19]** with a top-flight concert promoter. Nissan also holds over 5000 more seats than Merriweather, nearly all of which are fixed seats that command a higher ticket price than open lawn space, giving Nissan significantly greater earning potential. As the Supreme Court reminds us, ***HN9***[] "intrinsic superiority of the 'tied' product would convince freely choosing buyers to select it over others" without any coercion from the seller. *Times-Picayune, 345 U.S. at 605*; accord *Serv. & Training, Inc., 963 F.2d at 687-88*. Yet IMP fails to account for Nissan's or LN's inherent advantages, or indeed any explanation of artists' preference for that venue other than an illicit tying arrangement.

Not only did artists have various reasons to choose Nissan of their own accord, but they were also equally free to turn down that venue or LN's entire package deal of venues and tour promotion. Artists have always had two options for structuring their tours. Instead of contracting with a single national promoter for all concert dates, performers can work with local promoters on a concert-by-concert basis and pick any venue they want for a specific date. If at any point LN tried to tie Nissan to its promotion services, the artist could book its tour "locally," use another promoter for the Washington-Baltimore **[**20]** area, and opt for Merriweather instead. ***HN10***[] When promotion and venues "may be purchased separately in a competitive market, one seller's decision to sell the two in a single package imposes no unreasonable restraint on either market." *Jefferson Parish, 466 U.S. at 11*. In other words, LN's combined but non-coercive offer of promotion and venues would not foreclose artists from choosing Merriweather over Nissan or other venue operators **[*687]** like IMP from competing for that business. If, however, LN happened to out-bargain IMP with better package deals, better compensation, and a better venue, then an antitrust lawsuit would not be the answer to plaintiff's troubles.

C.

IMP's venue-to-venue tying claim is largely a repetition of its claim of venue-to-promotion tying. The key difference is the tying product. Plaintiff argues that LN leveraged its market power in areas where it controlled the only amphitheater to force artists to perform at Nissan. Again, IMP presents no direct evidence that LN withheld access to amphitheaters in LN-controlled areas unless artists chose Nissan over Merriweather. Nor does its circumstantial evidence manage to rebut the myriad reasons discussed above for why artists would independently make that choice **[**21]** of venue. The mere fact that artists sometimes took a package deal of multiple LN venues for a given tour does not prove tying. At the same time, the record shows a proportion of non-tied sales that far exceeds the ten-percent benchmark: twenty-six percent of artists who performed at an LN amphitheater in a locality where it owned the only such venue ended up choosing Merriweather, not Nissan, for its Washington-Baltimore show. J.A. 5529-30. With one in four consumers buying the tying product without the tied product, it becomes hard to accept a story of LN strapping Nissan to its other venues and forcing artists to perform there.

The change in the tying product thus makes no difference to plaintiff's case. IMP still fails to prove anything more than, as the district court found, "vigorous competition by Merriweather and Nissan in negotiating with artists to perform at their respective venues." *It's My Party, Inc., 88 F. Supp. 3d at 495*. In a world of robust market competition where artists were free to take a package deal of promotion and venues, free to purchase those products separately, free to turn down both, and where they in fact exercised all those options to their advantage, the strands of IMP's reasoning begin to **[**22]** resemble the invisible ropes allegedly tying LN's products together.[*]

IV.

Quite beyond the specifics of market definitions and product tying, IMP levies a more general attack. Its brief stresses LN's market position as "the largest promoter in the world, larger than all other promoters combined." Appellant's Br. at 63. Size and scope, in IMP's eyes, are cause for suspicion. LN's nationwide reach, "1,000 artist relationships," id., and exclusive access to venues are apparently so dominant that the network itself deters entry into the industry and unfairly disadvantages localized competitors like IMP. Id. at 63-65. According to plaintiff, "attempting to replicate LN's network and promotion relationships would cost 'billions.'" Id. at 63.

The sweeping attack upon LN's size in this action cannot without more suffice to prove an antitrust infraction. Upon further **[**23]** inspection, what plaintiff characterizes as illegal conduct turns out to be lawful pro-competitive behavior. To hold otherwise would have the most serious implications. Carried to their logical end, plaintiff's arguments would cast a pall over all manner of packaged deals, free contractual **[*688]** negotiations, and any endeavor to become the dominant player in an industry. To do so would undermine the very competition that ***antitrust law*** was designed to encourage. See *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)* (***HN11***[] "The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system.").

The word "tying" at the core of plaintiff's claims carries a sinister connotation, evoking the image of an unwelcome parasite tightly bound to the desired product with the helpless consumer unable to take one without the other. ***HN12***[] In outlawing tying arrangements, Congress and the Court were originally concerned with egregious forms of leverage, such as tacking superfluous goods onto a patented product. Areeda & Hovenkamp, supra, at ¶ 1700d. That leverage was understandably seen as an unfair way for monopolists in one market to invade related markets. Erik Hovenkamp & Herbert Hovenkamp, **[**24]** Tying Arrangements and Antitrust Harm, *52 Ariz. L Rev. 925, 931 (2010)*.

Yet even as the Court recognized that evil, it hastened to stress the value of offering "package sales" of multiple goods, "conduct that is entirely consistent with the Sherman Act." *Jefferson Parish, 466 U.S. at 12*; see also *Serv. & Training, Inc., 963 F.2d at 688*. What buyers often want is "the purchase of several related products in a single competitively attractive package," especially where each component alone would hold comparatively little value. *Phillips v. Crown Cent. Petroleum Corp., 602 F.2d 616, 628 (4th Cir. 1979)* (giving the example of a restaurant

[*] IMP's other claims of anticompetitive conduct by LN fall in tandem with its tying allegations since all are based on the same misconceptions. Likewise, plaintiff's state ***antitrust law*** claims echo its allegations under the Sherman Act and thus also fail. Finally, plaintiff's remaining state-law claims fail for the reasons outlined by the district court.

franchise as a packaged product desired by restaurateurs). Offering an "attractive package," however, becomes indistinguishable from anticompetitive conduct under IMP's conception of coercion-less tying. If that view carries the day, no seller could combine related goods or leverage its competitive advantage in related markets without risking antitrust charges.

The real loss would be the productive synergies created when sellers package complementary products. LN's business model serves as an example. When LN bundles promotion, including financing and advertising, and a series of concert venues together, it becomes a one-stop shop for touring artists. In such a case, the practice of "[b]undling obviously saves distribution and consumer **[**25]** transaction costs . . . [and] can also capitalize on certain economies of scope." *United States v. Microsoft Corp., 253 F.3d 34, 87, 346 U.S. App. D.C. 330 (D.C. Cir. 2001)*. Artists do not have to seek out and transact with separate sellers for each of the services offered by LN.

The whole thereby becomes greater than the sum of its parts as LN is able to offer advantages only made possible by selling distinct but complementary products together. As one example, managing concerts in multiple locations allows LN to "cross-collateralize" its tours. *It's My Party, 88 F. Supp. 3d at 481*. The national promoter can "cover losses from concerts that underperformed with revenue from concerts that met or exceeded expectations," thereby reducing the overall risk for itself and for the artists. Id. A local promoter responsible for a single concert in a single location lacks this risk-pooling ability. It is likely one reason why national promoters are often able to attract artists with a higher guaranteed payment, while their local counterparts can only offer a cut of the ticket sales for a particular show. Id. If, however, the packaging inherent in coordinating concert tours were deemed unlawful tying, for instance of one **[*689]** venue to another, then this synergy and its attendant benefits would be at risk.

Of course, the idea **[**26]** of synergy is not unique to the live music industry. It, and thus the potential for tying, is present whenever products or production processes fit naturally together. A prime example is vertical integration, where a firm houses multiple stages of the production and distribution process for a single good or related goods. Andy C. M. Chen & Keith N. Hylton, Procompetitive Theories of Vertical Control, *50 Hastings L.J. 573, 578 (1999)*. Take a computer manufacturer, for example, that "makes its own steel, types its own documents, creates and places its own advertising, transports the finished product to dealers, or repairs the product in the hands of consumers. To that extent it 'forecloses' independent makers of steel or suppliers of typing, advertising, transportation or repair services." Areeda & Hovenkamp, supra, at ¶ 1700j1. One could conceivably accuse the vertically integrated manufacturer of tying those goods and services together in selling the end product, the computer.

And yet it is no surprise that vertical integration has generally been permitted despite its apparent similarity to tying. See id. (noting ***antitrust law***'s tolerance of vertical integration); Roger D. Blair & David L. Kaserman, Vertical Integration, Tying, and Antitrust Policy, 68 Am. Econ. Rev. 397 (discussing the functional similarities **[**27]** between tying and vertical integration). A single firm incorporating separate but closely related production processes can often be far more efficient than various independent entities transacting to produce the same good or bundle of goods. See *Jefferson Parish, 466 U.S. at 41* (O'Connor, J., concurring in judgment) (quoting *Fortner Enters. v. U.S. Steel Corp., 394 U.S. 495, 514 n.9, 89 S. Ct. 1252, 22 L. Ed. 2d 495 (White, J., dissenting) (1969)*). With advances in modern technology comes even greater potential for efficient integration, increased compatibility among products, and ties that are technological as much as or more than contractual. See Areeda & Hovenkamp, supra, at ¶ 1701d. It would be unfortunate if an overly aggressive tying doctrine were to impede that innovation.

Because concert venues and promotion are not technically part of the same production process, this may not be a case involving vertical integration per se. Nonetheless, one can see how IMP's expansive tying definition could chill constructive forms of integration. Unable to sell goods and products as a single unit, businesses may have little reason to consolidate underlying production processes and promotional strategies no matter how efficiently they fit together. The eventual outcome would be a strange world in which sellers go out of their way to isolate **[**28]** their own products and different components of their production and promotion processes from one other.

The ultimate victim in that scenario would be the consumer and his ability to freely contract for desired goods and services. So long as a transaction is free from coercion, the consumer has every right to walk away from package deals or demand more from the seller. It is paternalistic for either a competitor or the court to just assume that taking two products together is not the result of independent decision-making. See *Microsoft, 253 F.3d at 87-88* (reiterating consumer choice as the touchstone of tying doctrine and the need to assess whether consumers prefer to buy products together).

From its market definitions to its descriptions of anticompetitive conduct, IMP's entire case sets up a David-and-Goliath battle between an industry behemoth and its regional challenger. The tying **[*690]** argument in particular is predicated on the fact that LN can leverage its sprawling national network of promoters and venues to oblige artists to perform at Nissan. At certain points, the whole argument seems to turn on LN's dominant market position, on what LN is rather than what it did. It may be understandable as a matter of strategy **[**29]** for antitrust plaintiffs to target industry giants. Certainly, many such cases do require a finding of market power, and the evidence may show what it fails to show here, namely that the dominant player in an industry used that very domination for anticompetitive ends. See *E.I. du Pont de Nemours & Co., 351 U.S. at 389-90* (focusing monopolization doctrine on the exercise of market power to foreclose fair competition).

And yet ***HN13***[] big is not invariably bad. An outsized market position may reflect nothing more than business success achieved through superior effort and sound strategy. See *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*. After all, the purpose of ***antitrust law*** is to penalize anticompetitive practices, not competitive success. Even monopoly power, long considered a red flag in ***antitrust law***, can under certain circumstances be a legitimate advantage:

> Firms may acquire monopoly power by establishing an infrastructure that renders them uniquely suited to serve their customers. Compelling such firms to share the source of their advantage is in some tension with the underlying purpose of ***antitrust law***, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities.

Trinko, 540 U.S. at 407-08. LN invested heavily in developing just such an **[**30]** infrastructure, expanding beyond its core promotion business to acquire exclusive booking rights at concert venues nationwide and merging with a leading ticket vendor, Ticketmaster. The synergies among promotion, venues, and ticket sales, all of which serve to bring live music to the public, should be obvious.

In a world where the "big is bad" mantra reigns unquestioned, we would be left with separate tour promoters, separate venue operators, and separate ticket vendors, each with little incentive to interact or join with the others despite their natural affinities. See *Fed. Trade Comm'n v. Proctor & Gamble Co., 386 U.S. 568, 597-98, 87 S. Ct. 1224, 18 L. Ed. 2d 303 (1967)* (Harlan, J., concurring) (considering the possible efficiencies created by merging producers of complementary goods in adjacent markets). IMP's tying allegations thus threaten in the end to bring us three forms of strict economic segregation, first of products, then of production processes, and finally of producers in adjoining markets. It is not wholly fantastical to wonder if even ketchup and mustard, salt and pepper, forks and knives will have to bid each other adieu, doomed to solitary existences along the grocery aisle.

The Davids of the world need not hope for such a marketplace in order to thrive. Just as big **[**31]** is not necessarily bad, small is not necessarily weak. Even though national firms undoubtedly have an edge over smaller competitors and David may not triumph over Goliath everywhere, he can certainly hone his home court advantage. While LN was busily spreading its operations all over the country, IMP could have focused instead on branding itself as a uniquely attractive local outfit, striving to know the Washington-Baltimore audience better than any other promoter and deepening its relationships with local clubs, businesses, and media. As it is, IMP has in fact enjoyed much success at its Merriweather venue, hosting scores of major artists and doubling its revenue **[*691]** from $11.8 million in 2006 to $22.5 million in 2012. J.A. 827-40, 4908.

IMP's distortion of tying doctrine serves in fact as a potential template for any local business wishing to drive a national competitor out of its regional market. That template would prove particularly useful when, as in this case, the competition is on a local basis and the competitors are a mix of national and local players. If offering products or services across a particular field is tying and if a national network is itself suspect when compared **[**32]** to the resources of a regional contender, then businesses have much less motivation to operate in multiple geographic markets. Why shoulder the costs of expansion when the specter of antitrust liability awaits?

Cornering the local Washington-Baltimore market may not have been far from IMP's mind. Seth Hurwitz, IMP's principal, has protested that "the scourge of the [live music] industry is too many shows." J.A. 1566. According to Hurwitz, LN was "paying way too much money just to keep [a] show away from [IMP]," and the bidding process for concerts -- the key mechanism for price competition among promoters -- made it "prohibitive to actually do a show and make money." J.A. 1560, 1562. To ease what it considered an excess of competition, Hurwitz sought to eliminate its archrival. He suggested either that LN "sell the Nissan/Jiffy Lube property" or that the two promoters "work together" to stop bidding against each other when bringing artists to the Washington-Baltimore area. J.A. 1560-62, 1570. After failing to collude with LN or expel it from the market, plaintiff turned to the next best option -- ***antitrust law***.

This case thus captures the anticompetitive effects and consequences that **[**33]** can ironically arise from antitrust lawsuits. See *Matsushita Elec. Indus., 475 U.S. at 594* (warning against allowing antitrust doctrine to "chill the very conduct the antitrust laws are designed to protect"); William J. Baumol & Janusz A. Ordover, Use of Antitrust to Subvert Competition, 28 J.L. & Econ. 247 (1985). This can be a special hazard in antitrust litigation brought by competitors of the defendant. See Edward A. Snyder & Thomas E. Kauper, Misuse of the Antitrust Laws: The Competitor Plaintiff, *90 Mich. L. Rev. 551 (1991)*. If abused, such suits can ineluctably lead to an environment of commercial parochialism. By cutting ties among related products and related producers, IMP's view of economic activity, if allowed to take hold, would box firms both into their own product markets and into their own geographic locales. That tendency toward isolationism has more in common with the market squares and horse-drawn buggies of the nineteenth century than with the interconnected and technology-driven contemporary world. The loser in all this is of course the consumer, left with a patchwork of localized monopolies and one-product wonders flourishing at the expense of larger and more diverse competitors. To help prevent ***antitrust law*** from being hijacked for such anticompetitive **[**34]** ends, we join the district court in sending this tussle between two rivals back to the marketplace from whence it came. The judgment is hereby

AFFIRMED.

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In re Urethane Antitrust Litig.

United States District Court for the District of New Jersey

February 8, 2016, Decided; February 8, 2016, Filed

Civ. No. 2:08-5169 (WJM-MF)

Reporter

2016 U.S. Dist. LEXIS 15137 *; 2016-1 Trade Reg. Rep. (CCH) P79,494; 2016 WL 475339

IN RE URETHANE ANTITRUST LITIGATION

Prior History: *In re Urethane Antitrust Litig., 2015 U.S. Dist. LEXIS 169845 (D.N.J., Dec. 21, 2015)*

Core Terms

motion in limine, antitrust, price-fixing, conspiracy, references, probative value, deposition, cases, introduce evidence, allegations, discovery, documents, employees, introduce, urethane, invocations, outweighed, destruction, policies, deposition testimony, exclude evidence, inadmissible, chemicals, hearsay, door, instruction of a jury, discovery order, investigations, credibility, prejudicial

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Judges: WILLIAM J. MARTINI, UNITED STATES DISTRICT JUDGE.

Opinion by: WILLIAM J. MARTINI

Opinion

OPINION & ORDER

WILLIAM J. MARTINI, U.S.D.J.:

This is an antitrust action in which Plaintiffs accuse The Dow Chemical Company ("Dow") of colluding with other businesses in order to artificially inflate the prices of urethane chemicals. This matter comes before the Court on several motions *in limine* filed by both parties. The Court writes for the benefit of the parties and assumes familiarity with both the facts of the case and the issues presented in the instant motions.

I. DISCUSSION

The Court will now address twelve of the motions *in limine* filed in this action.[1]

1. Dow's Motion *in Limine* to Preclude References to Other Anti-Trust Cases [ECF 114]

Dow seeks to preclude admission of references to various categories of antitrust cases. **First** are references to other anti-trust cases involving entities other than Dow and industries other than the urethanes market. **Second** are references to a rubber chemicals cartel anti-trust case that **[*4]** did allegedly involve Dow, as well as alleged co-conspirator Bayer. **Third** are references to price-fixing raids on Bayer and subsequent investigations into the chemicals and urethanes industry.

Dow's motion will be **GRANTED IN PART**. With respect to the **first category** of references (anti-trust cases that do not involve urethanes or Dow), the Court will allow such testimony only if Dow challenges Dr. Marx by arguing that a cartel will exist only where price increases stick. If Dow opens that door, Dr. Marx is entitled to respond by referencing other anti-trust cases that, in her opinion, rebut Dow's assertion. However, the Court reserves the ability to limit the scope of such testimony if it becomes apparent that Dr. Marx's references will cause a mini-trial regarding other cartels that have nothing to do with this case. With respect the **second category**, Plaintiffs are prohibited from linking Dow to other price-fixing cases. The prejudice that would result from such testimony substantially outweighs any probative value. *See* FRE 403 (court may exclude relevant evidence if its probative value is substantially outweighed by a danger of unfair prejudice).[2] Therefore, to the extent that Dr. Marx wants **[*5]** to describe price-fixing cases in a way that links those cases to Dow, those references will be precluded. With

[1] The parties have filed a total of 16 motion *in limine*. Two of those motions have been already decided. *See* ECF Nos. 224 & 229.

[2] Similarly, Plaintiffs will be excluded from introducing any evidence concerning government raids on Dow or Dow's alleged involvement in any other price-fixing conspiracies. Plaintiffs have not shown that such evidence is needed to bolster Stephanie Barbour's credibility, and the prejudicial effect would substantially outweigh any probative value.

respect to the **third category**, the Court will allow references to the Bayer raids if Dow opens the door by accusing Dr. Marx of excluding 2004 conspiracy period solely in order to increase Plaintiffs' damages. If Dow opens the door, Dr. Marx can argue that she excluded 2004 from the conspiracy period because Bayer decided to withdraw from the urethane conspiracy in 2003 after a 2002 government raid. Dow cannot challenge Dr. Marx's decision to exclude 2004 and then expect the Court to prohibit Dr. Marx from explaining the rationale behind her decision. It will therefore be up to Dow to make a tactical decision as to whether to challenge Dr. Marx's alleged conspiracy period.

2. Dow's Motion *in Limine* Concerning Antitrust Compliance Policies [*6] [ECF 116]

Dow seeks to exclude evidence regarding its interpretation of the antitrust laws and its internal advice to employees on how to avoid conduct that could be misconstrued as a violation of those laws. The Court agrees with Dow's position.

Dow's motion will be **GRANTED**. This case turns on whether Dow violated antitrust laws. Thus, whether Dow employees believed they violated Dow's antitrust policies is irrelevant. *FRE 401*. It therefore also follows that the manner in which Dow interpreted its own antitrust policies is irrelevant. *See id.* Even if such evidence were relevant, it would be substantially be outweighed by prejudice because the testimony could confuse the jury on what the governing law was. *See FRE 403*. While Plaintiffs propose that any confusion can be cured an additional jury instruction, the Court finds that a barrage of evidence concerning internal antitrust policies (as opposed to ***antitrust law***) will create prejudice too great to be cured by a limiting instruction.

3. Dow's Motion *in Limine* to Preclude Reference to the Urethane Class Action [ECF No. 118]

Plaintiffs do not plan to affirmatively raise the class case (or class verdict) during trial; however, they intend (1) to cross-examine **[*7]** Dr. Elzinga or Dr. Ugone with the verdict in the class trial, and (2) to have their own expert characterize the class verdict as a basis for her opinions. Notwithstanding Plaintiffs' representations, Dow's motion will be granted.

Dow's motion will be **GRANTED**. While Dow's expert, Dr. Kenneth Elzinga, plans to testify that the economic evidence is inconsistent with the existence of a conspiracy, such testimony does not somehow "open the door" to Plaintiffs introducing the class verdict. There is no way of knowing why the jury rendered its verdict; indeed, it is possible that the jury agreed with Dr. Elzinga regarding the economic evidence, but nonetheless found that the non-economic evidence supported the finding of a conspiracy. Moreover, as the MDL Court noted, "the jury [in the class case] might have found a conspiracy limited in scope in such a way that it would not fall within the particular claim alleged by any particular direct-action plaintiff." MDL Court Order dated December 16, 2013, ECF No. 3111. And even assuming the class verdict was probative in that it may undermine Dr. Elzinga's testimony, any probative value would be substantially outweighed by unfair prejudice and jury **[*8]** confusion. *See Coleman Motor Co. v. Chrysler Corp., 525 F.2d 1338, 1351 (3d Cir. 1975)* ("The admission of a prior verdict creates the possibility that the jury will defer to the earlier result and thus will, effectively, decide a case on evidence not before it."). These determinations with respect to the cross-examination of Dr. Elzinga apply equally to the cross-examination of Dr. Ugone.

Dr. Marx will also not be permitted to testify regarding the class case. Under *Federal Rule of Evidence 703*, an expert can form his opinion by relying on facts that would otherwise be inadmissible. However, if the expert plans to introduce those facts to the jury, their probative value in helping the jury evaluate the opinion must substantially outweigh their prejudicial effect. With respect to Dr. Marx's testimony, it is undisputed that Dr. Marx's report does not reference the class verdict. The Court is therefore skeptical of the class verdict having any probative value with respect to Dr. Marx's testimony. Consequently, the requirements of *FRE 703* have not been met.

4. Dow's Motion *in Limine* to Preclude References to Former Defendants as "Defendants" [ECF 120]

The following entities were formerly named as defendants, but have since settled: BASF SE, BASF Corporation, BASF Coordination Center Comm. V., **[*9]** Bayer AG, Huntsman International LLC, Lyondell Chemical Company, Jeanne-Pierre Dhanis, and Uwe Hartwig. Dow has moved to preclude Plaintiffs from referring to those entities as "defendants" or "co-defendants." Dow recognizes that the deposition video testimony will sometimes refer to these entities as defendants, and does not argue that the videotapes should be edited to remove those references. Instead, Dow proposes that a jury instruction be used to correct any confusion regarding references to defendants in the video deposition testimony. However, Dow argues that, with the exception of the video deposition testimony, Plaintiffs should be precluded from referring to those entities as defendants or co-defendants.

Dow's motion *in limine* will be **GRANTED**. Referring to former defendants as "defendants" or "co-defendants" would prejudice Dow because it would potentially cause the jury to infer that the former defendants were already held liable. It also may lead the jury to conclude that the former defendants entered into settlements with plaintiffs and therefore Dow should be required to pay too. Moreover, Plaintiffs fail to demonstrate how using the terms "defendants" or "co-defendants" **[*10]** would have any probative value whatsoever. With respect to the use of those terms in video deposition testimony, the Court will provide a jury instruction in order to clear any confusion.

5. Dow's Motion *in Limine* to Preclude Plaintiffs' Expert from Offering Opinions Outside Her Expertise [ECF 121]

The question presented by this motion is whether Plaintiffs' experts may offer opinions concerning the credibility of witnesses or whether a particular event actually occurred. According to Dow, Dr. Raiff testified in a deposition that in reaching his damages estimates, he relied on his own evaluation of other witness testimony, including his assessments regarding credibility. Also according to Dow, Dr. Marx later testified that she concurred with Dr. Raiff's assessment of the evidence. Consequently, Dow contends that Dr. Marx should be precluded from offering opinions concerning the credibility of witnesses or whether a particular event actually occurred. Plaintiffs, however, assert that Dr. Marx does not plan to offer any testimony regarding those issues.

This motion will be **DENIED WITHOUT PREJUDICE**. Dr. Marx will be a live witness at trial. If Plaintiffs' counsel begins to veer into areas **[*11]** concerning witness credibility or whether an event actually occurred, Dow will be permitted to object on the grounds that such testimony is inadmissible. If Dr. Marx's testimony does not touch upon those areas, no objection will be necessary.

6. Dow's Motion *in Limine* to Exclude Evidence Relating to Allegations of Document Destruction [ECF 125]

The Court is faced with determining whether Plaintiffs should be precluded from introducing evidence related to allegations that Dow destroyed documents revealing conspiratorial activity. This issue concerns documents belonging to three former Dow employees: Stephanie Barbour, David Fischer, and Bob Wood.

Because of the fact-specific nature of this motion, the Court will provide a brief background. Stephanie Barbour was terminated from Dow in 2004. Shortly thereafter, Barbour alleged that she was terminated in retaliation for reporting wrongdoing on the part of her supervisor, David Fischer. Because of her claims of retaliation, Dow issued a litigation hold on Barbour's documents. Dow contends that when her allegations were being investigated in 2004, Barbour did not accuse any Dow employees of engaging in price-fixing. However, in 2010 Barbour **[*12]** testified that she was aware of price-fixing at Dow and that she took notes regarding price-fixing while she was a Dow employee. Plaintiffs never received those notes and therefore contend that Dow destroyed them in order to cover-up the conspiracy. Barbour's deposition was again taken in 2013. According to Dow, in her 2013 deposition, Barbour admitted that her notes may have been lost or deleted due to a technical malfunction. Consequently, Dow argues, there is no basis for any conclusion that Dow destroyed her notes.

In addition to evidence concerning Barbour, Plaintiffs argue that they should be able to introduce evidence concerning the destruction of documents belonging to Dow employees David Fischer and Bob Wood. Fischer served as Barbour's supervisor at Dow, while Wood was supervisor to Fischer. Dow explains that, consistent with

Dow's document retention policies, Fischer and Wood's documents were destroyed 35 days after Fischer and Wood were terminated in 2004. Plaintiffs maintain that they will not introduce this evidence for spoliation purposes. Rather, this evidence will support Plaintiffs' allegations that Dow engaged in a cover up of the conspiracy.

Dow's motion will be **[*13] GRANTED IN PART AND DENIED IN PART**: the proposed testimony from Barbour, Fischer and Eberhart will be ruled admissible, while the proposed testimony from Wood will be ruled inadmissible. Acts of concealment, including document destruction, are relevant for determining whether a conspiracy existed. *United States v. Smith, 294 F.3d 473, 479 (3d Cir. 2002)*. Barbour has testified that as a Dow employee she took notes concerning price-fixing activities at Dow. Moreover, Barbour at one point testified that the relevant notes were still on her work computer the day she left Dow. Finally, Dow admits that it retained Barbour's documents as part of a litigation hold. Taken together, there is a plausible theory that the price-fixing documents should have still been on her computer after she departed. During cross-examination, Dow of course may seek to undermine Barbour's testimony by testing her recollection or pointing to what she stated on the record in 2013. But this does not preclude Plaintiffs from introducing her testimony. Similarly, Plaintiffs have presented evidence showing that Dow was looking into allegations that Fischer engaged in improper activities with competitors. Dow's investigation into Fischer occurred against the backdrop of government **[*14]** investigations concerning price-fixing in the chemicals market. Consistent with this view, testimony from Rule 30(b)(6) witness Arthur Eberhart regarding Dow's document retention policies will also be admissible. However, Plaintiffs have not sufficiently demonstrated that Fischer's supervisor, Bob Wood, could have been in possession of documents concerning price-fixing. Therefore, Plaintiffs will not be allowed to introduce document destruction evidence with respect to Bob Wood. To be clear, Plaintiffs are not permitted to introduce this evidence in order to support any spoliation arguments. Instead, they can seek to use such evidence to support the allegation that Dow engaged in a cover-up of the conspiracy.[3]

7. Dow's Motion *in Limine* to Exclude Evidence Related to Bayer's Internal Investigation [ECF 127]

The issue here is whether Plaintiffs should be permitted to introduce evidence concerning Bayer's internal investigation into alleged price-fixing discussions that occurred between Bayer and **[*15]** Dow. Specifically, the issue is whether such evidence should (1) be admissible for its truth; or (2) be admissible as material on which Plaintiffs' experts relied.

Because the issues presented by this motion are fact-specific, the Court will provide a brief background. Bayer is a urethane producer that settled with Plaintiffs out of court. As part of the settlement agreement, Bayer agreed to have its counsel provide Plaintiffs with information regarding price-fixing discussions that allegedly occurred between Bayer and Dow. The Bayer employees who relayed the information to Bayer's counsel have since plead the *Fifth Amendment*. The evidence can be broken into two categories: (1) testimony from Dr. Marx regarding conversations she had with Bayer's counsel; and (2) documents created by Dr. Marx, Dr. Raiff (Plaintiffs' former expert), and Plaintiffs' counsel, concerning conversations they had with Bayer's counsel. Plaintiffs argue that despite involving multiple layers of hearsay, the evidence should be admissible for its truth because (1) it falls within the statement-against-interest exception; and/or (2) it falls within the "residual" hearsay exception. Plaintiffs further argue that even if the evidence **[*16]** is inadmissible for its truth, it should be admissible as evidence that Dr. Marx relied upon when forming her opinion.

Dow's motion will be **GRANTED IN PART**. The Court concludes that the evidence concerning Bayer's investigation is inadmissible for its truth. However, the Court will reserve on whether it is admissible as evidence upon which Dr. Marx relied when forming her opinion. The evidence will not be admitted for its truth because it is inadmissible hearsay not subject to any hearsay exceptions. First, the statements made by Bayer's counsel were not statements against interest. *See* *FRE 804*. Instead Bayer agreed to provide Plaintiffs with that information in connection with a settlement agreement. *American Auto Accessories, Inc. v. Fishman, 979 F. Supp. 706, 707 (N.D. Ill. 1997)* (statement-against-interest exception inapplicable where statements were made in connection with settlement

[3] Plaintiffs have consented to withdrawing certain portions of Ms. Barbour's testimony. *See* Pls. Opp. at 5 n. 5, ECF No 157. Notwithstanding the Court's decision, Plaintiffs will be held to that representation.

agreement and defendants were seeking to "curry favor" with plaintiffs). Nor does the "residual" hearsay exception apply. The residual hearsay exception is to be used only in exceptional circumstances. *Bohler-Uddeholm America, Inc. v. Ellwood Group, Inc., 247 F.3d 79, 112 (3d Cir. 2001)*. Additionally, it is to be applied only where the offered testimony contains circumstantial guarantees of trustworthiness. *See* *FRE 807*. Here, the evidence is not particularly trustworthy because **[*17]** it does not involve direct statements made by Bayer employees; rather, it consists solely of notes and summaries prepared by Plaintiffs and their experts. *Barry v. Trustees of Int'l Ass'n of Full-Time Salaried Officers & Employees of Outside Local Unions & District Counsel's (Iron Workers) Pension Plan, 467 F.Supp. 2d 91, 102 (D.D.C. 2006)*.

The Court will reserve on whether Dr. Marx will be permitted to testify as to how she relied on conversations with Bayer when forming her expert opinion. Whether Dr. Marx may refer to those conversations will depend on a number of factors that are presently unknown. For example, Dow may open the door to such testimony if it challenges Dr. Marx's setting of the benchmark and conspiracy periods for her regression models.[4]

8. Plaintiffs' Motion *in Limine* to Preclude Evidence and Argument Related to *Fifth Amendment* Invocations [ECF 95]

Plaintiffs seek to preclude Dow from introducing evidence related to Plaintiffs' employees' invocation of their *Fifth Amendment* rights at depositions. Specifically, certain Carpenter, Vitafoam, and Woodbridge employees **[*18]** invoked their *Fifth Amendment* right not to answer any questions at their depositions, including questions about their employers' allegedly anticompetitive conduct in the downstream foam market.

First, the Carpenter employees later revoked their *Fifth Amendment* invocations and answered questions at subsequent depositions. Dow did not designate for use at trial any of the Carpenter employees' deposition testimony at issue. Dow now seeks to introduce the later-revoked *Fifth Amendment* invocations as impeachment evidence against the Carpenter trial witnesses. **Second**, Plaintiffs presented, pursuant to *Rule 30(b)(6)*, other Vitafoam and Woodbridge corporate designees to answer questions on the deposition topics. The Vitafoam and Woodbridge witnesses are not on either party's witness list, but Dow now requests a jury instruction explaining that Dow was denied the opportunity to gather evidence relevant to its defense because of the Vitafoam and Woodbridge employees' *Fifth Amendment* invocations.

The Court will **GRANT** Plaintiffs' motion. **First**, any "potential probative value of [the Carpenter employees'] invocation of the *Fifth Amendment* is further reduced by the fact that [they] subsequently answered all of the questions," and "the potential prejudice . . . is high," such that it **[*19]** substantially outweighs any probative value. *See* *Harrell v. DCS Equipment Leasing Corp., 951 F.2d 1453, 1464-65 (5th Cir. 1992)*; *see also* *FRE 403* (court may exclude relevant evidence if its probative value is substantially outweighed by a danger of unfair prejudice). **Second**, during discovery, Dow did not challenge the adequacy of the Rule 30(b)(6) designations as a substitute for Vitafoam and Woodbridge employees' testimonies. And the MDL Court ruled that Dow had received all the discovery it was due. Dow may not now argue for a jury instruction to the contrary. Lastly, the Court has already precluded Dow from introducing evidence related to Plaintiffs' conduct in the downstream market; arguably, evidence of the *Fifth Amendment* invocations fall within the scope of that order.

9. Plaintiffs' Motion *in Limine* to Preclude Evidence and Argument Relating to the DOJ Investigation and Result [ECF 97]

Plaintiffs move to preclude Dow from introducing evidence relating to the DOJ's 2005 criminal investigation into Dow's pricing conduct in the urethane market, and the DOJ's ultimate decision not to prosecute Dow. Plaintiffs

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[4] Plaintiffs have also indicated that Dr. Marx may refer to her conversations with Bayer's counsel when explaining why she attributes the variances detected by her models to the existence of a conspiracy. However, the Court has also reserved on whether Dr. Marx may attribute the variances to any particular cause. *See* ECF No. 229.

argue that the evidence should be categorically excluded because: (1) that fact that the DOJ chose not to prosecute Dow is not relevant to the issue of whether Dow actually committed antitrust **[*20]** violations; and (2) the evidence is unfairly prejudicial because it would tempt the jury to conclude that Dow is innocent in this case. Dow opposes, arguing that it seeks to introduce the evidence to impeach certain witnesses, including Lawrence Stern, the former head of Bayer, who received prosecutorial immunity in exchange for cooperating with the DOJ.

Plaintiffs' motion *in limine* will be **GRANTED IN PART AND DENIED IN PART**. Dow is not permitted to present evidence of the DOJ's investigation or its result as part of its case-in-chief, as the risk of prejudice substantially outweighs any probative value. *See Am. Home Assurance Co. v. Sunshine Supermarket, Inc., 753 F.2d 321, 325 (3d Cir. 1985)* (stating that the "higher burden of persuasion" in a criminal case makes "evidence of non-prosecution . . . of very limited probative value" in a subsequent civil case, and such evidence is "highly prejudicial" if it relates to a principal issue in the civil case.). However, to the extent that Dow wishes to introduce impeachment evidence of an agreement between Stern and the government that resulted in Stern's prosecutorial immunity (insofar as it does not contain references to the DOJ's investigation into Dow's conduct), Dow may do so. *See United States v. Murray, 468 F. App'x 104, 107-08 (3d. Cir. 2012)* (stating that immunity agreements properly **[*21]** "inform the jury's assessment of witness credibility and bias."). However, the Court advises Plaintiffs that, should they reference the DOJ investigation at trial, they could potentially open the door to the Court permitting Dow to offer evidence regarding said investigation.

10. Plaintiffs' Motion *in Limine* to Preclude Testimony that Violates the MDL Court's Discovery Order [ECF 99]

Plaintiffs seek to preclude Dow from introducing portions of the deposition testimonies of former Dow attorneys Lynn Schefsky and Tom McCormick that, according to Plaintiffs, "exceed the scope" of discovery permitted by the MDL Court's July 2013 discovery order.

As described in more detail in the portion of this Opinion and Order addressing Dow's Motion to Exclude Evidence Relating to Allegations of Document Destruction, Stephanie Barbour was terminated from Dow in 2004. Barbour alleged that she was terminated in retaliation for reporting wrongdoing on the part of her supervisor, David Fischer, to Lynn Schefsky. Dow subsequently directed Tom McCormick to conduct an internal investigation into Barbour's claims ("Dow's 2004 investigation"). During Barbour's 2010 deposition, she testified that she was aware **[*22]** of price-fixing at Dow and that she took notes regarding price-fixing while she was a Dow employee. In July 2013, after the class action trial had concluded, the MDL Court modified a scheduling order to allow Dow to conduct new discovery regarding Dow's 2004 investigation. The MDL Court reasoned that good cause existed to reopen discovery because Plaintiffs had indicated an intent to pursue two new theories at trial: (1) Dow's destruction of Barbour's notes; (2) Dow's failure to investigate Barbour's antitrust allegations. The multi-district litigation court ruled that limited discovery could be conducted as to Dow's 2004 investigation, but did not "set stringent limits on the means and manner." The court directed the parties to file a motion if either side felt the other was abusing the limited extension of the discovery deadline. Neither party did so. Plaintiffs now argue that Dow violated the July 2013 discovery order by delving into topics beyond the scope of the discovery order (such as Dow's antitrust compliance program generally and Barbour's previous reports of antitrust violations) and, therefore, Dow should be precluded from using portions of the Schefsky and McCormick depositions **[*23]** at trial.

Plaintiffs' motion *in limine* will be **DENIED**. The challenged deposition testimony is well within the scope of discovery contemplated by the MDL Court in its July 2013 order: the testimony directly relates to Dow's 2004 investigation into Barbour's antitrust allegations. Moreover, if Plaintiffs believed that Dow's deposition designations violated the July 2013 discovery order, they should have filed a motion with the MDL Court at the time, as prescribed by the July 2013 order.

11. Plaintiffs' Motion *in Limine* to Preclude Reference to How Plaintiffs Became Involved in the Case, Plaintiffs' Knowledge of the Litigation or the Case Being Lawyer Driven [ECF 103]

Plaintiffs seek to preclude Dow from introducing evidence related to: **(1)** the manner in which Plaintiffs became involved in this litigation; **(2)** Plaintiffs' knowledge of the details of the lawsuit itself; and **(3)** this case being "lawyer-driven" by Plaintiffs' counsel.

Plaintiffs' motion *in limine* will be **GRANTED**. First, the evidence is irrelevant. *See* FRE 401. How Plaintiffs became involved in the litigation, the extent of Plaintiffs' employees' knowledge of the details of Dow's alleged price-fixing conspiracy, and who "drove" the **[*24]** litigation do not tend to prove or disprove whether Dow engaged in conduct that violated the Sherman Act. Second, such evidence is prejudicial: it carries a great risk that the jury will become distracted from the key issues in the case and decide the case on improper grounds (such as a sense that Plaintiffs were manipulated into filing suit by lawyers looking to profit from a big class action lawsuit). *See* FRE 403.

12. Plaintiffs' Motion *in Limine* to Preclude Evidence Regarding Plaintiffs' Financial Condition [ECF 105]

Plaintiffs seek to preclude Dow from introducing evidence regarding Plaintiffs' revenues, assets, profits (derived from their sales in the downstream foam market), or net worth. Plaintiffs argue that this evidence is not relevant and prejudicial. Dow argues that profitability is relevant to determining Plaintiffs' injury under Section 4 of the Clayton Act.

Plaintiffs' motion *in limine* will be **GRANTED**. First, evidence of Plaintiffs' financial position is irrelevant to the question of whether Dow violated antitrust laws. *See* *Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 489, 88 S. Ct. 2224, 20 L. Ed. 2d 1231 (1968)* (noting "as long as the seller continues to charge the illegal price, he takes from the buyer more than the law allows" and "whatever price the buyer sells, the price **[*25]** he pays the seller remains illegally high"). Second, such evidence carries a substantial risk of unfair prejudice: the jury may conclude that Plaintiffs don't really "need" the recovery because the companies are profitable. *See* FRE 403.

II. CONCLUSION

Consistent with the above determinations, **IT IS** on this 8th day of February 2016, hereby **ORDERED** that

1. Dow's Motion *in Limine* to Preclude References to Other Anti-Trust Cases [ECF 114] is **GRANTED IN PART**, with Dr. Marx retaining the right to testify regarding anti-trust cases/investigations not involving Dow in the event that Dow challenges her testimony by (1) arguing that a conspiracy will exist only if prices stick; and (2) challenging her decision to exclude 2004 from the conspiracy period.

2. Dow's Motion *in Limine* Concerning Antitrust Compliance Policies [ECF 116] is **GRANTED**.

3. Dow's Motion *in Limine* to Preclude Reference to the Urethane Class Action [ECF No. 118] is **GRANTED**.

4. Dow's Motion *in Limine* to Preclude References to Former Defendants as "Defendants" [ECF 120] is **GRANTED**.

5. Dow's Motion *in Limine* to Preclude Plaintiffs' Expert from Offering Opinions Outside Her Expertise [ECF 121] is **DENIED WITHOUT PREJUDICE**, with Dow reserving **[*26]** the right to re-raise its objection during Dr. Marx's testimony

6. Dow's Motion *in Limine* to Exclude Evidence Relating to Allegations of Document Destruction [ECF 125] is **GRANTED IN PART AND DENIED IN PART**.

7. Dow's Motion *in Limine* to Exclude Evidence Related to Bayer's Internal Investigation [ECF 127] is **GRANTED IN PART**, with the Court reserving on whether the evidence is admissible as material relied upon by Dr. Marx.

8. Plaintiffs' Motion *in Limine* to Preclude Evidence and Argument Related to *Fifth Amendment* Invocations [ECF 95] is **GRANTED**.

9. Plaintiffs' Motion *in Limine* to Preclude Evidence and Argument Relating to the DOJ Investigation and Result [ECF 97] is **GRANTED IN PART AND DENIED IN PART**, with the Court reserving on whether the Court will permit Dow to offer evidence regarding the DOJ investigation, should Plaintiffs reference said investigation at trial.

10. Plaintiffs' Motion *in Limine* to Preclude Testimony that Violates the MDL Court's Discovery Order [ECF 99] is **DENIED**.

11. Plaintiffs' Motion *in Limine* to Preclude Reference to How Plaintiffs Became Involved in the Case, Plaintiffs' Knowledge of the Litigation or the Case Being Lawyer Driven [ECF 103] is **GRANTED**.

12. Plaintiffs' Motion *in* ***[*27]*** *Limine* to Preclude Evidence Regarding Plaintiffs' Financial Condition [ECF 105] is **GRANTED**.

/s/ William J. Martini

WILLIAM J. MARTINI, U.S.D.J.

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Hicks v. PGA Tour, Inc.

United States District Court for the Northern District of California

February 9, 2016, Decided; February 9, 2016, Filed

Case No. 15-cv-00489-VC

Reporter

165 F. Supp. 3d 898 *; 2016 U.S. Dist. LEXIS 31597 **; 2016-1 Trade Reg. Rep. (CCH) P79,504

WILLIAM MICHAEL HICKS, et al., Plaintiffs, v. PGA TOUR, INC., Defendant.

Subsequent History: Affirmed in part and vacated in part by, Remanded by *Hicks v. Pga Tour, 2018 U.S. App. LEXIS 20905 (9th Cir. Cal., July 27, 2018)*

Prior History: *Hicks v. PGA Tour, Inc., 2015 U.S. Dist. LEXIS 115416 (N.D. Cal., July 24, 2015)*

Core Terms

caddies, bibs, wear, advertising, endorsement, tournament, golf, fans, display, golfer, logo, dismissal with prejudice, allegations, marketing, unfair, products, violates, rights, shirts, golf tournament, interchangeable, television, antitrust, contracts, magazine, sponsors, duress, seller, right of publicity, cause of action

LexisNexis® Headnotes

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

Evidence > Judicial Notice

HN1[] **Defenses, Demurrers & Objections, Motions to Dismiss**

On a motion to dismiss, the court may take judicial notice of documents which are referenced in but not appended to the pleadings, and whose authenticity no party disputes.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Choice of Law

HN2[] **Federal & State Interrelationships, Choice of Law**

Parties may, in absence of strong contrary public policy, choose which forum's law will govern an action, including by agreement during litigation.

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

Contracts Law > Contract Interpretation > Ambiguities & Contra Proferentem

HN3[] Motions to Dismiss, Failure to State Claim

Under California law, the general rule is that if the relevant contractual language is ambiguous, such that either side's interpretation is potentially reasonable, the dispute must be resolved by a jury. But even if disputed language might appear ambiguous when read in isolation, where the context reveals that the language is susceptible to only one reasonable interpretation, the ambiguity can be conclusively resolved in favor of that interpretation as a matter of law. This is true even on a motion to dismiss: if the allegations in the complaint, viewed with other materials properly considered at the pleading stage, conclusively show that only the defendant's interpretation of the disputed contractual language is reasonable, the complaint must be dismissed.

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

HN4[] Motions to Dismiss, Failure to State Claim

A concession by a non-moving party is appropriately considered on a motion to dismiss.

Business & Corporate Compliance > ... > Breach > Breach of Contract Actions > Elements of Contract Claims

HN5[] Breach of Contract Actions, Elements of Contract Claims

There is no breach of contract where the conduct of which a plaintiff complains is specifically authorized by the contract.

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

HN6[] Amendment of Pleadings, Leave of Court

Leave to amend need not be given where a plaintiff cannot cure defects in his complaint without alleging facts inconsistent with prior iterations of the complaint.

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

HN7[] Motions to Dismiss, Failure to State Claim

On a motion to dismiss, a court may consider documents which are not physically attached to the complaint but whose contents are alleged in the complaint and whose authenticity no party questions.

Contracts Law > ... > Affirmative Defenses > Coercion & Duress > Economic Duress

HN8[] Coercion & Duress, Economic Duress

If a party to a contract signs it under economic duress, a court has discretion to rescind it. The doctrine of economic duress can apply when one party has done a wrongful act which is sufficiently coercive to cause a reasonably prudent person, faced with no reasonable alternative, to agree to an unfavorable contract. A wrongful act does not necessarily mean a tortious or unlawful act but encompasses a greater range of unethical behavior. In addition to showing that the wrongful act was objectively coercive, the party seeking rescission must also show that it actually was coerced, i.e. that it had no reasonable alternative but to agree. California courts have held a person had no reasonable alternative when the only other alternative is bankruptcy or financial ruin. The doctrine does not allow for rescission of contracts that are merely the result of hard bargaining, as opposed to the kind of extreme financial coercion that leaves a person with no real choice but to agree.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

HN9[] **Types of Contracts, Quasi Contracts**

There is no standalone cause of action for unjust enrichment in California. However, when a plaintiff alleges unjust enrichment, a court may construe the cause of action as a quasi-contract claim seeking restitution.

Torts > ... > Invasion of Privacy > Appropriation > Elements

Trademark Law > Subject Matter of Trademarks > Particular Subject Matter > Right of Publicity

HN10[] **Appropriation, Elements**

California recognizes both a statutory and common law right of publicity. To state a claim for common law misappropriation in violation of the right of publicity, plaintiffs must allege (1) the defendant's use of the plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury. For a claim under *Cal. Civ. Code § 3344*, plaintiffs must additionally allege (1) a knowing use; (2) for purposes of advertising, and (3) a direct connection between the use and the commercial purpose. Both the common law and statutory causes of action for misappropriation require lack of consent.

Antitrust & Trade Law > Sherman Act > Claims

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

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

HN11[] **Sherman Act, Claims**

To state a valid claim under the *Sherman Act*, *15 U.S.C.S. § 1 et seq.*, a plaintiff must allege that the defendant has market power within a relevant market, and must provide a facially plausible definition of that market. Defining the relevant market requires plausibly alleging both a relevant product market and a relevant geographic market. The relevant product market must encompass the product at issue as well as all economic substitutes for the product. That is, the market must include all products for which there is reasonable interchangeability of use or cross-elasticity of demand. If a plaintiff alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff's favor, the relevant market is legally insufficient and a motion to dismiss may be granted. This threshold requirement exists to prevent the antitrust laws from applying too broadly.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization

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

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

HN12[] **Regulated Practices, Monopolies & Monopolization**

Antitrust law is not intended to reach all potentially objectionable conduct by economic competitors; it is intended to protect consumers from the anticompetitive effects of wrongful monopolization or restraints of trade. The theory is that in a functioning competitive market, if one seller raises the price of its product, consumers will turn to other sellers of similar products to avoid paying the higher price. The conduct of a seller (or group of sellers) only implicates the antitrust laws if it allows the seller (or group of sellers) to charge artificially high prices in a scenario where consumers have no reasonable opportunity to turn to another product. To determine whether that kind of harm is likely to happen or has happened, it is necessary to examine the entire product market, i.e. all products a consumer would consider reasonably interchangeable and would turn to if there were a significant price increase in the original product. If consumers are not precluded from responding to the defendant's conduct simply by turning to reasonable alternatives in the market, the conduct of the defendant (even if otherwise wrongful) was not meant to be covered by the antitrust laws.

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

HN13[] **Federal Unfair Competition Law, False Designation of Origin**

The *Lanham Act* creates a cause of action against a defendant who, in connection with any goods or services uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person. *15 U.S.C.S. § 1125(a)(1)(A)*.

Trademark Law > Subject Matter of Trademarks > Particular Subject Matter > Right of Publicity

HN14[] **Particular Subject Matter, Right of Publicity**

A plaintiff can only state a false endorsement claim if the use of his identity is unauthorized.

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

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

California's unfair competition law (UCL), Cal. Bus. & Prof. Code § 17200, allows a cause of action for any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising. The California Supreme Court has held that a practice may be deemed unfair even if not specifically proscribed by some other law. However, where the same conduct alleged to be unfair under the UCL is also alleged to be a violation of another law, the UCL claim rises or falls with the other claims. That is because to permit a separate inquiry into essentially the same question under the unfair competition law would invite conflict and uncertainty.

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Judges: VINCE CHHABRIA, United States District Judge.

Opinion by: VINCE CHHABRIA

Opinion

[*902] ORDER GRANTING MOTION TO DISMISS, DENYING MOTION TO STRIKE

Re: Dkt. Nos. 79, 80, 82

This case is about the "bibs" caddies wear during golf tournaments sponsored by the PGA Tour. These bibs display the name of the golf tournament, the name of the golfer for whom the caddie works (on the back), and often corporate logos. **[**4]** The bibs generally look like this:

SAC ¶ 1.

Recently there has been great strife between the caddies and the Tour, with caddies complaining that their working conditions are poor and that the Tour does not treat them with common human decency. To use one high-profile example, at a tournament in February 2015, play was suspended because of a thunderstorm with high winds. Players and other people were permitted to go indoors, while caddies were left to seek refuge under an open metal shed or in their vehicles. This prompted ESPN analyst Scott Van Pelt to opine that the PGA Tour "treats its caddies like outside dogs."[1]

Caddies are now fighting back. As part of this fight, 168 caddies have sued the PGA Tour in federal court. The lawsuit is a proposed class action, in which the caddies **[*903]** seek to represent themselves and all other similarly-situated caddies. They contend that the Tour may not require them to wear the bibs during tournaments, or at least that the Tour must compensate them for wearing the bibs because of the publicity they provide for the Tour and its sponsors. Specifically, the caddies assert that the bib **[**5]** requirement violates the contracts they signed with the Tour, violates their "right of publicity," and violates the federal antitrust and trademark laws.

But caddies have been required to wear the bibs for decades. So caddies know, when they enter the profession, that wearing a bib during tournaments is part of the job. In other words, the bib is the primary part of a caddie's uniform. And the contracts the caddies signed with the Tour require them to wear the uniforms prescribed by the Tour. For that reason, there is no merit to the caddies' contention that the contracts somehow prevent the Tour from requiring them to wear bibs. Nor does the bib requirement implicate federal antitrust or trademark law. The complaint is therefore dismissed. Dismissal is with prejudice, because the caddies have been unable to identify a way (and the Court is unable to think of a way) they could cure the defects in their complaint, despite multiple rounds of briefing and a lengthy hearing on the Tour's most recent motion to dismiss. *Northstar Fin. Advisors, Inc. v. Schwab Invs., 781 F. Supp. 2d 926, 931 (N.D. Cal. 2011)*.

I. CONTRACTUAL CLAIMS

A. BREACH OF CONTRACT

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[1] SAC ¶ 17 (quoting Scott Van Pelt, *Scott's "One Big Thing*", ESPN Radio, *http://espn.go.com/espnradio/play?id=12409670*).

For each pro golf tournament in which caddies participate, they must sign a form contract with the Tour.[2] The contract contains language **[**6]** imposing dress and uniform requirements on the caddies for each tournament. But the language about dress and uniform requirements does not explicitly mention bibs. The caddies seize on this silence to argue that the contract does not allow the Tour to make them wear bibs. And they argue that the bib requirement interferes with their right to make money off endorsements, because the bib covers space on their shirts that could otherwise display endorsements. The question, therefore, is whether the general contract language imposing dress and uniform requirements on the caddies at each tournament can be reasonably understood as precluding the Tour from requiring the caddies to wear bibs at those tournaments.

As a preliminary matter, it bears noting that the caddies signed these form contracts in the forty-two different states where the Tour's tournaments are held. Although one might assume that interpretation of each contract should be governed by the law of the state in which it was signed, the parties agree that California law governs the caddies' breach of contract claim. ***HN2***[] "[P]arties may, in absence of strong contrary public policy, choose which forum's law will govern an action," *Dimidowich **[*904]** v. Bell & Howell, 803 F.2d 1473, 1477 n.1 (9th Cir. 1986)* (citing *Lauritzen v. Larsen, 345 U.S. 571, 588-89, 73 S. Ct. 921, 97 L. Ed. 1254 (1953))*, including by agreement during litigation, *see* *id. at 1477*; *see also* *Isofoton, S.A. v. Giramberk, No. CV-04-0798-PHX-ROS, 2006 U.S. Dist. LEXIS 35805, 2006 WL 1516026, at *2 (D. Ariz. May 30, 2006)*. Moreover, the parties both assert that there is no material difference between the laws of the forty-two states on this issue. The Court will therefore apply California law.

HN3[] Under California law, the general rule is that if the relevant contractual language is ambiguous, such that either side's interpretation is potentially reasonable, the dispute must be resolved by a jury. *See* *Requa v. Regents of Univ. of Cal., 213 Cal. App. 4th 213, 152 Cal. Rptr. 3d 440, 449 (Ct. App. 2012)*; *Aragon-Haas v. Family Sec. Ins. Servs., 231 Cal. App. 3d 232, 282 Cal. Rptr. 233, 238 (Ct. App. 1991)*; *Marina Tenants Ass'n v. Deauville Marina Dev. Co., 181 Cal. App. 3d 122, 226 Cal. Rptr. 321, 324 (Ct. App. 1986)*. But even if disputed language might appear ambiguous when read in isolation, where the context reveals that the language **[**8]** is susceptible to only one reasonable interpretation, the ambiguity can be conclusively resolved in favor of that interpretation as a matter of law. *See* *Kashmiri v. Regents of Univ. of Cal., 156 Cal. App. 4th 809, 67 Cal. Rptr. 3d 635, 660 (Ct. App. 2007)*; *Boeing Co. v. Cont'l Cas., 157 Cal. App. 4th 1258, 69 Cal. Rptr. 3d 322, 326-27 (Ct. App. 2007)*. This is true even on a motion to dismiss: if the allegations in the complaint, viewed with other materials properly considered at the pleading stage, conclusively show that only the defendant's interpretation of the disputed contractual language is reasonable, the complaint must be dismissed. *See* *Skilstaf, Inc. v. CVS Caremark Corp., 669 F.3d 1005, 1017 (9th Cir. 2012)*; *see also* *Boeing, 69 Cal. Rptr. 3d at 326*; *Lee v. City of L.A., 250 F.3d 668, 688 (9th Cir. 2001)*.

As mentioned, the question here is whether the language of the form contract imposing dress and uniform requirements on caddies can be reasonably interpreted as not authorizing the Tour to require them to wear bibs. The pertinent paragraph states:

> Caddies shall wear uniforms and identification badges as prescribed by the host tournament and PGA TOUR. All caddies are required to wear solid-colored, Khaki-style long pants, which touch the top of the shoe, or solid-colored, knee-length, tailored shorts or skorts and a collared shirt while on club property. T-shirts, jeans, culottes, skirts, capris, cut-off shorts and cargo-style shorts are not permitted. Acceptable colors shall be determined at the discretion of the Tournament **[**9]** Director.

[2] The Court grants the Tour's request for judicial notice of Exhibits A-R. ***HN1***[] "The Court may take judicial notice of documents which are referenced in but not appended to the pleadings, and whose authenticity no party disputes." *Northstar Fin. Advisors, Inc. v. Schwab Invs., 781 F. Supp. 2d 926, 942 (N.D. Cal. 2011)* (citing *Branch v. Tunnell, 14 F.3d 449, 454 (9th Cir. 1994)*, *overruled on other grounds by* *Galbraith v. Cty. of Santa Clara, 307 F.3d 1119 (9th Cir. 2002))*. The complaint references these documents — form caddie registration agreements, caddie application forms, and player handbooks and regulations — and the caddies have stipulated that they do not contest the authenticity **[**7]** of these documents. *See* Dkt. No. 78, at 2. The caddies' motion to strike, Dkt. No. 82, is accordingly DENIED.

Dkt. No. 80 Ex. F. Although the caddie registration agreement has changed over time, the first sentence of this provision has remained identical since at least 2010, and is apparently used at all events in all three of the Tour's pro golf tours. Dkt. No. 80 Exs. A-R. The remaining language has remained almost identical as well. *See id.*

In isolation, this language might appear ambiguous. On the one hand, a person might understand the first sentence of the paragraph to mean that caddies must wear whatever "uniforms" the host tournament and the Tour decide to "prescribe," without limitation. That would, of course, include bibs. On this interpretation, the second sentence would mean that, in addition to whatever uniform the host tournament and the Tour prescribe, caddies must limit themselves to wearing certain kinds of clothing (for example, solid-colored pants or knee-length shorts).

[*905] On the other hand, one might understand the second sentence of the paragraph to be modifying the first one, so that the kinds of "uniforms" a host tournament and the Tour may "prescribe" include the type and color of the pants and shirts caddies may wear, and nothing more. On this interpretation, **[**10]** the paragraph does not authorize the Tour to require caddies to wear bibs.

But even if this contract language might appear susceptible to two different interpretations when considered in isolation, there is only one reasonable interpretation when the language is considered in the context of this case. As the plaintiffs themselves concede in their briefing, "the PGA Tour has required caddies to wear bibs for decades."[3] Dkt. No. 98 at 6. Moreover, each caddie is, according to the complaint, "forced to wear identical bibs during a given tournament." SAC ¶ 103. In other words, for decades, the bib has been the primary part of the "uniform" that the Tour requires caddies to wear. This context, which is established by the allegations in the complaint and facts that the caddies have conceded in their papers, shows that the caddies' proposed interpretation is not reasonable, because no reasonable person signing the contract after 2010 could believe he retained the right not to wear a bib during a tournament. The only reasonable interpretation of the contract is that the caddies agreed the Tour could make them wear bibs.

It follows that the caddies have no claim for breach of contract. *See, e.g.,* *Burke v. TV Guide Magazine Grp., Inc., 442 F. App'x 356, 358 (9th Cir. 2011)* (unpublished) ***HN5***[] (no breach where "the conduct of which [a] plaintiff complains . . . is specifically authorized by the contract"). And by definition, by consenting to wear bibs, the caddies relinquished any right they otherwise would have had to display endorsements on the parts of their shirts covered by the bibs. Their lawsuit therefore does not state a claim for breach of contract.

The only remaining question is whether the caddies should be given leave to amend their breach of contract claim. The only conceivable way the caddies could state a claim for breach of contract in the face of this language permitting the Tour to require them to wear bibs would be through a plausible allegation that the Tour had somehow relinquished this contractual right. *Cf.* *Waller v. Truck Ins. Exch., Inc., 11 Cal. 4th 1, 44 Cal. Rptr. 2d 370, 900 P.2d 619, 637 (Cal. 1995)*. Although the caddies make an ephemeral assertion that the Tour has at times "suggested that caddies are not actually required to wear the bibs," SAC ¶ 12, every concrete factual allegation they make on this issue **[**12]** is to the contrary and indicates that the Tour has regularly enforced its contractual rights. For example, the caddies allege the Tour "has fined Plaintiff Steve Williams numerous times for removing bibs," and that "Local Hosts have similarly forced caddies to wear the bibs . . . by threatening to report caddies to [the Tour] for discipline, by not permitting a caddie to participate in a tournament and carry out his duties for his professional golfer, and by threatening to prohibit the caddie from participating in a tournament unless the caddie wears the bib." *Id.* The caddies also complain the Tour has "obstinately refused to change its practice" of requiring them to wear bibs. SAC ¶ 11. And plaintiff James Edmonson declared under oath, in support of an earlier-filed **[*906]** motion for a preliminary injunction: "During my career, [the Tour] has *always* threatened to exclude caddies from working at a tournament if they refuse to wear the bibs." Dkt. 3 Ex. 1 at ¶ 12 (emphasis added).[4] Given these allegations, it is

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[3] ***HN4***[] A concession like this is appropriately considered on a motion to dismiss. **[**11]** *See* *Scognamillo v. Credit Suisse First Bos. LLC, No. C03-2061 TEH, 2005 U.S. Dist. LEXIS 20221, 2005 WL 2045807, at *9 (N.D. Cal. Aug. 25, 2005)*; *see also* *Brown v. Philip Morris Inc., 250 F.3d 789, 795, 797 (3d Cir. 2001)*; *cf.* *Soto-Negron v. Taber Partners I, 339 F.3d 35, 38 (1st Cir. 2003)* (quoting *Chongris v. Bd. of Appeals, 811 F.2d 36, 37 (1st Cir.1987)*).

clear amendment would be futile. *See, e.g., Stone v. Travelers Corp., 58 F.3d 434, 437 n.1 (9th Cir. 1995)* ***HN6***[] (leave to amend need not be given where a plaintiff cannot cure defects in his complaint without alleging facts inconsistent with prior **[**13]** iterations of the complaint). The caddies' breach of contract claim is therefore dismissed with prejudice.

B. DURESS

Perhaps anticipating the conclusion that the language of the contract allows the Tour to require them to wear bibs, the caddies alternatively argue they agreed to this contract language under duress. SAC ¶ 155. The caddies note that they are employed by the individual golfers who participate in Tour events, not by the Tour itself. *Id.*; *see also id.* ¶¶ 6, 69. The caddies allege that the Tour "threatened to and attempted to interfere with [the caddies'] business relationships with their respective **[**14]** players and individual sponsors" if they would not agree to wear the bibs. SAC ¶ 155. The Tour also allegedly "threatened to or did in fact preclude caddies from working for their golfer [at Tour events] if they refused to" wear the bibs. *Id.* The caddies assert that, because they "lack viable alternative employment," they had no choice but to agree to wear the bibs at the Tour's insistence. *Id.*

HN8[] If a party to a contract signs it under economic duress, a court has discretion to rescind it. *Rich & Whillock, Inc. v. Ashton Dev., Inc., 157 Cal. App. 3d 1154, 204 Cal. Rptr. 86, 89 (Ct. App. 1984)*. "The doctrine of 'economic duress' can apply when one party has done a wrongful act which is sufficiently coercive to cause a reasonably prudent person, faced with no reasonable alternative, to agree to an unfavorable contract." *CrossTalk Prods., Inc. v. Jacobson, 65 Cal. App. 4th 631, 76 Cal. Rptr. 2d 615, 622-23 (Ct. App. 1998)*. A wrongful act does not necessarily mean a tortious or "unlawful act" but encompasses a greater range of unethical behavior. *Tarpy v. Cty. of San Diego, 110 Cal. App. 4th 267, 1 Cal. Rptr. 3d 607, 614 (Ct. App. 2003)* (citing *CrossTalk Prods., 76 Cal. Rptr. 2d at 622-23*). In addition to showing that the wrongful act was objectively coercive, the party seeking rescission must also show that it actually was coerced, i.e. that it had no reasonable alternative but to agree. *CrossTalk Prods., 76 Cal. Rptr. 2d at 623*. California courts have held a person had no reasonable alternative "when the only other alternative is bankruptcy or financial ruin." **[**15]** *Rich & Whillock, 204 Cal. Rptr. at 89*. The doctrine does not allow for rescission of contracts that are merely the result of "[h]ard bargaining," as opposed to the kind of extreme financial coercion that leaves a person with no real choice but to agree. *Id.*

[*907] The allegations in this lawsuit cannot support a theory of economic duress. It might be one thing if someone became a professional caddie in reliance on the notion that a significant portion of his income would come from logos displayed on shirts he wore during tournaments, only later to be forced to choose either to stop making that money or to stop practicing his trade. It is another thing for someone embark upon a profession whose practitioners have long been required to wear bibs, and who therefore have not been able to display logos on the part of the shirt covered by the bib. The caddies allegation that they were coerced into this arrangement on threat of extreme economic hardship is not plausible, and this claim is dismissed with prejudice.

C. UNJUST ENRICHMENT

HN9[] There is no "standalone cause of action for 'unjust enrichment'" in California. *Astiana v. Hain Celestial Grp., Inc., 783 F.3d 753, 762 (9th Cir. 2015)* (citing *Durell v. Sharp Healthcare, 183 Cal. App. 4th 1350, 108 Cal. Rptr. 3d 682, 699 (Ct. App. 2010))*. However, "[w]hen a plaintiff alleges unjust enrichment, a court may 'construe the

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[4] The complaint expressly references exhibits attached to Edmondson's declaration, and impliedly incorporates the substance of Edmondson's declaration itself. ***HN7***[] "[A] court may consider documents which are not physically attached to the complaint but 'whose contents are alleged in [the] complaint and whose authenticity no party questions.'" *Van Winkle v. Allstate Ins. Co., 290 F. Supp. 2d 1158, 1162 (C.D. Cal. 2003)* (quoting *eCash Techs., Inc. v. Guagliardo, 127 F. Supp.2d 1069, 1074 (C.D. Cal. 2000)* (second alteration original)). Because the plaintiffs offered Edmondson's declaration themselves and the defendant does not dispute its authenticity, the Court will consider the declaration in ruling on the motion to dismiss. *See Appling v. Wachovia Mortg., FSB, 745 F. Supp. 2d 961, 968 (N.D. Cal. 2010)*.

cause of action as a quasi-contract claim **[**16]** seeking restitution.'" *Id.* (citing *Rutherford Holdings, LLC v. Plaza Del Rey, 223 Cal. App. 4th 221, 166 Cal. Rptr. 3d 864, 872 (Ct. App. 2014))*. In this case, because the caddies agreed to wear the bibs in an express contract and the complaint does not plausibly allege the contract was procured by fraud or duress or is otherwise unenforceable, even if the Court were to construe the caddies' unjust enrichment claim as a claim for restitution, that claim would fail as a matter of law. *See Durell, 108 Cal. Rptr. 3d at 700*. It is therefore dismissed with prejudice.

II. RIGHT OF PUBLICITY

The caddies also allege the Tour is violating their "right of publicity" by using them as "human billboards." They contend the Tour makes money by requiring the caddies to wear bibs, because the bibs display corporate logos and the names of corporate sponsors.

HN10[] California recognizes both a statutory and common law right of publicity. *Cohen v. Facebook, Inc., 798 F. Supp. 2d 1090, 1093 (N.D. Cal. 2011)*. "To state a claim for common law misappropriation [in violation of the right of publicity], plaintiffs must allege '(1) the defendant's use of the plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury.' For a claim under *Civil Code § 3344*, plaintiffs must additionally allege '(1) a "knowing" use; (2) **[**17]** for purposes of advertising, and (3) a direct connection between the use and the commercial purpose.'" *Id. at 1093-94* (quoting *Newcombe v. Adolf Coors Co., 157 F.3d 686, 692 (9th Cir. 1998))*.

Both the common law and statutory causes of action for misappropriation require lack of consent. *Id.* As previously explained, the contracts the caddies sign before participating in tournaments allow the Tour to require them to wear bibs. By definition, therefore, the caddies have consented to the use of their images at tournaments to display what is on the bibs. Further, in that same agreement, the caddies granted and assigned to the Tour their "individual television, radio, motion picture, photographic, electronic, . . . and all other similar or related media rights with respect to" their participation in Tour events. Dkt. No. 80 Ex. F. It is therefore implausible that the caddies did not consent to the Tour's commercial use of their likenesses in televising and otherwise depicting the caddies participating in Tour events wearing the bibs.

[*908] The caddies note that the Tour's *player* handbook distinguishes between "media rights" and "marketing rights," and that the provision on "marketing rights" expressly protects the players' right to seek endorsements. Dkt. No. 3 Ex. 1-A **[**18]** at 150-51. Then they argue that this distinction should be read into their contract as well, even though their contract says nothing about "marketing rights." Even assuming they are correct, it does nothing to save their "right of publicity" claim. There is no inconsistency between consent by a caddie to wear a bib and retention by the caddie of "marketing rights." The caddies can still seek to promote or endorse products, regardless of whether they also consented to allowing the Tour to use their likenesses in the limited manner described by the contract (i.e. to depict the caddies participating in Tour events while wearing the bibs).

The caddies' right of publicity claims are dismissed with prejudice.

III. ANTITRUST CLAIMS

The caddies assert various claims under *Sections 1* and *2* of the Sherman Act, *15 U.S.C. §§ 1*, *2*. As a threshold matter, ***HN11***[] "to state a valid claim under the *Sherman Act*, a plaintiff must allege that the defendant has market power within a 'relevant market,'" and must provide a facially plausible definition of that market. *Newcal Indus., Inc. v. Ikon Office Sol., 513 F.3d 1038, 1044, 1045 (9th Cir. 2008)*; *see also id. at 1044 n.3*; *Tanaka v. Univ. of S. Cal., 252 F.3d 1059, 1063 (9th Cir. 2001)*; *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. Defining the relevant market requires plausibly alleging both "a relevant product market and a relevant geographic market." *Sidibe v. Sutter Health, 4 F. Supp. 3d 1160, 1174 (N.D. Cal. 2013)*; *see also Newcal, 513 F.3d at 1045 n.4*. The relevant product **[**19]** market "must encompass the product at issue as well as all economic substitutes for the product." *Newcal, 513 F.3d at 1045*. That is, the market must include all products for which there is "reasonable interchangeability of use or . . . cross-elasticity of demand." *Id.* (quoting *Brown Shoe v. United States, 370 U.S. 294, 325, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*). If a plaintiff "alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff's favor, the relevant market is legally insufficient and a motion to dismiss may be granted." *Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 436 (3d Cir. 1997)*.

This threshold requirement exists to prevent the antitrust laws from applying too broadly. ***HN12***[] ***Antitrust law*** is not intended to reach all potentially objectionable conduct by economic competitors; it is intended to protect *consumers* from the anticompetitive effects of wrongful monopolization or restraints of trade. *See, e.g., NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 107, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984)*. The theory is that in a functioning competitive market, if one seller raises the price of its product, consumers will turn to other sellers of similar products to avoid paying the higher price. The conduct of a seller (or group of sellers) only implicates the antitrust laws if it allows the seller (or group of sellers) to charge artificially **[**20]** high prices in a scenario where consumers have no reasonable opportunity to turn to another product. *See id.* To determine whether that kind of harm is likely to happen or has happened, it is necessary to examine the entire product market, i.e. all products a consumer would consider reasonably interchangeable and would turn to if there were a significant price increase in the original product. If consumers are not precluded from responding to the defendant's conduct simply **[*909]** by turning to reasonable alternatives in the market, the conduct of the defendant (even if otherwise wrongful) was not meant to be covered by the antitrust laws. *See Adidas Am., Inc. v. NCAA, 64 F. Supp. 2d 1097, 1101-02 (D. Kan. 1999)*.

The caddies allege there are two relevant product markets in which the Tour has committed antitrust violations: the "Endorsement Market" and the "Live Action Advertising Market." SAC ¶ 82. In these markets, the caddies allege, advertisers of certain products seek the attention of pro golf fans. With regard to both markets, the caddies allege that pro golf fans are unique — that they tend to be older, wealthier, and more privileged than fans of other sports. Therefore, according to the caddies, it is not merely companies that advertise golf-specific products **[**21]** that wish to reach golf fans in particular. It is also companies that advertise luxury goods and services that fans of other sports will be less interested in, or less able to purchase. SAC ¶ 95.

The caddies describe the endorsement market as "the national market for the endorsement of products and services by participants in professional golf tournaments." SAC ¶ 84. According to the lawsuit, endorsements by pro golfers and caddies displayed during golf tournaments are not reasonably interchangeable with other forms of advertising to golf fans, such as television ads, magazine ads, internet ads, or posters displayed at golf course clubhouses. SAC ¶ 85. This is so, the caddies allege, because golf fans cannot ignore, say, a Nike hat worn by a golfer during a tournament in the same way they could ignore a Nike ad in a magazine. *Id.* And this is true, the caddies allege, even if the Nike ad has a picture of the same golfer wearing the same hat. *Id.* In other words, the caddies allege that the in-tournament endorsement market is distinct from all other forms of advertising to golf fans, including but not limited to other ways of communicating to golf fans that a player or caddie endorses **[**22]** a product.[5]

The caddies describe the live action advertising market as "the national . . . market for in-play or in-action commercial advertising at professional golf events between commercial breaks." SAC ¶ 88. This is different from the endorsement market in one sense: with the live action advertising market, it does not matter whether the advertisement of a product comes in the form of an endorsement. But it is similar to the endorsement market in another sense: the live action advertising market is limited to things people see when they're watching the golf "action" on TV. Beyond a display on the shirt or hat of a golfer or caddie, this might include the display of a sign on a bridge on the golf course, or the display of a logo on a graphic that appears on screen during tournament play (like when the leaderboard is shown). The caddies allege that these advertisement opportunities are sold to sponsors, whose logos "are inserted subtly but effectively in the **[**23]** field of play where they can be viewed by

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[5] The Court assumes, for the sake of argument and for purposes of this motion to dismiss only, that fans of pro golf are uniquely attractive to certain advertisers in a way that fans of other sports (such as tennis) are not. *Cf. NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 111, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984)*.

the live golf tournament audience and by the broadcast audiences between commercial breaks." *Id.* As with the endorsement market, the caddies allege that these forms of advertisement are unique and not reasonably interchangeable with other forms of advertising to golf fans, because broadcast viewers can fast-forward through commercials, or ignore magazine ads or posters, but cannot readily avoid **[*910]** observing a logo that appears on screen during tournament play. SAC ¶ 90.

These allegations — that advertising in the "Endorsement Market" and the "Live Action Advertising Market" is meaningfully distinct from other forms of advertising to golf fans — are not plausible. Companies that wish to advertise things like golf balls or luxury watches to fans of pro golf can do so in a variety of ways: television ads, magazine ads, internet ads, posters at golf course clubhouses, and more. To be sure, not all forms of advertising are the same, and some forms have benefits that others don't. For example, with a television ad, a company can communicate a detailed verbal and visual message about its product (including but not limited to an endorsement by a golfer, **[**24]** or an actor, or a caddie, or some other figure). With a magazine ad, the company cannot communicate verbally, but it can communicate visually, and the ad might be hard to ignore if it appears on the page opposite an article someone is reading. With a logo being worn by a caddie or a golfer during a tournament, the company's communication capabilities are far more limited, but perhaps the communication is more likely to catch someone's eye. However, it's not enough to allege that these forms of advertising have differences. *See, e.g., United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 394, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)*. To implicate the antitrust laws, the caddies must allege facts from which one could plausibly conclude that these different methods of advertising to golf fans are not reasonably interchangeable, such that even if the price of one advertising method went up in a meaningful way, companies would not switch to another method of advertising. The caddies have alleged no such facts. Even assuming the caddies are correct that an endorsement of a product by a golfer or caddie is sufficiently different from an advertisement without an endorsement, the endorsement market cannot be so narrowly defined as to include only in-play endorsements and not also endorsements **[**25]** communicated via other media, because it isn't plausible that an increase in the price of in-play endorsements would have no effect on the demand for other types of endorsements, or vice versa. Likewise, with respect to the live action advertising market, while it may be true that the advent of DVRs has rendered in-play advertisement opportunities more attractive than they previously were, it does not plausibly follow that a price increase in in-play advertisement opportunities would have no effect on the demand for other forms of advertisement to golf fans. If it became too expensive to put a logo on a bridge, there is no logical reason a company wouldn't decide instead to put its logo on a magazine ad, or on a wall in golf course clubhouses, or any number of other places.

In sum, the product markets proposed by the caddies are not natural. They are artificial, contorted to meet their litigation needs. *Cf. Adidas Am., 64 F. Supp. 2d at 1102*. Nor have the caddies been able to explain how they could state an antitrust claim using a plausible product market definition. Accordingly, their *Sherman Act* claims are dismissed with prejudice.

IV. *LANHAM ACT*

HN13[] The *Lanham Act* creates a cause of action against a defendant who, "in **[**26]** connection with any goods or services . . . uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which . . . is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, **[*911]** sponsorship, or approval of his or her goods, services, or commercial activities by another person." *15 U.S.C. § 1125(a)(1)(A)*.

The caddies' *Lanham Act* claim is essentially a false endorsement claim: they allege the Tour "used the likenesses and images of Plaintiffs to endorse the products and services of bib sponsors," thereby misleading golfing audiences into believing that the caddies themselves endorse those products and services. SAC ¶¶ 150, 151. But ***HN14***[] a plaintiff can only state a "false endorsement claim" if the use of his identity is "unauthorized." *Waits v. Frito-Lay, Inc., 978 F.2d 1093, 1110 (9th Cir. 1992), abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 188 L. Ed. 2d 392 (2014); see also Abdul-Jabbar v. Gen. Motors Corp.,* *85 F.3d 407, 410 (9th Cir. 1996)*. As previously explained, the only plausible interpretation of the parties' agreements is that the caddies consented to the very thing they now complain of — namely, the Tour's right **[**27]** to make the caddies wear bibs at tournaments and to televise and otherwise accurately depict the caddies participating in those tournaments. The caddies' *Lanham Act* claim therefore also fails as a matter of law and is dismissed with prejudice.

V. UNFAIR COMPETITION

Finally, the caddies allege that the Tour's conduct violates ***HN15***[] California's unfair competition law ("UCL"), *Cal. Bus. & Prof. Code § 17200*. *Section 17200* allows a cause of action for "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." The California Supreme Court has held that "a practice may be deemed unfair even if not specifically proscribed by some other law." *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 20 Cal. 4th 163, 83 Cal. Rptr. 2d 548, 973 P.2d 527, 540 (Cal. 1999)*. However, where the same conduct alleged to be unfair under the UCL is also alleged to be a violation of another law, the UCL claim rises or falls with the other claims. *DocMagic, Inc. v. Ellie Mae, Inc., 745 F. Supp. 2d 1119, 1146 (N.D. Cal. 2010)*. That is because "[t]o permit a separate inquiry into essentially the same question under the unfair competition law would . . . invite conflict and uncertainty." *Chavez v. Whirlpool Corp., 93 Cal. App. 4th 363, 113 Cal. Rptr. 2d 175, 184 (Ct. App. 2001)*. Because the conduct the caddies assert is unfair under the UCL overlaps completely with the allegations the Court has held fails to state a claim for breach of contract, misappropriation of likeness, and antitrust **[**28]** violations, the caddies' UCL claim fails as a matter of law too. *See* *DocMagic, 745 F. Supp. 2d at 1146*; *Chavez, 113 Cal. Rptr. 2d at 184*. This claim is therefore also dismissed with prejudice.

VI. CONCLUSION

The caddies' overall complaint about poor treatment by the Tour has merit, but this federal lawsuit about bibs does not. The complaint is dismissed with prejudice.

IT IS SO ORDERED.

Dated: February 9, 2016

/s/ Vince Chhabria

VINCE CHHABRIA

United States District Judge

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Razmco & Assocs. v. BB&T Ins. Servs. of Cal.

Court of Appeal of California, Fourth Appellate District, Division One

February 9, 2016, Opinion Filed

D066296

Reporter
2016 Cal. App. Unpub. LEXIS 1039 *

RAZMCO AND ASSOCIATES, INC. et al., Plaintiffs and Respondents, v. BB&T INSURANCE SERVICES OF CALIFORNIA, INC. et al., Defendants and Appellants.

Notice: NOT TO BE PUBLISHED IN OFFICIAL REPORTS. *CALIFORNIA RULES OF COURT, RULE 8.1115(a)*, PROHIBITS COURTS AND PARTIES FROM CITING OR RELYING ON OPINIONS NOT CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED, EXCEPT AS SPECIFIED BY *RULE 8.1115(b)*. THIS OPINION HAS NOT BEEN CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED FOR THE PURPOSES OF *RULE 8.1115*.

Prior History: **[*1]** APPEAL from a judgment of the Superior Court of San Diego County, No. 37-2010-00102178-CU-BT-CTL, Randa Trapp, Judge.

Disposition: Reversed.

Core Terms

tenets, brokers, premium, defendants', cause of action, legal standard, determinable, misrepresentations, unfair, plaintiffs', Guidelines, purposes, commissions, fraudulent, discount, renewal, intentional misrepresentation, third party, taxicab, anniversary, Antitrust, garaged, rebates, checks, gift, fleets, refund, prospective economic advantage, wrongful conduct, trial court

Counsel: Duane Morris, Russell W. Roten, Katherine L. Nichols, Paul J. Killion and Kathryn T.K. Schultz for Defendants and Appellants.

Cummins & White, Larry M. Arnold and Melody S. Mosley for Plaintiffs and Respondents.

Judges: BENKE, Acting P. J.; AARON, J., IRION, J. concurred.

Opinion by: BENKE, Acting P. J.

Opinion

Defendants and appellants BB&T Insurance Services of California, Inc., aka BB&T-John Burnham (collectively BB&T) and at all times relevant its agent/employee, Masoud Shahri (Shahri) (sometimes collectively defendants), appeal a jury verdict of about $140,000 in compensatory and $600,000 in punitive damages in favor of plaintiffs and respondents Razmco & Associates, Inc., dba Nova Insurance Services (collectively Nova) and its principal, Bahman Bitaraf (Bitaraf) (sometimes collectively plaintiffs), on plaintiffs' cause of action for intentional interference with prospective economic advantage (IIPEA).

Defendants raise a series of contentions on appeal, including the trial court prejudicially erred in instructing the jury it consider the alleged violation of a third party insurer's private **[*2]** "tenets," which were adopted merely as guidelines to prevent a handful of independent insurance brokers/agents from gaining a competitive advantage over one another, in determining whether defendants engaged in independently wrongful conduct as required in an IIPEA cause of action.

As we explain, we conclude the court erred in ruling the insurer's tenets could be used as the basis to establish independently wrongful conduct for purposes of this tort. We further conclude there is no other basis in the record to establish this element. We thus reverse the judgment in favor of plaintiffs and order the trial court to enter judgment in favor of defendants.

FACTUAL AND PROCEDURAL SUMMARY

Bitaraf was an experienced taxi driver and road supervisor who in 1988 became a licensed insurance broker. Bitaraf, as noted, at all times relevant was the owner of Nova. He specialized in writing commercial transportation insurance.

At issue in this case was the placement of automobile liability insurance for the large taxi cab fleets of United Independent Taxi Drivers, Inc. (UITD) and San Gabriel Transit, Inc. (SGT). Typically, taxi companies like UITD and SGT needed insurance for automobile liability; general **[*3]** liability; accidental insurance, which Bitaraf described as being similar to worker's compensation for drivers; and comprehensive and collision. Bitaraf began writing insurance for SGT in 1989. Between 2002 and 2007, Bitaraf also wrote automobile liability coverage insurance for UITD.

Plaintiffs' operative complaint[1] alleged that defendant BB&T was also in the business of providing commercial transportation insurance and was a direct competitor of plaintiffs; that neither plaintiffs nor BB&T provided "insurance to their clientele directly, but rather through broker agreements between their clientele and various insurance providers"; that both plaintiffs and BB&T generally offered "insurance from common insurance providers, subject to those insurance providers' premium rates for commercial vehicles garaged in different geographic locations and various discounts allowed for among other things, mounted cameras"; and that because of the "relatively small number of insurance brokers dealing in the public livery insurance business [i.e., commonly known as the commercial transportation business], [d]efendants . . . were aware at all times relevant . . . of [p]laintiffs' existing and prospective economic relationships **[*4]** with various taxi cab companies subject to this lawsuit."

Plaintiffs' operative complaint alleged that in 1999, plaintiffs entered into a "Producer Agreement" with American Business Insurance Services, Inc.—an authorized agent of Mercury Insurance Company—and related entities (Mercury). Pursuant to the terms of that agreement, plaintiffs placed coverage for large taxi cab fleets, including, as relevant here, SGT.

In 2005, plaintiffs entered into a "Consultant Agreement" with Ken Spiker Associates, Inc., another authorized agent of Mercury. The complaint alleged that as a producer through Ken Spiker Associates, Inc., plaintiffs **[*5]** placed coverage with Mercury for other large taxi fleets, including, as relevant here, UITD.

The complaint alleged that when Mercury implemented its public livery coverage, it established guidelines or "basic tenets" that it expected brokers and agents to follow, including, as relevant here: "Mercury will offer the same quote, given equal documentation, to a prospect not currently a Mercury policyholder. The company will not allow the agent/broker a competitive advantage over another Mercury producer by relinquishing commission for a reduced rate over another Mercury quote" (hereafter the commissions tenet); and "Mercury will not condone special

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[1] The record shows the court granted summary adjudication in favor of defendants on plaintiffs' causes of action for intentional and negligent interference with *existing* economic relationships. The court also separately granted without leave to amend defendants' motion for judgment on the pleadings on plaintiffs' cause of action for negligent interference with *prospective* economic relationships. Neither ruling is at issue in this appeal. At trial, plaintiffs had two remaining causes of action against defendants: IIPEA and unfair competition (*Bus. & Prof. Code, § 17200 et seq.*; hereafter UCL or Act).

monetary, gift or favors incentivizing arrangements outside of the premium quote to attract the business in competition with another Mercury [a]gent/[b]roker. Discovery of any of these types of incentives by the Company will be grounds for discipline which may include termination of the [agency] contract" (hereafter the incentives tenet). (Original emphasis omitted.)

The operative complaint further alleged that insurance providers' premium rates are "generally determined by the location in which the commercial vehicles are kept or 'garaged' in the normal course **[*6]** of business"; that the premium rates for vehicles garaged in the City or County of Los Angeles were typically higher than the rates for vehicles garaged in the City of Palm Springs or San Bernardino County; and that Shahri, on behalf of himself and BB&T, "misrepresented to existing clients [i.e., SGT] and potential new clients of BB&T . . . that he could offer them insurance policies for their commercial vehicles fleets garaged in the City of Los Angeles and/or Los Angeles County at the same rate as for those commercial vehicles fleets garaged in Palm Springs and/or San Bernardino County."

The operative complaint alleged Shahri also misrepresented to Mercury "where the clients' vehicles were actually garaged (e.g., Palm Springs or Riverside instead of Los Angeles) in order to get a lower premium rate quote from the insurance provider than the actual garaging location would have obtained, and then offered that rate to the client [i.e., SGT] or potential client. Based on these false pretenses, [d]efendants were able to acquire more business from existing clients than they normally would have, as well as acquire business from new clients that they had not previously serviced."

In addition to other **[*7]** material misrepresentations made by Shahri, the operative complaint alleged that defendants paid "'kickbacks' of insurance premiums and/or subsidizing the insurance premiums paid by the large taxi cab fleets"; that they paid "substantial sums of money (a.k.a. bribes) to large taxi cab fleets, disguised as 'Risk Management Incentives,' anniversary gifts or other 'authorized' discounts"; and that they offered loans to large taxi cab fleets at below market interest rates among other allegedly improper payments.

The record shows Bitaraf on behalf of Nova and Shahri on behalf of BB&T separately made presentations to the UITD board during its August 2007 meeting in an attempt to obtain UITD's insurance business for the next policy period. The operative complaint alleged Mercury, in response to a complaint by plaintiffs and others in the "fall of 2007," conducted an internal investigation and concluded its authorized agent Shahri, on behalf of BB&T, had not engaged in any wrongdoing in connection with his August 2007 presentation to the UITD board. As such, plaintiffs alleged they reasonably relied on Mercury's conclusion, as Mercury was in a superior position than plaintiffs to conduct an **[*8]** investigation and plaintiffs "had no reason to disbelieve" Mercury's findings and conclusions as a result of that investigation.

However, the record shows that "[i]n or around January 2011," plaintiffs "further heard through rumor" that defendants had engaged in misconduct during the August 2007 UITD board meeting. The operative complaint alleged that plaintiffs sought to conduct discovery to obtain the records of UITD, but that defendants consistently objected to this discovery and that it was not until the "spring of 2012[] when Nova learned through formal [*sic*] the eventual production of the audio recordings of UITD's [August 2007] board meetings that contrary to representations made by BB&T, Shahri and [d]efendants . . . during Mercury's investigation, . . . [defendants] had in fact made material misrepresentations and engaged in wrongful conduct and unfair business practices to obtain the [UITD] account. Shahri is recorded in these minutes as stating among other things: [¶] ['']. . . In addition to all the services that I offered, sometime ago I received a letter from UITD for celebration of your 30th anniversary, you guys were looking for sponsors, a lot of people talk, I put my money where my **[*9]** mouth is . . . Mercury has a funny way of saying . . . we cannot contribute toward the policy, but nobody in this country can tell me that . . . I cannot contribute money, that is my right . . . The check is already here. A lot of people talk, I walk the talk. What I can put on the table . . . I can put lines of credit . . . and all sorts of banking . . . your credit cards will be cheaper. . . . I have to put a lot of things on the table not just insurance.['] "

DISCUSSION

A. Mercury's "Tenets" Do Not Constitute a "Determinable Legal Standard"

1. *Additional Background*

Before trial and in response to defendants' motion to strike, the trial court ruled that Mercury's tenets could be used as a basis to establish wrongful conduct separate and apart from the interference itself for purposes of an IIPEA cause of action.

The author of the tenets and Mercury's head of agent relations, Richard Wolak, testified at trial that shortly after the August 2007 board meeting he investigated complaints by Bitaraf and others that Shahri had improperly given checks to UITD. Wolak then found Shahri had done nothing wrong.

After UITD voted to purchase automobile liability insurance through BB&T, Mercury again **[*10]** received complaints about Shahri and how defendants had violated Mercury's tenets in connection with Shahri's pitch to the UITD board. Wolak reopened the investigation.

Wolak testified that he wrote the tenets. At least with respect to UITD, as noted plaintiffs in large part relied on defendants' violation of the commissions and incentives tenets to show defendants' conduct was independently wrongful. Wolak testified that, at all times relevant, a "small club of agents and brokers," perhaps about five or six, were in the business of placing commercial transportation insurance in Southern California and that offering commercial transportation insurance was then a new venture for Mercury.

Wolak further testified he used the word "tenet," and specifically avoided the word "rule," because "my [i.e., Wolak's] whole purpose here was to create, like, a gentleman's agreement, something like a guideline. Not a strict and hard[-]fast law, but I wanted to give it some meaning. So I used the words that you [*sic*] thought would bring some strength to it and hopefully everyone could adhere to."

He testified that if the tenets were violated, Mercury "didn't promote any remedy" and instead, "would take **[*11]** under advisement whatever the violation would be"; that the tenets were not binding but rather were "just suggestions"; that he "absolutely" did not intend the tenets to have "any legal effect," or to use them to set up some sort of "legal structure"; that he never used the tenets to take any disciplinary action against a "single person"; that the purpose of the tenets was "to keep the Mercury agents from fighting with each other while [Mercury] tried to get [its commercial transportation insurance] business off the ground"; and that he unilaterally withdrew the tenets in March 2008.

As noted, Wolak further investigated whether any of the tenets were violated by Shahri in connection with the August 2007 board meeting after Wolak received new complaints in October 2007. Wolak again determined there was no such violation, a conclusion he reiterated at trial. In fact, at trial Wolak testified that, when Shahri offered through BB&T (which was owned by a bank) to provide UITD various additional services, including cheaper credit cards and lines of credit, Shahri was merely engaging in healthy competition where one independent agent/broker was seeking to "get a competitive advantage over **[*12]** another Mercury agent[/broker]."

Specifically, Wolak testified Shahri was not "rebating money. He's creating a better price as far as the insurance product is concerned. This is something in the banking business, whatever other things that a brokerage has to offer. That is what they're offering. This has nothing to do with the — playing with the rates and commissions to overcome the competition."

When asked if offering such services violated the incentives tenet, Wolak testified, "Again, going back to this: This is a guideline. Gifts mean[] tickets to the Super Bowl, not things that they can do in terms of what brokers do: adding products and services to a client's repertoire to help them better cover their business."

With respect to the anniversary "gift," Wolak testified when he initially investigated the matter some numbers regarding the amount of the "gift" were "bantered about," but he then did not have specific knowledge about what Shahri had offered the UITD board. Nonetheless, he found nothing wrong with making such a "gift," noting: "Again, the guidelines were for the surreptitious payment, meaning that — we're going to sneak this money to you under the table or however they're **[*13]** going to do it — give you a rebate, and that's how we're going to get money back to you because I can't do it any other way. But it's common for contributions to be made to a fund — anniversary fund that paid for their — they can solicit that from any broker. They can solicit the taxicab people and say, Hey, all you four brokers in the business, would you like to contribute to our anniversary fund?"

With respect to the 30th anniversary "gift," the record shows BB&T conducted an internal audit and learned in May or June 2007 that UITD initially was owed about $161,000 in refunds on prior UITD polices placed by BB&T and issued by one or more liability insurers that had gone into liquidation. Shahri testified that in mid-July 2007, before the UITD board meeting, he delivered a refund check in this amount to the president of UITD, as also reflected by an accompanying cover letter drafted by Shahri explaining the audit and how the majority of the refund was due to the insolvency of Insurance Co. of New York. The letter stated the return of such funds was "perfect timing for your 30th anniversary celebration."

The record shows a further audit by BB&T uncovered an additional $13,000 and change **[*14]** in refund owing as returned premium. Shahri again met with, and delivered a check in this amount to, the president of UITD before Shahri's August 2007 presentation. According to Shahri, the president of UITD stated during these meetings that a portion of the money refunded by BB&T would be used to cover the costs of a party celebrating UITD's anniversary and to purchase and install cameras in certain vehicles, which would result in lower premiums.

The record also shows both before and during his August 2007 presentation to the board, Shahri told UITD it was entitled to a 5 percent renewal discount from Mercury, a statement which turned out to be incorrect. As discussed in more detail *post*, plaintiffs rely on this statement among others to show Shahri made material misrepresentations during his August 2007 presentation in order to gain an unfair competitive advantage over plaintiffs.

In any event, the record shows UITD was not entitled to a 5 percent renewal discount because UITD was going into its third year with Mercury, whereas the renewal discount only applied *after* three years for renewing customers like UITD. Shahri testified he misread a Mercury worksheet when he offered the 5 **[*15]** percent renewal discount, which Wolak agreed was an "easy" mistake to make because the renewal discount actually began in year four of the renewal, although the Mercury worksheet suggested the discount was available in year "3." The record shows BB&T subsequently made up the difference in the down payment of the policy and covered the loss by submitting a claim on its separate errors and omissions policy.

After receipt of the checks, the record shows there is a conflict in the evidence regarding whether the UITD board conducted its own investigation regarding the propriety of the checks, inasmuch as Bitaraf had subsequently complained to the UITD board during a second presentation held on September 4, 2007 that the checks from BB&T were "going to be a problem." The testimony shows the money initially was placed in a trust account. One board member testified UITD did not conduct any form of investigation regarding the two checks, including determining whether the checks were a premium refund or a gift. Instead, according to this board member, UITD just blindly accepted the checks, although this member did recall a company attorney met with the board regarding the checks.

However, another **[*16]** board member in attendance at the August and September 2007 presentations by Shahri testified the board consulted its corporate attorney, who concluded there was no problem with the two checks because, after investigation, it was determined they were merely "premium refund[s]," and, thus, it was "[UITD's] money."

2. *Guiding Principles*

The elements of an IIPEA claim are: """(1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant.' [Citations.]" [Citation.]"' (*Winchester Mystery House, LLC v. Global Asylum, Inc. (2012) 210 Cal.App.4th 579, 596, 148 Cal. Rptr. 3d 412*.)

Particularly relevant to the case at issue, the interference *also* must amount to "independently actionable conduct." (*Korea Supply Co. v. Lockheed Martin Corp. (2003) 29 Cal.4th 1134, 1159, 131 Cal. Rptr. 2d 29, 63 P.3d 937* (*Korea Supply*).) For an act to be sufficiently independently wrongful, it must be "unlawful, that is, if it is proscribed by some constitutional, statutory, regulatory, common law, or other *determinable legal standard*." (*Ibid.*, fn. omitted & italics added.) Accordingly, the **[*17]** alleged interference must have been "wrongful by some legal measure other than the fact of interference itself." (*Della Penna v. Toyota Motor Sales, U.S.A., Inc. (1995) 11 Cal.4th 376, 393, 45 Cal. Rptr. 2d 436, 902 P.2d 740*.)

"The independently wrongful act [for purposes of IIPEA] must be the act of interference itself, but such act must *itself* be independently wrongful. That is, '[a] plaintiff need not allege the interference and a second act independent of the interference. Instead, a plaintiff must plead and prove that the conduct alleged to constitute the interference was independently wrongful, i.e., unlawful for reasons other than that it interfered with a prospective economic advantage. [Citations.]' (*Stevenson Real Estate Services, Inc. v. CB Richard Ellis Real Estate Services, Inc. (2006) 138 Cal.App.4th 1215, 1224, 42 Cal. Rptr. 3d 235* [(*Stevenson*)].)

"It is the plaintiff's burden to plead and prove that the defendant's conduct is independently wrongful in order to recover. The fact that the defendant's conduct was independently wrongful is an element of the cause of action itself. (*Bed, Bath & Beyond of La Jolla, Inc. v. La Jolla Village Square Venture Partners (1997) 52 Cal.App.4th 867, 881, 60 Cal. Rptr. 2d 830*.)

"The question has arisen as to whether, in order to be actionable as interference with prospective economic advantage, the interfering act must be independently wrongful *as to the plaintiff*. It need not be. There is 'no sound reason for requiring that a defendant's wrongful actions must be directed towards the plaintiff seeking to recover **[*18]** for this tort. The interfering party is liable to the interfered-with party [even] "when the independently tortious means the interfering party uses are independently tortious *only as to a third party*."' (*Korea Supply Co. v. Lockheed Martin Corp., supra, 29 Cal.4th at p. 1163*.)" (*Crown Imports, LLC v. Superior Court (2014) 223 Cal.App.4th 1395, 1404-1405, 168 Cal. Rptr. 3d 228*, fn. omitted.)

The *Stevenson* case informs our analysis on this issue. There, the plaintiff sued the defendants for IIPEA after the plaintiff '"expended hundreds of hours of time"' identifying rental properties at the request of a third party. (*Stevenson, supra, 138 Cal.App.4th at p. 1218*.) Ultimately, the plaintiff located a suitable property for the third party and provided the third party with "substantial information" regarding that particular property. (*Ibid.*) After the plaintiff commenced negotiations for the lease of the property, the third party demanded defendant Insignia negotiate the lease on its behalf. Plaintiff in response informed Insignia that its conduct violated the Rules of Professional Conduct of the American Industrial Real Estate Association (Association), which applied to the property because it was listed for lease with Association member defendant CB Richard Ellis, the successor-in-interest to Insignia. (*Id. at pp. 1218-1219*.) Eventually, the third party leased the property for 66 months, and Insignia, rather than **[*19]** the plaintiff, received a 3 percent commission. (*Id. at p. 1219*.)

A key issue in *Stevenson* was whether "a trade association's written rules are sufficient to constitute a 'determinable legal standard,' as required by *Korea Supply, supra, 29 Cal.4th at page 1159*." (*Stevenson, supra, 138 Cal.App.4th at p. 1222*.) In analyzing this issue, the *Stevenson* court noted as follows: "No California case has addressed this issue. Several states that require or permit a showing of wrongful conduct for intentional interference with prospective economic advantage permit a cause of action based upon a violation of established industry, trade or professional rules or standards." (*Ibid.*, fn. omitted.)

Although the *Stevenson* court recognized that reliance on "industry, trade or professional rules or standards" to support an interference claim was "not without criticism" (*Stevenson, supra, 138 Cal.App.4th at p. 1223*), it nonetheless concluded that "a violation of well-defined, established rules or standards of a trade, association or profession may constitute the type of wrongful conduct that will support a cause of action for intentional interference with prospective economic advantage. The conclusion is based primarily upon the language used in *Korea Supply*. The California Supreme Court held an act was 'independently wrongful if it is unlawful, **[*20]** that is, if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard.' (*Korea Supply, supra, 29 Cal.4th at p. 1159*, fn. omitted.) The specified sources—constitution, statute, regulation and common law—account for virtually all sources of legal restrictions imposed upon a party's conduct. 'Other determinable legal standard' necessarily refers to some other source of limitations upon behavior by which conduct could be assessed. Given the prevailing rule in other states, . . . in an action between competitors, who are bound by well-defined, established rules or standards of a trade, association or profession, those rules may constitute 'a determinable legal standard' within the scope of *Korea Supply*. If particular rules or standards unduly restrict free competition, it may be inappropriate to permit a plaintiff to base an interference with prospective economic advantage upon them.

"*Korea Supply* also required, however, that the defendant's conduct amount to 'independently actionable conduct.' (*Korea Supply, supra, 29 Cal.4th at p. 1159*.) This necessarily requires that the rules or standards provide for, or give rise to, a sanction or means of enforcement for a violation of the particular rule or standard that allegedly **[*21]** makes the defendant's conduct wrongful. Seldom are the rules or standards of associations, trades and professions likely to give rise to legal causes of action. However, internal remedies available within the association, such as a right of arbitration between the aggrieved members, should suffice to establish 'independently actionable conduct.'" (*Stevenson, supra, 138 Cal.App.4th at pp. 1223-1224*.)

In reaching its decision, the court in *Stevenson, supra, 138 Cal.App.4th at page 1222*, distinguished this court's opinion in *Gemini Aluminum Corp. v. California Custom Shapes, Inc. (2002) 95 Cal.App.4th 1249, 116 Cal. Rptr. 2d 358* (*Gemini*), which also informs our decision in this case. In *Gemini*, the plaintiff subcontracted with the defendant to "power coat" aluminum parts in connection with a contract between the plaintiff and a third-party manufacturer. After a dispute arose between the plaintiff and the defendant in connection with the subcontract, a principal of the defendant instructed one of his salespersons to "'go get the [third party's] business.'" (*Id. at p. 1254*.) The plaintiff sued the defendant for IIPEA among other causes of action after the defendant was successful in providing the third party the same services/materials previously provided by the plaintiff.

In affirming the judgment in favor of the defendant, this court in *Gemini* concluded opinion testimony proffered by the plaintiff **[*22]** to the effect that that it would be "'unethical,' 'really bad business' or not 'customary in the industry'" for the defendant "to solicit the account of a company with which [the plaintiff] was [then] doing business" was insufficient to establish independently wrongful conduct for purposes of IIPEA. (*Gemini, supra, 95 Cal.App.4th at pp. 1257-1258*.) In so concluding, this court noted that relying on opinions applying a "nebulous 'industry standards' test . . . would create uncertainty and chill, not maximize, competition." (*Id. at p. 1258*.)

As noted, *Stevenson* distinguished *Gemini* from its facts, concluding: "Unlike the opinion testimony relied upon by the plaintiff in *Gemini*, the Association's Rules are written and presumably made available to all Association members. The Rules therefore cannot be deemed nebulous. Any Association member and anyone with access to the Rules could easily refer to the written rules to discover what the Rules permitted, required and prohibited. The Rules therefore do not implicate the concerns regarding uncertainty and chilling competition expressed by the court in *Gemini*." (*Stevenson, supra, 138 Cal.App.4th at p. 1222*.)

3. *Analysis*

We independently conclude Mercury's tenets do not constitute a "determinable legal standard" as required by our Supreme Court. **[*23]** (See *Korea Supply, supra, 29 Cal.4th at p. 1159*.) Indeed, as noted by their author Wolak, the tenets were not intended to be "rules" but rather a "gentlemen's agreement" between Mercury and its independent agents/brokers; they applied only to a handful of agents/brokers then placing commercial transportation insurance with Mercury, which was seeking to enter the commercial transportation market; they were enforced rarely if ever by Mercury; and they were ambiguous regarding what Mercury permitted, required, and prohibited, including with respect to incentives and/or refunds, as aptly demonstrated by Wolak's testimony in this case.

As such, we conclude the tenets were not "*well-defined*, established rules or standards" on which to base an IIPEA claim (see *Stevenson, supra, 138 Cal.App.4th at p. 1223*, italics added) but rather were "nebulous" guidelines that "would create uncertainty" (see *Gemini, supra, 95 Cal.App.4th at p. 1259*).

However, even *if* the tenets constituted a "determinable legal standard" for purposes of an IIPEA cause of action, we conclude they nonetheless unduly restricted free competition. (See *Stevenson, supra, 138 Cal.App.4th at p.*

1223; see also Gemini, supra, 95 Cal.App.4th at p. 1258.) Indeed, our own independent research suggests it is not unlawful for an agent/broker to obtain a competitive advantage by offering incentives, including reducing his or her commission or **[*24]** offering rebates, when placing insurance.[2] Although *former* Insurance Code section 751[3] prohibited "unlawful rebates" in connection with the procurement of insurance, this anti-rebating statute was repealed in 1988 by the passage of Proposition 103. (Repealed by Initiative Measure (Prop. 103, approved Nov. 8, 1988, § 7).)

As such, it appears Mercury's incentives tenet, which as noted prohibited "incentivizing arrangements outside of the premium quote **[*25]** to attract . . . business," was an invalid restraint on competition. (See Antitrust Guidelines for the Insurance Industry (Cal. Dept. of Justice, 1990) at p. 59 (Antitrust Guidelines) [noting the "repeal of the anti-rebating statute necessarily affects the antitrust context by giving legal recognition to the entrepreneurial freedom of agents to compete by reducing their commissions" and further noting "coercive arrangements [by insurers] to prohibit agents from granting or advertising rebates are unlawful"].)

We reach the same conclusion with respect to the commissions tenet. As noted, that tenet provided: "The company [Mercury] will not allow the agent/broker a competitive advantage over another Mercury producer by relinquishing commission for a reduced rate over another Mercury quote." Again, after repeal of the anti-rebating statute in 1988, an agent/broker may properly exercise his or her "entrepreneurial freedom" and compete for business by "relinquishing" commission in order to offset premiums. (See Antitrust Guidelines, at p. 59.)

In sum, we independently conclude Mercury's tenets cannot be used as a "determinable legal standard" for purposes of plaintiffs' IIPEA claim. The tenets **[*26]** were not rules, much less "well-defined" rules (see Stevenson, supra, 138 Cal.App.4th at p. 1223), but were rather merely guidelines that were intended by their drafter to be a "gentlemen's agreement" between Mercury and a few independent agents/brokers to discourage infighting when competing for business.

However, even *if* such tenets constituted a "determinable legal standard," we further conclude it would be "inappropriate to permit a plaintiff to base an interference with prospective economic advantage upon them" (see Stevenson, supra, 138 Cal.App.4th at p. 1223) because, at a minimum, they unduly restricted lawful competition among agents/brokers when placing insurance. (See Antitrust Guidelines, at p. 59.)

B. Other Bases to Establish a "Determinable Legal Standard"

1. *The UCL Claim*

Plaintiffs contend that even if Mercury's tenets do not constitute a "determinable legal standard" for purposes of their IIPEA cause of action, they nonetheless established this element of the tort based on the jury's finding that defendants committed an "unfair, fraudulent or unlawful business practice in regard to either the [UITD] or the [SGT] accounts."

a. Additional Background

The record shows that with respect to plaintiffs' UCL claim, the jury was instructed as follows:

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[2] We note Insurance Code section 750 prohibits offering any "rebate, refund, commission, or other consideration . . . as compensation or inducement" in connection with the "processing, presenting, or negotiating *claims*, including *claims* under policies of insurance." (Italics added.) This statute has no application to the case at bar, which does not involve an insurance *claim*.

[3] Insurance Code former section 751 provided: "An insurer, or an insurance agent, broker, or solicitor, personally or otherwise, shall not offer or pay, directly or indirectly, as an inducement to enter into an insurance contract, any valuable consideration which is not clearly specified, promised or provided for in the policy, or application for the insurance, and any such consideration not appearing in the policy is an unlawful rebate."

"Question No. 1 **[*27]** : Did Defendants commit an unfair, fraudulent or unlawful business practice in regard to either the [UITD] or the [SGT] accounts?"

Because the jury answered this question "yes," they were instructed to go to Question No. 2, which asked:

"Question No. 2: Did Defendants give rebates, give up commissions, provide unearned discounts or credits to either [UITD] or [SGT] that were not given to other taxi cab companies purchasing insurance on like terms and conditions?"

Because the record shows the jury again answered this question "yes," they were instructed to go to Question No. 3, which asked:

"Question No. 3: Did the payment of money, allowance for unearned credits or discounts, or giving up of commissions have a tendency to destroy competition?"

Because the jury also answered "yes" to this question, it was instructed to answer Question No. 4, which provided:

"Question No. 4: Was Defendants' conduct a substantial factor in causing Plaintiffs' harm?"

The jury again answered this question "yes" but found plaintiffs' "out-of-pocket expenses . . . as a result of the unfair, fraudulent, or unlawful business practice" by defendants was "$0.00." The record also shows the jury was given other instructions **[*28]** regarding plaintiffs' UCL claim, including defining "business act or practice," "unfair," "fraudulent," and "unlawful" among others.

b. Guiding Principles and Analysis

The UCL defines "'unfair competition' as 'any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising.'" (*Zhang v. Superior Court (2013) 57 Cal.4th 364, 370, 159 Cal. Rptr. 3d 672, 304 P.3d 163*.) A UCL action "'is not an all-purpose substitute for a tort or contract action.' [Citation.] Instead, the [A]ct provides an equitable means through which both public prosecutors and private individuals can bring suit to prevent unfair business practices and restore money or property to victims of these practices. . . . [T]he 'overarching legislative concern [was] to provide a streamlined procedure for the prevention of ongoing or threatened acts of unfair competition.'" (*Korea Supply, supra, 29 Cal.4th at p. 1150*.) As a result, the remedies available to private individuals for violation of the UCL are limited to restitution and injunctive relief. (*Id. at p. 1144*.) Because the statute "'is written in the disjunctive, it establishes three varieties of unfair competition—acts or practices which are unlawful, or unfair, or fraudulent.'" (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co. (1999) 20 Cal.4th 163, 180, 83 Cal. Rptr. 2d 548, 973 P.2d 527* (*Cel-Tech*).)

A business act or practice is "unfair" under the UCL when the conduct "threatens **[*29]** an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." (*Cel-Tech, supra, 20 Cal.4th at p. 187*, fn. omitted.) A business act or practice is "unlawful" when it violates a predicate law. (*Id. at p. 180*; see also *CADC/RAD Venture 2011-1 LLC v. Bradley (2015) 235 Cal.App.4th 775, 793, 185 Cal. Rptr. 3d 684* [noting the "standards applicable to a UCL unfairness claim are something of a moving target"].)

"Finally, a fraudulent business act or practice is one in which members of the public are likely to be deceived. [Citation.] Thus, in order to state a cause of action based on a fraudulent business act or practice, the plaintiff must allege that consumers are likely to be deceived by the defendant's conduct. (*Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal.3d 197, 211, 197 Cal. Rptr. 783, 673 P.2d 660*.)" (*Prakashpalan v. Engstrom, Lipscomb & Lack (2014) 223 Cal.App.4th 1105, 1134, 167 Cal. Rptr. 3d 832* (*Prakashpalan*).)

Here, the special verdict required the jury in Question Nos. 2 and 3 to determine whether defendants engaged in conduct that had a "tendency to destroy competition" as a result of defendants' giving "rebates" or giving up "commissions . . . or other credits" to UITD or SGT. Although the jury answered both questions "yes," as noted *ante* we independently conclude that after repeal of Insurance Code former *section 751* in **[*30]** 1988, defendants' conduct as so described in Question Nos. 2 and 3 was not unlawful and, thus, cannot be used as a basis to show unfair competition. (See Antitrust Guidelines, at p. 59.)

That is, offering rebates or giving up commissions is not "unfair" within the meaning of the UCL because such conduct does *not* "threaten[] an incipient violation of an ***antitrust law***, or violate[] the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threaten[] or harm[] competition." (See *Cel-Tech, supra, 20 Cal.4th at p. 187*.) Rather, as noted, such conduct actually encourages lawful competition.

Such conduct, again as specifically described in Question Nos. 2 and 3, is also not "unlawful" within the meaning of the UCL because it does not result in the "violation of another law" that can be used as a predicate under this prong. (See *Smith v. State Farm Mutual Automobile Ins. Co. (2001) 93 Cal.App.4th 700, 718, 113 Cal. Rptr. 2d 399*; see also Antitrust Guidelines, at p. 59.) Nor is such conduct "fraudulent"; not only is there no evidence in the record to support the finding that the public was likely to be deceived by defendants offering UITD, SGT or both, a rebate of commissions but, as was the case with respect to the "unfair" and "unlawful" **[*31]** prongs of the UCL, such conduct (as specifically described in the special verdict form) is not unlawful or deceitful. (See *Prakashpalan, supra, 223 Cal.App.4th at p. 1134*.)

In sum, we independently conclude that the conduct defined in Question Nos. 2 and 3 of the special verdict cannot be the basis for a finding of an "unfair," "unlawful" *or* "fraudulent" act or practice under the UCL, as such conduct as a matter of law is not "unlawful competition." As such, we further conclude this conduct cannot be the basis to establish a "determinable legal standard" for the tort of IIPEA.

Plaintiffs nonetheless contend that defendants' conduct of "[d]efrauding insurance companies out of premiums, placing cabs in wrong zip codes and selling phony insurance coverages" established the "unlawful" prong for purposes of the UCL because such conduct separately violates various provisions of the Insurance Code. But, as noted *ante*, the jury was specifically instructed with respect to the conduct that was deemed actionable under the UCL claim, which did *not* include any alleged Insurance Code violation.

In any event, we note from the record that plaintiffs did *not* allege in their operative complaint, or argue in their opposition to defendants' motion to strike portions **[*32]** of that complaint, that defendants' conduct violated *Insurance Code sections 780*,[4] *781*[5] and/or *790.03, subdivision (a)*[6] in order to show such conduct was "unlawful"

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[4] *Insurance Code section 780* provides: "An insurer or officer or agent thereof, or an insurance broker or solicitor shall not cause or permit to be issued, circulated or used, any statement that is known, or should have been known, to be a misrepresentation of the following: [¶] (a) The terms of a policy issued by the insurer or sought to be negotiated by the person making or permitting the misrepresentation. [¶] (b) The benefits or privileges promised thereunder. [¶] (c) The future dividends payable thereunder."

[5] *Section 781 of the Insurance Code* provides: "(a) A person shall not make any statement that is known, or should have been known, to be a misrepresentation (1) to any other person for the purpose of inducing, or tending **[*33]** to induce, such other person either to take out a policy of insurance, or to refuse to accept a policy issued upon an application therefor and instead take out any policy in another insurer, or (2) to a policyholder in any insurer for the purpose of inducing or tending to induce him or her to lapse, forfeit or surrender his or her insurance therein. [¶] (b) A person shall not make any representation or comparison of insurers or policies to an insured which is misleading, for the purpose of inducing or tending to induce him or her to lapse, forfeit, change or surrender his or her insurance, whether on a temporary or permanent plan."

[6] *Insurance Code section 790.03* defines "unfair methods of competition and unfair and deceptive acts or practices" to include: "(a) Making, issuing, circulating, or causing to be made, issued or circulated, any estimate, illustration, circular, or statement misrepresenting the terms of any policy issued or to be issued or the benefits or advantages promised thereby or the dividends or share of the surplus to be received thereon, or making any false or misleading statement as to the dividends or share of surplus previously paid on similar policies, or making any misleading representation **[*34]** or any misrepresentation as to the financial condition of any insurer, or as to the legal reserve system upon which any life insurer operates, or using any name or title of any policy or class of policies misrepresenting the true nature thereof, or making any misrepresentation to any

under the UCL.[7] "'[I]t is fundamental that a reviewing court will ordinarily not consider claims made for the first time on appeal which could have been but were not presented to the trial court.' Thus, 'we ignore arguments, authority, and facts not presented and litigated in the trial court. Generally, issues raised for the first time on appeal which were not litigated in the trial court are waived.'" (*Newton v. Clemons (2003) 110 Cal.App.4th 1, 11, 1 Cal. Rptr. 3d 90*, fns. omitted.)

And, assuming without deciding defendants' conduct of "[d]efrauding insurance companies out of premiums, placing cabs in wrong zip codes and selling phony insurance coverages" violated *Insurance Code sections 780*, *781* and/or *790.03, subdivision (a)*, as plaintiffs now claim, we nonetheless conclude such violations do not establish as a matter of law unfair competition for purposes of the UCL. "[N]either the Insurance Code nor regulations adopted under its authority provide a private right of action." **[*35]** (*Rattan v. United Servs. Auto. Ass'n (2000) 84 Cal.App.4th 715, 724, 101 Cal. Rptr. 2d 6*.) As such, in order to state a claim under the UCL based on an agent/broker's conduct, a plaintiff must allege something more than a mere violation of the Insurance Code. (See *Raisin Bargaining Ass'n v. Hartford Cas. Ins. Co. (E.D. Cal. 2010) 715 F.Supp.2d 1079, 1091*; see also *Maler v. Superior Court (1990) 220 Cal.App.3d 1592, 1598, 270 Cal. Rptr. 222* [noting a plaintiff cannot circumvent the ban on a private action for damages under *Insurance Code section 790.03* "by bootstrapping an alleged violation [of that statute] onto [the UCL] so as to state a cause of action [under a different provision of the Insurance Code]"].) Thus, even assuming defendants violated one or more of these (or other) provisions of the Insurance Code, we conclude such violations do not establish as a matter of law unlawfulness under the UCL.

2. *Intentional Misrepresentation*

Although plaintiffs' operative complaint did *not* assert a cause of action for intentional misrepresentation, we note from the record the jury was instructed with respect to this common law tort ostensibly because it too potentially could serve as a basis to establish a "determinable legal standard" for plaintiffs' IIPEA claim. (See *Korea Supply, supra, 29 Cal.4th at p. 1159* [noting an "act is independently wrongful if it is unlawful, that is, if it is proscribed by some constitutional, statutory, regulatory, *common law*, or other determinable legal standard" (italics added **[*36]** & fn. omitted)].)

With respect to "intentional misrepresentation," the jury was instructed as follows:

"1. That Defendants represented to Mercury, to [UITD] or to [SGT] that a fact was true; [¶] 2. That Defendants' representation was false; [¶] 3. That Defendants knew that the representation was false when it was made, or that the representation was made recklessly and without regard for its truth; [¶] 4. That Defendants intended that Mercury, UITD or [SGT] rely on the representation; [¶] 5. That Mercury, UITD or [SGT] reasonably relied on Defendants' representation; [¶] 6. That Plaintiffs were harmed; and [¶] 7. That Mercury's, UITD's or [SGT's] reliance on Defendants' representation was a substantial factor in causing Plaintiffs' harm."

The jury was also instructed as follows on the meaning of "reliance":

"Mercury, [UITD] or [SGT] relied on Defendants' misrepresentation if the misrepresentation substantially influenced Mercury, UITD or [SGT] to take action in a certain manner.

"With respect to UITD, UITD would likely have renewed its policy with Plaintiffs had Defendants not made misrepresentations of returned premiums as a gift for UITD's 30th anniversary, or had not misrepresented that **[*37]** UITD was entitled to a 5% credit and paid 5% of UITD's premium in violation of Mercury's written guidelines.

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policyholder insured in any company for the purpose of inducing or tending to induce the policyholder to lapse, forfeit, or surrender his or her insurance."

[7] We note that in connection with the UCL claim, the special verdict also did not require the jury to specify which of the "three varieties" of unfair competition defendants' conduct violated (see *Cel-Tech, supra, 20 Cal.4th at p. 180*), as the special verdict merely asked whether defendants committed "an unfair, fraudulent *or* unlawful business practice." (Italics added.)

"Or

"With respect to [SGT], Mercury would not have offered the policy for the amount of premium quoted to Defendants without Defendants' misrepresentation regarding the location of [SGT's] taxi cab units.

"Or

"UITD would likely have renewed its policy through Plaintiffs without the misrepresentations of Defendants.

"Or

"[SGT] would likely have renewed its policy through Plaintiffs without the misrepresentations by Defendants regarding the lower premium based on the incorrect garaging locations or areas of operation of [SGT's] taxi cabs, or Defendants' misrepresentations regarding the policy's $1 million in uninsured motorist (UM) coverage, or that [SGT] did not have to pay premiums for its spare taxis.

"It is not necessary for Defendants' misrepresentations to be the only reason for the conduct by Mercury, SGT or UITD."

Finally, the jury was instructed as follows on the meaning of "reasonable reliance":

"In determining whether UITD's, Mercury's, or [SGT's] reliance on the misrepresentation was reasonable, Plaintiffs must first prove that the matter was material. A matter is material **[*38]** if a reasonable person would find it important in determining his or her choice of action.

"If you decide that the matter is material, you must then decide whether it was reasonable for UITD, Mercury, or [SGT] to rely on this representation. In making this decision, take into consideration UITD's, Mercury's, or [SGT's] intelligence, knowledge, education, and experience.

"However, it is not reasonable for anyone to rely on a misrepresentation that is preposterous. It also is not reasonable for anyone to rely on a misrepresentation if facts that are within UITD's, Mercury's, or [SGT's] observation show that it is obviously false."

Here, plaintiffs contend there is substantial evidence showing Shahri on behalf of BB&T made myriad false representations.[8] However, assuming some or all of such representations were false and assuming plaintiffs can rely on the representations of defendants to *others* to establish an intentional misrepresentation cause of action,[9] we conclude under the circumstances of this case that such misrepresentations do not constitute a "determinable legal standard" for purposes of plaintiffs' IIPEA claim.

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[8] Such misrepresentations included among others Shahri's statement during **[*39]** the August 2007 UITD board meeting that the returned premiums already given to UITD were a "gift" for UITD's 30th anniversary; his statement both before and during that same meeting that UITD was entitled to a 5 percent renewal credit when in fact UITD was not entitled to such a credit; his statement that SGT's taxi cab units were operated and/or garaged in certain locations, when in fact those units were actually operated and/or garaged in a different location that subsequently required an upward adjustment of SGT's premiums; and his statement that SGT was not required to pay a premium on 75 of its "spare" cabs, which were operated when a "regular" cab was out of commission, which turned out not to be correct.

[9] We note the jury was instructed it could find intentional misrepresentation based on defendants' conduct directed at UITD, SGT and/or Mercury. We note none of these entities were a party to the lawsuit, and it is not altogether clear that plaintiffs had "standing" to assert a misrepresentation claim involving conduct not directed at them. California Civil Jury Instruction (CACI) No. 1900, the standard jury instruction for intentional misrepresentation, teaches that the misrepresentations **[*40]** must have been directed to the plaintiff and that the plaintiff must have relied on such misrepresentations. (See CACI No. 1900, which provides in part that defendant represented to *plaintiff* a fact that was true that turned out to be false; that defendant intended *plaintiff* to rely on the representation and *plaintiff* did so rely; and that *plaintiff's* reliance on the representation was reasonable.) In light of our decision in this case, we decline to reach the standing issue or address any other issues in connection with the intentional misrepresentation jury instructions, including the (confusing) instruction regarding "reliance."

Indeed, as the jury instructions illustrate, to state a valid cause of action for intentional misrepresentation plaintiffs were required to prove, and the jury to find, several elements other than whether defendants' various representations to UITD, SGT and/or Mercury were false. We note plaintiffs have *not* argued in their brief that there is substantial evidence in the record to support findings with respect to these additional elements, including that UITD, SGT and/or Mercury *relied* on such misrepresentations and/or whether their reliance was *reasonable*. We further **[*41]** note there is no finding by the jury in the special verdict form that defendants actually committed the tort of intentional misrepresentation.

We therefore conclude on this record that plaintiffs' failure to address this issue on appeal and to provide evidence from the record—which also must be substantial—to establish *all* the elements of intentional misrepresentation, *if* such evidence even exists, results in a forfeiture of the issue on appeal. (See *Tiernan v. Trustees of Cal. State University & Colleges (1982) 33 Cal.3d 211, 216, fn. 4, 188 Cal. Rptr. 115, 655 P.2d 317*.) As such, we further conclude plaintiffs cannot use the tort of intentional misrepresentation to establish the element of "determinable legal standard" for purposes of IIPEA.

C. Plaintiffs Cannot State a Cause of Action for IIPEA or for the Violation of the UCL

We conclude as a matter of law plaintiffs cannot state a cause of action for IIPEA because they did not prove conduct that is independently wrongful separate from the interference itself, which is a required element of this tort. (See *Korea Supply, supra, 29 Cal.4th at p. 1159*.) We reach this conclusion because Mercury's commissions and/or incentives tenets do not constitute a "determinable legal standard" for purposes of this tort; because these two tenets, in any event, "unduly restrict[ed] free competition" (see *Stevenson, supra, 138 Cal.App.4th at p. 1223*); and because neither **[*42]** plaintiffs' UCL claim nor an intentional misrepresentation cause of action based on defendants' misrepresentations to UITD, SGT and/or Mercury satisfy the independently wrongful standard under the circumstances of this case.

We further conclude plaintiffs cannot state a UCL claim because, as noted, the conduct set forth in Question Nos. 2 and 3 of the special verdict, on which this claim is expressly based, does not constitute "unfair competition" as a matter of law.[10]

DISPOSITION[11]

The judgment is reversed. The trial court is ordered to enter judgment in favor of defendants. Defendants to recover their costs of appeal.

BENKE, Acting P. J.

WE CONCUR:

AARON, J.

IRION, J.

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[10] In any event, we note the jury awarded plaintiffs "$0.00" for out-of-pocket expenses on their UCL claim. We also note that plaintiffs were *not* entitled to an award of damages or punitive damages even *if* successful on this claim. (See *Clark v. Superior Court (2010) 50 Cal.4th 605, 610, 112 Cal. Rptr. 3d 876, 235 P.3d 171* [noting "damages, including punitive damages and increased or enhanced damages" are *not* recoverable for a violation of the UCL].)

[11] In light of our decision, we need not reach defendants' other contentions on appeal.

In re Opana Er Antritrust Litig.

United States District Court for the Northern District of Illinois, Eastern Division

February 10, 2016, Decided; February 10, 2016, Filed

MDL Docket No. 2580; Case No. 14 C 10150

Reporter

162 F. Supp. 3d 704 *; 2016 U.S. Dist. LEXIS 16700 **; 2016-1 Trade Reg. Rep. (CCH) P79,505

IN RE OPANA ER ANTRITRUST LITIGATION

Subsequent History: Motion granted by, Dismissed without prejudice by *In re Opana ER Antritrust Litig., 2016 U.S. Dist. LEXIS 23319, Trade Reg. Rep. (CCH) P 79572, 2016 WL 738596 (N.D. Ill., Feb. 25, 2016)*

Motion granted by, in part, Motion denied by, in part, Dismissed by, in part *In re Opana ER Antritrust Litig., 2016 U.S. Dist. LEXIS 105915, 2016 WL 4245516 (N.D. Ill., Aug. 11, 2016)*

Related proceeding at, Request denied by, Without prejudice *FTC v. Endo Pharms., Inc., 2016 U.S. Dist. LEXIS 145329 (E.D. Pa., Oct. 20, 2016)*

Related proceeding at *In re Impax Labs., Inc., 2017 FTC LEXIS 177 (F.T.C., Oct. 18, 2017)*

Summary judgment granted by, in part, Summary judgment denied by, in part, Motion granted by, Motion denied by, Motion granted by, in part, Motion denied by, in part *In re Opana ER Antitrust Litig., 2021 U.S. Dist. LEXIS 105342, 2021 WL 3627733 (N.D. Ill., June 4, 2021)*

Petition granted by, Remanded by *In re Opana ER Antitrust Litig., 2021 U.S. App. LEXIS 27004 (7th Cir. Ill., July 13, 2021)*

Prior History: *Endo Pharms., Inc. v. Actavis, Inc., 2013 U.S. Dist. LEXIS 126248 (D.N.J., Sept. 3, 2013)*

Core Terms

generic, patent, Settlement, brand, manufacturer, sales, antitrust, purchaser, antitrust claim, indirect, motion to dismiss, allegations, unjustified, launch, anti trust law, consumer protection, unjust enrichment, class action, anticompetitive, triggering, settlement agreement, state law, first-filer, Complaints, infringed, estimate, courts, litigation costs, pharmaceutical, certification

LexisNexis® Headnotes

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

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

Under the *Federal Food, Drug, and Cosmetic Act* (FDCA), manufacturers that create a new drug must obtain approval to sell the product by filing a New Drug Application (NDA). *21 U.S.C.S. §§ 301-392*. An NDA must include specific data concerning the safety and effectiveness of the drug, as well as information on applicable patents. *21 U.S.C.S. § 355(a)*, *(b)*. When the Food and Drug Administration (FDA) approves a brand manufacturer's NDA, the manufacturer may list in the Approved Drug Products with Therapeutic Equivalence Evaluations (commonly known as the Orange Book) any patents that the manufacturer believes could reasonably be asserted against a generic manufacturer that makes, uses, or sells a generic version of the brand drug. *21 U.S.C.S. § 355(b)(1)*. When a brand manufacturer wishes to make changes to a drug that already has an approved NDA, the brand manufacturer must submit a supplemental new drug application (SNDA) to the FDA. A SNDA is required when a brand manufacturer wishes to change a drug label, market a new dosage strength, or change the way the drug is manufactured.

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

HN2[] Agriculture & Food, Federal Food, Drug & Cosmetic Act

The *Hatch-Waxman Act*, enacted in 1984, simplified the regulatory hurdles for prospective generic manufacturers by eliminating the need for them to file New Drug Application (NDA). Under the Act's abbreviated regulatory approval process for generic drugs, a generic drug manufacturer may file an Abbreviated New Drug Application (ANDA) relying on the scientific findings of safety and effectiveness in the brand drug's NDA, and demonstrating that the proposed generic is pharmaceutically equivalent and bioequivalent (together therapeutically equivalent) to a brand drug. *21 U.S.C.S. § 355(j)(8)(B)*.

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

HN3[] Agriculture & Food, Federal Food, Drug & Cosmetic Act

To obtain Food and Drug Administration (FDA) approval of an Abbreviated New Drug Application (ANDA), a manufacturer must also certify that the generic drug will not infringe any patents listed in the Therapeutic Equivalence Evaluations (commonly known as the Orange Book). Under the *Hatch-Waxman Act*, the ANDA must contain one of four certifications: (I) that there are no patents listed in the Orange Book that cover the brand drug; (II) that any Orange Book listed patents have expired; (III) that the generic is not seeking approval before the expiration of any unexpired patents listed in the Orange Book; or (IV) that any unexpired patents listed in the Orange Book are not infringed, are invalid, and/or are unenforceable (this is commonly referred to as a Paragraph IV certification). *21 U.S.C.S. § 355(j)(2)(A)(vii)*.

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

HN4[] Agriculture & Food, Federal Food, Drug & Cosmetic Act

A generic manufacturer must serve notice to the brand company of a Paragraph IV certification because such a certification creates an artificial act of patent infringement, permitting the brand company to file a patent infringement suit against the generic manufacturer. *35 U.S.C.S. § 271(e)(2)(A)*. If the brand company files suit within 45 days of receiving the Paragraph IV certification, final Food and Drug Administration (FDA) approval of the generic manufacturer's Abbreviated New Drug Application (ANDA) is automatically stayed until the earlier of (i) 30 months, or (ii) entry of a district court judgment finding patent invalidity or non-infringement. *21 U.S.C.S. §*

355(j)(5)(B)(iii). During this stay, the FDA may grant tentative approval of the generic manufacturer's ANDA if it determines that the ANDA would otherwise qualify for final approval absent the stay. 21 U.S.C.S. § 355(j)(5)(B)(iv).

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

HN5[] Agriculture & Food, Federal Food, Drug & Cosmetic Act

As an incentive for generic pharmaceutical companies to challenge suspect patents listed in the Orange Book, the Hatch-Waxman Act grants the first company to file a Paragraph IV Abbreviated New Drug Application (commonly known as the first-filer) a 180-day period of generic marketing exclusivity during which time the Food and Drug Administration (FDA) will not approve a later-filed Abbreviated New Drug Application (ANDA) for the same brand drug. 21 U.S.C.S. § 355(j)(5)(B)(iv). During the 180-day period of market exclusivity, the first-filer only competes against the brand manufacturer and potentially any Authorized Generic (AG) marketed under the brand manufacturer's New Drug Application (NDA). The start of the 180-day exclusivity period is triggered by the earlier of two events: (1) the first-filer's commercial marketing of a drug product, or (2) a court decision of noninfringement or patent invalidity. Only the first-filer can trigger its 180-day exclusivity period via the commercial-marketing trigger. 21 U.S.C.S. § 355(j)(5)(B)(iv)(I). However, a subsequent Paragraph IV ANDA filer can trigger the first-filer's 180-day exclusivity period via a successful court judgment. This 180-day period of exclusivity can prove valuable, possibly worth several hundred million dollars to the first-filer.

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

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

Generic drugs that are therapeutically equivalent to their brand counterpart receive an "AB" rating from the Food and Drug Administration (FDA). This means that the generic and brand drugs have the same active ingredient, form, dosage, strength, and safety and efficacy profile. An AB-rated generic may be automatically substituted at the pharmacy counter for the brand drug. Today, all 50 states and the District of Columbia have drug substitution laws to further encourage generic competition. Although the specific terms of these laws vary by state, drug substitution laws either permit or require pharmacists to dispense an AB-rated generic drug in place of a brand drug, absent the prescribing physician's contrary instructions. Because an AB-rated generic drug may be automatically substituted for the brand drug, once the generic drug hits the market, it quickly captures sales from the brand drug, often capturing 80% or more of the brand sales within the first six months.

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

HN7[] Motions to Dismiss, Failure to State Claim

A motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6) challenges the legal sufficiency of a complaint. A complaint must contain enough facts to state a claim to relief that is plausible on its face. When considering a Fed. R. Civ. P. 12(b)(6) motion to dismiss, the court accepts the plaintiff's allegations as true, and analyzes those facts in the light most hospitable to the plaintiff's theory, drawing all reasonable inferences for the plaintiff.

Antitrust & Trade Law > Sherman Act

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

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

Stating a *Sherman Act* claim merely requires enough facts taken as true to suggest that an agreement was made. Asking for plausible grounds to infer an agreement does not impose a probability requirement it simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of an illegal agreement. But in analyzing a motion to dismiss, the court need not accept as true legal conclusions, or threadbare recitals of the elements of a cause of action, supported by mere conclusory statements.

Antitrust & Trade Law > Sherman Act > Remedies

Civil Procedure > Settlements > Settlement Agreements

HN9[] **Sherman Act, Remedies**

A reverse settlement payment, that is, a payment by a patentee to a claimed infringer, may be a restraint of trade under a rule of reason analysis when the payment is large and unjustified. The likelihood of a reverse payment bringing about anticompetitive effects depends upon its size, its scale in relation to the payor's anticipated future litigation costs, its independence from other services for which it might represent payment and the lack of any other convincing justification.

Contracts Law > Contract Interpretation

HN10[] **Contracts Law, Contract Interpretation**

A "payment" is defined as the performance of an obligation by the delivery of money or some other valuable thing accepted in partial or full discharge of the obligation.

Contracts Law > Contract Interpretation

HN11[] **Contracts Law, Contract Interpretation**

A large payment is anything more than the value of the avoided litigation costs plus any other services provided from the generic to the brand manufacturer. A payment is justified when it reflects traditional settlement considerations, such as avoided litigation costs or fair value for services. Such payments do not raise the concern that a patentee is using its monopoly profits to avoid the risk of patent invalidation or a finding of noninfringement. The burden is on the defendant to show in the antitrust proceeding that legitimate justifications are present, thereby explaining the presence of the challenged term and showing the lawfulness of that term under the rule of reason. Thus, at the motion to dismiss stage, a plaintiff need only plausibly plead that a large payment was made and that any such payment is not explained by traditional settlement considerations.

Antitrust & Trade Law > Sherman Act > Remedies

Civil Procedure > Settlements > Settlement Agreements

HN12[] **Sherman Act, Remedies**

When a plaintiff has met their prima facie burden on a reverse settlement payment, the burden shifts to the defendant to offer pro-competitive justifications for the reverse payment. But such justifications, as with any affirmative defense, cannot be resolved on a motion to dismiss unless the facts establishing the defense are clear on the face of the plaintiff's complaint.

Antitrust & Trade Law > Sherman Act

Civil Procedure > Settlements > Settlement Agreements

Patent Law > Remedies

HN13[] **Antitrust & Trade Law, Sherman Act**

It is normally not necessary to litigate patent validity to answer the antitrust question. An unexplained large reverse payment itself would normally suggest that the patentee has serious doubts about the patent's survival. And that fact, in turn, suggests that the payment's objective is to maintain supracompetitive prices to be shared among the patentee and the challenger rather than face what might have been a competitive market — the very anticompetitive consequence that underlies the claim of antitrust unlawfulness. The anticompetitive harm is not that the patent surely would have been invalidated if not for the settlement, and that a generic therefore surely would have entered the market at an earlier date. If that were the standard, a determination of a patent settlement's lawfulness under ***antitrust law*** would require the very same patent litigation that the settlement avoided. The anticompetitive harm is that the reverse-payment settlement seeks to prevent the risk of competition. A plaintiff must plead facts sufficient to infer (and they must ultimately prove, within the rule-of-reason framework) that a large and otherwise unjustified reverse payment was made as part of the settlement in order to shore up some perceived risk of competition.

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

HN14[] **Standing, Elements**

To establish standing under Article III of the United States Constitution, a plaintiff must show (1) that he has suffered (or is imminently threatened with) a concrete and particularized injury in fact, (2) that is fairly traceable to the challenged conduct, and (3) that is likely to be redressed by a favorable judicial decision. But Article III's injury-in-fact requirement has nothing to do with the text of the statute relied upon. As long as one member of the class has a plausible claim to have suffered an injury that is fairly traceable to the challenged conduct and likely to be redressed by a favorable decision, the requirements of Article III standing are satisfied.

Civil Procedure > Special Proceedings > Class Actions > Prerequisites for Class Action

HN15[] **Class Actions, Prerequisites for Class Action**

Whether the named plaintiffs may assert the rights of absent class members is neither a standing issue nor an Article III of the United States Constitution case or controversy issue but depends rather on meeting the prerequisites of *Fed. R. Civ. P. 23* governing class actions.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

HN16[] Remedies, Damages

Only the overcharged direct purchaser, and no one else in the chain of distribution, can recover damages under federal ***antitrust law***. The indirect-purchaser rule does not prevent indirect purchasers from recovering damages under state antitrust laws where the state laws otherwise allow it.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships

HN17[] Preliminary Considerations, Federal & State Interrelationships

State procedural rules control in federal court when they are part of a State's framework of substantive rights or remedies.

Governments > Legislation > Effect & Operation > Prospective Operation

Governments > Legislation > Effect & Operation > Retrospective Operation

HN18[] Effect & Operation, Prospective Operation

Statutes and their amendments are presumed to apply prospectively. Only when it appears by clear, strong language or by necessary implication that the legislature intended a statute to have retroactive application will the courts apply it retrospectively.

Antitrust & Trade Law > Business & Corporate Compliance > Antitrust

Civil Procedure > Special Proceedings > Class Actions

HN19[] Antitrust & Trade Law

Mississippi does not provide for class actions in its State courts as a matter of State procedure. Its ***antitrust law*** states that it shall be the duty of the district attorneys to enforce the civil features of the antitrust laws of the State, but it does not expressly State that antitrust class actions are prohibited. *Miss. Code Ann. § 75-21-37*. Mississippi's procedural rule banning class actions is not part of the State's framework of substantive rights or remedies, and therefore does not control in federal court.

Governments > Legislation > Statute of Limitations > Time Limitations

HN20[] Statute of Limitations, Time Limitations

Kansas and Mississippi provide that antitrust claims are subject to a three-year limitations period. *Kan. Stat. Ann. § 60-512*; *Miss. Code Ann. § 15-1-49*.

Governments > Legislation > Statute of Limitations > Tolling

HN21[] Statute of Limitations, Tolling

The continuing violation doctrine — an exception to the statute of limitations, advises that each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act, and as to those damages, the statute of limitations runs from the commission of the act. The federal courts routinely apply the continuing violation doctrine in the context of federal ***antitrust law***. But the doctrine has received mixed treatment by state courts deciding state antitrust claims.

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Judges: Harry D. Leinenweber, United States District Judge.

Opinion by: Harry D. Leinenweber

Opinion

[*710] **MEMORANDUM OPINION AND ORDER**

This lawsuit is one of many in the federal courts involving the application of the Supreme Court's decision in *FTC v. Actavis, Inc., 133 S.Ct. 2223, 186 L. Ed. 2d 343 (2013)*, to settlements between branded and generic pharmaceutical manufacturers. In this case, **[**5]** Direct Purchaser Plaintiffs ("DPPs") have brought claims under the *Sherman Act*, and Indirect, or End-Payor Purchaser Plaintiffs ("EPPs") have brought claims under state antitrust, consumer protection, and unjust enrichment laws. DPPs and EPPs (collectively, the "Plaintiffs") allege that Endo Health Solutions Inc., Endo Pharmaceuticals Inc., Penwest Pharmaceuticals Co. (collectively, "Endo"), and Impax Laboratories, Inc. ("Impax") (collectively, the "Defendants") delayed the entry of generic versions of Opana ER to the Oxymorphone ER Market by entering into an illegal reverse payment agreement to settle ongoing patent infringement litigation between Endo and Impax.

Currently before the Court are two Motions to Dismiss. The Motions seek dismissal of DPPs' First Amended Consolidated Complaint [ECF No. 118], and EPPs' First Amended Consolidated Complaint [ECF No. 121] under *FED. R. CIV. P. 12(b)(6)*. For the following reasons, the Motion to dismiss DPPs' First Amended Consolidated Complaint is denied, and the Motion to Dismiss EPPs' First Amended Consolidated Complaint is granted in part and denied in part.

I. BACKGROUND

Except where noted, the following facts are contained in both DPPs' and EPPs' Complaints, documents **[**6]** attached to the Complaints, and documents that are referenced in, and critical to, the Complaints. *Geinosky v. City of Chicago, 675 F.3d 743, 745 n.1 (7th Cir. 2012)* (In resolving a motion to dismiss, the court must consider "documents attached to the complaint, documents that are critical to the complaint and referred to in it, and information that is subject to proper judicial notice."). Plaintiffs' factual allegations are accepted as true for purposes of deciding the motions to dismiss.

[*711] A. Hatch-Waxman Regulatory Framework

HN1[] Under the *Federal Food, Drug, and Cosmetic Act* ("FDCA"), manufacturers that create a new drug must obtain approval to sell the product by filing a New Drug Application ("NDA"). *21 U.S.C. §§ 301-392*. An NDA must include specific data concerning the safety and effectiveness of the drug, as well as information on applicable patents. *Id.* at *§ 355(a)*, *(b)*. When the Food and Drug Administration ("FDA") approves a brand manufacturer's NDA, the manufacturer may list in the "Approved Drug Products with Therapeutic Equivalence Evaluations" (commonly known as the "Orange Book") any patents that the manufacturer believes could reasonably be asserted against a generic manufacturer that makes, uses, or sells a generic version of the brand drug. *Id.* at *§ 355(b)(1)*. When a brand manufacturer **[**7]** wishes to make changes to a drug that already has an approved NDA, the brand manufacturer must submit a supplemental new drug application ("sNDA") to the FDA. An sNDA is required when a brand manufacturer wishes to change a drug label, market a new dosage strength, or change the way the drug is manufactured.

HN2[] The *Hatch-Waxman Act*, enacted in 1984, simplified the regulatory hurdles for prospective generic manufacturers by eliminating the need for them to file NDAs. Under the Act's abbreviated regulatory approval process for generic drugs, a generic drug manufacturer may file an Abbreviated New Drug Application ("ANDA") relying on the scientific findings of safety and effectiveness in the brand drug's NDA, and demonstrating that the proposed generic is pharmaceutically equivalent and bioequivalent (together "therapeutically equivalent") to a brand drug. *Id.* at *§ 355(j)(8)(B)*.

HN3[] To obtain FDA approval of an ANDA, a manufacturer must also certify that the generic drug will not infringe any patents listed in the Orange Book. Under the *Hatch-Waxman Act*, the ANDA must contain one of four certifications: (I) that there are no patents listed in the Orange Book that cover the brand drug; (II) that any Orange Book **[**8]** listed patents have expired; (III) that the generic is not seeking approval before the expiration of any unexpired patents listed in the Orange Book; or (IV) that any unexpired patents listed in the Orange Book are not infringed, are invalid, and/or are unenforceable (this is commonly referred to as a "Paragraph IV certification"). *Id.* at *§ 355(j)(2)(A)(vii)*.

HN4[] A generic manufacturer must serve notice to the brand company of a Paragraph IV certification because such a certification creates an "artificial act" of patent infringement, permitting the brand company to file a patent infringement suit against the generic manufacturer. *35 U.S.C. § 271(e)(2)(A)*. If the brand company files suit within 45 days of receiving the Paragraph IV certification, final FDA approval of the generic manufacturer's ANDA is automatically stayed until the earlier of (i) 30 months, or (ii) entry of a district court judgment finding patent invalidity or non-infringement. *21 U.S.C. § 355(j)(5)(B)(iii)*. During this stay, the FDA may grant "tentative approval" of the generic manufacturer's ANDA if it determines that the ANDA would otherwise qualify for final approval absent the stay. *Id.* at *§ 355(j)(5)(B)(iv)*.

HN5[] As an incentive for generic pharmaceutical companies to challenge suspect patents listed in the **[**9]** Orange Book, the *Hatch-Waxman Act* grants the first company to file a Paragraph IV ANDA (commonly known as the "first-filer") a 180-day period of generic marketing exclusivity during which time the FDA will not approve a later-filed ANDA for the same brand drug. *Id.* at *§ 355(j)(5)(B)(iv)*. During the 180-day period of market exclusivity, the **[*712]** first-filer only competes against the brand manufacturer and potentially any Authorized Generic ("AG") marketed under the brand manufacturer's NDA. *Id.* The start of the 180-day exclusivity period is triggered by the earlier of two events: (1) the first-filer's commercial marketing of a drug product, or (2) a court decision of noninfringement or patent invalidity. *Id.* Only the first-filer can trigger its 180-day exclusivity period via the commercial-marketing trigger. *Id.* at *§ 355(j)(5)(B)(iv)(I)*. However, a subsequent Paragraph IV ANDA filer can trigger the first-filer's 180-day exclusivity period via a successful court judgment. *Janssen Pharmaceutica, N.V. v. Apotex, Inc., 540 F.3d 1353, 1357 (Fed. Cir. 2008)*. This 180-day period of exclusivity "can prove valuable, possibly worth several hundred million dollars" to the first-filer. *Actavis, 133 S.Ct. at 2229*.

B. AB-Rated Generic Drugs

HN6[] Generic drugs that are "therapeutically equivalent" to their brand counterpart receive an "AB" rating from **[**10]** the FDA. This means that the generic and brand drugs have the same active ingredient, form, dosage, strength, and safety and efficacy profile. An AB-rated generic may be automatically substituted at the pharmacy counter for the brand drug. Today, all 50 states and the District of Columbia have drug substitution laws to further encourage generic competition. *New York ex rel. Schneiderman v. Actavis PLC, 787 F.3d 638, 644-45 (2d Cir. 2015)*. Although the specific terms of these laws vary by state, drug substitution laws either permit or require pharmacists to dispense an AB-rated generic drug in place of a brand drug, absent the prescribing physician's contrary instructions. *Id.*

Because an AB-rated generic drug may be automatically substituted for the brand drug, once the generic drug hits the market, it quickly captures sales from the brand drug, often capturing 80% or more of the brand sales within the first six months. DPP Complaint ("DPC") ¶ 46; EPP Complaint ("EPC") ¶ 36. Within a year of a generic drug's entry in the market, on average, the generic obtains about 90% of the brand drug sales, and the price of the drug typically drops by 85%. DPC ¶ 46; EPC ¶ 38.

C. Endo-Impax Patent Litigation

Until early spring of 2012, Defendant Endo manufactured Opana ER, an extended **[**11]** release form of oxymorphone hydrochloride marketed for the relief of moderate to severe pain. DPC ¶ 73; EPC ¶ 1. Endo's NDA for Opana ER was approved by the FDA on June 22, 2006, and Endo launched the product the following month. DPC ¶ 74; EPC ¶ 84. At the time, Endo only had three years of regulatory protection from generic competition for Opana ER because the patent on the active ingredient in Opana ER (oxymorphone hydrochloride) had expired decades earlier. Knowing this, Endo purchased the rights to four patents — U.S. Patent No. 5,128,143 (the "143 patent"), No. 5,958,456 (the "'456 patent"), No. 5,662,933 (the "'933 patent"), and No. 7,276,250 (the "'250 patent") (collectively, the "Penwest Patents") — that could be used to block generic entry beyond those three years. DPC ¶¶ 70, 71, 76; EPC ¶¶ 79, 80. Endo then listed the '143 patent in the Orange Book as covering Opana ER, and later added the '456 and '933 patents. DPC ¶¶ 85, 87; EPC ¶ 87.

In November of 2007, Impax filed an ANDA seeking to market a generic version of Opana ER, and submitted a Paragraph IV certification stating that the Penwest Patents were not valid and/or would not be infringed by Impax's generic. DPC ¶¶ 40-44, 88, 93; EPC ¶ 92. On January 25, 2008, Endo sued Impax over the 456 and 933 patents, triggering **[**12]** the 30-month stay. DPC ¶¶ 39, 92, 156; EPC ¶¶ 51, 94. Other generic companies later filed ANDAs seeking **[*713]** to market generic versions of Opana ER before the expiration of the Penwest Patents, and Endo sued each for alleged patent infringement. DPC ¶¶ 99-125; EPC ¶¶ 101-127. Because Impax was the first-filer for the 5, 10, 20, 30, and 40 mg strengths of Opana ER, it was entitled, upon obtaining FDA approval, to 180 days of exclusivity for those strengths as against the other ANDA filers. DPC ¶¶ 40-44, 93, 96; EPC ¶¶ 53, 95, 98. Thus, by filing suit and delaying Impax's entry for 30 months, Endo delayed all generics from launching 5, 10, 20, 30 and 40 mg strengths of generic Opana ER.

On May 13, 2010, a month before the 30-month stay was set to expire, the FDA tentatively approved Impax's ANDA for all strengths of Opana ER. DPC ¶¶ 39, 212; EPC ¶¶ 51, 133. This meant that, upon the expiration of the 30-month stay on June 14, 2010, Impax was free to make an "at-risk" launch of its generic without waiting for the trial court's final ruling in the Impax patent litigation. But, for whatever reason, Impax agreed not to launch its generic through the last day of trial. DPC ¶ 214; EPC ¶ 135. The **[**13]** trial began on June 3, 2010, and proceeded for two days. DPC ¶ 129; EPC ¶ 138. On June 8, 2010, Endo and Impax settled. DPC ¶ 131; EPC ¶ 141.

D. Endo-Impax Settlement

The Endo-Impax Settlement consisted of two agreements entered into simultaneously: (1) the Settlement and License Agreement ("SLA"), and (2) the Development and Co-Promotion Agreement ("DCA"). DPC ¶ 132; EPC ¶¶ 148, 150. Under the SLA, Impax agreed to delay its launch of generic Opana ER until the earlier of: (i) January 1, 2013, (ii) thirty days after a non-appealable federal court decision finding that Endo's patents were invalid or not infringed, or (iii) Endo's withdrawal of its patents from the Orange Book. SLA § 3.2. Impax further agreed to refrain from challenging the validity or enforceability of the '933 and '456 patents, as well as the '250 patent, which Endo had not even accused Impax of infringing. SLA § 3.3. In return, Endo covenanted not to sue Impax on, and granted Impax a license as to, any then-existing or subsequently obtained patents relating to Opana ER. *Id.* at § 4.1(a),(b). Additionally, Endo agreed to refrain from launching an AG version of Opana ER during Impax's 180-day exclusivity period ("No-AG Agreement"). *Id.* at § 4.1(c).

The SLA was also structured so that, depending **[**14]** on the volume of Opana ER sales at the time Impax's generic entered the market, one of three things would occur. First, if at the time Impax entered the market, sales of Opana ER had declined below a certain threshold defined in the SLA, Endo was required to pay Impax under the "Endo Credit" provision. *Id.* at § 4.4. The amount of the Endo Credit payment depended on the amount of decline in Opana ER sales — the greater the decline in sales, the larger the payment required under the Endo Credit provision. *Id.* Second, if Opana ER sales exceeded a certain threshold defined in the SLA by the time Impax entered the market, then Impax was required to pay Endo a 28.5% royalty on Net Sales of Impax's generic under the Royalties provision. *Id.* at § 4.3. Finally, if sales of Opana ER remained somewhere between the Endo Credit and the Royalties threshold amounts, neither party was required to pay anything.

The other aspect of the Endo-Impax Settlement was the DCA, which resulted in a $10 million cash payment from Endo to Impax. DCA § 3.1. Under the DCA, Endo and Impax agreed to work together on the development and promotion of a drug for the treatment of Parkinson's disease. *Id.* at § 2.1. Among other things, Endo agreed to support the **[**15]** product's development through a $10 million up-front **[*714]** payment, and to make additional future payments to Impax if Impax successfully completed various clinical and commercial milestones. *Id.* at §§ 3.1, 3.2, 3.3. In return, Endo received an exclusive license to promote the product to non-neurologists in the United States. *Id.* at §§ 2.1, 2.2. Endo also received the right to keep between 75% and 100% of the profits from the sale of the drug to non-neurologists in the United States. *Id.* at § 3.4. Endo paid Impax the $10 million cash payment, but no other payments have been made pursuant to the DCA. DPC ¶ 152; EPC ¶ 152.

E. Aftermath

One month after Endo settled with Impax, on July 7, 2010, Endo filed an sNDA for the approval of a crush resistant formula of Opana ER ("Opana ER CRF"). DPC ¶¶ 176-77; EPC ¶¶ 145-46. Endo purportedly made this switch to Opana ER CRF for patient safety reasons, because the crush resistant formula was less prone to abuse. DPC ¶ 182; EPC ¶ 170. But the FDA found insufficient evidence to conclude that Opana ER had an increased potential for abuse compared to Opana ER CRF. DPC ¶ 182; EPC ¶¶ 173-178. Plaintiffs allege that Endo made this switch in anticipation of the market erosion for branded **[**16]** Opana ER that would result from the ultimate launch of Impax's generic.

Despite the lack of evidence supporting Endo's purported reasons for the switch to the new crush resistant formula, the FDA nonetheless approved Endo's sNDA for Opana ER CRF on December 9, 2011. DPC ¶ 179; EPC ¶ 147. By May 2012, Endo had ceased manufacturing Opana ER and shifted its marketing efforts to Opana ER CRF. DPC ¶ 180; EPC ¶ 169. Opana ER CRF sales quickly replaced the vast majority of the sales of Opana ER. DPC ¶ 186; EPC ¶ 183. By July of 2012, Endo publically reported that 90% of Opana ER sales had moved to Opana ER CRF. DPC ¶ 146 n.30; EPC ¶ 183.

Because of Endo's market shift from Opana ER to Opana ER CRF, by the time Impax's generic entered the market in line with the terms of the Endo-Impax Settlement Agreement, in January 2013, sales of Opana ER had declined below the threshold defined in the SLA, triggering the Endo Credit provision. The amount Endo was required to pay Impax under the Endo Credit was determined based on the sales of Opana ER in the quarter immediately prior to the launch of Impax's generic — the lower the brand Opana ER sales, the higher the Endo Credit payment. SLA §

1.1; DPC ¶ 140; EPC **[**17]** ¶ 184. Ultimately, in April of 2013, Endo paid Impax $102,049,000 pursuant to the Endo Credit provision. DPC ¶ 7; EPC ¶ 184. Moreover, because the FDA did not determine Opana ER and generic versions thereof to be AB-rated equivalents of Opana ER CRF, generic versions of Opana ER, like Impax's generic, were not automatically substitutable, and were therefore unable to capture the sales of Opana ER CRF. DPC ¶¶ 178, 189; EPC ¶¶ 167, 211. Without generic competition, Endo was able to sell Opana ER CRF at supracompetive prices. DPC ¶ 185; EPC ¶¶ 8, 10.

II. LEGAL STANDARD

HN7[] A motion to dismiss for failure to state a claim under *Rule 12(b)(6)* challenges the legal sufficiency of a complaint. *Hallinan v. Fraternal Order of Chi. Lodge No. 7, 570 F.3d 811, 820 (7th Cir. 2009)*. A complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. When considering a *Rule 12(b)(6)* motion to dismiss, the Court accepts the plaintiff's allegations as true, and analyzes those facts in the light most hospitable to the plaintiff's theory, drawing all reasonable inferences for the plaintiff. *Camasta **[*715]** v. Jos. A. Bank Clothiers, Inc., 761 F.3d 732, 736 (7th Cir. 2014)*.

HN8[] Stating a *Sherman Act* claim merely requires enough facts taken as true to suggest that an agreement was made. *Twombly, 550 U.S. at 556*. "Asking for plausible grounds to infer an agreement does not impose a probability **[**18]** requirement . . . it simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of [an] illegal agreement." *Id.* But in analyzing a motion to dismiss, the Court need not accept as true "legal conclusions, or threadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Brooks v. Ross, 578 F.3d 574, 581 (7th Cir. 2009)* (quoting *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009))* (internal quotations and alterations omitted).

III. ANALYSIS

Plaintiffs' claims arise out of the Supreme Court's opinion in *FTC v. Actavis*, which decided whether it is illegal for a brand-name company to provide a payoff to a potential generic competitor, to keep it from entering the market earlier than it otherwise might have. *FTC v. Actavis, 133 S.Ct. at 2223*. In *Actavis*, a pharmaceutical company, Company A, had FDA approval to market a brand name drug, and held the related patent. *Id. at 2229*. Two other pharmaceutical companies, Companies B and C, filed ANDAs containing Paragraph IV certifications suggesting that the generics Company B and Company C intended to market did not infringe Company A's patent. *Id.* A fourth would-be generic manufacturer, Company D, agreed with Company C to share certain litigation costs and related profits. *Id.* Predictably, Company A initiated patent **[**19]** infringement litigation against Companies B and C, triggering the 30-month stay under the *Hatch-Waxman Act*. *Id.* Later, Companies A, B, C and D entered into a settlement agreement. *Id.* Pursuant to the agreement, Companies B, C and D agreed to delay the market entry of their generics for approximately nine years. *Id.* In exchange, Company A paid Companies B, C and D several hundred million dollars. *Id.* The Federal Trade Commission ("FTC") brought antitrust claims against all four companies, alleging that they had conspired to restrain trade when Companies B, C and D agreed to share in Company A's monopoly profits by accepting payment in exchange for agreeing not to compete.

The district court dismissed the FTC's antitrust claims on grounds that the agreement between Companies A, B, C and D did not exceed the scope of the underlying patent and therefore could not be treated as an agreement to restrain trade. *In re AndroGel Antitrust Litig. II, 687 F.Supp.2d 1371, 1377-79 (N.D. Ga. 2010)*. The district court reasoned that Company A's patent gave Company A the exclusive right to manufacture and sell the product in question, and the agreement merely prohibited the generic manufacturers from marketing an identical product. *Id. at 1377*. The Eleventh Circuit affirmed on the same grounds. **[**20]** *F.T.C. v. Watson Pharms., Inc., 677 F.3d 1298, 1312 (11th Cir. 2012)* ("[A]bsent sham litigation or fraud in obtaining the patent, a reverse payment settlement is immune from antitrust attack so long as its anticompetitive effects fall within the scope of the exclusionary potential of the patent.").

The Supreme Court reversed the Court of Appeals. The Court noted that it is unusual for the patentee to pay a purported infringer when the latter has no pending damages claim, and concluded that settlement agreements structured in this manner may raise antitrust concerns. *See*, *133 S.Ct. at 2237-38*. Specifically, the Court held that ***HN9***[] a reverse settlement payment, that is, a payment by a patentee to a **[*716]** claimed infringer, may be a restraint of trade under a "rule of reason" analysis when the payment is large and unjustified. *Id. at 2230, 2237-38*. In so holding, the Court rejected the lower courts' "scope of the patent" test, which immunized reverse payments from antitrust challenge so long as the settlement allowed generic entry before the expiration of the challenged patent. *Id. at 2230*. Instead, the Court explained that the "likelihood of a reverse payment bringing about anticompetitive effects depends upon its size, its scale in relation to the payor's anticipated future litigation costs, its independence from other **[**21]** services for which it might represent payment and the lack of any other convincing justification." *Id. at 2237*.

This decision, the Court made clear, was not intended to disturb other well-recognized forms of settlement. For example, antitrust concerns do not arise from settlements where the patentee simply allows the claimed infringer to enter the market before the patent expires and where the patentee pays the litigation costs of its adversary. *Id. at 2237*. Nonetheless, under *Actavis*, a reverse payment that is large and unjustified — when analyzed with reference to traditional settlement considerations — may have the potential to work anticompetitive harm. *Id. at 2237*.

Following the Court's lead in *Actavis*, Plaintiffs allege that the Endo-Impax Settlement contained a large and unjustified reverse settlement payment that satisfies a "rule of reason" analysis. Defendants, in their Motions to Dismiss DPPs' and EPPs' Complaints, make four broad arguments: (1) the Endo Credit and the No-AG Agreement were not reverse payments; (2) the Endo Credit and No-AG Agreement were not large; (3) the DCA payment was not large or unjustified; and (4) Plaintiffs have failed to allege antitrust injury. Additionally, Defendants argue that **[**22]** EPPs' state law allegations should all be dismissed for failure to state a claim. The Court will discuss each argument in turn.

A. Reverse Payments

The first inquiry under *Actavis* is whether Plaintiffs have sufficiently pleaded that the consideration paid by Endo to Impax constitutes a "reverse payment." If they have not done so, their antitrust claims fail, and the Court need not go any further. Plaintiffs allege that the Endo-Impax Settlement included a reverse payment — which was made up of the Endo Credit, the No-AG Agreement, and the DCA — for Impax's agreement not to introduce its generic into the market until January 1, 2013 (32 months after the FDA tentatively approved Impax's ANDA).

Defendants argue that the Endo Credit was not a reverse payment because: (1) no money was exchanged at the time the SLA was signed; (2) the Endo Credit provision did not *require* Endo to pay Impax at a future date; (3) under the Royalties provision, there was a chance Impax would be required to pay Endo; and (4) the type and amount of payment to be made under the SLA was conditioned on future events unknown at the time the Settlement Agreement was entered. Defendants also argue that the No-AG Agreement **[**23]** was not a reverse payment to Impax because Endo did not agree under this provision to refrain from competing with Impax, and therefore the No-AG Agreement did not have value to Impax.

Plaintiffs urge the Court to look at the agreement as a whole and acknowledge the economic reality of the relevant transaction. In this regard, Plaintiffs argue that the contingency of the payment does not insulate it from antitrust scrutiny. Specifically, Plaintiffs allege that the economic reality of the SLA was plain: it insured that Impax would receive a large reverse payment in exchange for staying off the market either through the Endo Credit if **[*717]** sales of Opana ER dropped, or through the No-AG Agreement if sales of Opana ER remained steady after two-and-one-half years. Plaintiffs argue that even if Impax had been required to pay Endo under the Royalties provision, Impax would still have received significant value through the Settlement. This is because the Royalties provision was only triggered if sales of Opana ER rose by a predefined amount. If this rise in sales occurred, then when Impax entered the market with its generic, there would be more Opana ER sales for it to capture, and Endo's promise **[**24]** not to compete through an AG during Impax's 180-day exclusivity period would become even more valuable.

The Court agrees with Plaintiffs that it is improper to view the components of the Endo-Impax Settlement in isolation. *See, e.g., In re Niaspan Antitrust Litig., 42 F.Supp.3d 735, 752 (E.D. Pa. 2014)* ("[T]he Licensing Agreement must be read in conjunction with the Co—Promotion and Manufacturing Agreements executed that same day."). When looked at from this perspective, Plaintiffs' allegation that the Endo Credit and No-AG Agreement were "Two Sides of the Same (Reverse Payment) Coin" is plausible and persuasive. Plaintiffs allege that Endo and Impax drafted a sophisticated agreement, and acknowledging that the future was largely unpredictable, included multiple contingencies to account for possible market changes and ensure that Impax received payment for delaying the entry of its generic into the market. Although the form and amount of that payment were contingent on future occurrences, taking the Plaintiffs' allegations as true, it was certain at the time of the Endo-Impax Settlement that Impax would receive anywhere from $33 to $49 million under the No AG-Agreement and an additional $10 million under the DCA.

Moreover, the Court finds Defendants' argument **[**25]** regarding the No-AG Agreement unpersuasive. Although it may be true that Endo was free to compete with Impax in other areas of the market, that does not change the fact that the No-AG Agreement was a payment, possibly of great monetary value to Impax as the first-filing generic.

HN10[] A "payment" is defined as the "[p]erformance of an obligation by the delivery of money *or* some other valuable thing accepted in partial or full discharge of the obligation." *Black's Law Dictionary* (10th ed. 2014). In *Actavis*, the Supreme Court recognized generally that the 180—day exclusivity period is "possibly 'worth several hundred million dollars,'" and may be where the bulk of the first-filer's profits lie. *Actavis, 133 S.Ct. at 2229* (quoting C. Scott Hemphill, *Paying for Delay: Pharmaceutical Patent Settlement as a Regulatory Design Problem*, *81 N.Y.U. L.Rev. 1553, 1579 (2006)*). At the same time, Endo's commitment not to produce an AG means that it gave up the valuable right to capture profits in the new two-tiered market. As such, the No-AG Agreement transferred the profits Endo would have made from its AG to Impax — plus potentially more, in the form of higher prices, because it enabled Impax to have a generic monopoly instead of a generic duopoly. *See, King Drug Co. of Florence v. Smithkline Beecham Corp., 791 F.3d 388, 405 (3d Cir. 2015)*. Thus, even though **[**26]** Endo was free to compete with Impax in other areas, by agreeing not to launch an AG during Impax's 180-day exclusivity period, Endo conveyed significant value to Impax.

Therefore, Plaintiffs have sufficiently alleged that the Endo-Impax Settlement contained a reverse payment. The Court now considers whether this reverse payment was large and unjustified.

B. Large and Unjustified

Defendants argue that (1) Plaintiffs fail to establish that the Endo Credit and the **[*718]** No-AG Agreement were large payments, and (2) the $10 million up-front payment under the DCA was neither large nor unjustified. Again, Defendants choose to assess the components of the Endo-Impax Settlement in piecemeal fashion and argue that each individual payment fails to rise to the level of a large and unjustified payment. The Court disagrees with this approach. Instead, the Court must determine whether, when taken as a whole, the total payment Impax received under the SLA, No-AG Agreement and DCA was large and unjustified.

HN11[] A "large" payment is anything more than the value of the avoided litigation costs plus any other services provided from the generic to the brand manufacturer. *In re Lipitor Antitrust Litig., 46 F.Supp.3d 523, 543 (D.N.J. 2014)*. A payment is justified when it reflects "traditional **[**27]** settlement considerations, such as avoided litigation costs or fair value for services." *Actavis, 133 S.Ct. at 2236*. Such payments do not raise the "concern that a patentee is using its monopoly profits to avoid the risk of patent invalidation or a finding of noninfringement." *Id.* The burden is on the defendant to "show in the antitrust proceeding that legitimate justifications are present, thereby explaining the presence of the challenged term and showing the lawfulness of that term under the rule of reason." *Id.* Thus, at the motion to dismiss stage, a plaintiff need only plausibly plead that a large payment was made and that any such payment is not explained by traditional settlement considerations. *Id.*

Defendants note correctly that Plaintiffs have not attempted to assign dollar values with significant precision to the various provisions of the Settlement Agreement. This is among the stronger of Defendants' arguments. Some other courts interpreting *Actavis* have held that pleading an estimate of the total monetary value and a reliable foundation for that value are necessary to establish the plausibility required by *Rule 12(b)(6)*. *See, e.g., In re Effexor XR Antitrust Litig., No. 3:11—CV—5479 PGS, 2014 U.S. Dist. LEXIS 142206, 2014 WL 4988410 (D.N.J. Oct. 6, 2014)*; *Lipitor Antitrust Litig., 46 F.Supp.3d at 542*. While sharing the concerns expressed **[**28]** by those courts and agrees that a plaintiff must provide at least a rough estimate of the value of the reverse payment and anticipated litigation costs, the Court is also aware that a precise valuation may require discovery, as it will likely depend on evidence in Defendants' exclusive possession and on expert analysis. *In re Aggrenox Antitrust Litig., 94 F.Supp.3d 224, 244 (D. Conn. 2015)*.

That being said, Plaintiffs have provided an estimate of the total monetary value of the Endo-Impax Settlement and some basis for this valuation. Specifically, DPPs estimate that the minimum cash value of the Settlement Agreement was approximately $59 million — $49,067,032 for the No-AG Agreement plus an additional $10 million under the DCA. DPC ¶ 148. To reach this estimate, DPPS rely on the formula in the SLA used to calculate the payment under the Endo Credit provision, which they contend was designed to capture the value to Impax of the No-AG Agreement during the 180-day exclusivity period, based on peak Opana ER sales. DPC ¶¶ 140-148. EPPs estimate the value of the No-AG Agreement to be between $33 and $49 million, plus the additional $10 million under the DCA, making their total estimated value of the Settlement Agreement between $43 and $59 million. EPC ¶ 155. **[**29]** EPPs rely on IMS data to approximate Opana ER sales over the 180-day exclusivity period, and then estimate that the value of the No AG-Agreement was a fraction of that amount "depending on reasonable assumptions and methodologies used." EPC ¶ 155.

[*719] Although not perfect, the Court cannot conclude simply from the absence of precise figures that the pleadings represent formulaic recitations of elements and allegations that fail to rise above the speculative. On the contrary, the complaints make specific allegations about the terms of the settlement and their relative value that are plausible on their face. Whether Plaintiffs can substantiate those allegations may be an issue for summary judgment or trial, but for purposes of the motions to dismiss, the allegations are sufficient.

DPPs allege that the median cost of an entire patent litigation with more than $25 million at stake is approximately $5 million. DPC ¶ 149. Plaintiffs allege that the amount of litigation costs saved by Endo would have been a small fraction of this since the litigation had already proceeded to trial before ultimately reaching settlement. DPC ¶ 149; EPC ¶ 161. Thus, even the most conservative estimate of the value **[**30]** of the reverse payment in the Endo-Impax Settlement — $33 million — is large in comparison to the value of the avoided litigation costs. Therefore, the Court concludes that Plaintiffs sufficiently pleaded the existence of a large reverse payment under *Actavis*.

Plaintiffs allege that this large payment was unjustified because it did not reflect traditional settlement considerations. Specifically, Plaintiffs argue that the payment was much larger than any saved litigation costs and was not in exchange for other services. As discussed above, Plaintiffs' allegations, if taken as true, support the conclusion that this payment was significantly larger than any litigation costs Endo and Impax may have saved by settling so late in the game. Moreover, despite their attempts, Defendants cannot justify the $10 million upfront payment under the DCA as being made in exchange for "other services provided from the generic to the brand manufacturer." This is because the DCA guaranteed Impax the $10 million payment even if Impax did not manufacture the drug or the drug did not gain FDA-approval.

HN12[] Thus, Plaintiffs have met their *prima facie* burden, and going forward, the burden shifts to Defendants to **[**31]** offer pro-competitive justifications for the reverse payment. *Id. at 245*. But such justifications, as with any affirmative defense, cannot be resolved on a motion to dismiss unless the facts establishing the defense are clear on the face of Plaintiffs' Complaint. *Cf. Jones v. Bock, 549 U.S. 199, 215, 127 S. Ct. 910, 166 L. Ed. 2d 798 (2007)*; *In re Solodyn (Minocycline Hydrochloride) Antitrust Litig., No. CV 14-MD-02503-DJC, 2015 WL 5458570, at *7 (D. Mass. Sept. 16, 2015)*.

Defendants argue that the Endo Credit and No-AG Agreement were a "carrot" and "stick" intended to reasonably balance the parties' economic incentives by (1) enticing Endo to continue making robust sales of Opana ER prior to

Impax's licensed entry date and (2) disincentivizing Endo from taking actions that could lead to a significant decrease in sales of Opana ER before Impax launched. This justification is certainly plausible, but the facts establishing it are not clear on the face of Plaintiffs' Complaints or from the SLA itself. Essentially, Plaintiffs and Defendants have raised two starkly contrasting characterizations of the provisions of the SLA, both of which are believable. But to find Defendants' justification to establish conclusively that the payment under the SLA was made for procompetitive reasons, the Court would need to make inferences **[**32]** from the allegations in the complaints in Defendants' favor, which is contrary to the motion to dismiss standard. *See, Phelan v. City of Chicago, 347 F.3d 679, 681 (7th Cir. 2003)* (In reviewing a motion to dismiss a court "must draw all reasonable inferences **[*720]** in favor of the non-movant."). Therefore, the Court concludes that Plaintiffs have pleaded sufficiently that the reverse payment was large and unjustified.

C. Antitrust Injury

Defendants contend that even if Plaintiffs have alleged sufficiently the existence of a large and unjustified reverse payment from Endo to Impax, the Complaints must still be dismissed because Plaintiffs have failed to allege plausibly that this reverse payment caused injury to competition and to Plaintiffs themselves. Defendants argue that there is no allegation of actual injury, because there is no plausible allegation of actual delay of the entry of a generic into the Oxymorphone ER Market. Specifically, under Defendants' theory, Plaintiffs must allege facts to show that, but for the Endo-Impax Settlement, Impax would have *lawfully* launched a generic version of Opana ER before January 1, 2013. However logically compelling that argument may be in isolation, it is at odds with the Supreme Court's reasoning in *Actavis* ***[**33]*** .

By requiring Plaintiffs to plead that Impax would have been able to lawfully launch its generic, Defendants essentially contend that Plaintiffs must plead that the Endo patents would ultimately have been invalidated or found uninfringed. In doing so, Defendants favor a rule that requires litigating the patents' merits — at least in some abbreviated fashion — in order to determine whether the settlement violates ***antitrust law***. But the Supreme Court in *Actavis* expressly disclaimed this line of analysis:

> ***HN13***[] [I]t is normally not necessary to litigate patent validity to answer the antitrust question . . . . An unexplained large reverse payment itself would normally suggest that the patentee has serious doubts about the patent's survival. And that fact, in turn, suggests that the payment's objective is to maintain supracompetitive prices to be shared among the patentee and the challenger rather than face what might have been a competitive market — the very anticompetitive consequence that underlies the claim of antitrust unlawfulness.

Actavis, 133 S. Ct. at 2236. The Court made clear that the anticompetitive harm is not that the patent surely would have been invalidated if not for the settlement, and that a generic therefore **[**34]** surely would have entered the market at an earlier date. If that were the standard, a determination of a patent settlement's lawfulness under ***antitrust law*** would require the very same patent litigation that the settlement avoided.

Instead, the anticompetitive harm, under *Actavis*, is that the reverse-payment settlement "seeks to prevent the risk of competition." *Id.* Plaintiffs need not plead (or prove) the weakness of the Endo patents, because the patent's ultimate validity is not at issue. Rather, "they must plead facts sufficient to infer (and they must ultimately prove, within the rule-of-reason framework) that a large and otherwise unjustified reverse payment was made as part of the settlement in order to shore up some perceived risk" of competition. *Aggrenox Antitrust Litig., 94 F.Supp.3d at 240*.

Plaintiffs contend that Endo used this large payment to buy itself freedom from generic competition. Plaintiffs allege but for Endo's unlawful and large reverse payment, Impax would have launched its generic earlier than it finally did either: (a) "at-risk" (that is, while the patent litigation was still pending); (b) after winning the patent suit; or (c) via a lawful settlement agreement that provided for an earlier Impax entry date **[**35]** without a large reverse payment from Endo to Impax. Instead of this occurring, Plaintiffs contend that Endo and Impax — competitors — conspired to allocate the Oxymorphone ER Market **[*721]** in a manner that gave each company more exclusivity than it was lawfully entitled to in order to maximize profits at the expense of Plaintiffs and consumers.

Plaintiffs further allege that Endo used that market exclusivity to further stifle generic competition by switching the market to its new formulation, Opana ER CRF. Plaintiffs allege that the reverse payment was designed to, and did in fact: (a) delay the entry of Impax and other less expensive, AB-rated generic versions of Opana ER; (b) fix, raise, maintain or stabilize the price of brand and generic versions of Opana ER; (c) allow Endo to make Opana ER CRF, and to make sales that otherwise would have gone to less expensive generic Opana ER; and (d) allocate nearly 100% of the Oxymorphone ER Market to Endo for at least two and one-half years. Finally, Plaintiffs contend that Impax ensured it received full compensation for agreeing not to compete and ceding most of the sales to Endo's new formulation. Plaintiffs allege that the Endo-Impax Settlement **[**36]** Agreement worked to guarantee that Impax would get paid for staying off the market, whether or not Endo switched the market to Opana ER CRF: if Endo did not switch the prescription base, Impax would get paid through the valuable No-AG Agreement; if Endo did switch the prescription base, Impax would get cash plus the less valuable No-AG Agreement.

These allegations, if true, raise a reasonable expectation that discovery will reveal sufficient evidence to prove the large reverse payment was made to prevent competition on various fronts. *Aggrenox Antitrust Litig., 94 F.Supp.3d. at 245-46*. Therefore, the Court concludes that Plaintiffs have stated a viable claim under *Actavis*. The Court denies Defendants' Motion to Dismiss DPPs' Complaint.

For the same reasons, the Court also denies Defendants' Motion to Dismiss EPPs' Complaint for failure to state an antitrust cause of action under *Actavis*. The Court now turns to Defendants' Motion to Dismiss EPPs' various state law claims.

D. EPPs' State Law Claims

EPPs have brought state antitrust claims under the laws of 28 jurisdictions, EPC ¶¶ 256, 265, 273, state consumer protection claims under the laws of four additional jurisdictions, *id. at ¶ 279*, and unjust enrichment claims in the combined 32 **[**37]** jurisdictions, *id. at ¶¶ 93-94*. Defendants contend that all of EPPs' state law claims must be dismissed because: (1) EPPs lack Article III standing to bring state law claims in ten jurisdictions; (2) EPPs lack standing under *Illinois Brick* to bring antitrust claims in three states; (3) the claims under ten state antitrust laws are defective for various other reasons; (4) EPPs have failed to state valid claims under state consumer protection laws; and (5) EPPs have failed to state a valid claim for unjust enrichment. The Court will address briefly each argument.

1. Article III Standing

Defendants argue that EPPs' claims in District of Columbia, Maine, Nebraska, New Hampshire, New Mexico, North Dakota, Oregon, Puerto Rico, South Dakota, Utah, and Vermont must be dismissed because EPPs have failed to allege any connection whatsoever with those jurisdictions, and therefore lack standing to bring those claims under Article III of the Constitution. Plaintiffs argue that Defendants are attempting to create a class action standing barrier that exceeds the requirements of Article III.

HN14[] To establish standing under Article III, a plaintiff must show (1) that he has suffered (or is imminently threatened with) a concrete and particularized **[**38]** "injury in fact," (2) that is fairly traceable to the challenged conduct, and (3) that is **[*722]** likely to be redressed by a favorable judicial decision. *Johnson v. U.S. Office of Pers. Mgmt., 783 F.3d 655, 660 (7th Cir. 2015)* (citing *Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992))*. Essentially, Defendants argue that because EPPs have not established that the named plaintiffs have a connection with these ten jurisdictions, they have failed to allege injury-in-fact as to those claims. It is true that injury is a prerequisite to standing. But Article III's injury-in-fact requirement "has nothing to do with the text of the statute relied upon." *Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 97, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998)*. As long as one member of the class has a plausible claim to have suffered an injury that is fairly traceable to the challenged conduct and likely to be redressed by a favorable decision, the requirements of Article III standing are satisfied. Kohen v. Pac. Inv. Mgmt. Co. LLC, 571 F.3d 672, 676 (7th Cir. 2009).

EPPs have satisfied the requirements of Article III. EPPs contend that Defendants alleged anticompetitive conduct caused EPPs injury by delaying market entry of generic Opana ER and forcing plaintiffs to pay supracompetitive prices. Further, EPPs seek damages for their state law claims, so a favorable decision will redress their injury. A greater showing is not required at this stage of the proceedings. **HN15**[] Whether the named plaintiffs "may assert **[**39]** the rights of absent class members is neither a standing issue nor an Article III case or controversy issue but depends rather on meeting the prerequisites of Rule 23 governing class actions." Lewis v. Casey, 518 U.S. 343, 395-96, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996) (Souter, J., concurring in part, dissenting in part, and concurring in the judgment) (alterations and internal quotation marks omitted); Arreola v. Godinez, 546 F.3d 788, 795 (7th Cir. 2008) (analyzing named plaintiff's standing as a separate inquiry from his entitlement to relief or ability to satisfy the criteria of Rule 23). The Court denies Defendants' Motion to Dismiss EPPs' claims for lack of standing. The suitability of the named plaintiffs as representatives of the class will be addressed at the class certification stage.

2. Illinois Brick

This case is rendered much more complicated by the rules of *Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*, and *California v. ARC America Corp., 490 U.S. 93, 109 S. Ct. 1661, 104 L. Ed. 2d 86 (1989)*. In the former case, the Supreme Court held that **HN16**[] only the overcharged direct purchaser, and no one else in the chain of distribution, can recover damages under federal ***antitrust law***, *Illinois Brick, 431 U.S. at 746*; in the latter, the Supreme Court held that the "indirect-purchaser rule" does not prevent indirect purchasers from recovering damages under state antitrust laws where the state laws otherwise allow it, *ARC America, 490 U.S. at 101*. Many states have passed so-called "*Illinois Brick* repealer statutes" **[**40]** in response to the Court's decision in *ARC America Corp.* Other states continue to follow the rule of *Illinois Brick*, and deny recovery to indirect purchasers under their states' antitrust laws. Defendants argue that Illinois and Puerto Rico are *Illinois Brick* jurisdictions, and that Rhode Island was too until it passed an *Illinois Brick* repealer statute in 2013, which Defendants argue should not be applied retroactively. EPPs dispute Defendants' interpretation of the laws of these states.

a. Illinois

Defendants argue that under the Illinois Antitrust Act only the Illinois Attorney General may bring a class action asserting **[*723]** indirect purchaser antitrust claims. *See*, 740 ILCS 10/7(2). Defendants note that courts have dismissed indirect purchaser class action claims asserted in federal court under Illinois law for this reason. *See, e.g., In re Nexium Antitrust Litig., 968 F.Supp.2d 367, 408-09 (D. Mass. 2013)* (applying the attorney general restriction to bar an indirect purchaser class action in federal court); *In re Flonase Antitrust Litig., 692 F.Supp.2d 524, 539 (E.D. Pa. 2010)* ("In this case, Plaintiffs are prohibited from asserting claims under the Illinois Antitrust Act, because the Act does not provide relief to indirect purchasers through class actions.").

EPPs rely on *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 130 S. Ct. 1431, 176 L. Ed. 2d 311 (2010)*, to argue that Illinois cannot limit Rule 23's class action procedure. But **[**41]** this argument has been repeatedly rejected by the courts. *See, e.g., In re Wellbutrin XL Antitrust Litig., 756 F.Supp.2d 670, 677 (E.D. Pa. 2010)* ("The Illinois restrictions on indirect purchaser actions are intertwined with Illinois substantive rights and remedies . . . [such that] application of Rule 23 would 'abridge, enlarge or modify' Illinois' substantive rights, and therefore Illinois' restrictions on indirect purchaser actions must be applied in federal court."). The Court agrees with the analysis in *Wellbutrin*. Under *Shady Grove*, **HN17**[] state procedural rules control in federal court when they are "part of a State's framework of substantive rights or remedies." *Shady Grove, 559 U.S. at 419* (Stevens, J., concurring). That is the case here. Therefore, the Court must apply the Illinois Antitrust Act and dismiss with prejudice EPPs' indirect purchaser antitrust claim brought under Illinois law.

b. Puerto Rico

Puerto Rico has not passed an *Illinois Brick* repealer, and its territorial courts have not addressed the issue directly. Other federal district courts have concluded that *Illinois Brick* applies and bars indirect-purchaser actions in Puerto Rico. *See, e.g.,* *United Food & Commercial Workers Local 1776 & Participating Emp'rs Health & Welfare Fund v. Teikoku Pharma USA, Inc., 74 F.Supp.3d 1052, 1085-86 (N.D. Cal. Nov. 7, 2014)*; *Nexium Antitrust Litig., 968 F.Supp.2d at 409-10*; *In re Digital Music Antitrust Litig., 812 F.Supp.2d 390, 413 (S.D.N.Y. 2011)* (*citing* *In re TFT—LCD (Flat Panel) Antitrust Litig., 599 F.Supp.2d 1179, 1185-87 (N.D. Cal. 2009))*. Despite the overwhelming authority to the contrary, EPPs argue that **[**42]** Puerto Rico liberally construes its antitrust laws to permit suit by "[a]ny person" injured by acts prohibited by the statute, including indirect purchasers.

The case relied upon by EPPs, *Rivera—Muñiz v. Horizon Lines Inc., 737 F.Supp.2d 57 (D.P.R. 2010)*, cites as support for its conclusion *Pressure Vessels of Puerto Rico, Inc. v. Empire Gas de Puerto Rico, 137 D.P.R. 497, 509-18, 1994 Juris P.R. 144 (1994)*. *Pressure Vessels* did not address indirect purchaser standing or the rule of *Illinois Brick. See, generally, Pressure Vessels, 137 D.P.R. at 497*. Therefore, the Court does not find *Rivera—Muñiz* persuasive. Absent an interpretation by the courts of Puerto Rico allowing antitrust recovery by indirect purchasers or an express *Illinois Brick* repealer statute enacted by the legislature, the Court concludes that EPPs' indirect purchaser antitrust claim is barred in Puerto Rico and must be dismissed with prejudice.

c. Rhode Island

Rhode Island was an *Illinois Brick* state until its legislature enacted a repealer statute on July 15, 2013. *See*, *R.I. Gen. Laws § 6-36-7(d)*. Although enacted after the Endo-Impax Settlement was entered, EPPs argue the statute should apply **[*724]** to their claims because it was in effect when they filed their first complaints in June of 2014. "It is well established, however, that ***HN18***[] statutes and their amendments are presumed to apply prospectively . . . . Only when 'it appears by clear, strong language or by necessary **[**43]** implication that the Legislature intended' a statute to have retroactive application will the courts apply it retrospectively." *Hydro—Mfg. v. Kayser—Roth Corp., 640 A.2d 950, 954-55 (R.I. 1994)* (quoting *VanMarter v. Royal Indemnity Co., 556 A.2d 41, 44 (R.I. 1989))*. Here, the statute provided that it shall "take effect on passage." 2013 R.I. Pub. Laws 365, § 2. Therefore, EPPs' Rhode Island indirect purchaser antitrust claim is not saved by the later-enacted repealer statute, and must be dismissed with prejudice.

3. State Law Antitrust Claims

a. District of Columbia, Hawaii, Mississippi, New York, Oregon and West Virginia

Defendants argue that the antitrust laws of District of Columbia, Hawaii, Mississippi, New York, Oregon and West Virginia "limit claims to anticompetitive conduct that takes place solely or predominantly within the jurisdictions' borders." None of the cited states' laws contain so categorical a limitation, however. Moreover, although EPPs' claims allege national anticompetitive conduct, they also claim that the unlawful Endo-Impax Settlement affected commerce in each state and resulted in overcharges to end-payors in each state. EPC ¶ 233; *In re Auto. Parts Antitrust Litig., No. 12-md-2311, 2013 U.S. Dist. LEXIS 80338, 13 WL 2456612, at *20-21 (E.D. Mich. June 6, 2013)* ("[T]he price-fixed products entered into the stream of commerce in these states and caused **[**44]** injury, thereby triggering the antitrust laws of the states."). The Court does not see why the *intra* state effect of the *inter*state anticompetitive conduct would not be reached by the laws of these states; therefore, the Court declines to dismiss EPPs' claims on this basis.

b. Illinois and Mississippi

Defendants next argue that EPPs cannot maintain indirect purchaser claims in Mississippi or Illinois because: (1) "Mississppi does not permit class actions of any kind"; and (2) the Illinois Antitrust Act "requires that all indirect purchaser class suits be brought by the Illinois Attorney General." Having previously addressed Defendants argument, and dismissed EPPs' claims under the Illinois Antitrust Act, the Court will focus on the argument in regards to Mississippi law.

HN19[] Mississippi does not provide for class actions in its state courts as a matter of state procedure. Its ***antitrust law*** states that "[i]t shall be the duty of the district attorneys . . . to enforce the civil features of the antitrust laws of this state," but it does not expressly state that antitrust class actions are prohibited. *Miss. Code Ann. § 75-21-37*. Under the *Shady Grove* analysis discussed previously, Mississippi's procedural rule banning class **[**45]** actions is not "part of [the] State's framework of substantive rights or remedies," and therefore does not control in federal court. *Shady Grove, 559 U.S. at 419* (Stevens, J., concurring); *cf. In re New Motor Vehicles Canadian Exp. Antitrust Litig., 241 F.R.D. 77, 83 (D. Me. 2007) vacated on other grounds*, *522 F.3d 6 (1st Cir. 2008)*. As such, the Court must apply *Fed. R. Civ. P. 23* and decline to dismiss EPPs' indirect purchaser antitrust claim brought under Mississippi law.

c. Kansas, Mississippi, and Tennessee

Defendants argue that EPPs' statutory claims based on Kansas, Mississippi, and Tennessee law should be dismissed because these claims are barred by the statutes **[*725]** of limitations in those states. ***HN20***[] Kansas and Mississippi provide that antitrust claims are subject to a three-year limitations period. *See*, *Kan. Stat. Ann. § 60-512*; *Miss. Code Ann. § 15-1-49*. But Tennessee law in this area is not settled. *Compare State ex rel. Leech v. Levi Strauss & Co.*, No. 79-722-III, 1980 WL 4696 (Tenn. Ch. Sept. 25, 1980) (applying three-year limitations period to state antitrust claim), *with Stratienko v. Chattanooga-Hamilton Cnty Hosp. Auth., No. 1:07-CV-258, 2009 U.S. Dist. LEXIS 21683, 09 WL 736007, at *12 (E.D. Tenn. Mar. 17, 2009)* (declining to apply three-year limitations periods to state antitrust claim). The Court is reluctant to decide an unsettled area of state law; therefore, the Court declines to dismiss EPPs' indirect purchaser antitrust claim brought under Tennessee state law.

Turning to the claims under the **[**46]** laws of Kansas and Mississippi, EPPs argue that their claims are not barred under ***HN21***[] the "continuing violation" doctrine — an exception to the statute of limitations. This doctrine advises that "each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act," and as to those damages, "the statute of limitations runs from the commission of the act." *Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 338, 91 S. Ct. 795, 28 L. Ed. 2d 77 (1971)*. EPPs argue that Defendants' sale of Opana ER and its generic equivalents at supracompetitive prices throughout the Class Period triggered application of the "continuing violation" doctrine and tolled the statute of limitations on their state antitrust claims in Kansas and Mississippi.

The federal courts routinely apply the "continuing violation" doctrine in the context of federal ***antitrust law***. But the doctrine has received mixed treatment by state courts deciding state antitrust claims. *Compare, McKinnon v. Honeywell Intern., Inc., 2009 ME 69, 977 A.2d 420, 425 (Me. 2009)* ("[W]e have never adopted the continuing violations doctrine as a means of tolling the statute of limitations . . . [and] [w]e decline to [do so] in this case."), *with Medicare Rentals, Inc. v. Advanced Servs., 119 N.C. App. 767, 460 S.E.2d 361, 365 (N.C. Ct. App. 1995)* ("Under [North Carolina law], each subsequent [antitrust] violation is a separate offense for the purpose of the statute **[**47]** of limitations."). EPPs do not point to, and the Court has not found, a single case from Mississippi or Kansas expressly adopting the "continuing violation" doctrine in the antitrust context. In light of the unsettled nature of this doctrine, and the absence of guidance from the states in question, the Court declines to toll the statute of limitations for EPPs' antitrust claims under Kansas and Mississippi law. These claims are therefore dismissed with prejudice.

d. Utah

Utah has passed an *Illinois Brick* repealer statute, and its antitrust statute therefore does grant indirect purchasers the right to bring antitrust damages claims, but only if they are citizens or residents of Utah. *See*, Utah Code § 76-10-3109. EPPs appear to be asserting claims under that law on behalf of residents of Utah, but they do not claim that any of the named plaintiffs are such residents. Although, as stated earlier, this deficiency does not prevent EPPs from establishing Article III standing, it does prevent them from bringing an indirect purchaser claim under the laws of Utah. Therefore, the Court dismisses this claim with leave to replead.

4. Consumer Protection Claims and Unjust Enrichment Claims

Defendants argue that EPPs' claims **[**48]** under the consumer protection laws of Florida, Massachusetts, Missouri, and Pennsylvania **[*726]** and all of EPPs' unjust enrichment claims should be dismissed because the Complaint is devoid of factual allegations sufficient to show that Defendants have violated these laws. Specifically, Defendants contend that EPPs fail to set forth the elements of the claims under each state's laws, much less plead facts sufficient to establish that those elements have been met.

The Court agrees with Defendants. EPPs have *listed* claims under various state laws, but they have not truly *pleaded* claims under those laws sufficient to show their entitlement to recovery under them, as required by Fed. R. Civ. P. 8. *See,* Iqbal, 556 U.S. at 678 ("A pleading that offers labels and conclusions or formulaic recitation of the elements of a cause of action will not do."). Rather, they have pleaded antitrust claims and the factual foundation for them, and have merely alleged that those claims are also actionable under state consumer protection laws and as unjust enrichment.

EPPs' pleadings on their consumer protection and unjust enrichment claims fail to account for any consequential differences that may exist among the undifferentiated state-law claims. The **[**49]** bald assertion that the alleged antitrust conduct violates dozens of non-antitrust laws, or the implication that there are no consequential differences between those laws, is not entitled to deference, because "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." Iqbal, 556 U.S. at 678.

The Court need not rule on the many specific arguments Defendants make regarding the individual state claims, because EPPS have not pleaded state law consumer protection or unjust enrichment claims sufficient to satisfy Rule 8 under Twombly and Iqbal. Therefore, the Court dismisses EPPs' consumer protection and unjust enrichment claims, and grants leave to replead in a non-conclusory fashion.

IV. CONCLUSION

For the reasons stated herein, Defendants' Motion to Dismiss DPPs' First Amended Consolidated Complaint [ECF No. 118] is denied. Defendants' Motion to Dismiss EPPs' First Amended Consolidated Complaint [ECF No. 121] is granted in part and denied in part. EPPs' antitrust claims under the state laws of Illinois, Puerto Rico, Rhode Island, Kansas, and Mississippi are dismissed with prejudice. EPPs' antitrust claims under Utah state law, and all of their **[**50]** consumer protection and unjust enrichment claims are dismissed with leave to replead within twenty-one (21) days from the date of this memorandum opinion and order.

IT IS SO ORDERED.

/s/ Harry D. Leinenweber

Harry D. Leinenweber, Judge

United States District Court

Dated: 2/10/2016

[Marruffo v. Mannatto](#)

United States District Court for the District of Arizona

February 11, 2016, Decided; February 11, 2016, Filed

No. CV-15-00261-PHX-SPL (JZB)

Reporter
2016 U.S. Dist. LEXIS 194640 *

Macario Ignacio Marruffo, Plaintiff, v. James Mannatto, et al., Defendants.

Subsequent History: Motion granted by, in part, Motion denied by, in part, Request granted, Motion denied by, Without prejudice, Request denied by, Without prejudice *Marruffo v. Mannatto, 2016 U.S. Dist. LEXIS 194641 (D. Ariz., Oct. 25, 2016)*

Motion denied by, Summary judgment granted by, Dismissed without prejudice by *Marruffo v. Mannatto, 2017 U.S. Dist. LEXIS 221380 (D. Ariz., Mar. 10, 2017)*

Request denied by, Habeas corpus proceeding at, Transferred by *Marruffo v. Arizona, 2020 U.S. App. LEXIS 676 (9th Cir. Ariz., Jan. 9, 2020)*

Core Terms

first amended complaint, alleges, rights, second amended complaint, civil rights, fail to state a claim, inmate, legal services, retaliation, violations, ongoing, Notice, courts, failure to state a claim, amended complaint, protective order, racketeering, shotgun, amend, shot, criminal proceeding, back of the head, further notice, criminal case, proceedings, Disclosure, complaints, lawsuits

Counsel: **[*1]** Macario Ignacio Marruffo, also named as: Macario Marruffo, Plaintiff, Pro se, San Luis, AZ USA.

For Kizzy Street, Sgt, young fiction ex parte individual and official capacity, also known as, Unknown Street, Defendant: Ashlee B Hesman, LEAD ATTORNEY, Struck Love Bojanowski & Acedo PLC, Chandler, AZ USA; Kathleen L Wieneke, LEAD ATTORNEY, Wieneke Law Group PLC, Tempe, AZ USA.

Judges: Honorable Steven P. Logan, United States District Judge.

Opinion by: Steven P. Logan

Opinion

ORDER

On February 10, 2015, Plaintiff Macario Ignacio Marruffo, who is confined in the Pinal County Jail, filed a pro se civil rights Complaint pursuant to *42 U.S.C. § 1983* and an Application to Proceed In Forma Pauperis. In a March 23, 2015 Order, the Court denied the Application to Proceed with leave to refile. On April 22, 2015, Plaintiff filed another Application to Proceed In Forma Pauperis. In a June 17, 2015 Order, the Court denied that Application to Proceed with leave to refile On July 8, 2015, Plaintiff informed the Court that he was no longer in custody. In an August 17, 2015 Order, the Court instructed Plaintiff to either pay the filing and administrative fees or file a nonprisoner Application to Proceed In Forma Pauperis.

On September 21, 2015, Plaintiff **[*2]** filed a Motion for Appointment of Counsel and a non-prisoner Application to Proceed. In an October 21, 2015 Order, the Court granted the Application to Proceed, denied the Motion for Appointment of Counsel, and dismissed the Complaint with leave to amend. The Court gave Plaintiff 30 days to file an amended complaint that cured the deficiencies identified in the Order and warned Plaintiff that his case would be dismissed without further notice if he failed to timely file an amended complaint.

In a November 30, 2015 Order, the Court noted that Plaintiff had failed to comply with the October 21, 2015 Order and dismissed the action. The Clerk of Court entered Judgment that same day.

On December 2, 2015, Plaintiff filed a Motion for Request for Complete Change of Venue with Housing Relocation and a Protective Order. In a December 29, 2015 Order, the Court vacated the November 30 Judgment, denied Plaintiff's requests for a transfer and a protective order, and granted his request for an extension of time to file a First Amended Complaint.

On January 21, 2016, Plaintiff filed a First Amended Complaint. On February 4, 2016, Plaintiff filed a second "First Amended Complaint" (Doc. 21). The Court **[*3]** will screen the February 4, 2016 First Amended Complaint and will dismiss it with leave to amend.[1]

Also pending before the Court are Plaintiff's Motion for Disclosure/Motion for Protective Order (Doc. 17), "Motion of Notice to Denied Legal Services" (Doc. 19); and "Motion to Dismiss Criminal Case for Lack of Subject Matter Jurisdiction, Improper Venue and Statute of Limitations" (Doc. 20). The Court will deny these Motions.

I. Statutory Screening of Prisoner Complaints

The Court is required to screen complaints brought by prisoners seeking relief against a governmental entity or an officer or an employee of a governmental entity. *28 U.S.C. § 1915A(a)*. The Court must dismiss a complaint or portion thereof if a plaintiff has raised claims that are legally frivolous or malicious, that fail to state a claim upon which relief may be granted, or that seek monetary relief from a defendant who is immune from such relief. *28 U.S.C. § 1915A(b)(1)-(2)*.

A pleading must contain a "short and plain statement of the claim *showing* that the pleader is entitled to relief." *Fed. R. Civ. P. 8(a)(2)* (emphasis added). While *Rule 8* does not demand detailed factual allegations, "it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. "Threadbare recitals of **[*4]** the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.*

"[A] complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. A claim is plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "Determining whether a complaint states a plausible claim for relief [is] . . . a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id. at 679*. Thus, although a plaintiff's specific factual allegations may be consistent with a constitutional claim, a court must assess whether there are other "more likely explanations" for a defendant's conduct. *Id. at 681*.

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[1] An amended complaint supersedes previously filed complaints. ***Ferdik v. Bonzelet, 963 F.2d 1258, 1262 (9th Cir. 1992)***; *Hal Roach Studios v. Richard Feiner & Co., 896 F.2d 1542, 1546 (9th Cir. 1990)*. Accordingly, Plaintiff's February 4, 2016 First Amended Complaint supersedes the January 21, 2016 "First Amended Complaint," and the Court will treat the February 4, 2016 document as the operative pleading.

But as the United States Court of Appeals for the Ninth Circuit has instructed, courts must "continue to construe *pro se* filings liberally." *Hebbe v. Pliler, 627 F.3d 338, 342 (9th Cir. 2010)*. A "complaint [filed by a pro se prisoner] 'must be held to less stringent standards than formal pleadings drafted by lawyers.'" *Id.* (quoting *Erickson v. Pardus, 551 U.S. 89, 94, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007)* (per curiam)).

If the Court determines that a pleading could be cured by the allegation of other **[*5]** facts, a pro se litigant is entitled to an opportunity to amend a complaint before dismissal of the action. *See Lopez v. Smith, 203 F.3d 1122, 1127-29 (9th Cir. 2000)* (en banc). Plaintiff's First Amended Complaint will be dismissed for failure to state a claim, but because it may possibly be amended to state a claim, the Court will dismiss it with leave to amend.

II. February 4, 2016 First Amended Complaint

Plaintiff names the following Defendants in the February 4, 2016 First Amended Complaint: Narcotics Detective Brian McCloskey; Pinal County Jail Paralegal Loretta Valdez; Pinal County Sheriff's Office (PCSO) Commander Terry Johnson; Commander Cathy Vangordon; Detention Officer Leider; Detectives Ramon Salinas and Brian Ramirez; Probation Officer Nancy Rivera; Prosecutor Jill Sosin; County Attorney Lando Voyles; Pinal County Sheriff Paul Babeu; Lieutenant Gilberto Hoyos; Commander Terry Johnson; Sergeant Street; Lieutenant Scott Arnold; County Public Defender James Mannatto; Attorney James Soslowsky; Attorney Tina Talkington; Paralegal Peter Gambino; Paralegal Patricia Armamant; Sergeant E. Delgado; Prosecutor Jason Johannes; Prosecutor Kathryn Pierce; PCSO Sergeant Tanya Delgado; Judge Dwight Callahan; "Public Snitches" Matthew Daniel **[*6]** Garcia and Lisa Garcia; Former Police Officer Dallin Gonzalez; Deputy Sheriff Steve Henry; and Administrative Director Tim Gaffnay.

Plaintiff raises 18 claims for relief and states that he wants "to amend under [the] Racketeering Influenced Corruption Organization Act." (Doc. 21 at 1.)

In Count One, Plaintiff claims his civil rights and rights under the Racketeer Influenced and Corrupt Organizations Act (RICO) were violated when, while arresting Plaintiff, Defendant McClosky threatened Plaintiff with "a fatal accident" if Plaintiff did not dismiss his civil cases against Defendants Salinas and Brown. Plaintiff claims Defendants Valenzuela and Hoyos similarly threatened him. Plaintiff alleges that on November 22, 2015, he was shot in the back of the head by Defendant Street "while already on the ground." (*Id.* at 4.)

In Count Two, Plaintiff alleges his *Eighth Amendment* rights were violated when Defendant Valdez and other PCSO staff members "wrote him up" for "disrespecting staff." (*Id.* at 5.) Plaintiff claims this was in retaliation for Plaintiff filing lawsuits. Plaintiff further claims Defendants Tanya Delgado and E. Delgado threatened him if "he does not stop." (*Id.*)

In Count Three, Plaintiff claims his *First Amendment* rights are **[*7]** violated because Defendant Valdez "continues to deny [him] legal services." (*Id.* at 6.) Plaintiff claims he brought the issue to Defendants Johnson, Vangordon, and Henry, "but they did not help."

In Count Four, Plaintiff alleges his *Fourteenth Amendment* rights were violated when, on January 19, 2016, his state criminal trial was postponed for a psychological evaluation.

In Count Five, Plaintiff claims his *Eighth Amendments* are violated because Defendants Johnson, Vangordon, Arnold, Hoos, and Valdez are embezzling or misappropriating inmate and public funds by "charging 100% on any debt owed to the Pinal County Jail." (*Id.* at 8.) Plaintiff claims this violates antitrust laws and RICO.

In Count Six, Plaintiff alleges his *Fourteenth Amendment* rights are violated because Defendant Babeu is violating RICO and "is showing extreme discrimination upon [Plaintiff] as well as county attorney Lando Voyles and Jill Sosin." Plaintiff further claims that "for this particular reason Loretta Valdez does not want to send out [his] civil amended complaints." (*Id.* at 9.)

In Count Seven, Plaintiff claims his *Fourteenth Amendment* rights are violated because Pinal County Sheriff's Office is a corrupt organization. Plaintiff further claims that after Plaintiff informed Defendants he was filing RICO charges **[*8]** against them, Defendant Georgini,, "out of retaliation" ordered a psychological evaluation of Plaintiff and delayed Plaintiff's trial. (*Id.* at 10.)

In Count Eight, Plaintiff alleges his *Fourteenth Amendment* rights were violated when Defendant Georgini did not remove Plaintiff's public defender from Plaintiff's case.

In Count Nine, Plaintiff claims that on December 4, 2015, he returned from court and Defendant Valenzuela told Plaintiff that he would kill Plaintiff if Plaintiff did not drop his lawsuits. Plaintiff further states that on November 22, 2015, an "ERT" crew came into his unit, yelled for everyone to get on the floor, and, while Plaintiff was on the floor, shot Plaintiff with a 12-gauge shotgun in the back of the head with a "less than lethal round." (*Id.* at 12.)

In Count Ten, Plaintiff alleges his civil rights and RICO were violated when Defendants McCloskey, Ramirez, and Salinas "committed an overt act of kidnapping by illegally without consent having imprisoned a 75 year old woman in her room by having pushed her wheelchair into the bedroom while they illegally conducted [their] search at the residence of . . . ., where Defendant probation officer Nancy Rivera also participated in the search." (*Id.* at 13.) Plaintiff alleges **[*9]** Defendants McCloskey, Ramirez, and Salinas "instigated those criminal activities and under RICO [he] can bring a case upon [Defendant Prosecutors]." (*Id.*)

In Count Eleven, Plaintiff claims that on January 29, 2016, Defendant Valdez refused to send out "the amended civil complaint [Plaintiff] has been attempting to send out." (*Id.* at 14.)

In Count Twelve, Plaintiff alleges his "equal clause right to protection of personal safety" was violated and he states that he will not "forfeit" his civil suits. (*Id.* at 15.)

In Count Thirteen, Plaintiff claims that on January 21, 2016, his "fast and speedy trial due date was up but court appointed public defender Joshua Wallace . . . told Joseph R. Georgini to order a psychological evaluation be done." (*Id.* at 16.) Plaintiff claims his due process and *Sixth Amendment* rights are being violated.

In Count Fourteen, Plaintiff alleges he was harassed in violation of "the 1992 civil rights act and federal ***antitrust law***." (*Id.* at 17.) Plaintiff claims that on September 24, 2015, Defendant Street shot him in the back of the head with a less than lethal round from a 12-gauge shotgun. Plaintiff further claims Defendant E. Delgado told several inmates that "if the activist does not stop he is going to get his! **[*10]** Now that is clearly organized harassment through organized violent measures since I didn't get shot and threatened to forfeit civil complaints." (*Id.* at 17.)

In Count Fifteen, Plaintiff claims money was wrongfully taken from his inmate account. Plaintiff claims Defendant Vangordon told him that he is "being sanctioned for fighting and medical bills." (*Id.* at 18.) Plaintiff contends generally that Defendants Valenzuela, Voyles, and Babeu mishandle county and public funds.

In Count Sixteen, Plaintiff claims Defendant Georgini allows Defendant Sosin to extend Plaintiff's incarceration, in violation of his due process rights, "due to politically motivated reasons." (*Id.* at 19.)

In Count Seventeen, Plaintiff alleges Defendant Georgini "has been ignoring to grant [him] change of counsel and Joshua Wallace is working with the state and against [him], he has not answered any of [Plaintiff's] letters." (*Id.* at 20.)

In Count Eighteen, Plaintiff claims he was accused of killing Defendant Matthew Daniel Garcia. Plaintiff further claims Defendant Wallace tried to make him sign a plea bargain, Plaintiff fired him three times, but "he is like a bad habit hard to get rid of." (*Id.* at 21.) Plaintiff claims he was incarcerated until he was forced **[*11]** to enter a plea bargain.

Plaintiff seeks criminal prosecution of Defendants and $45 million in monetary damages.

III. Failure to State a Claim

A. RICO

Plaintiff has failed to state a claim under RICO, *18 U.S.C. §§ 1961-1968*. In a civil action brought under RICO, the plaintiff must allege sufficient facts to establish a "pattern of racketeering activity," which must include at least two "predicate acts," a criminal enterprise in which the defendants participated, and a causal relationship between the predicate acts and the harm suffered by the plaintiff. *18 U.S.C. §§ 1961-68*, *2314* and *2315*; *Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496-97, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985)*; *River City Markets, Inc. v. Fleming Foods West, Inc., 960 F.2d 1458, 1464 (9th Cir. 1992)*. "Racketeering activity" means "any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical," acts indictable under specified federal statutes, and certain offenses involving fraud. *18 U.S.C. § 1961(1)*. Claims that defendants conspired to violate an individual's civil rights do not fall within the statutory definition of "racketeering activity." *Bowen v. Oistead, 125 F.3d 800, 806 (9th Cir. 1997)* (citing *Sun Savings & Loan Assn. v. Dierdorff, 825 F.2d 187, 191 (9th Cir. 1987))*. Finally, to allege a RICO claim, a plaintiff must also allege an impact on interstate commerce or an injury to his business or property. *Sedima, 473 U.S. at 495-96*.

Plaintiff alleges violations of his civil rights; this does **[*12]** not constitute racketeering activity. Further, Plaintiff's claims demonstrate no impact on interstate commerce. Plaintiff's First Amended Complaint is therefore not properly brought under RICO. Similarly, Plaintiff's claims in Counts One and Five, which are based solely on alleged violations of RICO, fail to state a claim.

B. Claims Related to Plaintiff's Criminal Trial: Counts Four, Seven, Eight, Ten, Thirteen, Sixteen, Seventeen, and Eighteen

Even if the Court construes Plaintiff's First Amended Complaint as brought pursuant to *42 U.S.C. § 1983* (the appropriate statute under which to raise claims for violations of individual civil rights), Plaintiff fails to state a claim for relief.

In Counts Four, Seven, Eight, Ten, Thirteen, Sixteen, Seventeen, and Eighteen, Plaintiff raises multiple claims related to his ongoing criminal trial in state court. As the Court explained in its original screening Order, the trial judge and prosecutors are immune from suit under *§ 1983* for their role in prosecution of criminal cases. *See Buckley v. Fitzsimmons, 509 U.S. 259, 270, 113 S. Ct. 2606, 125 L. Ed. 2d 209 (1993)* (Prosecutors are absolutely immune from liability under *§ 1983* for their conduct in "initiating a prosecution and in presenting the State's case" insofar as that conduct is "intimately associated **[*13]** with the judicial phase of the criminal process."); *Stump v. Sparkman, 435 U.S. 349, 356-357, 98 S. Ct. 1099, 55 L. Ed. 2d 331 (1978)* (Judges are absolutely immune from *§ 1983* suits for damages for their judicial acts except when they are taken "in the clear absence of all jurisdiction.").

Moreover, Plaintiff's claims challenge the validity of his arrest and ongoing criminal proceedings. The abstention doctrine set forth in *Younger v. Harris, 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971)*, prevents a federal court in most circumstances from directly interfering with ongoing criminal proceedings in state court. The *Younger* doctrine espouses a "strong federal policy against federal-court interference with pending state judicial proceedings, absent extraordinary circumstances." *Middlesex County Ethics Comm. v. Garden State Bar Association, 457 U.S. 423, 431, 102 S. Ct. 2515, 73 L. Ed. 2d 116 (1982)*. "The policy rests on notions of comity and respect for state functions and was born of the concern that federal court injunctions might unduly hamper state criminal prosecutions." *Champion Int'l Corp. v. Brown, 731 F.2d 1406, 1408 (9th Cir. 1984)* (citing *Younger, 401 U.S. at 44*).

In deciding whether *Younger* abstention applies, the Ninth Circuit applies the three-pronged test outlined by the Supreme Court in *Middlesex:* (1) the state proceedings are ongoing, (2) the proceedings implicate important state interests, and (3) the state proceedings provide an adequate opportunity to raise federal questions. *Fresh Int'l Corp. v. Agric. Labor Relations Bd., 805 F.2d 1353, 1357-58 (9th Cir. 1986)* (citing *Middlesex, 457 U.S. at 432*).

In this case, each of the three requirements **[*14]** are met: Plaintiff's criminal proceedings are ongoing; the proceedings implicate important state interests in the prosecution of criminal activity; and Plaintiff has ample opportunity in his state criminal proceedings to challenge alleged police misconduct, the sufficiency of the evidence against him, and the alleged illegal search of his home. Accordingly, abstention in this case is appropriate and the Court will dismiss Counts Four, Seven, Eight, Ten, Thirteen, Sixteen, Seventeen, and Eighteen, without prejudice. *See* *Beltran v. California, 871 F.2d 777, 782 (9th Cir. 1989)* (*Younger* abstention requires dismissal of the federal action).

C. Retaliation: Counts Two and Nine

A viable claim of *First Amendment* retaliation contains five basic elements: (1) an assertion that a state actor took some adverse action against an inmate (2) because of (3) that prisoner's protected conduct, and that such action (4) chilled the inmate's exercise of his *First Amendment* rights (or that the inmate suffered more than minimal harm) and (5) did not reasonably advance a legitimate correctional goal. *Rhodes v. Robinson, 408 F.3d 559, 567-68 (9th Cir. 2005)*; *see also* *Hines v. Gomez, 108 F.3d 265, 267 (9th Cir. 1997)* (retaliation claims require an inmate to show (1) that the prison official acted in retaliation for the exercise of a constitutionally protected right, and (2) that the action "advanced **[*15]** no legitimate penological interest"). The plaintiff has the burden of demonstrating that his exercise of his *First Amendment* rights was a substantial or motivating factor behind the defendants' conduct. *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977)*; *Soranno's Gasco, Inc. v. Morgan, 874 F.2d 1310, 1314 (9th Cir. 1989)*.

Although pro se pleadings are liberally construed, *Haines v. Kerner, 404 U.S. 519, 520-21, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972)*, conclusory and vague allegations will not support a cause of action. *Ivey v. Bd. of Regents of the Univ. of Alaska, 673 F.2d 266, 268 (9th Cir. 1982)*. Further, a liberal interpretation of a civil rights complaint may not supply essential elements of the claim that were not initially pled. *Id.*

In Count Two, Plaintiff claims that Defendant Valdez "wrote him up" for disrespecting staff after she saw that Plaintiff had filed lawsuits against jail staff and that Defendants Tanya Delgado and E. Delgado told him if he does not stop, "he will get his." Plaintiff does not state what sanctions, if any, he received as a result of the writeup, nor does he allege that Defendants T. Delgado and E. Delgado did more than verbally threaten him. "'Verbal harassment or abuse . . . is not sufficient to state a constitutional deprivation under *42 U.S.C. ' 1983*.'" *Oltarzewski v. Ruggiero, 830 F.2d 136, 139 (9th Cir. 1987)* (quoting *Collins v. Cundy, 603 F.2d 825 (10th Cir. 1979))*; *see also*, *McFadden v. Lucas, 713 F.2d 143, 146 (5th Cir. 1983)* (mere threatening language and gestures do not, even if true, amount to constitutional violations); *Johnson v. Glick, 481 F.2d 1028, 1033 n.7 (2d Cir. 1973)* (the use of words, no matter how violent, does not comprise **[*16]** a *§ 1983* violation). Accordingly, Plaintiff has not demonstrated that he suffered more than minimal harm.

In Count Nine, Plaintiff claims that on December 4, 2015, he returned from court and Defendant Valenzuela told Plaintiff that he would kill Plaintiff if Plaintiff did not drop his lawsuits. Plaintiff further states that on November 22, 2015, an "ERT" crew came into his unit, yelled for everyone to get on the floor, and, while Plaintiff was on the floor, shot Plaintiff with a 12-gauge shotgun in the back of the head with a "less than lethal round." Plaintiff has not demonstrated that the incident with the shotgun was in retaliation for his filing lawsuits because the incident occurred *before* his encounter with Defendant Valenzuela. To the extent Plaintiff claims Defendant Valenzuela verbally threatened him, he has not demonstrated that he suffered more than minimal harm, as required to state a claim for retaliation.

Plaintiff has therefore failed to state a claim in Counts Two and Nine of the First Amended Complaint.

D. Access to Courts: Counts Three and Eleven

In Count Three, Plaintiff claims Defendant Valdez denied him legal services and that he complained to Defendants Johnson, Vangordon, **[*17]** and Henry, but they did nothing to help. In Count Eleven, Plaintiff claims Defendant Valdez refused to send his amended civil complaint.

The right of meaningful access to the courts prohibits officials from actively interfering with inmates' attempts to prepare or file legal documents. *Lewis v. Casey, 518 U.S. 343, 350, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996)*. The right of access to the courts is only a right to bring petitions or complaints to federal court and not a right to discover such claims or even to litigate them effectively once filed with a court. *Id. at 354*. The right "guarantees no particular methodology but rather the conferral of a capability-the capability of bringing contemplated challenges to sentences or conditions of confinement before the courts." *Id. at 356*.

As a matter of standing, for an access-to-courts claim, a plaintiff must show that he suffered an "actual injury" with respect to contemplated litigation. *Id. at 349*. To show actual injury with respect to contemplated litigation, the plaintiff must demonstrate that the defendants' conduct frustrated or impeded him from bringing to court a nonfrivolous claim that he wished to present. *Id. at 352-53*.

. . . .

Plaintiff's allegations in Count Three are too vague to state a claim. Plaintiff does not describe what legal service Defendant **[*18]** Valdez denied him, nor does he allege that the denial resulted in an actual injury.

In Count Eleven, Plaintiff claims that on January 29, 2016, Defendant Valdez refused to send his amended civil complaint. The Court notes Plaintiff's First Amended Complaint is signed January 27, 2016, two days *before* the alleged refusal to send the amended complaint. Moreover, the only case Plaintiff presently has pending in this Court is the present case. The Court received a "First Amended Complaint" from Plaintiff on January 21, 2016, and a second "First Amended Complaint" on February 4, 2016. Accordingly, Plaintiff's claim that Defendant Valdez refused to mail his amended complaints appear to be incorrect. Plaintiff has failed to state a claim in Counts Three and Eleven.

E. Equal Protection and Discrimination: Counts Six and Twelve

In Count Six, Plaintiff alleges his *Fourteenth Amendment* rights are violated because Defendant Babeu is violating RICO and "is showing extreme discrimination upon [Plaintiff] as well as county attorney Lando Voyles and Jill Sosin, Terry Johnson, Cathy Vangordon mainly paralegal Loretta Valdez." Plaintiff further claims that "for this particular reason Loretta Valdez does not want to send out **[*19]** [his] civil amended complaints."

Plaintiff characterizes Count Twelve as an "equal clause right" claim and states that he will not "forfeit" his civil rights suits.

Plaintiff's allegations in both Counts Six and Twelve are too vague to state a claim. Generally, "[t]o state a claim . . . for a violation of the *Equal Protection Clause* . . . [,] a plaintiff must show that the defendants acted with an intent or purpose to discriminate against the plaintiff based upon membership in a protected class." *Barren v. Harrington, 152 F.3d 1193, 1194 (9th Cir. 1998)*. Plaintiff has not alleged he is a member of a protected class, nor has he alleged that any Defendant acted with the intent or purpose to discriminate against him based upon his membership in a protected class. Plaintiff has therefore failed to state a claim in Counts Six and Twelve of the First Amended Complaint.

F. Count Fourteen

In Count Fourteen, Plaintiff claims that on September 24, 2015, Defendant Street shot Plaintiff in the back of the head with a "less than lethal round" from a 12-gauge shotgun. In other portions of this Complaint, Plaintiff describes the same incident but states it occurred on November 22, 2015. Plaintiff further alleges that he was "roughed up" by Defendant Johnson and that Defendant E. **[*20]** Delgado threatened him.

The *Fourteenth Amendment's Due Process Clause*, and not the *Eighth Amendment*, applies to the use of excessive force against pretrial detainees that amounts to punishment. *Kingsley v. Hendrickson, U.S. , , 135 S. Ct. 2466, 2473 192 L. Ed. 2d 416 (2015)*; *Gibson v. County of Washoe, 290 F.3d 1175, 1197 (9th Cir. 2002)*. Force is excessive if the officers' use of force was "objectively unreasonable" in light of the facts and circumstances confronting them, without regard to their mental state. *Kingsley, 135 S. Ct. at 2472-73*; *see also* *Graham v. Connor, 490 U.S. 386, 397, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989)* (applying an objectively unreasonable standard to a *Fourth Amendment* excessive force claim arising during an investigatory stop). In determining whether the use of force was reasonable, the Court should consider factors including, but not limited to

> the relationship between the need for the use of force and the amount of force used; the extent of the plaintiff's injury; any effort made by the officer to temper or to limit the amount of force; the severity of the security problem at issue; the threat reasonably perceived by the officer; and whether the plaintiff was actively resisting.

Kingsley, 135 S. Ct. at 2473.

Because officers are often forced to make split-second decisions in rapidly evolving situations, the reasonableness of a particular use of force must be made "from the perspective of a reasonable officer on the scene, including what the officer knew at the time, not with the 20/20 vision of hindsight." **[*21]** *Id. at 2473-74* (citing *Graham, 490 U.S. at 396*). Further, "[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers," violates the Constitution. *Graham, 490 U.S. at 396* (citation omitted).

Plaintiff's claims in Count Fourteen are too vague to state a claim. Plaintiff provides no details regarding the circumstances of the shotgun incident and it is therefore impossible to determine whether the use of force was "objectively unreasonable." Further, Plaintiff does not describe the nature or severity of his injuries. Plaintiff has failed to state a claim in Count Fourteen.

G. Count Fifteen

In Count Fifteen, Plaintiff appears to claim that his *Eighth Amendment* rights are violated because money is being wrongfully taken from his account. Plaintiff appears to claim that he was charged multiple times for "destruction of county property" for a plastic bracelet. Plaintiff states that "at one time I broke it used to cost $5.00 but Paul Babeu keeps taking away all of the money that gets sent to me." (Doc. 21 at 18.) Plaintiff further states that Defendant Vangordon told him that he is being financially sanctioned for fighting and is being charged for medical care.

A pretrial detainee's claim for unconstitutional conditions of confinement **[*22]** arises from the *Fourteenth Amendment Due Process Clause* rather than from the *Eighth Amendment* prohibition against cruel and unusual punishment. *Bell v. Wolfish, 441 U.S. 520, 535, 99 S. Ct. 1861, 60 L. Ed. 2d 447 and n.16 (1979)*. Nevertheless, the same standards are applied. *See* *Frost v. Agnos, 152 F.3d 1124, 1128 (9th Cir. 1998)*.

To state an *Eighth* or *Fourteenth Amendment* claim, plaintiffs must meet a two-part test. "First, the alleged constitutional deprivation must be, objectively, sufficiently serious" such that the "official's act or omission must result in the denial of the minimal civilized measure of life's necessities." *Farmer v. Brennan, 511 U.S. 825, 834, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994)* (internal quotations omitted). Second, the prison official must have a "sufficiently culpable state of mind," i.e., he must act with "deliberate indifference to inmate health or safety." *Id.* (internal quotations omitted). Deliberate indifference is a higher standard than negligence or lack of ordinary due care for the prisoner's safety. *Id at 835*. In defining "deliberate indifference" in this context, the Supreme Court has imposed a subjective test: "the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, *and* he must also draw the inference." *Id. at 837* (emphasis added).

Plaintiff has not alleged how the withdrawal of funds from his account has resulted in a substantial risk of serious harm to his health or safety, nor **[*23]** has he alleged facts showing that the withdrawals were not the result of negligence or administrative errors. Accordingly, Plaintiff has failed to state an *Eighth* or *Fourteenth Amendment* claim in Count Fifteen.

IV. Leave to Amend

For the foregoing reasons, Plaintiff's First Amended Complaint will be dismissed for failure to state a claim upon which relief may be granted. Within 30 days, Plaintiff may submit a second amended complaint to cure the deficiencies outlined above. The Clerk of Court will mail Plaintiff a court-approved form to use for filing a second amended complaint. If Plaintiff fails to use the court-approved form, the Court may strike the second amended complaint and dismiss this action without further notice to Plaintiff.

Plaintiff must clearly designate on the face of the document that it is the "Second Amended Complaint." The second amended complaint must be retyped or rewritten in its entirety on the court-approved form and may not incorporate any part of the original Complaint or First Amended Complaint by reference. Plaintiff may include only one claim per count.

For each count, Plaintiff must write short, plain statements telling the Court: (1) the constitutional right Plaintiff believes was **[*24]** violated; (2) the name of the Defendant who violated the right; (3) exactly what that Defendant did or failed to do; (4) how the action or inaction of that Defendant is connected to the violation of Plaintiff's constitutional right; and (5) what specific injury Plaintiff suffered because of that Defendant's conduct. *See* *Rizzo v. Goode, 423 U.S. 362, 371-72, 377, 96 S. Ct. 598, 46 L. Ed. 2d 561 (1976)*.

Plaintiff must repeat this process for each person he names as a Defendant. If Plaintiff fails to affirmatively link the conduct of each named Defendant with the specific injury suffered by Plaintiff, the allegations against that Defendant will be dismissed for failure to state a claim. **Conclusory allegations that a Defendant or group of Defendants has violated a constitutional right are not acceptable and will be dismissed**.

A second amended complaint supersedes the original Complaint and First Amended Complaint. *Ferdik v. Bonzelet, 963 F.2d 1258, 1262 (9th Cir. 1992)*; *Hal Roach Studios v. Richard Feiner & Co., 896 F.2d 1542, 1546 (9th Cir. 1990)*. After amendment, the Court will treat the original Complaint and First Amended Complaint as nonexistent. *Ferdik, 963 F.2d at 1262*. Any cause of action that was raised in the original complaint or first amended complaint and that was voluntarily dismissed or was dismissed without prejudice is waived if it is not alleged in a second amended complaint. *Lacey v. Maricopa County, 693 F.3d 896, 928 (9th Cir. 2012)* (en banc).

V. Motions

A. Motion [*25] for Disclosure/Protective Order

In his Motion for Disclosure/Protective Order, Plaintiff seeks an order requiring "Defendants Salinas, Ramirez, Sosin, and Georgini to stop harassment and to step down from pending case." As the Court explained in its earlier discussion of Plaintiff's trial-related claims, the Court will not intervene in Plaintiff's ongoing criminal trial. The Court will deny this portion of the Motion.

Plaintiff further seeks disclosure of various documents and other items of evidence. Because the Court will dismiss the First Amended Complaint, and Defendants have not been served, the Court will deny as moot this portion of the Motion. If Plaintiff files a second amended complaint and the Court determines service is appropriate, the Court will issue a formal scheduling order setting the time for the parties to conduct discovery.

B. "Motion of Notice to Denied Legal Services"

In his "Motion of Notice to Denied Legal Services," Plaintiff reiterates his claims regarding Defendant Valdez and the alleged denial of access to the courts. Plaintiff also states that he unable to make copies of his filings. To the extent that Plaintiff is attempting to raise additional claims regarding **[*26]** denial of access to the courts, a Motion is not the proper method for doing so. Plaintiff must raise new claims for relief in a second amended complaint.

With respect to his complaints regarding photocopies, Plaintiff should note that the District Court does not require that copies of the documents filed in a civil case be photocopied. Handwritten copies of filed documents are acceptable. Therefore, Plaintiff's access to this Court is not dependent on Defendants' provision of photocopies. *See* *Sands v. Lewis, 886 F.2d 1166, 1169 (9th Cir. 1989)* (rejecting any constitutional right to free and unlimited photocopying) (citing *Jones v. Franken, 697 F.2d 801, 803 (7th Cir. 1983)* ("[B]road as the constitutional concept of liberty is, it does not include the right to xerox.")).

The Court will therefore deny Plaintiff's "Motion of Notice to Denied Legal Services."

C. Motion to Dismiss Criminal Case

Plaintiff requests that the Court dismiss his ongoing state criminal case. First, this Court lacks jurisdiction to dismiss state criminal charges against Plaintiff. Furthermore, for the reasons discussed earlier in this Order, this Court will not intervene in Plaintiff's ongoing state criminal proceedings. The Court will deny the Motion to Dismiss.

VI. Warnings

A. Address Changes

Plaintiff must file and **[*27]** serve a notice of a change of address in accordance with *Rule 83.3(d) of the Local Rules* of Civil Procedure. Plaintiff must not include a motion for other relief with a notice of change of address. Failure to comply may result in dismissal of this action.

B. Copies

Plaintiff must submit an additional copy of every filing for use by the Court. *See* *LRCiv 5.4*. Failure to comply may result in the filing being stricken without further notice to Plaintiff.

C. Possible "Strike"

Because the First Amended Complaint has been dismissed for failure to state a claim, if Plaintiff fails to file a second amended complaint correcting the deficiencies identified in this Order, the dismissal may count as a "strike" under the "3-strikes" provision of *28 U.S.C. § 1915(g)*. Under the 3-strikes provision, a prisoner may not bring a civil action or appeal a civil judgment in forma pauperis under *28 U.S.C. § 1915* "if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury." *28 U.S.C. § 1915(g)*.

D. Possible Dismissal [*28]

If Plaintiff fails to timely comply with every provision of this Order, including these warnings, the Court may dismiss this action without further notice. *See Ferdik, 963 F.2d at 1260-61* (a district court may dismiss an action for failure to comply with any order of the Court).

IT IS ORDERED:

(1) The First Amended Complaint (Doc. 21) is **dismissed** for failure to state a claim. Plaintiff has **30 days** from the date this Order is filed to file a second amended complaint in compliance with this Order.

(2) If Plaintiff fails to file a second amended complaint within 30 days, the Clerk of Court must, without further notice, enter a judgment of dismissal of this action with prejudice that states that the dismissal may count as a "strike" under *28 U.S.C. § 1915(g)*.

(3) Plaintiff's January 11, 2016 "Motion for Disclosure/Motion for Protective Order" (Doc. 17) is **denied**.

(4) Plaintiff's "Motion of Notice to Denied Legal Services" (Doc. 19) is **denied**.

(5) Plaintiff's February 4, 2016 Motion to Dismiss Criminal Case (Doc. 20) is **denied**.

(6) The Clerk of Court must mail Plaintiff a court-approved form for filing a civil rights complaint by a prisoner.

Dated this 11th day of February, 2016.

/s/ Steven P. Logan

Honorable Steven P. Logan

United States District **[*29]** Judge

End of Document

United States v. Blavatnik

United States District Court for the District of Columbia

February 12, 2016, Decided

Civil Action No. 15-1631 (RDM)

Reporter

168 F. Supp. 3d 36 *; 2016 U.S. Dist. LEXIS 17467 **; 2016-1 Trade Reg. Rep. (CCH) P79,497

UNITED STATES OF AMERICA, Plaintiff, v. LEN BLAVATNIK, Defendant.

Core Terms

settlements, consent judgment, antitrust, civil penalty, HSR Act, monetary, consent decree, anti trust law, decrees, equitable relief, violations, parties, Clayton Act, injunctive, cases, final judgment, courts, injunctive relief, monetary penalty, monetary relief, notification, judgments, restrain, terms, entry of judgment, injunctive decree, proposed judgment, public interest, district court, ratification

LexisNexis® Headnotes

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Antitrust Procedures & Penalties Act

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

HN1[] **Settlements, Antitrust Procedures & Penalties Act**

The *Tunney Act* applies to any proposal for a consent judgment submitted by the United States for entry in any civil proceeding brought by or on behalf of the United States under the antitrust laws. *15 U.S.C.S. § 16(b)*. First, the Act provides for disclosure of certain information pertaining to the settlement and for an opportunity for public comment. It requires that the government file a proposed consent judgment with the district court and publish it in the Federal Register at least 60 days prior to the effective date of such judgment; that any written comments and responses to them also be filed and published within 60 days; that materials considered determinative in formulating the proposed judgment be made publicly available; that the government, unless otherwise instructed by the court, file with the court and publish in the Federal Register a competitive impact statement reciting various information about the proposal; and that a summary of the proposal and the competitive impact statement be published in specified newspapers, *§ 16(c)*.

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Antitrust Procedures & Penalties Act

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

HN2[] Settlements, Antitrust Procedures & Penalties Act

The *Tunney Act* requires a defendant in a proposed consent judgment under the antitrust laws to disclose to the court any lobbying contacts with the government—that is, any and all written or oral communications by or on behalf of such defendant with any officer or employee of the United States concerning or relevant to such proposal. *15 U.S.C.S. § 16(g)*. In addition, it requires that the Attorney General receive and consider any written comments and, at the close of a 60-day period, publish a response to them. *§ 16(d)*. Finally, the court must ultimately determine that the entry of such judgment is in the public interest before entering the proposed consent judgment, and the *Tunney Act* provides procedures for making that determination. *§ 16(e)-(f)*.

Mergers & Acquisitions Law > Antitrust > Premerger Notifications

HN3[] Antitrust, Premerger Notifications

The Hart-Scott-Rodino Act (HSR Act) requires notification to the Department of Justice and the Federal Trade Commission (FTC) and observation of a waiting period before a person completes certain acquisitions of voting securities or assets. *15 U.S.C.S. § 18a(a)*. The HSR Act also exempts an array of transactions, including the acquisition of voting securities solely for the purpose of investment. *§ 18a(c)(9)*. This premerger notification requirement facilitates the agencies' ability to detect and prevent antitrust violations before they occur. Violations of the HSR Act are punishable by a civil penalty of not more than $16,000 per day. *§ 18a(g)(1)*; *Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, § 31001(s), 110 Stat. 1321, 1321-373*; *16 C.F.R. § 1.98(a)*. Violations of the notification requirement are also subject to such other equitable relief as the court in its discretion determines necessary or appropriate. *§ 18a(g)(2)(C)*.

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Antitrust Procedures & Penalties Act

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

HN4[] Settlements, Antitrust Procedures & Penalties Act

The *Tunney Act* applies to any proposal for a consent judgment submitted by the United States for entry in any civil proceeding brought by or on behalf of the United States under the antitrust laws. *15 U.S.C.S. § 16(b)*.

Governments > Legislation > Interpretation

HN5[] Legislation, Interpretation

Courts, of course, have a duty to construe statutes, not isolated provisions.

Governments > Legislation > Interpretation

HN6[] Legislation, Interpretation

Under the ratification doctrine, Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change. This rule applies when Congress re-enacts a provision in the face of a consensus as to its interpretation so broad and unquestioned that the court must presume Congress knew of and endorsed it.

Counsel: [1]** For United States of America, Plaintiff: Daniel Edward Haar, LEAD ATTORNEY, U.S. DEPARTMENT OF JUSTICE, Washington, DC USA; Kenneth A. Libby, FEDERAL TRADE COMMISSION, Bureau Of Competition, Compliance, Washington, DC USA.

For Len Blavatnik, Defendant: Daniel M. Abuhoff, PRO HAC VICE, DEBEVOISE & PLIMPTON LLP, New York, NY USA.

Judges: RANDOLPH D. MOSS, United States District Judge.

Opinion by: RANDOLPH D. MOSS

Opinion

[*37] **MEMORANDUM OPINION AND ORDER**

This matter is before the Court on the Government's Motion for Entry of Final Judgment. Dkt. 1-4. The United States and Defendant Len Blavatnik have stipulated to entry of a Final Judgment providing for the payment of a civil penalty of $656,000 by Defendant pursuant to *Section 7A(g)(1) of the Clayton Act*, *15 U.S.C. § 18a(g)(1)*, the premerger notification provision of the *Hart-Scott-Rodino Antitrust Improvements Act of 1976* ("HSR Act"). Dkts. 1-2, 1-3. In its motion, the Government asserts that the procedures for reviewing proposed consent judgments under the *Antitrust Procedures and Penalties Act of 1974* ("APPA"), also known as the *Tunney Act*, *15 U.S.C. § 16(b)-(h)*, do not apply to this case because the proposed consent judgment seeks only monetary penalties, rather than injunctive relief. Dkt. 1-4 at 3. On October 19, 2015, the **[**2]** Court ordered supplemental briefing regarding whether the *Tunney Act* is indeed inapplicable, Dkt. 2, as the Government's motion included only a single paragraph on the matter, Dkt. 1-4 at 3, and no case law addresses the issue in any depth. In light of the apparent agreement of the Government and Defendant that the *Tunney Act* is inapplicable, the Court's October 19, 2015 Order invited interested *amici*, if any, to file briefs addressing the matter. Dkt. 2 at 3. The Government filed a supplemental brief further elucidating its position on November 20, 2015, Dkt. 3, with which Defendant Blavatnik summarily concurred, Dkt. 4. No *amicus* briefs were filed. The Court heard oral argument on the issue on February 3, 2016.

Although the Court recognizes that the Justice Department's reading of the Act is supported by 40 years of consistent practice, the Court cannot reconcile that practice or the Government's position in this case with the plain language of the *Tunney Act*, which applies to "*any* proposal for a *consent judgment* submitted by the United States" and not merely to proposed injunctive decrees. *15 U.S.C. § 16(b)* (emphasis added). The Court is also unconvinced that either the legislative history of the **[**3]** *Tunney Act* or any subsequent congressional action provides a basis to depart from—or to assign a unique meaning to—that plain language. Because the *Tunney Act* procedures, accordingly, must be followed in this case, and because the Government has yet to comply with those procedures, the Court **DENIES** the Government's Motion for Entry of Final Judgment (Dkt. 1-4) without prejudice.

I. BACKGROUND

Congress enacted the *Tunney Act* against the backdrop of a long history of concern about the Justice Department's **[*38]** process for settling antitrust cases. In 1959, the Antitrust Subcommittee of the House Committee on the Judiciary issued a report on the settlement of antitrust enforcement matters. *See* Antitrust Subcomm., H.R. Comm. on the Judiciary, 86th Cong., 1st Sess., *Rep. on the Consent Decree Program of the Dep't of Justice* (Comm. Print 1959) ("1959 Report").[1] The report explained that the Subcommittee had received complaints "that consent decrees . . . eliminated the judiciary from enforcement of the antitrust laws;" that they deprived private litigants of the ability

[1] *Available at* http://catalog.hathitrust.org/Record/011396134 .

to benefit from the Government's prosecution of antitrust litigation in the form of follow-on actions for treble damages; that **[**4]** they were negotiated in secret, without input from competitors who "might be adversely affected;" and that they "often deprived the Government of relief it could have obtained if it had litigated its case." *Id.* at x. The Subcommittee assembled case studies of prominent antitrust "consent decrees" and concluded that the Justice Department had been too solicitous of the defendants' interests and had "abdicate[d] [its] duty" to ensure that settlements served the public interest, *id.* at 293; *see also id.* at 296-97, that decrees improperly left monopolies intact, *id.* at 290, that the Department demonstrated a "lack of candor" by not sharing information about settlements with the Subcommittee and the public, *id.* at 292; *see also id.* at 304, and that the Department had failed to require compliance with consent decrees, *id.* at 294, 302.

The Subcommittee, as a result, recommended that the Department of Justice revise its antitrust settlement procedures. *Id.* at 304. In particular, the Subcommittee urged the Department to "devise procedures which would assure competitors of the defendants a greater participation in the preparation of the terms of a consent decree than is now provided by the sporadic discussions which the Department of Justice on occasion initiates." **[**5]** *Id.* Under those procedures, as contemplated by the Subcommittee, the Department would "provide notice to the public of the terms of the consent decree, and establish a waiting period" during which "private parties, who may be affected by the terms of the decree, should be given an opportunity to intervene in the Government's case in order to present their objections to the court for its consideration." *Id.* Moreover, "[w]hen the Department of Justice presents a consent decree to the court for its approval, it should be accompanied by a statement that sets forth the facts involved, the defendant's position, the meaning of the provisions used in the decree, and the reasons that form the basis for the Department's acceptance of the particular compromise." *Id.* The Subcommittee resolved to give the Attorney General the opportunity to "accomplish this revision through changes in the rules that govern the administration of his Department," but cautioned that, should he decline to act "or if the changes he institutes are inadequate, Congress should, by legislation, establish mandatory procedures and standards of conduct for this area." *Id.*

The Justice Department responded in July 1961, when then-Attorney **[**6]** General Robert Kennedy issued an administrative order entitled "Consent Judgment Policy." 28 C.F.R. § 50.1 (1970). That order established a "policy" that the Department would "consent to a proposed judgment in an action to prevent or restrain violations of the antitrust laws only after or on condition that an opportunity is afforded persons (natural or corporate) who may be affected by such judgment and who are not named as parties to the action to state comments, views or relevant allegations **[*39]** prior to entry of such proposed judgment by the court." *Id.* § 50.1(a). "Pursuant to this policy," the order further provided that proposed antitrust consent judgments would "be filed in court or otherwise made available upon request to interested persons . . . at least 30 days prior to entry by the court," and that the Department would "receive and consider any written comments, views or relevant allegations relating to the proposed judgment" before entry of the judgment. *Id.* § 50.1(b). The Department reserved discretion to decide whether to disclose comments and "reserve[d] the right" (1) to disavow the proposed consent judgment if new facts or considerations came to light in the comment process and (2) "to object to intervention by **[**7]** any party not named as a party by the Government." *Id.* The Department also adopted other reforms through less formal means, but abandoned them shortly thereafter. *See* Note, *The* ITT *Dividend: Reform of Department of Justice Consent Decree Procedures*, 73 Colum. L. Rev. 594, 607-609 (1973) (discussing the use of settlement clauses providing that the settlement would have *prima facie* effect in a treble damages action and pre-filing negotiation practices).

The Department's antitrust settlement authority was once again subject to scrutiny when "the details of the [International Telephone & Telegraph Corporation ("ITT")] antitrust settlement bec[a]me public in [the] Spring [of] 1972." *Id.* at 603. The Justice Department's settlement with ITT permitted "the nation's ninth largest corporation" to merge with Hartford Fire Insurance "in exchange for divesting itself of several smaller subsidiaries." *Id.* at 603-04. Senate confirmation hearings for Attorney General Richard G. Kleindienst probed the ITT settlement and suggested a connection between ITT's contributions to the 1972 Republican National Convention and the Nixon administration's willingness to settle on terms unduly favorable to ITT, but Kleindienst denied any White House involvement in the matter. *Id.* at 604; 120 **[**8]** Cong. Rec. 29,269-70 (1974). The Watergate tapes revealed, however, that President Nixon had indeed told then-Deputy Attorney General Kleindienst that he did not want an ITT prosecution. *See* Ciara Torres-Spelliscy, Brennan Ctr. for Justice, *The I.T.T. Affair and Why Public Financing*

Matters for Political Conventions (Mar. 19, 2014).[2] As a result, President Nixon's "unlawful activities . . . relating to the confirmation of Richard Kleindienst as Attorney General of the United States" were included in the Articles of Impeachment adopted by the House Judiciary Committee. 120 Cong. Rec. at 29,268 (1974). Attorney General Kleindienst also ultimately pleaded guilty in 1974 to a charge of failing to testify "accurately and fully" at his confirmation hearings about White House involvement in the ITT case. *See* Torres-Spelliscy, *supra*.

The ITT scandal was a major impetus for the passage of the *Tunney Act*. *See* 120 Cong. Rec. 38,585 (1974) (statement of Sen. Tunney); *see also* 120 Cong. Rec. 36,342 (1974) (statement of Rep. Holtzman); *The* ITT *Dividend, supra*, at 626-34. ***HN1***[] The Act applies to "[a]ny proposal for a consent judgment submitted by the United States for entry in any civil proceeding brought by or on behalf of the United States under the **[**9]** antitrust laws." *15 U.S.C. § 16(b)*. First, the Act provides for disclosure of certain information pertaining to the settlement and for an opportunity for public comment. It requires that the Government file a proposed "consent **[*40]** judgment" with "the district court . . . and publish[] [it] . . . in the Federal Register at least 60 days prior to the effective date of such judgment;" that any written comments and responses to them also be filed and published within 60 days; that materials "considered determinative in formulating" the proposed judgment be made publicly available; that the Government, "unless otherwise instructed by the court," file with the court and publish in the Federal Register a competitive impact statement reciting various information about the proposal, *id.*; and that a summary of the proposal and the competitive impact statement be published in specified newspapers, *id. § 16(c)*. ***HN2***[] The Act also requires the defendant to disclose to the court any lobbying contacts with the government—that is, "any and all written or oral communications by or on behalf of such defendant . . . with any officer or employee of the United States concerning or relevant to such proposal." *Id. § 16(g)*. In addition, it requires **[**10]** that the Attorney General "receive and consider any written comments" and, at the close of the 60-day period, publish a response to them. *Id. § 16(d)*. Finally, the court must ultimately "determine that the entry of such judgment is in the public interest" before entering the proposed consent judgment, and the Act provides procedures for making that determination. *Id. § 16(e)-(f)*.

Just two years after enacting the *Tunney Act*, Congress enacted the Hart-Scott-Rodino Act. ***HN3***[] As relevant here, the HSR Act requires notification to the Department of Justice and the Federal Trade Commission ("FTC") and observation of a waiting period before a person completes certain acquisitions of voting securities or assets. *15 U.S.C. § 18a(a)*. The Act also exempts an array of transactions, including the acquisition of voting securities "solely for the purpose of investment." *Id.* at *§ 18a(c)(9)*. This premerger notification requirement facilitates the agencies' ability to detect and prevent antitrust violations before they occur. *See, e.g., id. § 18a(f)* (providing procedures for obtaining a preliminary injunction against consummation of a proposed acquisition that would violate the *Clayton Act*, the Federal Trade Commission Act, or the *Sherman Act*). Violations of **[**11]** the HSR Act are punishable by a civil penalty of not more than $16,000 per day. *Id. § 18a(g)(1)*; Debt Collection Improvement Act of 1996, *Pub. L. No. 104-134, § 31001(s), 110 Stat. 1321, 1321-373* (amending the *Federal Civil Penalties Inflation Adjustment Act of 1990*, *28 U.S.C. § 2461* note); *16 C.F.R. § 1.98(a)*. Violations of the notification requirement are also subject to "such other equitable relief as the court in its discretion determines necessary or appropriate." *15 U.S.C. § 18a(g)(2)(C)*.

II. ANALYSIS

The Government and Defendant Blavatnik assert that the proposed consent judgment in this case is not subject to *Tunney Act* procedures because an HSR Act settlement solely for a civil penalty is not a "proposed consent judgment" within the meaning of the *Tunney Act*. *See* Dkts. 3-4. According to the Government, the *Tunney Act* applies to settlements seeking equitable relief and not to those seeking only monetary penalties. Dkt. 3 at 2. Thus, under the Government's theory, HSR Act settlements for injunctive relief are subject to the *Tunney Act*, while HSR Act settlements for monetary penalties are not. *Id.* at 13 n.4. In the Government's view, "[a]pplication of *Tunney Act* procedures to settlements for exclusively legal relief such as monetary penalties is inconsistent with the statute's

[2] *Available at* *https://www.brennancenter.org/blog/itt-affair-why-public-financing-matters-political-conventions* .

history, its language as a whole, and nearly four decades **[**12]** of precedent." *Id.* at 2. It further contends that Congress has "implicitly ratified" its position. *Id.*

[*41] A. The Text

In order to determine whether the *Tunney Act* applies to proposed settlements for civil penalties, the Court "begin[s] with the text of the statute." *Kasten v. Saint-Gobain Performance Plastics Corp., 563 U.S. 1, 7, 131 S. Ct. 1325, 179 L. Ed. 2d 379 (2011)*. ***HN4***[] The Act applies to "[a]*ny* proposal for a *consent judgment* submitted by the United States for entry in *any civil proceeding* brought by or on behalf of the United States *under the antitrust laws*." *15 U.S.C. § 16(b)* (emphases added). The Court can easily dispose of two issues. First, there can be no reasonable dispute that an HSR Act civil penalty action arises "under the antitrust laws." Although enacted after the original *Clayton Act of 1914* (as well as the *Tunney Act*), the relevant portions of the HSR Act were inserted into the *Clayton Act*. *See* Hart-Scott-Rodino Antitrust Improvements Act of 1976, *Pub. L. No. 94-435, § 201, 90 Stat. 1383, 1390* (amending the *Clayton Act* by inserting *§ 7A*); *see also* Dkt. 1 at 2 (Government's complaint referring to HSR premerger notification provisions as "*Section 7A(g)* of the Clayton Act"). The *Clayton Act*, in turn, defines "antitrust laws" to include, among other statutes, the *Clayton Act* itself. *15 U.S.C. § 12(a)*. Second, although civil penalties are punitive in nature, this is undoubtedly a "civil proceeding." **[**13]** The Government does not contest either of these propositions.

The dispositive question is thus whether a proposed judgment for civil penalties entered pursuant to a settlement between the parties is a "consent judgment" within the meaning of the *Tunney Act*. As a matter of common usage, it is difficult to avoid the conclusion that the answer is not merely yes, but that it is tautologically so. A "consent judgment" is, by definition, a judgment to which the parties have agreed. Black's Law Dictionary observes that a "consent judgment" is synonymous with an "agreed judgment," which is "[a] settlement that becomes a court judgment when the judge sanctions it. In effect, an agreed judgment is merely a contract acknowledged in open court and ordered to be recorded, but it binds the parties as fully as other judgments." *Agreed Judgment, Consent Judgment*, Black's Law Dictionary (10th ed. 2014). The Merriam-Webster Dictionary similarly defines a "consent judgment" as "a judgment by a court exercising common-law jurisdiction entered by consent of the parties upon stipulation or agreement." *Consent Judgment*, Webster's Third New Int'l Dictionary, Unabridged (2016). The surrounding language of the **[**14]** *Tunney Act*, moreover, confirms the law's expansive reach and the absence of a carve-out for particular types of "consent judgments." It applies to "*any* proposal for a consent judgment . . . in *any* civil proceeding." *15 U.S.C. § 16(b)* (emphases added). Thus, as a matter of ordinary meaning, it is difficult to escape the conclusion that the Act applies to *all* proposed Department of Justice antitrust consent judgments—whether for equitable or monetary relief.

The Government does not agree. Instead, it contends that the phrase "consent judgment" has long been understood in ***antitrust law*** to refer only to settlements for equitable relief. In support of this position, the Government asserted at oral argument that it has been unable to locate any pre-*Tunney Act* case that used the phrase "consent judgment" to refer to a purely monetary judgment in an antitrust enforcement action. To this, it added that the 1961 Attorney General policy statement was captioned "Consent Judgment Policy," but expressly applied only to actions "to prevent or restrain violations of the antitrust laws." 28 C.F.R. § 50.1(a) (1970). According to the Government, the latter phrase—"to prevent or restrain"—is a technical term that is used in *§ 4* of the Sherman **[**15]** Act and *§ 15* of the Clayton Act **[*42]** to refer to the courts' equitable powers to enjoin actions in violation of the substantive antitrust laws. *See* *15 U.S.C. §§ 4*, *25*. That contention, indeed, finds support in the text of *§ 4* of the Sherman Act and *§ 15* of the Clayton Act, which provide that "it shall be the duty of the several United States attorneys . . . to institute proceedings in *equity* to prevent and restrain" violations of those statutes. *Id.* (emphasis added).

The problem with the Government's argument is that it essentially skips over the question of the plain meaning of the *Tunney Act* and argues, instead, that the Department's pre-*Tunney Act* practice shows that Congress did not intend to reach purely monetary awards. As the Government explained at oral argument, the only civil penalty actions for monetary relief authorized before the HSR Act was enacted were actions brought under the *Federal*

Trade Commission Act ("FTCA") for violations of FTC orders. *See id.* § 21(l); *see also id.* § 15a (authorizing damages suits by United States). All other antitrust suits by the United States involved claims for equitable relief under the Sherman and Clayton Acts. It is thus unsurprising that the Government has been unable to locate **[**16]** any pre-Tunney Act cases in which the phrase "consent judgment" was used to refer to purely monetary settlements. Indeed, as the Government conceded at oral argument, it was also unable to locate any case involving a purely monetary settlement that used a phrase other than "consent judgment" to refer to a court-approved settlement. In short, the Government found evidence that the label "consent judgment" was used to refer to injunctive settlements, but no evidence—one way or the other—about whether the label also applied to court-ordered monetary settlements. Similarly, the fact that the Attorney General's "Consent Judgment Policy" applied to actions "to prevent or restrain violations of the antitrust laws" may indicate that in 1961 the Department was focused on enforcement of the Sherman and Clayton Acts, as they then existed, but it says little, if anything, about the plain meaning of the phrase "consent judgment" in the Tunney Act.

The Government's contention that the phrase "consent judgment" can be construed to exclude monetary judgments would have greater purchase if the Tunney Act used the phrase "consent decree," because that term has sometimes been used to connote purely equitable **[**17]** relief. *See Decree*, Black's Law Dictionary (10th ed. 2014) ("'The chief differences between decrees in equity and judgments at common law are [that] [t]he former are pronounced by courts of equity; the latter, by courts of law.'").[3] The Act, however, does not refer to "consent decrees," only to "consent judgment[s]." And although it is possible to construe the word "decree" as limited to the award of equitable relief, the word "judgment" admits of no such limitation. To the contrary, a "judgment" is "[a] court's final determination of the rights and obligations of the parties." *Judgment*, Black's Law Dictionary (10th ed. 2014). The term may be "used in a broad sense to *include* decrees in equity," *id.* (emphasis added), but it does not under any recognized definition *exclude* monetary awards. The pre-Tunney Act history that the Government identifies, moreover, does not challenge this settled understanding: that **[*43]** history shows that the phrase "consent judgment" is capacious enough to *include* injunctive decrees, but it says nothing about whether the phrase *excludes* monetary awards. So understood, there is no basis to conclude that the Department of Justice's practices altered the commonly understood meaning **[**18]** of the words Congress actually used.

The Government also argues that a previously enacted provision of the Clayton Act, which like the Tunney Act appears in § 5 of the Clayton Act, shows that Congress used the phrase "consent judgment" to refer solely to settlements invoking the equitable—or injunctive—power of the courts. As originally enacted, § 5 of the Clayton Act (now § 5(a)) provided "[t]hat a final judgment or decree" entered "in any criminal prosecution or in any suit or proceeding in equity brought by or on behalf of the United States under the antitrust laws" could be used as "prima facie evidence" in a private suit for damages. Pub. L. No. 63-212, § 5, 38 Stat. 730, 731 (1914) (codified at 15 U.S.C. § 16(a)). The law, however, expressly exempted "consent judgments or decrees entered before any testimony has been taken." *Id.* ***[**19]*** From this, the Government draws the conclusion that, at least in 1914, Congress understood a "consent judgment or decree" to mean an order embodying the resolution of either a "criminal prosecution" or a "suit or proceeding in equity"—but not an action at law. Dkt. 3 at 4. Finally, the Government argues that the 1955 amendment to the "prima facie evidence" provision—which substituted "any civil . . . proceeding" for the prior reference to "any . . . proceeding in equity," *Pub. L. No. 84-137, § 2, 69 Stat. 282, 283 (1955)*—was merely intended to conform the law to the 1938 merger of law of equity, and was not intended to reflect any substantive change in the law. Dkt. 3 at 4. Thus, according to the Government, the phrase "consent judgment" should be construed in the Clayton Act as rooted in the Act's original focus on "proceedings in equity," which did not contemplate the award of monetary relief. *Id.*

On closer inspection, however, this history, if anything, supports the opposite conclusion. The principal purpose of the 1955 amendments to the Clayton Act was to give "the United States the right to recover actual damages for injuries" that the Government itself sustains as a result of anticompetitive conduct. S. Rep. No. 84-619, at 1 **[**20]**

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[3] Other definitions, however, indicate that consent "decrees" are not limited to equitable relief. "Decree" is also defined as "[a] court's final judgment" and "[a]ny court order." *Decree*, Black's Law Dictionary (10th ed. 2014). Moreover, a "civil-penalty order" is defined as "[a] judicial *decree* imposing some type of punishment for violating a noncriminal statute." *Civil-penalty Order*, Black's Law Dictionary (10th ed. 2014) (emphasis added).

(1955), *as reprinted in* 1955 U.S.C.C.A.N. 2328, 2328. The amendments thus added a new *§ 4A* to the Clayton Act, which authorized the United States to recover "actual damages" that it sustained to "its business or property by reason of anything forbidden in the antitrust laws." *Pub. L. No. 84-137, § 1, 69 Stat. 282, 282-83 (1955)* (codified at *15 U.S.C. § 15a*). When Congress did this, it also amended the exception to the "prima facie evidence" provision in *§ 5* of the Clayton Act to exclude not only "consent judgments or decrees entered before any testimony has been taken," but also "judgments or decrees entered in actions under" the newly added "*section 4A*" of the Act. *Id.* at *§ 2, 69 Stat. at 283*. Yet, had Congress believed that *§ 5*'s reference to "civil proceedings" was already limited to claims seeking equitable relief, this change would have been unnecessary. Moreover, the amendment shows that Congress understood the phrase "judgments or decrees" to reach claims for monetary relief. From this, it is a small step to conclude that the reference to "consent judgment[s]" in the *Tunney Act* was understood to include settlements for monetary relief.[4]

[*44] Finally, the Government contends that, when read as a whole, the *Tunney Act* cannot sensibly be applied to HSR Act monetary settlements because "the procedures defined in the . . . Act, and the factors it requires courts to consider, . . . apply only to settlements that seek injunctive or other equitable relief." Dkt. 3 at 9. Most notably, in the Government's view, the principal components of the competitive impact statement required by *§ 5(b)*, *see* *15 U.S.C. § 16(b)*, and related factors that the court must consider to determine whether a proposed consent judgment is in the public interest have "little or no relevance" to a civil penalty. Dkt. 3 at 10. The competitive impact statement must, among other things, identify "the anticipated effects on competition of [the proposed] relief," **[**22]** "the remedies available to potential private plaintiffs damaged by the alleged violation in the event that [the] proposal for the consent judgment is entered," and "a description of the procedures available for modification of [the] proposal." *15 U.S.C. § 16(b)*. And, before entering the proposed judgment, the court must consider "the competitive impact of [the] judgment," and "the impact of entry of [the] judgment upon competition in the relevant . . . markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint." *Id. § 16(e)*.

HN5[] Courts, of course, "have a 'duty to construe statutes, not isolated provisions.'" *Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson, 559 U.S. 280, 290, 130 S. Ct. 1396, 176 L. Ed. 2d 225 (2010)* (quoting *Gustafson v. Alloyd Co., 513 U.S. 561, 568, 115 S. Ct. 1061, 131 L. Ed. 2d 1 (1995))*. Here, however, the requirements identified by the Government are not inconsistent with application of the Act to civil penalty settlements. First, the fact that certain factors are not implicated by a particular settlement—*e.g.*, that there are no procedures for modifying the settlement or that the settlement is unlikely to have any direct or readily identifiable competitive effect in the relevant markets—does not render the application of the Act to civil penalties untenable or even awkward. Indeed, the Government (in its view, voluntarily) **[**23]** used *Tunney Act* procedures to explain its first HSR Act settlement for a civil penalty, and its competitive impact statement was both perfectly coherent and wholly consistent with the purposes of the *Tunney Act*. *See United States v. The Costal Corp.; Proposed Final Judgment and Competitive Impact Statement, 49 Fed. Reg. 36,454, 36,454-59 (Sept. 17, 1984)*.

Second, although it is true that a purely procedural violation of the HSR premerger notification requirement—that is, a failure to give notice of a merger that does not otherwise violate the antitrust laws—might appear to have, at most, a limited competitive impact, the Government has consistently applied the *Tunney Act* to HSR Act settlements involving injunctive relief. *See* Dkt. 3 at 13 n.4. Yet every time the Government agrees to resolve a HSR Act claim on purely monetary terms, it necessarily agrees not to seek injunctive relief. That decision implicates the same policy considerations as the Government's decision to seek injunctive terms. That is, if it is appropriate to assess the impact on competition of a proposed HSR Act injunctive settlement, then it is appropriate to assess the consequences of declining to **[*45]** seek injunctive relief. It is also an overstatement to suggest that purely monetary settlements will have no competitive consequences. As the Government itself **[**24]** stated in its first

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[4] The language of the "prima facie evidence" provision also shows that Congress understood that orders concluding "criminal proceedings," including orders to pay **[**21]** "criminal fines," *15 U.S.C. § 1*, were understood to constitute "consent judgments or decrees." *See also* 10 A.L.R. Fed. 328 (1972) ("Although the phrase 'consent judgments or decrees' [in *§ 16(a)*] does not normally describe criminal convictions, the lower federal courts are agreed that a judgment of conviction entered on a plea of nolo contendere in a federal antitrust prosecution is a consent decree within the meaning of the proviso . . . ." (internal footnote omitted)).

HSR civil penalty action, "While civil penalties . . . have no competitive impact in and of themselves, the civil penalty . . . will help deter Defendant and others . . . from failing to comply with the notice and waiting requirements of the HSR Act. Compliance with these requirements will strengthen antitrust enforcement and thereby help to maintain competitive markets." *49 Fed. Reg. at 36,456*. Thus, although the competitive impact of an HSR civil penalty settlement is an indirect one, there is no reason that the Department and the Court cannot assess how that indirect impact affects the public interest.

In summary, nothing in the structure or purposes of the *Tunney Act* suggests that applying it to consent judgments for civil penalties would be "'untenable in light of [the statute] as a whole,'" *King v. Burwell, 135 S. Ct. 2480, 2495, 192 L. Ed. 2d 483 (2015)* (quoting *Dep't of Revenue of Oregon v. ACF Indus., Inc., 510 U.S. 332, 343, 114 S. Ct. 843, 127 L. Ed. 2d 165 (1994))*, and thus the Court finds no reason "to depart from what would otherwise be the most natural reading of the pertinent statutory phrase," *id.* Nor is there any basis to conclude that Congress assigned anything but the plain meaning to the phrase "consent judgment" anywhere in the *Clayton Act*, including in the *Tunney Act*. To the contrary, the United States has itself used the phrase in **[**25]** just this way. *See, e.g.*, Press Release, Fed. Trade Comm'n, *Penzoil to Pay $2.6 Million to Settle Federal Charges in Purchase of Chevron Stock*, 1994 WL 524955 (Sept. 27, 1994) (referring to "consent judgment" requiring payment of civil penalty for alleged HSR Act reporting violation). The Court, accordingly, concludes that the statute unambiguously applies to all antitrust "consent judgments," including those seeking purely monetary relief.

B. The Legislative History

As the Government correctly notes, much of the legislative history of the *Tunney Act* suggests that Congress's principle concern was with consent decrees embodying equitable relief. As discussed above, the history of the *Tunney Act* can be traced back to the 1959 Report of the Antitrust Subcommittee of the House Committee on the Judiciary. That Report discusses a series of specific antitrust settlements, all of which involved the use of consent decrees to restrain specific conduct. 1959 Report at 35-39, 171-72. It begins, moreover, by discussing the Justice Department's authority to enter negotiated settlements in "equity proceedings that have been instituted by the Attorney General to enjoin violations of the antitrust laws," *id. at 1*, and it ends by discussing potential reforms to the "consent decree" procedures employed by **[**26]** the Department of Justice, *id.* at 301-05. Although some of the Subcommittee's concerns were directed generally at the enforcement of the antitrust laws—such as ensuring that the use of settlements did not impede the development of judicial precedents interpreting the antitrust laws and that those who violate the antitrust laws cannot avoid "unfavorable publicity" through amicable settlements—others were directed more specifically at injunctive decrees—such as ensuring that competitors who are affected by the settlement receive notice and an opportunity to be heard. *Id. at 303-04*.

Similarly, the Justice Department's 1961 "Consent Judgment Policy" was most clearly directed at antitrust settlements involving injunctive relief. The policy was adopted in response to the 1959 Report, **[*46]** which was itself prompted by concerns about inadequate injunctive decrees. The policy, moreover, applied only to settlements in actions "to prevent or restrain violations" of the antitrust laws, 28 C.F.R. § 50.1(a) (1970), and, as noted above, a nearly identical phrase appears in *§ 4* of the Sherman Act and *§ 15* of the Clayton Act, and, in those contexts, is directed at "proceedings in equity." *15 U.S.C. §§ 4*, *25*. And, finally, the 1961 policy was designed to "afford[] persons **[**27]** (natural or corporate) *who may be affected* by" the settlement an opportunity to be heard. 28 C.F.R. § 50.1(a) (1970) (emphasis added). Although it is conceivable that a purely monetary settlement might affect third parties, it seems most likely that the policy was concerned with the effect that an injunctive settlement might have on those who were not parties to the litigation or negotiation.

This focus on equitable decrees, as opposed to monetary settlements, carried through to Congress's consideration of the *Tunney Act* itself. Passage of the Act was most immediately prompted by congressional concern about settlement of the ITT antitrust case, where ITT was required to give up certain "holdings, but was allowed to retain the Hartford Fire Insurance Co., its most profitable subsidiary and most liquid asset." 119 Cong. Rec. at 24,598 (statement of Sen. Tunney). Other examples of controversial settlements included the 1941 Atlantic Refining Co. case, where the "original complaint sought sweeping divestitures in the oil industry," but "the eventual consent decree only resulted in the divestment of 2,500 [unprofitable] Sinclair service stations in 14 sparsely populated Mid-continent States;" the 1956 ATT-Western **[**28]** Electric case, where ATT was allowed "to retain its manufacturing monopoly notwithstanding overwhelming evidence of improprieties;" the 1966 Von's Grocery Store case, where Von merely "jettisoned its 40 least profitable outlets;" the 1969 "smog case," where the automobile industry was not required to "undo its past damage;" and the El Paso case, where the Supreme Court "accused the Antitrust Division of 'knuckling under' to the El Paso Natural Gas Co." *Id.* Like the examples given in the 1959 House Report, all of these examples involved the asserted inadequacy of injunctive decrees.

Given this background, the Court does not doubt that Congress was spurred to act by its perception that the Justice Department had repeatedly settled antitrust cases for injunctive decrees that were less demanding than Congress believed appropriate. That, however, does not resolve the issue for several reasons. First, the most obvious reason that Congress focused on consent decrees is that, at the time the *Tunney Act* was enacted, consent decrees constituted the overwhelming bulk of the Department's enforcement activity—from "1955 to 1967, 81 percent of all antitrust judgments were represented by consent decrees." **[**29]** 119 Cong. Rec. at 3,455 (statement of Sen. Gurney); *see also* 118 Cong. Rec. at 31,674 (statement of Sen. Tunney) (approximately 80 percent of civil antitrust suits settled through "consent decrees" requiring the defendant to "modify its conduct"). Indeed, the Government has identified only two statutes that authorize the imposition of monetary penalties in an antitrust action—the *FTCA*, which permits the United States to seek monetary penalties, as well as injunctive relief, where a party to an FTC order violates that order, and the HSR Act, which was not enacted until two years after the *Tunney Act*. *15 U.S.C. §§ 18a(g)(1)*, *21(l)*; *see also id. § 15a* (damages suits by United States). It is thus unremarkable that there was little focus on purely monetary relief at the time the *Tunney Act* was enacted.

Second, although not the principal focus of the legislation, there is some evidence **[*47]** that Congress was concerned with more than just injunctive decrees. In discussing the ITT settlement, for example, Senator Tunney expressed dismay that the company was not required to "disgorge the profits made between acquisition and divestiture, a retention which can only offer incentives to others to strive for similar short-run profit **[**30]** taking." 119 Cong. Rec. at 24,598 (statement of Sen. Tunney). Although disgorgement is often considered an equitable remedy, that label is not relevant for present purposes. What matters is the fact that Congress was concerned with the failure of the Justice Department to pursue a monetary remedy that would not have had a direct effect on competition but would have created "incentives" for others to comply with the antitrust laws. Although perhaps a step further removed, the same is true here. The imposition of HSR Act penalties, in the words of the Justice Department, deter violations of the pre-merger notification requirements and thus "strengthen antitrust enforcement and thereby help to maintain competitive markets." *49 Fed. Reg. at 36,456*. As the Department has further explained:

> Before the HSR Act was enacted, the DOJ and the FTC were often forced to investigate anticompetitive mergers that had already been consummated without public notice. In those situations, the agencies' only recourse was to sue to unwind the parties' merger, and the merged firm often delayed the litigation so that years elapsed before adjudication and attempted relief. During this extended time, the loss of competition continued **[**31]** to harm consumers, and if the court ultimately found that the merger was illegal, effective relief was often impossible to achieve.

79 Fed. Reg. 70,555, 70,561 (Nov. 26, 2014). That explanation of the purpose of the HSR Act parallels the concern about disgorgement discussed in the *Tunney Act* legislative history.

Finally, although not every policy concern discussed in the legislative history applies to HSR Act monetary settlements, a number do. Congress, to be sure, recognized that enforcement actions under the *Sherman Act* can have a substantial effect on the public and the defendant's competitors. The Government's choice to settle a case, rather than to litigate it to judgment, can deprive third parties of the benefit of the collateral estoppel benefits of a litigated judgment, *see 15 U.S.C. § 16(a)*, and "a bad or inadequate consent decree may as a practical matter foreclose further review of a defendant's practices." 118 Cong. Rec. at 31,674 (statement of Sen. Tunney). Those concerns admittedly have little to do with a monetary settlement of an HSR Act claim. But, Congress also recognized that "the public's interest in deterrence of future antitrust violations by the defendant and by other potential defendants may be affected profoundly by the **[**32]** willingness of the Justice Department to settle cases and the price exacted for such settlements." *Id.* To the extent that compliance with the HSR Act "help[s] to maintain competitive markets," as the Department has professed, *49 Fed. Reg. at 36,456*, the public has an interest in ensuring that HSR Act settlements exact an appropriate price. Following in the wake of the ITT settlement and the related scandal, moreover, Congress was concerned with both transparency and the fact that antitrust settlements may invite intensive lobbying, because "the stakes are high" for "those who exercise the greatest corporate influence." 118 Cong. Rec. at 31,676 (statement of Sen. Tunney). It thus concluded that "it is particularly important to assure some measure of public scrutiny of the exercise of that influence." *Id.* Although that rationale may apply most acutely in cases where the Government seeks to block large mergers or **[*48]** to require divesture of substantial interests, the principle applies broadly enough to include HSR Act monetary penalties.

For present purposes, the Court need not—and does not—conclude that Congress was focused on purely monetary settlements. Because the plain language of the *Tunney Act* reaches all "consent **[**33]** judgments"—whether for injunctive or monetary relief—the questions are whether "reliance on [the literal] language would defeat the plain purpose of the statute," *Bob Jones Univ. v. United States, 461 U.S. 574, 586, 103 S. Ct. 2017, 76 L. Ed. 2d 157 (1983)*, and whether the context in which Congress employed that language makes evident a "meaning—or ambiguity—" not otherwise evident from the text, *King, 135 S. Ct. at 2489*. For the reasons explained above, the answer to both of these question is "no." To the contrary, inclusion of proposed monetary judgments within the scope of the Act serves its objectives of increasing transparency and accountability in the settlement of antitrust cases and ensuring that antitrust settlements "exact a price" sufficient to deter future violations of the antitrust laws.

C. Practice and Congressional Ratification

The Government further contends that district courts have a longstanding practice of exempting consent judgments for civil penalties from *Tunney Act* procedures and that Congress has implicitly ratified this practice. Dkt. 3 at 12-15. To be sure, district courts have on many occasions since the passage of the Act entered civil penalty consent judgments without first applying *Tunney Act* procedures, *see* Dkt. 3 at 21-26 (table collecting 47 HSR entries of judgment); **[**34]** *see also* *id. at 35 (Exh. 2)* (entry of judgment for civil penalty under *15 U.S.C. § 21(l)*), but these unpublished cases provide, at best, limited support for the Government's construction of the Act.

Neither the Government nor this Court has identified any cases analyzing the issue in any depth, or any Court of Appeals decision addressing it at all. *United States v. Computer Associates International, Inc.*, provides the longest discussion of the matter. *See* *No. 01-2062, 2002 U.S. Dist. LEXIS 23039, 2002 WL 31961456, at *9 (D.D.C. Nov. 20, 2002)*. The final judgment entered by the district court in that case, however, simply stated: "The United States does not believe that the payment of civil penalties under the HSR Act is subject to the [APPA]. Consequently, the civil penalties component of the proposed Final Judgment is not open to public comment." *Id.* A footnote then explained:

> Obtaining civil penalties in a consent judgment is not the type of "consent judgment" Congress had in mind when it passed the APPA. Thus, in consent settlements seeking both equitable relief and civil penalties, courts have not required use of APPA procedures with respect to the civil penalty component of the proposed final judgment. Moreover, courts in this district have consistently entered consent judgments for civil penalties **[**35]** under the HSR Act without employing APPA procedures.

*2002 U.S. Dist. LEXIS 23039, at *9 n.1* (internal citations omitted).

In the absence of a more complete analysis, such pronouncements are of only limited persuasive value. Indeed, the Government has not identified a single case in which the issue of the *Tunney Act's* application to civil penalties was substantively briefed; rather, it points only to cases in which it "notified" the court of its interpretation of the Act—in the manner it did here—by including a short statement regarding its position in its motion for entry of judgment. Dkt. 3 at 16 & n.9, 21-26. Accordingly, the district courts' practice of entering consent judgments for civil penalties without applying *Tunney Act* **[*49]** procedures says little, if anything, about whether that practice is consistent with the statute.

Nor is the Court persuaded that Congress has implicitly ratified the practice, as the Government contends. Dkt. 3 at 12-15. ***HN6***[] Under the ratification doctrine, "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard v. Pons, 434 U.S. 575, 580, 98 S. Ct. 866, 55 L. Ed. 2d 40 (1978)*. This rule applies when Congress re-enacts a provision in the face of a "consensus **[**36]** [as to its interpretation] so broad and unquestioned that [the Court] must presume Congress knew of and endorsed it." *Jama v. ICE, 543 U.S. 335, 349, 125 S. Ct. 694, 160 L. Ed. 2d 708 (2005)*. Here, there is no reason to conclude that Congress has ratified an interpretation of the *Tunney Act* that excludes purely monetary settlements.

In support of its ratification argument, the Government points to the 2004 amendments to the *Tunney Act*, *see Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, § 221(b)(2), 118 Stat. 661, 668-69 (2004)* (codified at *15 U.S.C. § 16*)—the only amendments that Congress has made to the Act. Those amendments: (1) made it mandatory, rather than permissible, for courts to consider all of the "public interest determination" factors enumerated in *§ 5(e)*; (2) revised some of the *§ 5(e)* enumerated factors and added others; (3) permitted district courts to authorize a more cost-effective method of disseminating public comments than publication in the Federal Register under *§ 5(d)*; and (4) specified which agents of the defendant are subject to the lobbying disclosure requirements of *§ 5(g)*. *Id.* The amendments also included legislative findings indicating that Congress's principle purpose was to overrule the D.C. Circuit's decisions in *United States v. Microsoft, 56 F.3d 1448, 1462, 312 U.S. App. D.C. 378 (D.C. Cir. 1995)*, and *Mass. School of Law at Andover, Inc. v. United States, 118 F.3d 776, 783, 326 U.S. App. D.C. 175 (D.C. Cir. 1997)*, both of which held that a proposed consent judgment should be rejected **[**37]** only if it would make "a mockery of judicial power." *See Pub. L. No. 108-237, § 221(a), 118 Stat. at 668*; *United States v. SBC Commc'ns, Inc., 489 F. Supp. 2d 1, 11-14 (D.D.C. 2007)*.

Nothing contained in those amendments or Congress's consideration of the legislation approaches the type of showing required to find an implicit ratification of a judicial or administrative interpretation of a pre-existing statute. First, and foremost, Congress did not re-enact the *Tunney Act* as a whole and did not re-enact the provision containing the language at issue here. That language—"any proposal for a consent judgment submitted by the United States"—appears in *§ 5(b)* of the Clayton Act. The 1994 amendments, however, did not touch *§ 5(b)*, but, rather, added language to *§ 5(d)* and *§ 5(g)* and added and deleted language in *§ 5(e)*. *Pub. L. No. 108-237, § 221(b)(2), 118 Stat. 661, 668-69 (2004)*. Thus, Congress did not "re-enact . . . without change" the statutory provision on which the Government places an interpretive gloss. *Lorillard, 434 U.S. at 580*. *Cf. Jama, 543 U.S. at 349*; *NLRB v. Gullett Gin Co., 340 U.S. 361, 366, 71 S. Ct. 337, 95 L. Ed. 337 (1951)*; *Nat'l Lead Co. v. United States, 252 U.S. 140, 146-47, 40 S. Ct. 237, 64 L. Ed. 496, 55 Ct. Cl. 514 (1920)*; *In re North, 50 F.3d 42, 45, 311 U.S. App. D.C. 71 (D.C. Cir. 1995)*.

Nor does the Government point to any evidence that Congress gave any consideration to the meaning of "consent judgment" in *§ 5(b)* or that it was even aware of the practice of exempting consent judgments seeking civil penalties from *Tunney Act* review. Although courts often presume that Congress is "aware of an administrative **[*50]** or judicial interpretation of a statute and . . . adopt[s] that interpretation **[**38]** when it re-enacts a statute without change," that presumption turns in significant part on the condition that the pre-existing interpretation is one that "affects the new statute." *Lorillard, 434 U.S. at 580-81*. The notion is that Congress necessarily legislates against a backdrop of established law. Courts assume that Congress is aware of that law and, absent evidence to the contrary, that it understands how new legislation fits within the existing framework. It is an altogether different matter, however, to make the unrealistic assumption that Congress is aware of—and intends to ratify—unreported district court orders and occasional Federal Register notices[5] that are unrelated to the specific provisions it is amending or to the substance of the changes it is making. *See Jama, 543 U.S. at 351* (rejecting contention that two

[5] In addition to the unpublished entries of judgment by district courts discussed *supra*, the Government has periodically stated its position in Federal Register notices regarding mixed consent judgments that seek both equitable relief and civil penalties. *See, e.g.*, *44 Fed. Reg. 41,579, 41,583 (July 17, 1979)* ("[W]e do not believe that under the A.P.P.A. **[**39]** the penalty aspect of this case is open to public objection."). The Government also explained its view that the *Tunney Act* is inapplicable to HSR Act settlements for civil penalties in a footnote in the Federal Register in conjunction with its first HSR Act penalty case in 1984. ***49 Fed. Reg. at 36,455 n.1***; *see also* Dkt. 3 at 17-18.

Court of Appeals decisions, "one of which was only a two-sentence *per curiam*," amounted to a "judicial consensus").

Finally, application of the ratification doctrine to the 2004 amendments is particularly out of place here, since those amendments sought to ensure robust judicial review of "consent judgments." *See* *SBC Commc'ns, Inc., 489 F. Supp. 2d at 11-14*. The Government's argument, in contrast, would contradict the plain terms of the *Tunney Act*, and it would do so in the absence of any congressional acknowledgment or evidence that the issue of purely monetary antitrust settlements was subject to a moment's consideration or debate. The ratification doctrine is a tool for discerning congressional intent—not a means of creating it. The Court, accordingly, rejects the Government's contention that Congress has adopted through silence a narrowing and atextual interpretation of "consent judgment."

III. CONCLUSION

For the forgoing reasons, the Government's Motion for Entry of Final Judgment (Dkt. 1-4) is **DENIED** without prejudice.

/s/ Randolph D. **[**40]** Moss

RANDOLPH D. MOSS

United States District Judge

Date: February 12, 2016

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Campbell v. Othoff

United States District Court for the District of North Dakota

February 17, 2016, Decided; February 17, 2016, Filed

Case No. 4:15-cv-00143

Reporter
2016 U.S. Dist. LEXIS 34684 *

Anthony Leon Campbell, Plaintiff, vs. Paul Othoff, Commander Ward County Jail Operations and Manager for Turnkey Corrections at Ward County Jail; Turnkey Correction, Inc.; Steve Kukowski, Sheriff of Ward County Jail Facility; Leann Bertsch, Director of Department of Corrections, Defendants.

Subsequent History: Adopted by, Motion granted by, Dismissed by, in part, Dismissed by, in part, Without prejudice *Campbell v. Othoff, 2016 U.S. Dist. LEXIS 34683 (D.N.D., Mar. 17, 2016)*

Core Terms

damages, Jail's, commissary, antitrust, immunity, RECOMMENDATION, official capacity, screening, pricing

Counsel: [*1] Anthony Leon Campbell, Plaintiff, Pro se, Minot, ND.

For Leann Bertsch, Director, Department of Corrections and Rehabilitation, Defendant: Douglas Alan Bahr, ATTORNEY GENERAL'S OFFICE, CIVIL LITIGATION, BISMARCK, ND.

Judges: Charles S. Miller, Jr., Magistrate Judge.

Opinion by: Charles S. Miller, Jr.

Opinion

REPORT AND RECOMMENDATION

This matter is now before the court for screening pursuant to *28 U.S.C. §1915A*. Also, there is a pending motion to dismiss by defendant Bertsch that has been fully briefed by the parties.

I. BACKGROUND

At least as the time of the filing of the complaint, plaintiff was incarcerated at the Ward County Jail in Minot. In his complaint, plaintiff claims that the prices being charged in the Jail's commissary are excessive because, according to him, they are greater than what persons outside the facility would have to pay for the same items on the open market. Plaintiff contends that the excessive pricing, as well as the acts of defendants causing it, violated federal antitrust laws[1] and his right to equal protection under the *Fourteenth Amendment*. The only relief that plaintiff seeks is damages. (Doc. No. 7).

One of the defendants that plaintiff wants to sue is Turnkey Correction, Inc. ("Turnkey"). Plaintiff contends that the excessive pricing is the result of Turnkey being involved with the Jail's commissary but is unclear in terms of its alleged role. For purposes of what follows, it will be assumed plaintiff is claiming that Turnkey is both operating the Jail's commissary and is the supplier of the items sold within it, rather than just being a supplier.

The other persons named as defendants are: Paul Othoff, who is alleged to be the Ward County Jail's commander of operations; Steve Kukowski, the Ward County Sheriff; and Leann Bertsch, the Direct of the North Dakota Department of Corrections and Rehabilitation ("NDDOCR"). There is no mention in the complaint of any of these individuals being sued in their individual as opposed to official capacities; but, in terms of the final outcome here, it does not make a difference.

II. STANDARDS GOVERNING INITIAL REVIEW

A. Screening requirements

When a prisoner proceeding *in forma pauperis* seeks to sue a governmental entity, officer, or employee, the Prison Litigation Reform Act of **[*3]** 1995 ("PLRA") requires the court to conduct an early screening of the complaint to weed out claims that clearly lack merit with the hope this will help to lessen the burdens imposed by the ever-rising number of prisoner suits, which too often are frivolous and without merit. *Jones v. Bock, 549 U.S. 199, 202-03, 127 S. Ct. 910, 166 L. Ed. 2d 798 (2007)*; *Woodford v. Ngo, 548 U.S. 81, 83-84, 126 S. Ct. 2378, 165 L. Ed. 2d 368 (2006)*. In conducting the screening required by *28 U.S.C. § 1915A*, the court is required to identify any cognizable claims and to dismiss the complaint, or any part of it, that is frivolous, malicious, fails to state a claim, or seeks monetary relief from an immune defendant.

Neither *42 U.S.C. § 1983* nor the PLRA imposes any heightened pleading requirements. *Jones v. Bock, 549 U.S. at 211-12*. Consequently, in order to state a cognizable claim, the complaint need only meet the minimum requirements of *Fed. R. Civ. P. 8(a)(2)*, which are that it contain "a short and plain statement of the claim showing that the pleader is entitled to relief." *Erickson v. Pardus, 551 U.S. 89, 93, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007)* (per curiam).

The court is obligated to construe a *pro se* complaint liberally and hold it to a less stringent standard than what normally would be required of attorneys. Id.; see also *Federal Express Corp. v. Holowecki, 552 U.S. 389, 402, 128 S. Ct. 1147, 170 L. Ed. 2d 10 (2008)*; *Solomon v. Petray, 795 F.3d 777, 787 (8th Cir. 2015)*. This does not mean that the court must accept everything or anything that is filed by *pro se* prisoners, however. In enacting the screening requirement, Congress obviously expected it **[*4]** to be more than a ritualistic exercise and that courts would only allow to go forward those claims that are cognizable, that seek relief from a non-immune party, and that are not obviously frivolous or malicious.

To meet the minimal pleading requirements of *Rule 8(a)(2)* for stating a cognizable claim, something more is required than simply expressing a desire for relief and declaring an entitlement to it. See *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 556 n.3, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* ("Bell Atlantic"). The complaint must state enough to "'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Erickson v. Pardus, 551 U.S. at 93* (quoting *Bell Atlantic, 550 U.S. at 555*). And, even though a *pro se* complaint is to be liberally construed, it must also contain enough to satisfy Bell Atlantic's "plausibility standard." E.g., *Ventura-Vera v. Dewitt, 417 Fed. Appx. 591, 592, 2011 WL 2184269, *1 (8th Cir. 2011)* (unpublished per curiam) (citing

[1] In his complaint, plaintiff references the Clayton Act codified at *15 U.S.C. §§ 12 et seq.* as modified by the Robinson-Patman Act. Given what follows, **[*2]** the court need not get into the intricacies of federal ***antitrust law***.

Harris v. Mills, 572 F.3d 66, 72 (2d Cir. 2007) for the appropriate post-Bell Atlantic standard); see also *Stone v. Harry, 364 F.3d 912, 914 (8th Cir. 2004)* (*pro se* complaints must allege sufficient facts to state a claim). Complaints that offer nothing more than labels and conclusions or a formulaic recitation of the elements are not sufficient. See id. Frivolous claims are those that are clearly baseless, fanciful, fantastic, or delusional. See *Denton v. Hernandez, 504 U.S. 25, 32-34, 112 S. Ct. 1728, 118 L. Ed. 2d 340 (1992)*.

III. DISCUSSION

A. Antitrust claim

As noted above, plaintiff seeks only damage relief in this **[*5]** action. Consequently, plaintiff's complaint fails to state a claim for which relief can be granted because each of the defendants are entitled to immunity from plaintiff's antitrust claims for damages, albeit for different reasons.

The two county defendants sued in their official capacities are entitled to immunity by virtue of *15 U.S.C. § 35(a)*, which reads as follows:

> **(a) Prohibition in general**
>
> No damages, interest on damages, costs, or attorney's fees may be recovered under section 4, 4A, or 4C of the Clayton Act (*15 U.S.C. 15*, *15a*, or *15c*) from any local government, or official or employee thereof acting in an official capacity.

See, e.g., *McGuire v. Ameritech Services, Inc., 253 F.Supp.2d 988, 1016 (S.D. Ohio 2003)* ("McGuire") (dismissing claim for damages under *15 U.S.C. § 15* brought against local officials operating county jails).

Likewise, Turnkey is similarly immune based on *15 U.S.C. § 36(a)*, which reads:

> **(a) Prohibition in general**
>
> No damages, interest on damages, costs or attorney's fees may be recovered under section 4, 4A, or 4C of the Clayton Act (*15 U.S.C. 15*, *15a*, or *15c*) in any claim against a person based on any official action directed by a local government, or official or employee thereof acting in an official capacity.

This is because the Ward County Jail is a county facility operated by the Ward County Sheriff. *N.D.C.C. §§ 11-10-20*, *11-15-03*, *12-44.1-02*. And, whatever services and goods Turkey **[*6]** provides is necessarily at the direction of the Ward County Sheriff thereby entitling Turnkey to immunity from damages. See *McGuire, 253 F.Supp.2d at 1016* (dismissing claim for damages under *15 U.S.C. § 15* brought against private defendants providing telephone services to jails at the direction of local officials).

Finally, any claim against defendant Bertsch in her official capacity as NDDOCR Director for antitrust violations is a claim against the State for which the State has *Eleventh Amendment* immunity as to any claim for damages. E.g., *Mirch v. Beesely, 316 Fed.Appx. 643 (9th Cir. 2009)* (dismissing claim for monetary damages for alleged antitrust violations under the Sherman and Clayton Acts against the Nevada State Bar Association and its employees on grounds of immunity under the *Eleventh Amendment* since the Bar Association was an arm of the State); see *Will v. Michigan Dep't of State Police, 491 U.S. 58, 64 n.5, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1988)* (drawing distinction between an antitrust claim brought against a State for injunctive relief and one seeking damages and noting that the trial court in an earlier antitrust case considered by the Court had dismissed the damage claim on *Eleventh Amendment* grounds). Further, defendant Bertsch would also have state-action ("Parker") immunity based on the seminal case of *Parker v. Brown, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943)*; see, e.g., *North Carolina State*

Bd. of Dental Examiners v. F.T.C., __ U.S. __, 135 S.Ct. 1101, 1110, 191 L. Ed. 2d 35 (2015) ("Dental Examiners"). This is because Bertsch is the Director of the NDDOCR, which is a department **[*7]** of the State and not a board comprised of otherwise private active market participants like in Dental Examiners.[2] Finally, apart from any

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[2] Even if plaintiff had sought relief other than money damages, Director Bertsch would likely be entitled to *Parker* immunity for the reasons stated. Also, while Parker immunity does not automatically extend to municipalities or political subdivisions of the States since they are not themselves sovereign, "substate governmental entities do receive immunity from antitrust scrutiny when they 'act pursuant to state policy to displace competition with regulation or monopoly public service.'" *F.T.C. v. Phoebe Putney Health System, Inc., __ U.S. __, 133 S.Ct. 1003, 1010-11, 185 L. Ed. 2d 43 (2013)* ("Phoebe Putney") (quoting *Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 370, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991))*. Finally, in certain circumstances, private parties who carry out state functions are entitled to the benefit of Parker immunity. *Id. at 1010*.

A two-part test is employed to determine whether anticompetitive conduct of nonsovereign actors should be deemed state action and, for that reason, shielded from federal antitrust laws. First, the State must have **[*8]** articulated a clear policy to allow the anticompetitive conduct. Second, the State must provide active supervision of the anticompetitive conduct. Dental Examiners, 135 S.Ct. at 1111-12. An exception is made for local governmental entities, however, which only have to satisfy the first part of the test. *Phoebe Putney, 133 S.Ct. at 1011*. In order to meet the "clear articulation" test, it is not necessary that a state legislature expressly state in a statute or its legislative history that it intends for the delegated action to have anticompetitive effect. Rather, it is sufficient if the anticompetitive effect was a foreseeable result of what was authorized. Id.

In North Dakota, the State Legislature has (1) made the incarceration of inmates at the county level a public function through its requirement that counties either provide county jails or contract with other governmental entities for housing inmates, and (2) required that county sheriffs operate the jails, with the sheriff being an elected official whose office is provided for both under state statutory law and the North Dakota Constitution. See *N.D. Const. Art. VII, § 11*; *N.D.C.C. §§ 11-10-20*, *11-15-03*, & *12-44.1-02*. Further, the State Legislature has enacted N.D.C.C. ch 12-44.1, which regulates the operation of correctional facilities, including county jails. **[*9]** Among other things, ch. 12-44.1: (1) requires each facility to develop and periodically update a manual for operating the facility; (2) governs the treatment of inmates and proscribes inmate rights; (3) grants the NDDOCR the authority to promulgate minimum standards for the construction and operation of correctional facilities; and (4) requires the NDDOCR to annually conduct an inspection of each facility with respect to health and safety, fire and life safety, security, rehabilitation programs, recreation, treatment of inmates, and personnel training. Finally, the NDDOCR has promulgated detailed jail rules and standards that even more closely regulate jails and their operations. See *www.nd.gov/docr/county/docs/NORTH* DAKOTA CORRECTIONAL FACILITY RULES 2014(2).pdf (last accessed February 9, 2016).

Given all of this, the North Dakota Legislature clearly has made incarceration of inmates a governmental function, *i.e.*, something that will generally be done by governmental entities and not the private sector, with the effects of that policy upon competition being clearly foreseeable. Further, the State's policy of government-operated correctional facilities clearly encompasses the ordinary incidents **[*10]** of incarcerating inmates including, for example, providing food, clothing, routine medical care, and recreational opportunities - all things that are subject to explicit regulation by the State and for which the State does not require be contracted out to the private sector. Finally, there is no reason why the same would not be true for a jail's operation of a commissary, which is a minor aspect of any county jail's operation, if it decides to offer one, and serves only inmates - a market with respect to which the State has generally eliminated competition. The net result of all of this is that the "clear articulation" requirement appears to be satisfied thereby entitling the county defendants to *Parker* immunity.

As for Turnkey, the "clear articulation" part of the two-part test is likely satisfied for the reasons already expressed and the second part of the two-part test (the "active supervision requirement") is likely satisfied by the fact that Turnkey is subject to the direct control of the Ward County Sheriff, who, in turn, is subject to removal from office by the Governor under *N.D.C.C. § 44-11-01* for acts of misconduct, malfeasance, or neglect of duties and ultimately by the voters in the next election **[*11]** if they are dissatisfied with his or her performance. Also, Turnkey's ability to operate is subject to the indirect control of the State in two respects. First, although the NDDOCR has chosen not to directly regulate jail commissaries as of this point, it undoubtedly has the legislative authority to do so if it deemed it necessary to carry out its responsibilities under N.D.C.C. ch.12-44.1. Second, the operation of jail commissaries are more generally subject to the statutory provisions governing the treatment of inmates and inmates rights set forth in N.D.C.C. ch. 12-44.1 (*e.g.*, the right of inmates to equal treat) as well as NDDOCR review generally of inmate treatment. Hence, Turnkey is also likely entitled to *Parker* immunity.

Not surprisingly, whether based upon a similar analysis or more general reasoning, a number of courts have concluded that Parker immunity should extend to the operation of commissaries by state or local governmental entities. See, e.g., *Wheeler v.*

immunity, plaintiff has failed to plead sufficient facts to make out a plausible claim of an antitrust violation against defendant Bertsch.

B. Alleged violation of federal equal protection rights

Generally speaking, prisoners have no constitutional right of access to a jail commissary. See, e.g., *Tokar v. Armontrout, 97 F.3d 1078, 1083 (8th Cir.1996)* ("[W]e note that we know of no constitutional right of access to a prison gift or snack shop...."); *Moore v. Ozmint, No. 3:10-3041, 2012 U.S. Dist. LEXIS 31519, 2012 WL 762460, at *10 (D.S.C. Feb. 16, 2012)* (there is no freestanding constitutional right to canteen privileges). Further, once a jail voluntarily sets up a commissary or provides for commissary services, there is no constitutional requirement that the jail must offer commissary items for sale at or near what the cost might otherwise be to the public if the same items were purchased locally on the open market. See, e.g., *LaPlante v. Lovelace, No. 2:13-cv-32, 2013 U.S. Dist. LEXIS 145870, 2013 WL 5572908 at *11 (W.D. Mich. Oct. 9, 2013)* ("Federal courts consistently have held that prisoners have no right to purchase products at regular retail prices."). Further, governmental officials can certainly discriminate between prisoners and the general public, and there is no allegation here that plaintiff was being charged more for commissary items than other inmates with whom he was similarly situated. In short, plaintiff's claim of denial of equal **[*13]** protection under the *Fourteenth Amendment* based upon an alleged pricing of commissary items that is greater than what the public might pay is without merit on its face.[3] See, e.g., *Hernandez v. Pugh, No. 4:12-cv-0923, 2012 U.S. Dist. LEXIS 174518, 2012 WL 6113617, at **6-7 (N.D. Ohio Dec. 10, 2012)* (rejecting a claim of denial of equal protection with respect to allegedly excessive commissary charges); *Guyer v. Frame, No. 85-3808, 1985 U.S. Dist. LEXIS 12505, 1985 WL 4984, at *1 (E.D. Pa. Dec. 20, 1985)* (same).

IV. RECOMMENDATION

The undersigned **RECOMMENDS** that defendant Bertsch's motion to dismiss as to her be granted (Doc. No. 15) and that plaintiff's complaint be otherwise dismissed in its entirety pursuant to *28 U.S.C. § 1915A* for failure to state a claim and that the dismissal be without prejudice with respect to his claims of antitrust violation and with prejudice with respect to his equal protection claim.

NOTICE OF RIGHT TO FILE OBJECTIONS

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*Beard, No. 03-4826, 2005 U.S. Dist. LEXIS 9778, 2005 WL 1217191, at ** 2-7 (E.D. Pa. May 19, 2005)*; *Dehoney v. S.C.Dept. of Corr., Nos. 0:94-3169-21BD, 1995 U.S. Dist. LEXIS 21446, 1995 WL 842006, at *1 (D.S.C. July 31, 1995)* aff'd ***72 F.3d 126*** [published in full-text format at *1995 U.S. App. LEXIS 34980*] (4th Cir. 1995) (South Carolina Department of Corrections entitled to Parker immunity as a state agency from an antitrust claim over the operation of a prison canteen); *Guyer v. Frame, No. 85-3808, 1985 U.S. Dist. LEXIS 12505, 1985 WL 4984, at *2 (E.D. Pa. Dec. 20, 1985)* (rejecting claim of antitrust violation **[*12]** based on alleged excessive commissary charges brought against a county prison).

[3] The State is also correct that there is *Eleventh Amendment* immunity for the claim of alleged constitutional violation being brought against defendant Bertsch. Under Eighth Circuit precedent, this court is required to assume that public officials are being sued in their official capacities unless there is a clear expression to the contrary. See, e.g., *Remington v. Hoopes, 611 Fed. App'x 883, 884-85 (8th Cir. 2015)* ("[W]hen a plaintiff's complaint is silent or otherwise ambiguous about the capacity in which the plaintiff is suing the defendant, our precedent requires us to presume that the plaintiff brings suit against the defendants in only their official capacities."); *Johnson v. Outboard Marine Corp., 172 F.3d 531, 535 (8th Cir. 1999)*. The net result of this is that plaintiff has no claim against defendant Bertsch for alleged violation of his equal protection rights. This is because any suit against Bertsch in her official capacity is a suit against the State, which has *Eleventh Amendment* immunity from any claim for damages under *42 U.S.C. § 1983* for violation **[*14]** of federal civil rights. See, e.g., *Kentucky v. Graham, 473 U.S. 159, 165-69, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985)*; *Reynolds v. Dormire, 636 F.3d 976, 981 (8th Cir.2011)* (state officials sued in official capacity possess *Eleventh Amendment* immunity from damage claims).

Pursuant to D.N.D. Civil L.R. 72.1(D)(3), any party may object to this recommendation within fourteen (14) days after being served with a copy of this Report and Recommendation. Failure to file appropriate objections may result in the recommended action being taken without further notice or opportunity to respond. Because plaintiff is incarcerated the deadline for filing objections shall be extended to March 17, 2016.

Dated this 17th day of February, 2016.

/s/ *Charles S. Miller, Jr.*

Charles S. Miller, Jr., Magistrate Judge

United States District Court

In re Ambac Bond Ins. Cases

Court of Appeal of California, First Appellate District, Division Three

February 18, 2016, Opinion Filed

A139765

Reporter

2016 Cal. App. Unpub. LEXIS 1230 *

In re AMBAC BOND INSURANCE CASES. [Two consolidated cases.][*]

Notice: NOT TO BE PUBLISHED IN OFFICIAL REPORTS. *CALIFORNIA RULES OF COURT, RULE 8.1115(a)*, PROHIBITS COURTS AND PARTIES FROM CITING OR RELYING ON OPINIONS NOT CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED, EXCEPT AS SPECIFIED BY *RULE 8.1115(b)*. THIS OPINION HAS NOT BEEN CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED FOR THE PURPOSES OF *RULE 8.1115*.

Subsequent History: Decision reached on appeal by *In re Ambac Bond Ins. Cases, 2016 Cal. App. Unpub. LEXIS 2479 (Cal. App. 1st Dist., Apr. 4, 2016)*

Prior History: [*1] JCCP No. 4555.

Core Terms

rating, insurers, credit rating, agencies, plaintiffs', dual, cause of action, Cartwright Act, unfair, nonprofit, conspiracy, misrepresentation, bonds, municipal bond, rating system, defendants', municipal, motion to strike, prima facie, anti-SLAPP, free speech, trial court, allegations, subprime, assign, prong, present evidence, public entity, unlawful conspiracy, transactions

Judges: Pollak, J.; McGuiness, P. J., Jenkins, J. concurred.

Opinion by: Pollak, J.

Opinion

In this consolidated proceeding, plaintiffs, a collection of public and nonprofit entities,[1] have alleged claims for, among other things, negligent misrepresentation, violations of the Cartwright Act (*Bus. & Prof. Code, § 16700 et*

[*] Contra Costa County v. Ambac Financial Group (S.F. Super. Ct. No. CJC-08-004555) and The Olympic Club v. MBIA, Inc. (S.F. Super. Ct. No. CGC-09-487058).

[1] Public entity plaintiffs are: City of Los Angeles, City of Oakland, City of Redwood City, City of Richmond, City of Riverside, City of Riverside as successor agency to City of Riverside Redevelopment Agency, Public Financing Authority of City of Riverside, City of Sacramento, City of San Jose, City of San Jose as successor agency to redevelopment agency of San Jose, City of Stockton, City of Stockton as successor agency to Redevelopment Agency of the City of Stockton, Public Financing Authority of City of Stockton, City and County of San Francisco, Alameda County, Contra Costa County, San Mateo County, Tulare County, East Bay Municipal Utility District, Los Angeles Department of Water and Power, Los Angeles World Airports, Sacramento

seq.), and violations of the Unfair Competition Law (UCL) (Bus. & Prof. Code, § 17200 et seq.) against a collection of credit rating agencies,[2] including The McGraw-Hill Companies, Inc., now known as McGraw Hill Financial, Inc. and Standard & Poor's Financial Services LLC (collectively S&P), and bond insurers.[3] The present appeal and cross-appeal arises out of the trial court's ruling on defendants' motions to strike these causes of action as a strategic lawsuit against public participation (SLAPP) under Code of Civil Procedure section 425.16 (the anti-SLAPP statute).[4] S&P contends the court erred in denying its motion to strike plaintiffs' negligent misrepresentation and UCL claims; the bond insurers contend the court erred in denying their motion to strike plaintiffs' UCL claims; and plaintiffs contend the court erred in granting defendants' motions to strike their claims under the Cartwright Act. We reverse the order insofar as it granted bond insurer defendants' motions to strike plaintiffs' **[*2]** claims under the Cartwright Act but affirm the order in all other respects.

Factual and Procedural Background

Between July 2008 and April 2009, individual plaintiffs filed several complaints against the bond insurer defendants. In May 2009, the individual actions were coordinated and a coordination trial judge was appointed. A year later, the rating agencies were added as defendants. The claims arise out of what plaintiffs describe as the rating agencies' "dual credit rating system," under which the risk of default of bonds **[*4]** issued by municipalities and nonprofit entities was rated higher than the risk on corporate bonds even though the financial risk factors for the municipal and nonprofit bonds were lower than for the corporate bonds. Plaintiffs also claim that the rating agencies misrepresented the financial condition of the bond insurers, ultimately causing plaintiffs to incur substantial losses when the mortgage market collapsed.

Plaintiffs characterize their claims as follows: "This case arises from commercial transactions between the public entities and nonprofits and the credit rating agencies and bond insurers related to specific tax-exempt municipal bonds the public entities and nonprofits issued to finance public works, including [to] build and maintain schools, hospitals, subsidized housing, utilities and infrastructure. [¶] Before the public entities and nonprofits issued these bonds, the rating agencies charged multi-millions of dollars in fees to provide analytical reviews of and assign credit ratings to the pending bonds under the 'dual credit rating system.' This system made municipal bonds less desirable to investors by uniformly assigning lower credit ratings to municipal bonds than to **[*5]** riskier corporate debt. In turn, the bond insurers charged the public entities and nonprofits multi-millions of dollars in premiums for bond insurance to 'enhance' the credit rating of pending municipal bonds by 'wrapping' the bonds with the bond insurers' highest AAA credit ratings assigned by the rating agencies, for which the bond insurers also paid fees to the rating agencies. In other words, the bond insurers 'rented' their AAA credit ratings to the public entities and nonprofits to overcome the fact that, under the dual credit rating system, the rating agencies did not assign AAA credit ratings to municipal bonds. [¶] The dual credit rating system was highly lucrative for the rating agencies and bond insurers but cost the public entities and nonprofits multi-millions of dollars for analytical reviews, insurance premiums and other fees and costs that corporate issuers did not have to pay. Additionally, under the dual credit rating system, the marketability of bonds issued by the public entities and nonprofits were wholly dependent upon the maintenance by the bond insurers of their highest AAA credit ratings throughout the term of the bonds. [¶] In 2007-2008, the rating

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Municipal Utility District, Sacramento Suburban Water District and The Regents of the University of California. Nonprofit plaintiffs are: Jewish Community Center of San Francisco and The Olympic Club.

[2] The rating agencies originally named as defendants also included Moody's Corporation, Moody's Investors Service, Inc., and Fitch Inc., Fitch Ratings, Ltd., and Fitch Group, Inc. Only **[*3]** the McGraw-Hill Companies, Inc., now known as McGraw Hill Financial, Inc. and Standard & Poor's Financial Services LLC, are parties to the appeal.

[3] The bond insurers named as defendants originally consisted of Ambac Assurance Corporation, Ambac Financial Group, Inc., MBIA Inc., MBIA Insurance Corporation, MBIA Insurance Corporation of Illinois, ACA Insurance Corp., Financial Guarantee Insurance Company (FGIC), Financial Security Assurance Inc., Assured Guaranty Corp., and Syncora Guarantee, Inc. Ambac Financial Group, Inc., ACA Insurance Corp., FGIC, and Syncora. were dismissed for various reasons and are no longer parties to the coordinated proceeding.

[4] All statutory references are to the Code of Civil Procedure section unless otherwise noted.

agencies **[*6]** downgraded the bond insurers' AAA credit ratings. As a direct result, the public entities and nonprofits suffered substantial damages when many of their bonds became unmarketable, and they were forced to pay higher interest rates, refinancing costs, termination fees, and other significant financial fees, costs and/or penalties. This occurred when the rating agencies and bond Insurers revealed publically that the bond insurers were overexposed to toxic subprime mortgage-backed securities—the collapse of the subprime mortgage market was at the heart of the global financial crisis." (Fn. omitted.)

Of particular concern to the present appeal are plaintiffs' allegations in support of their Cartwright Act and UCL claims that the bond insurers and the rating agencies knew the dual credit rating system was inaccurate and unfair to plaintiffs but unlawfully agreed to maintain the system in order to continue profiting from the system. Plaintiffs' negligent misrepresentation claims turn on allegations that beginning in 2001, the ratings agencies knew that the bond insurers were insuring risky subprime mortgage backed securities and, thus, had no reasonable basis to believe the AAA credit ratings **[*7]** they assigned to the bond insurers were accurate.

In October 2010, the ratings agencies filed special motions to strike under the anti-SLAPP statute. Thereafter, the bond insurers filed their special motions to strike. In July 2013, after extensive briefing and argument, the trial court issued a final order granting the motions to strike the Cartwright Act claims, but denying the motions to strike the UCL and negligent misrepresentation claims.

Both S&P and plaintiffs timely filed notices of appeal from the trial court's order. Thereafter, bond insurers filed notices of cross-appeal in relation to plaintiffs' appeal.

Discussion

"'A special motion to strike is a procedural remedy to dispose of lawsuits brought to chill the valid exercise of a party's constitutional right of petition or free speech. [Citation.] The purpose of the anti-SLAPP statute is to encourage participation in matters of public significance and prevent meritless litigation designed to chill the exercise of *First Amendment* rights. [Citation.] The Legislature has declared that the statute must be "construed broadly" to that end.' [Citations.] [¶] 'The analysis of an anti-SLAPP motion . . . involves two steps. "First, the court decides **[*8]** whether the defendant has made a threshold showing that the challenged cause of action is one 'arising from' protected activity."' [Citation.] '"In the anti-SLAPP context, the critical consideration is whether the cause of action is based on the defendant's protected free speech or petitioning activity."' [Citation.] The court looks to '"the gravamen or principal thrust" of the action.' [Citations.] [¶] '"If the court finds [the threshold] showing has been made, it then must consider whether the plaintiff has demonstrated a probability of prevailing on the claim." [Citation.] "Only a cause of action that satisfies both prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning and lacks even minimal merit—is a SLAPP, subject to being stricken under the statute."' [Citation.] [¶] If the defendant meets its threshold burden and the plaintiff asserts its claims are exempt under the commercial speech exemption of *section 425.17, subdivision (c)*, the plaintiff then has the burden to show the applicability of that exemption. [Citations.] If the plaintiff does not meet that burden, he or she must then establish a probability of prevailing on the claims. [¶] Review of an order granting or denying **[*9]** a motion to strike under *section 425.16* is de novo. (*Hawran v. Hixson (2012) 209 Cal.App.4th 256, 268-269, 147 Cal. Rptr. 3d 88*.)

1. Cartwright Act Claims

Plaintiffs allege that defendants violated the Cartwright Act by engaging "in an agreement . . . and/or conspiracy to create and maintain artificial conditions for the acquisition of municipal bond insurance." Their claims are based on allegations that the bond insurers and rating agencies conspired to perpetuate an "anticompetitive dual credit rating system." According to the complaint, "[t]he dual credit rating system is a system under which municipal plaintiffs and other issuers of municipal bonds, despite having far lower rates of default, were given lower credit ratings than issuers of corporate bonds with the same or higher risk of default. [¶] . . . The dual credit rating system dramatically increased the price that defendants were able to charge plaintiffs for bond insurance; the amount plaintiffs paid for bond insurance was inversely correlated with their credit ratings; the lower the credit rating of an issuer the higher the premium charged by the bond insurance companies to insure bonds issued by that issuer." According to the complaint, rating agencies also have a significant financial interest in perpetuating **[*10]** the dual credit rating system because the system allows them "to get paid for multiple credit letters" on each transaction. The complaint alleges the rating agencies "knew that there was a disparity between the actual default rates and the intentionally low credit ratings they were giving municipalities" and between 1999 and 2000, "elements within the [ratings agencies] began to publically admit the flawed nature of the dual credit rating system." In response to the suggestions that the system was flawed, "a conspiracy between and among the bond insurance companies and the [ratings agencies] was formed. At the heart of this conspiracy was an agreement by the [ratings agencies] to maintain the dual credit rating system despite the [rating agencies'] admitted recognition of its inherent inaccuracy."

The trial court found that plaintiffs' claims under the Cartwright Act arise from protected activity and that the *section 425.17, subdivision (c)* exemption for commercial speech did not apply. Turning to the second prong of the anti-SLAPP analysis, the court found that plaintiffs had not made a sufficient showing with respect to their Cartwright Act claims because the necessary element of an agreement had not been demonstrated **[*11]** by substantial evidence. Accordingly, the court granted the defendants' motions to strike plaintiffs' Cartwright Act claims.

A. Do plaintiffs' Cartwright Act claims arise from protected activity?

A motion to strike under *section 425.16, subdivision (b)(1)* may be directed at "[a] cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue . . . ." "The California Supreme Court has explained the first prong of the anti-SLAPP statute as follows: '[T]he statutory phrase "cause of action . . . arising from" means simply that the defendant's act underlying the plaintiff's cause of action must *itself* have been an act in furtherance of the right of petition or free speech. [Citation.] . . . [T]he critical point is whether the plaintiff's cause of action itself was *based on* an act in furtherance of the defendant's right of petition or free speech. [Citations.] . . . In determining whether [defendants'] burden is met, we keep in mind that '"the nature or form of the action is not what is critical but rather that it is against a person who has exercised certain rights" **[*12]** [citation].' [Citation.] Moreover, 'the gravamen of an action is the *allegedly wrongful and injury-producing conduct*, not the damage which flows from said conduct.' [Citation.] And, finally, where . . . the cause of action alleges both protected and nonprotected activities, the statute does not apply if the protected activities are 'merely incidental' or 'collateral' to the nonprotected activities." (*California Public Employees' Retirement System v. Moody's Investors Service, Inc. (2014) 226 Cal.App.4th 643, 658-659, 172 Cal. Rptr. 3d 238* (*CalPERS*).)

No party disputes that the creditworthiness of the municipalities and nonprofit organizations that are plaintiffs in this action, and the criteria on which their financial condition is evaluated—the matters addressed by S&P's published ratings—are issues of public interest within the meaning of *section 425.16, subdivision (e)(4)*. What is questioned is whether the alleged misconduct on which plaintiffs' Cartwright Act claims are based is conduct in furtherance of "defendants' constitutional right of free speech" on those matters of public interest. "An act is in furtherance of the right of free speech if the act helps to advance that right or assists in the exercise of that right." (*Tamkin v. CBS Broadcasting, Inc. (2011) 193 Cal.App.4th 133, 143, 122 Cal. Rptr. 3d 264*.)

Plaintiffs contend that the critical conduct with respect to their Cartwright Act claims is the alleged agreement between the **[*13]** rating agencies and the bond insurers that the rating agencies would continue to rate plaintiffs' creditworthiness pursuant to a system that defendants knew was unfair and inaccurate. Even assuming that it is the agreement and not the publication of the rating that allegedly injured plaintiffs, the alleged agreement as to how the rating agencies would formulate their ratings is conduct in furtherance of the publication of the ratings, which is an exercise of their right to free speech. Therefore, the alleged agreement advanced or assisted in the exercise of the rating agencies' right to free speech. (See, e.g., *Greater Los Angeles Agency on Deafness, Inc. v. CNN, Inc. (9th Cir. 2014) 742 F.3d 414, 424* [decision to display videos without closed captioning even if not itself an exercise of free speech constitutes conduct in furtherance of defendant's protected right to report the news.]; *Hunter v. CBS Broadcasting, Inc. (2013) 221 Cal.App.4th 1510, 1521, 165 Cal. Rptr. 3d 123* [allegedly discriminatory selection of news anchors is conduct in furtherance of the exercise of free speech because it "helped advance or assist" defendant's reporting of the news].) Thus, the trial court correctly determined that S&P met the burden under the first prong of the anti-SLAPP analysis of showing that plaintiffs' claims arise from protected activity.

A different analysis, however, **[*14]** is required for the bond insurer defendants. The bond insurers argue that plaintiffs' claims are based on their "advocacy" on behalf of the dual rating system, which they assert, constitutes protected speech on a matter of public interest. They rely on allegations in plaintiffs' complaint that in response to a suggestion in 2006 that Moody's was considering discontinuing use of the dual rating system, "several bond insurance companies organized a coordinated response" in which "top executives from two of the bond insurance companies met with Moody's top public finance analysts to ensure that despite indications to the contrary, Moody's would abide by the terms of the [agreement]." The bond insurers cite *Clamp-All Corp. v. Cast Iron Soil Pipe Inst. (1st Cir. 1988) 851 F.2d 478, 487* for the proposition that "advocacy by commercial entities to private standard-setters or others who affect their markets is protected speech."

Plaintiffs disagree. They argue that their Cartwright Act claims do not "seek to impose liability on the bond insurers . . . for participating in a 'public debate about rating systems.'" Rather, they assert that their claims are based on the "secret, behind-the-scenes agreement" between the bond insurers and the rating agencies "to perpetuate **[*15]** [the dual rating system] at the [plaintiffs'] expense." They also argue that the bond insurers' reliance on the 2006 communications involving Moody's ignores the other relevant allegations in the complaint: "While the allegations (and evidence) regarding the bond insurers' attempt to suppress public discussion of the abandonment of the dual credit rating system in 2006 constitutes evidence of an underlying anticompetitive conspiracy, that does not mean the [plaintiffs'] claim is based on or otherwise depends on this evidence. The allegations, which the trial court ignored, show that the conspiracy existed both before and after the 2006 draft request for comments." (Emphasis omitted.)

Although there may be merit to the bond insurers' argument, we need not resolve this issue because we conclude that plaintiffs made a prima facie showing of their ability to prevail on this claim.

B. Does the commercial speech exemption apply?

Section 425.17, subdivision (c) exempts a cause of action arising from commercial speech from the anti-SLAPP law when "(1) the cause of action is against a person primarily engaged in the business of selling or leasing goods or services; (2) the cause of action arises from a statement or conduct **[*16]** by that person consisting of representations of fact about that person's or a business competitor's business operations, goods, or services; (3) the statement or conduct was made either for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person's goods or services or in the course of delivering the person's goods or services; and (4) the intended audience for the statement or conduct meets the definition set forth in *section 425.17[, subdivision] (c)(2)*," that is, "an actual or potential buyer or customer, or a person likely to repeat the statement to, or otherwise influence, an actual or potential buyer or customer." (*Simpson Strong-Tie Co., Inc. v. Gore (2010) 49 Cal.4th 12, 22, 30, 109 Cal. Rptr. 3d 329, 230 P.3d 1117*.)

As stated above, the misconduct alleged in plaintiffs' Cartwright Act cause of action is the allegedly unlawful agreement to use the dual credit rating system to rate plaintiffs' creditworthiness. As such, the cause of action does not arise "from a statement or conduct by [either the rating agencies or the bond insurers] consisting of representations of fact about [the rating agencies' or the bond insurers'] or a business competitor's business operations, goods, or services." (*Simpson Strong-Tie Co., Inc. v. Gore, supra, 49 Cal.4th at p. 30*.) Although the rating agencies allegedly **[*17]** made misrepresentations about the accuracy of their ratings, the falsity of those representations is not the basis of plaintiffs' Cartwright Act cause of action; the nub of the claim is the alleged agreement to use a common dual rating system. Hence, the court properly rejected application of the commercial speech exemption to this cause of action.

C. *Did plaintiffs establish a probability of prevailing on their claims against the rating agency defendants?*

"To show a probability of prevailing for purposes of *section 425.16*, a plaintiff must ""make a prima facie showing of facts which would, if proved at trial, support a judgment in plaintiff's favor."" [Citation.] This standard is 'similar to the standard used in determining motions for nonsuit, directed verdict, or summary judgment,' in that the court cannot weigh the evidence. [Citations.] However, the plaintiff 'cannot simply rely on the allegations in the complaint' [citations], but 'must provide the court with sufficient evidence to permit the court to determine whether "there is a probability that the plaintiff will prevail on the claim."'" (*ComputerXpress, Inc. v. Jackson (2001) 93 Cal.App.4th 993, 1010, 113 Cal. Rptr. 2d 625*.) However, "[a]n anti-SLAPP-suit motion is not a vehicle for testing the strength of a plaintiff's case **[*18]** . . . so early in the proceedings . . . . It is a vehicle for determining whether a plaintiff, through a showing of minimal merit, has stated and substantiated a legally sufficient claim." (*Wilbanks v. Wolk (2004) 121 Cal.App.4th 883, 906, 17 Cal. Rptr. 3d 497*, citing *Equilon Enterprises v. Consumer Cause, Inc. (2002) 29 Cal.4th 53, 63, 124 Cal. Rptr. 2d 507, 52 P.3d 685*.)

The elements of plaintiffs' Cartwright Act claim are ""(1) the formation and operation of the conspiracy, (2) the wrongful act or acts done pursuant thereto, and (3) the damage resulting from such act or acts."'" (*Quelimane Co. v. Stewart Title Guaranty Co. (1998) 19 Cal.4th 26, 47, 77 Cal. Rptr. 2d 709, 960 P.2d 513*.) As noted above, the trial court found that plaintiffs' failed to make an adequate showing with respect to the formation and operation of the alleged conspiracy.

In *Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 851-852, 107 Cal. Rptr. 2d 841, 24 P.3d 493*, the court set forth the plaintiff's burden when required make a prima facie showing of the existence of an unlawful conspiracy necessary to assert a claim under the Cartwright Act: "[I]n order to carry a burden of production to make a prima facie showing that there is a triable issue of the material fact of the existence of an unlawful conspiracy, a plaintiff, who would bear the burden of proof by a preponderance of evidence at trial, must present evidence that would allow a reasonable trier of fact to find in his favor on the unlawful-conspiracy issue by a preponderance of the evidence, that is, to find an unlawful **[*19]** conspiracy more likely than not. Ambiguous evidence or inferences showing or implying conduct that is as consistent with permissible competition by independent actors as with unlawful conspiracy by colluding ones do not allow such a trier of fact so to find. ***Antitrust law***, including the Cartwright Act, compels the result. Otherwise, it might effectively chill procompetitive conduct in the world at large, the very thing that it is designed to protect [citation], by subjecting it to undue costs in the judicial sphere. Therefore, in addition, the plaintiff must present evidence that tends to exclude, although it need not actually exclude, the possibility that the alleged conspirators acted independently rather than collusively." (*Id. at p. 852*, fn. omitted.) The court added, "if the court determines that any evidence or inference presented or drawn by the plaintiff indeed shows or implies unlawful conspiracy more likely than permissible competition, it must then deny the defendants'' motion for summary judgment, even in the face of contradictory evidence or inference presented or drawn by the defendants, because a reasonable trier of fact could find for the plaintiff. . . . [¶] But if the court determines **[*20]** that all of the evidence presented by the plaintiff, and all of the inferences drawn therefrom, show and imply unlawful conspiracy *only as likely* as permissible competition or *even less likely*, it must then grant the defendants' motion for summary judgment, even apart from any evidence presented by the defendants or any inferences drawn therefrom, because a reasonable trier of fact could not find for the plaintiff." (*Id. at pp. 856-857*.)

We agree with the trial court that plaintiffs' evidentiary showing that S&P entered into an agreement with any bond insurer or other rating agency to perpetuate the use of the dual credit rating system is insufficient. While plaintiffs unquestionably presented evidence of a strong financial motive and ample opportunity to enter into a conspiracy, there is insufficient evidence, either express or circumstantial, of an actual agreement. Contrary to plaintiffs' argument, the evidence is insufficient to support a reasonable inference that the maintenance of the dual rating system by S&P was "more likely than not" the product of an unlawful conspiracy. Plaintiffs argue: "The rating agencies' and bond insurers' lock-step adherence to the dual credit rating system implies collusion **[*21]** because it is inconsistent with the competitive market forces. Had any one of the three ratings agencies split from the others and applied a corporate equivalent rating scale to municipal bonds, as Moody's contemplated in 2006, or developed a municipal scale that clearly communicated the distinction between municipal and corporate debt, that rating agency would have immediately secured the majority of the municipal bond rating business from the others. [¶] Earning extra revenue from the dual rating system, by contrast, required that all three rating agencies provide ratings services on the same, ineffective municipal scale."

Plaintiffs argue that they submitted substantial evidence "in the form of expert testimony, fact witness testimony and party admissions, showing that the dual credit rating system could not and would not have survived as long as it did absent collusion between the credit rating agencies and the bond insurers." Plaintiffs' strongest evidence that defendants "more likely than not" engaged in a conspiracy comes from the declaration of Joseph Pimbley, whom plaintiffs retained as an "expert in municipal finance, credit enhancements and antitrust investigations." His **[*22]** declaration explains that "[t]he purpose of credit ratings is to provide information to investors on the credit quality of debt securities. Each [ratings agency] fully expects and wants investors to interpret different ratings on two bonds as the [rating agency's] unbiased, expert analysis that the two bonds have differing credit quality." Under the dual rating system, however, the ratings agencies "did not apply similar credit analysis and judgment to all bond sectors—specifically the [rating agencies] did not assign ratings to municipal and corporate bonds in a manner consistent with the affirmative representations of the meaning of the rating levels. [¶] The [ratings agency] default study results beginning in the 1990's should have moved the [rating agencies] to fix their credit rating analyses and assignments. Instead, the [ratings agencies] chose to maintain this 'dual system.' . . . [¶] The [rating agencies] failure to take corrective actions is particularly troubling given that when the [rating agencies] wish to apply different standards to different debt instruments, they specifically and clearly create ratings scales with different symbols. [For example], . . . [t]o avoid confusing **[*23]** investors, the [rating agencies] apply different rating symbols for short-term versus long-term debt. [¶] Had the [rating agencies] truly wished to rate municipal bonds with different meaning for the ratings, they would have created rating scales with distinct symbols and explained them clearly." (Fn. omitted.)

Ultimately, Pimbley concludes that the rating agencies "knowingly failed to assign ratings to municipal bonds in a manner consistent with the affirmative representations of the meanings of their ratings. This failure did not serve the marketplace; it only served to mislead investors." He concludes that the rating agencies "did not standardize their rating scales in large part because of the [rating agencies'] close relationship with the bond insurers. In short, the [rating agencies] were motivated by financial gain in this deliberate misrepresentation. The bond insurers were motivated by the fact that their business model would collapse if there was no dual credit rating system. These two business models merged to allow the dual credit system to perpetuate for years after the [rating agencies] recognized that the system was unfair and arbitrary." Plaintiffs also presented evidence **[*24]** in support of their claim that when the credit rating agencies "finally made changes to their rating scales, each did so within a small window of time in 2010."

This evidence does not tend to show that the continued use of the system resulted from an unlawful agreement rather than from S&P's determination of its own financial best interests. Plaintiffs do not dispute that the dual credit rating system was established by the rating agencies long before they allegedly discovered it was inaccurate and unfair. As the bond insurance market grew, so did a considerable income stream for the rating agencies. Nothing in the record establishes that the failure of S&P to discontinue the system was the product of an unlawful agreement rather than the reflection of its own financial self-interest. As in the case of any oligopoly, had any one of the rating agencies discontinued the dual rating system, "immediately secur[ing] the majority of the municipal bond rating system from others," as plaintiffs assert, it would expect the other agencies to follow suit and also discontinue use of the dual rating system, thereby decreasing rather than increasing its own profitability. (See Gregory J. Werden, Economic Evidence **[*25]** on the Existence of Collusion: Reconciling ***Antitrust Law*** with Oligopoly Theory, 71 Antitrust L.J. 719, 721 (2004).) That is the reason for which parallel action by competitors, without more, is not sufficient to establish the existence of an illegal agreement. (*Biljac Associates v. First Interstate Bank (1990) 218 Cal.App.3d 1410, 1423, 1428, 267 Cal. Rptr. 819*, disapproved on different ground in *Demps v. San Francisco Housing Authority (2007) 149 Cal.App.4th 564, 566, 57 Cal. Rptr. 3d 204* [Conscious parallel pricing is not in itself unlawful and, without evidence of concerted activity, will not support an inference of antitrust conspiracy.]; *Eddins v. Redstone (2005) 134 Cal.App.4th 290, 308-309, 35 Cal. Rptr. 3d 863* [consciously parallel behavior will not support an inference of conspiracy without evidence '"(1) that the defendants acted in contradiction of their economic interests, and (2) that the defendants had a motive to enter into an agreement."'].)

Plaintiffs' "direct evidence of collusion" fares no better at establishing an agreement involving S&P. According to plaintiffs, their "evidence shows that in January 2006, Moody's circulated a draft request for comments among the bond insurers and others in the municipal finance industry that had not been released to the public, which proposed seeking public comment on the abandonment of the dual credit rating system. The bond insurers, by and through a trade association colluded amongst themselves to pressure Moody's not to make **[*26]** any changes that would reduce or eliminate the 'spread' between municipal bonds and corporate debt that comprises the 'heart' of the municipal bond insurance industry. Two executives from the bond insurers met with Moody's shortly thereafter. One of the executives' summary of the meeting—'we were preaching to the choir'—clearly implies that an agreement to maintain the dual credit rating system had been discussed and advanced. Following the bond insurers communications, Moody's released a substantially revised request for comments that removed the exact question that the bond insurers disliked—whether the corporate equivalent scale should be used for U.S. municipal debt in all sectors." (Emphasis omitted.) Moody's January 2006 draft request for comments and its June 2006 request for comments are contained in the record and show that the relevant question went from "Should we expand the assignment of corporate equivalent ratings beyond swaps and taxable cross-border transactions to taxable transactions sold within the United states?" to "Should we (a) expand the assignment of corporate equivalent ratings (CERs) to taxable municipal transactions sold within the United States, (b) continue **[*27]** our current practice of assigning corporate equivalent ratings only to taxable transactions sold outside the United states and swaps, or (c) eliminate the practice of assigning CERs to individual municipal obligations?" The bond insurer defendants stipulated to the contents of emails written by an executive at one of the bond insurance companies noting the potential seriousness of the proposed changes as well as his intention to contact the trade association "to see if we can draft an industry response" as well as an executive's response following the May 2006 meeting with Moody's. The bond insurers also stipulated that "executives from two bond insurer defendants met with Moody's" in May 2006.

This evidence is insufficient to support an inference that S&P, as compared to Moody's, was a party to any agreement with the bond insurers. While that possibility of course remains, it is no more than speculation in the absence of some evidence linking S&P to entry of the alleged agreement. And, as just indicated, plaintiffs have presented no such evidence.

This evidence is sufficient, however, to support an inference that the bond insurer defendants were parties to an agreement with Moody's. **[*28]** Contrary to the bond insurers' argument, plaintiffs' evidence shows more than that Moody's merely "heard the bond insurers' position and decided to act in accordance with that position." The evidence of the meeting and Moody's subsequent change to its request for comments, coupled with plaintiffs' additional evidence that there is no reasonable justification for perpetuating the system other than an improper financial motive, is sufficient to support the inference (though not conclusive) of a conspiracy. (See *Brown v. Pro Football, Inc. (1996) 518 U.S. 231, 241, 116 S. Ct. 2116, 135 L. Ed. 2d 521* ["***Antitrust law*** also sometimes permits judges or juries to premise antitrust liability upon little more than uniform behavior among competitors, preceded by conversations implying that later uniformity might prove desirable [citations] or accompanied by other conduct that in context suggests that each competitor failed to make an independent decision."]; *Monsanto Co. v. Spray-Rite Serv. Corp. (1984) 465 U.S. 752, 764, 104 S. Ct. 1464, 79 L. Ed. 2d 775* ["[T]he antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others 'had a conscious commitment to a common scheme designed to achieve an unlawful objective.'"].)

For purposes of defeating a special motion to strike, plaintiffs need not, as bond insurers suggest, **[*29]** establish all of the details of the conspiracy. While the bond insurers are quick to point out that "there is no indication [in the record] of who these executives were or what companies employed them, what was discussed, whether anything was agreed upon, or even if they met separately or together with Moody's" that evidence undoubtedly will be pursued during discovery. In *Aguilar v. Atlantic Richfield Co., supra, 25 Cal.4th at page 857*, the court acknowledges that "a plaintiff . . . must often rely on inference rather than evidence since, usually, unlawful conspiracy is conceived in secrecy and lives its life in the shadows." At this early stage of the proceedings the evidence is sufficient to support the inference of a conspiracy, enabling plaintiffs to defeat the bond insurers' motion to strike and attempt to obtain further evidence that will prove their claim.

Finally, the bond insurers argue that absent evidence that they coerced Moody's into the agreement, their "advocacy" is protected by the *First Amendment*. Bond Insurers again rely on their argument that "[a]dvocacy to a private standards-setting body undertaken on a collective basis by competitors through a trade association or otherwise is protected under the *First Amendment*." As bond insurers acknowledge, however, the *First Amendment* does **[*30]** not protect "advocacy" that "involves economic coercion or similar abuse." Nor, does the *First Amendment* protect advocacy that "serves no legitimate purpose, or that . . . is unnecessarily harmful." (*Clamp-All Corp. v. Cast Iron Soil Pipe Inst., supra, 851 F.2d at p. 487*.) Plaintiffs' evidence that the bond insurer's so-called "advocacy" of the dual credit rating system did not serve a legitimate purpose and was unnecessarily harmful is sufficient to defeat the bond insurers' *First Amendment* defense for purposes of this motion.

D. Conclusion

In summary, we find no error in the court's order striking plaintiffs' Cartwright Act claims against S&P. However, we conclude that plaintiffs made a prima facie showing of their ability to prevail on this cause of action against the bond insurers and that the court erred in striking the Cartwright Act cause of action against those defendants.

2. UCL Claims

"The UCL does not proscribe specific acts, but broadly prohibits 'any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising . . . .' (*Bus. & Prof. Code, § 17200*.) 'The scope of the UCL is quite broad. [Citations.] Because the statute is framed in the disjunctive, a business practice need only meet one of the three criteria to be considered unfair competition.'" (**[*31]** *Durell v. Sharp Healthcare (2010) 183 Cal.App.4th 1350, 1359, 108 Cal. Rptr. 3d 682*.) An act or practice may be actionable as "unfair" under the unfair competition law even if it is not "unlawful." (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co. (1999) 20 Cal.4th 163, 180, 83 Cal. Rptr. 2d 548, 973 P.2d 527*.)

Nonprofit plaintiffs allege that defendants' actions, "including but not limited to making illegal agreements among themselves to act jointly to perpetuate the dual rating system and thus cause harm to competition in the bond insurance market, fix, stabilize and/or increase the price of bond insurance sold to plaintiff[s]," constitute "unfair, illegal and/or fraudulent business practices within the meaning of *Business and Professions Code [section] 17200 et seq.*"

As indicated above, the trial court found that defendants satisfied their burden under the first prong of the anti-SLAPP analysis with respect to the UCL claims. The court explained that its ruling that the nonprofit plaintiffs had not met their burden under the second prong with respect to the Cartwright Act necessarily precluded a prima facie showing of a violation of the UCL under the unlawful criterion of the statute. The court concluded, however, that plaintiffs had made a prima facie showing under the unfairness criterion of the UCL and denied defendants' motion on that basis.

As indicated in the preceding discussion, we have concluded that the bond insurers' special **[*32]** motion to strike the Cartwright Act cause of action should have been denied. It therefore follows that plaintiffs are entitled to pursue their a UCL cause of action against the bond insurers under the illegality criterion, whether or not that cause of action against them can be sustained under the unfairness criterion. In their briefing and at oral argument, the bond insurers argued that the nonprofit plaintiffs lack standing to pursue their UCL claims against one or both of the remaining bond insurers because they did not purchase bond insurance from those insurers. Their argument is premised on the failure of the nonprofit plaintiffs to present evidence of the existence of a conspiracy to perpetuate the dual rating system. Because we have determined that the evidence of the bond insurers participation in a conspiracy is sufficient to defeat the anti-SLAPP motion addressed to the nonprofit plaintiffs' Cartwright Act claims, the evidence also makes a prima facie showing that the bond insurers' wrongful conduct (participation in the alleged antitrust conspiracy) caused the nonprofit plaintiffs to suffer injury in the form of increased or unnecessary payments for bond insurance. (See, **[*33]** e.g., *Clayworth v. Pfizer, Inc. (2010) 49 Cal.4th 758, 788, 111 Cal. Rptr. 3d 666, 233 P.3d 1066* [Pharmacy plaintiffs had standing under UCL as indirect purchaser where "loss was the result of an unfair business practice: Pharmacies paid more than they otherwise would have because of a price-fixing conspiracy in violation of state law."]; *Rosack v. Volvo of America Corp. (1982) 131 Cal.App.3d 741, 753, 182*

Cal. Rptr. 800 ["[A] jury can *infer* the fact of injury when a conspiracy to fix prices has been established and plaintiffs have established that they purchased the affected goods or services. This inference eliminates the need for each class member to prove individually the consequences of the defendants' actions to him or her."])[5]

Because we have concluded that the plaintiffs failed to establish a likelihood of success on their Cartwright Act cause of action against the rating agencies, and because these defendants have carried their burden of showing that the UCL cause of action is based on constitutionally **[*35]** protected activity, we must determine whether the nonprofit plaintiffs have made a prima facie showing of their ability to prevail against the rating agencies under the unfairness criterion of the UCL sufficient to overcome the motion to strike.

Under *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., supra, 20 Cal.4th 163, 187*, conduct is "unfair" within the meaning of the statute if it "threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." In this case, the trial court concluded that plaintiffs had made a sufficient showing that defendants' conduct was unfair under this standard. The court explained, "Regarding the antitrust public policy, . . . [plaintiffs] say the result of this asserted unfair practice results in a violation of many of the things to which ***antitrust law*** in general and the Cartwright Act specifically are directed. [¶] . . . [T]he idea is . . . that this system of rating, dual rating resulting in the rating agencies getting business and the insurance company selling insurance, end up in a closed market where the participants, without regard to an agreement **[*36]** to do this, make a lot of money. [¶] And I think the evidence presented by the plaintiff supports that interpretation . . . . They repeated comments regarding that there is a system that's going on here that results in charging of fees or the charging of insurance premiums, that there's nothing that anybody can do about it, that there's a cost impact on the issuers of bonds and the like, and the expert opinion that there's no factual basis for any of this, but everybody is doing it because they see the benefit of it."[6]

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[5] Bond insurers also argued in their briefs that the UCL claims should be dismissed because under this statute there is no form of relief to which the plaintiffs can possibly be entitled. The UCL "provides only limited remedies: restitution and injunctive relief." (*Shersher v. Superior Court (2007) 154 Cal.App.4th 1491, 1497, 65 Cal. Rptr. 3d 634*.) Because the disputed practice is no longer in use, injunctive relief is not available. As to restitution, "'in the UCL context . . . restitution means the return of money to those persons from whom it was taken or who had an ownership interest in it.'" (*Ibid*; *Bus. & Prof. Code, § 17203* ["The court may make such orders or judgments, . . . as may be necessary to restore to any person in interest **[*34]** any money . . . which may have been acquired by means of such unfair competition."].) Direct payment from plaintiff to defendant is not necessary to state a claim under the UCL. (*Shersher, supra, at p. 1497*; *Troyk v. Farmers Group, Inc. (2009) 171 Cal.App.4th 1305, 1340, 90 Cal. Rptr. 3d 589*.) In cases where there is no direct payment, a plaintiff must show that the defendant benefitted from the actions that resulted in an economic loss to plaintiff. (*Shersher, supra, at pp. 1499-1500* [finding that defendant benefitted from plaintiff's purchase of its products from third party dealers despite the fact that payment was not made directly from plaintiff to defendant.]; *Troyk, supra, at pp. 1339-1342* [defendants subject to claim of restitution for service charges paid by consumers to a third party because defendants received a benefit from the payment of such charges and because defendants and the third party acted as a single enterprise].) Here, plaintiffs presented evidence that bond insurers acquired significant financial benefits from their participation in the alleged conspiracy.

[6] The trial court recognized two alternative definitions of "unfair" that may be applicable in this action and found that nonprofit plaintiffs had presented a probability of prevailing under each standard. (See *West v. JPMorgan Chase Bank, N.A. (2013) 214 Cal.App.4th 780, 806, 154 Cal. Rptr. 3d 285* ["Several definitions of 'unfair' under the UCL have been formulated. They are: [¶] 1. 'An act or practice is unfair if the consumer injury is substantial, is not outweighed by any countervailing benefits to consumers or to competition, and is not an injury the consumers themselves could reasonably have avoided.' [Citation.] [¶] 2. '"[A]n 'unfair' business practice occurs when that practice 'offends an established public policy or when the practice is immoral, unethical, **[*37]** oppressive, unscrupulous or substantially injurious to consumers.' [Citation.]" [Citation.]' [Citation.] [¶] 3. An unfair business practice means '"the public policy which is a predicate to the action must be 'tethered' to specific constitutional, statutory or regulatory provisions."'"].) Defendants assert that the *Cel-Tech* standard is the only standard applicable in this action. Because we agree with the trial court's conclusion under that standard, we need not consider whether other standards apply or whether nonprofit plaintiffs' showing satisfied other standards as well.

S&P's argument that nonprofit plaintiffs, as a matter of law, "cannot restate their failed theory of antitrust harm under an unfairness prong UCL claim" is unfounded. *Chavez v. Whirlpool Corp. (2001) 93 Cal.App.4th 363, 113 Cal. Rptr. 2d 175*, relied on by defendants, does not hold that the absence of illegality precludes a finding of unfairness under the UCL. In that case, the court observed "conduct that the courts have determined to be permissible . . . cannot be deemed 'unfair' under the unfair competition law." (*Id. at p. 375*; see also *Belton v. Comcast Cable Holdings, LLC (2007) 151 Cal.App.4th 1224, 1240, 60 Cal. Rptr. 3d 631*.) But the court explained, "We do not hold that in all circumstances an 'unfair' business act or practice must violate an ***antitrust law*** to be actionable under **[*38]** the unfair competition law. Instead we hold that conduct alleged to be 'unfair' because it unreasonably restrains competition and harms consumers . . . is not 'unfair' if the conduct is deemed reasonable and condoned under the antitrust laws." (*Chavez, supra, at p. 375*.) As the trial court here correctly observed, the fact that plaintiffs were unable to substantiate their Cartwright Act claims against the ratings agencies does not mean that defendants' conduct is necessarily immune from liability under the unfairness criterion of the UCL. Since plaintiffs have made a plausible showing that the dual rating system was unreasonable, knowingly resulting in unjustifiable extra insurance costs for the public and nonprofit agencies, the court properly denied the special motion to strike the UCL cause of action against the rating agencies.

3. Negligent Misrepresentation Claims

Plaintiffs allege defendants "misrepresented the bond insurance companies' financial strength and concealed from plaintiffs that the bond insurance companies had shifted, and/or had the plan to shift, their risk free business model into the business of insuring exotic and risky financial instruments consisting of bundles of thousands of subprime **[*39]** mortgages. . . . This shift placed the bond insurance companies' financial strength at risk by jeopardizing their 'AAA' rating and ability to provide the credit support they had been paid millions to provide for plaintiffs' . . . bonds. Defendants made these misrepresentations with knowledge of their falsity or at least with no reasonable basis on which to believe in their truth. Defendants made these representations with the intention to induce plaintiffs to purchase bond insurance and leave it in place. Defendants also did so with the expectation that plaintiffs, as among a limited group of bond insurance purchasers, would rely on these misrepresentations and concealments in making these decisions. Had defendants not made these misrepresentations and/or revealed the true facts to plaintiffs, plaintiffs would not have purchased the bond insurance from them . . . and would not have left them in place into 2008. Ultimately, plaintiffs lost millions when the auctions for the [bond] issuances failed as a result of plaintiffs' decisions to purchase the bond insurance for these issuances and to leave it in place."

The trial court concluded that S&P had satisfied its prong one burden: "All **[*40]** of plaintiffs' causes of action against S&P arise out of S&P's speech regarding the publication of opinions and other materials and the dissemination of those opinions and other material concerning matters of concern in the public financial markets." The court found, however, that plaintiffs had presented substantial evidence as to each element necessary to support their causes of action for negligent misrepresentation against S&P and that S&P had not established its affirmative defense under the *First Amendment*.

The trial court's prong one analysis is likely correct. (See *CalPERS, supra, 226 Cal.App.4th at p. 659*.) We need not explore the issue further, however, as we conclude that the trial court's ruling on the second prong is also correct.

"The elements of negligent misrepresentation are (1) the misrepresentation of a past or existing material fact, (2) without reasonable ground for believing it to be true, (3) with intent to induce another's reliance on the fact misrepresented, (4) justifiable reliance on the misrepresentation, and (5) resulting damage." (*Apollo Capital Fund, LLC v. Roth Capital Partners, LLC (2007)158 Cal. App. 4th 226, 243, 70 Cal. Rptr. 3d 199*.) S&P challenges plaintiffs' showing on each element.

S&P contends that their ratings are not actionable statements of fact. They argue that S&P's "ratings of plaintiffs' bonds and **[*41]** of the bond insurers constitute opinions of *future* events." They rely on the allegations in plaintiffs' complaints that the credit ratings express "'the likelihood of default by the entity that issues debt.'" In *CalPERS, supra, 226 Cal.App.4th at page 664*, this court refused to interpret credit ratings "in such a narrow fashion." We explained, "At first glance, resolving whether ratings are actionable misrepresentations for purposes of this tort seems quite straightforward given the oft-stated rule that a speaker's opinion about a future event is not a statement about a past or existing material fact. 'It is hornbook law that an actionable misrepresentation must be made about past or existing facts; statements regarding future events are merely deemed opinions.' [Citations.] . . . [¶] However, . . . 'Under certain circumstances, expressions of professional opinion are treated as representations of fact. When a statement, although in the form of an opinion, is "not a casual expression of belief" but "a deliberate affirmation of the matters stated," it may be regarded as a positive assertion of fact. [Citation.] Moreover, when a party possesses or holds itself out as possessing superior knowledge or special information or expertise **[*42]** regarding the subject matter and a plaintiff is so situated that it may reasonably rely on such supposed knowledge, information, or expertise, the defendant's representation may be treated as one of material fact." (*Id. at p. 662*; see also *Anschutz Corp. v. Merrill Lynch & Co. Inc. (N.D. Cal. 2011) 785 F.Supp.2d 799, 824* [credit rating was actionable either as a """a deliberate affirmation of the matters stated,""" or because the credit rating agency's opinion is based on its "superior knowledge or special information"]; *Abu Dhabi Commercial Bank v. Morgan Stanley & Co. Inc. (S.D.N.Y. 2012) 888 F.Supp.2d 431, 456* [Rating agencies may be liable for fraud "if the ratings *both* misstated the opinions or beliefs held by the [r]ating [a]gencies *and* were false or misleading with respect to the underlying subject matter they address."].)

In this case, plaintiffs submitted evidence that S&P had superior knowledge and special information about the financial condition and creditworthiness of the bond insurers. According to S&P's own documents, S&P "takes great care to assure that the market views its credit ratings as highly credible and relevant, and will continue to review its practices, policies, and procedures on an ongoing basis and modify or enhance them, as necessary, to ensure that rigorous analytics, integrity, independence, objectivity, transparency, credibility, and quality continue as **[*43]** fundamental premises of its operations." In its application for registration as a nationally recognized statistical rating organization, S&P writes that it "provides a credit rating only when, in its opinion, there is information of satisfactory quality to form a credible opinion on creditworthiness, consistent with its *credit rating information and data policy*, and only after applicable quantitative, qualitative, and legal analyses are performed. Throughout the ratings and surveillance process, the analytical team reviews information from both public and nonpublic sources."

In a report entitled "Bond Insurance Criteria: Industry Overview and Analytical Focus," S&P states that its "financial strength rating is a current opinion of the financial security characteristics of an insurance organization with respect to its ability to pay under its insurance policies and contacts in accordance with their terms." S&P's rating methodology for bond insurers "addresses many of the same factors involved in any insurance company's financial strength rating. However, the criteria developed for bond insurers have been tailored to the unique aspects of the financial guaranty business and differ in **[*44]** important respects. [¶] One critical difference . . . is the expectation that only minimal net losses will occur in a normal operating environment. This expectation is based on the credit quality of the insured portfolios, which overwhelmingly consist of issues that are investment grade or near investment grade quality on an uninsured basis." For this reason, S&P employed a "capital adequacy model" to determined the adequacy of capital reserves. "This model tests the ability of the bond insurer to handle claims that would be expected to occur in a hypothetical worst case scenario." Finally, S&P's rating criteria was established with "rating durability in mind" because "[i]nvestors expect that bond insurers' ratings will be stable and not subject to frequent adjustment based on the normal ebbs and flows of credit quality over the traditional economic cycle."

Consistent with its rating criteria, S&P imposed a "minimum capital level" for bond insurers and set a "preferred ownership profile" for bond insurers. S&P set "credit quality composition standards" for bond insurers' portfolios. S&P "periodically monitor[ed] the bond insurer's portfolio to look for any significant credit deterioration that might give **[*45]** rise to a need for additional capital."

In 2007, S&P issued a report stating, "Despite the well-documented deterioration in the world of subprime mortgages, this sector does not appear to be a threat to the rating stability of the bond insurers. We come to this view as the result of the insurers' underwriting standards . . . , their sound risk management practices, . . . and their conservative capital management strategies, which result in cushions that allow for adverse development without jeopardizing their capital adequacies." S&P explained that it had employed a number of analytical tools to determine the bond insurers ability to "withstand subprime stress" and based on the results, S&P concluded the "stress test results are positive."

Taken as a whole, this evidence makes a sufficient showing that the ratings given the bond insurers, although in the form of an opinion, were "'not a casual expression of belief' but 'a deliberate affirmation of the matters stated'" and that S&P's ratings are based on superior knowledge or special information concerning the then-present financial condition of the insurers and their ability to withstand foreseeable claims against their outstanding policies. **[*46]**

Plaintiffs also made a prima facie showing that S&P did not have reasonable grounds for believing its ratings to be accurate. Plaintiffs' expert, William Sarsfield, opined that "starting no later than 2003, the credit ratings agencies had no reasonable basis to believe that the AAA ratings they assigned to the bond insurers were true and accurate. . . . [T]he credit rating agencies knew or should have known bond insurers did not merit the 'AAA' ratings assigned by the credit ratings agencies because the bond insurers were overexposed to residential backed . . . securities and credit default swaps . . . referencing subprime mortgage debt." Sarsfield explains, "Setting aside internal emails, communications and other evidence showing the credit rating agencies knew or should have known the bond insurers did not merit AAA ratings given the bond insurers' exposure to [residential mortgage backed securities] and [credit default swaps] referencing subprime housing debt, a series of highly publicized government reports clearly called into questions the bond insurers' AAA credit ratings given the bond insurers' exposure to the subprime market. . . . [¶] . . . [¶] These warnings, coupled with a significant **[*47]** run up in securitized subprime lending, clearly placed the credit rating agencies on notice that the bond insurers did not merit AAA credit ratings." S&P's attack on Sarsfield's credentials and opinions are not well taken. S&P argues that "Mr. Sarsfield has never been employed at a ratings agency and has had no experience with the rating process for the bond insurers." In analyzing a SLAPP motion, however, this court does not weigh the credibility of plaintiff's evidence. (*ComputerXpress, Inc. v. Jackson, supra, 93 Cal.App.4th 993, 1010*.) S&P also faults Sarsfield for failing to offer an "explanation of the rating process for the bond insurers" and for not identifying "any particular assumptions that he views as lacking any reasonable basis." Sarsfield's declaration, however, cannot be read in a vacuum. Plaintiffs' presented substantial evidence regarding the rating process for bond insurers including, as set forth above, considerable evidence regarding S&P's descriptions of its ratings criteria. Read together, the evidence makes a prima facie showing that given what S&P knew or should have known regarding the bond insurers' exposure to the subprime mortgage market, S&P could not or should not have concluded that the bond insurers merited their **[*48]** AAA ratings under the identified criteria.

Plaintiffs made a sufficient showing of reliance and resulting damage. We reject S&P's argument that plaintiffs failed to establish that S&P owed them a legal duty of care. Although phrased by S&P as a question of duty, the relevant question is whether plaintiffs are within the class of persons entitled to rely on S&P's misrepresentations. In *Bily v. Arthur Young & Co. (1992) 3 Cal.4th 370, 408, 11 Cal. Rptr. 2d 51, 834 P.2d 745*, the court explained that "the person or 'class of persons entitled to rely upon the representations is restricted to those to whom or for whom the misrepresentations were made. Even though the defendant should have anticipated that the misinformation might reach others, he is not liable to them.'" This rule "attempts to define a narrow and circumscribed class of persons to whom or for whom representations are made. In this way, it recognizes commercial realities by avoiding both unlimited and uncertain liability for economic losses in cases of professional mistake and exoneration of the auditor in situations where it clearly intended to undertake the responsibility of influencing particular business transactions involving third persons. [This rule] thus appears to be a sensible and moderate approach **[*49]** to the potential consequences of imposing unlimited negligence liability which we have identified." (*Ibid.*) Plaintiffs have more than adequately shown that S&P intended to influence business transactions between plaintiffs and the bond insurers.

Plaintiffs also presented sufficient evidence that they did, in fact, rely on S&P's ratings and were damaged by their reliance. Plaintiffs presented numerous declarations by agents of the various nonprofit and public entities indicating that the entity relied to its detriment on the rating agencies' representations that the bond insurers were AAA rated and that the entity would not have purchased bond insurance without that express representation. Contrary to S&P's argument, the declarations submitted are sufficient for purposes of opposing its motion to strike. (*CalPERs, supra, 226 Cal.App.4th at p. 672*.)

Finally, S&P argues the trial court erred in rejecting its affirmative defense that plaintiffs' claims are barred by the *First Amendment*. "[A] special motion to strike should be granted 'if the defendant presents evidence that defeats the plaintiff's claim as a matter of law. [Citation.] Generally, a defendant may defeat a cause of action by showing . . . there is a complete defense to the cause **[*50]** of action . . . .' [Citation.] '[A]lthough *section 425.16* places on the plaintiff the burden of substantiating its claims, a defendant that advances an affirmative defense to such claims properly bears the burden of proof on the defense.'" (*CalPERs, supra, 226 Cal.App.4th at p. 674*.)

S&P argues that "[u]nder the *First Amendment*, credit ratings, as opinions, have been held to be fully protected" and, alternatively, that "[e]ven where courts have declined to hold that ratings are absolutely protected, case law makes clear that credit ratings are entitled to *First Amendment* protection *subject only to* an 'actual malice exception'—requiring proof of actual, subjective 'serious doubt' or disbelief of the statement by the speaker."

Initially, we reject S&P's argument that plaintiffs' claims are barred because they are based on its protected expression of opinion rather than a provable false factual statement. As discussed above, plaintiffs made a prima facie showing that S&P's AAA ratings of the bond insurers was a representation of fact sufficient to withstand the motion to strike. Accordingly, S&P's rating is not entitled to absolute protection under the *First Amendment*.

We likewise reject S&P's argument that plaintiffs' negligent misrepresentation claims are subject to the "actual malice" standard applicable **[*51]** in defamation and libel cases. *Compuware Corp. v. Moody's Investors Servs., Inc. (6th Cir. 2007) 499 F.3d 520*, relied on by S&P is instructive. In that case, plaintiff contracted with defendant credit rating agency for a determination of plaintiff's overall creditworthiness. Later, after defendant issued a report downgrading plaintiff's rating, plaintiff filed an action for breach of contract and defamation against defendant. After concluding that plaintiff had failed to produce evidence of actual malice sufficient to withstand summary judgment of its defamation claim (*id. at pp. 526-528*), the court held that the "actual malice" requirement also applied to plaintiff's breach of contract claim and supported the granting of summary judgment of that claim as well. (*Id. at p. 529*.) The court explained, "Ordinarily, 'enforcement of . . . general laws against the press is not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations.' [Citation.] But stricter scrutiny may be warranted where a plaintiff attempts to use a state-law claim 'to avoid the strict requirements for establishing a libel or defamation claim.'" (*Id. at p. 529*; see also *County of Orange v. McGraw Hill Companies, Inc. (C.D. Cal. 1999) 245 B.R. 151, 155* ["Although these issues traditionally arise in libel or defamation actions, the actual malice standard applies to other causes **[*52]** of action when the plaintiff seeks compensatory damages arising from allegedly false statements."].) The court concluded that the breach of contract claim was premised on the defamation claim insofar as "it is inescapable that Compuware seeks compensation for harm caused to its reputation." (*Id. at p. 530*.) The court continued, "We see no material difference between this claim—which, although labeled one for breach of contract, essentially asserts that Moody's acted incompetently (i.e., negligently) in compiling and evaluating its publication of protected expression—and a tort claim based on conduct that might support a pendant defamation claim." (*Id. at p. 532*.)

In stark contrast, plaintiffs' negligent misrepresentation claim is not "based on conduct that might support a pendant defamation claim" and is not based on injuries to plaintiffs' reputations. Plaintiffs' claims are based on positive statements about the creditworthiness of the bond insurers that plaintiffs allege were false. There is no basis on which to apply the actual malice standard and no error in the court's denial of S&P's motion to strike.

Disposition

The trial court's order on defendants' motions to strike under *section 425.16* is reversed insofar as it ordered **[*53]** plaintiffs' Cartwright Act claims against the bond insurer defendants stricken and is affirmed in all other respects. The parties shall bear their own costs on appeal.

Pollak, J.

We concur:

McGuiness, P. J.

Jenkins, J.

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In re Domestic Drywall Antitrust Litig.

United States District Court for the Eastern District of Pennsylvania

February 18, 2016, Decided; February 18, 2016, Filed

MDL No. 2437; 13-MD-2437

Reporter

163 F. Supp. 3d 175 *; 2016 U.S. Dist. LEXIS 19487 **; 2016-1 Trade Reg. Rep. (CCH) P79,528

IN RE: DOMESTIC DRYWALL ANTITRUST LITIGATION. THIS DOCUMENT RELATES TO: All Direct Purchaser Actions, All Indirect Purchaser Actions

Prior History: *In re Domestic Drywall Antitrust Litig., 939 F. Supp. 2d 1371, 2013 U.S. Dist. LEXIS 52566 (J.P.M.L., Apr. 8, 2013)*

Core Terms

manufacturers, pricing, announced, email, increased price, customers, Sales, analysts, Plaintiffs', Marketing, conspiracy, elimination, communications, Defendants', wallboard, competitors, summary judgment, Gypsum, drywall, co-conspirator, summary judgment motion, dealers, responded, declarations, distributors, spoke, documents, increases, minutes, self-interest

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > Claims

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

HN1[] **Sherman Act, Claims**

In a case alleging violations of *15 U.S.C.S. § 1*, to avoid summary judgment, plaintiffs must show that a genuine issue of material fact exists as to whether defendants entered into an anti-competitive agreement.

Antitrust & Trade Law > Sherman Act

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

HN2[] **Antitrust & Trade Law, Sherman Act**

A non-movant's burden in defending against summary judgment in a *Sherman Act* antitrust case is no different than in any other case. Thus, as when reviewing any summary judgment motion, the court must view the facts and any reasonable inferences drawn therefrom in the light most favorable to the party opposing summary judgment, considering the evidence as a whole and refraining from weighing evidence or making credibility determinations.

Antitrust & Trade Law > Sherman Act > Claims

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

HN3[] Sherman Act, Claims

In an antitrust case under 15 U.S.C.S. § 1, to avoid summary judgment, plaintiffs must submit evidence that when considered holistically, tends to exclude the possibility that the alleged conspirators acted independently or interdependently. A nonmovant plaintiff in a section 1 case does not have to submit direct evidence, i.e., the so-called smoking gun, but can rely solely on circumstantial evidence and the reasonable inferences drawn from such evidence.

Antitrust & Trade Law > Sherman Act > Claims

Evidence > Inferences & Presumptions > Inferences

HN4[] Sherman Act, Claims

The extent of what constitutes a reasonable inference in the context of an antitrust case is somewhat different from cases in other branches of the law in that ***antitrust law*** limits the range of permissible inferences from ambiguous evidence in a 15 U.S.C.S. § 1 case. In drawing favorable inferences from underlying facts, a court must remember that often a fine line separates unlawful concerted action from legitimate business practices. Evidence which is equally consistent with legal and illegal conduct, standing alone, cannot support an inference of antitrust conspiracy.

Antitrust & Trade Law > Sherman Act > Claims

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

HN5[] Sherman Act, Claims

In an antitrust case under 15 U.S.C.S. § 1, defendants are not entitled to summary judgment simply because they demonstrated a plausible rationale for their behavior. Rather, the focus must remain on the evidence proffered by the plaintiff and whether that evidence tends to exclude the possibility that the defendants were acting independently.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Sherman Act > Scope

HN6[] Sherman Act, Claims

The antitrust laws prohibit only overt concerted action. Firms are not prohibited from making decisions that are based on the actions of other firms.

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

HN7[] Regulated Practices, Price Fixing & Restraints of Trade

Oligopolistic markets tend to be interdependent because competitors are more likely to consider each other's actions in markets dominated by few sellers. Thus, though each firm in an oligopoly may independently decide upon its course of action, any rational decision must take into account the anticipated reaction of the other firms. Because the firms are aware of what their competitors are doing, oligopolists' decisions may be interdependent, meaning the decisions were made upon considering competitors' actions or reactions. But such decisions are nonetheless considered to have been arrived at independently.

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

HN8[] Regulated Practices, Price Fixing & Restraints of Trade

In an oligopolistic market, interdependence may sometimes result in conscious parallelism, in which the firms engage in the same behavior because they consider the actions of their competitors, but not because they have overtly agreed to engage in that behavior. Conscious parallelism may enable firms in a concentrated market to maintain their prices at supracompetitive levels, or even raise them to those levels, without engaging in any overt concerted action. Consciously parallel conduct does not violate antitrust laws. Only actual agreement (i.e., a conscious commitment to a common scheme designed to achieve an unlawful objective) qualifies as an unreasonable restraint of trade in violation of ***antitrust law***.

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

HN9[] Cartels & Horizontal Restraints, Sherman Act

In an antitrust case under *15 U.S.C.S. § 1*, for plaintiffs to create a fact issue about whether defendants entered an agreement, plaintiffs must present evidence tending to exclude the possibility of independent conduct, including interdependent conduct (e.g., conscious parallelism). In the Third Circuit, plaintiffs may show that defendants' parallel conduct is attributable to an agreement (rather than interdependence) by showing three elements: 1. Defendants' behavior was parallel; 2. Defendants were conscious of each other's conduct and awareness was an element in their decision-making processes; 3. plus factors showing an actual agreement: (1) motive, (2) actions contrary to defendants' interests, and (3) traditional conspiracy evidence. The third element's list of plus factors is non-exhaustive, but those three factors have been relied on repeatedly by the Third Circuit.

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

HN10[] Cartels & Horizontal Restraints, Sherman Act

In an antitrust case involving analysis of "plus factors" that could show an actual agreement, the absence of any plausible motive to engage in the conduct charge is highly relevant to whether a genuine issue for trial exists within the meaning of *Fed. R. Civ. P. 56(e)*. Also, evidence of actions against self-interest means there is evidence of behavior inconsistent with a competitive market. For example, evidence that prices were raised despite no rise in demand or costs might indicate defendants are acting contrary to their interests.

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

HN11[] **Cartels & Horizontal Restraints, Sherman Act**

In oligopolies, even a showing that the relevant market was ripe for collusion and that the defendants raised prices without a rise in demand or costs will usually be insufficient to rule out interdependent conduct. By nature, oligopolistic markets are conducive to price fixing and will often exhibit behavior that would not be expected in competitive markets. Therefore, these factors are neither necessary nor sufficient to preclude summary judgment, at least where the claim is price fixing among oligopolists. Nonetheless, courts must consider these first two factors because they are relevant and inform the inferences that might be drawn from plaintiffs' other evidence.

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

HN12[] **Cartels & Horizontal Restraints, Sherman Act**

Traditional conspiracy evidence will generally be the most important evidence in a price-fixing case involving an oligopoly. This category of evidence may involve customary indications of traditional conspiracy, or proof that the defendants got together and exchanged assurances of common action or otherwise adopted a common plan even though no meetings, conversations, or exchanged documents are shown.

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

Evidence > Inferences & Presumptions > Inferences

HN13[] **Cartels & Horizontal Restraints, Sherman Act**

Evidence of competitors meeting together, without more, is insufficient to raise inferences of conspiracy without additional evidence. That said, opportunities to conspire may be probative of a conspiracy when meetings of defendants are closely followed in time by suspicious actions or records.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

HN14[] **Summary Judgment, Evidentiary Considerations**

In considering whether plaintiffs have submitted sufficient evidence to survive summary judgment, the court may consider only admissible evidence. *Fed. R. Civ. P. 56(c)*.

Evidence > ... > Hearsay > Exemptions > Statements by Coconspirators

HN15[] **Exemptions, Statements by Coconspirators**

Fed. R. Evid. 801(d)(2)(E), which codifies the co-conspirator exception, provides that a statement is not hearsay if it is offered against an opposing party and was made by the party's coconspirator during and in furtherance of the conspiracy. Demonstrating a conspiracy, and the declarant's and non-offering party's participation therein, are preliminary questions of fact for purposes of admissibility under *Rule 801(d)(2)(E)*. *Fed. R. Evid. 104(a)*. *Rule*

104(a) provides that the court must decide any preliminary question about whether evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.

Evidence > ... > Procedural Matters > Preliminary Questions > Admissibility of Evidence

Evidence > ... > Hearsay > Exemptions > Statements by Coconspirators

HN16[] Preliminary Questions, Admissibility of Evidence

According to the plain meaning of *Fed. R. Evid. 104(a)*, courts may make preliminary factual determinations by considering any evidence it wishes, unhindered by considerations of admissibility. In Bourjaily, the Supreme Court acknowledged that out-of-court statements made by anyone, including putative co-conspirators, are often hearsay. Even if they are, they may be considered, Glasser and the bootstrapping rule notwithstanding. The Court in Bourjaily did not decide whether a trial court could rely solely upon hearsay statements to determine that a conspiracy had been established by a preponderance of the evidence. Rather, the Court's holding merely provided that a court, in making a preliminary factual determination pursuant to *Fed. R. Evid. 801(d)(2)(E)*, can consider the proffered hearsay statements themselves. A subsequent amendment to the Federal Rules of Evidence in 1997 clarified that the statement must be considered but does not by itself establish the existence of the conspiracy or participation in it under (E). *Fed. R. Evid. 801(d)(2)(E)*.

Evidence > ... > Hearsay > Exemptions > Statements by Coconspirators

HN17[] Exemptions, Statements by Coconspirators

In the Third Circuit post-Bourjaily, in order for an out-of-court statement to be admissible pursuant to *Fed. R. Evid. 801(d)(2)(E)*, the district court must find by a preponderance of the evidence that: (1) a conspiracy existed; (2) the declarant and the party against whom the statement is offered were members of the conspiracy; (3) the statement was made in the course of the conspiracy; and (4) the statement was made in furtherance of the conspiracy. A district court's preliminary finding will not be disturbed on appeal unless it is clearly erroneous. Alternatively, a district court has "considerable discretion" to admit the statements conditionally, subject to their later being connected up.

Evidence > ... > Procedural Matters > Preliminary Questions > Admissibility of Evidence

HN18[] Preliminary Questions, Admissibility of Evidence

The Rules of Evidence are to be liberally construed in favor of admissibility. To that end, a court may admit the proposed evidence on the condition that the proof be introduced later. *Fed. R. Evid. 104(b)*. And the court has a wide berth in conditionally admitting co-conspirator statements at the summary judgment stage.

Evidence > Inferences & Presumptions > Inferences

HN19[] Inferences & Presumptions, Inferences

The acceptable inferences which can be drawn from circumstantial evidence vary with the plausibility of the plaintiffs' theory and the dangers associated with such inferences.

Antitrust & Trade Law > Sherman Act > Claims

Evidence > ... > Hearsay > Exemptions > Statements by Coconspirators

HN20[] **Sherman Act, Claims**

The fact that hearsay is admitted under *Fed. R. Evid. 104* as to a particular defendant, does not necessarily compel a conclusion that the defendant has joined an agreement on prices in violation of *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*.

Evidence > ... > Procedural Matters > Preliminary Questions > Admissibility of Evidence

HN21[] **Preliminary Questions, Admissibility of Evidence**

In considering the court's duty under *Fed. R. Evid. 104*, Third Circuit law requires that the court make rulings favorable to plaintiffs if plaintiffs have presented, by a preponderance of evidence, sufficient facts to warrant admissibility.

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

HN22[] **Cartels & Horizontal Restraints, Price Fixing**

In an antitrust case under *15 U.S.C.S. § 1*, price discussion among low level sales people has little probative weight. Evidence of sporadic exchanges of shop talk among field sales representatives who lack pricing authority is insufficient to survive summary judgment.

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

HN23[] **Cartels & Horizontal Restraints, Price Fixing**

For purposes of ***antitrust law***, manufacturers are permitted to communicate with one another under most circumstances. A jury could consider the manufacturers' communications to be probative of an agreement only if there is some evidence that exchanges of information had an impact on pricing decisions.

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

HN24[] **Cartels & Horizontal Restraints, Price Fixing**

With respect to the legal viability of a conduit theory in an antitrust case, the Third Circuit has indicated that an antitrust conspiracy that required a middle-man could nonetheless be considered a conspiracy.

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

HN25[] **Cartels & Horizontal Restraints, Price Fixing**

In an antitrust case under 15 U.S.C.S. § 1, in order for plaintiffs to show that defendants' parallel conduct is attributable to an agreement, evidence of plus factors must tend to exclude the possibility of independent conduct. The mere presence of one or more of these "plus factors" does not necessarily mandate the conclusion that there was an illegal conspiracy between the parties, for the court may still conclude, based upon the evidence before it, that the defendants acted independently of one another, and not in violation of antitrust laws. Defendants are not entitled to summary judgment merely by showing that there is a plausible explanation for their conduct; rather the focus must remain on the evidence proffered by the plaintiff and whether that evidence tends to exclude the possibility that the defendants were acting independently.

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

HN26[] **Cartels & Horizontal Restraints, Price Fixing**

Evidence that the defendant had a motive to enter into a price fixing conspiracy means evidence that the industry is conducive to oligopolistic price fixing, either interdependently or through a more express form of collusion. But plaintiffs' showing that defendants had a plausible reason to conspire does not end the inquiry.

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

HN27[] **Cartels & Horizontal Restraints, Price Fixing**

In an antitrust case under 15 U.S.C.S. § 1, the Third Circuit has clarified that, in evaluating plus factors, courts should equate "actions against self-interest" with "evidence of behavior inconsistent with a competitive market."

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

HN28[] **Cartels & Horizontal Restraints, Price Fixing**

Evidence of a defendant declining to pursue another manufacturer's customer could be viewed as inconsistent with a competitive market. But, evidence that a defendant refused to adjust its list price in order to secure a new customer would not be so probative.

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

HN29[] **Cartels & Horizontal Restraints, Price Fixing**

In an antitrust case under 15 U.S.C.S. § 1, when no evidence suggests that the increase in list prices was correlated with any changes in costs or demand, a jury may conclude that defendants acted against self-interest.

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

HN30[] **Cartels & Horizontal Restraints, Price Fixing**

In an antitrust case under 15 U.S.C.S. § 1, a showing the defendants had motive and acted against self-interest is neither necessary nor sufficient to preclude summary judgment, at least where the claim is price fixing among oligopolists. Rather, to elevate a finding of actions against self-interest to a finding that a jury could conclude that defendants entered an agreement, plaintiffs must supply traditional conspiracy evidence.

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

HN31[] **Cartels & Horizontal Restraints, Price Fixing**

In a *Sherman Act*, *15 U.S.C.S. § 1*, case involving oligopolies, the most important evidence will generally be non-economic evidence that there was an actual, manifest agreement not to compete. Traditional conspiracy evidence may involve customer indications of traditional conspiracy, or proof that the defendants got together and exchanged assurances of common action or otherwise adopted a common plan even though no meetings, conversations, or exchanged documents are shown.

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

HN32[] **Cartels & Horizontal Restraints, Price Fixing**

In an antitrust case under *15 U.S.C.S. § 1*, defendants' decision to eliminate job quotes may qualify as traditional conspiracy evidence to avoid summary judgment.

Judges: [1]** MICHAEL M. BAYLSON, UNITED STATES DISTRICT JUDGE.

Opinion by: MICHAEL M. BAYLSON

Opinion

[*178] MEMORANDUM RE: DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

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[*180] I. Introduction

In fall 2011, several U.S. gypsum wallboard manufacturers announced substantial changes to their pricing, ending a long-standing pricing practice and scheduling a very large price increase to commence in January 2012 and to be effective for the entire year. Then, in fall 2012, these manufacturers again announced similar price increase to take effect in January 2013. In this multidistrict litigation ("MDL"), Plaintiffs allege that the Defendants' 2012 and 2013 price increases and other changes in pricing practices were the result of an agreement, in violation of federal and state antitrust **[**4]** laws.

Currently before the Court are four motions for summary judgment: Defendants' Joint Motion for Summary Judgment (ECF 206), Defendant CertainTeed's Motion for Summary Judgment (ECF 207-08), Defendant Lafarge's Motion for Summary Judgment (ECF 204), and Defendant PABCO's Motion for Summary Judgment (ECF 205). For the reasons that follow, the court GRANTS the Motions for Summary Judgment as to Certain Teed and DENIES the Motions for Summary Judgment as to American, National, Lafarge, and PABCO.

At the outset of these consolidated cases, the Court convened a pretrial conference on September 18, 2013 to discuss pretrial issues including discovery and initial pleadings. Defendants' counsel indicated that it was not their intention to file *Rule 12* motions, although their clients strenuously disputed the truth of the allegations against them. Eventually, a consensus was reached among counsel and the Court that discovery would be initially limited to whether there was an agreement between any Defendants in violation of *Sherman Act § 1*. (ECF 64). Thus, the Court postponed discovery on issues such as class action, damages, antitrust injury, etc.

By and large, discovery proceeded without any need for **[**5]** intervention. There was substantial production of documents by Defendants, and a deposition program was initiated and completed.

Following the close of discovery, Defendants, as planned, filed motions for summary judgment. As detailed below, each Defendant has supported its motion for summary judgment by declarations and deposition testimony by their officers and managers involved with the pricing of their drywall products. These testimonial materials assert that there was no agreement between their employer and any other Defendant.

Against this forceful show of denial, Plaintiffs have come forward with detailed facts that Plaintiffs assert show a genuine dispute that would allow a jury to find that there was an agreement by all of Defendants concerning prices.

[*181] Included within the factual material are excerpts from documents and testimony by the two third-party research organizations that had been subpoenaed and provided documents and deposition testimony, Longbow Research ("Longbow") and Thompson Research Group ("Thompson").

As required by the Court's practice order, Defendants have supported their motions for summary judgment with statements of undisputed facts. Plaintiffs have come **[**6]** forward with responses to many of these assertions, claiming there are disputed facts, and have added additional facts to which Defendants have responded.

As of result of this mélange of factual materials, the Court believes that the "core facts" of the case, as contained in documents produced by all of Defendants, or third parties, along with deposition testimony by their officers and managers, are largely undisputed. The task of the court is to determine whether inferences favorable to Plaintiffs can be drawn from these factual materials.

In proceeding towards the appropriate analysis, the Court believes that there are three issues that must first be analyzed in detail, as follows:

First, the Court will review the history of the drywall industry in the United States, which satisfies the accepted definition of an oligopoly, and the drywall manufacturers' efforts to raise prices following the well-documented housing slump in 2008-2010.

Second, the Court will provide the legal analysis of the decision by the Supreme Court in the *Matsushita* case and a number of Third Circuit opinions analyzing antitrust claims involving oligopoly industries such as drywall. The Court must recognize the unique **[**7]** economic discipline that applies to price fixing allegations against companies in an oligopoly setting, and the required hesitation, if not disinclination, to find any type of conspiracy from merely ambiguous evidence, but also, a duty to consider what courts have called "plus factors."

Third, the Court will review the evidence rules concerning alleged co-conspirator statements.

In making this review and analysis, the Court recognizes that this is not an occasion for fact finding. Defendants' motions assert their innocence; Plaintiffs assert their liability with equal vigor. The Court's role is not take sides, find facts, or determine liability or innocence, but only to determine what, if any, inferences can be drawn consistent with the governing case law on antitrust price fixing and the rules of evidence on allegedly co-conspirator statements.

After laying the groundwork on the industry background and legal principles, the Court will embark upon a chronological review of the factual materials, highlighting those facts that Plaintiffs have asserted are the strongest towards showing an agreement. The Court will then explain its decision as to admissibility of hearsay evidence, and separately, **[**8]** the ability of the jury to draw reasonable inferences of agreement based on the record in this case.

II. Procedural History

In April 2013, the Judicial Panel on Multidistrict Litigation ordered consolidation in this District before the undersigned of various drywall antitrust cases from this and other Districts for pretrial proceedings. The original Defendants were U.S. domestic drywall manufacturers, namely CertainTeed Gypsum ("Certain Teed"), United States Gypsum Company ("USG") and its parent USG Corporation ("USG Corp."), New NGC, Inc. ("National"), LaFarge North America Inc. ("LaFarge"), **[*182]** American Gypsum Company LLC ("American") and its parent company Eagle Materials Inc. ("Eagle"), TIN, Inc. ("TIN"), and PABCO Building Products, LLC ("PABCO").

By May 2013, multiple putative class actions had been consolidated in the MDL. These actions had been filed on behalf of proposed classes of Plaintiffs who purchased drywall either directly or indirectly from Defendants.[1] The direct purchaser actions alleged violations of *§ 1 of the Sherman Act*, *15 U.S.C. § 1*; the indirect purchaser actions sought injunctive relief through *§ 16* of the Clayton Act, *15 U.S. C. § 26*, based on allegations of violations of *§ 1 of the Sherman Act*, *15 U.S.C. § 1*, and **[**9]** sought damages based on alleged violations various of state laws.[2] The Court has jurisdiction over the federal law claims by virtue of *28 USC §§ 1331*, *1337*. The Court has jurisdiction over the Indirect Purchasers' state-law claims through *28 U.S.C. § 1367* and *28 U.S.C. § 1332* ("*CAFA*").

By Order dated May 7, 2013 (ECF 11), this Court consolidated, for pretrial purposes, (1) all pending indirect purchaser actions and any indirect purchaser actions filed thereafter ("Indirect Purchaser Action") and (2) all pending direct purchaser actions and any direct purchaser actions filed thereafter ("Direct Purchaser Action"). (ECF 11) Additionally, **[**10]** the Court ordered the Direct and Indirect Purchaser Actions to coordinate for pretrial purposes. These Direct and Indirect Purchaser Actions are the subjects of the instant Motions for Summary Judgement.

III. Plaintiffs' Allegations in the Amended Complaints

On June 24-25, 2013, the consolidated putative classes of Indirect Purchaser Plaintiffs and Direct Purchaser Plaintiffs both filed Amended Consolidated Class Action Complaints (ECF 20 (Direct), 21 (Indirect)). Both complaints allege that beginning in 2011, Defendants in the domestic drywall industry violated the antitrust laws by conspiring to raise prices, restrict supply, and eliminate the long-standing pricing practice of providing job quotes.

Drywall, also known as gypsum wallboard, sheetrock, and wallboard, is the basic material used to form walls and ceilings in over 90% of all new residential and commercial structures. The domestic drywall industry is oligopolistic. Defendants account for more than 89% of U.S. drywall sales, and the four largest Defendants (USG, National, Certain Teed, and American) account for approximately 70% of those sales.

According to the complaints, prior to fall 2011, Defendants typically announced multiple **[**11]** price changes each year because of the commodity nature of wallboard and fluctuations in costs. These increases were typically announced through letters distributed to customers 30 to 45 days before the effective date of the increase. Additionally, since the 1980s, manufacturers had competed for price in part by providing "job quotes." Through job quotes, manufacturers provided a quoted price to a **[*183]** customer for a specific "job" and that price would remain the valid price throughout the duration of the job, regardless of market fluctuation.

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[1] The Direct Purchaser Actions were comprised of those who purchased wallboard directly from the manufacturers; the Indirect Purchaser Actions were comprised of those who purchased wallboard through a retailer, contractor, or other intermediary, and whose claims are based on state laws.

[2] At least one case has been consolidated with this MDL but is not at issue today because it was filed as an individual action as opposed to a class action. *Ashton Woods Holdings LLC v. USG Corp., 15-1712, 2015 U.S. Dist. LEXIS 160733 (E.D. Pa.)* (also known as "Home Builders Action"). The cases at issue today are only those that were filed as class actions.

Like most construction industries, the drywall industry was significantly injured by economic events in the early 2000s, including the 2008-2010 Recession. According to Plaintiffs, prices had generally been flat or declining from 2008 to 2011. Defendants had attempted to raise prices multiple times in 2010 and 2011, but Plaintiffs allege Defendants were unable to obtain a meaningful increase because of the economic climate and because of competition with each other.

Then, over the span of a few weeks in late September and early October 2011, six Defendant-manufacturers distributed letters announcing that they would implement a price increase on January **[**12]** 1, 2012 and that the new price would remain in effect for the entire year. In those letters, five of those Defendants either announced or expressed anticipation that the 2012 price would be as high as a 35% increase over current prices, the steepest increase announced in over ten years. Six Defendants also used the letters to announce the immediate elimination of job quotes. The only Defendant-manufacturer who did not announce the elimination of job quotes in its letter, USG, still unofficially eliminated or significantly curtailed new job quotes in fall 2011.

According to Plaintiffs, unlike the previous price-increases attempted earlier in 2011 and prior years, Defendants' January 2012 price increase was effective for the entire year, even though there had been no meaningful increase in drywall demand or manufacturers' costs. Plaintiffs allege these increases succeeded because Defendants had agreed to increase the prices, eliminate job quotes, and limit the supply of wallboard, in violation of antitrust laws.

Following the success of the 2012 price increase, Defendants again announced substantial price increase in fall 2012 to take effect in January 2013 and to last the duration of **[**13]** 2013. As with the 2012 increase, Plaintiffs allege that Defendants agreed to implement the January 2013 price increase and restrict supply in the months preceding the increase, and that Defendants succeeded in achieving these goals, thus increasing the cost of wallboard over what would have been charged in a truly competitive market.

IV. Discovery

In September 2013, the Court ordered a phased discovery process, limiting Phase I to a single issue: "Whether the record contains sufficient facts and/or opinions, admissible at trial, to allow a jury to find a violation of *Section 1 of the Sherman Act*, including whether there was an agreement between or among defendants." (ECF 64).

After considerable discovery, a dispute arose when Defendants moved to compel Plaintiffs to answer so-called "contention interrogatories," which asked for detailed facts. (ECF 99). After oral argument on April 22, 2014, the Court issued a Memorandum, noting that, based on the briefs that had been filed, the Plaintiffs had gathered a great deal of detailed factual information from the documents produced by Defendants. *In re Domestic Drywall Antitrust Litig., 300 F.R.D. 228 (E.D. Pa. May 12, 2014)*. The Court therefore concluded that the most expeditious way to encapsulate the discovery that had so far **[**14]** taken place was to require Plaintiffs to file a "contention statement," indicating the detailed facts that supported their allegations. *Id.*

In this Memorandum, the Court noted the success that Plaintiffs had realized from sophisticated deployment of electronic discovery, and therefore, the Court concluded **[*184]** that it would not be burdensome for Plaintiffs to "parlay" the facts learned in discovery into contention statements as an alternative to answers to interrogatories to which Defendants would then have to respond. *Id.*

The only other major discovery dispute concerned a third-party subpoena to a research group, Thompson, which is in the business of collecting information, analyzing trends, and making predictions on the economics of various businesses, including drywall manufacturers. This dispute resulted in a lengthy opinion setting forth the facts that Thompson would have to reveal, but provided protection for proprietary or truly confidential information. *In Re Domestic Drywall Antitrust Litigation, 300 F.R.D. 234 (E.D. Pa. 2014)*.

V. Settling Defendants

In February 2015, Plaintiffs, both direct and indirect purchasers, reached settlements with a number of original Defendants: TIN, Inc. and the USG entities (including USG Corp., USG, and L&W[3]). The Court granted **[**15]** preliminary approval of the settlements in March 2015 (ECF 183-186), and granted final approval and issued a final judgment order on August 20, 2015. (ECF 276-279).

Although the settling Defendants are not parties to the instant Summary Judgment Motions, this Memorandum will discuss some of the facts related to those original Defendants to the extent they are relevant to the pending motions by the remaining Defendants.

VI. Motions for Summary Judgment

On May 12, 2015, the non-settling Defendants moved for summary judgment, arguing that Plaintiffs had failed to uncover enough evidence to create a fact issue about whether Defendants entered a price-fixing conspiracy. Together, all Defendants filed a joint motion for summary judgment (ECF 206). Additionally, three Defendants filed supplemental motions for summary judgment to make Defendant-specific arguments: Lafarge (ECF 204), CertainTeed (ECF 207), and PABCO (ECF 205).

In accordance with *Rule 56*, each Defendant has submitted factual materials, including affidavits, declarations, and/or deposition testimony, **[**16]** "asserting that a fact" alleged by Plaintiffs (namely, that Defendants agreed to fix prices and make other price-related changes to the industry) cannot be proven, and "show[ing]" the absence of a genuine dispute. *Fed. R. Civ. P. 56 (c)*.

In support of the joint motion, Defendants argue that the undisputed evidence reveals that Defendants were merely "following the leader," which they argue is an expected and legal business practice in an oligopoly. Defendants paint the drywall industry in 2011 as suffering from a dire economic outlook for the manufacturers, who were still feeling the impact of the downturn in the construction industry from 2006-2008 and the Great Recession that begin in 2008. Defendants claim that by September 2011, they had tried various methods of raising prices and reducing costs, but were nonetheless experiencing substantial losses each year between 2008 and 2011.

Desperate to find solutions to improve its bottom line, on September 20, 2011, American became the first manufacturer to issue a letter to customers that (1) eliminated job quotes effective immediately and (2) announced a 35% price increase to take effect on January 1, 2012 and last **[*185]** throughout all of 2012. Defendants submit declarations **[**17]** and depositions arguing that American's announcement took the industry by surprise, but seeing an opportunity to improve profitability, Defendants followed American's lead based on their independent conclusions that the changes announced by American were in the best interest of each individual manufacturer. Defendants argue that the same was true of the price increase that went into effect for 2013.

Each Defendant has satisfied its burden under *Rule 56(c)(1)* by filing declarations, and/or depositions of high-ranking corporate officers in which those officers deny the existence of, and their participation in, a price-fixing conspiracy. In reviewing Defendants' evidence, the Court focuses on the declarations of those individuals who are the most relevant to this litigation, where possible. When declarations are not available, the Court relies on deposition testimony.

A. American

American submitted declarations from David Powers (President, American) and Keith Metcalf (Sr. VP of Sales, Marketing, and Distribution, American), both of which support American's contention that it was not involved with

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[3] L&W Supply Corporation, a wholly-owned subsidiary of USG Corporation, was not named as a defendant, but was included in the settlement agreement.

any agreement to raise prices, eliminate job quotes, or restrict supply in either 2012 or 2013.[4] Exs. 48 **[**18]** (Powers decl.), 50 (Metcalf decl.).

According to these declarations, Messrs. Powers and Metcalf worked together to develop American's pricing strategy for 2012 and 2013, though Mr. Powers had final say over any pricing decisions. Ex. 48 ¶ 7; Ex. 50 ¶¶ 17-20, 33-35. Sometime in summer 2011, the two men worked to develop a new pricing strategy in light of American's financial woes,[5] ultimately deciding to increase prices by 35% because "the larger the increase that American Gypsum announced, the better chance American Gypsum had of successfully implementing at least a portion of the increase." Ex. 48 ¶ 31; *accord* Ex. 50 ¶ 19.

In an attempt to achieve this price improvement, Mr. Powers came up with the idea to eliminate job quotes. Ex. 48 ¶¶ 30-31; **[**19]** Ex. 50 ¶ 21. Messrs. Powers and Metcalf took their plan to Steven Rowley, President and CEO of Eagle Materials (American's parent company), and Mr. Rowley made the suggestion to create a calendar-year price given the large size of the price increase. Ex. 48 ¶ 31; Ex. 50 ¶ 22. American announced the increase "in late September because builders like to know how much their costs are increasing at that time since they negotiate the price for their next year's projects in October and November" and to provide "additional notice as a courtesy because of the change in job quote policy and the amount of the increase." Ex. 50 ¶ 25.

In making the announcement, Messrs. Powers and Metcalf recognized that they were taking a risk and could lose market share, but "American Gypsum was willing to lose some market share if it could realize higher prices, and hence a profit, on the sales that remained." Ex. 48 ¶ 32; Ex. 50 ¶ 20. And, if American "received negative feedback from [their] customers or if sales declined too much, then the company **[*186]** always had the option of rescinding, modifying, or selectively implementing the increase . . . ." Ex. 48 ¶ 32; *accord* Ex. 50 ¶ 20.

Messrs. Powers and Metcalf state **[**20]** that they did not discuss increase with any employee of any other wallboard manufacturer and that they independently reached the decision to increase prices in 2012 and 2013 and to eliminate job quotes. Ex. 48 ¶¶ 34-36; Ex. 50 ¶ 53. The declarations also assert that American competed with the other Defendants throughout the class period, "reduc[ing] prices for individual customers on hundreds of occasions in order to meet prices offered by its competitors in 2012." Ex. 50 ¶ 30.

B. National

National submitted the declaration of Craig Weisbruch (Sr. VP of Sales and Marketing, National), which supports National's contention that it was not involved in any agreement in violation of the *Sherman Act*. Ex. 210 (Weisbruch decl.).[6]

According to Mr. Weisbruch's declaration, he "did not enter into any agreement with any other drywall manufacturer regarding drywall prices, supply, or job quotes." Ex. 210 ¶ 38. He **[**21]** learned of American's price announcement on September 20, 2011 because two customers emailed him copies of the American letter. Ex. 210 ¶ 10. Prior to receiving the letters, Mr. Weisbruch did not know of "any plans by American Gypsum to raise prices or end job quotes," though, he "had heard secondhand reports from customers that USG had discussed with customers possibly ending USG's practice of issuing job quotes." Ex. 210 ¶ 11.

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[4] American also submitted the declaration of Timothy Gleason (Attorney, Will & Emery LLP), but this declaration was related to the discovery process rather than the merits of the case.

[5] In his declaration, Mr. Powers detailed that, because of the economic downturn in the early 2000s, American's price for wallboard dropped from $165 per thousand square feet in 2006 to $91 per thousand square feet in 2011, a 45% decrease. Ex. 48 ¶ 20; *accord* Ex. 50 ¶ 14.

[6] National also submitted the declaration of John Corsi (VP of Manufacturing, Operations, and Engineering, National), but this declaration goes to the operational status of National's plants and the production capacity of those plants, rather than to whether National entered into an agreement. Ex. 30.

Upon receiving the American letter, Mr. Weisbruch placed a moratorium on job quoting and called an emergency meeting of the sales leadership team to decide how to proceed.[7] Ex. 210 ¶ 13. The team concluded that it was in the best interest of National to follow American's lead, though it decided to hold off on announcing the "hard dollar" amount of the increase until December 2011 so it could "collect competitive intelligence from [its] customers and form a more complete competitive picture." Ex. 210 ¶¶ 14-19.

In 2013, Mr. Weisbruch stated that National decided to raise prices by 30% because of its independent business judgment, which was based on information about what other manufacturers were doing, business conditions, and financial need. Ex. 210 ¶¶ 23-31.

The record contains substantial evidence documenting Mr. Weisbruch's communications with research analysts. In his declaration, Mr. Weisbruch clarified that he

> never intended for anything [he] said to any industry analyst to be directly or indirectly conveyed to another drywall manufacturer. No analysts ever suggested to [him] that [the analyst] would convey **[*187]** anything [Mr. Weisbruch] said to another manufacturer. Nor did [he] ever ask an analyst to pass information [he] provided to any other manufacturer.

Ex. 210 ¶ 36.

C. Lafarge

Lafarge did not submit any declarations or affidavits, but every Lafarge employee **[**23]** that Plaintiffs deposed denied under oath that there was ever any discussion or agreement among Defendants regarding pricing or job quotes. Ex. 1102 (DeMay dep.) at 371:4-375:6; Ex. 59 (Preston dep.) at 197:15-202:6; Ex. 80 (Pearson dep.) at 291:17-22, 294:3-4; 297:11; Ex. 81 (Conlin dep.) at 181:9 - 14; Ex. 82 (Wilson dep.) at 145:25-150:3.

As with National, there is some evidence in the record of communications with Stephen DeMay (VP Sales, Lafarge) and a third-party analyst at Longbow. In their supplemental briefing, Lafarge cites the depositions of the research analysts at Longbow to support that Mr. DeMay never asked an analyst to pass information to another drywall manufacturer and the analysts never agreed to pass such information along. Lafarge Suppl. Br. at 20.

D. PABCO

PABCO's declarations of Ryan Lucchetti (President, PABCO) and Mark Burkhammer (Dir. Sales — North, PABCO) both support PABCO's assertion that it did not participate in any agreement in violation of the *Sherman Act*.[8] Exs. 93, 99.

According to his declaration, Mr. Lucchetti first learned of American's September 2011 announcement from a customer, at which time Mr. Lucchetti forwarded to letter to Mark Burkhammer, Phil Kohl (VP Sales and Marketing, PABCO), Todd Thomas (Dir. Sales — South, PABCO), Foster Duval (Sales Manager, PABCO), and Emil Kopilovich (VP Manufacturing, PABCO). Ex. 93 ¶¶ 23-24. Mr. Duval responded to the email, informing Mr. Lucchetti, for the first time, that Mr. Duval had spoken with Mr. Powers (President, American) the day before. Ex. 93 ¶¶ 24-25.

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[7] During the class period, National's pricing decisions were made by "discuss[ing[the issue and reach[ing] a consensus within a group of decision-makers consisting of [Mr. Weisbruch] and Messrs. Withrock [Dir. Demand Management], Kelly [Dir. Dealer Sales], Crutchfield **[**22]** [Dir. Dealer Sales], and Wood [Dir. Nat'l Accounts]." Ex. 210 ¶ 3. After a decision was reached with this group, the decision would be run by Tom Nelson (CEO, National), who had "ultimate authority over [National]'s pricing actions and during this period routinely approved of the recommendations of the sales leadership team." Ex. 210 ¶ 4.

[8] PABCO submitted additional declarations, but these declarations are related to issues other than whether Defendants reached an agreement (*e.g.*, plant operation during the relevant time period). **[**24]**

Mr. Lucchetti explained that PABCO decided to follow the lead of its competitors in 2011 regarding the price increase and elimination of job quotes after it had received the increase letters from American, USG, National, CertainTeed, and Lafarge. Ex. 93 ¶ 29. Similarly, before announcing a price increase for 2013, PABCO waited to see what the other manufacturers would do, deciding to raise prices only after receiving announcements from American, National, Certain Teed, and Lafarge. Ex. 93 ¶ 42.

Mr. Lucchetti claims that he "did not use or rely on information obtained from [any gypsum industry research analysts]" when making his pricing decisions. Ex. **[**25]** 93 ¶ 59.

E. CertainTeed

Of all Defendants, CertainTeed submitted by far the most declarations, offering approximately 90 declarations from Certain Teed leadership, employees, and customers. CertainTeed Exs. 1-50, 54-67, 69-94, 102-105. Almost all declarations deny knowledge of any agreement between CertainTeed and another manufacturer.[9] *Id.* **[*188]** Every declaration made by an employee of CertainTeed and its parent and sister companies also categorically denies entering into any agreement with any drywall competitor. CertainTeed Exs. 1-91, 93-94, 102-104.

According to the declaration of Steve Hawkins (VP Sales, Certain Teed), CertainTeed first learned of American's plans to increase prices and eliminate job quotes on September 20, 2011, when a customer emailed one of CertainTeed's Regional Sales Managers a copy of the American letter. CertainTeed Ex. 2 ¶ 50. The letter was forwarded to **[**26]** Mr. Hawkins, who sent it to John Donaldson (President, Certain Teed). Between September 20 and October 3, CertainTeed "went through a deliberative process . . . to come to a decision on the best approach for CertainTeed. And the deliberative process over [Certain Teed's] specific price levels did not conclude until late December." CertainTeed Ex. 1 ¶¶ 45-56.

Similarly, Mr. Hawkins recalls being surprised by American's March 2012 announcement that it would likely raise its 2013 prices by 25-30%.[10] CertainTeed Ex. 2 ¶ 86. CertainTeed did not immediately start providing guidance because "it was too difficult to try to forecast industry conditions that far in advance" and because CertainTeed was unsure about "how much of the 2012 price increase would be realized." *Id. ¶ 87*. In August 2012, senior leadership at CertainTeed met and concluded that they "would like to announce a 30% price increase for 2013." *Id. ¶ 88*. On September 13, 2012, after receiving news that National had decided to raise its prices by 30% for 2013, CertainTeed announced the same increase for 2013. *Id. ¶¶ 91-92*.

VII. Summary Judgment Standard

HN1[] To avoid summary judgment, Plaintiffs must show that a genuine issue of material fact exists as to whether Defendants entered into an anti-competitive agreement. *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)*.

HN2[] "[A] non-movant's burden in defending against summary judgment in an antitrust case is no different than in any other case." *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., Inc., 998 F.2d 1224, 1230 (3d Cir. 1993)* (quoting *Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358. 1363 (3d Cir. 1992))*. Thus, as when reviewing any summary judgment motion, we must "view the facts and any reasonable inferences drawn therefrom in the light most favorable to the party opposing summary judgment," considering the evidence as a whole and

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[9] There are six exceptions, all of which were written by employees of CertainTeed's parent corporation. Exs. 37, 39, 43, 74, 76, 77. These declarations do not indicate that the individuals were aware of an agreement; they simply fail to state lack of awareness while the other declarations state as much prominently.

[10] Mr. Donaldson retired from Certain Teed on March 9, 2012, so his declaration does not address the 2013 price **[**27]** increase. Certain Teed Ex. 1 ¶ 9.

refraining from weighing evidence or making credibility determinations. *In re Flat Glass Antitrust Litig., 385 F.3d 350, 357 (3d Cir. 2004)* (quoting *Intervest, Inc. v. Bloomberg, L. P., 340 F.3d 144, 160 (3d Cir. 2003))*; *accord Petruzzi's, 998 F.2d at 1230*.

HN3[] To avoid summary judgment, Plaintiffs must submit evidence that when considered holistically, "'tends to exclude the possibility' that the alleged conspirators acted independently" or interdependently. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)* (quoting *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984))*; *accord In re Flat Glass, 385 F.3d at 357*. **[*189]** "[A] nonmovant plaintiff in a *section 1* case does not have to submit direct evidence, *i.e.*, the so-called smoking gun, but can rely solely on circumstantial evidence and the reasonable inferences drawn from such evidence." *Petruzzi's, 998 F.2d at 1230*; *accord Matsushita, 475 U.S. at 588*.

HN4[] "The extent of what constitutes a reasonable inference **[**28]** in the context of an antitrust case, however, is somewhat different from cases in other branches of the law in that '***antitrust law*** limits the range of permissible inferences from ambiguous evidence in a *§ 1* case.'" *In re Baby Food Antitrust Litig., 166 F.3d 112, 124 (3d Cir.1999)* (quoting *Matsushita, 475 U.S. at 588*). "[I]n drawing favorable inferences from underlying facts, a court must remember that often a fine line separates unlawful concerted action from legitimate business practices." *Petruzzi's, 998 F.2d at 1230*. "[E]vidence which is *equally* consistent with legal and illegal conduct, standing alone, cannot support an inference of antitrust conspiracy." *Id. at 1231* (emphasis added).[11]

That said, ***HN5***[] Defendants are "not entitled to summary judgment simply because they demonstrated a plausible rationale for their behavior. Rather, the focus must remain on the evidence proffered by the plaintiff and whether that evidence 'tends to exclude the possibility that [the defendants] were acting **[**29]** independently.'" *Id. at 1232* (quoting *Monsanto, 465 U.S. at 764*).

After review of the relevant case law, the following sections will detail the undisputed facts regarding the industry prior to 2011 as well as Plaintiffs' evidence that the manufacturers entered price-related agreements during 2011 and 2012, and related arguments. Subsequently, the Court will apply the asserted factual disputes to the legal principles, addressing the evidence against each Defendant in turn.

VIII. Legal Analysis in Oligopoly Cases

HN6[] The antitrust laws prohibit only overt concerted action. *In re Flat Glass Antitrust Litig., 385 F.3d 350, 359-60 (3d Cir. 2004)*. Firms are not prohibited from making decisions that are based on the actions of other firms. *Id.*

It is undisputed that the market for drywall is oligopolistic. Oligopolistic markets tend to be interdependent. Phillip E. Areeda & Herbert Hovenkamp, *Fundamentals of* ***Antitrust Law*** § 14.03 (Wolters Kluwer Law & Business, 4th ed. 2015 supp.). Interdependence is the market state in which market participants' decisions depend on what the participants' believe their competitors will do or their observations of competitors' behavior. Areeda & Hovenkamp, *supra*, § 14.03. ***HN7***[] Oligopolistic markets tend to be interdependent because competitors are more likely to consider each other's actions in markets dominated **[**30]** by few sellers. Thus, though each firm in an oligopoly "may independently decide upon its course of action, any rational decision must take into account the anticipated reaction" of the other firms. *In re Baby Food Antitrust Litig., 166 F.3d 112, 122 (3d Cir.1999)*. Because the firms are aware of what their competitors are doing, "oligopolists' decisions may be interdependent," meaning the decisions were made upon considering competitors' **[*190]** actions or reactions. *Id.* (quoting, Areeda, ***Antitrust Law*** § 1429 (1986)). But such decisions are nonetheless considered to have been "arrived at independently." *Id.* (quoting, Areeda, ***Antitrust Law*** § 1429 (1986)).

[11] The Court recognizes that much of the evidence in this case is consistent with both Plaintiffs' and Defendants' version of events. That fact alone does not entitle Defendants to summary judgment. Rather, Defendants are entitled to summary judgment only if the evidence is *equally* consistent with Plaintiffs' and Defendants' narratives. *Petruzzi's, 998 F.2d at 1231*.

HN8[] Interdependence may sometimes result in conscious parallelism, in which the firms engage in the same behavior because they consider the actions of their competitors, but not because they have overtly agreed to engage in that behavior. *In re Flat Glass, 385 F.3d at 359*. Conscious parallelism may enable "firms in a concentrated market [to] maintain their prices at supracompetitive levels, or even raise them to those levels, without engaging in any overt concerted action." *Id.* Consciously parallel conduct does not violate antitrust laws. *Id.* Only actual agreement (*i.e.*, a "conscious commitment to a common scheme designed to achieve an unlawful objective") **[**31]** qualifies as an unreasonable restraint of trade in violation of ***antitrust law***. *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)*.

HN9[] For Plaintiffs to create a fact issue about whether Defendants entered an agreement, Plaintiffs must present evidence tending to exclude the possibility of independent conduct, including interdependent conduct (*e.g.*, conscious parallelism). *In re Flat Glass, 385 F.3d at 359*. In the Third Circuit, Plaintiffs may show that Defendants' parallel conduct is attributable to an agreement (rather than interdependence) by showing three elements:

1. Defendants' behavior was parallel;
2. Defendants were conscious of each other's conduct and awareness was an element in their decision-making processes;
3. plus factors showing an actual agreement: (1) motive, (2) actions contrary to Defendants' interests, and (3) traditional conspiracy evidence.

Id. at 360 n.11. The third element's list of plus factors is non-exhaustive, but those three factors have been relied on repeatedly by the Third Circuit. *Id. at 360*.

In their Summary Judgment Motions, Defendants do not meaningfully contest the first two elements. In fact, their defense is that the manufacturers were doing the same things because they were "following the leader," which essentially concedes the first two elements.

But the third **[**32]** element is disputed. Plaintiffs typically establish motive by showing market factors that would be conducive to collusion (*e.g.*, market concentration, high barriers to entry, etc.). *E. g., In re Chocolate Confectionary Antitrust Litig., 801 F.3d 383, 398 (3d Cir. 2015)*. Often it is plaintiffs' inability to establish motive (rather than their ability to establish it) that will have the greatest impact on the plaintiffs' case, because *HN10*[] "the absence of any plausible motive to engage in the conduct charge is highly relevant to whether a 'genuine issue for trial' exists within the meaning of *Rule 56(e)*." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 596, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*.

"[E]vidence of actions against self-interest means there is evidence of behavior inconsistent with a competitive market." *In re Chocolate Confectionary, 801 F.3d at 398*. For example, evidence that prices were raised despite no rise in demand or costs might indicate defendants are acting contrary to their interests. *In re Flat Glass, 385 F.3d at 359*.

But *HN11*[] in oligopolies, even a showing that the relevant market was ripe for collusion and that the defendants raised prices without a rise in demand or costs **[*191]** will usually be insufficient to rule out interdependent conduct. *Id. at 361*. "By nature, oligopolistic markets are conducive to price fixing and will often exhibit behavior that would not be expected in competitive markets. Therefore, these factors are neither necessary nor sufficient **[**33]** to preclude summary judgment, at least where the claim is price fixing among oligopolists."[12] *In re Chocolate, 801 F.3d at 398*. Nonetheless, courts must consider these first two factors because they are relevant and inform the inferences that might be drawn from plaintiffs' other evidence. *In re Flat Glass, 385 F.3d at 361 n.12*.

HN12[] Traditional conspiracy evidence will generally be "[t]he most important evidence" in a price-fixing case involving an oligopoly. *In re Flat Glass, 385 F.3d at 361* (quoting *In re High Fructose Corn Syrup Antitrust Litig., 295*

[12] The Third Circuit has indicated that there may be some instances in which evidence of the first two factors would do more than show an interdependent market (*e.g.*, unilateral exchanges of confidential price information). *In re Flat Glass, 385 F.3d at 361 n.12*

F.3d 651, 655 (7th Cir. 2002)). This category of evidence "may involve 'customary indications of traditional conspiracy,' or 'proof that the defendants got together and exchanged assurances of common action or otherwise adopted a common plan even though no meetings, conversations, or exchanged documents are shown.'" Id. at 361 (quoting Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law***, 243 (2d ed. 2000)).

There are five particular cases in which the Supreme Court and the Third Circuit have developed the law of the plus factors: *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp ., 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*; *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., Inc., 998 F.2d 1224 (3d Cir. 1993)*; *In re Baby Food Antitrust Litig., 166 F.3d 112 (3d Cir. 1999)*; *In re Flat Glass Antitrust Litig., 385 F.3d 350 (3d Cir. 2004)*; and *In re Chocolate Confectionary Antitrust Litig., 801 F.3d 383 (3d Cir. 2015)*. The Court has relied heavily on these cases in reaching its decision today.

A. *Matsushita Elec. Indust. Co., Ltd. v. Zenith Radio Corp. [**34]*

In *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*, the plaintiffs, manufacturers and sellers of consumer electronic products, sued numerous competitor-manufacturers who were headquartered in Japan. *Id. at 577*. The plaintiffs' theorized that defendants had engaged in a "scheme to raise, fix and maintain artificially *high* prices for television receivers sold by [defendants] in Japan and, at the same time, to fix and maintain *low* prices for television receivers exported to and sold in the United States." *Id. at 577* (quoting *In re Japanese Elec. Prods. Antitrust Litig., 723 F.2d 238, 251 (3d Cir. 1983))*.

The Supreme Court held that plaintiffs had not submitted sufficient evidence to survive the defendant's summary judgment motion, stressing that the Court was unwilling to make inferences of conspiracy from the ambiguous evidence offered by plaintiffs in light of defendants' lack of motive to conspire. *Id. at 593-94*. The Court explained that "[l]ack of motive bears on the range of permissible conclusions that might be drawn from ambiguous evidence: if petitioners had no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy." *Id. at 596-97*.

B. *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., Inc. [**35]*

In *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., Inc., 998 F.2d 1224* **[*192]** *(3d Cir. 1993)*, the Third Circuit affirmed in part and reversed in part a district court's grant of defendants' summary judgment motion. The plaintiffs had accused the defendants, companies in the oligopolistic fat and bone rendering industry, of conspiring to allocate customers and entering various other agreements related to enforcement of the underlying conspiracy. *Id. at 1228*.

The court distinguished the *Petruzzi's* plaintiffs from those in *Matsushita*, explaining that the *Petruzzi's* plaintiffs' theory of conspiracy made "perfect economic sense" because it would "enable [defendants] to make profits that the free market would not allow them, in both the short-run and the long-run." *Id. at 1232*.

The court also concluded that two of the three defendants acted against self-interest in a way that was "not attributable to interdependence," explaining that "[l]eaving all other things the same, absent an agreement it does not make economic sense for defendants not to bid on an account unless they have some problem like capacity or they know that the existing price is too high." *Id. at 1245-46*.

Although it appears that the plaintiffs' showing of actions against self-interest might have been sufficient standing alone to avoid summary judgment, **[**36]** the plaintiffs had also submitted substantial traditional conspiracy evidence against two of the defendants, including testimony from employees referring to a "code" that defendants had to not solicit each other's clients; recordings of secretly taped conversations of one of the defendants in which that defendant made reference to not taking other people's accounts; and expert testimony concluding that the economic data was consistent with a conspiracy. *Id. at 1233 - 34, 1236, 1244*. Considering all of the factors, the Third Circuit reversed the grant of summary judgment for these two defendants.

As to the remaining defendant, the court acknowledged that defendant had "made claims of capacity problems" and there was evidence that the firm actually took some accounts from the other two defendants. *Id. at 1245*. Thus, the court affirmed summary judgment as to the third defendant.

C. *In re Baby Food Antitrust Litig.*

Six years after *Petruzzi's*, the Third Circuit addressed allegations of price fixing in the oligopolistic baby food manufacturing industry, in *In re Baby Food Antitrust Litig., 166 F.3d 112 (3d Cir. 1999)*. The plaintiffs argued that the defendants had engaged in an 18-year price-fixing conspiracy to "fix, raise, and maintain wholesale prices and price levels **[**37]** of baby food in the United States." *Id. at 116*. The district court granted the defendants' summary judgment motion, and the Third Circuit affirmed. *Id. at 116*.

The plaintiffs had submitted an expert report to show that the defendants had motive to conspire and acted against self-interest. *Id. at 134*. But the court gave the expert report little to no weight given the expert's admission that his opinion was based on the assumption that defendants had conspired and that he had not "looked at whether the baby food industry fits the model of manufacturers following in their pricing practices the price leader." *Id.*

As further evidence of the defendants' actions against self-interest, the plaintiffs had also relied on (1) an internal defendant memorandum in which an employee referred to "our truce" and (2) one manufacturer's unwillingness to enter into new markets. As to the "truce" reference, the court explained that "the single use of the term in a highly competitive business environment and in the face of continuing fierce competition is as consistent with independent behavior as it is with price fixing." **[*193]** *Id. at 127*. As to the manufacturer's choice not to enter new markets, the court noted that only that manufacturer "was in a **[**38]** position to decide whether it was in its best interest to make such commitments" in light of the "substantial capital expenditures and resource commitments" that entering a new market would require. *Id.*

The court also placed little weight on the plaintiffs' traditional conspiracy evidence, which included documentation of industry chatter, manufacturer notes about anticipated competitor price movements, and a manufacturer's notes indicating its intent to achieve "parity" with a competitor's price. *Id. at 130-31, 133*.

D. *In re Flat Glass Antitrust Litig.*

In *In re Flat Glass Antitrust Litigation, 385 F.3d 350 (3d Cir. 2004)*, the plaintiffs argued that manufacturers in the oligopolistic flat glass industry had conspired to fix the prices of flat glass and auto replacement glass. *Id. at 354*.[13] All of the defendants except one, PPG, settled with plaintiffs. PPG then filed for summary judgment, which the district court granted. *Id. at 353*. The Third Circuit reversed the grant of summary judgment as to the flat glass allegations, but affirmed summary judgment as to the alleged auto replacement glass price-fixing conspiracy. *Id. at 356, 378*.

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[13] Notably, prior to the initiation of the private suits against the flat glass manufacturers, two executives of one of the industry's manufacturers were indicted on unrelated criminal **[**39]** charges. *In re Flat Glass Antitrust Litigation, 385 F.3d 350, 354 (3d Cir. 2004)*. Related to that proceeding, they claimed their employer (Libbey-Owens-Ford, "LOF") "had conspired with its competitors to fix the price of the glass products it sold." *Id.* LOF then submitted an admission to the Department of Justice admitting to as much, but not specifically naming its co-conspirators. *Id.* Although the *Flat Glass* court considered LOF's proffer to the Department of Justice, it noted that the evidence submitted by the plaintiffs was sufficient to warrant reversal of summary judgment regardless of LOF's proffer. *Id at 363 n.14*.

In reversing summary judgment, the court specifically considered the plaintiffs' plus-factor arguments as to motive, actions against self-interest, and traditional conspiracy evidence. The court concluded that the plaintiffs had shown motive in part because the demand for flat glass was in decline at the time of the alleged conspiracy and the industry experienced excess capacity. *Id. at 361*. The court also determined that plaintiffs had shown that the defendants had acted against their self-interest because "no evidence suggest[ed] that the increase in list prices was correlated with any changes in costs or demand." *Id. at 362*. Nonetheless, the court held that although the plaintiffs' **[**40]** first two plus factor allegations indicated "that the price increases were collusive," the plaintiffs had failed to show "whether the collusion was merely interdependent or the result of actual agreement." *Id. at 362*. Thus, the court turned to traditional conspiracy evidence.

The *Flat Glass* court concluded that plaintiffs' traditional conspiracy evidence was sufficient. Plaintiffs submitted evidence showing that the manufacturers were in possession of each other's price information in advance of announcements, which the court distinguished from the price exchange evidence submitted by the *Baby Food* plaintiffs because "the exchanges of information [in *Flat Glass* were] more tightly linked with concerted behavior and therefore they appear[ed] more purposive." *Id. at 368-69*. Moreover, "several of the key documents [in *Flat Glass*] emphasize[d] that the relevant price increases were not economically justified or supportable, but required competitors **[*194]** to hold the line." *Id. at 369*. Other documents suggested knowledge of "the plans of multiple competitors," as opposed to just a single one. *Id. at 369*. And "[p]redictions of price behavior were followed by actual price changes." *Id. at 369*.

E. *In re Chocolate Confectionary Antitrust Litig.*

Most recently, the Third Circuit clarified **[**41]** the plus-factor analysis in *In re Chocolate Confectionary Antitrust Litig., 801 F.3d 383 (3d Cir. 2015)*. Direct and indirect purchaser classes sued the three major chocolate manufactures, who together controlled more than 75% of the domestic chocolate market. *Id. at 391*. The court concluded the defendants had motive to conspire "[g]iven the market concentration and high barriers to entry." *Id. at 398*. The court relied primarily on the plaintiffs' experts to conclude that defendants had acted against their self-interest, relying on the experts' opinions that the cost increases in the chocolate market could not explain the price increases. *Id. at 399*. But, as stated in *Flat Glass*, the court explained that "evidence of a price increase disconnected from changes in costs or demand only raises the question: was the anticompetitive price increase the result of lawful, rational interdependence or of an unlawful price-fixing conspiracy?" *Id. at 400*. The court concluded the plaintiffs had failed to point to evidence that went beyond interdependence. *Id. at 401*.

Thus, as with *Flat Glass*, the most important evidence was the traditional conspiracy evidence. But here, the court found that evidence wanting. There were two internal memos from Hershey reflecting that Hershey had advance notice of price increases scheduled by Mars **[**42]** and Nestle USA. *Id. at 407-08*. But the court did not give much weight to those documents because the plaintiffs had "no direct or strong circumstantial evidence that the information came from Hershey's competitors, much less their upper-level executives." *Id. at 408*. There were three email exchanges among the competitors, but the court did not give them much weight, explaining that "sporadic communications among individuals without pricing authority are insufficient to create a reasonable inference of a conspiracy." *Id. at 409*. The court also noted that the timing of the communications and the actual price increases were not suspicious. *Id. at 407, 409*. Plaintiffs attempted to rely on defendants' departure from their pre-conspiracy conduct as traditional evidence, but the changes they cited were not "radical" or "abrupt" enough to create an inference greater than interdependence. *Id. at 410* (quoting *Toys "R" Us, Inc. v. FTC, 221 F.3d 928, 935 (7th Cir. 2000))*.[14]

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[14] The *Chocolate* court dedicated most of its traditional conspiracy evidence analysis to the plaintiffs' evidence of a Canadian conspiracy that mirrored the conspiracy alleged by the plaintiffs. *Id. at 403*. Because Plaintiffs here have not submitted any comparable evidence, the Court does not discuss that analysis.

IX. Undisputed Background Facts

[43]** In antitrust cases, it is often helpful to understand the mechanics of the industry.

A. Wallboard Industry Background

Wallboard is a building-material panel consisting of a gypsum core pressed between sheets of paperboard. It is used in the construction of interior walls and ceilings for residential and commercial buildings. There are a variety of types of wallboard, varying in thickness, length, core formulations, and applications. Some product lines include different properties, such as fire-resistance, mold-resistance, and impact-resistance. The core ingredient of **[*195]** wallboard is gypsum, but other costs for manufacturers include paper, energy, and labor.

1. Market Share

From 2010 through 2012, there were eight manufactures of gypsum wallboard located in the United States: American, CertainTeed, Lafarge, National, PABCO, TIN, USG, and Georgia-Pacific.[15] Manufacturer market share varied from region to region, but nationally each manufacturer's market share in 2011 was approximately[16] as follows:

- USG: 24-26%
- National: 21-26%
- CertainTeed: 10. 3%-11.7%
- American: 10%
- Lafarge: 10%
- Georgia-Pacific: 10%
- TIN: 7%[17]

There are multiple distribution channels in the wallboard industry, and Defendants typically sell to the following customers, though no Defendant sells to all of the customer types: (1) gypsum specialty dealers,[18] (2) independent building material dealers[19] and lumber yards, (3) mass merchandisers, and (4) manufactured housing, (5) lumber yard buy-groups,[20] (6) two-step distributors,[21] (7) manufacturers that use the drywall to fabricate specialty products, and (8) contractors. Plaintiffs in the Direct Purchaser Action belong to one of the customer groups. Plaintiffs in the Indirect Purchaser Action purchased wallboard from at least one of the listed customer groups.

2. Demand

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[15] Georgia-Pacific was never a party to the Direct or Indirect Purchaser Actions, and **[**44]** USG and TIN have settled.

[16] The parties disagree slightly about the precise percentage. The Court has indicated a range to capture the positions of both parties.

[17] Georgia-Pacific acquired the assets of TIN in July 2013. These numbers reflect market shares at the time of the events giving rise to this case, which predated the acquisition.

[18] Gypsum Specialty Dealers serve the commercial construction and new residential construction industries and sell wallboard to builders, contractors, and sub-contractors.

[19] Independent building material dealers **[**45]** and lumber yards sell other building materials in addition to wallboard.

[20] Lumber yard buy-groups are collections of lumber yards that attempt to leverage their combined buying power.

[21] Two-step distributors purchase wallboard and other construction materials and sell those products to lumber yards.

Demand for wallboard is directly related to the level of activity in the construction industry. The early 2000s saw the end of the housing boom in 2006 and the Great Recession. As a result, demand for new residential and commercial construction in 2011 was approximately 65% less than it was in 2006. The downturn in the construction industry caused the prices of manufacturers' wallboard products to drop precipitously. As a result, manufacturers shuttered some of their plants. The total number of operating plants in the United States in the mid-2000s was 77 plants, but during 2011 and 2012, there were only 60 operating plants. Ex. 123.

3. Capacity

The parties have offered two ways to measure capacity (and thus supply) in the wallboard industry. Theoretical, or "nameplate," capacity is the capacity of a wallboard plant if it runs seven days a week, 24 hours a day. The theoretical capacity **[**46]** of the entire wallboard industry in the United States is approximately 33. 5 billion square feet per year. Effective capacity, or **[*196]** "crewed capacity," is the capacity of a wallboard plant as it is presently staffed. Defendants urge that the proper measure of supply in the wallboard industry is as a percentage of the crewed capacity. Ex. 48 (Powers decl.) ¶ 39; Ex. 22 (Salah dep.) at 196:4-16, 197:23:11. Plaintiffs, with the support of their experts, counter that the proper measure of supply is as a percentage of the theoretical capacity. Pls. Response Br. at 93-94.

4. Job Quotes

At least prior to 2011, manufacturers offered their customers a variety of rebates, discounts, credits, and other price reductions. Thus, regardless of the list price, the actual price that customers paid widely varied.

One price negotiation tool was "job quoting." The practice of job quotes began over 30 years ago to help commercial contractors bid on large jobs. Typically, manufacturers provided job quotes for commercial jobs requiring one million square feet of wallboard or more. Manufactures gave distributors a quote for the entire job ("job quote") so that the distributor's customers, the contractors, could **[**47]** big on projects 12 to 18 months in advance. The use of job quotes grew from their inception in the 1980s, and by the 1990 s, they were no longer limited to large commercial projects.[22] The job quote practice was easily abused to the detriment of at least some of the manufacturers.[23] The abuses were exacerbated by the recession. Additionally, job quotes were a one-way liability for manufacturers because customers were not required to buy on the quote. Thus, if the market price dropped below the quote price, customers could simply buy drywall using the market price.

B. Trade Association Membership & Meetings

Plaintiffs have noted numerous instances in which Defendants' senior leadership were in the same place at the same time. For instance, the drywall and building materials **[**48]** industries have trade shows and conventions that are attended by customers, manufacturers, and dealers.[24] And during the class period, all Defendants belonged to the same trade association, the Gypsum Association, which hosted events attended by Defendants.[25]

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[22] Plaintiffs object to the use of Defendants' evidence that stems from before 2010 because the Court limited the discovery period to 2010-2013. The Court acknowledges Plaintiffs' objection but the facts merely provide background information.

[23] Plaintiffs dispute that USG's customers abused job quotes, but they do not provide evidence to create a fact dispute about whether the other manufacturers were impacted by job quote abuses.

[24] Plaintiffs submit evidence that Defendants had a presence at the following trade shows and customer-sponsored events: Association of the Wall and Ceiling Industry's ("AWCI") Interior Exterior Commercial Construction ("INTEX") Expo in April 2011 and 2012 and AWCI's Industry Executives' Conference & Committee Week in September 2011 and 2012 (PSOF ¶¶ 447-51); Global Gypsum Conference in October 2011 (PSOF ¶ 463); the Annual Meeting of AMAROK (a group of gypsum specialty dealers), held in April 2011 and 2012; the semi-annual meetings of the Drake Group (association of gypsum special dealers),

[*197] But it is now cannon that ***HN13***[] evidence of competitors meeting together, without more, is insufficient to raise inferences of conspiracy without additional evidence. *E. g., Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 567 n. 12, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*; *In re Chocolate Confectionary Antitrust Litig., 801 F.3d 383, 409 (3d Cir. 2015)*; *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., Inc., 998 F.2d 1224, 1242 n.15 (3d Cir. 1993)*; *Fragle & Sons Beverage Co. v. Dill, 760 F.2d 469, 473 (3d Cir. 1985)*. That said, opportunities to conspire may be probative of a conspiracy when meetings of Defendants are closely followed in time by suspicious actions or records. *See In re Text Messaging Antitrust Litig., 782 F.3d 867, 878 (7th Cir. 2015)* (explaining that plaintiffs' evidence of opportunities to conspire would have been "more compelling if the immediate sequel to any of these meetings had been a simultaneous or near-simultaneous price increase by the defendants"); *Fragle & Sons Beverage Co., 760 F.2d at 474* (concluding, in a non-oligopoly case, that plaintiffs had submitted sufficient evidence to survive summary judgment in a refusal-to-deal conspiracy, where the plaintiff showed that a dealer-defendant agreed to sell to plaintiff and later repudiated that agreement and that an intervening meeting took place between the dealer-defendant and plaintiff's direct competitor); *In re Linerboard Antitrust Litig., 504 F.Supp. 2d 38, 59 (E.D. Pa. 2007)* ("Importantly, plaintiffs do not offer their evidence of opportunity to **[**50]** conspire in isolation.").

To the extent Plaintiffs have submitted evidence of opportunities to conspire that are closely linked in time with suspicious documents or changes in pricing practices, the Court will consider that evidence below. But, the Court will not give weight to any evidence that shows a bare opportunity to conspire, without more.

X. *Bourjaily* and Application of the Co-Conspirator Hearsay Exception

HN14[] In considering whether Plaintiffs have submitted sufficient evidence to survive summary judgment, the Court may consider only admissible evidence. *Fed. R. Civ. P. 56 (c)*. This case involves multiple Defendants who are alleged to have been in a conspiracy. And most of Plaintiffs' evidence involves internal corporate communications from which Plaintiffs contend agreement might be inferred, rather than direct communications among Defendants. As such, the chief evidentiary question the Court must address is whether the hearsay statements made by one Defendant are admissible against the other Defendants. More specifically, are the statements made by one Defendant attributable to all Defendants by virtue of the co-conspirator exception to the rule against hearsay?

In answering this question, the Court finds **[**51]** it helpful to review the evolution of the co-conspirator exception and its application in the Third Circuit, particularly in civil antitrust cases.

A. Brief History of the Co-Conspirator Exemption

Before the adoption of the Federal Rules of Evidence in 1975, which codified the co-conspirator hearsay exemption, federal courts had long applied the doctrine that the declarations of one conspirator made to a third party are admissible against his co-conspirators so long as the declarations were made in furtherance of the objects of the conspiracy. *See Lutwak v. United States, 344 U.S. 604, 617-18, 73 S. Ct. 481, 97 L. Ed. 593 (1953)*; *Logan v. United States, 144 U.S. 263, 308-09, 12 S. Ct. 617, 36 L. Ed. 429 (1892)*.

[*198] In *Glasser v. United States, 315 U.S. 60, 74, 62 S. Ct. 457, 86 L. Ed. 680 (1942)*, the Supreme Court winnowed the viability of the co-conspirator exemption by providing that "such declarations are admissible over the objection of an alleged co-conspirator, who was not present when they were made, only if there is proof aliunde that

held in February 2011 and 2012 and September 2012 (PSOF ¶¶ 467 - 71); the Annual Show of ENAP (buying group) in March 2011 and 2012 (PSOF ¶¶ 472-74); the annual show of Guardian (for-profit buying group) in January 2011 and 2012 (PSOF ¶¶ 475-77); the semi-annual shows of LMC (collective buying group) held in March 2011 and March 2012 (PSOF ¶¶ 478-80). **[**49]**

[25] Plaintiffs submit evidence that Defendants had a presence at Gypsum Association events in March 2011, June 2011, October 2011, March 2012, July 2012, and October 2012. PSOF ¶¶ 452-62.

he is connected with the conspiracy." "Otherwise," the Court continued, "hearsay would lift itself by its own bootstraps to the level of competent evidence." *Id.* The Court reiterated this so called "bootstrapping-rule" again in *United States v. Nixon, 418 U.S. 683, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974)*. In *Nixon*, the Court provided that "[d]eclarations by one defendant may also be admissible against other defendants upon a sufficient showing, by independent evidence, of a conspiracy **[**52]** among one of more other defendants and the declarant and if the declarations at issue were in furtherance of that conspiracy." *Id. at 701* (emphasis added). In a footnote, the Court explained "by independent evidence" as requiring "substantial, independent evidence of the conspiracy, at least enough to take the question to the jury." *Id. at 701 n. 14*.[26]

B. Impact of Federal Rules of Evidence

With the advent of the Federal Rules of Evidence in 1975, what had been a clearly articulated prohibition on bootstrapping was called into question in the Circuit Courts. ***HN15***[] *Federal Rule of Evidence 801(d)(2)(E)*, which codifies the co-conspirator exception, provides that a statement is not hearsay if it is "offered against an opposing party and . . . was made by the party's coconspirator during and in furtherance of the conspiracy." Demonstrating a conspiracy, **[**53]** and the declarant's and non-offering party's participation therein, are preliminary questions of fact for purposes of admissibility under *Rule 801(d)(2)(E)*. *Fed. R. Evid. 104(a)*. *Rule 104(a)* provides that "[t]he court must decide any preliminary question about whether . . . evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege." *Id.*

Accordingly, courts began to question the prohibition on bootstrapping, musing that, under the new Rules, a court could consider the proffered hearsay statements, in addition to the independent evidence of conspiracy, in determining whether a conspiracy existed for purposes of the co-conspirator exception. *See, e.g., James R. Snyder Co., Inc. v. Associated Gen. Contractors of Am., Detroit Chapter, Inc., 677 F.2d 1111, 1117 (6th Cir. 1982)* ("The out-of-court statements themselves now may be used to convince the trial judge of the conspiracy's existence and the defendant's participation in it."); *United States v. Petrozziello, 548 F.2d 20, 23 n. 2 (1st Cir. 1977)* (recognizing that, while *Glasser* and earlier case law rejected bootstrapping, the new Rule "suggests that a conspiracy may be proved by the very statement seeking admittance.").

The Third Circuit engaged in an extended analysis of the effect the new Federal Rules of Evidence had on the *Glasser* rule *In re Japanese Elec. Prods. Antitrust Litig. (Japanese Elec. Prod.), 723 F.2d 238, 259-66 (3d Cir. 1983)*, *reversed on other grounds sub nom. Matsushita Elec. Indus.* ***[*199]*** *Co., Ltd. v. Zenith Radio Corp., 475 U. S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*.[27] In that case, the plaintiffs, manufacturers and **[**54]** sellers of consumer electronic products, sued numerous competitor-manufacturers, most of whom were headquartered in Japan. *Japanese Elec. Prods., 723 F.2d at 250*. The plaintiffs alleged, among other things, violations of *Sherman Act §§ 1* and *2*. *Id.* The district court judge[28] made evidentiary rulings excluding most of the plaintiffs' evidence that had been proffered in opposition to the defendants' summary judgment motions. The Court applied the *Glasser* rule and concluded that there was no admissible evidence that could raise an issue of fact as to the existence of a conspiracy in violation of *Sherman Act § 1*. *Id. at 256*. Thus, the court granted summary judgment on all of the plaintiffs' remaining claims and entered final judgment in favor of the defendants. *Id. at 256-67*.

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[26] The lower federal courts uniformly interpreted this statement as requiring a hearsay proponent in the co-conspirator context to present independent evidence of the conspiracy, without any reference to the hearsay statement itself. *See, e.g., United States v. Rodrigues, 491 F.2d 663, 666 (3d Cir. 1974)* ("In order to be properly admitted under the co-conspirator exception to the hearsay rule, there must be independent evidence linking the declarant to the defendant.").

[27] As indicated by the citation, *In re Japanese Electronic Litigation* is the Third Circuit opinion that was reversed by *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*, a case that this Court has already discussed in the section on legal analysis in oligopoly cases.

[28] The judge was Edward R. Becker, who later became Chief Judge of the Third Circuit Court of Appeals.

On appeal, the plaintiffs challenged the district court's exclusion of the purported statements of co-conspirators. *Id. at 260-66*. The plaintiffs argued that the trial court erred by applying **[**55]** the *Glasser* rule because the Federal Rules of Evidence had abrogated the *Glasser* rule. *Id. at 260*. The Third Circuit disagreed, concluding that neither *Federal Rule of Evidence 104(a)* nor *Federal Rule of Evidence 801(d)(2)(E)* "was intended to change the settled law that there must be independent proof aliunde of the existence of and membership in a conspiracy before coconspirator statements are admissible against a party." *Id. at 261*.

As this truncated history demonstrates, the Courts of Appeal were in disagreement as to whether the enactment of the Federal Rules of Evidence had indeed rendered the *Glasser* rule obsolete. The Supreme Court finally had cause to confront the issue in *Bourjaily v. United States, 483 U.S. 171, 107 S. Ct. 2775, 97 L. Ed. 2d 144 (1987)*.

C. *Bourjaily* Ends the Rule Against Bootstrapping

In *Bourjaily*, which is the Rosetta Stone for determining admissibility of co-conspirator statements, the Supreme Court squarely confronted the issue of "whether the court must determine by independent evidence that the conspiracy existed and that the defendant and the declarant were members of the conspiracy" for purposes of determining admissibility under *Rule 801(d)(2)(E)*. *Bourjaily, 483 U.S. at 173*. The facts of *Bourjaily* were straightforward:

> In May 1984, Clarence Greathouse, an informant working for the Federal Bureau of Investigation (FBI), arranged to sell a kilogram of cocaine to **[**56]** Angelo Lonardo. Lonardo agreed that he would find individuals to distribute the drug. When the sale became imminent, Lonardo stated in a tape-recorded telephone conversation that he had a "gentleman friend" who had some questions to ask about the cocaine. In a subsequent telephone call, Greathouse spoke to the "friend" about the quality of the drug and the price. Greathouse then spoke again with Lonardo, and the two arranged the details of the purchase. They **[*200]** agreed that the sale would take place in a designated hotel parking lot, and Lonardo would transfer the drug from Greathouse's car to the "friend," who would be waiting in the parking lot in his own car. Greathouse proceeded with the transaction as planned, and FBI agents arrested Lonardo and petitioner immediately after Lonardo placed a kilogram of cocaine into petitioner's car in the hotel parking lot. In petitioner's car, the agents found over $20,000 in cash.

Id. at 174.

Mr. Bourjaily was charged with conspiring to distribute cocaine and possession of cocaine with intent to distribute. *Id.* At trial, the Government introduced, over Mr. Bourjaily's objection, Mr. Lonardo's telephone statements about his "friend' s" participation in the contemplated **[**57]** transaction. *Id.* In holding that Mr. Lonardo's out-of-court statements satisfied *Rule 801(d)(2)(E)* and were not hearsay, the district court found that the Government had established, by a preponderance of the evidence, that a conspiracy involving Messrs. Lonardo and Bourjaily existed. *Id.* In so finding, the district court considered both the events in the parking lot *and* Lonardo's out-of-court telephone statements. *Id.* Mr. Bourjaily was ultimately convicted on both counts. *Id.*

On appeal, Mr. Bourjaily argued that the district court erred by considering Mr. Lonardo's out-of-court statements to determine whether a conspiracy existed and whether the defendant was a member of it for purposes of *Rule 801(d)(2)(E)*. *Id. at 176*. Mr. Bourjaily argued that the district court violated a strict reading of *Glasser*, namely that "a court should not consider hearsay statements at all in determining preliminary facts under *Rule 801(d)(2)(E)*. *Id. at 177*.

The Supreme Court acknowledged that a majority of the Courts of Appeals had adopted this strict interpretation of *Glasser*, but noted that "[b]oth *Glasser* and *Nixon* . . . were decided before Congress enacted the Federal Rules of Evidence in 1975." *Id. at 177*. ***HN16***[] According to the plain meaning of *Rule 104(a)*, courts may make preliminary factual determinations **[**58]** "by considering any evidence it wishes, unhindered by considerations of admissibility." *Id. at 178*. The Court acknowledged that "[o]ut-of-court statements made by anyone, including putative co-conspirators, are often hearsay. Even if they are, they may be considered, *Glasser* and the bootstrapping rule notwithstanding." *Id.* The Court in *Bourjaily* did not decide whether a trial court could rely *solely* upon hearsay statements to determine that a conspiracy had been established by a preponderance of the evidence. *Id. at 181*. Rather, the Court's holding merely provided that a court, in making a preliminary factual determination pursuant to *Rule 801(d)(2)(E)*, can consider the proffered hearsay statements themselves. *Id.* A subsequent amendment to the Federal Rules of Evidence in 1997 clarified that "[t]he statement must be considered but does not by itself establish . . . the existence of the conspiracy or participation in it under (E)." *Fed. R. Evid. 801(d)(2)(E)*.

D. Admissibility of Hearsay Statements in Antitrust Suits Under the Co-conspirator Exception Post-*Bourjaily*

HN17[] In the Third Circuit post-*Bourjaily*, "[i]n order for an out-of-court statement to be admissible pursuant to *Rule 801(d)(2)(E)*, the district court must find by a preponderance of the evidence that: (1) a conspiracy existed; **[**59]** (2) the declarant and the party against whom the statement is offered were members of the conspiracy; **[*201]** (3) the statement was made in the course of the conspiracy; and (4) the statement was made in furtherance of the conspiracy." *In re Flat Glass Antitrust Litig., 385 F.3d 350, 375 (3d Cir. 2004)* (quoting *United States v. Ellis, 156 F.3d 493, 496 (3d Cir. 1998))*. A district court's preliminary finding will not be disturbed on appeal unless it is clearly erroneous. *Bourjaily, 483 U.S. at 181*; *City of Tuscaloosa v. Harcros Chemicals, Inc., 158 F.3d 548 (11th Cir. 1998)*. Alternatively, a district court has "considerable discretion" to admit the statements conditionally, subject to their later being connected up. *United States v. Mobile Materials, Inc., 881 F.2d 866, 869 (10th Cir. 1989)* (quoting *United States v. Hernandez, 829 F.2d 988, 994 n.6 (10th Cir. 1987))*.

In the antitrust context, plaintiffs and prosecutors commonly seek to introduce the statements of purported co-conspirators that help to establish the existence of an agreement in violation of the *Sherman Act*. Two cases following the Supreme Court's decision in *Bourjaily* explain the Third Circuit's use of the co-conspirator exception in civil antitrust cases.

1. *Big Apple BMW, Inv. v. BMW of N. Am., Inc.*

In *Big Apple BMW, Inc. v. BMW of North America, Inc., 974 F.2d 1358 (3d Cir. 1992)*, applicants for several BMW franchises ("applicants") sued the U.S. distributor for BMW automobiles ("BMW distributor"), alleging that the BMW distributor and its dealers conspired to exclude the applicants from becoming dealers, in violation of the *Sherman Act*.

The applicant-plaintiffs based **[**60]** their claim on the fact that they had been denied BMW dealerships in the Tri-State area on each of the three times they had applied for them. The applicants argued that the area dealers, who would have been the applicants' competitors, persuaded the BMW distributors to deny the applicants' application so that the dealers could avoid price competition. Although the evidence underlying the first two denials was relevant to the suit, the Third Circuit addressed the co-conspirator exception to the hearsay rule in connection with only the evidence underlying the third denial.

The third denial occurred after the applicants had reached a written buy-sell agreement with Philadelphia BMW dealer Irvin Green. *Id. at 1370*. This agreement was made contingent on the applicants securing BMW and Volkswagen franchises by a certain date. *Id. at 1371*. But the BMW distributor once again denied the applicants' franchise application, and Mr. Green ultimately sold his BMW franchise to an existing BMW dealer. *Id. at 1372*.

The applicants claimed that they were denied a BMW dealership due to area dealers' concerns about price competition. In support of this theory, the applicants proffered the testimony of Bruce Braverman, the applicants' lease **[**61]** manager. *Id. at 1372*. Mr. Braverman's testimony took two forms, both of which the district court excluded as inadmissible hearsay.

First, Mr. Braverman testified at his deposition to several statements allegedly made to him by Don Mitchell, a BMW leasing representative:

> Don Mitchell told me that the BMW dealers in the area would not let [the applicants] get the franchise because they were afraid that [the applicants'] reputation of selling cars cheaper than everybody else was not something that [the BMW dealers] wanted to get involved with. [The BMW dealers] didn't want to be involved in price competition. They wanted to keep their price levels where they were and that [sic] they were going to do what they could to make sure that [the applicants] did not get the franchise.

[*202] *Id.* Furthermore, Mr. Braverman testified that BMW's leasing representative

> indicated to [Mr. Braverman] that he had spoken to dealers. The dealers, it was the dealers who did not want [the applicants] to get the franchise, it wasn't BMW who had rejected them. . . . [I]t seemed like it was a conspiracy of the dealers in the tri-state area that didn't want [the applicants] to get that franchise. I don't think BMW cared.

Id. Second, the **[**62]** applicants proffered a memorandum memorializing Mr. Braverman's alleged conversation with the BMW leasing agent.[29]

The Third Circuit reversed the district court's evidentiary finding, concluding first that the leasing agent's statement was made as a representative of BMW subsidiaries and therefore bound the BMW distributor as the corporate parent. *Id. at 1373*. Accordingly, under *Rule 801(d)(2)(D)*, Mr. Mitchell's statements to Mr. Braverman were admissible. *Id.*

The Third Circuit then applied the co-conspirator exception to hold that the various dealer statements[30] to the BMW leasing agent were also admissible. *Id. at 1374*. The court cited *Bourjaily* for the premise that a court "may look to independent evidence plus the statement itself for evidence of a conspiracy." *Id.* The court also explained that "mere association" would be insufficient evidence to establish the existence of a conspiracy and the declarant and defendant's connection to it, but "timing, circumstances, or a series of meetings," may prove sufficient. *Id. at 1372-74*. With these **[**63]** principles in mind, the court concluded that "the [applicants] ha[d] proffered evidence to show concerted action in violation of the *Sherman Act*," and that therefore, "they ha[d] demonstrated the requisite conspiracy for admissibility under *Rule 801(d)(2)(E)*."[31] *Id.* Thus, the Third Circuit concluded that the evidence was admissible. *Id. at 1374*.

2. *In re Flat Glass Antitrust Litig.*

The Third Circuit most recently addressed *Rule 801(d)(2)(E)* in the context of civil antitrust suits in *In re Flat Glass Antitrust Litig., 385 F.3d 350 (3d Cir. 2004)*. Although the court affirmed summary judgment as to the alleged conspiracy to fix automotive replacement glass, it reversed as to the flat glass price-fixing conspiracy. *Id. at 369*. After summarizing the evidence that, when considered as a whole, allowed the plaintiffs to move forward on their

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[29] The Court notes National's objection to the admissibility of Ex. 1515 under the hearsay exceptions due to the memorandum containing the subjective impressions of the analyst. The Court disagrees. *See Big Apple BMW, 974 F.2d at 1372-74*; *United States v. SKW Metals & Alloys, Inc., 195 F.3d 83, 88-89 (2d Cir. 1999)*.

[30] The excerpts from Mr. Braverman's testimony that are presented here do not specifically identify the dealers. But, in light of other evidence presented in the case, the Third Circuit concluded that that the identity of the dealers implicated by Mr. Mitchell's statement was sufficiently clear.

[31] The BMW distributor also made an additional argument relevant to the exclusion of this evidence. Because the BMW leasing agent categorically denied ever making the statements, the BMW distributor attempted to exclude (1) Mr. Braverman's recollection of the conversation with the BMW leasing agent and (2) the dealers' underlying communications with the BMW leasing agent. The Third Circuit rejected this argument, noting that the admissibility of co-conspirator statements under *Rule 801(d)(2)(E)* "is premised upon our adversarial system rather than in reliance upon indicia of reliability or trustworthiness," and it **[**64]** is "the factfinder [who] must decide which of the diametrically opposed witnesses is truthful." *Id.*

flat glass price-fixing claim against the defendant-appellee PPG, the Court turned to a number of evidentiary rulings the district court had made. *Id. at 370*. **[*203]** One such ruling was the district court's exclusion of two categories of handwritten notes produced by Ronald Skeddle, the former President and Chief Executive of Libbey-Owens-Ford Company ("LOF"), a flat glass manufacturer that was not party to the suit.

On appeal, the Third Circuit considered whether the notes were admissible under the co-conspirator exception to the rules against hearsay. In making its *Rule 104* finding, the district court had concluded that there was insufficient evidence from which a jury could conclude that PPG entered into an **[**65]** agreement to fix prices. In reviewing the district court's grant of summary judgment, the Third Circuit had already concluded that a jury could find that PPG entered into an agreement. Based on the Third Circuit's opinion in *Big Apple BMW*, one would have expected this to be the end of the matter.

But, the Third Circuit explained that it could not conclude whether the district court abused its discretion, explaining that "simply because a jury *could* find by a preponderance of the evidence that PPG entered into a conspiracy, it is not the case that the District Court *must* find that plaintiffs showed by a preponderance of the evidence that PPG entered into an agreement." *Id. at 375-76*. The Court then stated:

> Any particular factual determination requires making a number of more particularized factual determinations and weighing the relevant importance of those determinations. And two factfinders could feasibly reach different conclusion [sic], especially under a preponderance of the evidence standard.

Id. at 376.

In so clarifying, the Third Circuit appeared to guard against the kind of bootstrapping employed in *Big Apple BMW*. However, the Court closed its discussion of the co-conspirator exception with a reminder **[**66]** that, "[t]o be sure, however, 'the Federal Rules of Evidence are to be liberally construed in favor of admissibility.'" *Id.* (quoting *United States v. Pelullo, 964 F.2d 193, 204 (3d Cir. 1992))*.

E. Role of the Co-Conspirator Exception in this Case

It is Plaintiffs' burden to show, by a preponderance of the evidence, that *Rule 801(d)(2)(E)* requirements have been met. Abiding by the Third Circuit's holding in *Flat Glass* on the district court's obligations under *Rule 104*, this Court will make *Rule 104* findings relevant to the admissibility of statements under *Rule 801 (d)(2)(E)*. Those findings will be made following this Court's presentation of the chronology of material facts, and *Rule 104* findings will be made separately from and prior to any findings on Plaintiffs' ability to withstand the summary judgment motion.

HN18[] The Rules of Evidence are to be liberally construed in favor of admissibility. To that end, the Court notes that it "may admit the proposed evidence on the condition that the proof be introduced later." *Fed. R. Evid. 104(b)*. And the Court recognizes its wide berth in conditionally admitting co-conspirator statements at the summary judgment stage. *See United States v. Mobile Materials, Inc., 881 F.2d 866, 869 (10th Cir. 1989)*.[32] The Court will exercise this option.

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[32] *See also United States v. Misle Bus & Equip. Co., 967 F.2d 1227, 1233 (8th Cir. 1992)* (noting that the district court acted properly when it admitted co-conspirator statements conditionally and then, at close **[**67]** of evidence, specifically found that the government had met its burden in satisfying the requirements of *Bourjaily*); *ZF Meritor LLC v. Eaton Corp., No. 6-623, 2009 U.S. Dist. LEXIS 83409, 2009 WL 2920851 at *2 (D. Del. Sept. 14, 2009)* (admitting, with conditions, co-conspirator statements); *Consol. Credit Agency v. Equifax, Inc., No. 3 - 1229, 2004 U.S. Dist. LEXIS 31061, 2004 WL 5644363, at *13 n.19 (C.D. Cal. Aug. 5, 2004)* (stating "on a motion for summary judgment the Court may conditionally consider hearsay evidence, subject to a subsequent determination as to whether plaintiffs can prove the existence of the conspiracy as well as the participation of the declarant in the conspiracy.").

XI. Chronology of Material Facts

Although *Rule 56* focuses on factual disputes, in this case, most facts are undisputed. The facts presented, in both supporting **[*204]** and contesting Defendants' motions, come largely from Defendants' own documents, employee depositions, and/or memoranda of telephone calls made by various parties' representatives or third parties. The declarations filed by Defendants in support of their motions are not directly contradicted; instead, Plaintiffs cite facts from other materials that they assert would allow contradictory inferences and conclusions.

Thus, the Court's task becomes one of determining what inferences a jury could make from **[**68]** all facts, disputed and undisputed. This analysis is mostly about what inferences are reasonable. ***HN19***[] "[T]he acceptable inferences which can be drawn from circumstantial evidence vary with the plausibility of the plaintiffs' theory and the dangers associated with such inferences." *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., Inc., 998 F.2d 1224, 1232 (3d Cir. 1993)*. As previously discussed, Plaintiffs must submit sufficient evidence to permit an inference of conspiracy that is reasonable in the context of an oligopolistic market, which can prove to be a demanding standard.

Before reaching the permissible inferences, the Court finds it helpful to present a timeline of the events of this case without drawing any inferences. Plaintiffs submitted a separate statement of facts along with supporting record evidence. The Court has distilled that evidence into a timeline of what the Court believes contains Plaintiffs' most persuasive evidence.

After presenting the chronology, the Court will make *Federal Rule of Evidence 104* findings and address Plaintiffs' arguments about the inferences that can be drawn from the facts discussed in the chronology.

A. February — October 2011

1. 2/18/2011: Craig Weisbruch (Sr. VP of Sales and Marketing, National) indicated in an internal National email that Longbow had shared competitor [69] information with him. Ex. 1266**.

As early as February 2011, it appears that Longbow would share information among competitors. In an internal National email between Craig Weisbruch and Tom Nelson (Pres. and CEO, National), Mr. Weisbruch wrote:

> I just finished a long conversation with the guys from Longbow. If I were to summarize 45 minutes, it would be...the dealers tell them that the manufacturers are dead serious about this increase and they are going to get it. And, our smaller competitors are telling Longbow that they are serious about this one, and while they don't feel comfortable leading future increases, they are more than ready to follow them.

Ex. 1266.

2. 2/30/2011: Zoran Miling (Analyst, Longbow) emailed Craig Weisbruch (Sr. VP Sales and Marketing, National) to share "some commentary from a few of [National's] peers" (Eagle and USG). Ex. 1276.

Mr. Miling (Analyst, Longbow) wrote that Longbow had "held our Construction Materials Conference last week and wanted to pass along some commentary from a few of your peers." Ex. 1276. He then **[*205]** disclosed information regarding USG and Eagle Materials, including those companies' impressions of recent price increase attempts. Ex. 1276. Mr. Weisbruch **[**70]** responded that he "appreciate[d] the insight." Ex. 1276.

3. 4/3/2011-4/7/2011: Representatives from all Defendants attended the Las Vegas Trade Meeting. PSOF ¶ 448.[33]

Both parties agree that the attendees included, at least, David Bates (American), Keith Metcalf (American), Keith Metcalf (American), Matt Byrne (USG), Steve Bjorklund (USG), Christopher Griffin (USG), Scott Blanchard (USG), Rob Waterhouse (L&W), Donna Sue Mims (PABCO), Mark Burkhammer (PABCO), Philip Kohl (PABCO), Ryan Lucchetti (PABCO), Todd Thomas (PABCO), Bill Campbell (TIN), Jay Wyatt (TIN), Stephen Raley (TIN); Jay Conlin (Lafarge), Stephen DeMay (Lafarge), Isabelle Shiffrin (Lafarge), Robbe Pearson (Lafarge), Wayne Wilson (Lafarge), Bill Kelly (National) Scott Crutchfield (National), Craig Weisbruch (National), Duane Wood (National), Kurt Withrock (National), **[**71]** John Donaldson (CertainTeed), Steve Hawkins (Certain Teed). Defs. Resp. PSOF ¶ 448.

Plaintiffs also argue that Bill Mazurie (CertainTeed) and John Mixson (National) attended, and they presented evidence that these two were at least pre-registered for the event. Ex. 1732. Defendants argue these two did not attend, though they present no evidence to support that contention.

The parties also dispute whether the meeting was held from April 3-7 or April 2-7. Defs. Resp. PSOF ¶ 448.

4. 4/27/2011: Keith Metcalf (Sr. VP of Marketing, Sales, and Distribution, American) sent internal email indicating that there might be "a movement from all manufacturers to eliminate job quotes." Ex. 1165.

Susan Hall (Dir. of Sales, South, American) sent an email to Keith Metcalf (Sr. VP of Marketing, Sales, and Distribution, American) to ask a question related to how to quote jobs going into calendar year 2012. Ex. 1165. Mr. Metcalf responded: "Please don't quote anything in 2012. We may have a movement from all manufacturers to eliminate quotes." *Id.*

When deposed, Mr. Metcalf could not recall the source of the information that caused him to write that passage in April 2011. Ex. 1124 (Metcalf dep.) at 140:19-143:11. **[**72]**

5. 6/30/2011: Zoran Miling (Analyst, Longbow) sent Craig Weisbruch (Sr. VP Sales and Marketing, National) an email "to pass along some commentary from a few of your peers," namely, USG and American. Ex. 1276.

6. 7/8/2011: Longbow issued a report that directly quoted from an analyst's notes from a call with Lafarge. Exs. 1280, 2081, 1122 (Miling dep.) 310:15-23.

In July 2011, Zoran Miling (Analyst, Longbow) had a discussion with someone at Lafarge. Ex. 1122 (Miling dep.) at 310:15-23. Mr. Miling took detailed notes from the call. *Id.*; Ex. 1280. Portions of notes from this call appear verbatim in a July 8, 2011 Longbow report. Ex. 2081 at 7-8.

[*206] 7. 7/21/2011: Kathryn Thompson (Founder and Dir. of Research, Thompson) shared information about USG directly with Craig Weisbruch (Sr. VP Sales and Marketing, National). Ex. 1275 ; PSOF ¶ 207.

On July 21, 2011, Craig Weisbruch (Sr. VP of Sales and Marketing, National) emailed to Kathryn Thompson (Founder and Dir. of Research, Thompson): "I can't believe that USG is going in to their call tomorrow as the only company to not announce an increase." Ex. 1275.

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[33] The Court will occasionally reference paragraphs from Plaintiffs' Supplemental Statement of Facts ("PSOF") or Defendants' Statement of Facts ("DSOF"), rather than citing to the underlying exhibits. The Court is not relying on the statement of facts as evidence; it is using the reference merely as shorthand to refer to the exhibits listed in the statement of facts' paragraphs.

Ms. Thompson responded later that day: "The message I think you will hear from USG is they likely **[**73]** won't participate at all. If pressed, they'll say this decision is driven by their belief there is so much protected business in the market. Either way, let's compare notes when USG reports." Ex. 1275.

Mr. Weisbruch forwarded her response to Tom Nelson (Pres. and CEO, National), writing: "If true (and it sounds like she's spoken to them), here's a company that has truly run off the tracks." Ex. 1275.

8. 7/28/2011: Zoran Miling (Analyst, Longbow) emailed Craig Weisbruch (Sr. VP of Sales and Marketing, National) industry information on American and USG. Ex. 1281.

Mr. Weisbruch responded to American's unexpectedly low volume by commenting, "Our opinion is that American is trying to be a good steward of the price." Ex. 1281.

9. Early 9/2011: Internal PABCO email indicated recognition that a united manufacturer front would be necessary to cause a price increase. Ex. 1287.

Todd Thomas (Director of Sales, South, PABCO) wrote and circulated a confidential, internal PABCO memo that provided a market update for August 2011. The memo is not dated, but the context indicates it may have been written in early September 2011. Speaking about a price increase scheduled to take effect in early September **[**74]** 2011, Mr. Thomas wrote:

> It will take strong united effort by all manufacture [sic] to manage current job pricing and improved forward pricing for this increase attempt to yield any price improvement. I do believe that the poor financial performance by all manufacturers, a reality check that demand improvements are not coming any time some [sic], and price improvement is the only answer [sic] will result in all manufactures falling in line to support price improvement in the coming year.

Ex. 1287.

10. 9/2/2011: Keith Metcalf (Sr. VP of Marketing, Sales, and Distribution, American) sent an internal email prohibiting staff from providing job quotes except in limited circumstances. Ex. 1482.

On September 2, Keith Metcalf sent another email to American Gypsum employees.

> Effective immediately, during the remaining time for calendar 2011, no quotes should be given to a customer unless they hand you the PS's that day or make a commitment to [American] on that job for the balance of the year.
>
> When looking ahead to January 2012 and moving forward we would like to hold off on giving any quotes until September 19th, at which time we will reevaluate.
>
> Some of this may sound odd but if you would like to **[**75]** discuss further please give me a call.

Ex. 1482.

The impetus for this email was explained in an email exchange on September 20. On that date, Mary Schafer (VP of **[*207]** National Accounts, American) received an email from an American salesman asking whether he could provide a job quote for a particular project, referencing Mr. Metcalf's September 2 email. Ex. 2098. In response, Ms. Schafer wrote:

> We should pursue. *The email below [the Metcalf email] is referencing an anticipated announcement from one or more of the big boys relative to job quoting*. We're still waiting. Just want to proceed cautiously and not get locked in to big volume at low prices, especially if there is a game-changer event on the near horizon.

Ex. 2098 (emphasis added).

11. 9/6/2011, 1:45 PM: Mr. Metcalf (Sr. VP Sales, Marketing, and Distribution, American) called Rob Waterhouse (Sr. VP of Sales and Operations, L&W); the call lasted 24 seconds. At 1:48 PM, Mr. Waterhouse called Mr. Metcalf. The call lasted 4 minutes. Exs. 2146, 2187.

12. 9/6/2011, 1:56PM: Rob Waterhouse (Sr. VP of Sales and Operations, L&W) called Greg Salah (Sr. VP of Sales and Marketing, USG). The call lasted two minutes. Ex. 2187.

13. 9/7/2011: Greg Salah [76] (Sr. VP of Sales and Marketing, USG) emailed to USG leadership an internal draft letter creating an annual price for wallboard and eliminating job quotes. Ex. 2191**.

14. 9/12/2011: Phil Kohl (VP of Sales and Marketing, PABCO) sent a memo to PABCO leadership indicating that unanimous manufacturer action would be required to achieve price improvement. Ex. 1366.

Under the heading "General Market Conditions," the memo read:

> Real sustainable price improvement is impossible without a unanimous resolve to push through a price increase coupled with an absolute tightening and strict policing of all existing quotes. All gypsum companies see the need for an increase but the failure to achieve this end is caused by their apparent inability or refusal to tightly manage their existing quotes. In such an oversupplied market, even one lose open-ended quote can be the catalyst for the collapse of any price improvement.

Ex. 1366.

15. 9/19/2011: Dave Powers (President, American) called Foster Duvall (Sales Manager, PABCO). Exs. 1168, 1128.

They spoke for 19 minutes. *Id.* Both men acknowledged the call in their deposition testimony. Exs. 1128 (Powers dep.) 220:24-222:21, 1104 (Duval dep.) 181:10-182:11. And in **[**77]** an email the day after the call, Mr. Duvall wrote that he and Mr. Powers discussed a "lack of leadership in the industry" on the call. Ex. 1168.

Mr. Powers said this call reflects him merely returning a call from Mr. Duvall. Ex. 1128 (Powers dep.) at 220:24-222:3. Mr. Powers explained that he "seriously debated" whether to place the call because he knew American was about to release its announcement that would eliminate job quotes, create calendar-year pricing, and impose a 35% price increase for 1/1/2012. *Id.* But he decided to call Mr. Duvall nonetheless because Mr. Duvall was a personal friend, who had just had open-heart surgery multiple times. *Id.* Mr. Powers testified that they mostly discussed Mr. Duvall's health and family, but that they ended the call as they always did by slamming their former employer, USG, which involved talking about a lack of leadership in the industry. *Id.* at 222:07 — 223:09.

[*208] Mr. Duvall does not remember the call or what was said on it, though he does not contest that it occurred. Ex. 1104 (Duvall dep.) at 182:10-182:22.

16. 9/20/2011: American announced calendar-year pricing and the end of job quotes. Ex. 1489.

On September 20, 2011, American Gypsum circulated **[**78]** to customers a to-the-point announcement:

> **To our Customers**:
> Effective January 1, 2012, we will implement a 35% price increase on all gypsum wallboard products. This increased price (up 35%) will be your price for the entire year of 2012. This increase applies to all segments of the business.
> Effective immediately, we will no longer be providing job quotes. We thank you for your continued support.

Ex. 1489. The letter was signed by Keith Metcalf (Sr. VP Sales, Marketing, and Distribution, American).

17. 9/20/2011: An internal PABCO email shows that PABCO leaders knew USG was considering elimination of job quotes. Ex. 1496.

Todd Thomas (Director of Sales, South, PABCO) emailed Ryan Lucchetti (President, PABCO) and Mark Burkhammer (Director of Sales, North, PABCO):

> I just heard USG is coming out with a letter in the next day or so for a ~$25 — 30 increase January 1st. The letter will include wording about how they will handle job quotes. My understanding [sic] National and American are on board.

Ex. 1496.

18. 9/20/2011-9/21/2011: PABCO's president commented on the American announcement. Ex. 1168.

A customer forwarded the American to Ryan Lucchetti (President, PABCO) at 2:29 pm on September 20. **[**79]** Mr. Lucchetti forwarded the email to Foster Duvall (Sales Manager, PABCO) at 4:07 pm, saying, "Well here is the 1st." Ex. 1168. Mr. Duval responded: "Dave [from American] gave me a call yesterday and mentioned his frustration with the lack of leadership in the industry. Eliminating job quotes would be a great start for the price improvement." *Id.* The next day, Mr. Lucchetti responded, "Dave Powers is my new hero." *Id.*

Mark Burkhammer (Director of Sales, North, PABCO) also received Ryan Lucchetti's (President, PABCO) email forwarding the American announcement ("Well here is the first"). Mr. Burkhammer forwarded the letter to Marty Brand (VP Sales and Operations, L&W), writing "Hope this works." Ex. 1244. Mr. Brand responded, "Interesting idea. I hope this does fly. I like the way they put it out there 2-1/2 months ahead of time!" *Id.*

19. 9/20/2011-9/21/2011: CertainTeed leadership discussed American's announcement. Ex. 1491.

A customer emailed Bill Mazurie (Regional Manager, Certain Teed) a copy of the American increase letter. Ex. 1491. Mr. Mazurie forwarded it to Steve Hawkins (VP of US Sales, Certain Teed), writing: "Here it is. USG probably will be next." *Id.* Mr. Hawkins then forwarded **[**80]** the letter to other CertainTeed leaders, including John Donaldson (President, Gypsum-North America, CertainTeed).

In response, Mr. Donaldson indicated that he needed an "urgent recommendation on our approach." Ex. 1498. Later in the same email chain, Mr. Donaldson indicated that he was "very much in favor of matching the [American] announcement as closely as possible." Ex. 1498.

[*209] 20. 9/20/2011: Craig Weisbruch (Sr. VP Sales and Marketing, National) had a call with Kathryn Thompson (Founder and Dir. of Research, Thompson) about job quotes. *See* Ex. 1499 ("after our conversation yesterday about job quotes").

21. 9/21/2011, 8:17 a.m.: Craig Weisbruch (Sr. VP of Marketing and Sales, National) revealed he knew that USG was considering job quote elimination. Exs. 1500, 1510.

Craig Weisbruch (Sr. VP of Sales and Marketing, National) received a copy of the American announcement and forwarded it to National's President and CEO (Tom Nelson). In the body of the email Mr. Weisbruch wrote, "Looks like American beat USG to the punch. This will be interesting to watch play out." Ex. 1500. Mr. Nelson responded, "This might change the outlook slightly."

22. 9/21/2011, morning hours: Kathryn Thompson (Founder [81] and Dir. of Research, Thompson) and Craig Weisbruch (Sr. VP of Sales and Marketing, National) exchanged emails about job quote elimination. Ex. 1499. PSOF ¶¶ 238, 252, 323**.

On 9/21/2011 at 7:38 am, Craig Weisbruch (Sr. VP Sales and Marketing, National) wrote to Kathryn Thompson (Founder and Dir. of Research, Thompson) to follow-up about a conversation the two had the day before: "I should have added, again, after our conversation yesterday about job quotes, [the elimination of job quotes] is another way of telling the dealers that they are sick of pricing being manipulated by constant job quoting." Ex. 1499. Later in the same email chain, Mr. Weisbruch indicated that he thought the industry would follow American's lead. Ex. 1499.

Ms. Thompson quoted this email in a Thompson report that was circulated later that day.

23. 9/21/2011, 4:45 p.m.: National placed "a moratorium on job quoting until such time as [they] determine[d] [their] position on this subject going forward." Exs. 1500, 1510.

24. 9/21/2011, 6:00 p.m.: American employee indicated awareness that the price increase is not commensurate with demand. Ex. 1359.

The day after the American announcement, David Bates (Director of Sales — West, American) **[**82]** wrote an external email to a distributor related to the American announcement:

> I don't think demand matters anymore. Job quotes are the killers!!!!! I am already hearing Pabco, USG and National are going to announce something similar as well. The industry needs this increase badly.

Ex. 1359.

25. 9/21/2011: A Thompson Flashnote anticipated that the successful elimination of job quotes would require all manufacturers to do so simultaneously. Ex. 1259.

On 9/21/2011, Thompson sent out a "flashnote" to clients assessing American's 9/20/2011 letter:

> **The elimination of job quotes effectively stops price protection, which has been the bane of the wallboard industry**. Anywhere from 30%-70% of wallboard pricing is protected in the current **[*210]** market, according to TRG contacts, which limits the effectiveness of price increases. As one TRG wallboard industry contact quipped this morning, "this is another way of telling the dealers that they are sick of pricing being manipulated by constant job quoting."
>
> ***
>
> **Additional Color**. It is our understanding that USG floated the idea of elimination of job quotes to certain customers over the past month or so. ***As such, EXP's [American's] letter yesterday effectively [**83] supports USG's idea and also draws the proverbial line in the sand (i.e., "I dare you not to follow suit")***.
>
> **TRG Opinion**. Elimination of job quotes/price protection would be a positive for the wallboard industry, in our opinion. For this to work, however, all wallboard manufacturers would need to fall in line, and ***initial checks suggest this could be possible*** . . . .

Ex. 1259 (emphasis in original).

At least American received this report. Ex. 1259 (Thompson forwarding the report to American to keep American "in the loop").

26. 9/22/2011: Greg Salah (Sr. VP of Sales and Marketing, USG) sent an internal email that was optimistic about price improvement. Ex. 1502.

Greg Salah (Sr. VP of Sales and Marketing, USG) wrote to Scott Blanchard (VP of Sales, USG) only two days after the American announcement: "I do know one thing, we will not lose money in 2012. We have got to get wallboard to a point that we can get U.S. Gypsum to break even." Ex. 1502.

27. 9/22/2011: Longbow emailed National about Longbow's conversation with American/Eagle. Ex. 1277.

The day after the American announcement, Zoran Milling (Analyst, Longbow) asked Craig Weisbruch (Sr. VP of Sales and Marketing, National) about Mr. Weisbruch's **[**84]** thoughts on the American announcement. Ex. 1277.

Mr. Weisbruch responded to this email. Portions of his response appeared verbatim in Longbow's October 11, 2011 report, which was received by L&W, USG, TIN, Lafarge, and Certain Teed. *See* Exs. 1261 (L&W bates stamp), 1349 (USG bates stamp), 2046 (TIN bates stamp), 1363 (Lafarge bates stamp), 1858 (Certain Teed bates stamp).

Zoran Miling (Analyst, Longbow) responded, thanking Mr. Weisbruch for the input and adding:

> We spoke with Eagle earlier this morning to get their take on the matter . . . . Management's tone was much more stern in regard to this increase attempt relative to others, with [Eagle]'s CFO saying 'we're serious this time around.' . . . Interestingly, they were open in telling us that they don't care if they lose market share because of the new strategy.

Ex. 1277.

28. 9/27/2011: L&W and PABCO employees discussed the elimination of job quotes. Ex. 1244.

On September 27, Mark Burkhammer (Director of Sales, North, PABCO) invited Marty Brand (VP of Sales and Operations, L&W) to dinner through an email. In the email chain, Mr. Burkhammer said:

> I look forward to seeing you and sharing some tales... maybe talk a little strategy if all **[**85]** the announcements are out by then. Even though we haven't officially **[*211]** stated our intention I sent an email to the troops getting them ready. No more job quotes and 30 days to close any open quotes getting our system down to secured work through our distributors with footage and address's. I am suggesting, wherever and to whoever will listen, that the manufacturers have to police. . . . I don't know how this will all work out but it has some people thinking but getting something done by seven manufacturers for the good of the industry is like being in the house of reps in DC.

Ex. 1244.

29. 9/28/2011: USG sent letter out announcing elimination of job quotes and a shift to calendar-year pricing, but not announcing the specific amount of the January 1, 2012 increase. Ex. 1617.

30. 9/29/2011: Kathryn Thompson (Founder and Dir. of Research, Thompson) called Craig Weisbruch (Sr. VP of Sales and Marketing, National). The call lasted for 15 minutes. Ex. 2167.

Portions of Ms. Thompson's notes of this call (Ex. 1515) are repeated nearly verbatim in a 10/3/11 Thompson Research Group report. Ex. 1346.

31. 9/29/2011: CertainTeed stopped offering job quotes. Ex. 1299.

Although CertainTeed stopped offering **[**86]** job quotes by 9/29/2011, it officially distributed the letter eliminating job quotes and announcing calendar year pricing on 10/3/2011. Ex. 1299. The letter was misdated as 10/3/2012. Ex. 1299. Certain Teed promised a new price schedule by 11/15/11. Ex. 1299.

32. 9/30/2011: National distributed letter announcing the elimination of job quotes and shift to calendar-year pricing. Ex. 1319.

National released its letter on 9/30/2015, but it had already indicated that it would follow American's lead. Ex. 1499. National's Director of National Accounts (Duane Wood) testified that he did not recall whether National considered what National would do if the other manufacturers did not also eliminate job quotes. Ex. 1138 (Wood dep.) at 141:10-17.

33. 10/3/2011: Craig Weisbruch (Sr. VP of Marketing and Sales, National) called Kathryn Thompson (Founder and Dir. of Research, Thompson); the call lasted 15 minutes. Ex. 2171.

34. 10/3/2011: Thompson released a flashnote that reproduced nearly verbatim Ms. Thompson's notes from a 9/28/2011 meeting with Craig Weisbruch (Sr. VP of Sales and Marketing, National). *Compare* Ex. 1515 (9/28/2011 New York City meeting notes from meeting with National); *with* Ex. 1346 [87] (10/3/2011 Thompson flashnote, Lafarge bates stamp)**.

35. 10/3/2011: CertainTeed distributed a letter announcing the end of job quotes and beginning of calendar-year pricing. The letter did not include the amount of the January 2012 price increase. Ex. 1299.

36. 10/4/2011: Lafarge sent out letter announcing elimination of job quotes and shift to calendar-year pricing with a 35% increase. Ex. 1522, 1102.

Lafarge's VP of Sales (Steve DeMay) testified that he did not recall anyone at the company putting anything in writing to **[*212]** justify these changes. Ex. 1102 at 151:17-21.

37. 10/10/2011: A manufacturer exchanged emails with Longbow. Ex. 2133.

The sender of the email is redacted, but Longbow's October 11, 2011 report quoted directly from the email and attributed the quote to a manufacturer, without specifying which manufacturer. Ex. 2133. In the email exchange, the manufacturer-sender summarized the current manufacturer announcements and wrote that he anticipated the manufacturers to take measures to limit pre-buying. Ex. 2133.

38. 10/11/2011: Longbow issued a report indicating that Longbow was not confident that the price increase for January would stick, which was received by L&W, USG, Lafarge, [88] Certain Teed, and TIN. Ex. 1342**.

Longbow summarized the "key takeaway" as being that

> industry players recognize the January increase attempt as a new approach to pricing, one that could end up being at least partially successful. However, without capacity reductions or consolidation (assuming Lafarge continues to struggle to find a buyer for its wallboard assets), we are taking a wait and see approach given the difficulty the industry has had in the past securing long term price increase success despite many attempts during the downcycle.

Ex. 1342 at 1-2.

Multiple Defendants received this report. Exs. 1261 (L&W bates stamp), 1349 (USG bates), 578 (Lafarge bates stamp), 1263 (Lafarge bates stamp), 1858 (Certain Teed bates stamp), 2046 (TIN bates stamp).

39. 10/11/2011: A TIN sales manager told his sales team that TIN would support the January increase; TIN did not formally announce elimination of job quotes but quotes were eliminated by mid-October 2011. Exs. 1503, 1523.

40. 10/11/2011: Kathryn Thompson (Founder and Dir. of Research, Thompson) called John Donaldson (President, Gypsum-North America, CertainTeed) and the call lasted for 17 minutes. Ex. 2155.

41. 10/12/2011: PABCO gave Longbow [89] advanced notice of its price increase (which would be issued later that day); within minutes of receiving this notice, Longbow forwarded the notice to Craig Weisbruch (Sr. VP of Sales and Marketing, National). Ex. 1278, 2030, 1278, 1122 (Miling dep.) at 100:3-103:1**.

42. 10/12/2011: PABCO announced elimination of job quotes and implementation of calendar-year pricing with a 35% increase. Exs. 1095, 1118, 1320.

But prior to that announcement, PABCO had already curtailed job quotes. Ex. 1095 (Burkhammer dep.) at 120:20-22. The 35% price increase was the highest PABCO had ever announced. Ex. 1118 at 177:6-8.

43. 10/13/2011: PABCO sent an internal email reflecting that American had told its employees to stop sending written reports regarding any competitive information. Ex. 1493.

Phil Kohl (VP of Sales and Marketing, PABCO) emailed Ryan Lucchetti (President, **[*213]** PABCO) and Brian Hobdy (CFO, PABCO) with the subject "American and Temple-Inland Talk":

> Gary Miranda reports that American is telling their salesmen to discontinue all 'written' reports in regards to *all competitive information*; American apparently wants to limit their paper trail in regards to their thinking on the industry's planned $35 **[**90]** price increase. American is concerned that there may be a market backlash with claims of collusion if this increase becomes a reality in 2012.

Ex. 1493.

44. 10/13/2011: National expressed concern about existing job quotes, worrying those quotes might "blow the deal" if American were to think that National had "broken ranks." Ex. 1560.

Kurt Withrock (Dir. Demand Management, National) sent an email to Scott Carlsen (unknown position, National) about Colorado "job numbers." Mr. Withrock was asking whether Mr. Carlsen could pare down the job numbers, writing: "This scares me more than anything I see in the system. I'd hate to think we blow the entire deal because American thinks we've broken ranks and job quoted well into 2012 in their backyard . . . when we hardly cover variable on all that footage." Ex. 1560.

> **45. 10/14/2011: Lafarge President instructed sales staff to tow the line following a Longbow report that criticized Lafarge for lacking pricing discipline. Ex. 1263**.
>
> **46. 10/14/2011: Greg Salah (Sr. VP Sales and Marketing, USG) sent an email to Chris Griffin (President, USG), indicating that USG would go on a controlled distribution by 11/1/2011 to prevent flooding the**

> **market with cheap [**91] board, even though controlling supply was risky because competitors could steal market share. Ex. 1580**.

Mr. Salah also wrote that he knew that "a couple of competitors . . . have already gone on controlled distribution." Ex. 1580.

47. 10/19/2011: Keith Metcalf (Sr. VP Sales, Marketing, and Distribution, American) advised an American's Sales Director to tell a customer to expect other manufacturers to impose the same price increase as American, but he did so before the amount of the increases were officially announced by all American's competitors. Ex. 1169.

On October 19, one of American's clients sent an American Sales Director an email intimating that the customer would go elsewhere if American went through with the January 2012 increase. Ex. 1169.

The sales director forwarded the email to Keith Metcalf (Sr. VP of Marketing, Sales, and Distribution, American) to get Mr. Metcalf's advice about how to proceed. Metcalf responded: "I would tell Albert that when he re-engages the other manufacturers he will find the same answer." Notably, at the time Mr. Metcalf sent this **[*214]** email, all of the manufacturers that would announce an increase in the price had announced that an increase would be made, **[**92]** but they had not all announced what precisely the increase would be.

48. 10/19/2011: USG expressed concern that competitors might perceive that USG was involved in L&W's job quoting. Ex. 1564.

Rob Waterhouse (Sr. VP of Sales and Operations, L&W) sent Greg Salah (Sr. VP of Sales and Marketing, USG) some documents related to how L&W was handling the recent manufacturer price announcements. Salah responded:

> My only concern is your comments on jobs. We are taking a very hard line with all of our customers and not accepting job commitments dealers made on their own. It appears that L& W will be protecting a good deal of jobs and I assume the market will believe we are part of it.
>
> As a follow-up to our conversations, we will not be able to protect any jobs that were not in our job quote file with a specific identifiable job prior to September 28. Understanding this could cost USG volume in 2012, we feel we have no choice but to be very firm on our policy. Job quotes have decimated our pricing over the last 3-4 years. We cannot take a chance of creating the impression that we are not serious about our new pricing policy.

Ex. 1564.

49. 10/27/2011: National would not undercut USG's pricing when approached [93] by a customer because the job "violate[d] [National's] pricing policy established on 9/28" and National was "not in a position to provide special pricing." Ex. 1553**.

50. 10/28/2011: National listened to Eagle/American's earnings call. Ex. 1581.

The information learned on the call was then passed around at National:

> For those of you who did not listen in, here is a transcript from EXP's earnings call. They say they are very serious about a 35% price increase and are willing to take less volume to make it stick. They are also planning to shut down all of their wallboard plants for a 2 to 3 week period at the end of December (because that is a low volume period).

Ex. 1581.

51. 11/3/2011: In an internal email, Lafarge indicated that it was restricting supply. Ex. 1505.

Ike Preston (President, Lafarge) summarized the industry status:

> So far the announcement [of the elimination of job quotes and a 35% price increase] has had the full support of the industry and we are seeing distributors scrambling to build up inventory. We have focused on limiting the inventory build up by limiting production and not running overtime in the plants. Similar moves have been made by our competitors so we believe we have good **[**94]** reason to feel positive about the increase.

Ex. 1505.

52. 11/18/2011: Certain Teed refused to lower the price for Lowe's even though Lowe's had absorbed a price increase in April 2011 that the rest of CertainTeed's customer base didn't absorb. Ex. 1520.

A national accounts manager for Certain Teed emailed Steve Hawkins (VP of **[*215]** US Sales, Certain Teed), asking how firm the increase was for Lowe's:

> Lowe's took an average increase of $10 in April 2011. While the market has retreated, the Lowe's increase stayed intact. I have started prepping Steve Edwards for our pending January 2012 increase. He has advised that 35%/$50 is a bit steep. We are also hearing market reports that retail is not expecting to take the full increase. Since we were able to hold the April increase, I would recommend only going up $35-45 to come to the $50 you are seeking. . . . Please let me know your thoughts and I will work with Ian to get the Lowe's pricing matrix updated.

Ex. 1520. After the manager sent one follow-up email requesting a response, Hawkins responded:

> We must fully support [sic] increase. I have instructed Ian to update Lowes matrix reflecting our increase of $50-75-100. Makes no difference what happened **[**95]** last year or Zelman's opinion. We have no choice but to support. Thanks.

Ex. 1520.

53. 11/21/2011: Longbow issued a research report. Ex. 1589.

The report characterized the January increase announcements and provided an outlook.

> From the beginning, manufacturers have collectively communicated the same date for the increase, a similar amount, and all have uniformly abandoned the use of job quotes. In the past, differences in dates and magnitude have also tended to undermine the increase. In addition, they have communicated these items will in advance to allow time for distributors and contractors to digest the information and make the necessary accommodations. Even though USG is the lone manufacturer who has yet to announce a price increase amount (they will do so in December), many of its distributors through its subsidiary L&W are quoting prices beyond January 1st with 35% escalators.
>
> ***
>
> Working against [the manufacturers] is that the same weak demand environment that has scuttled so many prior price increase attempts still exists. Capacity utilization is still 50% and the distribution channel is still having difficulty passing along increases of their own after manufacturers last raised **[**96]** prices successfully back in March.

Ex. 1589 at 3.

54. 11/21/2011: Zoran Miling (Analyst, Longbow) emailed Craig Weisbruch (Sr. VP of Sales and Marketing, National) the most recent report. Ex. 1589.

Mr. Miling drew specific attention to information about USG and L&W: "Worth noting is that though USG has yet to announce a price increase, it's [sic] L&W arm is quoting prices beyond January 1st with $35-$40/MSF (~ 36%) escalators." Ex. 1589. He also wrote: "I'm sure plenty of lies are and will continue to be told, but from our perspective it appears as though the line is being held firmly." Ex. 1589. Mr. Weisbruch forwarded this to Tom Nelson **[*216]** (President, National), writing: "Don't know if you saw this or not. Pretty positive!" *Id.*

55. 11/28/2011: USG sent an internal email instructing sales staff that they could provide verbal guidance that USG would not quote jobs in 2013 and that the 2013 calendar-year price would likely be +20% from the 2012 calendar price. Ex. 1671.

56. 12/2/2011: In an internal email, a National director indicated his unwillingness to attempt to solicit competitors' customers. Ex. 1558.

57. 12/7/2011: Longbow sent an email report to TIN, PABCO, and National regarding a [97] meeting between Longbow and Eagle (American). ¶ Ex. 1267, 1258, 1268**.

Zoran Miling (Analyst, Longbow) sent individual, nearly identical emails to TIN, PABCO, and National regarding "a series of meetings" it hosted "with EXP [Eagle] management in Chicago." Ex. 1267 (email to PABCO), 1258 (email to TIN), 1268 (email to National). He indicated that "[o]verall, the meetings had an optimistic tone regarding the upcoming wallboard price increase." Under the label "Wallboard Price Increase — Continue to Say and Do the Right Things," Mr. Miling summarized:

> • . . . EXP [Eagle] indicated that it should know if the price increase holds by early February. Our recent channel checks have confirmed that the industry has put distributors on allocation and we estimated the full impact of the increase won't be known until March/April when distributors will look to stock up for the spring building season. . . .
>
> • While a prebuy is currently occurring, the industry has not added shifts or capacity to meet the order rates. As a result, while inventories are high at distribution, the manufacturers' allocation has limited the degree distributors can stock up in advance. . . Additionally, as [Eagle] is taking its wallboard **[**98]** plants down for maintenance this month, it essentially caps at current levels the amount its customers can order. Lastly, given space constraints at distribution and as wallboard can't be stored outdoors in the winter (or most anytime for that manner), distributors are limited in this regard to how much they can prebuy.
> ***
>
> • ***While 40% of past demand was subject to job quotes***, EXP estimates that lingering projects that were subject to the prebuy will be only 10% in early CY 12. Additionally, EXP estimates projects tied to previous quotes will roll of[f] and by mid CY12.

Ex. 1267, 1258, 1268

58. 12/7/2011: Steve DeMay (VP of Sales, Lafarge) had a 27-minute conversation with Zoran Miling (Analyst, Longbow), which Mr. Miling memorialized. Ex. 1269.

The notes of this call, found at Exhibit 1269, are discussed in depth in this memorandum. Portions of the notes from this call appeared verbatim in a February 23, 2012 Longbow report. *Compare* Ex. 1269; *with* Ex. 1624 at 9.

59. 12/27/2011: In an internal USG email, USG's VP of Sales - West indicated that USG would not produce more board despite a shortage. Ex. 1576.

Scott Blanchard (VP Sales — West, USG) received an email regarding board shortage. **[*217]** Mr. Blanchard **[**99]** indicated that USG might run some extra shifts at the plants, but that "[i]t's in the best interest of the market to keep it tight in January." Ex. 1576.

60. 12/27/2011: In an internal email, PABCO commented that if the industry could create wallboard scarcity, the price increase would be more likely to stick. Ex. 1582.

PABCO's VP of Sales and Marketing sent out an email entitled "Contrarian Thought," in which he explained that he

> wouldn't be too anxious to empty the warehouse...starting next week we need to believe that PABCO will get an additional $35/msf more on everything we ship... if we don't believe, how can we expect our customers to believe. In an oversupplied market with many participants bent on the increase's destruction PABCO's message needs to be strong along with that of our competitors.

Ex. 1582.

B. 2012 Activity

61. 1/9/2012: A representative from Longbow called Craig Weisbruch (Sr. VP Marketing and Sales, National), and they spoke for approximately 34 minutes. Ex. 2172.

62. 1/19/2012: In an internal Lafarge email, Lafarge's VP of Sales expressed concern that any cut in price to a wholesaler would be communicated to competition. Ex. 1563.

Steve DeMay (VP of Sales, Lafarge) exchanged **[**100]** emails with Wayne Wilson (Regional Sales Manager, Lafarge). Mr. Wilson wanted to know about a regional pricing issue. Mr. DeMay responded:

> I don't want to lose any high return business but as well do not want to be labeled as the price cutter. Both of these accounts are wholesalers so any move will likely be communicated to competition.

Ex. 1563.

63. 1/27/2012: In an internal American email, Keith Metcalf (Sr. VP Sales, Marketing, and Distribution, American) indicated that American would be unofficially providing 2013 pricing guidance to customers. Ex. 1172.

In response to an inquiry about pricing for 2013, Keith Metcalf (Sr. VP Sales and Marketing, American) responded:

> We are not ready to put a [sic] official notice out yet. If you would like you could send him and [sic] email to let him know our guidance. The guidance would be; [sic] for 2013 you will see increases **[*218]** from manufacturers up to 30% on today's numbers.

Ex. 1172.

64. 2/7/2012: Longbow research report on USG reported, "[USG's] [m]anagement also stated that it has no intention of undermining the increase — a key concern in the industry — as it views pricing as the best way to improve profitability given weak industry volumes." Ex. 1594.

65. [101] 2/10/2012: A TIN email to a customer estimated the price increase for 2013, estimating a $40 upswing from 2012 pricing. Ex. 1683**.

66. 2/14/2012: A representative from Longbow called Bill Kelley (Dir. Dealer Sales, National); they spoke for 16 minutes. Exs. 2167; 2172; 2175; 2173.

67. 2/23/2012: A Longbow report summarized the status of the wallboard market in light of the January 2012 changes. Ex. 1531.

One paragraph is most relevant to the tactic of volume restriction:

> The price increase continues to hold at or near the previously communicated level with contacts noting that certain manufacturers — chiefly [Eagle], National Gypsum and CertainTeed — continue to hold the line likely at the expense of volumes. Despite prior concerns to the contrary, both USG and Lafarge continue to act rationally. . . . In fact, the various manufacturers we spoke with told us they were more than willing to cede some share at the expense of price and our various discussions with industry contacts supports that view.

Ex. 1531.

68. 2/25/2012-2/27/2012: Defendants' employees attended 2012 Drake Group meeting in San Antonio, TX. PSOF ¶ 470.

The Drake Group LLC is a network of approximately 61 gypsum specialty dealers, **[**102]** which uses the aggregate buying power of its members to secure competitive rebates and discounts from vendors, including drywall vendors. The Drake Group does not purchase building products itself; it only negotiates the rebates and discounts made available to its members.

The parties agree that employees of some Defendants attended a February 25-27, 2012 Drake Group meeting in San Antonio, Texas. Drake Group meeting attended included Scott Blanchard (VP of Sales, USG), Matt Byrne (VP of Sales, USG), Cristopher Griffin (President, USG), Greg Salah (Sr. VP of Sales and Marketing, USG), John Donaldson (Pres., Gypsum-North America, CertainTeed), Steve Hawkins (VP of USG Sales, CertainTeed), Keith Metcalf (Sr. VP Sales, Marketing, and Distribution, American), David Powers (President, American), and Craig Weisbruch (Sr. VP of Sales and Marketing, National).

69. 2/27/2012: The last day of the Drake Group meeting, an internal National email indicated that National learned from dealers that American planned to announce formal guidance. Ex. 1677.

In an email titled "Weekly Report," Bill Kelly (Dir. Deal Sales, National Gypsum) **[*219]** wrote: "Dealers tell us that American Gypsum will soon be providing **[**103]** price guidance for 2013 in a written communication telling customers to plan for one price increase in January of 25-30%." Ex. 1677.

70. 2/28/2012: In an internal USG email, Scott Blanchard (VP Sales — West, USG) wrote a recap of the Drake meeting. Ex. 1638.

Scott Blanchard (VP Sales — West, USG) summarized the Drake Group meeting for Greg Salah (Sr. VP Sales and Marketing, USG):

> In general the Drake Meeting was a non-event. Few of the customers "surprised" us at the meeting with requests or market information. There was a more positive outlook for the year with almost all the customers.
> From a high level these are the main takeaways;
> - The new Price strategy is being well received by the distributors (helped them)
> - No manufacturer has moved price
> - Some manufacturers are back in old markets because they can make money (greatest concern to distributors)

• Lower job quotes are escalating 4/1/2012 (protected volume up at least $10/msf or cancelled by our competitors)

***

• What escalator should they use for 2013 (20-25% was our guideline, further discussion is necessary internally at USG)

Ex. 1638.

71. 3/1/2012: American issued price-guideline announcement for 2013 indicating that the pricing for [104] 2013 was "anticipated to be in the range of 25%-30% higher than [the] 2012 prices." Ex. 1679**.

Writing only "FYI," Greg Salah forwarded American's announcement to Chris Griff (President, USG):

> **To our Customers**:
> In September of last year, we announced that we would no longer be providing individual job quotes. At that time, we gave you prices to be used for all your work for the year 2012. In response to customer requests for prices to be used for work on jobs beyond the end of this year, we are sending you this communication to provide you guidance with respect to our wallboard pricing for 2013.
> Your January 2013 prices from American Gypsum are anticipated to be in the range of 25% - 30% higher than your 2012 prices. These January 2013 numbers and be used for all your work in 2013. This price increase is subject to further review as 2013 gets closer taking into consideration, among other things, increases in manufacturing and transportation costs.
>
> **[*220]** We will give you more specifics in the fall of this year.

Ex. 1680.

72. 3/7/2012: Jay Wyatt (Unknown position, TIN) provided internal email permitting sale staff to provide verbal guidance for 2013 pricing as "today's price plus no more than 30%." [105] Ex. 1684**

73. 3/10/2012: USG sent internal guidance indicating that USG would not send out a letter for 2013 pricing yet, but permitting sales staff to respond to customer inquiries by providing a verbal 25% increase estimate. Exs. 1681, 1682.

74. 3/15/2012: Garik Shmois (Analyst, Longbow) spoke with Ken Banas (Sr. Dir. Investor Relations, USG). Ex. 2168.

75. 4/2/2012: Longbow Research issues a report regarding 2013 pricing. Ex. 1270.

Zoran Miling (Analyst, Longbow) sent an email with the subject line "Wallboard Business Conditions Survey — Longbow Research." Related to the 2013 price increase, he wrote:

> • The January 1 price increase continues to find meaningful support, with contacts reporting that manufacturer pricing is up in the 28-35% range, which varies somewhat by region and manufacturer. Prices in March were stable on a sequential basis.
> . . .
> • Eagle Materials has announced a 25% - 30% price increase for CY 2013 and is the first manufacturer to formally issue guidance. Competing manufacturers report that they are supportive of the attempt, but will not issue formal guidance until mid-2012 or as late as CY3 Q12.

Ex. 1270. The full list of recipients is unknown, as Mr. Miling appears **[**106]** to have sent it to recipients as blind carbon copies (BCC). But, the bates stamp on the document indicates that at least National received this email.

76. 4/4/2012: National drafted a letter announcing a 2013 price increase, but it never sent that letter to customers. Ex. 1686.

The drafted letter indicated that National "anticipate[d] that January 2013 prices will be approximately 30% higher than pricing levels in January of 2012." Ex. 1686. Per Ex. 1134 (Weisbruch dep.) at 278:24-279:1, this letter was never sent out to customers.

77. 4/11/12: Lafarge quoted the April 2, 2012 Longbow report in a PowerPoint presentation. Ex. 1955.

The presentation quoted that

> manufacturers seem to be sticking to their guns and for the first time ever it's on the distributors to support the increase. Back in 2009/2010 these huge job quotes were offered and they were cheap. Now that they are all steadfast, it's up to the distributors to keep the price up now.

Ex. 1955 at 4.

78. 4/12/12: An internal National email provided sales staff with a script for customer guidance regarding the 2013 price increase, which anticipated an approximately 30% increase. Ex. 1687.

79. 4/15/2012 — 4/19/2012: Senior Sales and Marketing personnel from most [107] Defendants gathered at the AWCI/CISCA Convention and INTEX Expo in Charlotte, NC. Defs. Resp. to PSOF ¶ 450**.

The parties do not dispute that American, USG, National, Lafarge, CertainTeed, **[*221]** and TIN all sent representatives. Plaintiffs claim that PABCO also had a representative present, but the evidence cited in support of this contention does not confirm attendance by anyone from PABCO.

80. 4/17/2012: A representative from Longbow called Craig Weisbruch (Sr. VP Sales and Marketing, National); they spoke for approximately 14 minutes. Ex. 2167; Ex. 1122 (Miling dep.) at 172:25-177:8.

After the call, Garik Shmois (Analyst, Longbow) prepared an email to "Sales Approval" with the subject "USG Follow Up with Industry Insider." The first line explains, "We just got off the phone with an SVP (number three in the organization) of a large wallboard manufacturer to get his take on the USG results." Ex. 1600. This industry insider was Craig Weisbruch.

The call notes indicated Mr. Weisbruch's impression that USG was aggressive in January and February at winning share because its ultimate price increase was somewhat lower than expected. "In response to share gains, the rest of the industry responded more **[**108]** aggressively to re-set pricing in March on a customer by customer basis. . . . [USG] has not responded aggressively to the industry re-set which is a good thing longer term." Ex. 1600. Mr. Weisbruch also indicated that he "expect[ed] some of the USG share gains to reverse in 2Q. . . . [National] ha[d] won back in the last month the majority of the share it lost to USG and he expects most of the industry has rebalanced accordingly. Neither USG nor anyone else has been disruptive since the recent re-set." Ex. 1600.

81. 4/17/2012: Kathryn Thompson (Founder and Dir. of Research, Thompson) spoke with Ken Banas (Sr. Dir. Investor Relations, USG) and others at USG. Ex. 2168.

82. April 2012: PABCO distributed monthly report. Exs. 1095, 1688.

Mark Burkhammer, the author of the report, wrote on the 2013 increase:

> I would support the intention of the American letter and have communicated to our reps that we would recommend a 25% increase be accounted for on any work going through January 1, 2013. I do not think we should put any letter out in support until others comply in writing. Not even sure we should go beyond verbal support at this time or later.

Ex. 1688. In his deposition, Mr. Burhammer indicated that at **[**109]** this time customers who requested information would be told that PABCO was expecting a 25% increase, but PABCO was only providing that information to customers who specifically requested it. Ex. 1095 (Burkhammer dep.) at 155:12-157:8.

83. 5/21/2012: Bill Kelly (Dir. Dealer Sales, National) called Zoran Milling (Analyst, Longbow); they spoke for just under 22 minutes. Ex. 2177.

84. 6/14/2012: Ms. Thompson's notes from a phone call with Craig Weisbruch (Sr. VP Sales and Marketing, National) reflected that there were "verbal agreements" for price increases for 2013. Ex. 1515.

The contents of the notes from this call are discussed in greater detail later in the memorandum.

[*222] Portions of the notes are reflected in Thompson's July 15, 2012 report (Ex 1260). *Compare* Ex. 1515 ("2013 price increases? A: verbal agreements[] for a large price increase in 2013. EXP is already out for guidance for 25%-30%"); *with* Ex. 1260 ("TRG industry contacts are also telling us that manufacturers are discussing a sizable 2013 price increase to distributors (25%-30%), and we expect the industry will go on allocation by October.").

85. 6/19/2012: USG internally circulated an email containing commentary from Longbow [110] about Eagle Materials. Ex. 1689**.

Following Eagle's participation at the Longbow Construction Materials Investor Day 2012, Ken Banas (Sr. Dir. Investor Relations, USG) sent an internal email to USG leadership that included Eagle's "thoughts on pricing this year and next." Ex. 1689. The quotes in the email were provided directly from Longbow's research note, so it is unclear whether USG also attended Longbow's Investor Day.

Eagle's thoughts on pricing were related to its April announcement of a 25-30% price incase announcement: "While competing manufacturers have yet to follow suit, [Longbow's] recent wallboard survey (see: Pricing Holding as Downside Risks Cleared) indicated that most manufacturers have internally supported the attempt and will likely announce comparable increases of their own in ~3 Q12. At this point [Longbow is] modeling ~ 5% pricing next year, though we admit there is upside to our pricing forecase." Ex. 1689.

86. 7/2/2012: Garik Shmois (Analyst, Longbow) spoke with Ken Banas (Sr. Dir. Investor Relations, USG). Ex. 2168.

87. 7/2/2012: A Thompson analyst spoke with Ken Banas (Sr. Dir. Investor Relations, USG). Ex. 2168.

88. 7/9/2012: A representative of Longbow called [111] Craig Weisbruch (Sr. VP Sales and Marketing, National); they spoke for approximately 27 minutes. Ex. 2167**.

89. 7/11/2012: Longbow Research indicated that most manufacturers had informally announced a 2013 price increase by this date and anticipated that formal letters were likely to be issued in September or October. Ex. 1234.

90. 7/16/2012: A Thompson report indicated that Lafarge was telling customers to expect a 25% increase. Ex. 1690.

In addition to the anticipated increase, the report indicated that at "Lafarge also indicated that sometime between Labor Day and mid-October, they will go on 'controlled distribution' (*i.e.*, allocation) in order to prevent excessive pre-buy activity." Ex. 1690.

When USG received the report, Ken Banas (Sr. Dr., Inv. Relations) cut out the portion regarding Lafarge noting that it was "worth passing along..." and forwarded it to senior staff at L&W and USG. Ex. 1690.

[*223] 91. 7/25/2012: A representative from Thompson called Craig Weisbruch (VP of Sales and Marketing, National); they spoke for about 8 minutes. Ex. 2167.

92. 7/25/2012: Ms. Thompson (Founder and Dir. of Research, Thompson) spoke with Ken Banas (Sr. Dir. Investor Relations, USG). Ex. 2168.

93. 7/25/2012: [112] Thompson report stated that manufacturers were discussing a price increase and that there was a potential for allocation by October. Ex. 1260**

USG produced the report in discovery. Ex. 1260 (USG bates stamp).

94. 8/6/2012: In internal email, PABCO revealed its knowledge of other manufacturers' allocation plans. Ex. 1709.

In an August 6, 2012 email from Mark Burkhammer (Director of Sales, North, PABCO) to, inter alia, Foster Duval (Sales Manager, PABCO) and Ryan Luchetti (President, PABCO), he wrote: "I was told USG is going on allocation in September. We are also looking to allocate but I can't say I was ready to pull the trigger just yet. . . . Other manufacturers are doing the same planning. This will be an annual event to support increases." Ex. 1709.

95. 8/9/2012: Kathryn Thompson (Founder and Dir. of Research, Thompson) spoke with Ken Banas (Sr. Dir. Investor Relations, USG). Ex. 2168.

96. 8/10/2012: A representative of Thompson called Craig Weisbruch (Sr. VP Sales and Marketing, National); they spoke for approximately 20 minutes. Ex. 2167.

97. 8/16/2012: Internal CertainTeed communications revealed that CertainTeed considered adding a new shift at the Roxboro plant to respond to increased [113] demand. Ex. 136**.

Because of increased demand, Certain Teed considers adding another shift to the Roxboro plan. But, the plant manager writes to Dave Engelhardt (Pres., Gypsum-North America, CertainTeed) that it will take 12-16 weeks to add the shift safely. Ex. 136.

98. 8/20/2012: Around the time that National was preparing its 2013 price increase letter (Ex. 2201), Steve Martinez (unknown position, National) spoke with a representative from Longbow Research Group for approximately 4 minutes 44 seconds. Ex. 2149.

99. 8/22/2012, 10:30 am: Longbow analysts spoke with a representative from Eagle Materials (American). Ex. 1692.

Zoran Miling (Analyst, Longbow) sent Garik Shmois (Analyst, Longbow) an email on August 23 at 11:46 am asking at what time the two had talked to Eagle the day before. Garick Schmois responded: "Right about 10:30. Nice. We published at about 12:30. So he definitely was typing an email when we were talking. National never had a chance to lead given Eagle was so fast." Ex. 1692.

100. 8/22/2012, 11:30 am: American distributed a formal price increase letter for 2013. The increase announced was 25% over 2012 prices. Ex. 1691.

[*224] 101. 8/22/2012, 12:30pm: Longbow distributed a report [114] with the "scoop" that National would put out an official price increase later that day. Ex. 1693**.

Ken Banas (Sr. Dir. Investor Relations, USG) received the Longbow report and forwarded it to the higher ups at L&W and USG, writing:

> [T]he scoop [is] that National is putting out an official 30% price increase letter for next year later today, with "official" language vs. the "to-be-modified" guidance of 20-30% from Eagle earlier in the year.
>
> Channel check info from Longbow shows wallboard supply is getting very tight in many regions, with effective capacity utilization much higher than actual utilization. They comment all of this points to the likelihood of pricing traction next year.

Ex. 1693.

When deposed, Craig Weisbruch (Sr. VP Sales and Marketing, National) acknowledged that National was prepared to send the 2013 letter on August 22, 2013, but decided not to send the letter until September 6, 2012. Ex. 1134 (Weisbruch dep.) at 300:9-303:3. He provided no reason for why that was.

102. 8/22/2012: Kathryn Thompson (Founder and Dir. of Research, Thompson) called Craig Weisbruch (Sr. VP Sales and Marketing, National); they spoke for just over three minutes. Ex. 2167.

103. 8/22/2012: Garik Shmois [115] (Analyst, Longbow) spoke with Ken Banas (Sr. Dir. Investor Relations, USG). Ex. 2168**.

104. 8/22/2012, 1:51pm: An internal USG email provided that "[i]n an effort to manage anticipated surge buying for the remainder of 2012, we are implementing our Controlled Distribution process for all wallboard shipment on Monday, August 27th." Ex. 1712.

105. 8/22/2012, 2:38pm: Internal TIN email stated that "[d]ue to increased order volume the past two weeks, the gypsum management team has decided to implement a managed distribution plan for gypsum wallboard until further notice." Ex. 1711.

106. 8/23/2012: Internal CertainTeed emails indicated that National and American had gone on allocation in certain areas, and that CT "need[s] to discuss process to Implement our allocation as it appears conditions are upon us." Ex. 2203.

107. 8/23/2012: Bill Kelly (Dir. Dealer Sales, National) called Zoran Miling (Analyst, Longbow); they spoke for just under two minutes. Ex. 2177.

108. ~8/29/2012: National states that "between the time that [National] announced its 2013 price increase and the effective date of that increase, [National] instituted product allocation on a regional bases, as needed." Defs. Resp. to PSOF ¶ 440.

109. [116] 8/31/2012: In internal PABCO email, PABCO revealed its knowledge of other manufacturers' allocation-plan start dates. Ex. 1710**.

[*225] 110. 9/5/2012: In internal USG email, USG Plant Manager expressed frustration about slowing production. Ex. 1716.

Bruce Allen (Plant Manager, USG) writes:

> I'm being told we are only scheduled to run the Sigurd Plant three days due to USG controlled allocation. We have the opportunity and staffed [sic] to run four days. . . . We have customers wanting board. So we are going to let our competition pick up our surplus business? And if business is indeed picking up we are going to give it to our competition? I'm being told USG logistics, District sales and Manufacturing VP are all on board with this.

Ex. 1716. The email was sent to Jeffrey Barth and Jeffrey Broker. The Court does not have a record of their job titles, but by the context of the email, the email appears to be an internal USG communication.

111. 9/6/2012: National issued its 2013 price increase letter, announcing a 30% increase across the board. Ex. 1694.

112. 9/13/2012: CertainTeed announced a 30% price increase effective 1/2/2013. Ex. 1946.

Previously, on 8/22/2012, upon receiving American's 8/22/2012 **[**117]** letter, Dave Engelhardt (Pres., Gypsum-NA, CertainTeed) wrote to Steve Hawkins (VP of US Sales, Certain Teed): "Beat us to the punch. We don't have a choice now but to support 25%. Do you think anyone else will come out lower?" Ex. 1695.

113. 10/5/2012: Longbow issued a report stating that 50% of wallboard manufacturers had announced a price increase of 25-30% (AG, CT, Lafarge and NG) and that the other 50% were expected to announce in next 30-60 days. Ex. 1696.

The report also recorded an industry contact as stating: "As strange as it sounds, allocation is fairly uniform across all of the manufacturers. There may be some isolated breakdowns in discipline—we haven't seen any—but some of those players in the past that I would label as first offenders have been rigid in their position[.]" Ex. 1696.

114. 10/9/2012: PABCO internally distributed a September 2012 Market Condition Report, revealing PABCO's fear that competitors could react negatively to any perceived attempt to grab market share. Ex. 1707.

Under the "General Market Conditions" heading, the report indicated:

> [T]here is little-to-no resistance to the January 1, 2013 price increase. Quit [sic] a change from last year when all the naysayers **[**118]** were preaching the proposed increase would be a massive failure. Firmness across

> the board is the key to maximize our success... any perceived weakness or attempt to grab additional share with reduced pricing by any of the players could throw the price back into a destructive downward spiral.

Ex. 1707.

In his deposition, Phil Kohl (VP Sales and Marketing, PABCO) confirmed that **[*226]** PABCO was concerned about sending the wrong "signal" to competitors by extending a lower price past January's announced increase. PABCO didn't want to undercut the price and for the other manufacturers to think PABCO was trying to undercut price increase. Ex. 1118 (Kohl dep.) at 226:12-228:19.

115. 10/15/2012: Lafarge issued its price increase letter reflecting a 30% increase for 2013. Ex. 1697.

116. 10/24/2012: PABCO issued its price increase letter reflecting a 30% increase for 2013. Ex. 1698.

117. 10/25/2012: PABCO confirmed to a customer that PABCO would not provide job quotes for 2013. Ex. 1672.

118. 10/26/2012: In an internal USG email exchange (10/22-26), Scott Blanchard (VP of Sales, USG) wrote, "I do not think it is in our best interest to move off 'controlled distribution' at this point. CertainTeed and GP [119] will see it and react." Ex. 1721**.

119. 10/30/2012: Craig Kesler (CFO, Eagle) called Garik Shmois (Analyst, Longbow); the call lasted approximately 3 minutes. Ex. 2178.

120. 11/16/2012: USG issued price increase letter explaining that the prices would increase and that customers would be contacted individually regarding the amount of the increase. Ex. 1701.

A separate email on November 18, 2012 indicated to sales personnel that the price increase would be 25%. Ex. 1673.

121. 11/26/2012: TIN issued price increase letter reflecting a 30% increase. Ex. 1702.

122. 11/30/2012: L&W noted that it could not accommodate a lower price for any customer because to do so "would show our competition that we are protecting work and that would have the potential to harm the chances of this increase sticking." Ex. 1654.

Marty Brand (VP of Sales and Operations, L&W) rejected a regional sales manager's request for a flexible price, explaining that "it would show our competition that we are protecting work and that would have the potential to harm the chances of this increase sticking." Ex. 1654. Mr. Brand closed by writing, "Hold firm and keep me informed if you hear what the competition is doing in your markets." **[**120]** Ex. 1654.

123. 12/5/2012: Bill Kelly (Dir. Dealer Sells, National) called Zoran Miling (Analyst, Longbow); the call lasted approximately 14 minutes. Ex. 2177.

124. 12/7/2012: Longbow issues two reports, and USG leadership is pleased with the report on USG.

One of the Longbow reports was a summary of USG's meetings with investors in the week leading up to the report. In an internal USG email, Ken Banas (Sr. VP of Investor Relations, USG), wrote that he had spent three days with Garik Shmois (Analyst, Longbow) talking to investors, and that he thought Mr. Shmois "did an accurate job of capturing our key messages around L&W strategic focus, deleveraging the balance sheet and [USG]'s commitment to 2013 pricing" in the Longbow report. Ex. 1237.

Relevant to those messages, the Longbow report included such lines as: "[W]e **[*227]** heard all the right things about USG's willingness to support the industry's January 1 price increase . . . Our discussions with management confirms that 'they get it' in that pricing is more important than volume . . . and that disruptive pricing behavior on the company's part could quickly undermine the pricing strength seen over the past year." Ex. 2195. At least one manufacturer, **[**121]** Lafarge, received the report. Ex. 1364.

125. 12/11/2012: A representative of Longbow called Craig Weisbruch (Sr. VP Sales and Operations, National); the call lasted approximately 37 minutes. Ex. 2167; Ex. 1706 (call notes).

Garik Shmois (Analyst, Longbow) created thorough notes from the call, portions of which appear nearly verbatim in a December 18, 2012 Longbow report. Ex. 1674.

126. 12/13/2012: Garik Shmois (Analyst, Longbow) spoke with Ken Banas (Sr. Dir. Investor Relations, USG). Ex. 2168.

127. 12/17/2012: Garik Shmois (Analyst, Longbow) spoke with Ken Banas (Sr. Dir. Investor Relations, USG). Ex. 2168.

128. 12/18/2012: Longbow report indicated that manufacturers' elimination of job quotes remained in effect for 2013 and commented on the controlled distribution and capacity of manufacturers going into 2013. The report confirmed that CertainTeed, National, American, and Georgia-Pacific were not offering job quotes. The report also commented on manufacturer allocation. Ex. 1674.

As for the elimination of job quotes, the report indicated:

> We note that throughout the course of the downturn, job quotes obstructed manufacturers' ability to ultimately realize price increases; however since **[**122]** the elimination of this practice, manufacturers have been able to shift price risk from themselves and onto the distributor and ultimately the contractor as distributors themselves . . . have remained largely disciplined. Again, this has allowed for greater price certainty in the market and thereby has allowed contractors and distributors to compete more on service rather than price.

Ex. 1674 at 9.

As to future pricing:

> **Future Pricing**: The entire industry has thus far communicated their pricing intentions for 2013 in written form. National Gypsum, CertainTeed, Lafarge and Temple-Inland have each announced an increase of 30% whereas American Gypsum (EXP) has announced an increase of 25%. Neither Georgia-Pacific nor USG have announced a dollar amount, through [sic] distribution contacts report that each is communicating an increase of $40/MSF, which is ~30%. Additionally, as L&W is out with a $50/MSF price increase, we believe 2013 pricing will exceed our prior expectations.

Ex. 1674 at report p. 2.

129. 12/21/2012: In USG's Form 10-K for financial year ending 12/21/2012, USG indicated that demand was low for wallboard. Ex. 1222 at 7.

[*228] 130. 12/26/2012: Greg Salah (Sr. VP Sales and Marketing, [123] USG) wrote that there couldn't be any "slop over" with price despite shipping issues because of potential market reaction. Ex. 1708**.

In response to emails that severe weather was causing shipping problems, Greg Salah wrote internally at USG: "We cannot do any slop over. To great of a risk of perception that we are pursuing share at the expense of price." Ex. 1708.

XIII. Evidentiary Findings Pursuant to *Fed. R. Evid. 104*

The evidence just presented by the Court was presented without an eye towards the admissibility of the evidence. This is in part because the Court can consider both admissible and inadmissible evidence in determining whether certain evidence is admissible under the co-conspirator exception, as discussed in the *Bourjaily* sections, *supra*. Before confronting the inferences that Plaintiffs ask the Court to reach, the Court will address the three primary exceptions under which much of Plaintiffs' evidence is deemed admissible.

A. Parties' Statements

This is a relatively straightforward finding dictated by *Federal Rule of Evidence 801(d)(2)*. The Court has limited its review of the evidence concerning statements made by officers/employees of each Defendant to those that the evidence warranted the Court finding was a "party's agent **[**124]** or employee on a matter within the scope of that relationship and while it existed." All of Defendants' representatives quoted in this memorandum were either officers or managers who had some involvement with, or responsibility for, pricing drywall during the relevant time period. Thus, their statements are admitted against the speaker's employer.

B. Business Records

Defendants have objected to the Longbow and Thompson reports as inadmissible hearsay. *See* Defs. Resp. PSOF ¶ 273. Notably, Zoran Miling of Longbow and Kathryn Thompson of Thompson were both deposed. Ex. 1122 (Miling dep.); Ex. 1131 (Thompson dep.). Thus, their first hand impressions are not hearsay.

For the sole purpose of summary judgment, the Court concludes that the hearsay portions of their reports are admissible under *Rule 803(6)*, the business records exception to the hearsay rule, to the extent that any hearsay statements support their opinions of the market. Some portions of the reports quote unnamed industry insiders. The Court has not relied on any of those portions of the reports in deciding whether Plaintiffs have satisfied their summary judgment showing, so the Court does not need to determine at this time whether those **[**125]** portions of the reports will be admissible.

C. Co-Conspirator Statements & *Bourjaily*

As noted above, pursuant to *Rule 104(b)*, the Court delayed making findings until it reviewed the evidence in the record. Having reviewed the most relevant evidence, the Court pauses to make threshold findings pursuant to *Bourjaily* and *Federal Rule of Evidence 104*. **[*229]** Under *Bourjaily*, the Court's ruling is one of admissibility of evidence only, and is not a ruling as to sufficiency of Plaintiffs' evidence to prove liability as to any specific Defendant. Hearsay evidence may be admissible under the co-conspirator rule, as to only some Defendants. It is not necessarily a conclusion that the overall evidence is sufficient to deny that Defendant's motion for summary judgment, especially in an antitrust case where special rules apply on motions for summary judgment.[34]

HN20[] The fact that hearsay is admitted under *Rule 104* as to a particular Defendant, does not necessarily compel a conclusion that Defendant has joined an agreement on prices in violation of *§ 1 of the Sherman Act*. *In re Flat Glass Antitrust Litig., 385 F.3d 350, 375-76 (3d Cir. 2004)*.

Given the size of this industry, the large amount of money paid by the two settling Defendants, and the exposure to damages faced by the remaining Defendants, the Court has taken a long pause before making any rulings that will expose Defendants to liability, especially given Defendants' testimonial denials and vociferous arguments that Plaintiffs have failed in their efforts to show that an agreement existed.

HN21[] In considering the Court's duty under *Rule 104*, Third Circuit law requires the Court make rulings favorable to Plaintiffs if Plaintiffs have presented, by a preponderance of evidence, sufficient facts to warrant admissibility.

Based on the review of the facts presented by Defendants in their motion for summary judgment, the factual assertions put forth by Plaintiffs in their responses, and the legal arguments made by both parties, the Court has come to nine findings under *Federal Rule of Evidence 104*:

[127]** 1. The depressed economy that the drywall manufacturers endured following the 2008 recession, which affected many parts our nation's economy, was a frustrating time for all of the manufacturers in this industry. A number of individual efforts to raise prices failed, which a jury may find contradicts Defendants' assertions that the industry had always practiced "price followership." The communications with customers and industry analysts show, without any doubt, that all U.S. drywall manufacturers were anxious for the opportunity to raise prices.

2. The price increase that was announced in fall 2011 to become effective January 1, 2012, was historically a very large, if not the largest ever, percentage increase, announced at 35% for most manufacturers, and was followed by all Defendants, resulting in increased prices to purchasers.

3. Accompanying the price increase was the elimination of job quotes. Job quotes are a pricing mechanism, and they had long served as an effective way for purchasers to achieve discounts from list prices. The Court concludes a jury could find that the elimination of job quotes either was intended to cause, or Defendants knew would result in, very few if any discounts **[**128]** from the announced price increase. A jury could conclude that the elimination of job quotes resulted in a form **[*230]** of price maintenance. Plaintiffs have produced evidence that shows that each Defendant enforced elimination of job quotes during calendar years 2012-2013.

4. There are at least some actions taken by several of Defendants that could be considered as conduct against their self-interest, at least as that term has been defined in antitrust jurisprudence following *Matsushita*.

5. The record of this case shows several intercorporate communications. Many documents show very frequent discussions about prices between Defendants and analysts or customers. The Court agrees with Defendants that some of the evidence of pricing communications is, on its own, normal, innocuous, and insufficient to allow any inference of conspiracy. However, some of these communications could be interpreted as encouragement or affirmation that price increases announced in and following September 2011 would be adhered to.

6. Concerning Plaintiffs' theory that Defendants communicated with each other through analysts at Longbow and Thompson (the "conduit theory"), the Court finds, in what appears to be a novel factual **[**129]** situation, the above

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[34] "It is argued that a preponderance of the evidence test usurps the function of the jury to determine whether a conspiracy exists. This has surface appeal until it is remembered that what is involved here is a ruling on the admission or exclusion of particular evidence, and on this question only. As with all such judicial decisions on admissibility, the effect upon the outcome may be profound, **[**126]** but this comes from the ruling itself and not from the manner in which the law requires the trial judge to make it." *James R. Snyder Co. v. Associated Contractors of Am., Detroit Chapter, Inc., 677 F.2d 1111, 1117 (6th Cir. 1982)*.

chronology shows frequent use of Thompson's and Longbow's communications for pricing information, as well as for market reports. However, exchange of market information, including prices, is not necessarily evidence of agreement. Admitting these facts into evidence as to all Defendants may allow a jury to determine whether the use of analysts was a "facilitating device" that enabled at least some Defendants to communicate with each other under the guise of providing highly detailed, and often confidential, pricing information about their own company and others. The conduit evidence may also be a form of "signaling" between competitors that would have allowed Defendants to conclude that they were maintaining the increased prices and elimination of job quotes.

7. The expert opinions offered by Plaintiffs support the above findings, allowing admissibility of hearsay evidence. Although, by themselves, the expert opinions would not warrant a conclusion that Plaintiffs had met their burden of proof, under established Third Circuit precedent, the Court is within its discretion in citing and relying on the experts' opinions as having some relevance on Defendants' motions. **[**130]** It is appropriate to consider these opinions on the pending motions for summary judgement because a jury will be entitled, if finding Plaintiffs' experts credible, to rely on those opinions as part of its review of the evidence to determine whether Plaintiffs have proved that an agreement existed.

8. Under *Rule 104*, taking all the evidence in the light most favorable to Plaintiffs, Plaintiffs have shown by a preponderance of the evidence that an agreement existed, as to at least some Defendants. Plaintiffs' evidence is more than merely "ambiguous" and proves sufficient to allow a jury to find that these hearsay statements, and perhaps others not specifically mentioned in this memorandum, were made during and in furtherance of an agreement by Defendants American, National, PABCO and Lafarge. Under *Bourjaily* and its progeny, the hearsay evidence cited by Plaintiffs is admissible against these Defendants to the extent the statements were made during and in furtherance of the conspiracy. Whether it proves enough to deny the motion for summary judgment as to these Defendants will be discussed below, individually.

9. Plaintiffs' evidence as to Defendant Certain Teed is not sufficient to show that **[**131]** CertainTeed participated in the **[*231]** conspiracy. Therefore, the Court finds that the hearsay statements made by other Defendants or their agents, even when about CertainTeed, are not admissible against CertainTeed as statements of co-conspirators.

XIII. Plaintiffs' Theory of the Drywall Conspiracy

Relying on the evidence outlined in the chronology, Plaintiffs argue that a jury could draw inferences that Defendants entered an agreement to fix prices. Specifically, Plaintiffs argue that culpable inferences can be drawn from (1) the timing and similarity of Defendants' announcements of the elimination of job quotes and the 2012 and 2013 price increases, (2) Defendants' communications with one another in close proximity to major price announcements or under otherwise suspicious circumstances, (3) Defendants' communications with research analysts, and (4) Defendants' non-price conduct (*e.g.*, restricting supply), which facilitated the success of the increases.

The Court acknowledges that Plaintiffs have provided no "smoking guns," and that courts in this circuit "have been cautious in accepting inferences from circumstantial evidence in cases involving allegations of horizontal price-fixing among **[**132]** oligopolists." *In re Flat Glass Antitrust Litig., 385 F.3d 350, 358 (3d Cir. 2004)*. But even keeping this in mind, based on Plaintiffs' arguments and the record evidence, the Court concludes that when Plaintiffs' evidence is considered as a whole, there is substantial evidence, ranging temporally from Spring 2011 through the end of 2012, from which a jury could conclude that at least some Defendants reached an agreement with at least one other competitor. *Cf. Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., Inc., 998 F.2d 1224, 1233 (3d Cir. 1993)* ("We consider [the plaintiff's] evidence as a whole and with the reasonable inferences that we can draw from it.").

A. Timing and Similarity of Defendants' Announcements Related to Elimination of Job Quotes and the 2012 and 2013 Price Increases

Defendants do not dispute that they eliminated job quotes and announced price increases around the same time. Nor do they dispute that they did so with knowledge that the other manufacturers were doing the same. In fact, Defendants argue that they eliminated job quotes and increased prices *because* the other manufacturers were doing so. There is significant evidence supporting Defendants' arguments that Plaintiffs' evidence in this vein permits an inference of no more than price followership. And Defendants are correct that the Court must not rely on mere **[**133]** price followership activity because price followership is expected in oligopolistic markets.

The Court has nonetheless provided a fairly detailed review of the facts leading up to the price increases in January 2012 and January 2013 and will provide review of Plaintiffs' arguments related to those facts. Evidence that participants in an oligopolistic market acted the same way at the same time will always be insufficient, standing alone, to defeat a summary judgment motion. But, the timing and content of the manufactures' announcements is relevant to Plaintiffs' showing, even though the evidence in isolation is not dispositive.

1. Pricing Practices Prior to Fall 2011

Between 2010 and the September 20, 2011 American announcement, Defendants attempted seven price increases. Plaintiffs argue that the increases were all unsuccessful and also attribute the following characteristics to those increases:

- Usually one competitor would attempt to take market share and ends **[*232]** up wrecking the increase. PSOF ¶ 163.
- One of the larger manufacturers (National or USG) would lead typically the increase. PSOF ¶ 165.

- Increases were usually announced approximately 30 days before their effectiveness (presumably **[**134]** because it was difficult to anticipate conditions more than 30 days out). PSOF ¶ 166.
- Summer and early fall were the best times for an increase, but winter was inhospitable to increases. PSOF ¶¶ 167-68.

Defendants deny that the prior increases had these attributes. They also deny that the increases failed, admitting only "that some Defendants tried to raise prices at least seven times between January 2010 and fall 2011 with various levels of success." Defs. Resp. PSOF ¶ 162. And Defendants "deny that market conditions did not support those attempts or that they did not result in price appreciation." *Id.*

2. Price Increase & Elimination of Job Quotes Effective January 2012

In fall 2011, the status quo for pricing in the drywall industry changed dramatically. Ex. 1263; *see* Ex. 1085 (Lamb Report) ("Job quotes were an integral part of the industry, and their near simultaneous virtual elimination by Defendants in the last quarter of 2011 created a structural change in the Paper-backed Gypsum Wallboard industry.").

a. American Announcement

In a letter to customers on September 20, 2011, American announced a move to calendar-year pricing, a 35% price increase, and the elimination of job quotes. **[**135]** Ex. 1489. The letter was short and to the point:

> To our Customers:
> Effective January 1, 2012, we will implement a 35% price increase on all gypsum wallboard products. This increased price (up 35%) will be your price for the entire year of 2012. This increase applies to all segments of the business.
> Effective immediately, we will no longer be providing job quotes. We thank you for your continued support.
> Sincerely,
> American Gypsum Company

Keith Metcalf
Sr. VP of Marketing, Sales & Distribution

Ex. 1489. As noted in a Longbow report, American's announcement reflected a "new approach to pricing," including five features that differentiated it from prior price-increase attempts in the drywall market:

1. The elimination of job quotes — the list price will now be the purchase price
2. The duration of the increase — it's good for the entire year and will be the only one
3. The lead time in advance of the increase
4. The size of the increase
5. The content of the increase letter

Ex. 1263 at 1, 3.

Although this price announcement was substantially larger than those prior, American did not engage in any documented analysis prior to announcing these changes. Plaintiffs point out that American produced over **[**136]** 450,000 pages of documents in this litigation, yet Plaintiffs were unable to locate a single document in American Gypsum's production setting forth any analysis, study, or modelling of the plan to eliminate job quotes or raise prices by 35% on January 1, 2012. PSOF ¶ 233. American asserts that it reached its decision during **[*233]** undocumented discussions between three members of senior leadership. Ex. 48 (Powers decl.) ¶¶ 30-38; Ex. 50 (Metcalf decl.) ¶¶ 17-22. But American has not identified any contemporaneous documents that memorialize its process.

Relying in part on one of Defendants' experts, Plaintiffs argue that the lack of written analysis is suspicious. Certain Teed's expert, Dr. Barry Harris, testified that he would have expected a firm making this dramatic a shift from industry practices to have done more (*e. g.*, conducting customer research, considering potential responses from competitors, evaluating the impact of the announcement on the manufacturer's operations and financials) before making the announcement.[35] Ex. 1110 (Harris dep.) at 67:8-68:24.

b. USG Announcement

Other manufacturers quickly followed American's lead. USG was the first manufacturer to issue a formal announcement, distributing a letter to customers on September 28, 2011 that announced its elimination job quotes and implementation calendar-year pricing. No specific price was announced, but USG promised to notify customers of the 2012 price on December 1, 2011.

Although USG never provided a formal letter to all customers providing a uniform price increase, by October 5, USG's senior leadership approved the distribution of guidance for dealers of a 35% increase in prices. Ex. 1508. Ultimately, USG decided to allow prices to vary from market to market. According to USG, the final price increase **[**138]** was below 30% in every geographic market and below 20% in over one-third of geographic markets. DSOF ¶ 663.[36]

c. National Announcement

National released its letter on September 30, 2011, but prior to that date, it had already internally and externally indicated that it would follow American's lead. The day after American distributed its announcement, National

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[35] Defendants object to Plaintiffs' interpretation on Dr. Barry Harris's testimony, arguing that in this context Dr. Harris was explaining **[**137]** the types of actions that Certain Teed undertook in making its announcement. The Court rejects this reading. Although Dr. Harris was discussing the steps Certain Teed took, Dr. Harris also agreed that there were "important business reasons" for a company to take steps such as those taken by CertainTeed and that he would expect a company to take similar measures prior to making a decision to eliminate job quotes, dramatically increase prices, and shift to calendar-year pricing.

[36] Plaintiffs argue that "to the extent USG varied its price increase amounts, such variation is attributable to existing differences in prices prior to January 1, 2012." Pls. Resp. DSOF ¶ 655.

placed a moratorium on job quoting by sending an internal email to area managers. Exs. 1500, 1510. That same day, Craig Weisbruch (Sr. VP of Sales and Marketing, National) indicated externally that National would follow American's lead, reporting to a Thompson Research Group analyst that American's announcement "is the beginning of the manufacturers saying we can't survive in this unchanged climate for two or three more years. If there is going to be no volume increase, then there needs to be a new clearing price that allows us to be profitable at current volumes." Ex. 1499. National's Director of National Accounts testified that he did not recall **[**139]** whether National considered what National would do if the other manufacturers did not also eliminate job quotes. Ex. 1138 (Wood dep.) at 141:10-17.

[*234] d. CertainTeed Announcement

CertainTeed distributed a letter eliminating job quotes on October 3, 2011[37] (though they had unofficially stopped quoting jobs by at least September 29, 2011). Exs. 1299, 1517. Certain Teed promised to provide the new 2012 price by November 15, 2011.

CertainTeed opened its letter by explaining that the housing market "continues to face very depressed market conditions . . . with little expectation of real improvement within the coming year." Ex. 1299.

e. Lafarge Announcement

Lafarge sent a customer letter on October 4, 2011, announcing the immediate elimination of job quotes and the implementation of calendar-year pricing, along with a 35% increase. Ex. 1522. Lafarge's VP of Sales (Mr. DeMay) testified that he did not recall anyone at the company putting anything in writing to justify these changes. Ex. 1102 (DeMay dep.) at 151:17-21.

f. TIN Announcement

On October 11, 2011, TIN sales staff were informed that TIN planned to support the January 2012 increase. TIN never **[**140]** formally announced the elimination of job quotes, but job quotes were eliminated by mid-October 2011. Exs. 1503, 1523.

g. PABCO Announcement

PABCO formally announced the elimination of job quotes, implementation of a calendar-year price, and a 35% price increase on October 12, 2011. Ex. 1320. But prior to this announcement, PABCO had already curtailed job quotes. Ex. 1095 (Burkhammer dep.) at 120:20-22. The 35% price increase was the highest single increase that PABCO had ever announced, though "there had been prior years where the total combined amount of price increase announcements issued by PABCO exceeded 35%." Ex. 93 (Lucchetti decl.) ¶ 32.

h. Implementation & Results

As reflected in the below chart, by January 1, 2012, American, USG, National, Certain Teed, Lafarge, and PABCO had formally announced the elimination of job quotes and a shift to calendar-year pricing.[38] And all Defendants except USG had formally announced a price increase amount of approximately 35%.

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[37] The letter was misdated as October 3, 2012. Ex. 1299.

[38] Plaintiffs attempt to make much of the fact that Defendants used similar language in their letters to customers in fall 2011. But it is undisputed that Defendants received copies of the other manufacturers' letters through **[**141]** legitimate means after each

[*235]

Manufacturer	Initial Price Bulletin	% Increase Ultimately Announced	Job Quote Elimination
American	9/20/2011	35%	Yes
USG	9/28/2011	Less than 30%*	Yes
National	9/30/2011	35%	Yes
CertainTeed	10/3/2011	35-37%*	Yes
Lafarge	10/4/2011	35%	Yes
PABCO	10/12/2011	35%	Yes
TIN	11/29/2011	35%	Not in letter, but eliminated in practice
Georgia Pacific	12/2/2011	NA	No

*percentage price increase announced after initial letter

The amount of the announced increase that was actually realized by Defendants is contested, but Plaintiffs' expert concluded that Defendants were "able to implement significant price increases in 2012." Ex. 1085 at 78.

2. Events Leading up to the 2013 Price Increase

Even before the 2012 pricing went into effect, the amount of the calendar-year price for 2013 was already being considered by **[**142]** at least one manufacturer. Through an internal USG email, sales staff were instructed that they should not quote any jobs for 2013 and that "[t]he price guidance we are providing our customers is +20% from your January 2012 price for all of 2013." Ex. 1671. The email did clarify that the percentage would be confirmed at a later date. *Id.*

By January 27, 2012, American was providing "guidance" about the price increases that could be expected from manufacturers for January 2013. Ex. 1172. Keith Metcalf (Sr. VP Sales, Marketing, and Distribution, American) wrote to Susan Hall (Regional Sales Director, American): "We are not ready to put a[n] official notice out yet." Ex. 1172. But Metcalf told Ms. Hall that she could send a customer an email letting him know that "for 2013 you will see increases from manufacturers up to 30% on today's numbers." Ex. 1172. In Mr. Metcalf's deposition, Plaintiffs' counsel drew attention to the fact that Mr. Metcalf referred to "manufacturers, plural" in the email, but Mr. Metcalf responded by agreeing that "[t]he document states that, but I have no knowledge of that happening." Ex. 1124 (Metcalf dep.) at 237:3-20. Mr. Metcalf said that he didn't know which manufacturers **[**143]** he was referring to the email, though Plaintiffs' counsel never asked Mr. Metcalf the source of the information. *Id.* at 237:21-238:1.

[*236] In early February 2012, TIN also provided at least one customer with 2013 pricing guidance of a $40 upswing from 2012 pricing. Ex. 1683.

But it wasn't until spring 2012 that plans for a 2013 price increase truly got underway.

a. Pricing Guidance Following the Drake Group Meeting

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manufacturer made its announcements public (*e.g.*, the announcement was forwarded from costumers to manufacturers). Thus, the Court does not consider the similarity of the language used in the manufacturer's letters probative. *See* *Elevator Antitrust Litig., 502 F.3d 47, 51 (2d Cir. 2007)* (declining to find an inference of conspiracy from the defendants' similar contract language because "[s]imilar contract language can reflect the copying of documents that may not be secret").

From February 25-27, 2012, senior executives from USG, National, American, and CertainTeed attended a Drake Group event in Austin, Texas. Lafarge and PABCO did not attend. In USG's notes recapping the Drake Group Meeting, Scott Blanchard (VP Sales — West, USG) provided "main takeaways," one of which being that "[n]o manufacturer has moved price." Ex. 1638. Mr. Blanchard also noted that USG had been providing 2013 pricing guidance at 20-25% increase, but that "further discussion is necessary internally at USG." *Id.*

On March 1, 2012, three days after the conclusion of the meetings, American became the first manufacturer to provide formal 2013 pricing guidance. Keith Metcalf (Sr. VP of Marketing, Sales, and Operations, American) sent a letter to American's customers, writing: "Your January **[**144]** 2013 prices from American are anticipated to be in the range of 25%-30% higher than your January 2012 prices." Ex. 1678.

Based on internal National emails, it appears that National leadership knew that American was going to take this action before the letter was sent. Ex. 1677. In an email providing a summary of the Drake Group meeting, Bill Kelly of National wrote that dealers had told him that American would soon be providing written guidance. Ex. 1677.[39]

Some of the other manufacturers followed suit by permitting sales staff to provide verbal guidance. On March 7, 2012, TIN advised its sales staff that, upon being asked by customers, sales staff could tell customers to "use today's price plus no more than 30%." Ex. 1684. Similarly, on March 10, USG instructed its sales team that they could verbally tell customers to anticipate a 25% price increase for January 2013. Ex. 1681. National initially drafted a letter to advise customers to expect an approximately 30% increase in January 2013, but ultimately **[**145]** National opted not to send the letter, providing the information only verbally. Ex. 1686 (draft of letter); Ex. 1687 (script for providing verbal guidance to customers for 2013 pricing); Ex. 1134 (Weisbruch dep.) at 278:24 - 279:1. By April 2012, PABCO was also providing verbal guidance to expect a 25% increase in January 2013 over January 2012 prices, but this information was to be provided only to those customers who specifically asked. Exs. 1095 (Burkhammer dep.) at 156:1-18, 1688.

b. Fall 2012 Pricing Announcements

Plaintiffs have submitted evidence that, by the end of July 2012, all of the manufacturers were providing at least verbal guidance for a 20%-30% increase to go into effect in January 2013. Ex. 1690 (Lafarge); Exs. 1095, 1688 (PABCO); Ex. 1681 (USG); Ex. 1684 (TIN); Ex. 1687 (National); Ex. 1678 (American); *see also* Ex. 1234 (Longbow report) ("Most manufacturers have verbally communicated a 20-30% price increase should be expected for CY13. Formal letters will likely be issued in September or October.").

But the formal announcements didn't emerge until August 2012. Plaintiffs argue **[*237]** the sequence of communications allow the inference of an agreement.

On August 22, 2012, Longbow **[**146]** announced a "scoop" that National was planning to issue a formal letter announcing a 30% price increase for January 2013. Ex. 1693. But it was American that distributed a formal price increase letter that day that announced a 25% increase over 2012 prices. Ex. 1691 (American letter); Ex. 1693 (Longbow announcement).

Despite Longbow's report to the contrary, National didn't actually distribute their letter on August 22. Ultimately, National distributed its letter on September 6, 2012, though Craig Weisbruch (VP of Sales and Marketing, National) acknowledged that National was prepared to send the 2013 letter on August 22, 2013. Ex. 1134 (Weisbruch dep.) at 300:9-303:3. In Mr. Weisbruch's deposition, he could not provide a reason as to why National delayed distributing its letter, but in his declaration, he implied that National held off because they "were very sensitive to the perception of antitrust concerns because the Florida Attorney General's Office had requested information from [National] relating to the January 2012 price increase." Ex. 210 ¶¶ 29-31.

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[39] Defendants make a hearsay objection to Ex. 167. The Court rejects this objection because the document is being used to show notice and is not being offered for the truth of the matter asserted.

A week after the National announcement, on September 13, 2012, CertainTeed announced a 30% price increase. Ex. 1695.

The seas were **[**147]** then quite for about a month. On October 15, 2012, Lafarge issued its price increase letter reflecting a 30% increase. Ex. 1697. Then PABCO issued a letter announcing its own 30% increase for 2013 on October 24, 2012. Ex. 1698. On November 16, 2014, USG issued a letter telling its customers that prices would increase in 2013. Ex. 1701. Instead of providing a price increase amount, the letter noted that customers would be provided a price list in early December. Ex. 1701. Then, on November 26, 2012, TIN also issued a price increase letter reflecting a 30% increase.

Manufacturers also continued to refuse job quotes in 2012 and 2013. Ex. 1674 (Longbow report).

The relevant case law specifies that similar price movements by competitors can be considered along with other evidence, in determining whether inferences favorable to plaintiffs are warranted. The evidence reviewed above does show very similar price increases as to both date and percentage of increase and, by January 2012, the uniform elimination of job quotes as a form of pricing.

B. Intercorporate Communications

There are four exchanges that Plaintiffs chiefly rely on to argue that Defendants were communicating with each other about **[**148]** agreements: (1) internal American emails in April and September 2011, (2) phone calls between American and L&W shortly followed by calls between L&W and USG, (3) a phone call between PABCO and American the day before American announced the price increase, and (4) Thompson's notes about National's reference to "verbal agreements for a large price increase in 2013." The Court finds that many of these, when considered as a whole with the remainder of the evidence, could raise a reasonable inference about an agreement at least among some Defendants.[40]

[*238] Of course, the Court recognizes that ***HN23***[] manufacturers are permitted to communicate with one another under most circumstances. A jury could consider the manufacturers' communications to be probative of an agreement only if there **[**149]** is some evidence that exchanges of information had an impact on pricing decisions. *In re Flat Glass Antitrust Litig ., 385 F.3d 350, 369 (3d Cir. 2004)*; *In re Baby Food Antitrust Litig., 166 F.3d 112, 125 (3d Cir. 1999)*.

1. Keith Metcalf's April and Early September Communications

In early April 2011, senior pricing officials from all of the U.S. wallboard manufacturers attended a major trade show in Las Vegas, Nevada. Both building-material suppliers and customers attended the meeting.

Approximately three weeks after the Las Vegas trade show, Keith Metcalf (Sr. VP of Sales, Marketing, and Operations, American), sent an email to American's Director of Sales for the South Region (Susan Hall). Ex. 1165. Ms. Hall had emailed Mr. Metcalf to ask how to quote jobs that would take place in calendar year 2012. Ex. 1165. Metcalf's entire response was "[p]lease don't quote anything in 2012. We may have a movement from *all manufacturers* to eliminate quotes." Ex. 1165 (emphasis added). When deposed, Mr. Metcalf said that he could not recall the source of the information that caused him to write that passage in April 2011. Ex. 1124 (Metcalf dep.) at

[40] Consistent with Third Circuit precedent, the Court is not considering Plaintiffs' evidence of suspicious intercorporate and internal communications among manufacturers' low-level employees. *See* *In re Flat Glass Antitrust Litig., 385 F.3d 350, 368 (3d Cir. 2004)* (***HN22***[] "[P]rice discussion among low level sales people has little probative weight."); *In re Baby Food Antitrust Litig., 166 F.3d 112, 125 (3d Cir. 1999)* ("Evidence of sporadic exchanges of shop talk among field sales representatives who lack pricing authority is insufficient to survive summary judgment.").

140:19-143:11.[41] Based on the timing of the email in relation to the Las Vegas trade meeting, Plaintiffs ask the Court to infer that Defendants discussed the elimination of job quotes at the Las **[**150]** Vegas trade meeting.[42]

Then, on September 2, 2011, Mr. Metcalf sent another email that a jury could reasonably find suspicious. The email appears to have been directed to sales directors, but members of the American Gypsum leadership were also copied. Ex. 1482. In the email, Mr. Metcalf directed that "[e]ffective immediately, during the remaining time **[**151]** for calendar 2011, no quotes should be given to a customer unless they hand you the PO's that day or make a commitment to [American] on that job for the balance of the year." Ex. 1482. He also instructed that staff should "hold off" on giving any job quotes for projects that would commence or extend to 2012 or beyond until September 19, 2011. Ex. 1482. At the close of the email, he acknowledged that "[s]ome of this may sound odd," and invited email recipients to call him if they had concerns. Ex. 1482.

A few weeks later, on September 20, 2011, one of the email recipients (Mike Wagstaff, position at American unknown) forwarded the email to Mary Schafer (VP of National Accounts, American) for clarification about whether he could provide a **[*239]** job quote on a specific project. Ms. Schafer had been copied on the original September 2, 2011 email. She responded by telling Mr. Wagstaff to pursue the project, explaining that the original September 2 email "was referencing an anticipated announcement from one or more of the big boys relative to job quoting. We're still waiting. Just want to proceed cautiously and not get locked in to big volume at low prices, especially if there is a game-changer event **[**152]** on the near horizon." Ex. 2098.

Defendants have declined to make any hearsay objections to the Keith Metcalf emails, arguing instead that the document is irrelevant.[43]

2. September L&W Phone Calls

U.S. G. Corporation owns both U.S. G. Company ("USG"), a drywall manufacturer, and L&W Supply Company, a building-products distributor. Thus, L&W and USG are sister companies. Because USG sells wallboard to L&W, L&W is also a customer. But L&W also conducts business in some regions where USG does not. In those regions, L&W is a customer of American or PABCO. Plaintiffs argue that Defendants sometimes took advantage of L&W's customer-sister status with USG, using L&W as a middle-man to relay messages between drywall manufacturers.

One of these instances occurred in early **[**153]** September 2011. On September 6, phone records reveal two calls between American and L& W that were followed shortly by a call between L&W and USG:

- 9/6/2011, 1:45PM: Keith Metcalf (Sr. VP Marketing, Sales, and Distribution, American) called Rob Waterhouse (Sr. VP of Sales and Operations, L& W); the call lasted 24 seconds. Ex. 2146.
- 9/6/2011, 1:48PM: Rob Waterhouse (Sr. VP of Sales and Operations, L&W) called Keith Metcalf (Sr. VP Marketing, Sales, and Distribution, American). The call lasted 4 minutes. Ex. 2187.

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[41] Defendants have attempted to provide the basis for Mr. Metcalf's statement after the deposition. But the fact remains that Mr. Metcalf was unable to explain the basis at the deposition, even after preparing for four days. Pls. Response Br. at 26 n.47; Ex. 1124 (Metcalf dep.) at 140:19-143:11.

[42] Although Mr. Metcalf writes his email with the conditional "may," the Court finds that a jury could consider this email more than mere industry rumor in light of the senior leadership position of the author of the email and the timing of the email in relation to the Las Vegas trade meeting. *See* *In re Baby Food Antitrust Litig., 166 F.3d 112, 135 (3d Cir.1999)* ("[The] desultory collection of information 'on the street' by sales representatives is far removed from a concerted reciprocal exchange of important pricing and marketing information by the officers of major companies, particularly an exchange pursuant to an agreement.").

[43] Defendants have not raised any evidentiary objections to these emails, even though all of them came up in Plaintiff's Statement of Facts, in Defendants' reply briefing, and/or at the November 23 hearing. *See* PSOF ¶ 26 and 198, Joint Reply at 2, 21, and 32, and Hearing Tr. at 25-26, 29-31 (counsel for Certainteed), and 128-29 (all discussing Ex. 1165); PSOF 210 (discussing Ex. 1482); Joint Reply at 31 n.14, 70 (discussing Ex. 2098).

• 9/6/2011, 1:56PM: Rob Waterhouse (Sr. VP of Marketing and Sales, L&W) called Greg Salah (Sr. VP of Sales and Marketing, USG). The call lasted two minutes. Ex. 2187.

The next day, Mr. Salah sent an internal draft letter to Christopher Griffin (President, USG; Exec. VP of Operations at USG Corp.). The letter eliminated job quotes and promised calendar-year pricing, was post-dated as September 21, 2011, and was addressed to USG customers. In the email, Mr. Salah explained that he had sent the letter in anticipation of a conversation between Mr. Salah and Mr. Griffin later that week. Mr. Griffin also mentioned a meeting scheduled for September 21 "to review 2012 pricing strategy **[**154]** which will include a second strategy being developed by the Sales Executive team." Ex. 2191.

Plaintiffs argue that the phone calls are suspiciously timed because the calls would have enabled Mr. Metcalf to funnel job-quote elimination information through Mr. Waterhouse at L&W. They rely on Mr. Salah's draft letter, sent the day following these calls, to show that the elimination of job quotes was in fact discussed on these calls. However, Mr. Salah had already sent drafts of this letter to his sales team on three occasions that predated the suspicious phone calls, including one email on September 2, 2011 that anticipated discussing **[*240]** the letter at the September 21 meeting. *E.g.*, Exs. 769, 773, 775.

3. PABCO & American Phone Call

On September 19, 2011, David Powers (American, President) had a 19 minute call with Foster Duval (PABCO, Sales Manager).[44] Plaintiffs argue that although just a Sales Manager, Foster Duval was in fact a leader at PABCO, who had been hired because of his "high-level industry connections." Pls. Resp. Br. at 24. Defendants admit that Mr. Duval had long relationships with the Chairman, President and CEO of USG Corp.; the President and CEO of L&W; and the President of **[**155]** American Gypsum. Defs. Resp. PSOF ¶¶ 82-84.

When deposed, Mr. Powers said this call reflects him returning a call from Mr. Duvall. Ex. 1128 at 220:24-222:3. Mr. Powers claims that he "seriously debated" whether to place the call because he knew American was about to release the letter. Ex. 1128 (Powers dep.) at 220:24-222:3. But Mr. Duvall was Mr. Powers' personal friend, and Mr. Duvall had recently endured multiple open-heart surgeries. *Id.* So Mr. Powers testified he decided to call Mr. Duvall because Mr. Powers was concerned for the health of his friend. *Id.* Mr. Powers claims that the two mostly discussed Mr. Duvall's health and family, but that they ended the call as they always did by slamming their former employer, USG, which involved talking about a lack of leadership in the industry. *Id.* at 222:07 — 223:09.

When deposed, Mr. Duvall could not remember the call or what was said on it, though he does not dispute that it happened. Ex. 1104 (Duvall dep.) at 182:10-22. But in an email, Mr. Duvall indicated **[**156]** that more may have been discussed. The day after the call between Mr. Powers and Mr. Duvall, a customer forwarded the American announcement to Ryan Lucchetti (PABCO, President). Mr. Lucchetti forwarded the email to Mr. Duvall, writing, "Well here is the 1st." Ex. 1168. Mr. Duval responded: "Dave [from American] gave me a call yesterday and mentioned his frustration with the lack of leadership in the industry. Eliminating job quotes would be a great start for the price improvement." *Id.* The next day, Mr. Lucchetti responded, "Dave Powers is my new hero." *Id.*

Defendants concede that the phone call occurred; they disagree only with Plaintiffs' suggested inferences about the topics of the phone call. But the Court finds that the timing of the phone call relative to the announcement terminating job quotes and the PABCO email exchange that followed the American announcement, could both lend weight to the permissible inferences drawn from this phone call, in favor of Plaintiffs.

4. National's Reference to "[V]erbal[A]greements for a [L]arge[P]rice[I]ncrease in 2013"[45]

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[44] Mr. Powers and Mr. Duval also had other calls in 2011, including May 17, 2011 (19 minutes), July 13, 2011 (18 minutes), and August 18, 2011 (31 minutes). Defs. Resp. to PSOF ¶ 28 (a).

[45] Ex. 1515.

Exhibit 1515 is a Thompson Research document that memorializes a number of conversations between Kathryn Thompson (Founder and Dir. of Research, Thompson) and Mr. **[**157]** Weisbruch (VP of Sales and Marketing, National), ranging in date from February 10, 2011 through November 20, 2012.

The notes dated June 14, 2012 refer to "National Gypsum marketing in NYC." Ex. 1515. Following the bullet heading "2013 price increases?" the memorandum **[*241]** notes, "A: verbal agreements for a large price increase in 2013." *Id.* Ms. Thompson, the author of this document, was questioned heavily about these notes at her deposition. She neither confirmed nor denied that the speaker used the word "agreement," though she explained that her use of the word "agreement" in the memo did not necessarily mean that the word "agreement" was used in the conversation.

Plaintiffs argue that Ms. Thompson's notes should be considered as evidence of agreements among manufacturers to impose another large price increase in 2013. The Court agrees that a jury may so find.

Defendants argue that Mr. Weisbruch was not referring to agreements among manufacturers, but rather, was referring to agreements between National and its distributors. But, as noted above, the Court cannot simply adopt Defendants' argument as a matter of law when the document is susceptible to multiple reasonable interpretations. Although **[**158]** Defendants' argument reveals one possible inference, Plaintiffs' interpretation of the evidence is equally reasonable. In an antitrust case, a defendant's use of the word "agreement" in relation to price cannot be considered merely ambiguous and insufficient to warrant inferences in favor of Plaintiffs.[46]

C. Communications with Research Analysts

Plaintiffs argue that Defendants relayed information to one another through research analysts, namely, analysts at Thompson Research Group[47] and Longbow Communications, and that by doing so, Defendants were able to signal to one another that they continued to participate in the agreement to increase prices (the "conduit theory"). The Court agrees that the evidence **[**159]** can permit the inference that at least National and Lafarge used the research analysts to signal to the other manufacturers during the class period.[48] In other words, the interactions with research analysts might be considered a "facilitating practice" of an agreement regarding price.[49] However, the evidence is insufficient to permit the inference that Defendants actually reached an agreement by communicating through analysts.

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[46] The Third Circuit has explained that the single use of a term synonymous with agreement "in a highly competitive business environment and in the face of continuing fierce competition is as consistent with independent behavior as it is with price-fixing." *In re Baby Food Antitrust Litig., 166 F.3d 112, 127 (3d Cir. 1999)*. But the facts of *Baby Food* are distinguishable from the facts in this case. Most significantly, here, unlike *Baby Food*, the speaker who used the word "agreements" was a member of the senior leadership at National, not a low-level employee.

[47] The Court has previously described Thompson Research Group in greater detail. *In re Domestic Drywall Antitrust Litigation, 300 F.R. D. 234 (E. D. Pa. May 15, 2014)*.

[48] The Court notes that both Ms. Thompson and Mr. Miling have testified under oath (and Mr. Shmois has similarly declared) that they were not aware of any unlawful agreement and they never promised to convey information in support of one. DSOF ¶¶ 1183-1185. Those denials, however, are not dispositive on the issue of whether Defendants used Thompson and Longbow as unwitting conduits to transmit information to themselves.

[49] "A 'facilitating practice' is an activity that makes it easier for parties to coordinate pricing or their behavior in an anticompetitive way. It increases the likelihood of a consequence offensive to antitrust policy." Phillip E. Areeda & Herbert Hovenkamp, *Fundamentals of **Antitrust Law*** § 14.05(B)(1) **[**160]** (Wolters Kluwer Law & Business, 4th ed. 2015 supp.). "[T]he label 'facilitating practice' is only an invitation to further analysis, not a license for automatic condemnation." *Id.* And the labeling of a practice as a facilitating practice is not a permanent one, but rather, it is made on a case-by-case basis. *Id.*

[*242] The Court will first provide background information on the analysts and their relationships with Defendants, then review Defendants' challenge to the legal viability of Plaintiffs' argument, and finally review the evidence supporting Plaintiffs' arguments that Defendants used the analysts to signal information to one another.

1. Analyst Background Information

The principal players are Kathryn Thompson (Founder and Dir. of Research, Thompson), Zoran Miling (Corp. Stock Analyst, Longbow); and Garik Shmois (Sr. Analyst, Longbow). PSOF ¶¶ 109-110; DSOF ¶¶ 1120-28, 1138; Ex. 1876; Ex. 1023 at 13-14; Ex. 1024.

Briefly summarized, Thompson and Longbow are in the business of generating investment advice. Both prepare reports that provide financial insight into businesses and industries for clients, such as large institutional investors. Both companies covered the drywall industry during **[**161]** the relevant time period, and many Defendants obtained materials from one or both entities.

Critically, a key component of Thompson and Longbow's business models is soliciting information from industry insiders. Both Thompson and Longbow cultivated confidential contacts within the drywall industry and regularly spoke with them in an effort to make the best possible predictions and forecasts. Both companies contemporaneously documented their communications as well. *E. g.*, Exs. 1515, 1269. Thompson and Longbow processed these interactions and other information and then disseminated reports to their customer base, either as flash reports in response to a breaking development or as regular industry updates as often as once or more per month. *E.g.*, Ex. 1259 (flash report); Ex. 1201 (industry update).

2. Legal Viability of Plaintiffs' Conduit Theory

Plaintiffs do not cite any case law regarding the conduit theory, opting instead to treat claims of interactions between Thompson, Longbow, and Defendants as factual evidence in support of Plaintiffs' claim that Defendants conspired to fix prices. Pls. Resp. Br. at 45-49, 124. Defendants, by contrast, cite legal authority to argue that that Plaintiffs' **[**162]** conduit theory is not a viable means of showing an antitrust conspiracy. Defs. Joint Opening Br. at 52-56; Defs. Joint Reply Br. at 27-30.

The Court is aware of only one Third Circuit case that is arguably relevant to the legal viability of Plaintiffs' conduit theory: *In re Ins. Brokerage Antitrust Litig., 618 F.3d 300, 337 (3d Cir. 2010)*. There, ***HN24***[] the Third Circuit indicated that an antitrust conspiracy that required a middle-man could nonetheless be considered a conspiracy. *Id.* Based on the Court's reading of *Brokerage* and the Court's survey of the non-binding law in this area, the Court concludes that Plaintiffs' conduit theory is legally viable.

a. Authority Supporting Plaintiffs' Conduit Theory

Defendants attempt to distinguish Plaintiffs' conduit theory from that in *In re Titanium Dioxide Antitrust Litig., 959 F. Supp. 2d 799, 806 (D. Md. 2013)*, a case in which a district court denied the defendants' motion for summary judgment based in part on communications between the defendants and a third-party consultant. Defs. Reply Br. at 30 (citing *In re Titanium Dioxide Antitrust Litig., 959 F.Supp. 2d 799, 806 (D. Md. 2013))*.

The record in *Titanium Dioxide* reflected involvement by the third-party consultant in the pricing conspiracy. For example, emails reflected that

> **[*243]** • one defendant asked the consultant to confirm a price increase from another, based on the consultant's "lofty position";

• that same defendant leaked **[**163]** the consultant documents from a competitor and told the consultant not to "copy it verbatum [sic]" and to "screw up a few facts so it does not look like too much inside info"; and
• another defendant "as[ked the consultant] to do a little job for us — ascertain relative TiO2 inventory levels for some of our key competitors."

959 F. Supp. 2d at 812-13, 829.

Based on these exchanges, the District Court of Maryland found that the plaintiffs' evidence showed "the routine sharing of information between the individual firms and industry consultant Jim Fisher" and that these communications "support[ed] the Plaintiffs' theory that [Fisher] served as a conduit in the alleged price-fixing conspiracy." *Id. at 810, 829*. The court characterized this evidence as "evidence implying a traditional conspiracy." *Id.*

Similarly, the Court in *In re Polyurethane Foam Antitrust Litig., No. 1:10 MD 2196, 152 F. Supp. 3d 968, 2015 U.S. Dist. LEXIS 15404, 2015 WL 520930, at *41 (N.D. Ohio Feb. 9, 2015)* (unpublished), found that a scrap broker "served as a conduit for Defendant employees looking to build support for another underlay increase in March 2006."[50] The court noted that in a prior incident, the president of one defendant had asked the broker to send word to another defendant that "that it ought not go forward with a price increase because [the first defendant] had **[**164]** backed off the same increase." *2015 U.S. Dist. LEXIS 15404, [WL] at *12, 18*.

These cases provide support for the conclusion that communications from Defendants to Thompson and Longbow could be indicia of a price fixing agreement. As discussed in greater detail below, evidence in the case at bar resembles the analyst activity in the *Titanium* and *Polyurethane*. Although Plaintiffs have not highlighted it, the Court notes that, despite Defendants' arguments to the contrary, the record reveals numerous instances in which the analysts directly communicated information shared by one Defendant with another Defendant either directly (*e. g.*, through emailing one manufacturer notes about the analyst's interaction with another manufacturer) or indirectly (*e.g.*, by quoting a manufacturer in an analyst report and then circulating those reports among Defendants).

b. Authority Undermining Plaintiffs' Conduit Theory

To support their argument that Plaintiffs' conduit theory is invalid, Defendants rely on *Williamson Oil Co., Inc. v. Philip Morris USA, 346 F.3d 1287, 1308 (11th Cir. 2003)*, an opinion affirming summary judgment for the defendants in an oligopolistic market.[51] The plaintiffs argued that the defendants used stock analysts to signal pricing intentions to each other and that the defendants **[**165]** "'clarif[ied] their agreement not to compete on price' by publicly announcing their future pricing intentions at meetings with stock analysts." *Id.* The court rejected the plaintiffs' arguments, concluding that the statement **[*244]** was consistent with "rational, lawful, parallel pricing behavior that is typical of an oligopoly." *Id. at 1309-10*.

Although the Court appreciates the reasoning of this case, the Court finds that the facts of this case are distinguishable from *Williamson*. Unlike the analyst in *Williamson*, the analysts in this case (as illustrated below) repeated word-for-word statements from Defendants in their industry analyses, which multiple Defendants received. When read alongside documents in which Defendants make suspicious or revelatory communications about pricing

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[50] Neither party cited this case.

[51] One older case, not cited by either party, rejected allegations that the defendant car manufacturers used a large national leasing and car management company, a trade association, and an individual dealer as conduits to exchange "mutual assurances that each would eliminate or substantially reduce fleet price concessions if the other did. *United States v. General Motors Corp., No. 38219, 1974 U.S. Dist. LEXIS 6569, 1974 WL 926, at *11-14, *18 ¶¶ 67-88, 118 (E. D. Mich. Sept. 26, 1974)*. The opinion does not, however, go into detail on precisely why the theory failed.

to these same analysts, **[**166]** these examples could support an inference that the analysts were used as conduits.[52]

3. Evidence Allowing Inferences of Defendants Using Analysts As Conduits

Despite Defendants' protests to the contrary, Plaintiffs have submitted evidence that is susceptible to the inference that Craig Weisbruch (VP of Sales and Marketing, National) and Steve DeMay (VP of Sales, Lafarge) communicated to analysts knowing or intending that at least portions of their communications would be disseminated to other manufacturers.

a. National Signaling Through Thompson and Longbow?

Most critically, although not flagged by Plaintiffs, Defendants incorrectly assert that "Plaintiffs have no evidence that Miling or Thompson relayed anything Weisbruch said to a competitor or that Weisbruch intended for them to do so." Def. Reply Brief at 27-30. In reality, there are several documented instances of Craig Weisbruch (VP Sales and Marketing, National) sending communications **[**167]** to Thomspon and Longbow and of excerpts of those communications appearing verbatim in industry reports, which were circulated to multiple Defendants.[53]

The clearest example of Mr. Weisbruch possibly signaling through Longbow comes from late September 2011. On September 21, the day after American distributed its announcement, Mr. Weisbruch sent an email to Longbow about American's announcement. Ex. 1277. And on October 10, a manufacturer's employee sent Mr. Miling another email. Ex. 2133.[54] Longbow's October **[**168]** 11, 2011 report directly quotes lines from the September 21 and October 10 communications, though the report attributes the comments only to "manufacturers." Ex. 1342.[55] And,

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[52] Defendants also cite *Mayor and City Council of Balt., Md. v. Citigroup, Inc., 709 F.3d 129 (2d Cir 2013)*, a case that turns the conduit theory on its head by suggesting the use of conduits *undercuts* evidence of a direct agreement between defendants. The Court is unpersuaded by the reasoning in this non-binding case and declines to address it.

[53] Although there is no proof of receipt by another Defendant, in December 2012, a line from notes on a call that Longbow made with Mr. Weisbruch wound up appearing in a Longbow report. Ex. 2167. (AMA report); Ex. 1706 (call notes); Ex. 1674 ("taking an increase. I think it's as simple as that. They're going to take one."). And in April 2012, after Mr. Weisbruch called Longbow (Ex. 2167 ; Ex. 1122 at 172:25-177:8), Mr. Shmois prepared an email for "external use" with the subject "USG Follow Up with Industry Insider." The first line explains, "We just got off the phone with an SVP (number three in the organization) of a large wallboard manufacturer to get his take on the USG results." Ex. 1600.

[54] The sender of Ex. 2133 is redacted, but Plaintiffs have indicated their belief that the sender was Craig Weisbruch (VP of Sales and Marketing, National). Pls. Resp. to SOF ¶ 774 (misciting the exhibit number). The actual sender is irrelevant, however, because the Longbow report attributes the quotes from this email to a "manufacturer." Ex. 1342.

[55] The October 11 report and September 21 email both state: "I think this is the beginning of the manufacturers telling the market that we have to have a 'fair' price for our goods that allows us to make a profit and stay in business. Because the economic outlook for housing continues to be quite dark, and may be for some time to come, we have to find some way to get into the black I don't know what the end result will be, but see it as a constructive attempt to bring **[**169]** some sanity to pricing." Ex. 1342 (report); Ex. 1277 (Sept. 21 email).

The October 11 report and October 10 email both state: "This is potential game changing event and yet it is occurring in a very depressed market. It's normal for the distributors to be skeptical and scared. It's an opportunity for them to get a little needed margin but they are fearful . . . I expect a lot of pleading and lying over the next few months as the job policy and price increase amount becomes more clear. Keep in mind, we are moving to a new paradigm where the distributor is taking ALL the responsibility for the quote he is making. Previously he had the luxury of having the manufacturer absorbing all the downside risk. . . . So the situation is still unclear, and if you're a distributor quoting longer term work it's difficult to know what to do. As usual they are all watching what L&W is doing as signal to what USGs real intention is." Ex. 1342 (report); Ex. 2133 (Oct. 10 email).

at minimum we **[*245]** know that USG (Ex. 1349), TIN (Ex. 2046), Lafarge (Exs. 1363, 1263), and CertainTeed (Ex. 1858) received copies of the report, as evidenced by the fact that they produced the reports in discovery.

There is also substantial evidence that Thompson quoted[56] Mr. Weisbruch in industry reports or otherwise included the sentiment[57] of his communications in their reports.

Plaintiffs' **[**171]** evidence is also susceptible to an inference that Mr. Weisbruch would have known that the analysts were likely to share his information with other manufacturers. At the time Mr. Weisbruch made these communications with analysts, he should have known that at least Longbow was routinely sharing competitor information among Defendants because Longbow's analysts were sharing other Defendants' information with him:

- In February 2011, Mr. Weisbruch received information from Longbow that National's "smaller competitors [we]re telling Longbow that they are serious about this [price increase], and while they don't feel comfortable leading future increases, they are more than ready to follow them." Ex. 1266.[58]
- In June 2011, Mr. Miling emailed Mr. Weisbruch to share "some commentary from a few of [National's] peers" (Eagle and USG). Ex. 1276.

[*246] • In September 2011, Longbow emailed Mr. Weisbruch and stated, "We spoke with Eagle earlier this morning to get their take on the matter . . . . Management's tone was much more stern in regard to this increase attempt relative to others, with EXP's CFO saying 'we're serious this time around.'"). Ex. 1277.

- In October 2011, Mr. Miling emailed Mr. Weisbruch **[**172]** to relay information regarding price increases and job quote elimination that Longbow had "just heard from [Mr. Weisbruch's] counterpart at PABCO." Ex. 1278.[59]
- On November 21, 2011, Mr. Miling emailed Mr. Weisbruch to inform him that "though USG has yet to announce a price increase, its L&W arm is quoting prices beyond January 1st with $35-40/MSF (~36%) escalators." Ex. 1589.

Thus, at least as to National Gypsum, there is plainly evidence sufficient to support a jury inference that National either used or attempted to use the analysts as conduits to pass information to competitors.

b. Lafarge Signaling Through Longbow?

Mr. Weisbruch was not the only one whose statements to Longbow later appeared in a report possessed by a third party.

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[56] *Compare* Ex. 1515 (notes from Sept. 2011 meeting with National); **[**170]** *with* Ex. 1346 (10/2/2011 Thompson flashnote, Lafarge copy)

[57] *Compare* Ex. 1515 (June 2012 meeting with National Gypsum) ("2013 price increases? A: verbal agreements[]for a large price increase in 2013. EXP is already out for guidance for 25%-30%"); *with* Ex. 1260 (USG copy of July Thompson report stating "TRG industry contacts are also telling us that manufacturers are discussing a sizable 2013 price increase to distributors (25%-30%), and we expect the industry will go on allocation by October. [. . .] Going forward, we remain acutely focused on ensuring that there aren't any cracks in the job quote elimination efforts."); *compare also* Ex. 1499 (Ms. Thompson asks Mr. Weisbruch in an email, "Do you think the industry will follow EXP's lead?" Weisbruch responds, "I'd be surprised if they didn't. As I've told you for the last six months or so, I feel like my competitors have legitimately tried to get the price up."); *with* Ex. 1259 ("TRG Opinion. Elimination of job quotes/price protection would be a positive for the wallboard industry, in our opinion. For this to work, however, all wallboard manufacturers would need to fall in line, and initial checks suggest this could be possible.").

[58] The price increase discussed in this quote refers to an increase prior to the one announced in September 2011.

[59] Longbow meant "just" literally. *See* Ex. 2030 (email from PABCO source to Miling at 11:03 a. m. on October 12, 2011); Ex. 1278 (11:07 email from Miling to Weisbruch regarding what Miling "just heard from your counterpart at PABCO"); Ex. 1122 (Miling dep.) at 100:3-103:1.

One of the documents that received a great deal of attention during the oral argument **[**173]** is Exhibit 1269. This exhibit is a document reflecting Zoran Miling's (Analyst, Longbow) notes from a 27-minute phone call he held with Steve DeMay (VP of Sales, Lafarge) on December 2011. Exs. 2169; 1122 (Miling dep.) at 312:5-10. The Court concludes the document supports Plaintiffs' assertions as to several plus factors.

This exhibit is two and half single-spaced pages, the length of which, in and of itself, raises the question: Why would Mr. DeMay give such in-depth confidential financial and pricing information to Mr. Miling, knowing it was likely to be repeated to others, including manufacturers?

The first heading in the memorandum, "Response to USG and Competing Increases," noted that Certain Teed had come out with a large dollar increase, and then commented that Lafarge expected "some degree of downward negotiation from [CertainTeed's price]." Ex. 1269. The notes reflect that Lafarge anticipated that "National and some of the others that have yet to announce will be out with a dollar amount shortly," and guessed that amount might be approximately 40%. Ex. 1269. The document then continues with further thoughts on Lafarge's possible pricing, which a fact finder might conclude Lafarge **[**174]** would have kept confidential in the absence of an agreement. Reference is also made to L&W, a USG subsidiary.

The letter continues with other comments consistent with Lafarge offering highly confidential information to Mr. Milling of Longbow, allowing a jury to infer that it is likely to find its being repeated in other communications.

Furthermore, the document uses the word "undermine" three times as in the following example: "Simply put, it does not appear that as though any of the manufacturers **[*247]** are using the above method to undermine the price increase. If they were, we would have heard about it. So far, so good." Ex. 1269. The use of the word "undermine" in this document and in this context may allow a fact finder to conclude that it was an "agreement" that was being "undermined." Moreover, this statement reflects the constant communications all Defendants were having about prices with customers, which by themselves are not at all illegal or improper. But this document permits an inference that the pricing information received from customers had also spread among other manufacturers, either by knowing use of their customers' reports, or by the use of Thompson and Longbow.

The last **[**175]** and perhaps most important aspect of this document is a comment relating to the industry's fears that USG could destroy the increase. After discussing USG, Mr. DeMay is quoted as having said: "if we see them raise their price to their break-even number of $125 mill-net, there will be a collective responds [sic] from all of us — National, Lafarge, CertainTeed — all respond."[60] Ex. 1269. This language was heavily debated at the oral argument. The Court cannot ignore the possibility of a fact finder concluding that the phrase, "collective responds [sic]" (probably intended to be "response"), indicates intercorporate communications, past, present, and future.

The memorandum concludes with Mr. DeMay saying, "if I could talk to my counterparts at the other manufacturers **[**176]** . . . ." Although Defendants attempt to rely on this phrase to show that Mr. DeMay was not communicating with other manufacturers, it is equally susceptible to the inference that Mr. DeMay wanted Mr. Miling to communicate this information to the other manufacturers for him. And indeed, portions of Exhibit 1269 appeared in a February 2012 Longbow report received by USG. *Compare* Ex. 1269; *with* Exs. 1624 at 9.[61]

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[60] Portions of this document, including the identification of some of the referenced manufacturers, were redacted until shortly before the oral argument. Longbow, which had initially requested the redaction, withdrew the request. However, because of the redaction, there was not deposition testimony of Mr. DeMay or Mr. Milling about the identities mentioned in the memo, because it was still redacted as of the date of deposition.

[61] Both documents say: "It remains to be seen what Certain Teed does in the short and [medium]-term with their new North Carolina plant, and subsequently how [*while Lafarge said "National," Longbow changed its language to "competing manufacturers"*] will respond. When firing up a plant you need to run it full on for three days a week, which equates to about 5M board feet each week. Clearly, you can only stockpile so much and this may indeed displace some of the other plants in the Carolinas (National) and Virginia (USG). How CertainTeed acts - that is, will they cut the price - remains to be seen . . . we can adjust to that - it won't kill the increase. [. . .] These are all known issues that we are prepared for and have contingency plans set in place."

A jury may find that Exhibit 1269 **[**177]** takes on even more sinister overtones in light of the fact that previous Lafarge communications had been quoted verbatim in Longbow reports. In July 2011, Longbow had a discussion with someone at Lafarge regarding pricing and Lafarge's impression of its competitor's pricing. Portions of Miling's notes of the call appear verbatim in a July 8, 2011 Longbow report.[62] Although **[*248]** Plaintiffs have not presented proof that Lafarge possessed the July report or knew that the company had been quoted verbatim, Plaintiffs have produced sufficient evidence from which a jury could infer that Lafarge knew that direct quotation of the December 2011 conversation was possible.

The sum total of the evidence documents at least two Defendants communicating sensitive **[**178]** information to Longbow and Thompson only for those analysts to reprint that information verbatim in reports that other Defendants obtained. Such conduit evidence, when viewed in light of the fact that all remaining Defendants either spoke to analysts and/or received analyst communications,[63] could lend a jury support in analyzing whether a conspiracy existed.

D. Defendants' Non-Price Conduct

Plaintiffs present evidence that Defendants limited supply in the months leading up to the 2012 and 2013 increases and declined opportunities to compete for customers. Plaintiffs argue that this evidence provides a plus factor from which a jury could conclude that Defendants had entered an agreement because this evidence amounts to actions against self-interest.

Defendants counter that the use of limiting supply prior to an increase predates the class period, and that manufacturers did so to prevent customers from "loading up" on a product in advance of an increase. Defs. Opening **[**179]** Br. at 72.

1. Limiting Supply

Plaintiffs argue that Defendants controlled distribution prior to the 2012 and 2013 increases in a way that materially differed from prior allocation plans. PSOF ¶ 298. Although Plaintiffs concede that Defendants sometimes prepared allocation plans, Plaintiffs argue that Defendants rarely actually implemented these plans prior to the 2012 and 2013 increase, and when they did, they only did so a brief time before the price increase. PSOF ¶ 298.

In contrast, Plaintiffs submit evidence that Defendants artificially limited their supply in both 2012 and 2013 for substantial periods prior to the increase.

a. Limiting Supply Prior to 2012 Increase

Prior to the 2012 increase, USG appears to have been the first manufacturer to decide to control distribution. Ex. 1580. On October 14, 2011, Mr. Salah sent an email to USG's president, explaining that although it was risky to control distribution because "some competitors may decide to produce more and flood the market," USG needed to go on controlled distribution on November 1, 2011 because a number of customers had indicated that they planned to overbuy prior to the January 1, 2012 increase to avoid the increase. Ex. **[**180]** 1580.

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[62] *Compare* Ex. 1280; *with* Ex. 2081 p. 7-8 ("Those who are down substantially are the ones who are supplying Lowes, as they are now trying to play catchup with Home Depot, who went to stocking Lightweight wallboard almost exclusively. What LOW has done is implemented a 2 week like review for all of its stores in patches . . . . When the industry releases volumes mid-month, I would expect to see industry volumes down in the mid to high single-digits.").

[63] Many of National's interactions with Longbow via Mr. Weisbruch have been detailed above, as have several of Lafarge's. As to PABCO, *see e. g.*, Ex. 1257. As to CertainTeed, *see e.g.*, Ex. 1858. As to American, *see e.g.*, Ex. 831.

On October 28, 2011, Eagle held an earnings call and National listened in. Following the call, Mr. George Beckwith forwarded around the transcript of the call, summarizing that Eagle said "they are very serious about a 35% price increase and are willing to take less volume to make it stick. They are also planning to shut down all of their wallboard plants for a 2 to 3 week period at the end of December (because it is a low volume period)." Ex. 1581. Walter Withrock (Dir. of Demand Management, National) and Craig **[*249]** Weisbruch (Sr. VP of Sales and Marketing, National) replied all to the email asking what the others at National thought about Eagle closing its plants, to which Mr. Thomas Cusack (position unknown, National) responded: "It seems to me that saying they are serious about the 35% increase, they are indirectly creating a shortage to make this happen. I can't imagine all their plants just happen to need maintenance at the same time." Ex. 1581.

On November 3, 2011, Lafarge also indicated that it planned to limit supply and indicated that it knew that other manufacturers were also limiting supply. Ike Preston (President, Lafarge) wrote: "We have focused on limiting the inventory **[**181]** build up [by distributors] by limiting production and not running overtime in the plants. Similar moves have been made by our competitors so we believe we have good reason to feel positive about the increase." Ex. 1505.

By November 21, 2011, Longbow was distributing reports alerting that National, American, USG, PABCO, CertainTeed, and Lafarge were limiting their supply to prevent customers from stock-piling inventory prior to the increase. Ex. 1589. Although Longbow noted the limits on supply, it also explained that "we still believe moderate pre-buying will take place, especially as inventory levels appear mostly normal." Ex. 1505.

Even as some manufacturers were coming up on a wallboard shortage, they stuck to their allocation plans. Scott Blanchard (VP Sales — West, USG) received an email that some customers were too low on board to wait for the amount they had been allocated. Ex. 1576. In response, Mr. Blanchard said that USG might open extra slots at the plant the next week, but they wouldn't be adding any full days. Ex. 1576. "It's in the best interest of the market to keep it tight in January." Ex. 1576.

A similar string of emails appears in PABCO's internal email. PABCO's Senior **[**182]** VP of Sales and Marketing wrote that "[i]n an oversupplied market with many participants bent on the increase's destruction PABCO's message needs to be strong along with that of our competitors." Ex. 1582. "It's a good thing to *not* fulfill all our customers' needs this week; an increase will be much easier to achieve if we help the industry create a wallboard scarcity." Ex. 1582.

b. Limiting Supply Prior to 2013 Increase

Manufacturers were more candid about their limited allocation of wallboard prior to the 2013 increase.

Longbow's July 2012 report indicated that Lafarge planned to go on a controlled distribution sometime between Labor Day and mid-October. Ex. 1690.

On August 6, 2012, Mark Burkhammer (Director of Sales, North, PABCO) sent an email to PABCO leadership writing: "I was told USG is going on allocation in September. We are also looking to allocate but I can't say I was ready to pull the trigger just yet. . . . Other manufacturers are doing the same planning. This will be an annual event to support increases." Ex. 1709.

On August 22, both USG and TIN sent internal emails indicating that both manufacturers would implement controlled distribution within the week. Ex. 1711, 1712. On **[**183]** August 23, Certain Teed internally noted that National and American had already gone on allocation in certain areas, and that Certain Teed "need[ed] to discuss process to implement our allocation as it appears conditions are upon us." Ex. 2203. National also admitted that "between the time that [National] announced its 2013 **[*250]** price increase and the effective date of that increase, [National] instituted product allocation on a regional bases, as needed." Defs. Resp. PSOF ¶ 440.

2. Declining to Compete for Customers

Refusal to stray from the increase started very soon after it was announced. In October 2011, one of National's customers approached USG when National wouldn't give the customer the price it wanted. Ex. 1553. Greg Salah (Sr. VP Sales and Marketing, USG) directed his sales staff to turn down the opportunity:

> [N]o single job or relationship is more important that [sic] USG getting our new pricing policy in place. As tempting as the job is, it violates our pricing policy established on 9/28. . . . [W]e are not in a position to provide special pricing.

Ex. 1553.

It's also clear that manufacturers were concerned not just about actually creating price competition, but creating even the impression that **[**184]** they intended to compete on price. Ex. 1561. In an email chain discussing USG's potential specific price increase for 1/1/12, a USG salesman indicated that he was ok that his area had a $15 spread with the competitive low: "We're within $5 of National. . . . If they even think we're trying for share we're dead. I'd rather they wake up on 3rd base saying.... 'wow.... USG is selling 5/8' to the majors at $200!" Ex. 1561.

This is also evident in one of Certain Teed's internal email exchanges. On November 18, 2011, a national accounts manager for Certain Teed emailed Steve Hawkins (VP of Sales, CertainTeed) asking how firm the increase was for Lowe's:

> Lowe's took an average increase of $10 in April 2011. While the market has retreated, the Lowe's increase stayed intact. I have started prepping Steve Edwards for our pending January 2012 increase. He has advised that 35%/$50 is a bit steep. We are also hearing market reports that retail is not expecting to take the full increase. Since we were able to hold the April increase, I would recommend only going up $35-45 to come to the $50 you are seeking.

Ex. 1520. Mr. Hawkins responded that CertainTeed "must fully support [sic] increase. . . . Makes **[**185]** no difference what happened last year . . . . We have no choice but to support." Ex. 1520.

In December 2011, National received an email from a potential customer, asking National if they were still "running some mobile home gypsum board." ¶ Ex. 1558. In an internal email exchange, two National sale staff guessed that the customer sent the email because Georgia-Pacific had sent out its announcement about pricing/job quotes. Bill Kelly (Dir. of Dealer Sales, National) responded: "Very likely the reason he asked. Now would be a very bad time to solicit somebody else's long term customer." Ex. 1558.

In January 2012, Lafarge's VP of Sales (Steve DeMay) had an email exchange with one of Lafarge's regional sales managers (Wayne Wilson). Mr. Wilson wanted to know about a regional pricing issue. Mr. DeMay responded: "I don't want to lose any high return business but as well do not want to be labeled as the price cutter. Both of these accounts are wholesalers so any move will likely be communicated to competition." Ex. 1563.

In October 2012, PABCO internally distributed a September 2012 Market Condition Report, revealing PABCO's fear that competitors could react negatively to any perceived attempt **[**186]** to grab market share. Ex. 1707. The report commented that "any perceived weakness or attempt to grab additional share with reduced pricing by **[*251]** any of the players could throw the price back into a destructive downward spiral." Ex. 1707. In his deposition, Phil Kohl (VP Sales and Marketing, PABCO) confirmed that PABCO was concerned about sending the wrong "signal" to competitors by extending a lower price past January's announced increase; they didn't want to undercut the price and they didn't want the other manufacturers to think PABCO was trying to undercut price increase. Ex. 1118 (Kohl dep.) at 226:12-228:19.

Although this evidence might create a compelling inference of collusion in a diverse market, the evidence that Defendants were concerned about other manufacturers' impressions is entirely consistent with an oligopolistic market. But, when combined with Plaintiffs' other evidence, it is possible that this evidence could contribute to Plaintiffs' ability to tend to exclude the possibility that Defendants acted independently.

XIV. Analysis — Consideration of Plus Factors

To avoid Summary Judgment, Plaintiffs must show that a jury could find:

1. Defendants' behavior was parallel;

2. Defendants **[**187]** were conscious of each other's conduct and awareness was an element in their decision-making processes; and

3. plus factors showing an actual agreement: (1) motive, (2) actions contrary to Defendants' interests, and (3) traditional conspiracy evidence.

In re Flat Glass Antitrust Litig., 385 F.3d 350, 360 n.11 (3d Cir. 2004). Defendants essentially concede the first two elements through their argument that they are not liable because there were merely following the leader. Implicit in such a defense is that Defendants' behavior was parallel, that they were conscious of each other's conduct, and that awareness was an element in their decision-making processes. Even if Defendants' theory of defense had been different, Plaintiffs have presented more than sufficient evidence for a jury to find that the first two elements have been satisfied.

Thus, the dispute in this case centers on whether Plaintiffs' evidence is sufficient for a jury to find plus factors indicating agreement. ***HN25***[] "[E]vidence of plus factors must tend to exclude the possibility of independent conduct." *In re Baby Food Antitrust Litig., 166 F.3d 112, 133 (3d Cir. 1999)*. "[T]he mere presence of one or more of these 'plus factors' does not necessarily mandate the conclusion that there was an illegal conspiracy between the parties, for the court may still conclude, based upon the **[**188]** evidence before it, that the defendants acted independently of one another, and not in violation of antitrust laws."' *Id. at 122* (quoting *Balaklaw v. Lovell, 822 F.Supp. 892 (N. D. N. Y. 1993))*.

The Court pauses again to reiterate that all Defendants have presented not only an innocent rational for their conduct, but also strong testimonial denials of reaching any agreement. But Defendants are not "entitled to summary judgment merely by showing that there is a plausible explanation for their conduct; rather the focus must remain on the evidence proffered by the plaintiff and whether that evidence tends to exclude the possibility that the defendants were acting independently." *In re Chocolate Confectionary Antitrust Litig., 801 F.3d 383, 397 (3d Cir. 2015)* (quoting *Rossi v. Standard Roofing, Inc., 156 F.3d 452, 466 (3d Cir. 1998))*. The court examines below the facts that might warrant a jury in rejecting Defendants' denials.

[*252] A. Motive

HN26[] "Evidence that the defendant had a motive to enter into a price fixing conspiracy means evidence that the industry is conducive to oligopolistic price fixing, either interdependently or through a more express form of collusion." *In re Flat Glass Antitrust Litig., 385 F.3d 350, 360 (3d Cir. 2004)*. It cannot be seriously contested that a jury could find that Defendants had the motive to enter an agreement to raise prices. Defendants own documents are littered with references to manufacturers' poor financial performance and the dire **[**189]** straits of the industry. And Plaintiffs' expert concluded that "[t]he market structure in the Paper-backed Gypsum Wallboard industry was conducive to the alleged Cartel." Ex. 1085 (Lamb Report).

But Plaintiffs' showing that Defendants had a plausible reason to conspire does not end the inquiry. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 597 n. 21, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)* ("We do not imply that, if petitioners had had a plausible reason to conspire, ambiguous conduct could suffice to create a triable issue of conspiracy.").

B. Actions Against Self-Interest

Whether defendants in an oligopolistic market acted against self-interest is a difficult question. Although the appellate case law is somewhat opaque in this area,[64] ***HN27***[] the Third Circuit has clarified that courts should equate "actions against self-interest" with "evidence of behavior inconsistent with a competitive market." *In re Chocolate Confectionary Antitrust Litig., 801 F.3d 383, 398 (3d Cir. 2015)*. But because of the interdependence problem, determining whether Defendants' actions would have been irrational in a competitive market is a more difficult question than it appears at first blush.

Defendants have resolutely asserted, in filing in their declarations and briefs, that all of the actions that they have taken were in their economic self-interest. Plaintiffs' evidence to the contrary is principally in reports by Plaintiffs' experts. The Court is wary of relying too heavily on expert reports on these points, but having reviewed the case law and factual and expert materials on this topic, the Court concludes that the following actions could be found by a fact finder to be against the Defendants' self-interest, along with other evidence:

- announcing a 35% price increase despite a lack of meaningful increase in demand;
- eliminating job quotes; and
- artificially limiting supply.[65]

[*253] Defendants may have legitimate economic reasons for taking these actions, as they have argued in their briefing and at oral argument. But a fact finder could find that each of these actions were inconsistent with actions that would be taken in a competitive market, particularly in the economic circumstances of this industry.

HN29[] When "no evidence suggests that the increase in list prices was correlated with any **[**192]** changes in costs or demand," a jury may conclude that defendants acted against self-interest. *In re Flat Glass Antitrust Litig., 385 F.3d 350, 362 (3d Cir. 2004)*. Plaintiffs have provided substantial evidence from which a jury could conclude that the dramatic increase in price was not correlated with any changes in cost or demand. *See, e.g.*, Ex. 1085 at 78 (Lamb Report) ("Wallboard prices rose despite near historically low demand, excess production capacity and stable or declining costs."); Ex. 1287 (PABCO internal email in Sept. 2011) ("[D]emand improvements are not coming any time some [sic]."); Ex. 1589 (Nov. 2011 Longbow report) ("Working against [the manufactures] is the same weak demand environment that has scuttled so many prior price increase attempts."); Ex. 1222 (USG's Form 10-K for financial year 12/21/2012) (indicating demand was low for wallboard in 2012). Had Plaintiffs presented no other evidence on this plus factor, the Court's conclusions about this plus factor would remain the same.

But Plaintiffs also submitted evidence that Defendants took other actions that a jury could perceive to be against Defendants' self-interest, or inconsistent with a competitive market. A jury could consider Defendants' decision to eliminate job quotes to have **[**193]** been against each Defendant's self-interest. Prior to American's announcement, job quotes had been frequently used by manufacturers as a means of providing discounts to large buyers and as a means of competing with one another on price. By eliminating job quotes, Defendants were

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[64] "The concept of 'action against self interest' is ambiguous . . . . [R]efusing to raise or lower prices unless rivals do the same could be against a firm's self-interest but nevertheless could spring from independent **[**190]** behavior." *In re Baby Food Antitrust Litig., 166 F.3d 112, 122 (3d Cir. 1999)*.

[65] The Court believes that ***HN28***[] evidence of a defendant declining to pursue another manufacturer's customer could be viewed as inconsistent with a competitive market. But, **[**191]** evidence that a defendant refused to adjust its list price in order to secure a new customer would not be so probative. *See Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., Inc., 998 F.2d 1224, 1244 (3d Cir. 1993)* ("Areeda warns courts not to consider a failure to cut prices or an initiation of a price rise as an action against self-interest because it also reflects the interdependence of the industry."). Plaintiffs ask the Court to make inferences that Defendants refused to compete with each other for customers, but most of the evidence they offer reflects Defendants refusing merely to adjust their list price to secure a new customer. *See, e.g.*, Ex. 1553 (USG refusing to accept a job because it violated the pricing policy they established in September 2011); Ex. 1563 (Lafarge declining to pursue a customer because they did "not want to be labeled as a price cutter"). The one exception is that Plaintiffs have submitted one document from which a jury could conclude that National declined to offer a customer National's list price because the customer had previously been Georgia-Pacific's customer. *See* Ex. 1558 ("Now would be a very bad time to solicit somebody else's long term customer.").

eliminating a major competitive tool and risking that any one Defendant would continue quoting jobs and steal substantial market share.

A jury would be permitted to find that eliminating job quotes was inconsistent with a competitive market. *Cf. Interstate Circuit v. United States, 306 U.S. 208, 233, 59 S. Ct. 467, 83 L. Ed. 610 (1939)* ("It taxes credulity to believe that the several distributors would, in the circumstances, have accepted and put into operation with substantial unanimity such far-reaching changes in their business methods without some understanding that all were to join, and we reject as beyond the range of probability that it was the result of mere chance."). As Plaintiffs' expert concluded, in a competitive market, Defendants would have been incentivized to retain job quotes to prevent loss of market share to another [manufacturer], because if one firm eliminated job quotes while the other firms did not, that firm would lose one means of competing with other firms for sales." Ex. **[**194]** 1085 (Lamb Report). Even a National employee admitted that such action was risky. Bill Kelly (Director of Dealer Sales, National), testified that by eliminating job quotes, National "could have substantially less business come the winter because [they] did not bid work in October and **[*254]** November when that . . . work was bidding." Ex. 1116 (Kelly dep.) at 182:19-24.[66]

A jury could also conclude that Defendants acted against their self-interest based on Plaintiffs' evidence that Defendants artificially limited supply prior to the effective date of the 2012 and 2013 increases.[67] *See* Ex. 1085 at 112 (Report of Russell Lamb) (concluding that "Defendants' supply restrictions in the fall of 2011 and again in the fall of 2012" was "inconsistent with unilateral economic self-interest in the absence of the alleged Cartel"). Plaintiffs' evidence would permit a jury to conclude that, at minimum, USG, American, and Lafarge put customers on allocation prior to the January 2012 increase,[68] and **[**195]** PABCO, USG, TIN, CertainTeed, and National went on allocation prior to the January, 2013 increase.[69]

By limiting the amount of product Defendants were willing to sell to their customers, Defendants were risking that their customers would go elsewhere. As explained by Plaintiffs' expert: "In a market free of the alleged Cartel, if one firm refused to supply Paper-backed Gypsum Wallboard to its customers, other firms would benefit from selling to them because they would gain larger market shares, improve their capacity utilization, reduce production costs, and make higher profits." Ex. 1085 (Lamb Report) at 66. Thus, a jury could reasonably conclude that those **[**196]** Defendants who put customers on allocation prior to the increases were acting inconsistently with a competitive market.

Although the Court finds that Plaintiffs have submitted sufficient evidence for a jury to conclude that all Defendants acted against their self-interests, the Court recognizes that this finding is not sufficient, by itself, to defeat summary judgment because Plaintiffs have not yet tended to exclude the possibility of interdependent conduct. *In re Flat Glass Antitrust Litig., 385 F.3d 350, 361-62 (3d Cir. 2004)*; *cf. In re Chocolate Confectionary Antitrust Litig., 801 F.3d 383, 398 (3d Cir. 2015)* (explaining that ***HN30***[] a showing the defendants had motive and acted against self-interest "is neither necessary nor sufficient to preclude summary judgment, at least where the claim is price fixing among oligopolists"). Rather, to elevate a finding of actions against self-interest to a finding that a jury could conclude that Defendants entered an agreement, Plaintiffs must supply traditional conspiracy evidence.

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[66] Mr. Kelly continued on to explain: "But this was a time and we felt an opportunity for us to get rid of a burdensome job-quoting process and we felt it was worth taking the risk." Ex. 1116 (Kelly dep.) at 182:24-183:2.

[67] It is a well-known antitrust principle that any concerted restrictions of output are per se illegal. *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 99, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984)*.

[68] Ex. 1580 (USG); Ex. 1581 (Eagle/American); Ex. 1505 (Lafarge); *see also* Ex. 1589 (Longbow report indicating that National, American, USG, PABCO, CertainTeed, and Lafarge had gone on allocation).

[69] Ex. 1709 (PABCO); Ex. 1711 (USG); Ex. 1712 (TIN); Ex. 2203 (Certain Teed); Defs. Resp. PSOF ¶ 440 (National); *but see* Ex. 1118 (PABCO's Kohl dep.) at 220:2-3 ("We had a plan in place that was never — never stuck to. We emptied our warehouses again in 2012.")

C. Traditional Conspiracy Evidence

HN31[] In *§ 1 Sherman Act* cases involving oligopolies, the "most important evidence will generally be non-economic evidence 'that there was an actual, manifest agreement not to compete.'" *In re Flat Glass, 385 F.3d at 361* (quoting *In re High Fructose Corn Syrup Antitrust Litig., 295 F.3d 651, 655 (7th Cir. 2002))*. Traditional conspiracy evidence "may involve 'customer indications of traditional conspiracy,' or **[**197]** 'proof **[*255]** that the defendants got together and exchanged assurances of common action or otherwise adopted a common plan even though no meetings, conversations, or exchanged documents are shown.'" *Id.* (quoting Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law***, 243 (2d ed. 2000)).

Plaintiffs have submitted sufficient traditional conspiracy evidence for a jury to conclude that American, National, PABCO, and Lafarge had entered an agreement in violation of the *Sherman Act*. But, Plaintiffs have fallen short as to Certain Teed.[70]

Before evaluating the evidence on a Defendant-by-Defenant basis, the Court pauses to consider three pieces of traditional conspiracy evidence that could be considered against one or more Defendants based on the Court's *Bourjaily* findings:

1. Keith Metcalf's (Sr. VP Marketing, Sales, and Distribution, American) April 2011 email indicating that there might be "a movement from all manufacturers to eliminate quotes," which was written a few weeks after all Defendants sent representatives to the Las Vegas trade meeting (Ex. 1165);

2. the notes from **[**198]** the call between Steve DeMay (VP of Sales, Lafarge) and Zoran Miling (Analyst, Longbow), indicating that National, Lafarge, and Certain Teed would react to certain price moves by USG (Ex. 1269); and

3. the notes from the meeting between Kathryn Thompson (Founder and Dir. of Research, Thompson) and Craig Weisbruch (Sr. VP Marketing and Sales, National) indicating that there were *verbal agreements* for a large price increase in 2013 (Ex. 1515).

These statements alone might prove to be sufficient traditional conspiracy evidence for a jury to conclude that Defendants reached an agreement in violation of the *Sherman Act*.[71] *Cf. In re Flat Glass Antitrust Litig., 385 F.3d 350, 363 (3d Cir. 2004)* ("[The manufacturer's] response to the Antitrust Division does not directly state that it agreed with [the defendant] to raise prices. But a reasonable factfinder could infer such an agreement from [the manufacturer]'s reference to an 'across the board' price increase."). And as outlined at length in this opinion, Plaintiffs have provided far more evidence than these three exhibits.

Additionally, ***HN32***[] Defendants' decision to eliminate job quotes may qualify as traditional conspiracy evidence to avoid summary judgment. In *In re Chocolate Confectionary Antitrust Litig., 801 F.3d 383, 410 (3d Cir. 2015)*, the plaintiffs attempted to rely on the defendants' departure from their pre-conspiracy conduct as traditional conspiracy evidence. The court explained that "[f]or a change in conduct to create an inference of a conspiracy, the shift in behavior must be a 'radical' or 'abrupt' change from the industry's business practices." *Id.* (quoting *Toys "R" Us, Inc. v. FTC, 221 F.3d 928, 935 (7th Cir. 2000))*. Given the evidence that job quotes had been a feature in the drywall industry since the 1980s and that all Defendants eliminated this practice within weeks of **[*256]** each other in fall 2011, a jury might be justified in concluding that Defendants' shift in behavior was radical enough to contribute to the inference of conspiracy.

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[70] The Court does not consider the traditional conspiracy evidence involving TIN or USG because those manufacturers have settled.

[71] These statements are not admissible against Certain Teed because CertainTeed did not make any of the statements and the co-conspirator exception to the rule against hearsay doesn't apply as **[**199]** to CertainTeed, unlike the other Defendants, because the Court concluded that Plaintiffs failed to show by a preponderance of the evidence that Certain Teed was a member of the conspiracy.

1. American

Plaintiffs' evidence permits the inference that American reached an agreement to raise prices and eliminate job quotes, and specifically that Mr. Metcalf reached an agreement with other manufacturers **[**200]** to eliminate job quotes and increase prices during the Las Vegas Trade meeting in April 2011 and that Mr. Powers communicated about the status of the agreement with PABCO the day before announcing the increase in fall 2011. *See, e.g.*, Ex. 1165 (April 2011 Metcalf email) ("We may have a movement from all manufacturers to eliminate quotes."); Ex. 2098 (explaining that Mr. Metcalf's September 2011 email was "referencing an anticipated announcement from one or more of the big boys relative to job quoting"); Ex. 1168 (PABCO email after American announcement) (indicating that Mr. Powers (President, American) and Mr. Duvall (Sales Manager, PABCO) had a conversation about lack of industry leadership the day before the American announcement); Ex. 1110 (Harris dep.) at 67:8-68:24 (CertainTeed's expert's deposition) (testifying that he would expect a company announcing the changes that American announced in fall 2011 to have conducted more formal analysis).

2. National

Plaintiffs' evidence permits the inference that National participated in agreements to eliminate job quotes and raise prices, largely because of the frequent communications between Craig Weisbruch (Sr. VP Sales and Marketing, National) **[**201]** and analysts at Thompson and Longbow. *See, e.g.*, Ex. 1277 (email between Mr. Weisbruch and Thompson) ("I think this is the beginning of *the manufacturers* telling the market that we have to have a 'fair' price for our goods. . . ." (emphasis added)); Ex. 1560 (Withrock October 2011 email) ("I'd hate to think we blow the entire deal because American thinks we've *broken ranks* and job quoted well into 2012 in their backyard." (emphasis added)); Ex. 1515 (Thompson's notes from a June 2012 meeting with Weisbruch) ("2013 price increase? A: *verbal agreements* for a large price increase in 2013. . . . *[T]he industry* will be on planned distribution for the last 2-3 months to curtail excessive pre-buy activity." (emphasis added)).

3. PABCO

Plaintiffs' evidence permits the inference that PABCO participated in an agreement to eliminate job quotes and raise prices. *See, e. g.*, Ex. 1287 (email from PABCO's Director of Sales, South in September 2011) ("It will take strong united effort by all manufacture [sic] to manage current job pricing and improve forward pricing for this increase attempt to yield any price improvement."); Ex. 1168 (PABCO email after American announcement) (indicating that Mr. Powers **[**202]** (President, American) and Mr. Duvall (Sales Manager, PABCO) had a conversation about lack of industry leadership the day before the American announcement and that "[e]liminating job quotes would be a great start for *the* price improvement" (emphasis added)); Ex. 1244 (email from PABCO's Director of Sales, North on 9/27/2011) ("I am suggesting, wherever and to whoever will listen, that the manufacturers have to police. . . . [G]etting something done by seven manufacturers for the good of the industry is like being in the house of reps in DC."); Ex. 1278 (indicating that PABCO gave advanced notice of its price increase to Longbow and that within minutes of receiving that notice, Longbow forwarded the information to Craig Weisbruch at National); Ex. 1709 (email from PABCO's Director of **[*257]** Sales, North on 8/6/2012) ("Other manufacturers are doing the same planning [for allocation prior to the 2013 increase]. This will be an annual event to support price increases."); Ex. 1707 (10/9/2012 email from PABCO's VP of Sales and Marketing) ("[A]ny perceived weakness or attempt to grab additional share with reduced pricing by any of the players could throw the price back into a destructive downward spiral.").

4. Lafarge

Plaintiffs' **[**203]** evidence permits the inference that PABCO participated in an agreement to eliminate job quotes and raise prices, particularly in light of the information shared between Steve DeMay and Longbow in December

2011. *See, e.g.*, Ex. 1102 (DeMay dep.) at 151:17-21 (testifying that he didn't recall anyone putting anything in writing to justify the 2012 price increase and elimination of job quotes); Ex. 1269 (notes from 12/7/2011 call with Longbow) ("If we see [USG] raise their price to their breakeven number of $125 mill-net, there will be a collective responds [sic] from all of us — National, Lafarge, CertainTeed — we all respond. . . . If I could talk to my counterparts at the other manufactures [sic], I would tell them that the table is set and that we must show a degree of fortitude that we have not shown in years.").

5. CertainTeed

Unlike the other Defendants, there is a dearth of evidence of any communications by CertainTeed or other plus factors that could create the inference of conspiracy. *See, e. g.*, Ex. 1491 (email from CertainTeed Regional Manager upon receiving 2011 American announcement) ("Here it is. USG probably will be next."); Ex. 1520 (email from Regional Manager) (refusing **[**204]** to offer Lowe's a lower percentage increase even though Lowe's had absorbed an earlier price increase that the rest of the market had not absorbed).

As explained in the Court's *Rule 104* findings, the Court is unable to conclude that Plaintiffs have shown by a preponderance of the evidence that CertainTeed was a member of a conspiracy so as to allow statements by other Defendants to be admissible against Certain Teed. The Court has considered that Steve DeMay's (VP of Sales, Lafarge) memorialized comment to Zoran Miling (Analyst, Longbow) would have been perhaps the most persuasive evidence against CertainTeed. *See* Ex. 1269 (notes from 12/7/2011 call with Longbow) ("If we see [USG] raise their price to their breakeven number of $125 mill-net, there will be a collective responds [sic] from all of us — National, Lafarge, CertainTeed — we all respond."). But the Court cannot consider Exhibit 1269 against CertainTeed because the record fails to demonstrate that CertainTeed communicated with other manufacturers or analysts on par with the other Defendants, and therefore, does not show any factual basis for Mr. DeMay to have referenced Certain Teed. The record does show interchanges between Longbow **[**205]** and National. Thus, the Court can consider the exhibit against National and Lafarge because the record supports the Court concluding that they were co-conspirators for the purpose of *Federal Rule of Evidence 802(d)(2)(E)*. But, Plaintiffs have not proven CertainTeed a co-conspirator under that rule, and thus, that statement is inadmissible hearsay as against Certain Teed.

What the Court is left with then are two types of traditional conspiracy evidence that the Third Circuit has indicated in dicta might permit an inference of a conspiracy: (1) a sudden and abrupt change in business practices (*i.e.*, the elimination of job quotes) and (2) evidence that the other firms in the drywall industry entered into an agreement and that CertainTeed acted consistent with the other firms' **[*258]** actions. *See* *In re Chocolate Confectionary Antitrust Litig., 801 F.3d 383, 410 (3d Cir. 2015)* (rejecting the plaintiffs' argument, which was that a change in the defendants' conduct qualified as traditional conspiracy evidence, because the change was not abrupt enough); *In re Flat Glass Antitrust Litig., 385 F.3d 350, 363 (3d Cir. 2004)* (indicating that an inference of conspiracy may be permissible if there evidence that a defendant acted parallel to other firms and there is evidence that those other firms entered an agreement). The Court is not convinced that a jury would be justified in concluding, **[**206]** based on this traditional conspiracy evidence alone, that CertainTeed entered an agreement.

Although the Court accepts that Defendants' elimination of job quotes was a radical and abrupt change from prior business practice, the Court is unwilling to read *Chocolate* as indicating that a radical change alone would be sufficient to create an inference that Certain Teed entered an agreement. As for the other Defendants, the evidence of the abrupt change in business practice gains weight because it is coupled with other indicia of conspiracy.

Nor can the fact that CertainTeed made comparable price decisions to the other Defendants save Plaintiffs' claims against CertainTeed, even when considering the abrupt change in business practices alongside the parallel behavior of CertainTeed and the other Defendants. The Court reaches this conclusion despite the Third Circuit's indication that when evidence tends to show that "six firms act in parallel fashion and there is evidence that five of the firms entered into an agreement, . . . it is reasonable to infer that the sixth firm acted consistent with the other five firms' actions because it was also party to the agreement." *In re Flat Glass, 385 F.3d at 363*. Although CertainTeed **[**207]** acted in parallel fashion to the other Defendants, the evidence as to CertainTeed is far less than the evidence implicating the other Defendants. Thus, the Court concludes that, even considering all the evidence in the light most favorable to Plaintiffs, making an inference based solely on CertainTeed's parallel conduct and the elimination of job quotes is not sufficient to defeat summary judgment.

Unlike the other Defendants, it is undisputed that Certain Teed did engage in a documented decision-making process before following American's lead: it "obtained information from customers, evaluated the impact of its announcement on CertainTeed's operations and financials; its senior managers evaluated the pros and cons of an announcement; and it considered the responses made by competitors." Ex. 1110 (Harris dep.) at 67:8-68:24. And this fact is not genuinely disputed by Plaintiffs.

The Court notes the over 90 declarations filed by CertainTeed in support of its Motion for Summary Judgment, and finds Plaintiffs' evidence has failed to substantially challenge Certain Teed's *Rule 56* showing, which stands in contrast to Plaintiffs' persuasive showing as to the other Defendants. There are only a few **[**208]** communications between research analysts and CertainTeed, and those communications are far fewer than those among those analysts and Lafarge or National. There is no evidence that CertainTeed provided the type of information to analysts that was provided by National and Lafarge. And unlike PABCO or American, there is no evidence allowing an inference that CertainTeed spoke with a competitor shortly before making a major pricing decision.

The relative lack of evidence that CertainTeed communicated with other manufacturers or analysts coupled with the evidence that CertainTeed did take steps indicative of independent decision making, result in the Court's conclusion that a **[*259]** jury could not reasonably make the inference that Certain Teed participated in an agreement in restraint of trade.

IX. Conclusion

When Plaintiffs evidence is considered as a whole, it tends to exclude the possibility that National, American, PABCO, and Lafarge acted independently, or even interdependently. Therefore, Defendants' Motions for Summary Judgment are being **DENIED** as to those Defendants. Plaintiffs' evidence does not tend to exclude the possibility that CertainTeed acted independently, and therefore, Certain **[**209]** Teed's Motion for Summary Judgment will be **GRANTED**.

"[C]ertainty generally is illusion, and repose is not the destiny of man." Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 Harv. L. Rev. 457 (1897). We tell jurors they may find facts without any strict rules, but based on common sense, circumstantial evidence, etc., putting no blinders on their deliberative decision making. In contrast, *Federal Rule of Civil Procedure 52(a)(1)* requires a judge sitting without a jury to "find the facts specially" and to state "conclusions of law separately." Similarly, in ruling on a summary judgment motion, judges should explain whether the evidence presented would allow a jury to make inferences in favor of the party opposing the motion. In this price-fixing antitrust case, within an oligopolistic industry, strict rules govern what inferences may be drawn from the evidence.

Because of the voluminous factual details presented by Plaintiffs, this lengthy opinion was appropriate to summarize the facts warranting the Court's conclusions as to what inferences a jury could or could not draw. The Court recognizes Defendants' exposure to significant and trebled damages, which the putative class might be able to prove if, as, and when a class is certified and proceeds to trial.

[210]** Thus, the judge's function in ruling on summary judgment is as a "gatekeeper" through which the parties must pass. Denial of a summary judgment motion bestows a legal "rite of passage"—like the trials and tribulations facing the Prince and Papageno in Mozart's *The Magic Flute*, or the adventures of Ulysses in ancient Greece.

At trial, the jury then has free rein to actually determine what inferences it will make, which may be the same, or entirely different, than the inferences the judge has stated the jury must be allowed to make.

Although pressures to settle may be present, the defendants still have the option of succeeding on a directed verdict at the close of the plaintiffs' evidence (perhaps the evidence from the mouths of witnesses falls short of the "paper" that was successful in defeating summary judgment)—or in presenting, live, their officers and managers who are found more credible than the inferences plaintiffs advocate, resulting in a defense jury verdict, and again on post-trial motions, and again on appeal. The denial of summary judgment may be a temporal defeat for four Defendants, it need not be the end of the case.

"Now this is not the end. It is not even the beginning **[**211]** of the end. But it is, perhaps, the end of the beginning." Winston Churchill, Remarks at the Lord Mayor's Luncheon at Mansion House: The End of the Beginning (November 10, 1942).

ORDER

AND NOW, this 18th day of February 2016, after review of Defendants' Joint Motion for Summary Judgment and Supporting Statement of Facts (ECF 206, 211), Defendant Certain Teed's Motion for **[*260]** Summary Judgment (ECF 207-08), Defendant Lafarge's Motion for Summary Judgment (ECF 204), Defendant PABCO's Motion for Summary Judgment (ECF 205), Plaintiffs' Response thereto (ECF 249-50), and Defendants' Replies thereto (ECF 280-85), it is hereby **ORDERED** that:

1. Defendants Motions for Summary Judgment are **DENIED** as to Defendants American, National, Lafarge, and PABCO; and

2. Defendants Motions for Summary Judgment are **GRANTED** as to Defendant Certain Teed.

BY THE COURT:

/s/ Michael M. Baylson

MICHAEL M. BAYLSON, U.S.D.J.

Hunter v. Holsinger

United States District Court for the Western District of Virginia, Harrisonburg Division

February 19, 2016, Decided

Civil Action No. 5:15-cv-00043

Reporter

2016 U.S. Dist. LEXIS 20057 *

CHASE CARMEN HUNTER, Plaintiff, v. LESLEY J. HOLSINGER, et al., Defendants.

Subsequent History: Adopted by, Dismissed by, Motion denied by, Motion denied by, As moot Hunter v. Holsinger, 2016 U.S. Dist. LEXIS 38286 (W.D. Va., Mar. 24, 2016)

Prior History: *In re Hunter, 588 Fed. Appx. 232, 2014 U.S. App. LEXIS 23847 (4th Cir., 2014)*

Core Terms

conspiracy, alleges, email, dog, license, Counts, pleadings, immunity, motion to dismiss, antitrust, insurance policy, expectancy, amend, recommendations, parties, notice, rights, procure, cause of action, motion to amend, pro se, courts, matter of course, construe, requests, revoked, dismissal with prejudice, tortious interference, declaratory judgment, propose an amendment

Counsel: **[*1]** Chase Carmen Hunter, Plaintiff, Pro se, Fredericksburg, VA USA.

For Leslie J. Holsinger, Individually and in her official capacity as an officer for the Staunton Police Department, also known as Lesley J. Holsinger, Defendant: Mandi Jo Montgomery Smith, LEAD ATTORNEY, Timberlake Smith Thomas & Moses, PC, Staunton, VA USA.

Carrie Ann Robertson, also known as Carrie Ann Massie, Defendant: Charles Andrew Bolt, LEAD ATTORNEY, Blue Ridge Legal Services, Harrisonburg, VA USA.

Judges: Joel C. Hoppe, United States Magistrate Judge.

Opinion by: Joel C. Hoppe

Opinion

REPORT & RECOMMENDATION

By: Joel C. Hoppe

United States Magistrate Judge

Plaintiff Chase Carmen Hunter filed this action *pro se* against Lesley J. Holsinger and Carrie Ann Robertson ("Defendants"). Pending before the Court are Holsinger's motion to dismiss, ECF No. 24, Robertson's motion to dismiss, ECF No. 16, and Hunter's motions to amend the complaint, ECF Nos. 38-41. These motions are before me by referral under 28 U.S.C. § 636(b)(1)(B). The parties have briefed and argued the issue, and the matter is ripe for decision. After considering the pleadings, the parties' briefs and oral arguments, and the applicable law, I find that Hunter has failed to state a claim that entitles her to relief **[*2]** and that the proposed amendment of her Complaint would be futile. I therefore recommend that the presiding district judge grant Holsinger and Robertson's motions to dismiss and deny Hunter's motions to amend her complaint.

I. Procedural History

On June 4, 2015, Hunter filed a Complaint alleging ten counts against Holsinger alone and another four counts against both Defendants. ECF No. 2. Robertson and Holsinger filed separate motions to dismiss, ECF Nos. 16, 24, and Hunter responded with briefs in opposition that also contained many facts not within the Complaint, ECF Nos. 38, 39, 41. At oral argument and by Order on November 25, 2015, ECF No. 55, the Court interpreted Hunter's responsive briefs as a motion to amend her complaint and granted further briefing on the issue. Hunter filed a brief in support of her motion, ECF No. 44, Robinson and Holsinger filed briefs in opposition, ECF Nos. 58, 59, and Hunter filed reply briefs in support, ECF Nos. 60, 63.

II. Facts

For the purposes of the motions to dismiss, the Court accepts as true all of Hunter's well-pled facts and construes them in the light most favorable to her. *Philips v. Pitt Cty. Mem'l Hosp., 572 F.3d 176, 180 (4th Cir. 2009)*. Holsinger is an animal control officer for the City of Staunton, Virginia, **[*3]** and Robertson is a dog owner within Holsinger's jurisdiction. Compl. ¶¶ 1, 22-23. On March 26, 2015, Holsinger entered into the Virginia Department of Agriculture and Consumer Services online database that Robertson's dog had bitten someone. *Id.* ¶ 4. Roughly the same time, she informed Robertson of *Virginia Code § 3.2-6540(F)*, which requires owners of dogs that have been found dangerous to have liability insurance covering animal bites up to at least $100,000, or a surety bond of at least $100,000. *Id.* ¶ 1; *see Va. Code Ann. § 3.2-6540(F)*. She told Robertson that she "must purchase 'a separate policy with only the dog on it' and that Robertson must buy this policy from 'Lester Kalmanson Agency or xinsurance' because these are the only two providers [of policies with] 'only the dog' on them." Compl. ¶ 2. Hunter states that Holsinger pressured Robertson to comply over the next two months, including calling her repeatedly, saying she would euthanize her dog, and threatening to report Robertson—who was on supervised release—to her probation officer. *Id.* ¶ 1.

In early May 2015, Hunter assisted Robertson in procuring an insurance policy to satisfy *Virginia Code § 3.2-6540*.[1] *Id.* ¶ 2. When Robertson presented this policy to Holsinger on May 15, Holsinger informed her **[*4]** that Hunter was not licensed in Virginia and was under investigation. *Id.* ¶¶ 2, 25. She said Robertson's policy was fake, not legal, and failed to satisfy the statute. *Id.* Hunter alleges that Holsinger's statements about her were false, Holsinger knew they were false, and Robertson should have known they were false. *Id.* ¶¶ 2, 25. Holsinger referred Robertson to a renter's insurance policy from Farmer's Insurance Company that she said complied with *Virginia Code § 3.2-6540*. *Id.* ¶ 3. Hunter alleges that Holsinger coached Robertson to lie on her application to Farmer's by denying that her dog had bitten someone. *Id.* ¶ 4.

Despite Hunter's assurance that Holsinger's statements were false, Robertson demanded a refund, ordered Hunter to charge no future installment payments, and canceled the credit card associated with her policy. *Id.* She insulted Hunter, calling her pathetic, among other things. *Id.* ¶ 25. She further "filed complaints against Hunter with Holsinger, her credit card issuer, **[*5]** and the Bureau of Insurance, and posted comments about Hunter on the internet." *Id.* Hunter alleges that Holsinger told Robertson how to file the complaint with the Bureau of Insurance. *Id.* ¶ 26.

Hunter derives fourteen causes of action from these events. Against Holsinger alone, she alleges: conspiracy in restraint of trade and to create a monopoly in violation of *Sections 1* and *2* of the Sherman Act (Counts I and II), blackmail in violation of *18 U.S.C. § 873* (Count IV), deprivation of constitutional rights in violation of *42 U.S.C. § 1983* (Count V), conspiracy to interfere with civil rights in violation of *42 U.S.C. § 1985* (Count VI), failure to prevent

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[1] The exact nature of Hunter's business was unclear in the Complaint; however, in her motion to amend, Hunter clarifies that she is "an insurance agent who helps consumers obtain liability insurance for their dogs." ECF No. 39, at 5.

a conspiracy to interfere with civil rights in violation of *42 U.S.C. § 1986* (Count VII), accessory after the fact in violation of *18 U.S.C. § 3* (Count VIII), misprision in violation of *18 U.S.C. § 4* (Count IX), conspiracy against constitutional rights in violation of *18 U.S.C. § 241* (Count X), and deprivation of rights under the color of law in violation of *18 U.S.C. § 242* (Count XI). Against both Defendants, she alleges: a crime affecting insurance in violation of *18 U.S.C. § 1033* (Count III), common law fraud (Count XII), tortious interference with a business expectancy (Count XIII), and conspiracy (Count XIV). She requests monetary damages, declaratory and injunctive relief, **[*6]** and attorney's fees.

Hunter premises recovery for four of her counts—Counts III, IV, X, and XI—on *18 U.S.C. § 1964(c)*, part of the Racketeering Influenced and Corrupt Organization Acts ("RICO"), *18 U.S.C. §§ 1961-68*. In her motion to dismiss, Holsinger challenged the relevance of this statute under the facts of the Complaint. ECF No. 25, at 29-30. Hunter's responsive briefs contained a rebuttal to Holsinger's arguments and a significant amount of new facts detailing her RICO allegations. *See* ECF No. 38, at 4-32; ECF No. 39, at 5-35.[2] Both briefs end by requesting the Court "to allow Hunter to amend her complaint to include the details shown above," ECF No. 38, at 34; ECF No. 39, at 36, leading the Court to interpret these briefs as motions for leave to file an amended complaint.

In her proposed amended facts, Hunter states that she is one of only a few insurance agents who sell policies covering dangerous dogs. ECF No. 39, at 5-6. In 2009, **[*7]** one of her competitors in this market, Mitchel Kalmanson, sued her and others in Florida state court.[3] *Id.* at 6. Though the contours of this dispute are not clear, it eventually resulted in an April 2011 judgment against the defendants for ten million dollars. *Id.* Hunter alleges many defects with the case and judgment, including failure to effect service, forged records of hearings that never occurred, and court orders (including the final judgment) being entered by her opponents rather than a judge. *Id.* at 6-9. Hunter concludes that all court orders from this case and the judgment against her are "fraudulent" and not legally binding.[4] *Id.* at 6, 11. Hunter's attempts to challenge the judgment on direct appeal and with additional suits in Florida have been unsuccessful. *Id.*

In 2012, Kalmanson began attempting to collect on his judgment in multiple states, including Virginia.[5] *Id.* at 11-17, 22-23. Hunter challenged the judgment and Virginia collection efforts **[*8]** in Virginia state court and the United States District Court for the Eastern District of Virginia, but was not successful. *Id.* at 11-14. In January 2015, a Virginia judge ordered Hunter's property in Chesterfield County sold to satisfy the Florida judgment. *Id.* at 15-16. The locks on her property were changed, and Hunter has lost the rental income from that property. *Id.* at 16. Collection efforts have also resulted in multiple orders for Hunter's arrest, *id.* at 12-14, 19, 22-23, and two periods of imprisonment in Virginia for eight days each in 2012, *id.* at 12, 22-23. Hunter calls these arrests "kidnapping" performed "in cooperation with the criminal conspiracy arising from Florida." *Id.* at 14.

In October 2014, the Virginia Bureau of Insurance ("VBI") initiated an investigation into **[*9]** Hunter's business.[6] *Id.* at 14. The pleadings do not provide much detail on the proceedings, but it appears that the VBI took issue with

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[2] Hunter's opposition to Robertson's motion to dismiss, ECF No. 38, and her opposition to Holsinger's motion to dismiss, ECF No. 39, are largely identical in their recitation of new facts. For simplicity, the Court will cite to ECF No. 39 for all material identically presented in both motions.

[3] Hunter does not say who the other parties in the suit were, only that she was one of the defendants. ECF No. 39, at 9.

[4] Though this is a legal conclusion and need not be taken as true by the Court, Hunter's reasoning on this point is important to understanding her perspective and subsequent claims.

[5] Hunter "once lived in Virginia," ECF No. 39, at 13, and as of January 2015 still owned rental property in Chesterfield County, *id.* at 16. Her complaint does not provide her current residence, instead stating she "is a citizen of the United States of America and not a resident of Virginia, during all times relevant," Compl. ¶ 21, though she also states elsewhere that her state of residence is Massachusetts, ECF No. 39, at 33, and she mailed her Complaint from an address in California, ECF No. 2-1.

[6] Through a request under the North Carolina Freedom of Information Act, Hunter received emails between the North Carolina Department of Insurance ("NCDI") and the VBI. ECF No. 39, at 14-15. A September 11, 2014, email from an NCDI employee suggests to a VBI employee that the VBI take action against Hunter in an **[*10]** attempt to "corral" her. *Id.*

Hunter's website, *id.* at 19, and that they wrangled over production of documents, *id.* at 20. Concerning the documents, Hunter states both that the VBI "never alleged that Hunter had [or] was required to have" the requested documents and that she actually did respond to the request. *Id.* Nevertheless, the VBI threatened to fine her for failure to produce documents. *Id.* The proceeding ended with the VBI revoking Hunter's license, allegedly solely for Hunter's failure to produce the requested documents. *Id.* at 21. Hunter pleads multiple procedural defects with the VBI's process, especially the handling of her second administrative hearing, and consequently labels the order revoking her license "void." *Id.* at 21. Hunter reports that administrative action has also been taken against her by the Florida Department of Financial Services and the Texas Department of Insurance.[7] *Id.* at 17-18.

Hunter responded to Kalmanson's collection efforts and the VBI's actions with numerous additional lawsuits. She filed a petition with the Virginia Supreme Court alleging that Virginia judges violated state law in their attempts to enforce the Florida judgment. *Id.* at 20. The Virginia Supreme Court denied her request for a fee waiver, and Hunter did not pursue the petition further. *Id.* at 19-20. Hunter filed a federal suit and a petition with the Virginia Supreme Court challenging the VBI's authority to interfere with her business. *Id.* at 19. After the VBI's revocation of her license, she lodged an appeal with the Virginia Supreme Court and moved for recusal of every Justice due to allegedly rampant fraud and deceit by Virginia judges. *Id.* at 21-22. By Hunter's own account, none of these suits have resulted in overturning the Florida judgment, halting the efforts to collect on that judgment, or overturning the VBI's revocation of her Virginia license. *Id.* at 19-22.

With this **[*11]** background established, Hunter moves on to describe the events underlying the instant suit in greater detail.[8] Robertson first contacted Hunter on May 4, 2015, for help procuring an insurance policy for her dog. *Id.* at 24. In a May 7 email to Hunter, Robertson stated that her dog "must be on a policy of his own [for] 100,000." *Id.* at 25. Robertson also stated in emails to Hunter that "the dog warden had been calling me non stop [sic]," *id.* at 28 (May 13 email), and "I need [the policy] number or our dig [sic] will be taken," *id.* (May 12 email). On May 12, Hunter charged Robertson's credit card for an insurance policy and emailed a copy of the receipt to Robertson. *Id.* at 25. Robertson forwarded her policy information to Holsinger the same day. *Id.*

On May 13, Holsinger received an email from Shane Ayers, another Staunton police officer, that stated "Bill called the other day and said that [Hunter] was not licensed to do insurance in Virginia." *Id.* at 24. Hunter identifies Bill as William Stanton, an employee **[*12]** of the VBI and Virginia State Corporation Commission. *Id.* In either the same email or another email on May 13, Ayers also told Holsinger "you might let [Robertson] know that we approved insurance from PRIME (on-line) and Farmers Insurance." *Id.* at 27. Hunter relates later that "Public records Hunter obtained from the Virginia Department of Agriculture and Consumer Services in May 2015 show that all other dog owners in Holsinger's jurisdiction met Holsinger's demand for insurance with PRIME contracts which are a 'separate policy with only the dog on it.'" *Id.* at 34.

Robertson emailed Hunter on May 15, stating that she had discovered Hunter was not licensed in Virginia, the "dog warden could not accept your fake policy and is actually working with an investigator," Hunter did not have permission to access money from her account, she had canceled her card, and she demanded a refund. *Id.* at 28-29. Hunter told Robertson that she had been given incorrect information and that the her insurance policy was valid. *Id.* at 29. In a May 18 email, Robertson informed Hunter that she "had to get a new insurance policy, a legal one, and actually the dog warden sent me to this company." *Id.* Robertson again demanded a refund and stated "your **[*13]** [sic] so pathetic you don't even have a real phone number for your clients to call." *Id.* at 29. Robertson forwarded her correspondence with Hunter thus far to Holsinger on May 19. *Id.* at 32.

Robertson was aware of the instant suit against her and Holsinger by May 25, 2015. *Id.* at 30. By email to Hunter that day, she disputed Hunter's claim that she lied on her Farmer's Insurance application, stating she had correctly

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[7] Hunter states that the "record in the [VBI] administrative hearing proves that the [VBI] sought to revoke Hunter's license so that it could cause each of Hunter's non-resident state insurance licenses to be terminated." ECF No. 39, at 22.

[8] The additional detail comes largely from emails between Robertson and Hunter and documents procured under the Virginia Freedom of Information Act ("VFOIA") from the Staunton Police Department. *See* ECF No. 39, at 31 (describing the VFOIA request).

indicated that she had "never had to file an insurance claim for her dog biting anyone." *Id.* On May 26, Robertson sent Hunter an email with an attached document that she describes as the letter Holsinger received from the VBI that led her to deny the policy Hunter helped Robertson procure. *Id.* at 31. Hunter describes the attachment as "a generic-looking document of no known source . . . [which] appeared to be a 'case summary' of the [VBI's] insurance administrative action against Hunter." *Id.* Hunter's VFOIA request did not discover an email from the Staunton Police Department to Robertson with this document attached. *Id.*

Robertson also emailed Holsinger on May 26. She wrote that she had received a copy of the Complaint against them and that it was "packed with lies," including Hunter "saying you threatened **[*14]** me and coerced me into a bunch of stuff which is all untrue." *Id.* at 32. Robertson said that she would send Holsinger all email between her and Hunter that she had not already provided and requested that Holsinger call her. *Id.* Hunter concludes from these facts that participants in the RICO conspiracy originating from Florida solicited the Defendants' participation and the Defendants willfully joined in the RICO conspiracy against Hunter. *Id.* at 24, 32-33.

Hunter's brief also addresses some issues that are less directly tied to the narrative underlying her causes of action. Hunter expands upon her request in the Complaint for "a conclusive declaratory judgment clarifying the legal relations of the parties," Compl. ¶ 13, by listing four specific questions that she contends are real and imminent disputes ripe for declaratory judgment. ECF No. 39, at 2. She also reiterates her arguments that *Virginia Code §§ 3.2-6540(F)* and *38.2-2128* violate federal law regarding interstate commerce, *id.* at 23, and states that the National Association of Insurance Commissioners "functions in violation of federal law because it actively regulates interstate commerce," *id.* at 24.

II. Standards of Review

A. Motions to Dismiss

A complaint must "state[] a plausible claim for relief" that **[*15]** "permit[s] the court to infer more than the mere possibility of misconduct." *Ashcroft v. Iqbal, 556 U.S. 662, 679, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. In making this determination, the court accepts as true all well-pled facts and construes those facts in the light most favorable to the plaintiff. *Philips, 572 F.3d at 180*. The court need not accept "legal conclusions, formulaic recitation of the elements of a cause of action, or bare assertions devoid of further factual enhancements," however, as those are not well-pled facts for Rule 12(b)(6)'s purposes. *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc., 591 F.3d 250, 255 (4th Cir. 2009)* (citing *Iqbal, 556 U.S. at 678*).

Plaintiffs must plead enough facts to "nudge[] their claims across the line from conceivable to plausible," and the court should dismiss a complaint that is not "plausible on its face." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. Determining whether a complaint states a plausible claim for relief is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal, 556 U.S. at 679*. Federal courts have an obligation to construe *pro se* pleadings liberally, so that any potentially valid claim can be fairly decided on its merits rather than the *pro se* litigant's legal acumen. *Rankin v. Appalachian Power Co., No. 6:14cv47, 2015 U.S. Dist. LEXIS 10749, 2015 WL 412850, at *1 (W.D. Va. Jan. 30, 2015)* (citing *Boag v. MacDougall, 454 U.S. 364, 365, 102 S. Ct. 700, 70 L. Ed. 2d 551 (1982))*. Still, "a *pro se* plaintiff must . . . allege facts that state a cause of action, and district courts are not required 'to **[*16]** conjure up questions never squarely presented to them.'" *Considder v. Medicare, No. 3:09cv49, 2009 U.S. Dist. LEXIS 132571, 2009 WL 9052195, at *1 (W.D. Va. Aug. 3, 2009)* (quoting *Beaudett v. City of Hampton, 775 F.2d 1274, 1278 (4th Cir. 1985))*, *aff'd*, *373 F. App'x 341 (4th Cir. 2010)*.

B. Motions to Amend

A plaintiff may amend her complaint once as a matter of course within 21 days after serving it, or 21 days after service of a responsive pleading or service of a motion to dismiss under *Rule 12(b)*, *(e)*, or *(f)*, whichever is earlier. *Fed. R. Civ. P. 15(a)(1)(A)-(B)*. Once this window has elapsed, the plaintiff may only amend with the opposing party's written consent or the court's leave. *Id.* at *15(a)(2)*. Leave to amend a complaint should be freely granted when justice so requires. *Id.* The court should deny leave "only where good reason exists," *Franks v. Ross, 313 F.3d 184, 189 n.15 (4th Cir. 2002)*, such as when amending would be futile, *Laber v. Harvey, 438 F.3d 404, 426 (4th Cir. 2006)* (en banc). A proposed amendment "may properly be found futile where, as a matter of law, it fails to state a claim" against the putative defendant. *Cominelli v. Rector & Visitors of the Univ. of Va., 589 F. Supp. 2d 706, 712 (W.D. Va. 2008)*.

III. Discussion

The essential facts of this case are simple. The VBI revoked Hunter's license to transact insurance in Virginia. Hunter thereafter brokered an insurance policy on behalf of Robertson. Holsinger, in her duties as a police officer, informed Robertson of Hunter's revoked license and inability to transact insurance in Virginia. Robertson attempted to recover her money and **[*17]** reported Hunter's conduct. From that interaction, Hunter brings this suit against the Defendants alleging a scattershot of civil and criminal infractions. As the following discussion demonstrates, neither the Complaint nor Hunter's proposed amendments state a claim under the law.

A. Amendment as a Matter of Course

As an initial matter, Hunter argues that she should be able to amend her Complaint as a matter of course under *Rule 15(a)(1) of the Federal Rules of Civil Procedure*. The first responsive pleading to Hunter's Complaint was Robertson's motion to dismiss under *Rule 12(b)(6)*, which was served on July 27, 2015, by mail pursuant to *Rule 5(b)(2)(C)*. ECF No. 16, at 10. Hunter's right to amend as a matter of course thus lapsed on August 20, 2015, six days before Hunter filed for an extension of time to respond, ECF No. 29, and 25 days before her first response and motion to amend on September 14, 2015. *See* ECF No. 38; *see also* *Fed. R. Civ. P. 6(d)* (adding three days for mailed service). Hunter argues that her date to amend as a matter of course should be calculated from the *Roseboro* notice she received and, further, that the date to amend each count should be based upon the individual motion that sought to dismiss that count and its corresponding *Roseboro* notice—i.e., as Robertson's **[*18]** motion only sought dismissal of the counts alleged against her, it should only trigger the countdown to amend those counts, not the whole Complaint. *See* ECF No. 60, at 1-9; ECF No. 63, at 3-4.

The date by which a party must respond to a motion is set by the Local Rules at 14 days after service of the motion, unless otherwise directed by the Court. W.D. Va. Local Rule 11(c)(1). The Court's *Roseboro* notice concerning Robertson's motion to dismiss modified this deadline by allowing Hunter 21 days from its issuance to respond. ECF No. 18. At Hunter's request, the Court granted an additional 10-day extension to file a response to Robertson's and Holsinger's motions. ECF No. 30. A party's date to amend as a matter of course, on the other hand, is set by the Federal Rules at 21 days from service of a responsive pleading or motion. *Fed. R. Civ. P. 15(a)(1)*. Neither the Court's *Roseboro* notice nor its subsequent extension changed this deadline.

A *Roseboro* notice acts to ensure that a *pro se* plaintiff does not lose a dispositive motion because she is not aware of her obligation to respond. *Roseboro v. Garrison, 528 F.2d 309, 310 (4th Cir. 1975)*; *see also* *Proctor v. Morrissey, No. 95-1937, 1996 U.S. App. LEXIS 25712, 1996 WL 555302, at *4 (4th Cir. Oct. 1, 1996)* (stating that *Roseboro* concerns "[t]he entitlement of pro se litigants to specific notice of the pendency of proceedings in which dispositive action may be taken"). As with other **[*19]** concessions to *pro se* litigants, it encourages resolution of claims on their merits, rather than legal technicalities. *Cf.* *Rankin, 2015 U.S. Dist. LEXIS 10749, 2015 WL 412850, at *1* (discussing how courts construe *pro se* pleadings liberally). Nothing in the Fourth Circuit's opinion or this Court's *Roseboro* Notice extends the protections provided in that notice to *Rule 15*. That the *Roseboro* notice did not toll the deadline for Hunter's amendment as a matter of right means only that her proposed amended complaint will be evaluated on its merits, rather than granted automatically. This result is consistent with the federal rules and the holding in *Roseboro*.

Concerning Hunter's second argument, the rules are clear that the filing of any responsive pleading or motion triggers the deadline for amendment of the entire complaint. Thus, "if only some defendants file responsive pleadings, plaintiff still should be governed by the 21-day amendment period in *Rule 15(a)(1)(A)* for pleading amendments regarding the nonresponding defendants." 6 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1481 (3d ed. 2015), Westlaw; *see* Fed. R. Civ. P. 15(a) advisory committee's note to 2009 amendment ("The 21-day period to amend once as a matter of course after service of a responsive pleading **[*20]** or after service of a designated motion are not cumulative."). Further, even if the deadline to amend as a matter of course were calculated from the filing of Holsinger's motion, it would have elapsed three days prior to Hunter's first response in opposition and motion to amend. The Court will thus evaluate Hunter's proposed amendments under Rule 15(a)(2).[9]

B. RICO Allegations

Hunter states repeatedly that the Court must read her pleadings liberally because she is proceeding *pro se. See, e.g.*, ECF No. 60, at 6, 10, 17-18; ECF No. 63, at 5. While she is correct about this principle, she misunderstands its application. A Court is obliged to read a *pro se* litigant's *pleadings* liberally, such as overlooking a procedural error or failure to plead the exact cause of action called for by her facts, in order to "allow for the development of a potentially meritorious claim." **[*21]** Rankin, 15 U.S. Dist. LEXIS 10749, 2015 WL 412850, at *1. The Court should not, and indeed cannot, read the *law* liberally and change the elements of a cause of action so that the facts a *pro se* litigant presents state a claim. The Court will search for a meritorious claim in *pro se* pleadings, but cannot create a claim from those pleadings that does not exist in the law. Hunter repeatedly requests the Court do the latter.

For example, Hunter requests recovery on four of her Counts through 18 U.S.C. § 1964(c), part of the RICO Act, which only grants relief if there is an underlying violation of 18 U.S.C. § 1962. Hunter does not plead a violation of § 1962 in her Complaint. Her proposed amended complaint contains thirty pages of allegations devoted to describing "the RICO details" behind this litigation, ECF No. 39, at 5-35, culminating with block quotes of 18 U.S.C. § 1962(b)-(d), *id.* 34. Nonetheless, Hunter insists that her proposed amendment does not add any new claims, but only supplements the claims already in her Complaint. ECF No. 60, at 6. Rather than dismissing all RICO allegations and requests under § 1964(c) for failure to plead a corresponding claim under § 1962, the Court will liberally construe Hunter's pleadings and evaluate her RICO allegations on the merits.

Section 1964(c) allows "any person injured in his business or property **[*22]** by reason of a violation of section 1962" to bring a civil suit for recovery of threefold damages sustained, plus costs and attorney's fees. 18 U.S.C. § 1964(c). Violation of § 1962 requires that a defendant participate in "a pattern of racketeering activity" or "collection of unlawful debt," which involves an enterprise engaged in commerce. 18 U.S.C. § 1962(a)—(c). "Racketeering activity" is "any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical."[10] *Id.* § 1961(1). "Unlawful debt" is a debt incurred from illegal gambling activity or unlawful usury. *Id.* § 1961(6).

Hunter describes the Florida judgment rendered against her as "fraudulent," *see, e.g.*, ECF No. 39, at 7, 11, and alleges many defects with the underlying case and court procedure, *id.* at 7-8. These are conclusory allegations that the Court need not and does not credit. Moreover, nothing in these allegations involves illegal gambling or usury, as required to qualify as an "unlawful debt" under the RICO statutes. Hunter's proposed additional **[*23]** facts also relate that the judgment has not been overturned despite her appeals and collateral attacks. *See id.* at 6, 11, 19-20. The Full Faith and Credit Clause of the Constitution, U.S. Const. art. IV, § 1, and federal statute, 28 U.S.C. § 1738, mandate that "the judgment of a state court should have the same credit, validity, and effect, in every other court in

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[9] Hunter argues that her motions to amend should be considered motions to supplement. ECF No. 60, at 6-9. Although most of the events alleged in her filings are not new, some occurred after she filed the Complaint. The standards for evaluating a motion to amend under Rule 15(a) and a motion to supplement under Rule 15(d), however, are nearly identical. *See* Walker v. United Parcel Serv., 240 F.3d 1268, 1278 (10th Cir. 2001).

[10] The definition also includes a long list of statutes whose violation counts as racketeering activity, none of which Hunter alleges or her pleadings implicate.

the United States, which it had in the state where it was pronounced." *Thomas v. Washington Gas Light Co., 448 U.S. 261, 270, 100 S. Ct. 2647, 65 L. Ed. 2d 757 (1980)* (quotation omitted). Virginia expressly allows a foreign judgment creditor to either bring an action to enforce his judgment, *Va. Code Ann. § 8.01-465.5*, or to follow a codified procedure for the domestication and collection of foreign judgments, *id.* *§ 8.01-465.1 to -465.4*. Unless and until the Florida judgment is adjudicated invalid, courts in Virginia and throughout the country are bound to aid in its collection.

As to "racketeering activity," Hunter describes her two eight-day periods of imprisonment as "kidnapping," *id.* at 14, and the orders for her arrest as "attempted kidnapping," *id.* at 12-14, 19, 22-23. Kidnapping requires an unlawful seizure or detention. *18 U.S.C. § 1201*; *Va Code Ann. § 18.2-47*. Hunter does not provide detail on the circumstances of her detention, but does appear to contest the validity of the warrants behind her arrests. *See* ECF No. 39, at 12-14, 19, 22-23. Improper arrest by state officials pursuant to a warrant does not state a claim **[*24]** for kidnapping, but rather implicates malicious prosecution, which is not defined as "racketeering activity" under the RICO act.

The law must contend with the limited number of words in the English language, and therefore grants words and phrases specific definitions for use in certain contexts, such as RICO violations. Hunter believes the judgment against her was reached in violation of the law, and therefore considers it an unlawful debt. Even taking this conclusion as true, the judgment still does not fit the specific definition of "unlawful debt" set out by the RICO Act and to which its penalties apply. The same is true for Hunter's allegations of "racketeering activity." Furthermore, Hunter's speculative allegations attempting to link the Defendants to a commercial enterprise are unsupported and simply not plausible. Though the Court must liberally construe Hunter's pleadings, she must nonetheless provide sufficient facts to state a plausible claim. The Court cannot distort the meaning of the RICO statutes so that they match Hunter's allegations.

Neither the Complaint nor the proposed additional facts describe an "unlawful debt" or "racketeering activity" as defined by *18 U.S.C. § 1961* or a commercial **[*25]** enterprise. Nor do they show that Hunter may be able to allege such facts. The portions of Hunter's Complaint requesting relief for RICO violations should therefore be dismissed with prejudice and her motion to amend the complaint to add a RICO claim or facts describing the alleged RICO conspiracy denied as futile.

C. Claims Brought Under Criminal Statutes: Counts III, IV, VIII, IX, X, and XI

Hunter brings five counts against Holsinger and one count against both Defendants alleging violation of various criminal statutes. Federal criminal statutes are enforced through actions brought by the United States Attorney, *28 U.S.C. § 547*; *Fed. R. Crim. P. 7*, and "[a] private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another." *Diamond v. Charles, 476 U.S. 54, 64-65, 106 S. Ct. 1697, 90 L. Ed. 2d 48 (1986)*. "A private right of action to enforce a federal law can only be established by Congress, and the judicial duty is only to interpret the statute." *Reinheimer v. Moynihan, No. 5:14cv49, 2015 U.S. Dist. LEXIS 57255, 2015 WL 3507328, at *8 (W.D. Va. May 1, 2015)* (citing *Touche Ross & Co. v. Redington, 442 U.S. 560, 578, 99 S. Ct. 2479, 61 L. Ed. 2d 82 (1979))*, *report and recommendation adopted in relevant part*, *No. 5:14cv49, 2015 U.S. Dist. LEXIS 57255, 2015 WL 3513765 (W.D. Va. June 4, 2015)*. Therefore, absent clear Supreme Court guidance, a plaintiff cannot bring a civil claim for violation of a criminal statute. *Id.* (citing *Cannon v. University of Chicago, 441 U.S. 677, 690, 99 S. Ct. 1946, 60 L. Ed. 2d 560 (1979))*.

District courts have already found that the exact statutes Hunter **[*26]** attempts to enforce do not provide a provide right of action. *See* *Granier v. Ladd, No. 5:14cv5372, 2015 U.S. Dist. LEXIS 130505, 2015 WL 5676021, at *8 (N.D. Cal. Sept. 28, 2015)* (dismissing claim for violation of *18 U.S.C. § 873* and others brought under Title 18 because "[f]ederal criminal statutes do not provide a basis for civil liability."); *Bardes v. Mass. Mut. Life Ins. Co., No. 1:11cv340, 2011 U.S. Dist. LEXIS 50591, 2011 WL 1790816, at *3 (M.D.N.C. May 10, 2011)* ("*Section 1034* allows only the United States Attorney General (and, thus, by clear implication, not private plaintiffs) to seek civil penalties and injunctions for violations of the criminal prohibitions in *Section 1033*."); *Cominsky v. FBI, No. 1:07cv1261, 2007*

U.S. Dist. LEXIS 38719, 2007 WL 2206606, at *3 (N.D. Oh. May 29, 2007) ("Title 18 U.S.C. §§ 241, 242 and 18 U.S.C. §§ 3, 4 are criminal statutes. They provide no private right of action.").

Nothing that Hunter has pled or could plead would change the legal impossibility of recovery on these claims. Hunter's Counts III, IV, VIII, IX, X, and XI should be dismissed with prejudice and any amendment related to those counts denied.

D. Antitrust Claims: Counts I and II

Hunter brings antitrust claims against Holsinger alone, alleging in Count I that she violated 15 U.S.C. § 1 and in Count II that she violated 15 U.S.C. § 2. Hunter may bring a private cause of action under 15 U.S.C. § 15, which requires a plaintiff to demonstrate that the defendant violated antitrust statutes and that violation caused an injury **[*27]** to the plaintiff's business or property.

Hunter argues that Holsinger engaged in two anticompetitive acts: she initially told Robertson that she had to have a separate policy with only the dog on it to satisfy the Virginia statute, then rejected the policy Hunter helped Robertson procure and insisted that Robertson get one of two policies she recommended. Compl. ¶ 2; ECF No. 39, at 25, 29. Hunter concludes that Holsinger has conspired with VBI employees and other Stanton police officers to "restrict the insurance options for dog owners to just two providers in the entire United States of America," thereby impairing Hunter's ability to sell insurance in the Virginia market. ECF No. 39, at 27-28; *see also* ECF No. 60, at 20.

"The courts have long held that the federal antitrust laws apply primarily to private activity, and they do 'not apply to anticompetitive restraints imposed by the States as an act of government.'" Fisichelli v. City Known as Town of Methuen, 956 F.2d 12, 14 (1st Cir. 1992) (Breyer, C.J.) (quoting City of Columbia v. Omni Outdoor Advert., Inc., 499 U.S. 365, 372, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991)). As a municipal employee, Holsinger is potentially entitled to immunity for her actions under the Local Government Antitrust Act, 15 U.S.C. §§ 34-36, and the state action doctrine, *see* Parker v. Brown, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943) (establishing the doctrine); City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 98 S. Ct. 1123, 55 L. Ed. 2d 364 (1978) (applying *Parker* to municipalities). The Fourth **[*28]** Circuit instructs courts "to resolve the immunity issues as early as possible, with a minimum of expense and time to the parties." Sandcrest Outpatient Serv. v. Cumberland Cty. Hosp., 853 F.2d 1139, 1148 n.9 (4th Cir. 1998) (Powell, J. (Ret.), sitting by designation). The Court will address the state action doctrine first, as it provides immunity from damages and injunctions, while 15 U.S.C. § 35 concerns only damages. Command Force Sec., Inc. v. City of Portsmouth, 968 F. Supp. 1069, 1071-72 (E.D. Va. 1997).

The state action doctrine recognizes "that federal antitrust laws are not intended to prohibit States from imposing restraints on competition; thus, a State itself is absolutely immune from antitrust actions, both for money damages and for injunctive relief." Id. at 1072 (citing Parker, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315). A locality and its employees receive this same protection if they act in their official capacity pursuant to "an authorized implementation of state policy." Columbia, 499 U.S. at 371. The Supreme Court has emphasized that authorization is defined broadly for *Parker* immunity, asking only if the allegedly anticompetitive conduct is a "foreseeable result" of a clearly articulated state policy. Id. at 373-74. Authorization is broader even than legality; if the action is objectively authorized, the court does not look for substantive or procedural defects that may make the action illegal.[11] Id. at 370-73. Importantly, even allegations of bribery or conspiracy **[*29]** do not remove immunity if the

[11] The Court's conclusion is grounded in principles of federalism:

> "To be sure, state law 'authorizes' only agency decisions that are substantively and procedurally correct. Errors of fact, law, or judgment by the agency are not 'authorized.' Erroneous acts or decisions are subject to reversal by superior tribunals because unauthorized. If the antitrust court demands unqualified 'authority' in this sense, it inevitably becomes the standard reviewer not only of federal agency activity but also of state and local activity whenever it is alleged that the governmental body, though possessing the power to engage in the challenged conduct, has actually exercised its power in a manner not authorized by state law."
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> . . .

action is authorized. *Id. at 379* ("[W]e reaffirm our rejection of any interpretation of the Sherman Act that would allow plaintiffs to look behind the actions of state sovereigns to base their claims on 'perceived conspiracies to restrain trade.'" (quoting *Hoover v. Ronwin, 466 U.S. 558, 580, 104 S. Ct. 1989, 80 L. Ed. 2d 590 (1984)))*; *see also Fisichelli, 956 F.2d at 14* ("[I]n applying the '*Parker* immunity' doctrine, the courts should recognize no exception for 'conspiracy,' 'bribery,' or similar activity." (quoting *Columbia, 499 U.S. at 379*)).

Hunter contends that Holsinger exceeded any authorization by "giving insurance advice, giving legal advice, and telling insurance consumers from whom they must buy their insurance." ECF No. 39, at 3; *see also id.* at 28. She also argues that even if Holsinger is entitled to immunity in her official capacity, she is still liable in her individual capacity. ECF No. 63, at 2-3; *see Command Force Serv., 968 F. Supp. at 1074* ("[B]oth the State Action Doctrine and the LGAA protect these officials only when they are acting in an 'official capacity,' as opposed to their individual capacities.").

Virginia has a clearly articulated policy in *Virginia Code § 3.2-6540(F)* that all owners of dangerous dogs must have insurance coverage. Enforcement of this law, like others, is delegated to local municipalities such as the City of Staunton and its police officers such as Holsinger. *See Va. Code Ann. § 15.2-1704*. Hunter objects to Holsinger's classification of which insurance policies satisfy **[*31]** the statutory requirement and which do not. Animal control officers deciding whether an insurance policy satisfies the statute is not only a foreseeable result of *Virginia Code § 3.2-6540(F)*, but necessary to its enforcement. Thus, Holsinger's alleged anticompetitive actions were authorized by a clearly articulated state policy. Hunter's allegations that Holsinger misunderstood the statute or abused her authority have no bearing on her entitlement to immunity as a municipal employee. *See Columbia, 499 U.S. at 379*; *Fisichelli, 956 F.2d at 14*; *Allright Colorado, Inc. v. City & Cty. of Denver, 937 F.2d 1502, 1511 (10th Cir. 1991)* ("[W]e reject the argument that alleged errors or abuses in the implementation of state law should expose the City to antitrust liability."); *Boone v. Redevelopment Agency of City of San Jose, 841 F.2d 886, 892 (9th Cir. 1988)* ("[C]oncerns over federalism and state sovereignty . . . dictate that the [plaintiffs] not be allowed to use federal ***antitrust law*** to remedy their claim that the city and the agency exceeded their authority under state law."), *cert. denied 488 U.S. 965, 109 S. Ct. 489, 102 L. Ed. 2d 526 (1988)*.

Additionally, though immunity attaches only to actions taken in an official capacity, Hunter does not allege any anticompetitive actions by Holsinger beyond her interactions with Robertson regarding the standards of *Virginia Code § 3.2-6540(F)*. These acts concern the epitome of Holsinger's official duties—an animal control officer requiring a dog owner to comply with state law—for which **[*32]** she, just like a municipality, enjoys immunity. *See Fisichelli, 956 F.2d at 15-16* (discussing state action doctrine); *Command Force Sec., 968 F. Supp. at 1072* (citing *Sandcrest, 853 F.2d at 1142* (discussing Local Government Antitrust Act)). By way of contrast, when the court in *Command Force Security* found that the plaintiffs could potentially state an antitrust claim against police officers in their individual capacities, those officers were engaged in off-duty security work and were being sued for anticompetitive actions in the private security market they shared with the plaintiffs. *968 F. Supp. at 1071, 1074-75*. Hunter does not allege that Holsinger participates in the insurance market or that she has taken any actions outside of her role as an animal control officer; instead, her complaints involve Holsinger's interpretation and application of the law. These actions are part of Holsinger's official duties and are covered by state action immunity.[12]

> We agree with that assessment, and believe that in **[*30]** order to prevent *Parker* from undermining the very interests of federalism it is designed to protect, it is necessary to adopt a concept of authority broader than what is applied to determine the legality of the municipality's action under state law.

Columbia,, 499 U.S. at 371-72 (quoting P. Areeda & H. Hovenkamp, ***Antitrust Law*** ¶ 212.3b (Supp. 1989)).

[12] Besides Holsinger's immunity, Hunter's antitrust counts have otherwise fatal substantive flaws. Hunter cannot demonstrate, as required by *15 U.S.C. § 15*, that Holsinger's alleged antitrust violations caused an injury to her business or property. The VBI revoked Hunter's license before she dealt with Robertson, rendering their business relationship invalid and foreclosing **[*33]** her potential for future Virginia insurance sales. *See* Section III.G, *infra*. Concerning *15 U.S.C. § 1*, Hunter does not demonstrate concerted action between Holsinger and any other party as necessary to state a claim for conspiracy, *see* Section III.E, *infra*, and with regard to *15 U.S.C. § 2*, Hunter does not allege that Holsinger or anyone she interacted with is a participant in the

Holsinger is entitled to immunity from monetary and injunctive relief under the state action doctrine and thus analysis of the Local Government Antitrust Act is unnecessary. Nothing in Hunter's proposed amended facts affects Holsinger's immunity. Counts I and II of the Complaint should be dismissed with prejudice and the motion to amend related to those Counts rejected.

E. Title 42 Claims: Counts V, VI, VII

Hunter alleges violation of three civil rights statutes against Holsinger alone. As discussed below, Hunter does not and cannot state a claim under Title 42. Counts V, VI, and VII should be dismissed with prejudice and any amendments directed to those Counts denied as futile.

1. 42 U.S.C. § 1983

Count V alleges **[*34]** that Hunter is a victim of Holsinger's actions under *42 U.S.C. § 1983*. Compl. ¶ 46. *Section 1983* creates a civil cause of action against a state actor for "deprivation of any rights, privileges, or immunities secured by the Constitution and laws." *42 U.S.C. § 1983*. The statute itself does not confer a substantive right, but rather provides an avenue in federal court to redress other rights. *Albright v. Oliver, 510 U.S. 266, 271, 114 S. Ct. 807, 127 L. Ed. 2d 114 (1994)*. Every *§ 1983* claim therefore requires a separate underlying violation of the Constitution or federal law. As demonstrated in the previous sections, Hunter's pleadings do not state a claim under the RICO statutes, Holsinger is completely immune to the alleged antitrust violations, and the criminal statutes cited in the Complaint do not confer a private right of action under *§ 1983* or otherwise. Hunter thus has not pled a violation of the Constitution or federal law upon which to base a *§ 1983* claim.[13]

2. 42 U.S.C. § 1985

Count VI alleges conspiracy in violation of *§ 1985*, but does not specify which subsection Holsinger is alleged to have violated. **[*35]** "*Section 1985(1)* prohibits interfering with federal officials in the performance of their duties." *Shooting Point, L.L.C. v. Cumming, 238 F. Supp. 2d 729, 739 (E.D. Va. 2002)*, *aff'd*, *368 F.3d 379 (4th Cir. 2004)*. Hunter does not allege that Holsinger has interfered with any federal officials. *Section 1985(2)* prohibits obstructing justice in federal or state court, especially intimidating witnesses. *Id.; see* *Haddle v. Garrison, 525 U.S. 121, 125, 119 S. Ct. 489, 142 L. Ed. 2d 502 (1998)* ("The gist of the wrong at which *§ 1985(2)* is directed is . . . [the] intimidation or retaliation against witnesses in federal-court proceedings."). Though Hunter discusses many court proceedings in her proposed amended facts, she does not allege Holsinger's involvement in any of them; indeed, they mostly precede Holsinger's actions in May 2015 that underlie the Complaint.

"Finally, *section 1985(3)* prohibits conspiracies to deprive persons of the equal protection of the law." *Shooting Point, L.L.C., 238 F. Supp. 2d at 739* (citing *Griffin v. Breckenridge, 403 U.S. 88, 102-03, 91 S. Ct. 1790, 29 L. Ed. 2d 338 (1971)*). Enacted as part of the Civil Rights Act of 1871, the statute was designed to combat racial discrimination. *See* *United Bhd. of Carpenters and Joiners of America v. Scott, 463 U.S. 825, 836-37, 103 S. Ct. 3352, 77 L. Ed. 2d 1049 (1983)*. Though the statute is not confined only to racial concerns, a violation of *§ 1985(3)* requires a plaintiff to "demonstrate with specific facts that the defendants were 'motivated by a specific class-based, invidiously discriminatory animus to [ ] deprive the plaintiff[s] of the equal enjoyment of rights secured by the law to all.'" *Francis v. Giacomelli, 588 F.3d 186, 196-97 (4th Cir. 2009)* (alterations in original) (quoting **[*36]** *Simmons v.*

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insurance market, much less one who holds monopoly power. *See* *Estate Constr. Co. v. Miller & Smith Holding Co., 14 F.3d 213, 220 (4th Cir. 1994)* (elements of conspiracy in restraint of trade); *Cavalier Tel., LLC. v. Verizon Virginia, Inc., 330 F.3d 176, 183 (4th Cir. 2003)* (elements of monopolization).

[13] Hunter states at various times in her pleadings that *Virginia Code §§ 3.2-6540(F)* and *38.2-2128* are unconstitutional, but she does not bring an explicit constitutional claim or provide sufficient argument for the Court to infer one. *See* Compl. ¶ 1, 11-13; ECF No. 39, at 2-3, 23.

Poe, 47 F.3d 1370, 1376 (4th Cir. 1995)). "[T]he intended victims must be victims not because of any personal malice the conspirators have toward them, but because of their membership in or affiliation with a particular class." United Bhd. of Carpenters, 463 U.S. at 850-51 (1983) (Blackmun, J., dissenting). "Moreover, the class must exist independently of the defendants' actions; that is, it cannot be defined simply as the group of victims of the tortious action." *Id.*

Hunter does not allege that she is part of a class as contemplated by § 1985(3). None of the facts in her Complaint or proposed additional facts indicate that any of the actions she complains of were motivated by class-based animus. On the contrary, she asserts that the many individuals and organizations in her alleged conspiracy have acted against her personally and against her business. Even assuming that every allegation Hunter has alleged is true, the Supreme Court has explicitly declined to "construe § 1985(3) to reach conspiracies motivated by economic or commercial animus." United Bhd. of Carpenters, 463 U.S. at 838. With no implication of class-based animus in her facts, Hunter does not and cannot state a claim under § 1985(3).

3. 42 U.S.C. § 1986

Hunter's last civil rights count alleges that Holsinger knew of a conspiracy in violation of § 1985, was in a position to prevent or aid in preventing the **[*37]** conspiracy, and failed to act. *See* 42 U.S.C. § 1986. Fundamentally, "[a] cause of action based upon § 1986 is dependent upon the existence of a claim under § 1985." Trerice v. Summons, 755 F.2d 1081, 1085 (4th Cir. 1985). With no actionable conspiracy, there can be no failure to intercede. The absence of a valid claim under § 1985 is fatal to a claim under § 1986. *See* Patterson v. McCormick, No. 2:13cv293, 2014 U.S. Dist. LEXIS 67846, 2014 WL 2039966, at *9 (E.D. Va. May 15, 2014).

F. Fraud

Count XII alleges common law fraud against Holsigner and Robertson. "To prevail on an actual fraud claim under Virginia law, a plaintiff must prove by clear and convincing evidence '(1) a false representation, (2) of a material fact, (3) made intentionally and knowingly, (4) with intent to mislead, (5) reliance by the party misled, and (6) resulting damage to the party misled.'" Murr v. Capital One Bank (USA), N.A., 28 F. Supp. 3d 575, 584 (E.D. Va. 2014) (quoting Evaluation Res. Corp. v. Alequin, 247 Va. 143, 439 S.E.2d 387, 390, 10 Va. Law Rep. 779 (Va. 1994)).

Hunter's fraud allegations discuss many statements made by Holsinger and Robertson to each other and to third parties. *See* ECF No. 38, at 32-33; ECF No. 60, at 13-14. Fundamentally, however, a fraud claim requires that "the party asserting the claim be the party to whom false representations were made." Unlimited Screw Products, Inv. v. Malm, 781 F. Supp. 1121 (E.D. Va. 1991) (citing Jefferson Standard Life Ins. Co. v. Hedrick, 181 Va. 824, 27 S.E.3d 198, 202 (Va. 1943)). The Complaint and proposed amended facts do not allege a false representation made by Holsinger **[*38]** to Hunter, or any reliance upon such a statement by Hunter to her detriment. In fact, the pleadings do not contain any direct communication between Holsinger and Hunter.

The Complaint also does not plead a false representation made by Robertson to Hunter, but the proposed amended facts allege the claim with greater detail. ECF No. 38, at 32-33. Hunter quotes an "electronic agreement" between herself and Robertson wherein Robertson agreed that "[a]ny and all information which has been or will be provided by [Robertson] is and shall be true and correct," and that she would "pay any associated non-premium fees that are contained in [Robertson's] instance online insurance quote when such fees are allowed by law." *Id.* Hunter asserts that she relied upon these statements in her decision to engage in business with Robertson, but that Robertson's later actions demonstrate that she never intended to abide by these statements.

Hunter's pleadings do not support her argument. For Robertson to knowingly make a false statement with the intent to mislead she must have intended not to follow her representations at the time she made them. To the contrary, all the facts presented in this case indicate that **[*39]** Robertson honestly desired insurance coverage for her dog and abided by her agreement with Hunter until she discovered that Hunter was not licensed in Virginia and the policy she helped Robertson procure would not fulfill her needs. Nothing indicates that Robertson's representations were false at the time she made them. While a court should construe all facts in the plaintiff's favor when considering a motion to dismiss, it should accept "neither legal conclusions drawn from the facts nor unwarranted inferences, unreasonable conclusions, or arguments." *Luther v. Wells Fargo Bank, N.A., No. 4:13cv72, 2014 U.S. Dist. LEXIS 161001, 2014 WL 6451667, at *2 (W.D. Va. Nov. 17, 2014)* (quoting *Eastern Shore Mkts., Inc. v. J.D. Assocs. Ltd. Pshp., 213 F.3d 175, 180 (4th Cir. 2000))*. It would be unreasonable for the Court to conclude, based on Hunter's allegations, that Robertson's statements were false when she made them. Hunter consequently cannot state a claim for fraud. Count XII of the Complaint should be dismissed with prejudice and any proposed amendment of facts related to it denied.

G. Tortious Interference

Count XIII alleges tortious interference with a business expectancy against Holsinger and Robertson.[14] To state a claim, Hunter must plead: "(1) the existence of a valid contractual relationship or business expectancy; (2) knowledge of the relationship **[*40]** or expectancy on the part of the interferor; (3) intentional interference inducing or causing a breach or termination of the relationship or expectancy; and (4) resultant damage to the party whose relationship or expectancy has been disrupted." *Dunlap v. Cottman Transmission Sys., LLC, 287 Va. 207, 754 S.E.2d 313, 318 (Va. 2014)*.

The agreement between Robertson and Hunter for the procurement of an insurance policy could form a basis for a claim only against Holsinger, as a party cannot interfere with her own contract. *Atta v. Nelson, No. 7:11cv463, 2012 U.S. Dist. LEXIS 7436, 2012 WL 178355, at *4 (W.D. Va. Jan. 23, 2012)* (citing *Fox v. Deese, 234 Va. 412, 362 S.E.2d 699, 4 Va. Law Rep. 1248 (Va. 1987))*. Hunter has **[*41]** not attached a copy of a contract between her and Robertson, and the precise nature of the alleged contractual and business relationship is not clear from the pleadings. Hunter states that she is "an insurance agent who helps consumers obtain liability insurance for their dogs." ECF No. 39, at 5. Robertson "entered into a contractual agreement electronically with Hunter," ECF No. 38, at 32, pursuant to which Hunter helped Robertson obtain insurance, Compl. ¶¶ 2, 25, and charged her credit card $100, ECF No. 39, at 25, 32. Hunter states that she was not part of the resulting contract between Robertson and the insurance company. *Id.* at 2. After Holsinger informed Robertson that Hunter was not licensed in Virginia and her policy did not satisfy the statute, Robertson demanded a refund, ordered Hunter to charge no future installment payments, and canceled the credit card associated with her policy. Compl. ¶ 4. It is not clear what the terms of Robertson and Hunter's contract were, whether the contractual relationship ended with the provision of insurance, or what ongoing business relationship they had related to installment payments. It is therefore not possible to analyze the nature of the contract **[*42]** or business expectancy, the circumstances of its breach, or the resulting damages. The Complaint fails to state a claim for tortious interference with Robertson's contract on this basis alone.

Furthermore, Hunter's claim suffers a more fundamental flaw. The proposed amended facts state plainly that the VBI revoked Hunter's insurance license before she interacted with Robertson. ECF No. 39, at 21. Hunter alleges many defects with the VBI's procedure and concludes that these render the decision void. *Id.* Though she has lodged these objections in an appeal to the Virginia Supreme Court, the Court has yet to act on her petition. *Id.* at 21-22. Despite Hunter's opinion to the contrary, an administrative (or judicial) decision that has not been formally overturned has full legal effect. Therefore, she was not a licensed insurance agent when she allegedly contracted with Robertson. Virginia law is clear that one cannot sell, solicit, or negotiate contracts of insurance without an agent license. *Va. Code Ann. § 38.2-1822* (West); *Devnew v. Brown & Brown, Inc., 396 F. Supp. 2d 665, 673 (E.D.*

[14] In one of her reply briefs in support of her motion to amend, Hunter objects to Robertson's "conversion" of her claim for "tortious interference," Compl. ¶ 79, into a claim for tortious interference with a business expectancy. ECF No. 60, at 15. She argues that her complaint "sets forth 'tortious interference' which can be liberally construed," and Robertson is therefore adding unnecessary elements. *Id.* As with her RICO allegations, Hunter requests the Court to liberally construe the law rather than her pleadings. There is no cause of action in Virginia for tortious interference except for that which relates to a business expectancy. The Court cannot find otherwise, regardless of Hunter's *pro se* status.

Va. 2005) ("[T]o transact insurance in Virginia, Devnew must obtain an insurance agent license pursuant to the requirements in § 38.2-1817 [and] to maintain that license, he must comply with Virginia's insurance laws. § 38.2-1831(2)."); Cosby v. Com. ex rel. State Corp. Comm'n, 248 Va. 551, 450 S.E.2d 121, 123 (Va. 1994) (upholding **[*43]** State Corporation Commission's finding that an unlicensed woman soliciting and negotiating insurance on behalf of an agent violated Va. Code § 38.2-1822).

Tortious interference requires a *valid* contract and a contract that is itself illegal cannot form the basis of a interference claim. Am. Online, Inc. v. GreatDeals.Net, 49 F. Supp. 2d 851, 864 (E.D. Va. 1999). Put another way, a plaintiff has no expectation in a contract that is unenforceable. Under Virginia Law, if a party to a contract makes a "false representation of a material fact, constituting an inducement to the contract, on which the [other] had a right to rely," she commits fraud in the inducement. Abi-Najm v. Concord Condominium, LLC, 280 Va. 350, 699 S.E.2d 483, 489 (Va. 2010); *see also* In re Myrtle, 500 B.R. 441, 450 (Bankr. W.D. Va. 2013). Fraud in the inducement is grounds for rescission, rendering the entire contract voidable and unenforceable. Devine v. Buki, 289 Va. 162, 767 S.E.2d 459, 466 (Va. 2015); Abi-Najm, 699 S.E.2d at 489. Hunter contracted with Robertson to procure insurance and held herself out as an insurance agent without telling her that the VBI had revoked her Virginia license. That misrepresentation goes to the heart of their business relationship. Any contract made under those circumstances is unenforceable because of fraud in the inducement and could not form the basis of a tortious interference claim.[15]

As an additional lost business expectancy, Hunter pleads that the insurance company that issued the policy she helped Robertson obtain has since "ceased to offer this same insurance in Virginia and in all other states in which it does business only because Robertson and Holsinger joined together to attack Hunter's honest services." ECF No. 60, at 16; *see also* ECF No. 41. Hunter alleges that the Defendants' actions tortiously interfered with her ability to assist future dog owners to procure this insurance.

Courts require business expectancies to be more certain than what Hunter alleges here. "A contract expectancy is a contract that is expected to come into force in the future," GTSI Corp. v. Wildflower Int'l, Inc., No. 1:09cv123, 2009 U.S. Dist. LEXIS 61537, 2009 WL 2160451, at *8 (E.D. Va. July 17, 2009), and "[m]ere proof of a plaintiff's belief or hope that a business relationship **[*45]** will continue is inadequate to sustain the cause of action," Commercial Bus. Sys., Inc. v. Halifax Corp., 253 Va. 292, 484 S.E.2d 892, 896 (Va. 1997). Hunter's general assertion that she would have continued selling the insurance policy in the future lacks the specificity required to state a business expectancy. Furthermore, the revocation of Hunter's license forecloses any reasonable expectation she could have of continuing to sell insurance in Virginia.

Neither the Complaint nor the proposed amended facts present a valid contract or business expectancy upon which Hunter can base a claim for tortious interference. Considering that Hunter did not have a license to sell insurance in Virginia during the relevant time, she could not present additional facts related to this incident that would cure this defect. Count XIII should be dismissed with prejudice and any amendment of the facts related to it denied.

E. Conspiracy

Count XIV alleges that the Defendants have conspired against Hunter.[16] Virginia recognizes two versions of civil conspiracy—common law conspiracy and statutory conspiracy under Virginia Code §§ 18.2-499 and 18.2-500.

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[15] While addressing the tortious interference claim, Hunter states that "Robertson breached her contract with **[*44]** Hunter when she disputed her credit card transaction with Hunter on fraudulent grounds." ECF No. 60, at 17. Hunter does not actually bring a breach of contract claim, and the Court need not infer one. Hunter's failure to disclose that she was not licensed in Virginia would be grounds for fraudulent inducement, and, as Hunter alleged, Robertson clearly terminated any agreement between them.

[16] The Complaint does not specify whether Hunter is bringing a common law or statutory conspiracy claim. *See* Compl. ¶ 83. Hunter's proposed amendment provides a very brief argument in support of statutory conspiracy, but does so in a section titled "Count XIV — Common Law Conspiracy and Statutory Conspiracy . . . ." *See* ECF No. 38, at 33-34; ECF No. 39, at 35-36. In the

Common law conspiracy requires "(i) an agreement between two or more persons (ii) to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means, which (iii) **[*46]** results in damage to plaintiff." *Firestone v. Wiley, 485 F. Supp. 2d 694, 703 (E.D. Va. 2007)* (citing *Glass v. Glass, 228 Va. 39, 321 S.E.2d 69 (Va. 1984))*. *Section 18.2-499* imposes criminal liability on conspiracies to injure another in her business, while *§ 18.2-500* allows a civil cause of action and recovery of treble damages for a violation of *§ 18.2-499*. "To recover in an action under these statutes, a plaintiff must establish: (1) a combination of two or more persons for the purpose of willfully and maliciously injuring plaintiff in his business[;] and (2) resulting damage to plaintiff." *Dunlap, 754 S.E.2d at 317*.

The two types of conspiracy have common requirements. "Because there can be no conspiracy to do an act that the law allows," the Virginia Supreme Court has held that either type of conspiracy "must at least allege an unlawful act or an unlawful purpose to survive demurrer." ***[*47]*** *Id.* (citations omitted) (collecting cases). "Thus, where 'there is no actionable claim for the underlying alleged wrong, there can be no action for civil conspiracy based on that wrong.'" *Firestone, 485 F. Supp. 2d at 703* (quoting *Citizens for Fauquier Cty. v. SPR Corp., 37 Va. Cir. 44, 50 (1995))*. Additionally, "[u]nder either theory of recovery, the plaintiff must first allege that the defendants combined together to effect a 'preconceived plan and unity of design and purpose, for the common design is the essence of the conspiracy.'" *Bay Tobacco, LLC v. Bell Quality Tobacco Prods., LLC, 261 F. Supp. 2d 483, 499 (E.D. Va. 2003)* (quoting *Bull v. Logetronics, Inc., 323 F. Supp. 115, 131 (E.D. Va. 1971))*. Conspiracy must also be pled with particularity, and "in order to survive a motion to dismiss, [Hunter] must at least plead the requisite concert of action and unity of purpose in more than 'mere conclusory language.'" *Id.* (quoting *Lewis v. Gupta, 54 F.Supp.2d 611, 618 (E.D. Va. 1999))*.

Hunter's proposed amended facts contain many allegations of conspiracy that have no direct connection to the Defendants. *See* ECF No. 39, at 5-24 (spending 19 pages to describe six years of legal conflict before finally mentioning the Defendants and the facts underlying this dispute). Holsinger alleges three conspiracies specifically against the Defendants. First, she alleges that Holsinger and Robertson conspired to injure Hunter in her business. ECF No. 39, at 29-30. Second, "Holsinger conspired with Ayers and William **[*48]** Stanton to restrict, restrain, and impede interstate commerce in the insurance industry" by "restrict[ing] the insurance options for dog owners to just two providers in the entire United States of America." ECF No. 39, at 27-28; *see also* ECF No. 60, at 20. Third, "Robertson conspired with, among others, Bill of the [VBI] . . . to impede interstate commerce and to unlawfully regulate insurance." ECF No. 60, at 19.

In support of her conspiracy allegations, Hunter presents the following facts and events. Ayers told Holsinger in an email that Stanton had said Hunter was not a licensed insurance agent in Virginia. ECF No. 39, at 24. Ayers also said ""you might let [Robertson] know that we approved insurance from PRIME (on-line) and Farmers Insurance." *Id.* at 27. Holsinger informed Robertson that Hunter was not licensed in Virginia and that her policy did not satisfy the statute. *Id.* at 28. Robertson sent emails to Hunter expressing her anger and took remedial action, including canceling the card set up for installment payments, demanding a refund, and reporting Hunter to the VBI. *Id.* at 28-29. Robertson also sent Hunter a copy of what appeared to be a case summary of the VBI's action and forwarded the emails between herself and Hunter **[*49]** to Holsinger. *Id.* at 32. After Hunter filed suit against the Defendants, Robertson sent Holsinger another email requesting to discuss the suit and promising to forward any additional emails between herself and Hunter. *Id.*

These facts fail to allege either the unlawful purpose or concerted action necessary to sustain a conspiracy claim. As this opinion has discussed, the acts Hunter complains of do not state a cause of action under the law and none of Hunter's other Counts can provide the unlawful act upon which to base her fraud claim. There is no dispute that the VBI revoked Hunter's Virginia insurance license. None of Hunter's allegations of invalidity change the legal effect of that revocation. Neither are any statements made by the Defendants about Hunter's licensure or actions taken by them in response to it rendered unlawful because Hunter disagrees with the revocation decision and informed Robertson that it was fraudulent. In notifying others that the VBI had revoked Hunter's license and then

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interest of deciding any potentially valid claim on the merits, *Rankin, 2015 U.S. Dist. LEXIS 10749, 2015 WL 412850, at *1*, the Court will consider both forms.

taking steps to rectify Hunter's improper procurement of insurance for Robertson, the Defendants and other alleged conspirators did nothing unlawful. Even if the Defendants' actions were malicious **[*50]** and resulted in injury to Plaintiff—which the Court does not find—that would not render them unlawful. *R & D 2001, LLC v. Collins, No. CL-2005-7021, 2006 Va. Cir. LEXIS 131, 2006 WL 2578503, at *4 (Va. Cir. Ct. July 12, 2006)* ("In Virginia, there can be no conspiracy to do that which is lawful, even if it [is] done maliciously and operates to injure another person or property.").

Additionally, the Defendants' actions align with their own individual duty and self interest and do not support an inference of concerted action. Holsinger's communication with Ayers and, indirectly, Stanton involved Hunter's licensure and the procurement of insurance policies that reflect the requirements of *Virginia Code § 3.2-6540(F)*. Though Hunter characterizes Ayers's email concerning Prime and Farmer's policies as *prima facie* evidence of a conspiracy to restrict insurance options, the email suggests the companies as examples of policies that are known to satisfy the statute, not as an exclusive list. These interactions are a necessary and ordinary part of workplace communication in law enforcement. Holsinger relayed this information to Robertson as part of her duty to uphold the law, foster compliance, and serve the public. Robertson, finding that she had paid for a policy that did not work as promised, **[*51]** took steps to avoid further loss, recoup her money, and report Hunter's improper conduct. All of these actions are reasonable under the facts alleged and none of them indicate a common "preconceived plan or unity of design and purpose" between the Defendants, Ayers, or Stanton.

Count XI should be dismissed with prejudice and any proposed amendment related to it denied as futile.

F. Declaratory Judgment

Hunter's Complaint broadly requests "a conclusive declaratory judgment clarifying the legal relations of the parties." Compl. ¶ 13. Her proposed amended complaint expands upon this request by listing four specific questions for declaratory relief. ECF No. 39, at 2. "[A] federal court may properly exercise jurisdiction in a declaratory judgment proceeding when three essential elements are met: (1) the complaint alleges an 'actual controversy' between the parties 'of sufficient immediacy and reality to warrant issuance of a declaratory judgment;' (2) the court possesses an independent basis for jurisdiction over the parties (e.g., federal question or diversity jurisdiction); and (3) the court does not abuse its discretion in its exercise of jurisdiction." *Volvo Constr. Equip. N. Am., Inc. v. CLM Equip. Co., 386 F.3d 581, 592 (4th Cir. 2004)*. Neither Hunter's Complaint nor **[*52]** proposed amended complaint states a substantive claim upon which relief can be granted. There is thus no actual controversy between the parties or independent jurisdiction upon which to base declaratory judgment. Hunter's request should be denied with prejudice.

IV. Conclusion

Neither Hunter's Complaint nor proposed amended complaint states a claim for which the Court can grant relief. I therefore recommend that the presiding District Judge **GRANT** Robertson's motion to dismiss, ECF No. 16, **GRANT** Holsinger's motion to dismiss, ECF No. 24, and **DENY** Hunter's motions to amend her complaint, ECF Nos. 38, 39, 40, 41, and **DISMISS WITH PREJUDICE** Hunter's Complaint, ECF No. 2.

Notice to Parties

Notice is hereby given to the parties of the provisions of *28 U.S.C. § 636(b)(1)(C)*:

> Within fourteen days after being served with a copy [of this Report and Recommendation], any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, **[*53]** the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.

Failure to file timely written objections to these proposed findings and recommendations within 14 days could waive appellate review. At the conclusion of the 14 day period, the Clerk is directed to transmit the record in this matter to the Honorable Michael F. Urbanski, United States District Judge.

The Clerk shall send certified copies of this Report and Recommendation to all counsel of record and unrepresented parties.

ENTER: February 19, 2016

/s/ Joel C. Hoppe

Joel C. Hoppe

United States Magistrate Judge

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In re First Am. Home Buyers Prot. Corp. Class Action Litig.

United States District Court for the Southern District of California

February 22, 2016, Decided; February 22, 2016, Filed

Lead Case No. 13-cv-01585-BAS(JLB)

Reporter
313 F.R.D. 578 *; 2016 U.S. Dist. LEXIS 21357 **

IN RE: FIRST AMERICAN HOME BUYERS PROTECTION CORPORATION CLASS ACTION LITIGATION

Subsequent History: Affirmed by *Carrera v. First Am. Home Buyers Prot. Co., 702 Fed. Appx. 614, 2017 U.S. App. LEXIS 23086 (9th Cir. Cal., Nov. 16, 2017)*

Prior History: *Carrera v. First Am. Home Buyers Prot. Co., 2013 U.S. Dist. LEXIS 193969 (S.D. Cal., Sept. 6, 2013)*

Core Terms

warranty, renewal, contractors, plans, replacement, class certification, representations, brochures, repair, channel, real estate agent, consumer, advertising, seller, class action, area manager, customers, class member, unfair, predominance, concealment, correspondence, holder, expiration, damages, reasons, certification, home buyer, misrepresentations, escrow

Counsel: **[**1]** For Nancy Carrera, on behalf of herself and all others similarly situated, Karene Jullien, Brent Morrison, on behalf of themselves and all others similarly situated, Anna Hershey, on behalf of themselves and all others similarly situated, Plaintiffs: Anne Marie Murphy, Eric James Buescher, Niall McCarthy, LEAD ATTORNEYS, Cotchett, Pitre & McCarthy, LLP, Burlingame, CA; Francis A. Bottini, Yury Kolesnikov, LEAD ATTORNEYS, Bottini & Bottini, Inc., La Jolla, CA; Joanna W. LiCalsi, Robert Hutchinson, LEAD ATTORNEYS, Cotchett, Pitre & McCarthy LLP, Santa Monica, CA.

For Emily Diaz, Plaintiff: Anne Marie Murphy, Eric James Buescher, LEAD ATTORNEYS, Cotchett, Pitre & McCarthy, LLP, Burlingame, CA; Francis A. Bottini, Yury Kolesnikov, LEAD ATTORNEYS, Bottini & Bottini, Inc., La Jolla, CA; Joanna W. LiCalsi, Robert Hutchinson, LEAD ATTORNEYS, Cotchett, Pitre & McCarthy LLP, Santa Monica, CA.

For First American Home Buyers Protection Company, a California Corporation, Defendant: Edward P Swan, Jr., LEAD ATTORNEY, Jones Day, San Diego, CA; Joel D. Siegel, Paul M. Kakuske, LEAD ATTORNEYS, Dentons US LLP, Los Angeles, CA; Charles A. Newman, PRO HAC VICE, Dentons US LLP, One Metropolitan Square, St **[**2]** Louis, MO.

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

Opinion by: Cynthia Ann Bashant

Opinion

[*586] **ORDER**:

(1) DENYING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION (ECF NO. 121);

(2) DENYING MOTION FOR SANCTIONS (ECF NO. 132); AND

(3) DENYING *EX PARTE* MOTIONS RE: SUPPLEMENTAL AUTHORITY (ECF NOS. 139, 145, 146)

Plaintiffs Nancy Carrera, Anna Hershey, Emily Diaz, Brent Morrison, and Karene **[*587]** Jullien (collectively, "Plaintiffs") filed a Consolidated Class Action Complaint against defendant First American Home Buyers Protection Company ("Defendant" or "First American") on October 9, 2014 alleging: (1) tortious breach of the implied covenant of good faith and fair dealing; (2) violation of *California Civil Code § 1710(1)* (intentional misrepresentation); (3) violation of *California Civil Code § 1710(2)* (negligent misrepresentation); (4) violation of *California Civil Code § 1710(3)* (fraud by concealment); (5) violation of *California Civil Code § 1710(4)*; (6) violation of *California Business and Professions Code §§ 17200, et seq.* (the "UCL"); (7) false advertising; (8) breach of contract;[1] and (9) declaratory relief. (ECF No. 115 ("Consol. Compl.").)

On November 24, 2014, Plaintiffs filed a motion to certify the following class pursuant to *Federal Rule of Civil Procedure 23(b)(2)* and **[**3]** *(b)(3)*:

> All persons who purchased or were listed as the named insured on a home protection contract issued by Defendant First American Home Buyers Protection Corporation from March 6, 2003 to the present.

(ECF No. 121-1 ("Mot.") at pp. 2, 16, n. 8.) Plaintiffs seek certification of the class for the following claims: (1) intentional misrepresentation; (2) negligent misrepresentation; (3) fraud by concealment; (4) promissory fraud; (5) violation of the UCL; and (6) false advertising. (*Id.* at pp. 2-3.)[2] Defendant opposes. (ECF No. 128 ("Opp.").) The gravamen of Plaintiffs' class claims is that First American made misrepresentations in marketing home protection contracts, because First American routinely denies or delays legitimate claims made under the contracts.

After the filing of Plaintiffs' motion for class certification, Plaintiffs filed a motion for sanctions and the parties both filed *ex parte* motions for leave to file a notice of supplemental authority.

The Court finds these motions suitable for determination on the papers submitted and without oral argument. *See Civ. L.R. 7.1*. For the following **[**4]** reasons, Plaintiffs' motion for class certification (ECF No. 121) is **DENIED**, the *ex parte* motions regarding supplemental authority filed by the parties (ECF Nos. 139, 145, 146)[3] are **DENIED**, and Plaintiffs' motion for sanctions (ECF No. 132) is **DENIED**.

I. FACTUAL BACKGROUND

First American is a nationwide provider of home warranty plans. (Opp. at p. 8.) The plans provide for the "repair or replacement" of covered systems and appliances that malfunction during the plan period due to "normal wear and tear," subject to certain exclusions. (*Id.*) The plans expire after one year, but can be renewed for additional one year terms. (*Id.*) During the class period, First American sold plans with a variety of configurations in more than 40

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[1] The breach of contract claim is being brought solely on behalf of Plaintiffs Carrera, Hershey, Morrison, and Diaz individually. (ECF No. 115 at p. 49.)

[2] Plaintiffs do not seek certification of their tortious breach of the implied covenant of good faith and fair dealing claim.

[3] Having read and considered the moving papers, and good cause failing to appear, the Court **DENIES** the *ex parte* motions regarding supplemental authority. The Court will disregard any new argument contained in the motions. To the extent the cases are relevant, the Court will locate them in its own research.

states. (ECF No. 128-36 ("Hand Decl.") at ¶¶ 6-8.) From March 2003 through April 2011, First American sold 3,220,026 home warranty plans. (ECF No. 121-2 ("Bottini Decl.") at ¶ **[**5]** 26, Exh. 25.)

First American markets and advertises its plans through four channels: (1) real estate sales; (2) renewals; (3) starting in 2007, direct to consumer (via telephone and online); and (4) portfolio management (10 or more properties under contract). (Opp. at p. 9; Hand Decl. at ¶ 5; ECF No. 128-35 ("Craney Decl.") at ¶ 4; ECF No. 128-16 ("Miles Decl.") at ¶ 3.) The primary forms of marketing communication include "flyers, postcards, brochures, direct mail, email, social media, and websites." (Hand Decl. at ¶ 9.)

First American home warranty plans can be obtained (1) in connection with the purchase of a residential property; (2) separately by ordering over the phone or through **[*588]** First American's website; or (3) by renewing a prior contract. (Miles Decl. at ¶ 3.) For calendar years 2004 to 2013, inclusive, approximately 50% of First American's home warranty plans were sold in the real estate channel, 46% were sold in the renewal channel, 4% were sold in the direct-to-consumer channel, and less than 1% were sold in the portfolio management channel. (Hand Decl. at ¶ 32.)

During the class period, from approximately March 2003 to June 2011, First American issued approximately 1,320 different versions **[**6]** of its contract. (Miles Decl. at ¶ 8.) The contracts varied from state-to-state and year-to-year, and contained different types of coverage. (*Id.* at Exhs. C, D.)

First American's records reflect that approximately 49% of plan holders never make a claim under their plan. (*Id.* at ¶ 12.) In addition, although imprecise, First American's records reflect that between March 6, 2003 and December 31, 2012, approximately 4.5% of all claims made were denied in full or in part. (*Id.* at ¶ 11.)

A. Real Estate Sales Channel

In the real estate channel, First American employs approximately 100 "area managers" across the United States, who interact with local real estate agents. (Hand Decl. at ¶ 10.) The real estate agents, in turn, interact directly with home buyers and sellers, who then decide whether or not to purchase a home warranty plan with First American. (*Id.* at ¶ 10.) On occasion, home buyers and sellers use a real estate agent who does not interact with a First American area manager. (*Id.* at ¶ 11.) First American area managers are given discretion in determining how they want to market the plans. (*Id.* at ¶¶ 12, 13.) Marketing may include giving a live presentation at a real estate office or **[**7]** trade event, speaking or corresponding with a real estate agent, or distributing written marketing materials prepared by First American's sales and marketing department, which are available for the area manager to order. (*Id.* at ¶ 12.)

Plaintiffs assert that First American's area managers are given standardized, written scripts. (Bottini Decl. at Exhs. 1 and 2.) As examples, Plaintiffs attach a First American Product and Services Home Warranty Training Presentation for real estate agents (*see id.*) and a Quick Reference Guide (*see id.* at Exh. 3) to their motion. In the presentation, the agents are instructed to hand out and review First American's brochures. (*Id.* at Exhs. 1 and 2.) The guide contains a "suggested script" for buyers and sellers, which contains similar language to the brochures. (*Id.* at Exh. 3.)

First American disputes the contention that it provides its area managers with a "script" to follow in selling its plans to buyers and sellers. (Hand Decl. at ¶ 13.) First American claims the "script" attached to Plaintiffs' motion is part of a PowerPoint presentation approved by First American's sales and marketing department in 2010 for use by use by some area managers. (*Id.* at **[**8]** ¶ 14.) First American further claims this PowerPoint presentation was not used prior to 2010 and was never widely or uniformly disseminated to its network of area managers or available on First American's website. (*Id.* at ¶¶ 14, 15.)

First American also contends that the Quick Reference Guide attached to Plaintiffs' motion (Bottini Decl. at Exh. 3), which was generated in 2012, was only in use in the 2012-2013 time frame, and was not widely used or disseminated during that time. (Hand Decl. at ¶ 16.) First American further asserts that the Quick Reference Guide was never available on First American's website. (*Id.* at ¶ 16.)

First American admits that its sales and marketing department creates certain written materials, such as brochures and fliers, and sends those materials to many area managers to assist in the promotion of First American's home warranty plans or makes them available on First American's website. (Hand Decl. at ¶ 17; Bottini Decl. at Exh. 28 ("Miles II Depo.") at 64:6-12; *see also* Bottini Decl. at Exhs. 42, 43, 46.) However, First American contends they do not have a uniform practice of providing these materials and do not keep track of which specific materials the area **[**9]** managers opt to provide to the real estate agents. (Hand Decl. at ¶¶ 19, 20.) **[*589]** First American also does not monitor how each real estate agent uses the provided materials, if the agent uses them at all. (*Id.* at ¶¶ 21, 24, 27.)

In the real estate channel, home warranty plans may be purchased by the: (1) real estate agent; (2) home seller; or (3) home buyer. (Hand Decl. at ¶ 23; Craney Decl. at ¶ 5; Miles Decl. at ¶¶ 3, 4.) Of the three options, the plans are more often purchased by the home seller or real estate agent. (Hand Decl. at ¶ 25.) The home buyer is rarely involved in the evaluation and selection of the plan, and may not receive a copy of the contract until after closing and taking possession of the home. (*Id.* at ¶ 25.) First American's marketing materials are aimed at both buyers and sellers. (*See id.* at Exh. B.)

First American asserts that it has created a wide variety of marketing materials over the years, which have varied over time and from region to region. (*Id.* at 18, 28, 31, Exh. B.) Some of the materials are specifically created at the request of area managers to be tailored to a specific region. (*Id.* at ¶¶ 18, 28.) First American attaches to its Opposition a few examples of its advertising **[**10]** and marketing materials used in the real estate channel during the class period that do not reference Plaintiffs' alleged misrepresentations, and contain variations on the "cost comparison chart." (*Id.* at Exhs. A, B.) To their motion, Plaintiffs attach copies of eleven different brochures developed by First American containing the alleged misrepresentations. (Bottini Decl. at Exhibit 33.) First American contends that all of the brochures attached by Plaintiffs were intended for use exclusively in the real estate channel. (Hand Decl. at ¶ 29.)

Once escrow on a home purchase has closed, First American receives payment for the home warranty contract, typically a check drawn on the escrow account. (Miles Decl. at ¶ 4.) However, First American does not receive a copy of the underlying real estate purchase agreement, and has no way of knowing whether the buyer or seller agreed to pay for the premiums. (*Id.* at ¶ 4.) After First American receives an order and payment, First American mails a copy of the home warranty contract to the home buyer. (*Id.* at ¶ 4.)

B. Direct to Consumer Channel

First American created **th**e direct-to-consumer channel in 2007. (*Id.* at ¶ 34.) The channel includes limited **[**11]** scale direct mailings, telephone calls from First American based on leads generated by third-party vendors, and plans purchased directly through First American's website. (*Id.* at ¶ 34; Bottini Decl. at Exhs. 44, 45.) First American contends that because of the cost effectiveness of delivering marketing materials, purchasers are more likely to see advertising in an electronic format — website or email — rather than in a print format. (Hand Decl. at ¶ 34; *see also* Bottini Decl. at Exhs. 10-14, 15 ("Craney Depo.") at 113:8-115:15.)

C. Portfolio Management Channel

First American created the portfolio management channel in February 2013. The channel is defined as purchasers buying 10 or more warranties for their properties, for any given year. (Hand Decl. at ¶ 33.)

D. Renewals

When a home warranty plan is about to expire, First American mails various types of renewal correspondence to the holder of the plan. (Craney Decl. at ¶ 5.) The holder of the plan is not necessarily the person who purchased the plan. (*Id.*) However, First American only mails renewal correspondence to the holder of the plan, regardless of who purchased the plan originally. (*Id.*) For a variety of reasons, approximately 7% **[**12]** to 10% of plan holders never receive any renewal correspondence from First American. (*Id.* at ¶ 6.)

First American's renewal correspondence generally consists of a cover letter, plus one or more different marketing inserts called "buck slips." (Craney Decl. at ¶ 7; Craney Depo. at 20:25-21:11; *see also* Bottini Decl. at Exh. 16.) At various times during the class period, either three or four renewal letters were sent, at various intervals, prior to expiration of a plan. (Craney Depo. at 74:8-24, 75:9-76:3, 84:1-9, 88:4-89:14; Miles II Depo. at 26:4-24, 27:5-10, 229:3-12.) Each letter had several versions. (Craney Depo. at 75:19-76:3, 88:4-10; Miles II Depo. at 26:4-24, 27:5-10.)

[*590] The renewal correspondence varied in content throughout the class period. (Craney Decl. at ¶¶ 8, 13-20; Craney Depo. at 84:1-9.) Some of the cover letters and buck slips contained the allegedly false representations, while others did not. (Craney Decl. at ¶¶ 8, 9, 14-15, 17-18, 20, Exhs. A-G; *see also* Bottini Decl. at Exh. 9.) The renewal correspondence varied depending on the plan holder's payment method. (Craney Decl. at ¶¶ 9, 11-14.) During the class period, First American used approximately 106 different buck **[**13]** slips, with each correspondence containing anywhere from one to three of these buck slips. (*Id.* at ¶ 16.) With limited exceptions, First American no longer has records of which plan holders received which buck slips as part of their renewal correspondence during the class period. (*Id.* at ¶ 16.)

In addition to renewal correspondence, First American also utilizes "inside sales" staff to call customers whose plans are about to expire. (*Id.* at ¶ 22; Craney Depo. at 74:5-16.) The sales staff is not provided with any uniform written script or guidelines, but instead is given discretion and rely on its judgment in attempting to convince the plan holder to renew. (Craney Decl. at ¶ 22.) On April 12, 2013, the average renewal premium for First American nationwide was $580. (Craney Depo. at 67:13-22.)

E. Location

If plan holders choose to renew, they can renew by telephone, through First American's website, or by mail. (Craney Depo. at 63:21-25.) If plan holders renew by mail, the renewals are sent to Van Nuys, California, regardless of where the plan holder is located in the United States. (*Id.* 63:2-14.) First American does not maintain records on the method plan holders use to renew. (*Id.* at **[**14]** 64:1-9, 66:1-11.)

First American maintains call centers in Santa Rosa, California and Phoenix, Arizona. (Craney Depo. at 70:6-18; Miles Depo. at 27:17-24.) The sales people who work in the renewals and direct-to-consumer departments are in one of those two locations. (Craney Depo. at 70:6-22; Miles II Depo. at 20:14-21:8.) The First American marketing and sales personnel who assist in creating the renewal letters are located in Santa Rosa, California. (Craney Depo. at 81:15-25; Miles II Depo. at 29:12-30:18.) Barry Miles, previously the Director of Call Center Operations and Senior Director of Service Operations and now the Vice-President of Operations, is located in Phoenix, Arizona. (Miles Decl. at ¶ 2; Miles Depo. at 8:22-23; Miles II Depo. at 9:18-19.) He previously supervised personnel in the offices in Van Nuys and Phoenix, as well as a "near shore operation" in the Dominican Republic that is a third-party service provider. (Miles Depo. at 27:17-24, 29:12-16.)

The headquarters of First American is in California. (Miles II Depo. at 8:3-11.) Executives are located in Santa Rosa, Van Nuys, and Irvine, California, as well as Phoenix, Arizona and Texas. (*Id.* at 9:6-12, 10:14-17.)

F. [**15] Contractors

Before entering the "First American network," independent contractors are required to sign a "Service Agreement" with First American. (Miles Decl. at ¶ 22; *see also* Bottini Decl. at Exhs. 6, 7, & 29 ("Horne Depo.") at 30:2-16.) The

Service Agreement requires contractors to, among other things: (1) "agree[] to contact homeowner within three hours of being contacted by First American;" (2) "agree[] to initiate service under normal circumstances within 48 hours of receipt of work order from First American;" (3) provide evidence of liability and worker's compensation insurance; and (4) "guarantee[] work performed for a period of thirty days and all parts replaced for a period of ninety days from completion of assignment." (Miles Decl. at ¶ 22; *see also* Bottini Decl. at Exh. 7; Gosselin Depo. at 117:16-118:5.) First American also requires that each of its contractors be licensed in the appropriate trade, which First American confirms with the relevant regulatory agency. (Miles Decl. at ¶¶ 23, 24; Gosselin Depo. at 117:16-118:5.) First American also tracks the expiration date of its contractors' licenses to ensure they are current. (Miles Decl. at ¶ 24.)

First American utilizes **[**16]** various pricing structures for its contractors, including "uni-price," "flat rate," "default," "all-inclusive," "bid," and "value" payment methods. (Miles Decl. at ¶ 25; *see also* Bottini Decl. at Exh. 8; Bottini Decl. at Exhs. 25 ("Kaszynski Depo.") at 147:11-148:1, 39.) The pricing structures vary by what the contractor is obligated to pay and First American is obligated to pay for each job. (Miles **[*591]** Decl. at ¶ 25.) The percentage of contractors on any given pricing structure has varied considerably since 2003. (Miles Decl. at ¶ 26; *see also* Kaszynski Depo. at 156:10-21.)

First American sends "Welcome Aboard" packages to all contractors. (Horne Depo. at 30:2-32:7.) Each contractor receives the same package, although the package has changed over the years. (*Id.* at 30:2-32:7.) Packages are sent out via e-mail, fax, or mail. (*Id.* at 32:16-20.)

In allocating work to a contractor, First American claims "[e]ach contractor's circumstances are unique and are considered on a case-by-case basis," without one factor being determinative. (Miles Decl. at ¶ 28; Kaszynski Depo. at 144:8-18.) In allocating a percentage of work to a contractor, First American asserts that it takes into consideration the following **[**17]** factors: (1) volume of work a contractor is capable of handling; (2) the number of other contractors that work in the same trade for the same geographic area; and (3) "various cost and performance-related criteria." (Miles Decl. at ¶¶ 28, 29; *see also* Bottini Decl. Exhs. 36-38.)

Evaluating contractor performance includes analyzing a number of reports, including homeowner complaint ("partner violation") reports, re-dispatch reports, continuation reports, recall (or call-back) percentage reports, cash out reports, repair versus replace reports, and reimbursement reports. (Miles Decl. at ¶¶ 30, 33; *see also* Bottini Decl. at Exhs. 5, 53, 63; Kaszynski Depo. at 158:3-14; Horne Depo. at 215:19-217:20.) First American claims it does not impose any hard or fixed numerical standard that its contractors must satisfy, but it will follow up if one of the performance reports is unusually high. (Miles Decl. at ¶¶ 31, 39; Bottini Decl. at Exhs. 5, 19, 21, 23, 36-38, 54; Kaszynski Depo. at 144:8-18.) If First American is not satisfied with the contractor's response to the follow up, it may either reduce or eliminate the work it allocates to that contractor. (Miles Decl. at ¶ 31; Bottini Decl. at Exhs. **[**18]** 20 ("Gosselin Depo.") at 102:20-24; 107:14-109:20 & 52.) First American states that it routinely reduces or eliminates work allocations due to unsatisfactory performance reports, even where the contractor's average cost per invoice is no higher than other similarly situated contractors. (Miles Decl. at ¶ 31.) In allocating work to contractors, First American claims it does not consider the rate of denial of claims serviced by a contractor. (*Id.* at ¶ 32.)

For each claim, First American expects its contractors to first assess whether it is both possible and appropriate, under the circumstances, to repair a broken system or appliance, rather than replacing the entire system or appliance outright. (Miles Decl. at ¶ 27; Kaszynski Depo. at 143:23-144:7.) In one of its welcome packages to contractors, First American stated: "FA is looking for repair oriented contractors. We would like for you to attempt repair before you recommend replacement." (Bottini Decl. at Exh. 6; *see also* Bottini Decl. at Exhs. 54-56, 62, 66.) First American claims it does not encourage its contractors to make "inappropriate repairs," *i.e.*, repair an item when replacement is warranted. (Miles Decl. at ¶27.) From approximately **[**19]** 2008 to 2011, based on historical data, First American established the goal of a 6% to 8% replacement rate for "HVAC," *i.e.*, heating, ventilation, and air conditioning, work. (Gosselin Depo. at 106:19-107:11; Bottini Decl. at Exh. 19.)

First American attempts to track repair/replacement percentages for a certain subset of contractors (uni-price, flat rate, or default pricing structure), although its definitions of "repair" and "replace" "are to a large degree arbitrary and are used for comparative purposes only." (Miles Decl. at ¶¶ 33, 34.) For example, replacing a *part* in an appliance may be considered a "repair" or a "replacement." (*Id.* at ¶ 34.) In addition, First American's designation of certain claims as "repair" or "replace" depends on the contractor's price structure. (*Id.* at ¶¶ 35-38.) With respect to replacement items that First American **[*592]** covers, it maintains records of those purchases. (*Id.* at ¶ 36.) For contractors that have all-inclusive pricing which covers the purchase of all parts, First American does not maintain information on those purchases. (*Id.*)

First American does not keep track of how much its customers pay other than the service trade fee. (Miles II Depo. at 77:8-10; **[**20]** Horne Depo. at 187:2-6.) The service trade fee is listed in the plan holder's contract and generally varies by location. (Miles II Depo. at 73:2-20.) A contractor does not need to call First American if it covers anything not covered by the contract. (*Id.* at 78:3-4.) Non-covered charges may be reflected in the "Notes" section in Falcon, First American's software. (Miles II Depo. at 94:5-95:12; Horne Depo. at 186:8-23, 213:4-20; Bottini Decl. at Exh. 50.) First American surveys its customers every month, but does not proactively solicit information on fees paid for non-covered charges. (Miles II Depo. at 106:10-11, 117:14-16.)

G. Mandatory Arbitration Agreements

First American began adding mandatory arbitration provisions to new home warranty plans used in the portfolio management channel in February 2013. (Hand Decl. at ¶ 36.) Between February 2013 and early 2014, First American began adding arbitration clauses to its contracts on a state-by-state and channel-by-channel basis. (*Id.*) By early 2014, all new plans issued in all channels had mandatory arbitration clauses. (*Id.*)

H. Plaintiffs' Class Claims

Plaintiffs seek to certify a class for intentional misrepresentation, negligent misrepresentation, **[**21]** fraud by concealment, promissory fraud, unfair, unlawful or fraudulent conduct in violation of the UCL, and false advertising. (Mot at pp. 2-3.)

1. <u>Intentional and Negligent Misrepresentation</u>

Plaintiffs allege First American made several "uniform and identical written representations" to the named Plaintiffs and each member of the Class, which were contained in First American's standard home warranty contract and written advertisements. (Consol. Compl. at ¶¶ 64, 99, 104.) The representations include: (1) First American covers unknown defects; (2) First American provides coverage for systems and appliances which malfunction due to lack of maintenance, rust or corrosion, or chemical or sedimentary buildup; (3) repair/replacement costs range between $85 and $7,500; (4) the cost with a First American plan is just $55; (4) First American responded to nearly 900,000 service requests and saved homeowners over $121 million dollars in home repair costs in 2007; (5) First American is a subsidiary of First American Corporation; and (6) having a First American home warranty on a home will give it a competitive edge over other homes on the market. (*Id.* at ¶ 64.)

Plaintiffs contend these representations are false **[**22]** because: (1) First American routinely denies claims with pre-existing conditions; (2) First American routinely denies claims for pre-textual reasons, including lack of maintenance, rust, and corrosion, even if these things are not the cause of the malfunction; (3) First American trains its employees to deny legitimate warranty claims based on pre-textual reasons; (4) First American financially incentivizes its contractors to deny legitimate claims and/or perform substandard repairs; (5) First American creates economic incentives for contractors to shift the cost of repair or replacement onto the consumer; (6) First American routinely delays authorizing repairs or purchasing necessary equipment; (7) First American's customers routinely have to pay more than the service call fee because First American's contractors cause First American to deny, in whole or part, claims that should have been covered under the policy; (8) First American's contractors routinely gouge customers for the "non-covered" portions of warranty replacements and repairs; (9) First American's contractors routinely upsell customers for repairs and replacements that are not covered under the home warranty plan; (10) **[**23]** First American has no way of knowing how much its customers have to pay out of their pocket for repairs and replacements because it does not keep track of such costs; (11) First American paid out only $94.3 million in **[*593]** claims during 2007; (12) First American is a subsidiary of First American Title Insurance Company; and (13) there is no evidence a First American home warranty gives the seller a competitive edge on the market. (*Id.* at ¶ 64.)

2. Concealment

Plaintiffs allege that First American had a duty to disclose all material facts to its insureds pursuant to *California Insurance Code section 332*. (*Id.* at ¶ 108.) Given this duty, Plaintiffs allege that Defendant failed to disclose the following: (1) First American tells its contractors to repair rather than replace items, even where a replacement is necessary, and even under situations where repairing rather than replacing an item would pose a threat to the safety of First American's customer; (2) the consumer will pay significant sums out of pocket for the replacements First American does authorize, above and beyond what they have already paid for the premium and service call fees; (3) First American pays its contractors significantly below retail rates; (4) First American **[**24]** allows its contractors to charge full retail rates to First American's customers and encourages its contractors to earn their money mostly from the customer; (5) First American does not police its contractors with respect to charges they impose on First American's customers above and beyond First American's coverage under the home warranty plans and intentionally does not keep track of these charges; and (6) First American encourages a "race to the bottom" with respect to its contractors, by rewarding those who keep their average cost per call at a minimum. (*Id.* at ¶ 109.)

3. Promissory Fraud

Plaintiffs allege that First American promises customers that it will repair or replace covered systems, and the insured will only pay the service call fee to have any covered system repaired or replaced. (*Id.* at ¶¶ 116-119.) Plaintiffs allege that First American never had any intention of complying with these promises. (*Id.* at ¶¶ 120-121.)

4. UCL and FAL

Plaintiffs allege First American violated the unfair, fraudulent, and unlawful prongs of the UCL. (*Id.* at ¶ 134.) Plaintiffs allege that First American violated the unlawful prong by: (1) engaging in the fraud outlined above; (2) violating the FAL; **[**25]** (3) breaching its contracts with Plaintiffs; (4) violating the implied covenant of good faith and fair dealing; (5) violating *California Insurance Code section 332*; and (6) violating California's Unfair Insurance Practices Act. (*Id.* at ¶¶ 135-139.) Plaintiffs also allege First American violated the UCL and FAL by making or causing to be made the untrue and misleading statements set forth above. (*Id.* at ¶ 144.)

I. Named Plaintiffs

1. Nancy Carrera

Plaintiff Nancy Carrera ("Carrera") purchased a home in Virginia Beach, Virginia in or about February 2009. (ECF No. 128-10 ("Shophet Decl.") at Exh. B at 19:11-14.) Carrera's real estate agent, Jen Basnight, purchased a First American home warranty plan for Carrera in connection with the home purchase. (Shophet Decl. at Exh. B at 119:18-121:23; Exhs. K, L; Consol. Compl. at Exh. A.) Ms. Basnight informed Carrera that she purchases plans as a courtesy for the people who use her services. (Shophet Decl. at Exh. B at 121:15-23.) The money came from the seller's funds. (*Id.* at Exhs. K, L.)

Carrera recalls discussing over the phone with Ms. Basnight the types of services and warranties offered by First American and 2-10 Home Buyers Warranty. (Bottini Decl. II at Exh. 85 at 52:8-54:18.) Carrera testified **[**26]** she picked a home warranty company based in part on this conversation. (*Id.* at 54:6-8.) Prior to learning that Ms. Basnight had purchased a First American home warranty plan for her, Carrera does not recall seeing any advertising about a home warranty company. (Shophet Decl. at Exh. B at 120:11-24.) After Ms. Basnight informed Carrera that she had purchased a home warranty plan for her, Carrera went online and did some research about First American. (*Id.* at 120:6-10, 121:6-8.) Carrera testified that she liked First **[*594]** American's broad range of services and their low service fee. (*Id.* at 121:6-8.)

Shortly after escrow closed on her home, in her closing packet, Carrera received her First American contract along with several brochures for home warranty companies. (Bottini Decl. at Exh. 34 at 137:15-138:22; ECF No. 129-1 ("Bottini Decl. II") at Exh. 85 at 40:8-14, 118:14-18, 134:16-21.) Carrera reviewed the First American brochure. (Bottini Decl. at Exh. 34 at 137:15-138:22.) The brochure and attached "First American Home Warranty Sample Contract" contain several of the alleged misrepresentations. (*See id.* at Exh. 34 at Exh. 13.)

After reviewing the brochures, Carrera testified that she found **[**27]** "important" "[t]he service charge being low of $100, that it covered a broad, broad variety of appliances in [her] home, the customer service satisfaction[,] and . . . the quick response." (Bottini Decl. at Exh. 34 at 140:12-141:5; Bottini Decl. II at Exh. 85 at 116:14-117:19.) Carrera also went on First American's website at the time she received the brochures. (Bottini Decl. at Exh. 34 at 141:6-11.) Carrera reviewed this information before the deadline to cancel her First American policy. (*Id.* at Exh. 34 at 139:4-140:5.)

Carrera's First American home warranty plan was effective from February 20, 2009 through February 19, 2010. (Miles Decl. at ¶ 14.) In June 2009, she made a claim with respect to her air conditioning unit. (*Id.* at Exh. E.) Carrera did not renew her plan upon expiration. (*Id.* at ¶ 14.)

2. <u>Karene Jullien</u>

Plaintiff Karene Jullien ("Jullien") purchased a home in Sherman Oaks, California in or about June 2010. (Shophet Decl. at Exhs. E ("Jullien Depo.") at 18:20 - 20:10; U, V.) The home purchase agreement executed by Jullien states that the seller of the property was responsible for paying the cost, not to exceed $350, of a one year home warranty plan to be determined by the buyer **[**28]** during the escrow period. (Shophet Decl. at Exh. U, ¶ 4(E)(5).) However, a later revised invoice indicates Jullien might have purchased the plan herself for $330. (*Id.* at ¶ 27, Exh. W.)

After reviewing the evidence submitted by all parties, it is unclear who purchased the initial plan. During Jullien's deposition, however, she testified that she did not choose First American, and there is no evidence that she read or relied on any representations from First American. Jullien's broker in connection with this purchase was Ronald Zate. (*Id.* at Exh. E at 20:12-20.) Jullien testified that prior to the close of escrow she did not discuss any specific home warranty company with Mr. Zate. (*Id.* at 51:9-16.) However, she informed Mary Stu Bryan, the individual responsible for obtaining her home warranty plan, that she wanted a plan that would specifically cover her AC. (Bottini Decl. II. At Exh. 87 at 39:17-41:15.) She informed Ms. Bryan: "It doesn't [which company] matter as long as it covers the AC." (*Id.* at 39:20-21.) Jullien later testified that she does not know who ultimately chose First American and did not do any research comparing different home warranty companies prior to close of escrow. **[**29]** (Shophet Decl. at Exh. E at 51:2-25.)

Jullien's initial First American Home Warranty Plan was effective from June 17, 2010 through June 16, 2011. (Miles Decl. at ¶ 21.) During her initial contract term, beginning in or around April 2011, Jullien made claims with respect to her air conditioning unit, in that it was not cooling properly and it was dripping. (Shophet Decl. at Exh. E at 97:7-24; Miles Decl. at ¶ 20, Exh. I.)

In or around October 2011, Jullien renewed her contract with First American effective October 14, 2011. (Miles Decl. at ¶ 21; *see also* Consol. Compl. (ECF No. 116) at Exh. D.) Prior to this renewal, Jullien spoke with a First American representative over the phone. (Bottini Decl. II at Exh. 87 at 138:23-139:18.) She asked the technician to confirm whether or not her old air conditioning system would be covered, and he confirmed that it would be covered. (*Id.* at 139:5-18.) According to Jullien, the First American representative "said that he understood that the system was old, and they would take on the repair or replacement of the system if it failed again. And he even said wouldn't that be sweet for less than $500 a month — a year." (*Id.* at 139:14-18.)

[*595] In August 2012, **[**30]** Jullien received a $1,640.88 cash settlement in lieu of the replacement of her hydronic air handler, which she accepted. (Shophet Decl. at Exhs. Z, AA, BB.) Jullien was ultimately satisfied with how First American resolved the claim she had made. (*Id.* at Exh. E at 69:2-20.)

Jullien's plan expired on October 13, 2012. (Craney Decl. at ¶ 10; Miles Decl. at ¶ 21.) On or around August 6, 2012, Jullien was mailed an auto-renewal cover letter and notice. (Craney Decl. at ¶ 10.) She did not renew her second home warranty plan. (Miles Decl. at ¶ 21.)

3. Brent Morrison

Brent Morrison ("Morrison") purchased a home in Canyon Country, California in or around April 2012. (Shophet Decl. at Exhs. C at 21:5-9, M, N; Bottini Decl. at Exh. 69, ¶ 2.) The Purchase Agreement and Joint Escrow Instructions executed by Morrison states that the seller of the property was responsible for paying the cost, not to exceed $375, of a one year home warranty plan issued by First American. (Shophet Decl. at Exh. M, ¶ 4(D)(6).) In April 2012, Morrison's real estate agent, Danny Tresierras, ordered a First American home warranty plan. (*Id.* at Exhs. C at 16:17-24, Q, R.) Mr. Tresierras informed Morrison he chose First American because a past client of his said **[**31]** they do a good job. (Shophet Decl. at Exh. C at 25:5-15; Bottini Decl. at Exh. 70, ¶ 2.) Mr. Tresierras and Morrison did not have any other conversations about First American prior to Morrison signing the Purchase Agreement, or any conversations about other home warranty companies. (Shophet Decl. at Exh. C at 25:16-25.)

After Mr. Tresierras ordered the plan, an invoice was sent to Mr. Tresierras and the escrow company. (Shophet Decl. at Exh. R.) However, as reflected in subsequent Sale Escrow Instructions (dated after the Purchase Agreement and Joint Escrow Instructions) the sellers countered the plan out of the deal and did not provide a one-year home warranty plan for the property in the transaction. (Shophet Decl. at Exhs. O, Q; Bottini Decl. at Exh. 69, ¶ 2.)

When Morrison signed the loan documents, he still understood that a home warranty was included. (Shophet Decl. at Exhs. Q, P.) He subsequently made a claim on the plan on May 8, 2012. (*Id.* at Exh. P.) Upon being informed that no plan had been purchased, Morrison purchased a First American plan. (*Id.* at Exhs. R, P.) First American backdated the plan to the date the first claim was made on the property. (*Id.* at Exh. P.) Therefore, **[**32]** Morrison's First American home warranty plan was effective from May 8, 2012 through May 7, 2013. (Miles Decl. at ¶ 16; Shophet Decl. at Exh. S.) Morrison did not renew his plan upon expiration. (Miles Decl. at ¶ 16.)

In a declaration filed in state court, Morrison states that he received several different brochures from different home warranty companies which solicited him to buy a home warranty contract after escrow closed on his house. (Bottini Decl. at Exh. 69, ¶ 3.) He claims he chose First American based on the "benefits and coverage provided by First American . . . compared to the contracts offered by [other companies], as well as the fact that [his] real estate agent had previously recommended First American." (*Id.* at ¶ 4.) It is unclear when Morrison read the brochure, as he does not reference his initial claim and confusion, and which representations in the brochure he relied on.

Morrison did not retain the brochure he read and relied on, but attaches one that is "substantially similar" to the one he received. (Bottini Decl. at Exh. 69, ¶ 4, Exh. A.) The brochure and attached "First American Home Warranty Sample Contract" contain several of the alleged misrepresentations. (***[**33]*** *Id.*)

4. Anna Hershey

Anna Hershey ("Hershey") purchased a home on Cliffridge Avenue in La Jolla, California ("Cliffridge Property") in 1999. (Shophet Decl. at ¶ 22, Exh. D at 12:6-8.) Prior to July 2011, Hershey rented this property to tenants. (*Id.* at 13:3-12.) After that date, Hershey personally lived on the property. (*Id.* at 13:3-12.)

Hershey received a First American home warranty plan for the property as a gift in **[*596]** 1999. (*Id.* at 19:10-17, 74:19-25; Bottini Decl. at Exh. 70 at ¶ 2.) Hershey renewed the plan from time to time. (Shophet Decl. at Exh. D at 20:10-22; Bottini Decl. at Exh. 70 at ¶ 2.) As relevant to this case, Hershey purchased a plan for this property effective July 2, 2010 through July 1, 2011. (Miles Decl. at ¶ 19; Bottini Decl. at Exh. 70 at ¶ 2.) She renewed her plan upon expiration. (Miles Decl. at ¶ 19; Bottini Decl. at Exh. 70 at ¶ 2.) Her new plan was effective July 2, 2011 through July 1, 2012. (Miles Decl. at ¶ 19.) She initially renewed this plan after expiration in July 2012, but changed her mind and received a refund. (*Id.* at Exh G at 558.)

Hershey also purchased a home on Westbourne Street in La Jolla, California ("Westbourne Property") in 1985. (Shophet Decl. at ¶ 23, Exh. D at 28:5-7.) Prior to moving **[**34]** into the Cliffridge Property in July 2011, she lived in the Westbourne Property. (*Id.* at Exh. D at 22:13-25.) Hershey did not purchase the First American home warranty plan for the Cliffridge Property contemporaneously with the property. (*Id.* at ¶ 23, Exh. D at 28:8-11.) Hershey first purchased a home warranty plan with First American for the Westbourne Property in or around 2004. (*Id.* at Exh. D at 28:12-21.) She thereafter renewed the home warranty contract for this property. (*Id.* at ¶ 23, Exh. D at 30:9-12.)

As relevant to this case, Hershey purchased a First American home warranty plan for the Westbourne Property effective May 16, 2011 through May 15, 2012. (Miles Decl. at ¶ 19.) She renewed her plan upon expiration. (*Id.* at ¶ 19.) Her new plan was effective May 18, 2012 through May 17, 2013. (*Id.* at ¶ 19.) She did not renew the plan after expiration. (*Id.* at ¶ 19.)

In 2009 and 2010, Hershey attended classes at Mesa College to obtain her real estate license. (Shophet Decl. at Exh. D at 35:7-25.) While she was at Mesa College, First American home warranty plans were pitched by Lisa Wood, an area representative, who handed out First American brochures. (*Id.* at 36:17-25; Miles Decl. at Exh. G, p. 513.) Hershey also received First **[**35]** American brochures from Prudential, Grossmont College, and REBA, which is a La Jolla real estate association. (Shophet Decl. at Exh. D at 38:11-16, 40:2-17.) Hershey stated in an April 2013 declaration that she saw and relied on "numerous advertisements from Defendant First American" at an unspecified time. (Bottini Decl. at Exh. 70 at ¶ 3.) Hershey further stated that the unspecified "statements and representations" in the brochures "were significant and substantial reasons that caused [her] to purchase the home warranty contracts from First American." (*Id.*) She attaches two brochures to her declaration. (*Id.* at ¶ 2, Exhs. B, C.) The brochures and attached "First American Home Warranty Sample Contract" contain several of the alleged misrepresentations. (*Id.* at ¶ 4, Exhs. B, C.)

Prior to the time she purchased or renewed her home warranty contracts, Hershey states that she received "numerous additional advertisements and brochures from First American," which she specifically recalls stated that: First American provided both repair and replacement coverage; she would only pay one small service fee for each covered claim; the home warranty contracts provided budget protection for costly **[**36]** breakdowns; and First American had a "large network of 'pre-screened, certified service technicians.'" (*Id.* at ¶ 4.) Hershey states that these representations were "significant and material representations," which influenced her decision to purchase a First American home warranty contract instead of contracts offered by numerous competitors. (*Id.*)

Hershey also claims she received letters from First American urging her to renew her contracts. (*Id.* at ¶ 5.) Hershey says she read and relied upon these letters in renewing her coverage, in addition to the First American brochures and ads she had previously seen. (*Id.*)

In early 2011, Hershey maintained a "blog" on Zillow called "Anna Hershey's Advice." (Shophet Decl. at Exhs. D at 52:4-11; T.) On the blog, she answered a question about home warranty companies on January 5, 2011. (*Id.* at Exh. T.) In response, she stated: "Hi. I am very happy with First American Home Buyers Protection. Also used them for a rental. Available service is all spelld [sic] out in the contract, they respond promptly. Affiliated with Prudential." **[*597]** (*Id.* at Exh. T.) Hershey did not Google First American, however, until after she had problems with them. (*Id.* at Exh. D at 74:9-18.)

Hershey **[**37]** had claims relating to an oven door denied on the Cliffridge Property in or around November 2010 and May 2012 because the damage was determined not to be due to normal wear and tear. (Miles Decl. at Exh. G, pp. 529, 541-548, 553.) She also had a claim relating to an oven door on the Westbourne Property denied in June 2012 because the damage was determined not to be due to normal wear and tear. (*Id.* at Exh. H, pp. 566-574.)

5. Emily Diaz

In or around November 2007, Emily Diaz ("Diaz") purchased a residential property with multiple units on Brighton Avenue in San Diego, California. (Shophet Decl. at ¶ 36, Exhs. FF, HH, & CC at 81:15-84:25.) The Purchase Agreement for the property represents that the seller will pay for a one-year home warranty plan issued by CRES, not to exceed $750. (*Id.* at Exhs. FF at 268 & CC at 86:8-13.) The counter-offer states that the home warranty company will be the seller's choice. (*Id.* at Exh. FF at 266 & CC at 87:9-89:7.) Diaz was represented during the purchase by realtor Jimmy Loucks. (*Id.* at Exh. CC at 82:19-83:2.)

Diaz testified that she first became a contract holder with First American in December 2007 in connection with the Brighton Avenue property. (*Id.* at Exhs. CC at 14:23-15:3 & GG.) Prior to receiving her First American home warranty **[**38]** contract in the mail, she never spoke with anybody at First American, went online to research the company, or read about them in the paper. (*Id.* at Exh. CC at 208:11-209:11.)

During her contract with First American, Diaz submitted a claim for a shower drain that was not draining properly in March 2008, and a claim for a water heater in December 2008. (*Id.* at Exh. CC at 76:13-78:3, 186:14-20; Consol. Compl. at ¶ 53.) First American denied the claims. (Shophet Decl. at Exh. CC at 168:12-20.) Diaz ultimately hired and paid outside contractors to fix these issues. (*Id.* at Exh. CC at 76:13-78:3, 168:12-25.)

II. PROCEDURAL HISTORY[4]

A. Diaz Action

On March 6, 2009, Emily Diaz ("Diaz") commenced a class action against Defendant in San Diego Superior Court. (*Diaz v. First American Home Buyers Protection Corporation*, Case No. 09-cv-00775-BAS(JLB) ("Diaz Action"), ECF No. 1, Exh. A.) On April 15, 2009, Defendant removed the Diaz Action to federal court pursuant to the Class Action Fairness Act of 2005 ("CAFA"), *28 U.S.C. § 1332*, *28 U.S.C. § 1441(a)* and *(b)*, and *28 U.S.C. § 1453*. (*Id.*)

On June 22, 2009, the Court granted Defendant's motion to dismiss Diaz's third cause of action **[**39]** for violation of the Consumer Legal Remedies Act ("CLRA") without leave to amend and Diaz's fourth cause of action for violation of the UCL to the extent it relies on a violation of *California Insurance Code §§ 790 et seq.* or the CLRA. (Diaz Action, ECF No. 15.) The Court also dismissed without prejudice Diaz's fifth and sixth causes of action for intentional misrepresentation and false promise. (*Id.*)

On July 24, 2009, Diaz filed a First Amended Complaint. (Diaz Action, ECF No. 16.) On September 21, 2009, the Court dismissed Diaz's UCL claim to the extent it relies on the violations of *section 300 et seq. of the California Insurance Code* and *section 7000 et seq. of the California Business and Professions Code*. (Diaz Action, ECF No. 24.) The Court also dismissed Diaz's fourth and fifth causes of action to the extent they rely on fraudulent concealment. (*Id.*) Defendant filed an Answer to the First Amended Complaint on October 21, 2009. (Diaz Action, ECF No. 25.)

With leave of Court, Diaz filed a Second Amended Complaint on May 17, 2010. (Diaz Action, ECF No. 38.) On July 23, 2010, the Court granted Defendant's motion to dismiss the UCL claim on the grounds the claim was **[*598]** based on alleged violations of the California Unfair Insurance Practices Act ("UIPA"), which provides **[**40]** no private right of action. (Diaz Action, ECF No. 51 at p. 3.) The Court also struck paragraphs 41(b)-(e) from the SAC. (*Id.* at pp. 4-5.) Defendant filed an Answer to the Second Amended Complaint on August 23, 2010. (Diaz Action, ECF No. 54.)

On July 8, 2011, Diaz moved for class certification. (Diaz Action, ECF No. 87.) The proposed class consisted of:

> All persons and entities in the United States who, during the period from approximately March 6, 2003 through the present (the "Class Period"), purchased, and/or made a claim under, a home-warranty policy issued by Defendant First American Home Buyers Protection Corporation. Excluded from the class are defendants and their parents, subsidiaries, affiliates, all governmental entities, and co-conspirators.

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[4] The Court takes judicial notice of prior filings in the Diaz Action and the Carrera Action. (*See* ECF No. 128-1 at Exhs. A-P, U-W.) *See Fed. R. Evid. 201(b)*; *Lee v. City of Los Angeles, 250 F.3d 668, 689-90 (9th Cir. 2001)*.

(*Id.* at p. 2.) The proposed class was estimated to contain at least 1,339,900 individuals. (*Id.*) Diaz sought to certify two classes, a damages class under *Federal Rule of Civil Procedure 23(b)(2)*, and a class seeking rescission and restitution damages under *Rule 23(b)(3)*. (*Id.*) Diaz sought class certification of not only her breach of contract, breach of implied covenant of good faith and fair dealing, intentional misrepresentation, negligent misrepresentation, and false promise claims, but also for her dismissed **[**41]** UCL claim to preserve her rights. (*Id.* at p. 16.)

On September 8, 2011, the Court denied Diaz's motion for class certification. (Diaz Action, ECF No. 114.) The Court denied certification of Diaz's claims under *Rule 23(b)(2)* on the grounds they failed the superiority and predominance analysis. (*Id.* at pp. 8-13.) The Court further denied certification under *Rule 23(b)(3)* on the grounds Diaz's allegations of future harm were "purely speculative" and Diaz did not offer evidence to rebut Defendant's evidence that the independent contractors do not deny claims and only deny approximately 4% of claims. (*Id.* at p. 14.) The Court did not address Diaz's UCL claim.

Following the Court's denial of class certification, Defendant moved to dismiss for lack of subject matter jurisdiction on October 31, 2011 on the grounds Diaz refused to accept its Rule 68 Offer of Judgment for an amount greater than any amount she could possibly recover at trial. (Diaz Action, ECF No. 125.) On November 29, 2011, the Court granted the motion to dismiss. (Diaz Action, ECF No. 129.)

On November 18, 2013, the Ninth Circuit held that "an unaccepted Rule 68 offer that would fully satisfy a plaintiff's claim is insufficient to render the claim moot." (Diaz Action, ECF No. 163 at 16.) The Ninth Circuit **[**42]** also vacated the dismissal of Diaz's concealment and UCL claims. (*Id.*) The Ninth Circuit held that Diaz adequately alleged violations of the UCL "because her claims are premised on fraud, breach of contract and breach of the implied covenant of good faith and fair dealing, even if [Defendant's] alleged conduct also may have violated [UIPA]." (*Id* at 20.)

The remaining claims in the *Diaz* matter after appeal therefore included class claims for (1) concealment and (2) violation of the UCL, and individual claims for (1) breach of contract, (2) breach of the implied covenant of good faith and fair dealing, (3) intentional misrepresentation, (4) negligent misrepresentation, and (5) false promise.

B. Carrera Action

On September 23, 2009, Carrera filed a class action complaint against Defendant in Los Angeles Superior Court ("Carrera Action"). (ECF No. 1 at Exh. A; Diaz Action, ECF No. 65-2.) The complaint initially sought only injunctive and declaratory relief. (ECF No. 1 at Exh. A.) Defendant attempted to remove the Carrera Action to federal court three times. (*Id.* at ¶¶ 7, 12; Diaz Action, ECF No. 170-1 at p. 2.) Twice it was transferred from the Central District of California to the Southern District **[**43]** of California and remanded. (ECF No. 1 at ¶¶ 7-16.) After the second remand, on or about August 23, 2012, Carrera filed a Second Amended Complaint in Los Angeles Superior Court, adding plaintiffs Anna Hershey, Karene Jullien, and Brent Morrison. (*Id.* at Exh. O.)

[*599] On September 6, 2013, following Defendant's third removal, the Court denied Plaintiffs' motion to remand. (ECF No. 44.) Following the Ninth Circuit's decision in the Diaz Action, Plaintiffs in the Carrera Action were granted leave to file a Third Amended Complaint, which they did on November 6, 2013. (ECF Nos. 51, 52.) On January 17, 2014, the Court denied Defendant's motion to dismiss the Third Amended Complaint. (ECF No. 72.)

In the Third Amended Complaint, Plaintiffs alleged the following class claims: (1) tortious breach of the implied covenant of good faith and fair dealing; (2) violation of *California Civil Code § 1710(3)* (concealment); (3) violation of *California Civil Code § 1710(4)* (promissory fraud); (4) a violation of the UCL; (5) false advertising; and (6) declaratory relief; as well as individual claims for breach of contract on behalf of plaintiffs Carrera, Hershey, and Morrison. (ECF No. 52.)

C. Intervention

On December 17, 2010, Ms. Carrera moved to intervene in the Diaz Action **[**44]** on the grounds her claims share common questions of law and fact. (Diaz Action, ECF No. 62 at p. 2.) Diaz did not oppose the intervention. (Diaz Action, ECF No. 64.) Defendant opposed the intervention on the grounds that it was untimely. (Diaz Action, ECF No. 65 at pp. 1-2.) On January 12, 2011, the Court denied Ms. Carrera's motion to intervene on the grounds that it was "not timely at this late stage in the case." (Diaz Action, ECF No. 69 at p. 4.)

D. Consolidation

On July 3, 2014, Diaz filed a motion to consolidate the Diaz Action and the Carrera Action. (Diaz Action, ECF No. 170.) Following a limited opposition by Defendant, the Court granted the motion, finding that consolidation for all purposes under *Federal Rule of Civil Procedure 42(a)(2)* was warranted. (Diaz Action, ECF No. 180, at p. 8.) The Court designated the Carrera Action to be the Lead Case under the caption *In re First American Home Buyers Protection Corporation Class Action Litigation*, Lead Case No. 13-cv-01585-BAS(JLB), and ordered the parties to file a consolidated complaint, which contained no new allegations or causes of action. (*Id.* at pp. 9-10.) Thereafter, Defendant was ordered to file an answer to the consolidated complaint which contained no new affirmative defenses **[**45]** or counterclaims. (*Id.* at p. 10.)

On October 9, 2014, Plaintiffs filed a Consolidated Class Action Complaint against Defendant alleging: (1) tortious breach of the implied covenant of good faith and fair dealing; (2) violation of *California Civil Code § 1710(1)* (intentional misrepresentation); (3) violation of *California Civil Code § 1710(2)* (negligent misrepresentation); (4) violation of *California Civil Code § 1710(3)* (fraud by concealment); (5) violation of *California Civil Code § 1710(4)*; (6) violation of *California Business and Professions Code §§ 17200, et seq.* (the "UCL"); (7) false advertising; (8) breach of contract;[5] and (9) declaratory relief. (ECF Nos. 115, 116.) On October 31, 2014, Defendant filed an answer to the Consolidated Class Action Complaint. (ECF No. 117.)

III. LEGAL STANDARD

The class action is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 131 S. Ct. 2541, 2550, 180 L. Ed. 2d 374 (2011)* (quoting *Califano v. Yamasaki, 442 U.S. 682, 700-01, 99 S. Ct. 2545, 61 L. Ed. 2d 176 (1979))*. "In order to justify a departure from that rule, 'a class representative must be part of the class and "possess the same interest and suffer the same injury" as the class members.'" *Id.* (citing *E. Tex. Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 403, 97 S. Ct. 1891, 52 L. Ed. 2d 453 (1977))*. "To come within the exception, a party seeking to maintain a class action 'must affirmatively **[**46]** demonstrate his [or her] compliance' with *Rule 23*." *Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1432, 185 L. Ed. 2d 515 (2013)* (quoting *Wal-Mart, 131* ***[*600]*** *S. Ct. at 2551-2552*); *see also Mazza v. Am. Honda Motor Co., Inc., 666 F.3d 581, 588 (9th Cir. 2012)*.

Rule 23 "does not set forth a mere pleading standard." *Id.* (quoting *Wal-Mart, 131 S. Ct. at 2551*.) Rather, a party must satisfy "through evidentiary proof" all of the requirements of *Rule 23(a)*, and at least one of the requirements of *Rule 23(b)*. *Id.; see also United Steel, Paper & Forestry, Rubber, Mfg. Energy, Allied Indus. & Serv. Workers Int'l Union v. ConocoPhillips Co., 593 F.3d 802, 806 (9th Cir. 2010)*; *Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180, 1186*, amended *273 F.3d 1266 (9th Cir. 2001)*.

Rule 23(a) outlines four requirements that must be satisfied for class certification: (1) the class must be so numerous that joinder of all members is impracticable; (2) questions of law or fact exist that are common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. *United Steel, Paper & Forestry, Rubber, Mfg. Energy, Allied Indus. & Serv. Workers Int'l Union, 593 F.3d at 806* (citing *Fed. R. Civ. P.*

[5] The breach of contract claim is being brought solely on behalf of Plaintiffs Carrera, Hershey, Morrison, and Diaz individually. (ECF No. 115 at p. 49.)

23(a)). These requirements are commonly referred to as numerosity, commonality, typicality, and adequacy. *See, e.g., id.; Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019 (9th Cir. 1998)*. A plaintiff must also establish at least one of the requirements outlined in *Rule 23(b)*, including: (1) that there is a risk of substantial prejudice from separate actions; (2) that declaratory or injunctive relief benefitting the class as a whole would be appropriate; or (3) that common questions of law or fact predominate and the class action is superior to other **[**47]** available methods of adjudication. *Id. at 806-07* (citing *Fed. R. Civ. P. 23(b)*). The requirement set forth in *Rule 23(b)(3)* is generally referred to as "predominance." *Id. at 807*.

In analyzing whether a plaintiff has met his or her burden to satisfy the Rule 23 requirements, it "may be necessary for the court to probe behind the pleadings." *Wal-Mart, 131 S. Ct. at 2551* (quoting *Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 160, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982))*. Class certification "is proper only if 'the trial court is satisfied, after a rigorous analysis, that the prerequisites'" of *Rule 23(a)* and *(b)* have been satisfied. *Id.* (quoting *Falcon, 457 U.S. at 161*); *see also Comcast Corp., 133 S. Ct. at 1432* (applying same analytical principles to *Rule 23(a)* and *(b)*); *Zinser, 253 F.3d at 1186*. "Such an analysis will frequently entail 'overlap with the merits of the plaintiff's underlying claim.'" *Comcast Corp., 133 S. Ct. at 1432* (quoting *Wal-Mart, 131 S. Ct. at 2551*). However, "*Rule 23* grants courts no license to engage in free-ranging merits inquiries at the certification stage." *Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 133 S. Ct. 1184, 1194-95, 185 L. Ed. 2d 308 (2013)*. Accordingly, any merits consideration must be limited to those issues necessary to deciding class certification. *See id. at 1195* ("Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied.").

A district court is granted "broad discretion" to determine whether the Rule 23 requirements have been met. *Zinser, 253 F.3d at 1186*; *see also Bateman v. Am. Multi—Cinema, Inc., 623 F.3d 708, 712 (9th Cir. 2010)*; *In re Mego Fin. Corp. Sec. Litig., 213 F.3d 454, 461 (9th Cir. 2000)* ("The district court's **[**48]** decision certifying the class is subject to a very limited review and will be reversed only upon a strong showing that the district court's decision was a clear abuse of discretion.") (internal quotations omitted).

IV. DISCUSSION

Plaintiffs propose the following class definition:

> All persons who purchased or were listed as the named insured on a home protection contract issued by Defendant First American Home Buyers Protection Corporation from March 6, 2003 to the present (the "Class").[6]

[*601] (Mot. at p. 2.) Plaintiffs primarily seek certification under *Rule 23(b)(3)* for monetary relief, including damages. (Mot. at p. 16, n. 8.) However, because they also seek a class-wide injunction to end Defendant's alleged unlawful practices, they contend *Rule 23(b)(2)* certification is also appropriate. (*Id.*)

Plaintiffs seek certification of the class for the following claims: (1) intentional misrepresentation; (2) negligent misrepresentation; (3) fraud by concealment; (4) promissory fraud; (5) UCL violation; and (6) false **[**49]** advertising. (*Id.* at pp. 2-3.) Defendant opposes on the grounds: (1) Plaintiffs' claims are atypical; (2) individual issues of law and fact predominate; and (3) the proposed class is not ascertainable. (Opp. at pp. 19-40.)

For the reasons set forth below, the Court finds Plaintiffs have failed to meet the predominance and superiority requirements of *Rule 23(b)(3)*, and failed to establish that a class action is appropriate under *Rule 23(b)(2)*. Because Plaintiffs fail to meet the requirements of *Rule 23(b)*, the Court finds it unnecessary to address the requirements of *Rule 23(a)*.

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[6] Plaintiffs seek to certify a nationwide class. However, if the Court finds application of California law to a nationwide class to be inappropriate, Plaintiffs seek to certify a California class. (Mot. at p. 2, n. 2.)

A. Predominance

Rule 23(b)(3) requires the court to find "that the questions of law or fact common to class members predominate over any questions affecting only individual members." *Fed. R. Civ. P. 23(b)(3)*. "The predominance inquiry focuses on 'the relationship between the common and individual issues' and 'tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.'" *Vinole v. Countrywide Home Loans, Inc., 571 F.3d 935, 944 (9th Cir. 2009)* (quoting *Hanlon, 150 F.3d at 1022*). As the Ninth Circuit has stated:

> *Rule 23(b)(3)*'s predominance and superiority requirements were added to cover cases in which a class action would achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing **[**50]** about other undesirable results. Accordingly, a central concern of the *Rule 23(b)(3)* predominance test is whether adjudication of common issues will help achieve judicial economy.

Id. at 944 (internal quotation marks and citations omitted).

"When common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis." *Hanlon, 150 F.3d at 1022* (citation omitted). In contrast, when "claims require a fact-intensive, individual analysis," then class certification will "burden the court" and be inappropriate. *Vinole, 571 F.3d at 947*; *see also* *Zinser, 253 F.3d at 1189* ("[I]f the main issues in a case require the separate adjudication of each class member's individual claim or defense, a *Rule 23(b)(3)* action would be inappropriate[.]") (citation omitted). Though there is substantial overlap between *Rule 23(a)(2)*'s commonality and *Rule 23(b)(3)*'s predominance tests, the latter is a "far more demanding" standard. *Wolin v. Jaguar Land Rover N. Am., LLC, 617 F.3d 1168, 1172 (9th Cir. 2010)* (quoting *Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 623-24, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997))*. To determine whether questions of law or fact common to the class predominate, the court must analyze each claim separately. *Berger v. Home Depot USA, Inc., 741 F.3d 1061, 1068 (9th Cir. 2014)* (citing *Erica P. John Fund, Inc. v. Halliburton Co., 563 U.S. 804, 131 S. Ct. 2179, 2184, 180 L. Ed. 2d 24 (2011))*.

1. Nationwide Class

The Court first examines whether common issues of law predominate as Plaintiffs **[**51]** are attempting to apply California law to a nationwide class. It is well-established that where, as here, a federal court sits in diversity jurisdiction, the court "must look to the forum state's choice of law rules to determine the controlling substantive law." *Mazza, 666 F.3d at 589* (quoting *Zinser, 253 F.3d at 1187*); *see also* *Bruno v. Eckhart Corp., 280 F.R.D. 540, 545, n. 1 (C.D. Cal. 2012)*.

"Under California's choice of law rules, the class action proponent bears the initial burden to show that California has 'significant contact or significant aggregation **[*602]** of contacts' to the claims of each class member." *Id.* (quoting *Wash. Mut. Bank v. Super. Ct., 24 Cal. 4th 906, 921, 103 Cal. Rptr. 2d 320, 15 P.3d 1071 (2001))*; *see also* *Bruno v. Quten Research Inst., LLC, 280 F.R.D. 524, 538-39 (C.D. Cal. 2011)* (stating this requirement ensures that the certification of a nationwide class under the laws of a single state comports with due process). "Once the class action proponent makes this showing, the burden shifts to the other side to demonstrate 'that foreign law, rather than California law, should apply to class claims.'" *Id. at 590* (quoting *Wash. Mut. Bank, 24 Cal. 4th at 921*). "California law may only be used on a classwide basis if 'the interests of other states are not found to outweigh California's interest in having its law applied.'" *Id.* (quoting *Wash. Mut. Bank, 24 Cal. 4th at 921*)).

To determine whether the interests of other states outweigh California's interest, the court looks to a three-step governmental interest test:

> First, the **[**52]** court determines whether the relevant law of each of the potentially affected jurisdictions with regard to the particular issue in question is the same or different.

> Second, if there is a difference, the court examines each jurisdiction's interest in the application of its own law under the circumstances of the particular case to determine whether a true conflict exists.
> Third, if the court finds that there is a true conflict, it carefully evaluates and compares the nature and strength of the interest of each jurisdiction in the application of its own law to determine which state's interest would be more impaired if its policy were subordinated to the policy of the other state, and then ultimately applies the law of the state whose interest would be more impaired if its law were not applied.

Id. (quoting *McCann v. Foster Wheeler LLC, 48 Cal. 4th 68, 81-82, 105 Cal. Rptr. 3d 378, 225 P.3d 516 (2010))*.

The Court finds, and Defendant does not dispute, that Plaintiffs meet their initial burden of showing that California has a constitutionally sufficient aggregation of contacts to the claims of each putative class member because First American's headquarters are in California, it maintains at least one of its call centers in California, its sales and marketing personnel who assist in **[**53]** creating the renewal letters are located in California, the renewal letters are sent to California, approximately a third of its premiums were written in California at times during the class period, and several of its executives are located in California. *See* *Mazza, 666 F.3d at 590*. Because Plaintiffs meet their burden, Defendant must demonstrate that foreign law, rather than California law, should apply to class claims. *See id.*

Defendant submits a chart showing the material differences between California's consumer protection statutes and the consumer protection statutes of the other forty-nine states. (*See* Shophet Decl. at ¶ 44, Exh. NN.) In this case, during the class period, First American sold plans with a variety of configurations in more than 40 states. (*See* Hand Decl. at ¶ 7.) Under a conflict of laws analysis, "[a] problem only arises if differences in state law are material, that is, if they make a difference in this litigation." *Mazza, 666 F.3d at 590* (citing *Wash. Mut. Bank, 24 Cal. 4th at 919*). In *Mazza*, the Ninth Circuit examined the consumer protection statutes of 44 states and concluded that the apparent differences between the states' consumer protection statutes were "not trivial or wholly immaterial differences." *Id. at 591* (citing differences in scienter **[**54]** requirements between Colorado, New Jersey, and Pennsylvania; and reliance requirements between Florida, New Jersey and New York). These same differences are material in this case.

In examining the interests of foreign jurisdictions, the Ninth Circuit has concluded that each state has an interest in (1) "balancing the range of products and prices offered to consumers with the legal protections afforded to them;" and (2) "'being able to assure individuals and commercial entities operating within its territory that applicable limitations on liability set forth in the jurisdiction's law **[*603]** will be available to those individuals and businesses in the event they are faced with litigation in the future.'" *Id. at 592-93* (quoting *McCann, 48 Cal. 4th at 97-98*).

Lastly, in analyzing which state's interest is most impaired, the Ninth Circuit held that it is determinative where the "last event necessary to make the actor liable occurred." *See* *id. at 593-94*. In a fraud case, "the place of the wrong was the state where the misrepresentations were communicated to the plaintiffs, not the state where the intention to misrepresent was formed or where the misrepresented acts took place." *Id.* (citing *Zinn v. Ex-Cell-O Corp., 148 Cal. App. 2d 56, 80, n. 6, 306 P.2d 1017 (1957))*.

In *Mazza*, the plaintiffs brought a class action alleging that **[**55]** Honda misrepresented and concealed material information in connection with the marketing and sale of certain Acura vehicles, alleging violations of the UCL, FAL, Consumer Legal Remedies Act, *Cal. Civ. Code § 1750, et. seq.*, and unjust enrichment. *Id. at 587*. Plaintiffs sought to certify a nationwide class of consumers who were exposed to the misrepresentations through television commercials, brochures, in-store kiosks, and the car's owner's manual. *Id. at 586-87*. In determining the "place of the wrong," the Ninth Circuit found that "the last events necessary for liability as to the foreign class members — communication of the advertisements to the claimants and their reliance thereon in purchasing vehicles — took place in the various states, not in California." *Id. at 594*. Accordingly, the Court held that each class member's consumer protection claim should be governed by the consumer protection laws of the jurisdiction in which the transaction took place. *Id.*

Here, with respect to every real estate purchase, which account for approximately 50% of the transactions, the Court finds the "place of the wrong" was the state of purchase. For renewals, which account for approximately 46%

of the transactions, although the advertising was created in California, **[**56]** and one of the call centers was located in California, the misrepresentations were communicated to the putative class members in their respective home states, and therefore those jurisdictions have a stronger interest in the application of their laws. Accordingly, the Court finds that each class member's UCL and FAL claim should be governed by the consumer protection laws of the jurisdiction in which the transaction took place, and certification of these claims on a nationwide basis should be denied.[7]

Plaintiffs request that the Court certify a California class, in the alternative, if the Court elects not to certify a nationwide class. (ECF No. 129 ("Reply") at p. 24.) The Ninth Circuit did not foreclose that possibility in *Mazza. See* Mazza, 666 F.3d at 594. However, for the reasons set forth below, the Court does not find it appropriate to grant that request. The Court now turns to the elements of each claim and examines whether common questions predominate.

2. Fraud Claims

The elements of fraud under California law are: (1) a misrepresentation, **[**57]** which includes a false representation, concealment, or nondisclosure; (2) knowledge of its falsity; (3) intent to defraud, *i.e.*, to induce reliance; (4) justifiable reliance; and (5) resulting damage. *See* Lazar v. Super. Ct., 12 Cal. 4th 631, 638, 49 Cal. Rptr. 2d 377, 909 P.2d 981 (1996); Agosta v. Astor, 120 Cal. App. 4th 596, 603, 15 Cal. Rptr. 3d 565 (2004); Cadlo v. Owens—Ill., Inc., 125 Cal. App. 4th 513, 519, 23 Cal. Rptr. 3d 1 (2004). The elements comprising a cause of action for negligent misrepresentation are the same, except there is no requirement of intent to induce reliance. *See* Cadlo, 125 Cal. App. 4th at 519.

To establish fraud through nondisclosure or concealment of facts, a plaintiff similarly must prove: (1) the defendant concealed or suppressed a material fact; (2) the defendant was under a duty to disclose the fact to the plaintiff; (3) the defendant intentionally concealed or suppressed the fact with the intent to defraud the plaintiff; (4) the **[*604]** plaintiff was unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact; and (5) as a result of the concealment or suppression of the fact, the plaintiff sustained damage. *See* Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC, 162 Cal. App. 4th 858, 868, 76 Cal. Rptr. 3d 325 (2008); *see also* Davis v. HSBC Bank Nev., N.A., 691 F.3d 1152, 1163 (9th Cir. 2012); OCM Principal Opportunities Fund v. CIBC World Mkts. Corp., 157 Cal. App. 4th 835, 845, 68 Cal. Rptr. 3d 828 (2007). A legal duty to disclose facts arises in four circumstances: (1) when the defendant is in a fiduciary relationship with the plaintiff; (2) when the defendant had exclusive knowledge of material facts not known to the plaintiff; (3) **[**58]** when the defendant actively conceals a material fact from the plaintiff; and (4) when the defendant makes partial representations but also suppresses some material fact. Baggett v. Hewlett-Packard Co., 582 F. Supp. 2d 1261, 1267-68 (C.D. Cal. 2007) (citing LiMandri v. Judkins, 52 Cal. App. 4th 326, 60 Cal. Rptr. 2d 539 (1997)).

As relevant here, California Insurance Code section 332 imposes a duty to disclose. Pastoria v. Nationwide Ins., 112 Cal. App. 4th 1490, 6 Cal. Rptr. 3d 148 (2003). California law also recognizes an insurer's "special relationship" with an insured, under which an insurer has the duty reasonably to inform an insured of her rights under an insurance policy. *See* Vu v. Prudential Prop. & Cas. Ins. Co., 26 Cal. 4th 1142, 1149-51, 113 Cal. Rptr. 2d 70, 33 P.3d 487 (2001); Davis v. Blue Cross of N. Cal., 25 Cal. 3d 418, 426-27, 158 Cal. Rptr. 828, 600 P.2d 1060 (1979).[8]

"'Promissory fraud' is a subspecies of the action for fraud and deceit. A promise to do something necessarily implies the intention to perform; hence, where a promise is made without such intention, there is an implied misrepresentation of fact that may be actionable fraud." Lazar, 12 Cal. 4th at 638; *see also* Agosta, 120 Cal. App. 4th at 603. "[I]ntent not to perform cannot be proved simply by showing a subsequent failure to perform." UMG

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[7] Although Defendant argues a nationwide class is inappropriate with respect to all of its claims, it has failed to meet its burden with respect to its remaining claims.

[8] *See* Diaz Action, at ECF No. 163 (Ninth Circuit Opinion) at 18.

Recordings, Inc. v. Global Eagle Entm't, Inc., 117 F. Supp. 3d 1092, 2015 U.S. Dist. LEXIS 102659, 2015 WL 4606077, at *10 (C.D. Cal. June 22, 2015). "An action for promissory fraud may lie where a defendant fraudulently induces the plaintiff to enter into a contract." Lazar, 12 Cal. 4th at 638.

"Actual reliance occurs when the defendant's misrepresentation is an immediate cause of the plaintiff's conduct, altering his legal relations, and when, absent such representation, the plaintiff would not, in all reasonable probability, have **[**59]** entered into the transaction." Cadlo, 125 Cal. App. 4th at 519. In order to prove reliance on an omission, "[o]ne need only prove that, had the omitted information been disclosed one would have been aware of it and behaved differently." Mirkin v. Wasserman, 5 Cal. 4th 1082, 1093, 23 Cal. Rptr. 2d 101, 858 P.2d 568 (1993).

Defendant argues individual issues of law and fact will predominate as to Plaintiffs' fraud claims because no inference of reliance arises as to the entire class, and Plaintiffs have failed to provide a viable damages model. (Opp. at pp. 39, n. 33, 40.) To demonstrate that the element of reliance is a common question that can be resolved for all members of the Class in a single adjudication, Plaintiffs rely on the following statement of the law set forth in Vasquez v. Super. Ct., 4 Cal. 3d 800, 94 Cal. Rptr. 796, 484 P.2d 964 (1971):

> The rule in this state and elsewhere is that it is not necessary to show reliance upon false representations by direct evidence. The fact of reliance upon alleged false representations may be inferred from the circumstances attending the transaction which oftentimes afford much stronger and more satisfactory evidence of the inducement . . . than his direct testimony to the same effect. . . . [I]f the trial court finds material misrepresentations were made to the class members, at least an inference of reliance would arise as to the entire class. Defendants may, **[**60]** of course, introduce evidence in rebuttal.

Id. at 814 (internal quotations omitted); *accord* Occidental ***[*605]*** Land, Inc. v. Super. Ct. of Orange Cnty., 18 Cal. 3d 355, 363, 134 Cal. Rptr. 388, 556 P.2d 750 (1976). The Supreme Court of California clarified this statement in *Mirkin*, stating that "[w]hat we did hold [in *Vasquez* and *Occidental*] was that, *when the same material misrepresentations have actually been communicated to each member of a class*, an inference of reliance arises as to the entire class." Mirkin, 5 Cal. 4th at 1095 (emphasis in original). Therefore, "absent evidence of uniform material misrepresentations having been actually made to class members," an inference of reliance does not arise. *See* Knapp v. AT&T Wireless Servs., Inc., 195 Cal. App. 4th 932, 946, 124 Cal. Rptr. 3d 565 (2011) (quoting Kaldenbach v. Mut. of Omaha Life Ins. Co., 178 Cal. App. 4th 830, 851, 100 Cal. Rptr. 3d 637 (2009)).

Here, there is no evidence of common representations or omissions having been made to putative class members. Plaintiffs and Defendant agree that First American markets and advertises its plans through three primary channels: (1) real estate sales; (2) renewals; and (3) starting in 2007, direct to consumer (via telephone and online). (Mot. at pp. 3-7; Opp. at p. 9; Hand Decl. at ¶ 5; Craney Decl. at ¶ 4; Miles Decl. at ¶ 3.) The primary forms of marketing communication include "flyers, postcards, brochures, direct mail, email, social media, and websites." (Hand Decl. at ¶ 9.) The parties further agree that First American home warranty plans **[**61]** can be obtained (1) in connection with the purchase of a residential property; (2) separately by ordering over the phone or through First American's website; or (3) by renewing a prior contract. (Mot. at pp. 3-7; Miles Decl. at ¶ 3.)

In the real estate channel, Plaintiffs argue First American provides free, written marketing materials to real estate agents, which are standardized and approved for "company-wide distribution" in all states. (Mot. at pp. 3-4.) Plaintiffs further contend First American uses a standardized, written script to train real estate agents on how to sell its home warranty plans, which includes an instruction to hand out a written brochure which is "almost identical" for all states and a sample home warranty contract. (*Id.* at pp. 4-5.) Plaintiffs assert these brochures and contracts contain the alleged misrepresentations. (*Id.* at at p. 5.) In the direct to consumer channel, Plaintiffs argue First American makes its misrepresentations both through its website, "which contains standardized written representations concerning the benefits and attributes of its home warranty plans," and various print and media advertisements. (*Id.* at pp. 5-6.) Lastly, in the renewal channel, Plaintiffs argue First **[**62]** American sends several "standard form renewal letters" to its customers which contain the alleged false and misleading representations. (*Id.*

at p. 6.) Based on this evidence, Plaintiffs argue First American engaged in a "uniform advertising campaign" to sell its plans. (*Id.* at p. 7.) For the reasons discussed below, the Court disagrees.

In the real estate channel, which accounts for approximately 50% of First American home warranty plans sold between 2004 and 2013, First American employs approximately 100 area managers who interact with local real estate agents. (Hand Decl. at ¶¶ 10, 32.) The real estate agents, in turn, interact directly with home buyers and sellers; although a buyer or seller does not necessarily use a real estate agent who interacted with an area manager. (*Id.* at ¶¶ 10, 11.) Contrary to Plaintiffs' contention, Defendant represents that First American area managers are given discretion in determining how they want to market the plans, which may include giving a live presentation at a real estate office or trade event, speaking or corresponding with a real estate agent, or distributing written marketing materials prepared by First American's sales and marketing department, which are available **[**63]** for the area manager to order. (*Id.* at ¶¶ 12, 13.) Although First American has at various times promoted a script to area managers, which includes the suggestion to hand out its brochures and samples contracts,[9] First American maintains that its area managers **[*606]** are given complete discretion and it does not impose any requirements or monitor how area managers choose to advertise. (*Id.* at ¶¶ 19-21, 24, 27.) Moreover, the area managers may be another step removed from the ultimate purchaser of the plan — the buyer or seller of the home. Determining what representations were made between the area managers and the real estate agents, and also between the real estate agents and the purchasers will therefore require a highly individualized inquiry.

In the renewal channel, which accounts for 46% of First American home warranty plans sold between 2004 and 2013, the renewal correspondence varied depending on the plan holder's **[**64]** payment method, and varied in content throughout the class period. (Craney Decl. at ¶¶ 8, 9, 11-20; Craney Depo. at 84:1-9.) Some of the cover letters and buck slips contained the allegedly false or misleading representations, while others did not. (Craney Decl. at ¶¶ 8, 9, 14-15, 17-18, 20, Exhs. A-G; *see also* Bottini Decl. at Exh. 9.) During the class period, First American used approximately 106 different inserts, with each correspondence containing anywhere from one to three of these inserts. (Craney Decl. at ¶ 16.) For a variety of reasons, approximately 7% to 10% of plan holders never receive any renewal correspondence from First American. (*Id.* at ¶ 6.)

In addition to renewal correspondence, First American also utilizes a "inside sales" staff to call customers whose plans are about to expire. (Craney Decl. at ¶ 22; Craney Depo. at 74:5-16.) The sales staff is not provided with any uniform written script or guidelines, but instead are given discretion and rely on their judgment in attempting to convince the plan holder to renew. (Craney Decl. at ¶ 22.) Therefore, determining what representations each putative class member received or were exposed to prior to renewal, if anything, **[**65]** and what conversations were had between sales agents and customers will require a highly individualized inquiry.

Lastly, in the direct to consumer channel, which accounts for only 4% of First American home warranty plans sold between 2004 and 2013, putative class members received limited scale direct mailings, telephone calls from First American based on leads generated by third-party vendors, and plans purchased directly through First American's website. (Hand Decl. at ¶¶ 32, 34; Bottini Decl. at Exhs. 44, 45.) Again, determining which representations each putative class member received or were exposed to, if anything, will require a highly individualized inquiry.

In light of the foregoing, the Court finds Plaintiffs have failed to demonstrate through evidentiary proof that the same material representations or omissions were made to each putative class member. There are significant individual issues as to whether the putative class members were even exposed to, much less relied on, the alleged misrepresentations. Accordingly, an inference of reliance does not arise as to all class members and cannot be resolved on a class-wide basis. *See Kaldenbach, 178 Cal. App. 4th at 851*; *Knapp, 195 Cal. App. 4th at 946*.

Although Plaintiffs' experiences are not determinative, **[**66]** it is instructive that among Plaintiffs, all of them initially obtained a First American home warranty plan in connection with the purchase of a home, and most, if not

[9] During the class period, from approximately March 2003 to June 2011, First American issued approximately 1,320 different versions of its contract, which varied from state-to-state and year-to-year, and contained different types of coverage. (Miles Decl. at ¶ 8, Exhs. C, D.)

all, of the plaintiffs utilized real estate agents. Prior to purchasing and/or receiving a First American plan, not all of the plaintiffs were exposed to *any* representations about First American, much less the alleged misrepresentations. The other plaintiffs received different representations from their respective real estate agents about First American's home warranty plans. Not all of these representations included the alleged misrepresentations. Two of the five Plaintiffs renewed their plans, and each testified they relied on different representations from different sources. Again, not all of these representations included the alleged misrepresentations. Accordingly, the Court finds Plaintiffs have failed to establish predominance with respect to Plaintiffs' fraud claims.

In addition, "actual reliance, or causation, is inferred from the misrepresentation of a *material* fact." *Chapman v. Skype, Inc., 220 Cal. App. 4th 217, 229, 162 Cal. Rptr. 3d 864 (2013)* (citing *In re Tobacco* **[*607]** *II Cases, 46 Cal. 4th 298, 327, 93 Cal. Rptr. 3d 559, 207 P.3d 20 (2009))* (emphasis added); *see also* *Stearns v. Ticketmaster Corp., 655 F.3d 1013, 1022 (9th Cir. 2011)*, abrogated on other grounds by *Comcast Corp., 133 S. Ct. 1426, 185 L. Ed. 2d 515 (2013)*. "A misrepresentation is judged to be 'material' if 'a reasonable man would **[**67]** attach importance to its existence or nonexistence in determining his choice of action in the transaction in question.'" *In re Tobacco II Cases, 46 Cal. 4th 298, 327, 93 Cal. Rptr. 3d 559, 207 P.3d 20 (2009)*.

Here, the proposed Class contains three categories of individuals: (1) sellers; (2) real estate agents; and (3) buyers/owners. Plaintiffs have not demonstrated it can establish materiality on a class-wide basis as to these three categories of individuals. Based on the evidence submitted by Plaintiffs, certain real estate agents purchased the home warranty plans as "gifts" for their clients, and others picked First American because prior clients had a good experience with them. Plaintiffs submitted no evidence with respect to sellers, but it is implausible that buyers and sellers would necessarily attach the same importance to alleged misrepresentations in First American's advertising.[10] Plaintiffs argue that materiality can be demonstrated on a class-wide basis without distinguishing between the disparate categories of individuals in their proposed Class, who are not similarly situated. In the class context, "[i]f the misrepresentation or omission is not material as to all class members, the issue of reliance 'would vary from consumer to consumer' and the class should **[**68]** not be certified." *Stearns, 655 F.3d at 1022-23* (citing *In re Vioxx Class Cases, 180 Cal. App. 4th 116, 103 Cal. Rptr. 3d 83 (2010))*. For this reason as well, the Court finds Plaintiffs have failed to establish predominance with respect to the fraud causes of action.

3. UCL & FAL (Proposed California Class)

The UCL prohibits, and provides civil remedies for, unfair competition, which it defines as "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." *Kwikset Corp., 51 Cal. 4th 310, 322, 120 Cal. Rptr. 3d 741, 246 P.3d 877 (2011)* (quoting *Cal. Bus. & Prof. Code § 17200*). "Because the statute is written in the disjunctive, it is violated where a defendant's act or practice is (1) unlawful, (2) unfair, (3) fraudulent, or (4) in violation of *section 17500*," *i.e.*, the FAL. *Lozano v. AT&T Wireless Servs., Inc., 504 F.3d 718, 731 (9th Cir. 2007)*. The FAL "makes it unlawful for any person to 'induce the public to enter into any obligation' based on a statement that is 'untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading.'" *Davis, 691 F.3d at 1161* (quoting *Cal. Bus. & Prof. Code § 17500*). Each prong of the UCL is a "separate and distinct theory of liability." *Lozano, 504 F.3d at 731*.

Under the FAL, whether an advertisement is "misleading" **[**69]** must be judged by the effect it would have on a "reasonable consumer," who is the "ordinary customer acting reasonably under the circumstances." *Davis, 691 F.3d at 1161-62* (citing *Williams v. Gerber Prods. Co., 552 F.3d 934, 938 (9th Cir. 2008)*; *Colgan v. Leatherman Tool Grp., Inc., 135 Cal. App. 4th 663, 38 Cal. Rptr. 3d 36 (2006)*; *Lavie v. Procter & Gamble Co., 105 Cal. App. 4th 496, 129 Cal. Rptr. 2d 486 (2003))*. To prevail under this standard, a plaintiff must show that members of the public are likely to be deceived by the advertisement. *Id. at 1162* (citing *Williams, 552 F.3d at 938*); *see also* *In re Tobacco II Cases, 46 Cal. 4th at 312*. This standard encompasses "not only advertising which is false, but also advertising which[,] although true, is either actually misleading or which has a capacity, likelihood or tendency to deceive or confuse the public." *Id.* (quoting *Williams, 552 F.3d at 938*). In determining whether a statement is misleading, a

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[10] Notably, in the real estate channel, which comprises approximately 50% of all sales, the plans are more often purchased by the home seller or real estate agent. (*See* Hand Decl. at ¶ 25.)

court looks primarily to the words of the statement itself, and compares those words to the actual facts. *Viggiano v. Hansen Natural Corp., 944 F. Supp. 2d 877, 885-86 (C.D. Cal. 2013)* **[*608]** (citing *Colgan, 135 Cal. App. 4th at 679*). Statements that amount to "mere puffery," however, are not actionable, because no reasonable consumer relies on puffery. *See Williams, 552 F.3d at 939, n. 3*; *Cook, Perkiss and Liehe, Inc. v. N. Cal. Collection Serv., Inc., 911 F.2d 242, 246 (9th Cir. 1990)*; *Abramson v. Marriott Ownership Resorts, Inc., 155 F. Supp. 3d 1056, 2016 U.S. Dist. LEXIS 2311, 2016 WL 105889, at *7 (C.D. Cal. Jan. 4, 2016)*.

To be "unlawful" under the UCL, the advertisements must violate another "borrowed" law. *Davis, 691 F.3d at 1168* (citing *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 20 Cal. 4th 163, 180, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999))*. A business practice is "fraudulent" under the UCL if members of the public are likely to be deceived. *Id. at 1169*; *see also In re Tobacco II Cases, 46 Cal. 4th at 312*.[11] As with the FAL, the challenged conduct is judged by its effect on the "reasonable consumer." *Davis, 691 F.3d at 1169*. Any violation of the FAL necessarily violates **[**70]** the UCL. *Williams, 552 F.3d at 938* (citing *Kasky v. Nike, Inc., 27 Cal. 4th 939, 950-51, 119 Cal. Rptr. 2d 296, 45 P.3d 243 (2002))*.

The UCL does not define the term "unfair," thus "the proper definition of 'unfair' conduct against consumers 'is currently in flux' among California courts." *Davis, 691 F.3d at 1169* (citing *Lozano, 504 F.3d at 735*). For suits brought by consumers, courts have applied either the balancing test set forth in *S. Bay Chevrolet v. Gen. Motors Acceptance Corp., 72 Cal. App. 4th 861, 85 Cal. Rptr. 2d 301 (1999)*, the test set forth in *Cel-Tech*, or the three-pronged test set forth in the FTC Act. *Id. at 169-70*. However, the Ninth Circuit has declined to apply the FTC standard to consumer actions "in the absence of a clear holding from the California Supreme Court" that it should be applied. **[**71]** *Lozano, 504 F.3d at 736*.

Under the balancing test, "unfair" conduct occurs when that practice "offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." *Id. at 1169* (citing *S. Bay Chevrolet, 72 Cal. App. 4th at 886-87*). "Under this approach, courts must examine the practice's impact on its alleged victim, balanced against the reasons, justifications and motives of the alleged wrongdoer. In short, this balancing test must weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim." *Id.* (internal citations and quotations omitted). Under the *Cel-Tech* test, which was expressly limited in *Cel-Tech* to actions by competitors, but has been applied by courts to consumer actions, an "unfair" practice means "conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Id. at 1169-70* (citing *Cel-Tech., 20 Cal. 4th at 187 & n. 12*).

Under both the UCL and FAL, damages cannot be recovered; rather, plaintiffs are limited to injunctive relief and restitution. *See Cal. Bus. & Prof. Code §§ 17203*, *17535*; *Korea Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134, 1144, 131 Cal. Rptr. 2d 29, 63 P.3d 937 (2003)*; *In re Tobacco II Cases, 46 Cal. 4th at 312*; *Chern v. Bank of Am., 15 Cal. 3d 866, 875, 127 Cal. Rptr. 110, 544 P.2d 1310 (1976)*; *Viggiano, 944 F. Supp. 2d at 886*; *Colgan, 135 Cal. App. 4th at 695*. Under the UCL, "the primary **[**72]** form of relief available . . . to protect consumers **[*609]** from unfair business practices is an injunction, along with ancillary relief in the form of such restitution 'as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition.'" *In re Tobacco II Cases, 46 Cal. 4th at 319* (citing *Cal. Bus. & Prof. Code § 17203*).

a. *Fraudulent/False Advertising (FAL) Prongs*

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[11] The fraudulent business prong of the UCL is distinct from common law fraud, both in its elements and its remedies. *In re Tobacco II Cases, 46 Cal. 4th at 312*. "Unlike common-law fraud claims that focus on the victim's reliance or damages, the UCL focuses on the perpetrator's behavior: 'to state a claim under the UCL or the [FAL] . . . it is necessary only to show that members of the public are likely to be deceived." *Berger, 741 F.3d at 1068* (citing *In re Tobacco II Cases, 46 Cal. 4th at 312*). "Actual falsehood, the perpetrator's knowledge of falsity, and perhaps most importantly, the victim's reliance on the false statements — each of which are elements of common-law fraud claims — are not required to show a violation of California's UCL." *Id.* (citing *In re Tobacco II Cases, 46 Cal. 4th at 312*).

"[C]lass certification of UCL claims is available only to those class members who were actually exposed to the business practices at issue." Berger, 741 F.3d at 1068 (citing Stearns, 655 F.3d at 1020-21; Mazza, 666 F.3d at 595-96); *see also* Campion v. Old Republic Home Protection Co., Inc., 272 F.R.D. 517, 534 (2011) (citing Pfizer, Inc. v. Super. Ct., 182 Cal. App. 4th 622, 631, 105 Cal. Rptr. 3d 795 (2010)) ("[O]ne who was not exposed to the alleged misrepresentation and therefore could not possibly have lost money or property as a result of the unfair competition is not entitled to restitution."); Cohen v. DirecTV, 178 Cal. App. 4th 966, 980, 101 Cal. Rptr. 3d 37 (2010) ("[W]e do not understand the UCL to authorize an award for injunctive relief and/or restitution on behalf of a consumer who was never exposed in any way to an allegedly wrongful business practice.") Common issues do not predominate where there is "no cohesion among the [class] members because they were exposed to quite disparate information from various representatives of defendant." Stearns, 655 F.3d at 1020; *see also* Cohen, 178 Cal. App. 4th at 979 (affirming denial of class certification under the UCL where the **[**73]** evidence demonstrated that the class "would include subscribers who never saw DIRECTV advertisements or representations of any kind before deciding to purchase the company's HD services, and subscribers who only saw and/or relied upon advertisements that contained no mention of technical terms regarding bandwidth or pixels, and subscribers who purchased DIRECTV HD primarily based on word of mouth or because they saw DIRECTV's HD in a store or at a friend's or family member's home").

For the same reasons discussed above, the Court finds Plaintiffs have failed to demonstrate that there was cohesion among class members as to how they were exposed — if they were even exposed at all — to the various alleged false and misleading representations. As in *Campion*, "the proposed class members may have seen some, all or none of [the alleged misrepresentations] prior to the purchase of their home warranty plans due to the varying ways in which they acquired their plans." *See* Campion, 272 F.R.D. at 536-37. Again, although the named Plaintiffs experiences are not determinative in this context, their stories highlight the lack of cohesion among potential class members, as they were exposed to disparate information from a variety **[**74]** of sources, and not all of them were even exposed to the alleged false and misleading representations prior to purchase.

b. *Unlawful Prong*

Plaintiffs seek to certify a class under the unlawful prong of the UCL premised on a violation of the FAL and a violation of California Insurance Code section 12760, and presumably the alleged fraud. (Mot at p. 14.) Because Plaintiffs have failed to establish that class certification is appropriate with respect to its FAL and fraud claims, the Court finds Plaintiffs have not met their Rule 23 burden with respect to the unlawful prong of the UCL.

In addition, the Court finds that the Consolidated Class Action Complaint does not reference a violation of California Insurance Code section 12760. As Defendant points out, prior judges in this case similarly did not locate such a violation in prior versions of Plaintiffs' complaint. (*See* Opp. at pp. 19-20, n. 10 (citing ECF Nos. 76, 87, 94, & 104).) Plaintiffs cite no authority permitting them to seek certification of a claim not in the complaint, and do not respond to Defendant's argument that they should not be allowed to do so. Accordingly, the Court declines to certify a class based on this claim.

c. *Unfair Prong*

In attempting to certify a class under the unfair prong of the UCL, Plaintiffs simply **[*610]** argue that "[t]he evidence referenced **[**75]** above can establish a UCL violation under the 'unfair' . . . prong[]." (Mot at p. 14.) The Court finds that Plaintiffs have failed to meet their burden with respect to the unfair prong of the UCL.

B. Superiority

"Plaintiffs must also demonstrate that a class action is 'superior to other available methods for fairly and efficiently adjudicating the controversy.'" Otsuka v. Polo Ralph Lauren Corp., 251 F.R.D. 439, 448 (2008) (citing Fed. R. Civ. P. 23(b)(3)). "Where classwide litigation of common issues will reduce litigation costs and promote greater efficiency, a class action may be superior to other methods of litigation," and it is superior "if no realistic alternative exists." Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1234-35 (9th Cir. 1996). The following factors are pertinent to this analysis:

(A) the class members' interest in individually controlling the prosecution or defense of separate actions;
(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
(D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b)(3).

Plaintiffs argue that "[e]ach of the pertinent *Rule 23(b)(3)* factors, along with the overarching concern for judicial economy, supports class certification in this case." (Mot. at p. 24.) **[**76]** Defendant does not contest superiority under the superiority requirement. However, several of Defendant's arguments are relevant to the superiority analysis.

For the reasons set forth in the Court's discussion above of the propriety of certifying a nationwide class, the Court finds that the Class, as proposed, is not the superior means of resolving this case. In addition, the Court finds there will likely be difficulties in managing this class action. Defendant addresses this concern under the ascertainability requirement, but it is more appropriately addressed in terms of manageability.

The manageability requirement "encompasses the whole range of practical problems that may render the class action format inappropriate for a particular suit." *Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 164, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974)*. Among other considerations, "[t]his 'manageability' requirement includes consideration of the potential difficulties in notifying class members of the suit, calculation of individual damages, and distribution of damages." *Six (6) Mexican Workers v. Ariz. Citrus Growers, 904 F.2d 1301, 1304 (9th Cir. 1990)* (citation omitted). In sum, "when the complexities of class action treatment outweigh the benefits of considering common issues in one trial, class action treatment is not the 'superior' method of adjudication." *Zinser, 253 F.3d at 1192* (citations **[**77]** omitted). The Court has several significant qualms about the manageability of this case.

Plaintiffs' proposed Class includes all persons who purchased or were listed as the named insured on a First American home protection contract. (*See* Mot. at pp. 2, 16, n. 8.) There does not appear to be any dispute that First American maintains records for all persons listed as the named insured on a First American home protection contract. However, as all parties acknowledge, the person who is listed on the contract is not necessarily the purchaser of the contract. For the plans purchased through a real estate transaction, which comprise approximately 50% of all plans at issue, it is apparent that determining who purchased the plan will be time-consuming and difficult.

According to First American, once escrow on a home purchase has closed, First American receives payment for the home warranty contract, typically a check drawn on the escrow account. (Miles Decl. at ¶ 4.) However, First American does not receive a copy of the underlying real estate purchase agreement, and has no way of knowing whether the buyer or seller agreed to pay for the premiums. (*Id.* at ¶ 4.) For the named Plaintiffs in this **[**78]** case, in order to determine who purchased the plan, First American had to subpoena the escrow records. However, the records **[*611]** do not always reflect who purchased the contract. Accordingly, for a potentially large portion of the proposed Class, there will be significant difficulties in notifying class members of the suit, calculation of individual damages, and distribution of damages.

Plaintiffs also assert that their claims can be proven with common evidence. Among Plaintiffs' claims is that First American's contractors routinely gouge customers for non-covered portions of warranty replacements and upsell customers for repair and replacements that are not covered under the class members' home warranty plan, and that class members pay significant sums out of pocket to contractors above and beyond Defendant's fees. (Consol. Compl. at ¶¶ 64, 109.) As both parties agree, however, Defendant does not maintain its contractors' records and does not maintain records on how much its contractors charge customers outside of their covered plan. (*See id.; see also* Miles II Depo. at 73:2-20, 77:3-10, 94:5-95:12, 106:10-11, 117:14-16; Horne Depo. at 186:8-23, 187:2-6, 213:4-20; Bottini Decl. at Exh. **[**79]** 50.) Although these records may be able to be obtained from Defendant's contractors, this presents a manageability concern. The Court also has concerns about Defendants' ability to prove that First American routinely denies claims for pretextual reasons and routinely denies claims with pre-existing conditions without dragging every contractor into Court.[12]

For the foregoing reasons, the Court finds that Plaintiffs have failed to demonstrate that this class action is manageable and the superior method of resolving this case.

C. Certification Under *Rule 23(b)(2)*

Under *Rule 23(b)(2)*, a class may be certified where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." *Fed. R. Civ. P. 23(b)(2)*. "Class certification under *Rule 23(b)(2)* is appropriate only where the primary relief sought is declaratory or injunctive." *Zinser, 253 F.3d at 1195* (citing *Nelsen v. King Cnty., 895 F.2d 1248, 1254-55 (9th Cir. 1990)*; *O'Connor v. Boeing N. Am., Inc., 180 F.R.D. 359, 377 (C.D. Cal. 1997)*; *Haley v. Medtronic, 169 F.R.D. 643, 657 (C.D. Cal. 1996))*. A class seeking monetary damages may be certified pursuant to *Rule 23(b)(2)* only where such relief is "merely incidental to [the] primary claim for injunctive relief." *Probe v. State Teachers' Ret. Sys., 780 F.2d 776, 780 (9th Cir. 1986)*; *see also* *Wal-Mart, 131 S. Ct. at 2557* (holding that claims for monetary relief **[**80]** may not be certified under *Rule 23(b)(2)* "where . . . the monetary relief is not incidental to the injunctive or declaratory relief.") Moreover, *Rule 23(b)(2)* "does not authorize class certification when each class member would be entitled to an individualized award of monetary damages." *Wal-Mart, 131 S. Ct. at 2557*.

Although Plaintiffs' claim they "primarily" seek certification under *Rule 23(b)(3)* for monetary relief, including damages, "because they also seek a class-wide injunction to end Defendant's unlawful practices," they contend *Rule 23(b)(2)* certification is also appropriate. (Mot. at p. 16, n. 8.) "Because *Rule 23(b)(2)* certification is inappropriate where the primary relief sought is monetary, . . . the dispositive question is: What type of relief does [the plaintiff] primarily seek?" *Zinser, 253 F.3d at 1195* (citing *Nelsen, 895 F.2d at 1254*). The primary relief sought in this case is monetary, with each class member entitled to an individualized award of monetary damages. (*See* Mot. at pp. 20-22 (Plaintiffs' proposed calculation of damages)). Accordingly, the Court does not find *Rule 23(b)(2)* appropriate.

Moreover, "[u]nless the named plaintiffs are themselves entitled to seek injunctive relief, they may not represent a class seeking that relief." *Hodgers-Durgin v. de la Vina, 199 F.3d 1037, 1045 (9th Cir. 1999)* (en banc). "Standing must be shown with respect to each form of relief sought, whether **[**81]** it be injunctive relief, damages or civil penalties." *Bates v. United Parcel Serv., Inc., 511 F.3d 974, 985 (9th Cir. 2007)* (citing *Friends of the Earth, Inc. v. Laidlaw Envt'l Servs. (TOC), Inc., 528 U.S. 167, 185, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000))*. The fact **[*612]** that the named Plaintiffs previously purchased First American plans and may bring a claim for damages therefore does not in itself grant them standing to seek injunctive relief. *See* *City of Los Angeles v. Lyons, 461 U.S. 95, 103, 103 S. Ct. 1660, 75 L. Ed. 2d 675 (1983)* (stating that in a claim for injunctive relief, "past wrongs do not in themselves amount to that real and immediate threat of injury necessary to make out a case or controversy"). In order to establish standing to seek an injunction, a plaintiff must face an injury that is "actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)* (citations and internal quotation marks omitted). In other words, "he or she must demonstrate a 'very significant possibility of future harm.'" *In re Static Random Access memory (SRAM) Antitrust Litig., 264 F.R.D. 603, 610 (N.D. Cal. 2009)* (quoting *San Diego Cnty. Gun Rights Comm. v. Reno, 98 F.3d 1121, 1126 (9th Cir.1996))*.

Here, the named Plaintiffs do not currently have First American plans. (*See* Miles Decl. at ¶¶ 14, 16, 19, 21; Shophet Decl. at Exh. CC at 14:20-22.) Carrera's plan expired in February 2010, Morrison's and Hershey's final plans expired in May 2013, Jullien's final plan expired in October 2012, and Diaz testified she did not have a plan as of January 2011. (*See id.*) Although renewal is possible, there is no allegation or **[**82]** testimony suggesting that any of the named Plaintiffs intend to purchase a First American plan in the future. Thus, Plaintiffs have failed to

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[12] This concern also implicates the predominance requirement.

establish that they face an "actual or imminent" injury. For this reason as well, the Court denies Plaintiffs' request to certify a *Rule 23(b)(2)* class in the alternative.

V. MOTION TO STRIKE AND FOR SANCTIONS

Plaintiffs filed a motion to strike and for sanctions in connection with four reports Defendant attaches to its motion for class certification. (ECF No. 132 ("Strike Mot.").) Plaintiffs seek to exclude from evidence the four reports prepared by Defendant's expert, W. John Irwin II, because Defendant withheld these reports, as well as all corresponding notes and communications, from Plaintiffs during discovery and did not supplement its discovery responses upon determining that Mr. Irvin was going to be used as an expert. (Strike Mot. at p. 1.) The reports relate to inspections Mr. Irvin, a licensed Professional Mechanical Engineer, conducted on Plaintiffs' properties.

A. Background

With respect to this motion, the following facts do not appear to be disputed:

• Defendant designated Mr. Irwin as an expert that it may use at trial pursuant to *Federal Rule of Civil Procedure 26(a)(2)(A)* in the Diaz **[**83]** Action. (ECF No. 133 ("Strike Opp.") at p. 3; Strike Mot. at p. 4.)
• Plaintiffs' counsel deposed Mr. Irwin on July 5, 2011 in the Diaz Action. (Strike Opp. at p. 3.)
• After Hershey, Jullien, and Morrison joined Carrera as Plaintiffs in the Carrera Action, Mr. Irwin inspected their properties. (Strike Opp. at pp. 5-6; Strike Mot. at p. 4.)
• On November 21, 2013, Plaintiffs served a Request for Production ("RFP") seeking all documents "concerning [First American's] physical inspection of Plaintiffs' properties" including all reports, retainer agreements, and communications. (Strike Opp. at p. 6; Strike Mot. at p. 4.)
• As of the date of the request, the Court had not yet issued a Scheduling Order setting a deadline for designating experts. (Strike Opp. p. 6; ECF No. 92.)
• Because Mr. Irwin was still acting as a consultant in the Carrera Action, First American timely objected to the RFP, asserting the attorney work product doctrine, as codified in *Rule 26(b)(3)*. (Strike Opp. at p. 6; Strike Mot. at p. 5.)
• Defendant produced Mr. Irwin's handwritten notes and photographs from his inspections of the properties. (Strike Mot. at p. 5, n. 7; Strike Opp. at pp. 6-7; ECF No. 134 ("Strike Reply") at p. 3.)

[*613] • The Scheduling Order in the Carrera Action did not set the deadline for designating experts until after class certification **[**84]** briefing was completed. (Strike Opp. at p. 7.) The deadline was March 20, 2015 for initial designation. (ECF No. 92 at ¶ 2; *see also* ECF No. 109 at ¶ 4.)
• Defendant attached the four reports at issue to its opposition to Plaintiff's motion for class certification. (Strike Mot. at p. 6; Strike Opp. at p. 7.)
• The Irwin reports address the specifics of each named Plaintiff's home warranty claims. (Strike Mot. at p. 6; Strike Opp. at p. 8.)
• After Defendant attached the reports to its opposition, Plaintiffs did not seek to depose Mr. Irwin. (Strike Opp. at p. 8; Strike Reply at p. 9.)
• In their reply brief in support of class certification, Plaintiffs assert that "Plaintiffs [home warranty] claims and this motion [for class certification] have nothing to do with whether First American properly rejected [home warranty] claims or what portion of claims were approved of denied." (Strike Opp. at p. 8; Reply at p. 1, lines 9-11.)

B. Legal Standard

Under *Rule 26(b)(4)*, a party may employ two types of experts: (a) those experts identified as "an expert whose opinions may be presented at trial," which the Court will refer to as a "testifying" expert; and (b) experts "retained or specially employed . . . in anticipation of litigation or to prepare for trial and who [are] not expected to be called as a witness at **[**85]** trial," which the Court will refer to as a "non-testifying" or "consulting" experts. *Fed. R. Civ. P. 26(b)(4)(A)*, *(D)*. A party must disclose the identity of a testifying expert "at the times and in the sequence that the court orders." *Fed. R. Civ. P. 26(a)(2)(A)*, *(D)*. If the testifying expert is "one retained or specially employed to provide expert testimony in the case," the disclosure must include a report. *Fed. R. Civ. P. 26(a)(2)(B)*. Any draft of such a report is protected from disclosure, as are certain communications between the party's attorney and the testifying expert. *Fed. R. Civ. P. 26(b)(4)(C)*. A party may depose a testifying expert only after the expert report is provided. *Fed. R. Civ. P. 26(b)(4)*.

With respect to non-testifying or consulting experts, a party may "discover facts known or opinions held by" such an expert only "as provided in *Rule 35(b)*" or "on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means." *Fed. R. Civ. P. 26(b)(4)(D)*; *see also* *Downs v. River City Grp., LLC, 288 F.R.D. 507, 510-14 (D. Nev. 2013)*; *Estate of Manship v. United States, 240 F.R.D. 229 (M.D. La. 2006)*. In addition, "[w]hen experts serve as litigation consultants, the work-product privilege generally applies to materials reviewed or generated by them in that capacity." *S.E.C. v. Reyes, No. c 06-04435 CRB, 2007 U.S. Dist. LEXIS 27767, 2007 WL 963422, at *1 (N.D. Cal. 2007)* (citing *Fed. R. Civ. P. 26(b)(3)*); *see also* *Apple Inc. v. Amazon.com, Inc., No. 11-1327 PJH(JSC), 2013 U.S. Dist. LEXIS 47124, 2013 WL 1320760, at *1 (N.D. Cal. Apr. 1, 2013)*.

C. Discussion

Plaintiffs argue Defendant was required to **[**86]** supplement its response to the RFP after it determined it was using the Irwin reports in support of its opposition to Plaintiffs' motion for class certification. Pursuant to *Rule 26(e)(1)(A)*, "[a] party . . . who has responded to [a] . . . request for production . . . must supplement or correct its . . . response . . . in a timely manner if the party learns that in some material respect the . . . response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing." *Fed. R. Civ. P. 26(e)(1)(A)*. A party who fails to provide the information required by *Rule 26(e)* "is not allowed to use that information . . . to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." *Fed. R. Civ. P. 37(c)(1)*. Instead of this sanction, a court, on motion and after giving an opportunity to be heard, may order the payment of reasonable expenses, including attorney's fees, caused by the failure. *Fed. R. Civ. P. 37(c)(1)(A)*. **[*614]** The burden is on the party facing sanctions to prove that its violation was either substantially justified or harmless. *R&R Sails, Inc. v. Ins. Co. of Penn., 673 F.3d 1240, 1246 (9th Cir. 2012)*.

Specifically, Plaintiffs argue that Defendant was obligated to timely supplement in response **[**87]** to the RFP "[o]nce Defendant decided to use Mr. Irwin as an 'expert' in addition to a 'consultant.'" (Strike Mot. at p. 9.) Plaintiffs offer two theories as to when this occurred. First, Plaintiffs contend that Mr. Irwin was retained as an expert on November 29, 2012, when he was first retained for the Carrera Action. (*Id.* at p. 15.) Alternatively, Plaintiffs contend that — "[e]ven assuming Defendant initially retained Mr. Irwin solely as a 'consultant'" in the Carrera Action — Defendant was under the obligation to timely supplement its response to the RFP once Defendant decided to use Mr. Irwin as an expert. (*Id.* at p. 16.) Plaintiffs suggest this date was December 4, 2014, which is the date of Mr. Irwin's report on his inspection of the Hershey property. (*Id.*) Plaintiffs further claim they were surprised by the filing of the Irwin reports, the surprise cannot be cured, and providing the documents now would require re-briefing of the motion for class certification. (*Id.* at pp. 19-20.)

In response, Defendant argues that it was under no legal obligation to disclose to Plaintiffs, in advance of its deadline to designate experts, which expert declarations First American's counsel had decided and intended to file in support of its opposition **[**88]** to Plaintiffs' motion for class certification. After it filed the declaration of Mr. Irwin, Defendant concedes that it waived certain attorney-work product protections and opened the door to Mr. Irwin's deposition. For the following reasons, the Court agrees with Defendant.

Defendant designated Mr. Irwin as an expert in the Diaz Action and Plaintiffs were able to take his deposition. In the Carrera Action, however, Defendant claims it initially retained Mr. Irwin as a non-testifying expert. Therefore, under the work product doctrine of *Rule 26(b)(3)(A)* and the protection afforded non-testifying experts under *Rule 26(b)(4)(D)*, Plaintiffs were not entitled to discover the facts known or opinions held by Mr. Irwin absent a showing of exceptional circumstances. The consolidation of these cases did not automatically render Mr. Irwin an expert in the Consolidated Action. The Court set the deadline to designate experts in the Consolidated Action for March 20, 2015. (*See* ECF No. 92 at ¶ 2; *see also* ECF No. 109 at ¶ 4.) Plaintiffs were under no obligation to designate Mr. Irwin prior to that date.

Although the deadline to designate testifying experts did not occur until after Defendant's opposition to the motion for class certification **[**89]** was due, when Defendant submitted an expert declaration on behalf of Mr. Irwin with its opposition, the case law is clear that Defendant opened up discovery on Defendant's statements, findings, and opinions, and entitled Plaintiffs to take Mr. Irwin's deposition about the subject of his testimony. *See* *Worley v. Avanquest N. Am. Inc., No. C 12-04391 WHO(LB), 2013 U.S. Dist. LEXIS 175305, 2013 WL 6576732, at *4 (N.D. Cal. Dec. 13, 2013)*; *Positive Techs., Inc. v. Sony Elecs., Inc., No. 11-cv-2226 SI(KAW), 2013 U.S. Dist. LEXIS 49738, 2013 WL 1402337, at *2 (N.D. Cal. Apr. 5, 2013)* (citing *Sims v. Metro. Life Ins. Co., No. C-05-02980, 2006 U.S. Dist. LEXIS 100677, 2006 WL 3826716, at *2 (N.D. Cal. 2006))*. However, submitting Mr. Irwin's declaration does not permit discovery of information or material not put at issue or of the contents of any privileged communications. *Worley, 2013 U.S. Dist. LEXIS 175305, 2013 WL 6576732, at *4*.

Plaintiffs did not seek to depose Mr. Irwin after Defendant filed his declaration. Instead, they seek to sanction Defendant for not supplementing its response to their RFP. To the extent Defendant failed to supplement its response to the RFP in a timely manner, the Court finds that a sanction is not appropriate, as the failure was harmless. *See* *Fed. R. Civ. P. 37(c)(1)*. As Plaintiffs state in their reply in support of their motion for class certification: "Plaintiffs' claims and this motion have nothing to do with whether First American properly rejected claims or what portion of claims were **[**90]** approved or denied." (Reply at p. 1, lines 9-11.) Moreover, as is apparent from this Order, the Court did not — and did not need to — rely on Mr. Irwin's **[*615]** declaration or reports in deciding this motion. The Court further does not find that a sanction in the form of attorney's fees is appropriate. Accordingly, Plaintiffs' motion for sanctions is **DENIED**.

VI. CONCLUSION

For the foregoing reasons, the Court **DENIES** Plaintiffs' motion for class certification (ECF No. 121); **DENIES** the *ex parte* motions regarding supplemental authority filed by the parties (ECF Nos. 139, 145, 146); and **DENIES** Plaintiffs' motion for sanctions (ECF No. 132).

IT IS SO ORDERED.

DATED: February 22, 2016

/s/ Cynthia Ann Bashant

Hon. Cynthia Ann Bashant

United States District Judge

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In re Pool Prods. Distrib. Mkt. Antitrust Litig.

United States District Court for the Eastern District of Louisiana

February 22, 2016, Decided; February 22, 2016, Filed

MDL No. 2328 SECTION: R(2)

Reporter

166 F. Supp. 3d 654 *; 2016 U.S. Dist. LEXIS 20974 **; 2016-1 Trade Reg. Rep. (CCH) P79,554

IN RE: POOL PRODUCTS DISTRIBUTION MARKET ANTITRUST LITIGATION

Subsequent History: Summary judgment granted by *In re Pool Prods. Distrib. Mkt. Antitrust Litig., 2016 U.S. Dist. LEXIS 57390 (E.D. La., Apr. 29, 2016)*

Prior History: *In re Pool Prods. Distrib. Mkt. Antitrust Litig., 158 F. Supp. 3d 544, 2016 U.S. Dist. LEXIS 9525 (E.D. La., Jan. 27, 2016)*

Core Terms

Pool, pricing, overcharge, Products, customers, regions, Manufacturer, spatial, cointegration, integration, prediction, antitrust, benchmark, damages, calculation, Dealers, sales, conspiracy, geographic, reliable, margins, updates, vendors, estimates, catalog, tests, defendants', aggregated, matrix, regression

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Judges: SARAH S. VANCE, UNITED STATES DISTRICT JUDGE. JUDGE VANCE. MAG. JUDGE WILKINSON.

Opinion by: SARAH S. VANCE

Opinion

[*660] THIS DOCUMENT RELATES TO ALL CASES

ORDER AND REASONS

Defendants Pool Corporation, SCP Distributors LLC, and Superior Pool Products (collectively, "Pool"), move to exclude the testimony of Dr. Gordon C. Rausser, an expert for the Direct-Purchaser Plaintiffs (DPPs).[1] The Court has reviewed the parties' submissions and has heard oral argument on the motion. For the following reasons, the Court grants defendants' motion in part and denies it in part.

I. BACKGROUND

This is an antitrust case that direct-purchaser plaintiffs (DPPs) and indirect-purchaser plaintiffs (IPPs) filed against Pool and the Manufacturer Defendants. Pool is the country's largest distributor of products used for the construction and maintenance of swimming pools (Pool Products).[2] The Manufacturer Defendants are the three largest manufacturers of Pool Products in the United States: Hayward Industries, **[**4]** Inc. (Hayward), Pentair Water Pool and Spa, Inc. (Pentair), and Zodiac Pool Systems, Inc. (Zodiac).[3] As defined in DPPs' Second Consolidated Amended Class Action Complaint (SCAC), Pool Products are the equipment, products, parts, and materials used for the construction, renovation, maintenance, repair, and service of residential and commercial swimming pools. Pool Products include pumps, filters, covers, drains, fittings, rails, diving boards, and chemicals, among other goods. Pool buys Pool Products from manufacturers, including the three the Manufacturer Defendants, and in turn sells them to DPPs, which include pool builders, pool retail stores, and pool service and repair companies (collectively referred to as "Dealers" in the SCAC).[4]

DPPs have filed two consolidated amended complaints—the first on June 29, 2012[5] and the second on June 21, 2013[6]—each of which defendants moved to dismiss. The Court issued orders on both rounds of motions to dismiss,

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[1] R. Doc. 508. Originally, Pool along with Pentair, one of the Manufacturer Defendants, jointly moved to exclude Dr. Rausser's testimony. Pentair has since settled with DPPs. *See* R. Doc. 699. Accordingly, the motion as to Pentair is now moot.

[2] R. Doc. 284, ¶ 39.

[3] *Id.* ¶ 28.

[4] *Id.* ¶ 31.

[5] R. Doc. 107.

the details of which are summarized elsewhere.[7] Following those orders, DPPs were left with the following five claims: (1) a Section 1 claim under the *per se* rule involving a horizontal agreement between the Manufacturer **[**5]** Defendants and Pool to fix free freight minimums; (2) three Section 1 claims under the rule of reason involving three separate vertical conspiracies (one between Pool and each Manufacturer Defendant) to exclude Pool's competitors; and (3) a Section 2 attempted monopolization claim against **[*661]** Pool. Defendants have moved for summary judgment on these five claims. In addition, DPPs have moved for class certification. The Court has dismissed DPPs' Section 1 *per se* claim on summary judgment.

II. LEGAL STANDARD

When expert testimony offered by one party is subject to a *Daubert* challenge, the Court must act as a "gatekeeper" under *Federal Rule of Evidence 702*.

A district court has considerable discretion to admit or exclude expert testimony under *Rule 702*. *See Gen. Elec. Co. v. Joiner, 522 U.S. 136, 138-39, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997)*; *Seatrax, Inc. v. Sonbeck Int'l, Inc., 200 F.3d 358, 371 (5th Cir. 2000)*. *Rule 702*, which governs the admissibility of expert witness testimony, provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony **[**6]** is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702.

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the Supreme Court held that *Rule 702* requires the district court to act as a gatekeeper to ensure that "any and all scientific testimony or evidence admitted is not only relevant, but reliable." *509 U.S. at 589*; *see also Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 147, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999)* (clarifying that the *Daubert* gatekeeping function applies to all forms of expert testimony). The Court's gatekeeping function thus involves a two-part inquiry into reliability and relevance.

First, the Court must determine whether the proffered expert testimony is reliable. The party offering the testimony bears the burden of establishing its reliability by a preponderance of the evidence. *See Moore v. Ashland Chem. Inc., 151 F.3d 269, 276 (5th Cir. 1998)*. The reliability inquiry requires the Court to assess whether the reasoning or methodology underlying the expert's testimony is valid. *See Daubert, 509 U.S. at 592-93*. The aim is to exclude expert testimony based merely on subjective belief or unsupported speculation. *See id. at 590*.

The Court in *Daubert* articulated a flexible, non-exhaustive, five-factor test to assess the reliability of an expert's methodology: (1) whether the expert's theory **[**7]** can be or has been tested; (2) whether the theory has been subject to peer review and publication; (3) the known or potential rate of error of a technique or theory when applied; (4) the existence and maintenance of standards and controls; and (5) the degree to which the technique or theory has been generally accepted in the scientific community. *Id. at 593-95*. The Supreme Court has emphasized, however, that these factors "do not constitute a 'definitive checklist or test.'" *Kumho, 526 U.S. at 150* (quoting *Daubert, 509 U.S. at 593*). Rather, district courts "must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable." *Id. at 152*. Courts have also considered whether experts are "proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying," **[*662]** *Daubert v. Merrell Down Pharms., Inc., 43 F.3d 1311, 1317 (9th Cir. 1995)*, whether

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[6] R. Doc. 284.

[7] *See, e.g.*, R. Doc. 482 at 2-6.

the expert has adequately accounted for obvious alternative explanations, *see* *Claar v. Burlington N.R.R., 29 F.3d 499 (9th Cir. 1994)*, and whether the expert "is being as careful as he would be in his regular professional work outside his paid litigation consulting," *Sheehan v. Daily Racing Form, Inc., 104 F.3d 940, 942 (7th Cir. 1997)*.

A district court's gatekeeper function does not replace the traditional **[**8]** adversary system or the role of the jury within this system. *See* *Daubert, 509 U.S. at 596*. As the Supreme Court noted in *Daubert*: "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Id.* The Fifth Circuit has held that, in determining the admissibility of expert testimony, district courts must accord proper deference to "the jury's role as the proper arbiter of disputes between conflicting opinions. As a general rule, questions relating to the bases and sources of an expert's opinion affect the weight to be assigned that opinion rather than its admissibility and should be left for the jury's consideration." *United States v. 14.38 Acres of Land, More or Less Situated in Leflore Cty., Miss., 80 F.3d 1074, 1077 (5th Cir. 1996)* (quoting *Viterbo v. Dow Chem. Co., 826 F.2d 420, 422 (5th Cir. 1987))*.

Nonetheless, expert testimony "must be reliable at each and every step or else it is inadmissible. The reliability analysis applies to all aspects of an expert's testimony: the methodology, the facts underlying the expert's opinion, the link between the facts and the conclusion, *et alia*." *Knight v. Kirby Inland Marine Inc., 482 F.3d 347, 355 (5th Cir. 2007)* (citation omitted). "Where the expert's opinion is based on insufficient information, the analysis is unreliable." *Paz v. Brush Engineered Materials, Inc., 555 F.3d 383, 388 (5th Cir. 2009)*.

In *Joiner*, the Supreme Court **[**9]** explained that "nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." *522 U.S. at 146*. Rather, "[a] court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." *Id.*; *see also* *LeBlanc v. Chevron USA, Inc., 396 F. App'x 94, 98 (5th Cir. 2010)*.

Second, the Court must determine whether the expert's reasoning or methodology is relevant. The question here is whether the reasoning or methodology "fits" the facts of the case and will thereby assist the trier of fact to understand the evidence. *See* *Daubert, 509 U.S. at 591*. "[F]undamentally unsupported" opinions "offer[] no expert assistance to the jury" and should be excluded. *Guile v. United States, 422 F.3d 221, 227 (5th Cir. 2005)* (citing *Viterbo, 826 F.2d at 422*).

III. DISCUSSION

Defendants challenge five aspects of Dr. Rausser's opinion. The Court begins by summarizing Dr. Rausser's opinion and methodology. The Court then summarizes the substantive antitrust and class certification law necessary to understand how the challenged portions of Dr. Rausser's opinion matter to DPPs' antitrust claims and motion for class certification. The Court then assesses defendants' five challenges to Dr. Rausser's opinion.

[*663] A. Dr. Rausser's Opinion and Methodology

*1. Opinion **[**10]** About Impact of Defendants' Conduct on Pricing*

Dr. Rausser opines that Pool could charge inflated prices for Pool Products as a result of a mixture of conduct by Pool and the Manufacturer Defendants. He states that his "liability analysis" is how he shows the conduct had an impact on prices and thereby on plaintiffs.[8] His "liability analysis" consists of a narrative summary of the "documentary evidence" of Pool's and the Manufacturer Defendants' conduct during the class period, paired with a series of opinions about what the effect of that conduct would be on the market. Dr. Rausser relies on the following conduct in his liability analysis.

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[8] Rausser Deposition at 49:1-2.

To begin, Dr. Rausser states that Pool communicated with the Manufacturer Defendants about "cutting off" Pool's rivals.[9] He describes several examples of alleged "foreclosures," in which the Manufacturer Defendants, at Pool's direction, allegedly refused to sell product to new distribution rivals in certain markets. Dr. Rausser examines six incidents of foreclosure in his initial report. He supports his analysis with the Manufacturer Defendants' transaction data, which he says demonstrates sales patterns consistent with **[**11]** foreclosure—that is, limited or non-existent sales to the allegedly foreclosed rivals during the class period.[10]

Dr. Rausser also opines that Pool used its preferred vendor program to "facilitate its control of the market."[11] For vendors in the program, Pool provided extra advertising, marketing programs, and product support. In exchange, Pool required preferred vendors to maintain a certain percentage of sales (75% and later 80%) through distribution, including $2 million through Pool each year. Dr. Rausser opines that Pool used the preferred vendor program as leverage to encourage other desired behaviors by its preferred vendors.

First, he states that the preferred vendors' supply agreements usually contained a most-favored-pricing clause (colloquially called "most favored nation" provisions—"MFNs" for short).[12] The MFNs typically required that Pool receive a price at least equal to the lowest price offered to any other customer. According to Dr. Rausser, the MFNs ensured that Pool "would have available to it inventory that was effectively priced lower than that of its rivals, giving Pool[] another advantage[,] which it could use to ensure that its rivals could **[**12]** not compete effectively."[13]

Second, Dr. Rausser states that Pool pressured its preferred vendors to police their own minimum acceptable advertised price (MAPP) and lowest acceptable advertised price (LAPP) policies. He states that "MAPP/LAPP provisions between manufacturers and their customers (either distributors or Dealers who purchased direct) prohibited the customers from advertising (not selling) the manufacturers' products at a price below the manufacturer's set minimum."[14] Similarly, Dr. Rausser suggests that Pool pressured its preferred vendors to police their own policies about dealer "redistribution," which involved a dealer's purchasing product directly from a manufacturer through a buying group and then redistributing that product to other Dealers.[15]

[*664] Third, Dr. Rausser states that Pool directed preferred vendors not to sell to new distributors, and that it used the preferred vendor program as leverage to enforce its demands.[16] According to Dr. Rausser, vendors who did not adhere to Pool's conditions ran the risk of being "punished" by being excluded from the preferred vendor program.[17]

Dr. Rausser also identifies two strategies supposedly targeted at eliminating competition from **[**13]** buying groups. Buying groups allowed Dealers to purchase product directly from vendors at pre-negotiated prices, thus enabling Dealers to circumvent distribution. First, Dr. Rausser asserts that Pool encouraged the Manufacturer Defendants to increase their minimum purchase amounts for receiving free freight. He notes that the Manufacturer Defendants began announcing increases to their free-freight minimums in the fall of 2007 and that all three had raised their

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[9] Rausser Initial Report at 45.

[10] *Id.* at 57.

[11] *Id.* at 62.

[12] *Id.* at 63.

[13] *Id.* at 64.

[14] *Id.* at 65-66.

[15] *Id.* at 67.

[16] *Id.* at 68.

[17] *Id.* at 71-72.

minimum from $10,000 to $20,000 by February 2008.[18] According to Dr. Rausser, this hike in the free-freight minimums "increased the costs faced by many Pool Dealers, including buying group members," which in turn "made membership of such groups a less attractive option for Dealers wishing to escape" Pool.[19] This, in turn, "increase[d] Pool[]'s ability to sustain higher prices for its Dealer customers." Second, Dr. Rausser asserts that Pool sought to directly alter the incentives for Dealers to purchase through Carecraft, one of the two largest buying groups. Pool reached an agreement with Carecraft under which Carecraft would encourage its members to purchase through Pool and, in return, Pool would provide incentive funds to Carecraft in the **[**14]** form of rebates for purchases its members made.[20] Dr. Rausser refers to this arrangement, which allegedly led Carecraft to "strongly encourage[]" its members to buy through Pool, as the "capture" of Carecraft.[21]

Finally, Dr. Rausser suggests that, in certain instances, Pool sought to directly influence its rivals' pricing, either through the medium of one of its vendors, or by contacting the rival directly.[22]

Dr. Rausser summarizes the alleged effect of these various forms of conduct as follows:

> Through its actions, PoolCorp, in collaboration with the Manufacturing Defendants, directly limited competition from rival distributors and reduced the extent to which Dealers (including proposed Class members) could escape PoolCorp's actions. PoolCorp also signaled its ability and commitment to aggressively dissuade entry and expansion. It created a credible threat that enabled it to elevate and maintain its prices across the United States, causing adverse impact across the proposed Class.[23]

At his deposition, Dr. Rausser confirmed that it is his narrative liability analysis that demonstrates the impact of the defendants' conduct on Pool's prices.[24]

2. Opinion About Commonality ***[**15]*** *and Quantity of Impact*

Having concluded that an impact exists, Dr. Rausser proceeds to evaluate whether **[*665]** that impact would be "common" across the class. Dr. Rausser concludes that the allegedly supracompetitive pricing "caus[ed] an impact across all Class members,"[25] "regardless of region or product category."[26] Dr. Rausser supports this opinion with an analysis of Pool's pricing system. He opines that Pool "used a tightly controlled centralized pricing system to determine prices across geographical regions, products, and customers."[27] Defendants attack this conclusion on the ground that it lacks factual support.

Dr. Rausser also conducts a "Common Factors" regression, which seeks to identify the key variables that predict variation in Pool Products prices. For example, the Common Factors regression includes variables to represent costs, demand, seasonal variation, customer size, and product characteristics. He contends that because his

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[18] *Id.* at 58.

[19] *Id.* at 60.

[20] *Id.* at 73.

[21] *Id.* at 74.

[22] *Id.* at 74-77.

[23] *Id.* at 88.

[24] Rausser Deposition at 49:1-2.

[25] Rausser Initial Report at 84.

[26] *Id.*

[27] *Id.* at 88.

Common Factors regression can predict 99% of the variation in prices, it shows that "common factors predominate" in determining pricing across the class.

Next, Dr. Rausser uses a "before-and-after" analysis to quantify the alleged impact **[**16]** on the class. The before-and-after analysis seeks to quantify damages by comparing two time periods: a "before" time period, when the allegedly anticompetitive conduct was still underway, and an "after" time period, also referred to as the "benchmark" period, when most of the allegedly anticompetitive conduct had supposedly stopped. To compare the two time periods, he runs his "Common Factors" regression, but adds one additional variable, a "dummy" variable, which is set to 1 during the class period and to 0 during the benchmark period. He calls this regression his "Overcharge" regression. He uses November 21, 2011, as the dividing date between the before period and the benchmark period, because that is the date the Federal Trade Commission "publicly announced its investigation into Pool Products distribution" and "[d]uring that benchmark period, Pool[] was effectively prohibited from engaging in their previous anticompetitive conduct."[28] A positive and statistically significant coefficient on the overcharge dummy variable would indicate an overcharge attributable to the difference in competitive conditions between the class period and the benchmark period.

Defendants challenge Dr. Rausser's **[**17]** before-and-after analysis on two grounds. First, they challenge the benchmark period Dr. Rausser uses on the ground that many of the types of conduct challenged by the DPPs continued into the benchmark period. They argue that the benchmark period must be completely free of challenged conduct to be a reliable basis for a "before-and-after" analysis and that, because his benchmark period is not completely clean, his analysis should be excluded as unreliable. Second, defendants argue that Dr. Rausser's analysis does not "fit" the facts of this case because it does not disaggregate the effect of "any particular allegedly unlawful acts."[29] They contend that because this case includes separate claims, each involving a different constellation of defendants, the analysis must evaluate the impact of "individual alleged events." *Id.*

Dr. Rausser's opinion also includes a proposed method for calculating "individual damages" for each individual transaction during the class period. Dr. Rausser estimates the individual overcharge for each transaction in two steps. First, he uses his **[*666]** Overcharge regression model to generate a "Predicted But-For Price" for the transaction. Second, Dr. **[**18]** Rausser subtracts the Predicted But-For Price from the Actual Price that the customer paid for the transaction. The difference between the Actual Price paid and the Predicted But-For Price is the "individual overcharge" for that transaction.[30] Then, to correct for prediction error, Dr. Rausser takes the median overcharge for each product in a month and assigns that overcharge to all customers who purchased that product that month.

Defendants challenge his method on two grounds. First, they argue that his calculated "individual" overcharge for each transaction inappropriately includes an error term. Second, they challenge the final stage of his calculations, in which he substitutes a median overcharge term for his individualized estimates. They argue that this substitution obscures the differences between transactions and leads to "false positives." Ultimately, they contend that his method does not provide a reliable basis for the trier of fact to assess individual damages.

3. Opinion About Relevant Geographic Market

Dr. Rausser concludes that the relevant geographic market is the United States. He provides two bases for this conclusion. First, he opines **[**19]** that Pool Product prices should have been "spatially integrated" across the country.[31] Second, he contends that his conclusion finds support in the results of a "cointegration test" he

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[28] *Id.* at 11.

[29] R. Doc. 508-3 at 10.

[30] *See* Rausser Declaration at 18 n.115.

[31] Rausser Initial Report at 35-37; Rausser Rebuttal Report at 48-56; Rausser Supplemental Report at 11 n.29.

performed on Pool's pricing.[32] Defendants challenge Dr. Rausser's spatial integration theory on the ground that it is not supported by the facts and his cointegration test on the ground that it is not reliable.

B. Relevant Substantive Law

DPPs rely on Dr. Rausser's opinions to support their antitrust claims and their motion for class certification. The Court sets out the substantive law necessary to understand how the challenged portions of Dr. Rausser's opinion matter to DPPs' antitrust claims and motion for class certification.

1. Attempted Monopolization Claim

Section 2 of the Sherman Act forbids monopolization and attempts to monopolize. *15 U.S.C. § 2*. DPPs maintain one attempted monopolization claim against Pool. To prevail on the claim, DPPs must prove that Pool (1) engaged in predatory or anticompetitive conduct, (2) with the specific intent to **[**20]** monopolize, and (3) with "a dangerous probability" of achieving monopoly power. *Spectrum Sports v. McQuillan, 506 U.S. 447, 456, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993)*. In appraising whether there is a dangerous probability of success, courts focus principally on the defendant's share of the relevant market. *See, e.g., Pastore v. Bell Tel. Co., 24 F.3d 508, 512 (3d Cir. 1994)* ("Determining whether a 'dangerous probability' exists requires 'inquiry into the relevant product and geographic market and the defendant's economic power in that market.'" (quoting *Spectrum Sports, 506 U.S. at 459*)). Market definition is a necessary component of this analysis, because without a definition of a relevant market, there is no way to measure a defendant's ability to lessen or destroy competition. *Walker Process Equip. v.* ***[*667]*** *Food Mach. & Chem. Corp., 382 U.S. 172, 177, 86 S. Ct. 347, 15 L. Ed. 2d 247 (1965)*. A relevant market has both product and geographic dimensions. *Brown Shoe Co. v. United States, 370 U.S. 294, 324, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*; *Surgical Care Ctr. v. Hosp. Dist., 309 F.3d 836, 839-40 (5th Cir. 2002)* (affirming dismissal for failure to provide evidence sufficient to demonstrate relevant geographic market).

In addition to establishing a *Section 2* violation, to recover as private antitrust plaintiffs, DPPs must establish that they suffered injury in their "business or property by reason of anything forbidden in the antitrust laws." *Bell Atl. Corp. v. AT&T Corp., 339 F.3d 294, 302 (5th Cir. 2003)* (citing Clayton Act § 4, *15 U.S.C. § 15*). They must also provide "some indication of the amount of damage." *Id.* (citing *Alabama v. Blue Bird Body Co., Inc., 573 F.2d 309, 317 (5th Cir. 1978))*.

2. Conspiracy Claims

Section 1 of the Sherman Act prohibits "every contract, combination . . . **[**21]** or conspiracy, in restraint of trade or commerce among the several states." *15 U.S.C. § 1*. The Supreme Court has made clear, however, that the prohibition on "every" restraint on trade actually "prohibits only agreements that unreasonably restrain trade." *NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 133, 119 S. Ct. 493, 142 L. Ed. 2d 510 (1998)*.

DPPs' remaining section 1 claims are three separate vertical conspiracy claims: one alleging an agreement between Pool and Pentair, another alleging an agreement between Pool and Hayward, and another alleging an agreement between Pool and Zodiac. Vertical restraints are tested by the rule of reason. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 907, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007)* (overruling *Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 31 S. Ct. 376, 55 L. Ed. 502 (1911)*, and extending application of rule of reason to all vertical restraints).

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[32] Rausser Rebuttal Report at 55 n.109; Rausser Supplemental Report at 11 n.29.

Under the rule of reason, courts must assess whether a challenged restraint "unreasonably restrained trade," that is, whether it caused an "injury to competition." *Doctor's Hosp. of Jefferson, Inc. v. Se. Med. Alliance, Inc., 123 F.3d 301, 307 (5th Cir. 1997)* (citations omitted). Courts must balance

> the anticompetitive evils of a restrictive practice . . . against any procompetitive benefits or justifications within the confines of the relevant market. Proof that the defendant's activities, on balance, adversely affected competition in the appropriate product and geographic markets is essential to recovery under the rule of reason.

Id. (citing *Hornsby Oil Co. v. Champion Spark Plug Co., 714 F.2d 1384, 1392 (5th Cir. 1983))*. When assessing the effect **[**22]** on competition of a vertical conspiracy in a case that includes multiple "discrete conspiracies," a court must evaluate each alleged agreement individually:

> [E]ach . . . agreement must be treated as a separate conspiracy, and only acts taken in furtherance of that alleged conspiracy are appropriately considered in determining the adverse effects of the claimed restraints on trade, not acts of one conspirator taken in furtherance of other possible, distinct conspiracies. . . . Indeed, to hold otherwise would be to suggest that the distinction between a single conspiracy and multiple conspiracies involving a common defendant is one without a difference.

Dickson v. Microsoft Corp., 309 F.3d 193, 210-11 (4th Cir. 2002) (citations omitted). If, on balance, the challenged conduct injures competition, then the conduct violates *Section 1*; if not, then not.

[*668] Almost always, courts must conduct this assessment within a precisely defined market. *See Hornsby Oil Co., 714 F.2d at 1392-93* (holding that rule of reason analysis must be conducted in the context of the "appropriate product and geographic markets"). The Court must assess all of the relevant market circumstances within that market, including the market power of the businesses involved in the challenged conduct. *See id.*; *Leegin, 551 U.S. at 885-86*; *Dickson, 309 F.3d at 209 n.18*; *see also* 7 Phillip E. Areeda **[**23]** & Herbert Hovenkamp, ***Antitrust Law*** ¶ 1503a, at 393 (2010) (explaining that assessing whether harm to competition is "not only possible but likely and significant" ordinarily requires examining market circumstances). That said, "elaborate market analysis" is not always required:

> [Because] the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, "proof of actual detrimental effects, such as a reduction of output," can obviate the need for an inquiry into market power, which is but a "surrogate for detrimental effects."

F.T.C. v. Ind. Fed'n of Dentists, 476 U.S. 447, 460-61, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986). In most instances, however, plaintiffs cannot present direct evidence of detrimental effects. In that event, they must be able to define the relevant market. *Hornsby Oil Co., 714 F.2d at 1392-93*.

In addition to proving a violation of the antitrust laws, to establish private antitrust liability, DPPs must prove that they suffered an injury from the violation, and they must provide "some indication of the amount of damage." *Robinson v. Tex. Auto. Dealers Ass'n, 387 F.3d 416, 422 (5th Cir. 2004)* (citation omitted). The injury must be "antitrust injury," which is "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' **[**24]** acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*. In other words, the injury must be "congruent with the rationale for finding an antitrust violation in the first place." 2A Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** ¶ 355c4, at 81 (4th ed. 2014). Thus, a plaintiff cannot demonstrate antitrust injury without first establishing a violation. In addition, the causal link between the violation and the injury "may not be based on speculation," but rather "must be proved as a matter of fact and with a fair degree of certainty." *Blue Bird Body Co., 573 F.2d at 317*.

Once antitrust injury has been established, plaintiffs enjoy a "relaxed burden" with respect to the amount of damages. *Pierce v. Ramsey Winch Co., 753 F.2d 416, 435 (5th Cir. 1985)*. But "the standard for proving the quantum of damages is not without bounds, for antitrust damages may not be determined by guesswork or speculation." *El Aguila Food Prods., Inc. v. Gruma Corp., 131 F. App'x 450, 453 (5th Cir. 2005)*. Rather, there must be enough for a factfinder to make a "just and reasonable estimate of the damage based on relevant data." *Id.* (quoting Lehrman v. Gulf Oil Corp., 464 F.2d 26, 46 (5th Cir. 1972).

3. Class Certification

To be certified under Rule 23, the class must first satisfy four threshold requirements. A court may certify a class only if:

(1) the class is so numerous that joinder of all members is impracticable;
(2) there are questions of law or fact common to the class;

(3) the **[**25]** claims or defenses of the representative parties are typical of the claims or defenses of the class; and

[*669] (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). The party seeking certification bears the burden of establishing these requirements. Unger v. Amedisys, 401 F.3d 316, 320 (5th Cir. 2005) (citing Berger v. Compaq Comput. Corp., 257 F.3d 475, 479-80 (5th Cir. 2001)).

If the prerequisites of Rule 23(a) are met, the proposed class must also satisfy one of the three provisions for certification under Rule 23(b). For certification of a 23(b)(3) damages class, the court must make a finding that questions of law or fact common to class members predominate over questions affecting only individual members and that a class action is the best way to adjudicate the controversy. Fed. R. Civ. P. 23(b)(3); Unger, 401 F.3d at 320.

To determine whether the class claims meet the predominance requirement, the court must "identify the substantive issues that will control the outcome, assess[] which issues will predominate, and then determin[e] whether the issues are common to the class." Bell Atl. Corp. v. AT&T Corp., 339 F.3d 294, 302 (5th Cir. 2003). As summarized above, establishing the predicate antitrust violation to support each of DPPs' claims is only the first of three steps necessary to establish private antitrust liability. DPPs must also prove that they suffered "antitrust injury" and make a showing as **[**26]** to the amount of damages.

The Court will need to determine whether injury and amount of damages are susceptible to common proof. If injury "cannot be established for every class member through proof common to the class, the need to establish antitrust liability for individual class members defeats Rule 23(b)(3) predominance." Bell Atl., 339 F.3d at 302. Likewise, when plaintiffs fail to adduce a formula capable of providing "a just and reasonable estimate of the damages of every class member," individual issues as to amount of damages will defeat predominance. Id. at 304; Piggly Wiggly Clarksville, Inc. v. Interstate Brands Corp., 100 F. App'x 296, 297 (5th Cir. 2004) ("The necessity of calculating damages on an individual basis, by itself, can be grounds for not certifying a class." (citing Bell Atl., 339 F.3d at 308)). In *Piggly Wiggly*, the Fifth Circuit held that a district court did not abuse its discretion by refusing to certify a class on the ground that many individualized damages determinations would be required "because many of the class members negotiated a price rather than being charged strictly on price lists." Id. at 298. In short, "[c]lass treatment . . . may not be suitable where the calculation of damages is not susceptible to a mathematical or formulaic calculation, or where the formula by which the parties propose to calculate individual damages is **[**27]** clearly inadequate." Bell Atl., 339 F.3d at 307.

C. Analysis

Defendants challenge five aspects of Dr. Rausser's opinion. The Court addresses each in turn.

1. Opinion About Pool's "Centralized Pricing System"

Dr. Rausser opines that Pool "used a tightly controlled centralized pricing system to determine prices across geographical regions, products, and customers."[33] He advances this opinion in support of his conclusion that Pool's allegedly supracompetitive pricing "caus[ed] an impact across all Class members,"[34] "regardless of region **[*670]** or product category."[35] DPPs also rely on Dr. Rausser's opinion about Pool's pricing system to support their proposed market definition in their summary judgment briefing.[36] Defendants challenge Dr. Rausser's opinion about Pool's pricing on that ground that it "is not supported by the facts" in the record and is therefore irrelevant.[37]

To prove that Pool centrally controlled pricing, Dr. Rausser asserts that "catalog" (or "P") pricing was the most prevalent form of pricing **[**28]** Pool used and that Pool could "commonly elevate[] prices across its Dealer customers" through "bulk matrix updates" of its prices.[38] In contrast, defendants argue that "overwhelming factual evidence" indicates that Pool's prices are "set at the local branch level on a customer-by-customer, product-by-product basis."[39] Specifically, they argue that Pool extensively customized its pricing through the use of its matrix pricing system and price overrides; that catalog pricing not only represented a minority of Pool's sales, but also varied by geographic region; and that Dr. Rausser misrepresents the nature of Pool's "bulk matrix updates."

Pool's Pricing System

The parties agree that Pool uses three main types of pricing: regional catalog, or "P," prices; matrix, or "M," prices; and override, or "OV" prices. Pool issues approximately fifteen different regional catalogs.[40] Catalog pricing is set with input from the divisional pricing managers for each geographic division.[41] Matrix pricing is created at the local branch level, and is customized to individual customers (or customer groups) and individual products (or product groups). Finally, override **[**29]** prices indicate sales for which the sales center manager at a particular branch overrides the catalog and matrix price options.

The parties also agree that Pool uses two types of matrix pricing: "asterisk" (or "*") pricing, and "dollar sign" (or "$") pricing. Asterisk pricing reflects a set markup or discount from the catalog price, or a set markup from cost.[42] Thus, when Pool inputs a change to either catalog prices or cost, asterisk pricing updates automatically.[43] Dollar sign pricing reflects a fixed dollar price for a product for a specific customer or customer group.[44] Dollar sign pricing does not update automatically. Instead, when Pool experiences a cost increase from its vendors, it implements a "bulk update" of its dollar matrices to reflect the cost increase.[45]

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[33] Rausser Initial Report at 88.

[34] *Id.* at 84.

[35] *Id.*

[36] R. Doc. 582 at 14 (Opposition to Pool's Motion for Summary Judgment on DPPs' Attempted Monopolization Claims and IPPs' Analogous State Law Claims) (citing Rausser Initial Report at 88).

[37] R. Doc. 508-3 at 16.

[38] Rausser Initial Report at 94.

[39] R. Doc. 508-3 at 16.

[40] Deposition of Melanie Housey, May 2, 2013, at 139:2-3.

[41] *See* "Division Pricing Manager Responsibilities," Rausser Declaration Exhibit K.

[42] Deposition of Stephen Dwyer, November 14, 2013, at 52:16-18.

[43] *Id.* at 52:21-53:3.

[44] *Id.* at 51:20-52:7.

[45] *Id.* at 53:16-22.

Defendants' Challenges

Pool's expert, Dr. Johnson, argues that Dr. Rausser inaccurately represents the nature of the matrix and override pricing. According to Dr. Johnson, Dr. Rausser **[**30]** represents that commonality exists among transactions associated with the same price code, even though matrix and override pricing are, by definition, individualized.[46] For example, an "M1" price code **[*671]** would be used to set a price specific to an individual customer and an individual product (*i.e.*, the price Customer C pays for Brand Y sand), while an "M6" price code would be used to set a price applicable to a group of a customers for an individual product (*i.e.*, the price Customers A, B, and C pay for Brand Y sand). With override pricing, a Pool representative overrides the catalog and matrix price options.

Dr. Rausser and Dr. Johnson also disagree about how prevalent each type of pricing is, and what the prevalence of each pricing type implies about the degree to which Pool's pricing is "centralized." Dr. Rausser represents that approximately 43% of Pool's sales were made at catalog prices during the class period.[47] He argues that this demonstrates standardization in Pool's pricing. In contrast, Dr. Johnson, represents that "only 24%" of Pool's gross sales occurred at catalog prices during the class period.[48] Neither expert appears to dispute that 43% of Pool's sales, **[**31]** accounting for 24% of its gross sales, were made at catalog prices during the class period. Rather, they differ as to whether it is more helpful to analyze the percentage of orders or the percentage of sales dollars. Dr. Rausser criticizes Dr. Johnson's choice to analyze the percentage of sales dollars, as opposed to the percentage of orders made under each code, on the ground that using sales dollars "erroneously and needlessly gives the sales of a more expensive products a higher weight in the analysis."[49]

Finally, Dr. Johnson argues that Dr. Rausser misrepresents the nature of Pool's bulk updates. In his initial report, Dr. Rausser characterized Pool's bulk updates as a mechanism for Pool to manipulate prices "on a common basis"[50] and "commonly elevate[] prices across its Dealer customers."[51] In his declaration, Dr. Rausser shifts his explanation and argues that the evidence still supports the idea that Pool's price updates were "company-wide," because "at the start of each year" Pool updated its "catalog prices, followed by matrix price updates."[52]

Discussion

When determining the admissibility of evidence, district courts must afford "proper deference to the jury's role as the arbiter of disputes between conflicting opinions." *14.38 Acres of Land, 80 F.3d at 1077* (quoting *Viterbo, 826 F.2d at 422*). "As a general rule, questions relating to the bases and sources of an expert's opinion affect the weight to be assigned that opinion rather than its admissibility and should be left for the jury's consideration." *Id.* (quoting *Viterbo, 826 F.2d at 422*).

The Court has reviewed the documents cited by both experts in support of their conclusions about the nature and degree of centralization of Pool's pricing. The Court concludes that defendants' arguments consist of factual disputes and challenges to Dr. Rausser's conclusions, which are more appropriately explored through cross examination. "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert, 509 U.S.*

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[46] Johnson Affidavit at 12.

[47] Rausser Initial Report at 91 tbl.23.

[48] Johnson Affidavit at 8.

[49] Rausser Declaration at 5 n.35.

[50] Rausser Initial Report at 92.

[51] *Id.* at 94.

[52] Rausser Declaration at **[**32]** 7.

at 596. Dr. Rausser's conclusions about Pool's pricing are not devoid of factual support. Indeed, Dr. Rausser's reports cite a number of internal Pool documents that demonstrate some level of centralized **[*672]** control over pricing during the class **[**33]** period.

For example, he cites a document produced by Pool central management entitled "District Pricing Manager Responsibilities."[53] It states that the "core objective" of the division or district pricing manager position is to "improve the selling margins of the division."[54] The document outlines, step-by-step, the process divisions were to follow when making pricing decisions. Step one instructs the divisions to "Begin at 'P' [catalog] pricing . . . for many accounts it should be sufficient."[55] Steps two and three provide guidance on how to limit the use of customized matrix prices as much as possible.[56] The document also indicates that, as part of the process for setting catalog prices, all catalog price changes went through Steve Dwyer, the "corporate pricing manager."[57] This document demonstrates some level of centralized coordination and supervision of Pool's pricing.

Dr. Rausser also cites internal Pool emails discussing how to improve pricing discipline at the branch level. For example, he points to a 2006 email to senior staff from Manny Perez, Pool's president and CEO, in which Perez lists disciplinary **[**34]** actions to be taken against employees who grant unauthorized pricing exceptions. The list includes requiring the responsible employee to pay Pool for the difference between the sale price and the authorized price ("equivalent to reimbursing the Company for stealing") and "termination."[58] This document provides support for Dr. Rausser's opinion that "pricing discipline was instilled from the most senior levels[.]"[59]

Dr. Rausser also points to Pool's "Price Management 2011 Action Plan," which provides detailed instructions on managing Pool's active price matrices. The plan instructs managers to review all price matrices for specific customers, eliminate obsolete entries, and then "[i]ncrease the gross margin percent on every matrix for every customer."[60] The plan further instructs managers to review group matrices and reduce the number of customers and products assigned to the lists and "[i]ncrease the margins on all items on these lists."[61] The plan explains:

> As a general rule, 80% of our customers watch pricing by focusing on a relatively small list of products they purchase frequently. For these customers we should be able to raise our margins **[**35]** on every matrix item without raising any concerns. This will be easier this year as we have inflation. A margin going from 24.2% to 24.6% should go unnoticed.[62]

This document arguably provides step-by-step instructions for Pool's managers to implement across-the-board price increases for their customers.

These documents, and others like them, provide support for Dr. Rausser's opinion that Pool's pricing was subject to centralized control. Although Pool's pricing may not be as "tightly controlled" as Dr. Rausser **[*673]** opines, neither

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53 "Division Pricing Manager Responsibilities," Rausser Declaration Exhibit K.

54 *Id.*

55 *Id.*

56 *Id.*

57 *Id.*

58 April 8, 2006 email, Rausser Declaration Exhibit Q.

59 Rausser Declaration at 4.

60 "Price Management 2011 Action Plan," Rausser Declaration Exhibit V.

61 *Id.*

62 *Id.*

does it appear to be as atomized as Dr. Johnson suggests. This "dispute[] between conflicting opinions" is best left to the jury. *14.38 Acres of Land, 80 F.3d at 1077*.

The Court reaches a similar conclusion about Dr. Rausser's opinion on the effect of Pool's bulk updates. Although there is no dispute that the bulk updates do not update all prices for all products at one time, Dr. Rausser has pointed to some evidence that the bulk updates facilitated common, if not completely uniform, increases in prices. Specifically, he has analyzed the effect of the bulk updates on pricing for different product lines, and he presents his results **[**36]** in a series of graphs demonstrating step-like increases in prices corresponding to the bulk updates.[63] Thus, his bulk updates opinion is not without support in the record.

The Court denies defendants' motion to exclude Dr. Rausser's opinion about the centralization of Pool's pricing.

2. Definition of the Relevant Geographic Market

Dr. Rausser opines that the relevant geographic market is the United States.[64] He supports his conclusion by arguing that Pool Product prices should have been "spatially integrated" across the country,[65] and by reporting his interpretation of a "cointegration test" of Pool's pricing.[66] Defendants challenge Dr. Rausser's spatial integration analysis and cointegration test as unconnected to the facts of the case and unreliable.

"Spatial Integration" Theory

Dr. Rausser recognizes that the FTC complaint, which did not allege a national market, referred to "local geographic markets, focusing on demand-side effects — *i.e.* the limited ability of Dealers in certain locales **[**37]** to switch to distributors operating far away."[67] He argues, however, that a market can still be national on the basis of supply-side substitution. He explains:

> [B]ecause Pool Products can and did ship throughout the United States . . . prices are expected to be related (or "spatially integrated") across the country, through supply-side substitution. Simply, where prices are elevated in one region relative to another (above that which can be justified by differences in transportation costs between the two), the economics of supply-side substitutability means that product flow will be restricted in the low-price region and re-directed to the higher price region, because such a re-direction would be economically beneficial to the supplier. This dynamic (often referred to as "spatial arbitrage") serves to keep prices in different regions related, and it also means that the relevant enquiry regarding market power is one that looks across the United States and not just in a particular locale.[68]

Defendants challenge Dr. Rausser's spatial integration theory as ungrounded in the facts of the case.[69] They point out that Dr. Rausser has not identified any evidence indicating that **[**38]** Pool ever shipped product from one branch to another for the purpose of maximizing profits. **[*674]** Pool's expert, Dr. Johnson, points to evidence that gross margins varied by geographic region, and that, therefore, if Pool were engaging in "spatial arbitrage," it should have been shifting sales from less profitable to more profitable divisions until gross margins across geographies equalized.[70] As an illustration, Dr. Johnson points out that average gross margins for the heaters

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[63] Rausser Reply Report at 13-24.

[64] Rausser Initial Report at 35.

[65] *Id.* at 35-37; Rausser Rebuttal Report at 48-56; Rausser Supplemental Report at 11 n.29.

[66] Rausser Rebuttal Report at 55 n.109; Rausser Supplemental Report at 11 n.29.

[67] Rausser Initial Report at 35.

[68] *Id.* at 36.

[69] R. Doc. 508-3 at 16-17.

product line were twice as high in the Southeast region as in the Southern California region.[71] And yet Dr. Rausser has pointed to no evidence that heaters, or any other products, were transferred to improve margins.

At his deposition, Dr. Rausser could identify only two pieces of evidence in support of his spatial integration opinion. First, he identified a memo in which Pool management discussed the need to review with branches matrix pricing producing a "gross margin of 10% or less based on replacement cost."[72] To explain the memo, he cited deposition testimony by Manny Perez, indicating that Perez wanted general managers to **[**39]** personally review all low-margin sales. Dr. Rausser argued that this evidence demonstrates that Pool was aiming to "maximize total margins." He reasoned that "the only way of maximizing total margins is, in fact, to equalize them, setting the incremental value of margins across regions of the country in equilibrium."[73] This document does not demonstrate that spatial arbitrage actually occurred.

Second, Dr. Rausser identified a regional manager report that discussed Pool's internal mechanism for transferring product from one branch to a branch that is out-of-stock.[74] Pool's counsel asked Dr. Rausser:

> Q: Is there anything in those documents that suggests that the subject of transferring product had anything to do with anything other than situations where one branch is out of stock of a product and needs to get product from another branch in order to fill demand?
>
> A: Well, certainly that's the major point that is visited in this document. But it also shows . . . they put in place a mechanism for moving product from the area of excess supply to an area of excess demand. . . . But fundamentally, it goes to taking advantage of areas **[**40]** in which pricing and margins are better in one are than they are in another.
> Q: Show me where in Exhibit 3025 there's reference to the transfer of product being motivated by pricing or margins being better in one area rather than the other.
> A: If you have a stock out—this is implicit. If you have stock out -
> Q: This is a very specific question.
> A: Okay. Fair enough.
> Q: I'd like you to show me where explicitly it makes reference to that.
> A: There is no statement that goes directly to margins, but this is the internal . . . managerial operations with regard to moving product from one local branch to another.[75]

The regional manager report is not evidence of shifting product to increase margins.

[*675] On the demand-side, which Dr. Rausser does not extensively address, Dr. Johnson's reports provide evidence that Pool Products sales were significantly more localized than Dr. Rausser suggests. Specifically, Dr. Johnson points to evidence that buyers typically were not willing to travel long distances for Pool Products, or to have Pool Products shipped from far away (which he hypothesizes owes to high freight costs). He shows that in most **[**41]** states, more than 90% of pick-up purchases were made at stores 50 miles or less from the buyer.[76] Likewise, in most of the states where Pool has branches, more than 90% of the orders Pool shipped were to Dealers 125 miles away or less.[77] Dr. Rausser responds:

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70 Johnson Affidavit at 18.

71 *Id.* (citing Johnson Initial Report, Exhibit 61).

72 Exhibit 1848 to Rausser Deposition.

73 Rausser Deposition at 245:1-5.

74 Exhibit 3025 to Rausser Deposition.

75 Rausser Deposition at 249:12-251:2.

76 Johnson Rebuttal **[**42]** Report at 46, Exhibit 11.

77 *Id.* at 48, Exhibit 12.

> [T]hese statistics reflect only the distances over which Dealers *have* sourced Pool Products, not the distances over which they may be prepared to source Pool Products. If prices are in equilibrium, in that spatial arbitrage opportunities have been exploited and prices across regions have stabilized as a result, then Dealers need not source Pool Products from greater distances in order to enjoy better prices that may be on offer at distant branches. This does not mean that, if the network were to get out of equilibrium, with spatial arbitrage opportunities on offer, that Dealers would refrain from sourcing Pool Products from substantially further afield than 100 miles.[78]

But this is a bit like saying that the evidence for his theory is that there is no evidence. That Dealers, for the most part, ship locally may be consistent with a market that is integrated and in equilibrium, but it is equally consistent with an unintegrated market.

Ultimately, the Court finds that there is simply too great an analytical gap between the underlying evidence presented and Dr. Rausser's opinion. As the Fifth Circuit has repeatedly held, "[i]f an opinion is fundamentally unsupported, then it offers no expert assistance to the jury." *Guile, 422 F.3d at 227* (quoting *Viterbo, 826 F.2d at 422*). Thus, "an expert's opinion should not be admitted if it does not apply to the specific facts of the case." *Diggs v. Citigroup, Inc., 551 F. App'x 762, 765 (5th Cir. 2014)* (citing *Kumho Tire, 526 U.S. at 154*). Here, Dr. Rausser has failed to point to any evidence indicating that the theory of spatial integration applies to the facts of the Pool Products market. The lack of evidence is telling; it is hard to imagine how Pool could have executed a nationwide program of margin-maximizing product transfers without having some sort of company policy in place. Because Dr. Rausser's opinion of spatial integration is without support in the record, it offers no help to the fact finder, and the Court excludes it as irrelevant.

Cointegration Test

In two footnotes, Dr. Rausser describes a "cointegration test" that he ran, which supposedly supports his conclusion that prices are spatially integrated. First, in footnote 109 of his **[**43]** rebuttal report, Dr. Rausser writes:

> A cointegration test of PoolCorp's overall pricing supports that prices are spatially integrated across the regions of the United States. To test for spatial integration of PoolCorp's prices I identified all products which were sold by PoolCorp in every quarter and in every census region (Northeast, Midwest, South, and West) over the period from January 2007 through September 2012 **[*676]** (inclusive). I then computed the average quarterly price for each of the four census regions over all 621 such products. A cointegration test confirms that the four resulting price series are related, *see* my work papers. Fackler & Goodwin describe how cointegration tests can be used to investigate spatial integration.

Then, in footnote 29 of his supplemental report, he writes:

> In addition to the analysis presented in the Appendix, I have rerun the cointegration analysis of PoolCorp's overall pricing . . . after adjusting for the amended interpretation of PoolCorp's pricing variable in its OH database. However, because it is not consistently available throughout the time period, and cointegration analysis requires consistently measured time series, no adjustment is made for **[**44]** the unit-of-measure issue. The results continue to support my conclusion that prices are spatially integrated across the regions of the United States. *See* my work papers.

That is all the description that Dr. Rausser provides of his cointegration test. Dr. Rausser does not provide any evidence of his calculations or any description of his results. Without this, the Court is unable to evaluate Dr. Rausser's methodology. Dr. Johnson, who has apparently seen Dr. Rausser's work papers, writes, "Dr. Rausser does not describe either his testing or the associated results. It is unclear from a replication of his work papers what serves as the basis for his claim that he continues to find support for his conclusion."[79] The Court cannot accept Dr.

[78] Rausser Rebuttal Report at 54-55.

[79] Johnson Affidavit at 19 n.94.

Rausser's bare assertion that the test results "support[] that prices are spatially integrated across the regions of the United States." "[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." *Joiner, 522 U.S. at 146*. On this basis alone, Dr. Rausser's opinion about his cointegration test can be excluded as unreliable.

In addition, **[**45]** however, the Court has identified at least four substantive problems with the "methodology" of Dr. Rausser's cointegration test. First, as Dr. Johnson observes, Dr. Rausser's sample set of 621 products is quite small. It represents less than 1% of the products sold by Pool.[80] Dr. Rausser seeks to justify the small sample size by explaining that cointegration tests require "price series over a long period, with a high time-frequency," which counsels for using fewer regions and more frequent observations (*i.e.*, quarterly as opposed to annual). And he represents that the 621 products he included in his analysis are the only products that were sold by Pool in all four Census regions every quarter.[81] But this explanation does not answer the real question posed by a small sample set: Is the sample size big enough to yield statistically significant results? As Dr. Rausser does not provide his results, the Court has no way of knowing what level of statistical significance he obtained, if any.

Second, the Court finds no support for the use of four generic census regions for a test of geographic market integration in the Pool Products market. **[**46]** The census regions do not correspond to the organization of the Pool Products industry or of Pool's business. Moreover, each census region includes states that have little logical connection with one another. For example, the "West" census region comprises Alaska, Hawaii, Montana, Wyoming, Colorado, New Mexico, Idaho, Utah, Arizona, Nevada, **[*677]** Washington, Oregon, and California.[82] Thus, the region includes obvious "sunbelt" states (California, Arizona, New Mexico), and "snowbelt" states (Colorado, Washington).[83] Common sense indicates that different pricing factors may apply between sunbelt and snowbelt states. But because Dr. Rausser uses geographic regions that include states from both groups, the cointegration test cannot answer whether pricing is integrated between sunbelt and snowbelt states.

Third, Dr. Rausser admits that his data for the cointegration test **[**47]** does not correct for the "unit-of-measure issue." The unit-of-measure issue is a significant data coding issue that plagued Dr. Rausser's initial and rebuttal reports. The problem may be summarized as follows. For some transactions, Pool records a quantity of "one," indicating that one unit of a product was sold. For others, a quantity of "one" indicates "one case," indicating that twelve (or some other number greater than one) units of the product were sold. Thus, without the unit-of-measure variable, it is impossible to know whether the price given for a particular transaction is the price for one unit or for multiple units.

Dr. Rausser explains that he did not correct for unit-of-measure in the data set for his cointegration test because unit-of-measure information is "not consistently available throughout the time period."[84] He makes no attempt to explain what effect this error may have had on his results. But the unit-of-measure issue was such a big problem in Dr. Rausser's initial and rebuttal reports that the Court permitted him—over defendants' objections—to submit a supplemental report correcting the issue well after the deadlines for the exchange of expert reports had passed. **[**48]** This required numerous other adjustments to the Court's scheduling order, to wit: the defendants were allowed to submit supplemental reports from their experts in response to Dr. Rausser's supplemental report; Dr. Rausser had to be redeposed; and, most significantly, all of the briefing deadlines for summary judgment, class certification, and *Daubert* motions had to be pushed back by several months—all to correct for two data coding

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[80] *Id.* at 19.

[81] Rausser Declaration at 11; Rausser Reply Report at 55 n.109.

[82] Johnson Affidavit at 19 n.93.

[83] Johnson Initial Report at 78 (stating that the "snowbelt" comprises the northern United States); Deposition of Gregory Howard, July 25, 2013 at 259:13-16 ("The sunbelt typically starts in Southern California, works its way over to Florida and the southeast, and those are considered 12-month markets.").

[84] Rausser Supplemental Report at 11 n.29.

issues, the unit-of-measure issue being one. The Court has a hard time accepting that a coding issue this significant would not also cause problems for Dr. Rausser's results here.

Finally, the Court observes that Dr. Rausser has not followed the best practices prescribed by the very authorities he cites. Dr. Rausser's cointegration discussion cites P.L. Fackler & B.K. Goodwin, *Spatial Price Analysis, in* HANDBOOK OF AGRICULTURAL ECONOMICS 971 (Bruce L. Gardner & Gordon C. Rausser, eds. 2001). He states that the article "describe[s] how cointegration tests can be used to investigate spatial integration."[85] The Court has reviewed the article. It provides a number of cautions and caveats about the limitations of the tests it describes, **[**49]** including cointegration tests. The article explains that as a result of these limitations,

> *empirical tests supporting integration could be consistent with a complete lack of integration*, and tests rejecting integration could occur in markets that are completely linked. These indeterminate results follow from a number of weaknesses inherent in the empirical tests, **[*678]** including a lack of information about transaction costs, model misspecifications, and weaknesses in the inferential procedures.

Id. at 1017 (emphasis added). The article goes on to summarize:

> What can be learned about spatial market behavior from empirical tests based upon prices alone? These tests clearly provide information about spatial relationships among prices. However, the tests should be interpreted within the context of institutional and factual characteristics of the markets in question as well as the shortcomings associated with each test. *The significant limitations associated with individual tests suggest that inferences should not be based upon a single test but rather, when possible, on a variety of inferential techniques*.

Id. at 1018 (emphasis added). Thus, the very article to which Dr. Rausser directs the Court's attention undermines **[**50]** his approach here. He has conducted just one test, instead of the variety of tests and techniques prescribed by the article. Moreover, the article makes clear that the results of any one test standing alone are simply not enough from which to draw conclusions. Dr. Rausser's isolated use of the cointegration test violates accepted best practice as described by the authority upon which he relies. For all of these reasons, Dr. Rausser's opinion about his cointegration test is excluded as unreliable.

3. Benchmark Period

Damages calculations in antitrust cases seek to compare plaintiffs' actual experience in the real world with what the plaintiffs' experience would have been, "but for" the antitrust violation. *See* ABA Section of ***Antitrust Law***, ***Antitrust Law*** *Developments* 783 (7th ed. 2012). One widely accepted methodology for proving damages is a before-and-after analysis, which "compares . . . the prices [a plaintiff] paid during the period of violations with . . . prices paid . . . after [the violation period's] termination." *Id.* at 786.

Dr. Rausser employs a before-and-after analysis here. Dr. Rausser uses November 21, 2011, as the dividing date between the "before" **[**51]** period—when the allegedly anticompetitive conduct was still underway—and the "benchmark" period—when most of the allegedly anticompetitive conduct had supposedly stopped. Dr. Rausser says he chose the date because it is the date the Federal Trade Commission "publicly announced its investigation into Pool Products distribution" and "[d]uring that benchmark period, Pool[] was effectively prohibited from engaging in their previous anticompetitive conduct."[86] For his before-and-after analysis, Dr. Rausser uses the same variables as in his Common Factors regression, but adds one additional variable, a "dummy" variable, which is set to 1 during the class period and to 0 during the benchmark period. A positive and statistically significant coefficient on the overcharge dummy variable would indicate an overcharge attributable to the difference in competitive conditions between the class period and the benchmark period.

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[85] Rausser Reply Report at 55 n.109.

[86] Rausser Initial Report at 11.

Defendants challenge Dr. Rausser's chosen benchmark period on the ground that many of the types of conduct challenged by the DPPs continued into the benchmark period. They argue that the benchmark period must be completely free of challenged conduct to be a **[**52]** reliable basis for a "before-and-after" analysis, and that because his benchmark period is not completely clean, his analysis should be excluded as unreliable. They cite *National Farmers' Organization, Inc. v. Associated Milk Producers, Inc., 850 F.2d 1286 (8th Cir. 1988)*, *amended*, *878 F.2d 1118 (8th* **[*679]** *Cir. 1989)*, for the proposition that "an antitrust plaintiff's damages should reflect the difference between its performance in a hypothetical market *free of all antitrust violations* and its actual performance in the market infected by the anticompetitive conduct." *Id. at 1306* (emphasis added).

The Court rejects this argument. Defendants do not dispute that the before-and-after method is an accepted methodology to estimate overcharge damages. Nor do they provide any authority for the proposition that an expert's opinion must be excluded if the "after" period is not free of any residual effects of the challenged exclusionary or collusive conduct. *National Farmers' Organization*, cited by defendants, does not stand for that proposition, or anything close to it. Indeed, the Eighth Circuit's decision is a ringing endorsement of a liberal approach to calculating damages once the plaintiff has shown the fact of injury. *See* *850 F.2d at 1293* (explaining "a lesser standard of proof is applicable to proof of the amount of damages"). Further, as plaintiffs **[**53]** note, the court in *In re Linerboard Antitrust Litigation* rejected the argument that an expert's opinion must be excluded if the benchmark period is not free of collusion. *See* *497 F. Supp. 2d 666, 675 (E.D. Pa. 2007)*. In *Linerboard*, the plaintiffs alleged a horizontal price-fixing conspiracy. The plaintiffs' expert constructed a model that used variables representing cost, demand, and other predictive factors to predict what prices should have been absent the alleged collusion. For inputs, the expert used data that excluded the period of the alleged conduct. The expert subtracted the predicted but-for prices generated by his model from the prices paid by the plaintiffs during the damages period. The defendants argued that, in choosing variables for his regression, the expert incorrectly assumed his benchmark period was free from collusion. The court concluded that even if the benchmark was not "perfectly competitive," the argument was unavailing. It reasoned that if there was in fact some collusion during the benchmark period, then the but-for price estimates would be too high, resulting in a "more conservative" estimate. *Id.*

The FTC Consent Decree required Pool to cease and desist from engaging in practices designed to induce **[**54]** or coerce manufacturers to refuse to deal with other distributors, as well as from exacting penalties, discriminating, or retaliating against manufacturers because they dealt with or intended to deal with other distributors. Further, the Consent Decree required Pool to desist from conditioning participation in its preferred vendor program on whether a manufacturer sold to other distributors. Thus, the focus of the FTC Consent Decree and, indeed, the most serious of plaintiffs' allegations, involve Pool's efforts to induce or coerce manufacturers to refuse to deal with actual or would-be competitors. The Court has seen nothing in the record to indicate that Pool persisted in that conduct during the after period. That the preferred vendor program continued in the after period is not inconsistent with a cessation of anticompetitive activities. Pool was not required to forego the program completely; it was required only to stop using it as a tool to exclude competitors. Further, Dr. Rausser stated that during the after period, he did not "see any events with regard to foreclosure that one witnesses during the class period."[87] Dr. Rausser cited Pool Source as an example of a distributor that **[**55]** had been foreclosed, and to which Pentair and Zodiac began to sell substantial amounts in the after period.[88] **[*680]** As to the other challenged "mechanisms that were still in place" in the after period, Dr. Rausser stated that he did not see "any evidence" to support the assertion that they were "effectively implemented to achieve anticompetitive results."[89] The issues defendants raise with respect to free freight minimums and most favored nations clauses are not trivial, but they do not fundamentally undermine Dr. Rausser's analysis. Rather, they provide a fertile subject for cross-examination. *See* *Daubert, 509 U.S. at 596*. Dr. Rausser's before-and-after analysis is not excludable.

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[87] Rausser Deposition at 395:15-397:6.

[88] Rausser Initial Report at 54-55.

[89] *Id.*

4. Aggregated Causation Analysis

Fourth, defendants challenge Dr. Rausser's analysis on the ground that it does not disaggregate the impact of "any particular allegedly unlawful acts."[90] They argue that this case, which includes separate claims against different combinations of defendants, requires a disaggregated analysis of the impact of "individual alleged events."

In response, DPPs argue that Dr. Rausser's aggregated analysis is "[c]onsistent with DPPs' allegations **[**56]** and the evidence."[91] Essentially, they argue that because they allege that all of the challenged conduct is related in one way or another, it is correct for their expert to analyze all of the challenged conduct together. In support of their position, they cite cases in which the plaintiffs maintain only one Sherman Act claim. *See* *In re TFT LCD (Flat Panel) Antitrust Litig., 267 F.R.D. 583, 607 (N.D. Cal. 2010)* (single conspiracy claim); *In re Vitamins Antitrust Litig., 209 F.R.D. 251, 265 (D.D.C. 2002)* (single conspiracy claim); *Bonjorno v. Kaiser Aluminum & Chem. Corp., 752 F.2d 802, 813 (3d Cir. 1984)* (single attempted monopoly claim); *LePage's Inc. v. 3M, 324 F.3d 141, 166 (3d Cir. 2003)* (single monopoly claim); *Cont'l Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 698-99, 82 S. Ct. 1404, 8 L. Ed. 2d 777 (1962)* (single conspiracy to monopolize claim). They do not address whether an aggregated analysis can work in a case that involves multiple claims against different defendants.

Dr. Rausser confirms that he has taken an aggregated approach to analyzing the effect of the challenged conduct. He explains that his model "measures the increase in prices . . . attributable to PoolCorp's exercise of market power *whatever the basis for the maintenance or enhancement of that power*."[92] And he admits that the data will not allow him to disaggregate the effect, if any, of any individual challenged act or of any of DPPs' individual claims. Thus, there is no dispute that Dr. Rausser's analysis does not demonstrate the effect of **[**57]** any specific challenged act or of any of the separate conspiracies.

Dr. Rausser defends his approach. Indeed, he criticizes the defense experts for evaluating specific "alleged anti-competitive acts in isolation" and "attempting to trace the particular effects of each one as though none of the other conduct had taken place."[93] He argues that, as a matter of economics, all of the alleged anticompetitive acts "must be judged based on their aggregate, rather than singular, effect."[94]

Here, defendants challenge the "fit" of Dr. Rausser's methods to the issues in this case, making a relevance argument. What is relevant to the proof of a claim depends **[*681]** on the legal standard that governs the claim. If, under the legal standard, only the conduct of certain parties is to be considered in determining if a violation occurred, an expert's opinion based on the conduct of others does not fit the case. As just summarized, Dr. Rausser's aggregated causation analysis purports to demonstrate and quantify the effect of all of the defendants' challenged conduct together. Thus, the Court must determine whether an analysis that seeks **[**58]** to demonstrate only the aggregated effect of all of the challenged conduct is relevant to all of DPPs' claims.

The Court begins with DPPs' attempted monopolization claim against Pool. Liability in a private antitrust action requires that DPPs prove (1) a violation of the antitrust laws, (2) the fact of damage, and (3) some indication of the amount of damage. *El Aguila Food Prods., Inc. v. Gruma Corp., 131 F. App'x 450, 452 (5th Cir. 2005)*. "The fact of damage requirement is one of causation; the plaintiff must show that the defendant's unlawful conduct was a material cause of injury to it[.]" *Id.* In a *section 2* case, "[t]he fact finder should be able to consider the entire sum of unlawful exclusionary practices," although "care must be taken lest . . . causation and damages relate predominantly to lawful rather than unlawful conduct." 2B Areeda & Hovencamp at ¶ 310c7, at 235-237 (4th ed.

[90] R. Doc. 508-3 at 10.

[91] R. Doc. 573 at 20.

[92] Rausser Initial Report at 105 n.411 (emphasis added)

[93] Rausser Reply Report at 47.

[94] *Id.*

2014). "The dominant conduct causing the plaintiffs injuries must still be found to be unlawful." *Id.* at 237. Here, DPPs rely on all of the challenged conduct in support of their attempted monopolization claim against Pool. Thus, so long as all of the challenged conduct is found to be unlawful, proof of the aggregated effect of that conduct can satisfy the injury requirement for DPPs' *section 2* claim. Therefore, **[**59]** the aggregated analysis is relevant to DPPs' attempted monopolization claim against Pool. Thus, Dr. Rausser's aggregated analysis need not be excluded as to DPPs' attempted monopolization claim.

Next, the Court assesses the evidence's relevance to DPPs' three vertical conspiracy claims. With respect to these claims, the Court concludes that Dr. Rausser's aggregate analysis does not answer the relevant question. His opinion cannot help the fact-finder determine whether any one of these vertical conspiracies had an anticompetitive effect on the relevant market. As discussed earlier, DPPs' vertical conspiracy claims are assessed under the rule of reason. To prevail on a rule of reason claim, a plaintiff must demonstrate that a challenged restraint caused an adverse effect on competition, not simply to isolated competitors. *See* *Doctor's Hosp. of Jefferson, 123 F.3d at 307*. In assessing anticompetitive effects in the context of these vertical claims, the focus is not just on Pool's market share, but also on whether each Manufacturer Defendant had market power of antitrust concern. *See* *Dickson, 309 F.3d at 207-11*. Absent such power, a Manufacturer Defendant's collusion with Pool would be ineffective.[95] And, when assessing the effect on competition of a vertical **[**60]** conspiracy in a case that includes multiple "discrete conspiracies," a court must evaluate only the conduct in furtherance of each alleged agreement. *Id. at 210-11*. Dr. Rausser's aggregated analysis does not even attempt to demonstrate the effects of each defendant's acts taken in furtherance of each alleged conspiracy. Indeed, he does not even advance a theory to explain how collusion between Pool and, for example, Zodiac, could have injured competition. Dr. Rausser and plaintiffs treat the case as one big conspiracy among Pool and all three Manufacturer Defendants *inter se* to exclude Pool's rivals or would-be rivals in order to allow Pool to charge **[*682]** anticompetitive prices to its downstream customers. Notably, this is a claim that the Court dismissed on the pleadings because plaintiffs failed to plausibly allege horizontal collusion by the Manufacturer Defendants.[96]

Dr. Rausser does not demonstrate that any Manufacturer Defendant had the market power necessary to foreclose competition through an agreement with Pool. Dr. Rausser does not provide the market shares of each Manufacturer Defendant and merely provides how much of the Manufacturer **[**61]** Defendants' sales went to Pool and how much they collectively made up of Pool's sales. But Pool's purchases and sales do not constitute a market. Dr. Elzinga estimates, for example, that Zodiac's share of the total Pool Products purchased was between 6 and 7 percent.[97] So measured, Zodiac's individual share would suggest that it does not individually have the power to foreclose competition in a vertical agreement with Pool. Dr. Rausser's observation that Pool has buying leverage over the Manufacturer Defendants because Pool was their largest customer does not answer the question of whether any of these firms independently had the power to foreclose competition in a national market through an anticompetitive agreement with Pool. *See* *Dickson, 309 F.3d at 208-11*. For these reasons, the Court finds that Dr. Rausser's aggregate causation analysis does not fit DPPs' three vertical conspiracy claims, and it excludes his aggregated analysis as to these claims.

5. Individual Damages Calculation

Finally, defendants challenge Dr. Rausser's proposed method for calculating "individual damages" for the members of the class. Defendants challenge two aspects of his proposed method: (1) its supposed inclusion **[**62]** of an error term in its estimates of the overcharge applicable to each transaction analyzed, and (2) its use of a median overcharge term instead of an individualized overcharge estimate in the final stage of each calculation. Defendants

[95] *See* Elzinga DPP Report at 35-39.

[96] *See* R. Doc. 221 at 51-56.

[97] Elzinga DPP Report at 18.

argue that as a result of these two alleged flaws, Dr. Rausser's proposed method leads to "false positives" and does not provide a reliable formula for calculating individual damages across the class.

Inclusion of Error Term

Dr. Johnson represents that Dr. Rausser's individualized overcharge calculation for each transaction is equivalent to the uniform overcharge estimated by Dr. Rausser's Overcharge regression model, plus the prediction error associated with the transaction.[98] Dr. Johnson explains that "the error term in a regression model captures *what cannot be explained* by the model" and argues that it is "therefore inappropriate to attribute the observed variation in prices that cannot be explained by Dr. Rausser's regression model to the overcharge."[99]

The Court rejects this argument. Dr. Rausser estimates the individual overcharge for each transaction in two steps. First, he uses his regression model to generate a "Predicted **[**63]** But-For Price" for the transaction. Because this price is a prediction, it naturally includes an element of prediction error. (This is the "error term" to which Dr. Johnson refers.) Second, Dr. Rausser subtracts the Predicted But-For Price from the Actual Price that the customer paid for the transaction. The difference between the Actual Price paid and the Predicted But-For Price is the "individual overcharge" for that transaction.[100] **[*683]** That Dr. Rausser's model, like all predictive models, includes a measure of prediction error does not necessarily invalidate the model. The Court will not exclude his individual damages calculation on this ground.

Use of Medians

Defendants also challenge Dr. Rausser's use of median overcharges instead of individualized overcharge estimates in the final stage of each calculation. They argue that this method leads to "false positives" and does not provide a reliable basis for the trier of fact to assess individual damages.

The Court begins by summarizing Dr. Rausser's method. First, Dr. Rausser calculates "individual" overcharges for each transaction, as described above. Then, to ameliorate the effects of prediction error, **[**64]** Dr. Rausser takes the median overcharge for each product in a month and assigns that overcharge to all customers who purchased that product that month. He argues that this approach is "necessary given random prediction error," and that using medians "decreases individual overcharges that are too high (due to prediction error)" and "increas[es] individual overcharges that are too low or negative (due to prediction error)."[101]

If DPPs can establish an antitrust violation and antitrust injury, they will enjoy a "relaxed burden" with respect to the amount of damages. *Pierce, 753 F.2d at 435*. As the Fifth Circuit has explained, "[O]nce the causation hurdle has been overcome, the expert on damages need not be armed on the right hand with a slide rule, on the left hand with a computer. He is allowed some economic imagination so long as it does not become fantasy." *Terrell v. Household Goods Carriers' Bureau, 494 F.2d 16, 25 (5th Cir. 1974)*. Thus, while "antitrust damages may not be determined by guesswork or speculation," plaintiffs need provide only a sufficient basis a factfinder to make a "just and reasonable estimate of the damage based on relevant data." *El Aguila, 131 F. App'x at 453*.

Defendants have not established that Dr. Rausser's model fails to provide a basis for the factfinder to make a "just and reasonable estimate" **[**65]** of the damages for each plaintiff. DPPs' theory of the case is that class members were overcharged fairly uniformly across product lines and geographic regions. If DPPs persuade the factfinder that

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[98] Johnson Affidavit at 3-4.

[99] *Id.* at 4.

[100] *See* Rausser Declaration at 18 n.115.

[101] *Id.* at 18 & n.119.

their theory of the case is correct, then, theoretically, a damages formula simply applying the estimated average overcharge to each plaintiff's purchases would be sufficient to provide a reasonable estimate of individual damages. *See* *Greenhaw v. Lubbock Cty. Beverage Ass'n, 721 F.2d 1019, 1029 (5th Cir. 1983)*, *overruled in part on other grounds by* *Int'l Woodworkers of Am., AFL-CIO & its Local No. 5-376 v. Champion Int'l Corp., 790 F.2d 1174 (5th Cir. 1986)* (approving the application of an average overcharge figure, rather than an overcharge figure tailored by purchase location, to calculate damages for individual purchasers when it would have been impossible to determine how purchasers' shopping patterns would have differed in a competitive market). Here, Dr. Rausser has presented a model even more refined than one simply applying the average overcharge to all purchases. His individual damages model goes one step further, providing an overcharge estimate specific to the product purchased and the month of purchase.

Defendants argue that *In re Rail Freight Fuel Surcharge Antitrust Litigation, 725 F.3d 244, 406 U.S. App. D.C. 371 (D.C. Cir. 2013)*, requires the Court to reject Dr. Rausser's model. In *Rail Freight*, the D.C. **[**66]** Circuit reversed the district court's class certification order, **[*684]** partly on the ground that the district court had failed to take a "hard look" at the soundness of the plaintiffs' proposed damages model. *Id. at 255*. In particular, the court noted that the plaintiffs' proposed damages methodology "detect[ed] injury where none could exist." *Id. at 252*. In that case, however, the court could identify a segment of class members who categorically could not have suffered an overcharge: a group of shippers subject to legacy contracts and therefore "bound by rates negotiated before any conspiratorial behavior was alleged to have occurred." *Id*. No such group of categorically undamaged plaintiffs exists here. Rather, defendants point to the negative overcharge estimates that Dr. Rausser's model generates for some transactions (before he corrects for prediction error) as evidence that some class members "ha[d] no 'damages' at all."[102] Defendants misunderstand the purpose of Dr. Rausser's individual damages model. It does not purport to provide a precise *calculation* of the exact dollar amount each plaintiff was overcharged; it seeks to provide a reasonable *estimate* of each plaintiffs' likely overcharge.

To that end, **[**67]** Dr. Rausser has determined that using medians to control for prediction error results in more reasonable estimates. And defendants have not provided any reason to refute that using a median is an appropriate econometric method to mitigate prediction error when generating an estimate. Moreover, an estimate is precisely what ***antitrust law*** permits plaintiffs to present, once they have cleared the evidentiary hurdles of establishing a violation and antitrust injury. For these reasons, the Court will not exclude Dr. Rausser's proposed "formula . . . to calculate individual damages." *Bell Atlantic, 339 F.3d at 307*.

IV. CONCLUSION

For the foregoing reasons, the Court GRANTS IN PART and DENIES IN PART defendants' motion to exclude the testimony of Dr. Rausser. The Court excludes Dr. Rausser's opinion about (1) spatial integration, including his cointegration test; and (2) aggregate causation to demonstrate the effect of the alleged vertical conspiracies.

New Orleans, Louisiana, this 22nd day of February, 2016.

/s/ Sarah S. Vance

SARAH S. VANCE

UNITED STATES DISTRICT JUDGE

End of Document

[102] R. Doc. 508-3 at 9.

[Rochester Drug Co-Operative, Inc. v. Warner Chilcott Co. (In re Loestrin 24 Fe Antitrust Litig.)]

United States Court of Appeals for the First Circuit

February 22, 2016, Decided

Nos. 14-2071, 15-1250

Reporter

814 F.3d 538 *; 2016 U.S. App. LEXIS 3049 **; 2016-1 Trade Reg. Rep. (CCH) P79,508

IN RE: LOESTRIN 24 FE ANTITRUST LITIGATION.AMERICAN SALES COMPANY, LLC, on behalf of itself and all others similarly situated; ROCHESTER DRUG CO-OPERATIVE, INC., on behalf of itself and all others similarly situated, Plaintiffs, Appellants, CITY OF PROVIDENCE, RHODE ISLAND, individually and on behalf of itself and all others similarly situated; UNITED FOOD AND COMMERCIAL WORKERS LOCAL 1776 & PARTICIPATING EMPLOYERS HEALTH AND WELFARE FUND, individually and on behalf of all others similarly situated; NEW YORK HOTEL TRADES COUNCIL & HOTEL ASSOCIATION OF NEW YORK CITY, INC. HEALTH BENEFITS FUND, individually and on behalf of all others similarly situated; FRATERNAL ORDER OF POLICE, FORT LAUDERDALE LODGE 31, INSURANCE TRUST FUND, individually and on behalf of all others similarly situated; ELECTRICAL WORKERS 242 & 294 HEALTHCARE & WELFARE FUND, individually and on behalf of all others similarly situated; DENISE LOY, a resident citizen of the State of Florida, individually and on behalf of all others similarly situated; MELISA CHRESTMAN, a resident citizen of the State of Tennessee, individually and on behalf of all others similarly situated; MARY ALEXANDER, a resident citizen of the State of North Carolina, individually and on behalf of all others similarly situated; PAINTERS DISTRICT COUNCIL NO. 30 HEALTH & WELFARE FUND, individually and on behalf of all others similarly situated; TEAMSTERS LOCAL 237 WELFARE BENEFITS FUND, individually and on behalf of all others similarly situated; LABORERS INTERNATIONAL UNION OF NORTH AMERICA LOCAL 35 HEALTH CARE FUND, on behalf of itself and all others similarly situated; ALLIED SERVICES DIVISION WELFARE FUND, on behalf of itself and all others similarly situated; WALGREEN CO.; THE KROGER CO.; SAFEWAY, INC.; ALBERTSON'S, LLC; HEB GROCERY COMPANY L.P., Plaintiffs, v. WARNER CHILCOTT COMPANY, LLC; WARNER CHILCOTT PUBLIC LIMITED COMPANY; WARNER CHILCOTT HOLDINGS COMPANY III, LTD.; WARNER CHILCOTT CORPORATION, LLC, f/k/a Warner Chilcott Company, Inc.; WARNER CHILCOTT (US), LLC; WARNER CHILCOTT SALES (US), LLC; WARNER CHILCOTT LABORATORIES IRELAND LIMITED; WARNER CHILCOTT COMPANY; ACTAVIS, INC., f/k/a WATSON PHARMACEUTICALS, INC.; WATSON LABORATORIES, INC.; LUPIN LTD.; LUPIN PHARMACEUTICALS, INC., Defendants, Appellees.

Subsequent History: Objection overruled by, Motion granted by, Without prejudice *In re Loestrin 24 FE Antitrust Litig., 2017 U.S. Dist. LEXIS 38558 (D.R.I., Mar. 15, 2017)*

Dismissed by, in part, Dismissed without prejudice by, in part, Motion denied by, Without prejudice, in part, Motion denied by, in part, Motion denied by *In re Loestrin 24 Fe Antitrust Litig., 261 F. Supp. 3d 307, 2017 U.S. Dist. LEXIS 150422 (D.R.I., Aug. 8, 2017)*

Motion granted by, in part, Motion denied by, in part *In re Loestrin 24 Fe Antitrust Litig., 2017 U.S. Dist. LEXIS 198419 (D.R.I., Nov. 29, 2017)*

Class certification granted by, Motion denied by *In re Loestrin 24 FE Antitrust Litig., 2019 U.S. Dist. LEXIS 118308 (D.R.I., July 2, 2019)*

Later proceeding at *In re Loestrin 24 Fe Antitrust Litig., 2019 U.S. Dist. LEXIS 141319 (D.R.I., Aug. 14, 2019)*

Motion granted by, in part, Motion denied by, in part *In re Loestrin 24 FE Antitrust Litig., 2019 U.S. Dist. LEXIS 210600 (D.R.I., Dec. 6, 2019)*

Summary judgment denied by, Motion granted by, in part, Motion denied by, in part, Motion denied by, Motion granted by *In re Loestrin 24 Fe Antitrust Litig., 2019 U.S. Dist. LEXIS 220262 (D.R.I., Dec. 17, 2019)*

Prior History: [1]** APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND. [Hon. William E. Smith, U.S. District Judge].

In re Loestrin 24 FE Antitrust Litig., 2015 U.S. Dist. LEXIS 18693 (D.R.I., Feb. 17, 2015)
In re Loestrin 24 FE Antitrust Litig., 45 F. Supp. 3d 180, 2014 U.S. Dist. LEXIS 123322 (D.R.I., Sept. 4, 2014)

Disposition: Vacated and Remanded.

Core Terms

generic, patent, manufacturer, antitrust, district court, settlement, brand, anticompetitive, infringe, non-cash, brand-name, settlement agreement, cash payment, drug manufacturer, rule of reason, pharmaceutical, contraceptive, expire, effects, Hatch-Waxman Act, Sherman Act, provisions, bleeding, deals

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > Scope

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

HN1[] **Antitrust & Trade Law, Sherman Act**

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court. *15 U.S.C.S. § 1*.

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

Civil Procedure > Appeals > Standards of Review

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

In reviewing the grant of a motion to dismiss, the court of appeals recounts the facts as alleged in the operative complaint.

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

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

Civil Procedure > Judgments > Pretrial Judgments > Judgment on Pleadings

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

The court of appeals reviews a dismissal under *Fed. R. Civ. P. 12(b)(6)* de novo. For the purposes of review, it accepts as true all well-pled facts alleged in the complaint and draws all reasonable inferences in the plaintiffs' favor. A motion for judgment on the pleadings under *Rule 12(c)* is treated much like a *Rule 12(b)(6)* motion to dismiss, with the court viewing the facts contained in the pleadings in the light most favorable to the nonmovant and drawing all reasonable inferences therefrom.

Antitrust & Trade Law > Sherman Act > Claims

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

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

HN4[] **Sherman Act, Claims**

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. The pleadings need not contain detailed factual allegations but must provide more than labels and conclusions, and a formulaic recitation of the elements of the cause of action will not do. Although the pleading standards articulated in Twombly are now ubiquitous in the legal world, it is important to note that Twombly addressed the specific question of what a plaintiff must plead in order to state a claim under *§ 1* of the Sherman Act,, and the U.S. Court of Appeals for the First Circuit has cautioned against converting Twombly's mandates into a requirement that antitrust plaintiffs provide evidentiary support or set forth other "plus factors" to demonstrate the plausibility of their Sherman Act claims.

Antitrust & Trade Law > Sherman Act > Scope

HN5[] **Antitrust & Trade Law, Sherman Act**

In Actavis, it was alleged that the reverse payments involved side deals in which the generic manufacturers agreed to promote the brand name drug at issue in exchange for multi-million dollar payments from the brand manufacturer. This fact alone demonstrates that the U.S. Supreme Court recognized that a disguised above-market deal, in which a brand manufacturer effectively overpays a generic manufacturer for services rendered, may qualify as a reverse payment subject to antitrust scrutiny and militates against limiting the Supreme Court's decision to pure cash payments.

Antitrust & Trade Law > Sherman Act > Scope

HN6[] **Antitrust & Trade Law, Sherman Act**

Antitrust scrutiny attaches not only to pure cash reverse payments, but to other forms of reverse payment that induce the generic to abandon a patent challenge, which unreasonably eliminates competition at the expense of consumers. Moreover, this approach is consistent with ***antitrust law***, which has consistently prioritized substance over form. The Sherman Act is aimed at substance rather than form. The antitrust inquiry as "a functional one."

Antitrust & Trade Law > Sherman Act > Scope

HN7[] **Antitrust & Trade Law, Sherman Act**

True, Actavis does contain references to money. But the key word used throughout the opinion is "payment," which connotes a much broader category of consideration than cash alone. Black's Law Dictionary (10th ed. 2014) (defining "payment" as the "performance of an obligation by the delivery of money or some other valuable thing accepted in partial or full discharge of the obligation" and "the money or other valuable thing so delivered in satisfaction of an obligation"). As the U.S. Court of Appeals for the Third Circuit has observed, the thrust of the U.S. Supreme Court's reasoning is not that it is problematic that money is used to effect an end to a patent challenge, but rather that the patentee leverages some part of its patent power to cause anticompetitive harm--namely, elimination of the risk of competition.

Antitrust & Trade Law > Sherman Act > Scope

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

The U.S. Supreme Court's Actavis decision should reach non-monetary reverse payments.

Antitrust & Trade Law > Sherman Act > Scope

HN9[] **Antitrust & Trade Law, Sherman Act**

The language of Actavis emphasizes that the value of a reverse payment is a key component in determining whether it is unlawful. In discussing how to apply the rule of reason analysis to reverse payments, the U.S. Supreme Court explained, "the likelihood of a reverse payment bringing about anticompetitive effects depends upon its size, its scale in relation to the payor's anticipated future litigation costs, its independence from other services for which it might represent payment, and the lack of any other convincing justification." Such language emphasizes that the size of the reverse payment, particularly as it relates to potential litigation expenses, is central to the antitrust query and requires that the reviewing court or factfinder assess the value of the payment.

Antitrust & Trade Law > Sherman Act > Scope

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

HN10[] **Antitrust & Trade Law, Sherman Act**

The five considerations set forth by the U.S. Supreme Court require that the court or factfinder measure the payment's size. The Supreme Court stated that a reverse payment may be justified where it "reflects traditional settlement considerations, such as avoided litigation costs or fair value for services." And, for the market power inquiry, the Court explained that "the size of the payment from a branded drug manufacturer to a prospective generic is itself a strong indicator of power." Again, both statements assume that the value of the reverse payment is ascertainable. There is some dispute as to how the five considerations should factor into antitrust litigation going forward. The U.S. Court of Appeals for the First Circuit agrees with the view that the five considerations should not overhaul the rule of reason, nor should they create a new five-part framework in antitrust cases.

Antitrust & Trade Law > Sherman Act > Scope

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

HN11[] **Antitrust & Trade Law, Sherman Act**

There is overlap between the five considerations (set out by the U.S. Supreme Court in Actavis) and the preexisting elements of the rule of reason. For example, the U.S. Court of Appeals for the First Circuit's rule of reason analysis queries, among other things, whether the agreement involved the exercise of power in a relevant economic market. In that same vein, Actavis explains how to evaluate the market power question: "the size of the payment from a branded drug manufacturer to a prospective generic is itself a strong indicator of power." Similarly, the First Circuit rule of reason includes as an element the anticompetitive consequences of the alleged agreement, and the first of the five considerations articulated by the Supreme Court explains that a reverse payment may have significant anticompetitive effects where it "amounts to a purchase by the patentee of the exclusive right to sell its product."

Antitrust & Trade Law > Sherman Act

HN12[] **Antitrust & Trade Law, Sherman Act**

Antitrust litigation often requires an elaborate inquiry into the reasonableness of a challenged business practice and, as a result, is extensive and complex. In other words, antitrust litigation already requires courts to make intricate and complex judgments about market practices.

Antitrust & Trade Law > Sherman Act > Claims

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

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

HN13[] **Sherman Act, Claims**

The U.S. Court of Appeals for the First Circuit agrees with those courts that, rather than rejecting wholesale Actavis's applicability to non-cash payments, have required that the plaintiffs plead information sufficient "to estimate the value of the term, at least to the extent of determining whether it is "large" and "unjustified." Consistent with Twombly, which declined to require heightened fact pleading of specifics, the First Circuit does not require that the plaintiffs provide precise figures and calculations at the pleading stage. Requiring such a high burden would impose a nearly insurmountable bar for plaintiffs at the pleading stage because very precise and particularized estimates of fair value and anticipated litigation costs may require evidence in the exclusive possession of the defendants, as well as expert analysis. Nevertheless, the plaintiffs must allege facts sufficient to support the legal conclusion that the settlement at issue involves a large and unjustified reverse payment under Actavis.

Antitrust & Trade Law > Sherman Act > Scope

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

HN14[] **Antitrust & Trade Law, Sherman Act**

The U.S. Supreme Court acknowledged that Actavis had opened the door to a new landscape of litigation and "left to the lower courts the structuring of the present rule-of-reason antitrust litigation."

Counsel: Thomas M. Sobol, with whom Kristen A. Johnson, Hagens Berman Sobol Shapiro, LLP, Joseph H. Meltzer, Terence S. Ziegler, Kessler Topaz Meltzer & Check, LLP, David F. Sorensen, Michael Kane, Berger & Montague, PC, Peter R. Kohn, Neill W. Clark, and Faruqi & Faruqi, LLP, were on brief, for Direct-Purchasers' appellants.

Mark S. Hegedus, Attorney, Office of the General Counsel, Federal Trade Commission, with whom Jonathan E. Nuechterlein, General Counsel, Joel Marcus, Director of Litigation, Deborah L. Feinstein, Director, Stephen Weissman, Deputy Director, Markus H. Meier, Assistant Director, Bradley S. Albert, Deputy Assistant Director, and Jamie R. Towey, Attorney, Bureau of Competition, were on brief, of the Federal Trade Commission as amicus curiae in support of appellants.

Steve D. Shadowen, Interim Co-Lead Counsel, with whom Elizabeth Arthur, Matthew C. Weiner, Hilliard & Shadowen LLP, Donald A. Migliori, Michael M. Buchman, John A. Ioannou, Motley Rice LLC, J. Douglas Richards, Sharon K. Robertson, Cohen Milstein Sellers & Toll PLLC, Marvin **[**2]** A. Miller, Lori A. Fanning and Miller Law LLC, were on brief, for End-Payors' appellants.

Robert A. Milne, with whom Jack E. Pace III, Alison Hanstead, J. Mark Gidley, Peter J. Carney, White & Case LLP, John A. Tarantino, Nicole J. Benjamin and Adler Pollock & Sheehan P.C., were on brief, for appellees Warner companies.

Leiv Blad, Jr., with whom Zarema A. Jaramillo and Morgan, Lewis & Bockius LLP, were on brief, for appellees Lupin Limited and Lupin Pharmaceuticals, Inc.

Scott E. Perwin, Lauren C. Ravkind, Anna T. Neill, Kenny Nachwalter P.A., Paul J. Skiermont, Skiermont Puckett LLP, S. Michael Levin, Barry L. Refsin, Monica L. Rebuck and Hangley Aronchick Segal Pudlin & Schiller, on amicus brief of Walgreen Co., The Kroger Co., Safeway, Inc., Albertson's LLC, HEB Grocery Company, LP, Rite Aid Corporation and CVS Pharmacy, Inc.

Kenneth A. Wexler and Wexler Wallace LLP, on amicus brief on behalf of 70 Law, Economics, and Business Professors and the American Antitrust Institute.

Janet T. Mills, Attorney General of Maine, on amicus brief of the States of Maine, California, Alaska, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, **[**3]** Maryland, Massachusetts, Michigan Minnesota, Mississippi, Nebraska, New Hampshire, New Mexico, Oregon, Rhode Island, Tennessee, Texas, Utah, Vermont, and Washington.

Daniel S. Francis, D. Bruce Hoffman, Hunton & Williams LLP, Linda E. Kelly, Quentin Riegel, Manufacturers' Center for Legal Action, on amicus brief of National Association of Manufacturers.

Richard A. Samp, Mark S. Chenoweth, and Washington Legal Foundation, on amicus brief of Washington Legal Foundation.

Christopher T. Holding, William M. Jay, Brian T. Burgess, and Goodwin Procter LLP, on amicus brief of Generic Pharmaceutical Association.

Andrew Lazerow, Ashley Bass, Stephen Bartenstein and Covington & Burling LLP, on amicus brief of Pharmaceutical Research and Manufacturers of America.

Burt M. Rublin, Stephen J. Kastenberg, Jessica M. Anthony, Barbara A. Schwartz and Ballard Spahr LLP, on amicus brief of Antitrust Economists.

David A. Balto, James J. Kovacs and Law Offices of David A. Balto, on amicus brief of Consumer Action, AARP, U.S. Public Interest and Research Group, Public Citizen, Families USA, and Consumers Union.

Judges: Before Torruella, Lynch, and Thompson, Circuit Judges.

Opinion by: TORRUELLA

Opinion

[*541] TORRUELLA, Circuit Judge. This appeal **[**4]** arises from several pharmaceutical antitrust actions that were consolidated and transferred to the United States District Court for the District of Rhode Island by the United States Judicial Panel on Multidistrict Litigation.

Defendant Warner Chilcott ("Warner") is a brand-name drug manufacturer that owns the patent covering the oral contraceptive Loestrin 24 Fe ("Loestrin 24"). After defendant Watson Pharmaceuticals, Inc. ("Watson") notified Warner that it would seek to introduce a generic version of Loestrin 24, Warner sued Watson for patent infringement. The parties settled on conditions that Watson delay entry of its generic version of Loestrin 24 and, in exchange, Watson entered into favorable promotional deals with Warner and received promises that Warner would not introduce its own generic version of Loestrin 24, among other things. Shortly thereafter, defendant Lupin Pharmaceuticals, Inc. ("Lupin") announced that it would introduce a generic version of Loestrin 24. Warner brought a patent infringement suit against Lupin. Again, the parties settled on terms that Lupin wait to introduce its generic Loestrin 24 in exchange for attorneys' **[*542]** fees and Warner's agreement to enter into **[**5]** favorable side deals with Lupin.

Two putative classes of plaintiffs -- the Direct Purchaser Plaintiffs ("DPPs"), a group comprised of corporate entities that purchased Loestrin 24 directly from Warner, and End Payor Plaintiffs ("EPPs"), which consist of health and welfare benefit plans that have indirectly purchased, paid for, and provided reimbursement for their members' purchase of Loestrin 24, and individuals who purchased or paid for some or all of the purchase price of Loestrin 24 -- subsequently brought antitrust claims that the settlement agreements were violations of § 1 of the Sherman Act, *15 U.S.C. § 1*.[1] They contend that these agreements constitute illegal restraints on trade under *FTC v. Actavis, __ U.S. __, 133 S. Ct. 2223, 186 L. Ed. 2d 343 (2013)*, which subjected certain patent settlement agreements between generic drug and brand-name drug manufacturers to antitrust scrutiny where they involve "reverse payments." As described in more detail herein, a reverse payment typically arises where a brand-name drug manufacturer pays the generic manufacturer to delay entry of its generic equivalent, thereby protecting the brand's market from generic competition.

Specifically, this antitrust case queries whether, following Actavis, such settlement agreements are subject to federal antitrust scrutiny where they do not involve reverse payments in pure cash form. The district court found that Actavis only applied to monetary reverse payments and dismissed on the basis that the EPPs and DPPs had alleged the existence of non-cash reverse payments only. Because we disagree with the district court's limited reading of Actavis, we vacate and remand. We begin with the relevant statutory and legal background, which provides the framework for understanding the facts in this appeal.

I. Regulatory Background

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[1] *Section 1* of the Sherman Act provides:

> ***HN1***[] Every contract, combination in the form of trust or otherwise, or conspiracy, **[**6]** in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 1.

The Drug Price Competition and Patent Term Restoration Act of **[**7]** 1984, *Pub. L. No. 98-417, 98 Stat. 1585*, commonly known as the Hatch-Waxman Act, stipulates the process by which pharmaceutical firms may gain approval from the Food and Drug Administration ("FDA") to bring medications to the public marketplace. The Supreme Court in Actavis identified "four key features of the relevant drug-regulatory framework" under the Hatch-Waxman Act. *133 S. Ct. 2223, 2227-29, 186 L. Ed. 2d 343*.

First, to market a new prescription drug, a brand-name drug manufacturer must submit a New Drug Application ("NDA") to the FDA and undergo a laborious and expensive approval process. *21 U.S.C. § 355(b)(1)*; see *Actavis, 133 S. Ct. at 2228*. Among other things, the NDA must include "the patent number and the expiration date of any patent which claims the drug . . . or which claims a method of using such drug." *21 U.S.C. § 355(b)(1)*. Upon receiving FDA approval, the brand manufacturer must publish a description of any patents associated with that drug in the Approved Drug Products with Therapeutic Equivalence Evaluations, commonly known as the Orange Book. See *Caraco Pharm. Labs., Ltd. V. Novo Nordisk A/S,* ***[*543]*** *U.S. , 132 S. Ct. 1670, 1676, 182 L. Ed. 2d 678 (2012)*.

Second, the Hatch-Waxman Act promotes the availability of cheaper generic alternatives by allowing generic drug manufacturers to bypass certain aspects of the NDA process. Instead of filing an NDA, a generic manufacturer may file a less cumbersome Abbreviated New Drug Application **[**8]** ("ANDA") "specifying that the generic has the 'same active ingredients as,' and is 'biologically equivalent' to, the already-approved brand-name drug." *Actavis, 133 S. Ct. at 2228* (quoting *Caraco Pharm. Labs., Ltd., 132 S. Ct. at 1676*); *21 U.S.C. § 355(j)(2)*. But, "[b]ecause the FDA cannot authorize a generic drug that would infringe a patent, the timing of an ANDA's approval depends on the scope and duration of the patents covering the brand-name drug." *Caraco Pharm. Labs., Ltd., 132 S. Ct. at 1676*.

Third, the Hatch-Waxman Act establishes procedures for resolving patent disputes between brand and generic drug manufacturers. *21 U.S.C. § 355(j)(2)(A)(vii)*; *Actavis, 133 S. Ct. at 2228*. When seeking FDA approval, the generic manufacturer must certify that it will not infringe the brand manufacturer's patents. *21 U.S.C. § 355(j)(2)(A)(vii)*; *Actavis, 133 S. Ct. at 2228*. It can make this certification in one of four ways:

> It can certify that the brand-name manufacturer has not listed any relevant patents. It can certify that any relevant patents have expired. It can request approval to market beginning when any still-in-force patents expire. Or, it can certify that any listed, relevant patent "is invalid or will not be infringed by the manufacture, use, or sale" of the drug described in the [ANDA].

Actavis, 133 S. Ct. at 2228 (quoting *21 U.S.C. § 355(j)(2)(A) (vii)(IV)*).

The fourth alternative, also known as the Paragraph IV route, "counts as patent infringement and often 'means provoking litigation'" by **[**9]** the brand manufacturer. Id. (citation omitted) (quoting *Caraco Pharm. Labs., Ltd., 132 S. Ct. at 1677*). Should the brand manufacturer bring a patent suit within forty-five days of the generic manufacturer making a Paragraph IV certification, the FDA may not approve the generic manufacturer's ANDA for a thirty-month period. *21 U.S.C. § 355(j)(5)(B)(iii)*; *Actavis, 133 S. Ct. at 2228*. Paragraph IV litigation between generic and brand-name drug manufacturers is particularly relevant here as it has led to the settlement arrangements identified in Actavis.

Fourth, the Hatch-Waxman Act provides incentives for the first generic manufacturer to file an ANDA through the Paragraph IV route: the generic will receive a 180-day period of exclusivity during which "no other generic can compete with the brand-name drug." *Actavis, 133 S. Ct. at 2229*; *21 U.S.C. § 355(j)(5)(B)(iv)*. This exclusivity period is potentially worth hundreds of millions of dollars to the first-filing generic manufacturer. See *Actavis, 133 S. Ct. at 2229*.[2] That said, the generic manufacturer may still face competition from a generic version of the drug produced by the brand manufacturer, also known as an authorized generic ("AG"), at any time, including during the exclusivity

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[2] This 180-day exclusivity period can be forfeited as provided under the Hatch-Waxman Act. *21 U.S.C. § 355(j)(5)(D)*.

period. See *Teva Pharm. Indus. Ltd. v. Crawford, 410 F.3d 51, 54-55, 366 U.S. App. D.C. 203 (D.C. Cir. 2005)* (citing *21 U.S.C. § 355(j)(5)(B)(iv)*).

II. Actavis

We turn to **[**10]** Actavis, where the Supreme Court analyzed settlement agreements **[*544]** arising from Paragraph IV litigation with terms requiring "(1) Company B, the claimed infringer, not to produce the patented product until the patent's term expires, and (2) Company A, the patentee, to pay B many millions of dollars." *Actavis, 133 S. Ct. at 2227*. These types of settlements led to concerns that a brand manufacturer may be paying the generic manufacturer to abandon its patent challenge, thereby insulating the brand's market from competition and preventing consumers from accessing a more affordable generic version of the brand-name drug. The Court described this arrangement as a "reverse payment," explaining that "the basic question here is whether such an agreement can sometimes unreasonably diminish competition in violation of the antitrust laws." Id.

The Supreme Court answered in the affirmative. It rejected the argument that a settlement involving reverse payments is immune from antitrust scrutiny so long as any "anticompetitive effects [of the settlement] fall within the scope of the exclusionary potential of the patent," otherwise known as the "scope of the patent" test. *Id. at 2230* (quoting *FTC v. Watson Pharms., Inc., 677 F.3d 1298, 1312 (11th Cir. 2012))*.[3] The Court reasoned that Paragraph IV litigation **[**11]** does not begin with the baseline assumption that a patent is valid because "[t]he paragraph IV litigation . . . put[s] the patent's validity at issue, as well as its actual preclusive scope." *Id. at 2231*.

The Supreme Court acknowledged the "general legal policy" in favor of settlements,[4] but determined that "five sets of considerations" weighed in favor of subjecting reverse payment settlements to antitrust scrutiny. *Id. at 2234-37*. Specifically, the Court explained:

> [1] [A] reverse payment, where large and unjustified, can bring with it the risk of significant anticompetitive effects; [2] one who makes such a payment may be unable to explain and to justify it; [3] such a firm or individual may well possess market power derived from the patent; [4] a court, by examining the size of the payment, may well be able to assess its likely anticompetitive effects along with its potential justifications without litigating the validity of the patent; and [5] **[**12]** parties may well find ways to settle patent disputes without the use of reverse payments.

Id. at 2237. While the Supreme Court declined to adopt the Federal Trade Commission's ("FTC") suggestion that reverse payments be considered "presumptively unlawful," it determined that the potential anticompetitive effects of a reverse payment are subject to the rule of reason test. The "rule of reason" is a means of evaluating a restraint on trade and determining "whether under all the circumstances of **[*545]** the case the restrictive practice imposes an unreasonable restraint on competition." *Arizona v. Maricopa Cty. Med. Soc'y, 457 U.S. 332, 343-44, 102 S. Ct. 2466, 73 L. Ed. 2d 48 (1982)*. To satisfy the rule of reason test, the plaintiff must demonstrate "that the alleged agreement involved the exercise of power in a relevant economic market, that this exercise had anti-competitive consequences, and that those detriments outweighed efficiencies or other economic benefits." *Stop & Shop*

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[3] Before Actavis was decided, the circuits were split between the "scope of the patent test," see *In re Ciprofloxacin Hydrochloride Antitrust Litig., 544 F.3d 1323, 1332-36 (Fed. Cir. 2008)*, abrogated by *Actavis, 133 S. Ct. 2223, 186 L. Ed. 2d 343*; *In re Tamoxifen Citrate Antitrust Litig., 466 F.3d 187, 212-13 (2d Cir. 2006)*, abrogated by *Actavis, 133 S. Ct. 2223, 186 L. Ed. 2d 343*, and the "quick look" test, under which reverse payments were considered "prima facie evidence of an unreasonable restraint on trade," *In re K-Dur Antitrust Litig., 686 F.3d 197, 218 (3d Cir. 2012)*, vacated, ***Upsher Smith Labs., Inc. v. La. Wholesale Drug Co., Inc., 133 S. Ct. 2849, 186 L. Ed. 2d 904 (2013)***.

[4] The Court noted that it did not intend to disturb commonplace settlement forms. Whereas in a traditional settlement "a party with a claim (or counterclaim) for damages receives a sum equal to or less than the value of its claim," in a reverse payment settlement, "a party with no claim for damages (something that is usually true **[**13]** of a paragraph IV litigation defendant) walks away with money simply so it will stay away from the patentee's market." *Actavis, 133 S. Ct. at 2233*.

Supermarket Co. v. Blue Cross & Blue Shield of R.I., 373 F.3d 57, 61 (1st Cir. 2004); accord *Sterling Merch., Inc. v. Nestlé, S.A., 656 F.3d 112, 123 (1st Cir. 2011)*.

Nevertheless, the Supreme Court acknowledged that Actavis left many questions unanswered as to how these cases would be litigated and "le[ft] to the lower courts the structuring of the present rule-of-reason antitrust litigation." *Actavis, 133 S. Ct. at 2238*.

III. Facts

HN2[] "In reviewing the grant of a motion to dismiss, we recount the facts as alleged in the operative complaint[s]." *Ruivo v. Wells Fargo Bank, N.A., 766 F.3d 87, 88 (1st Cir. 2014)*. This appeal involves two operative complaints that allege substantially the same facts, filed by the EPPs and DPPs, respectively.

Loestrin 24 contains the active ingredients norethindrone acetate and ethinyl estradiol, both of which the FDA has approved as oral contraceptives since the 1970s. Previous versions of Loestrin, including Loestrin 21 and Loestrin 1/20, contain twenty-one tablets taken on a daily basis. The patient would then take a week of placebo pills or skip tablets for a week, depending on the version of Loestrin.

Studies conducted in the 1990s examined whether taking Loestrin tablets for a longer duration than the twenty-one day period decreased the incidence of intermenstrual bleeding, or "spotting," a common side-effect **[**14]** of oral contraceptives. The studies yielded inconsistent results as to whether taking Loestrin tablets for longer periods actually reduced intermenstrual bleeding. Nevertheless, U.S. Patent No. 5,552,394 (the "'394 Patent"), entitled "Low Dose Oral Contraceptives with Less Breakthrough Bleeding and Sustained Efficacy," was granted for "a method of female contraception characterized by a reduced incidence of breakthrough bleeding by administering a combination of estrogen and progestin for 23-25 consecutive days of a 28 day cycle."

Defendant Warner[5] currently owns the '394 Patent and, on April 15, 2005, submitted an NDA for approval to market the dosing regimen later known as Loestrin 24. On February 17, 2006, the FDA approved Loestrin 24 and the '394 Patent was listed in the Orange Book as covering Loestrin 24. As suggested by the '394 Patent, Loestrin 24 purports to reduce the incidence of intermenstrual bleeding by having the patient take the pills for twenty-four, as opposed to twenty-one, consecutive days.

A. Watson Litigation and Settlement

Only several months after the FDA approved Loestrin 24, on June 19, 2006, defendant Watson sent Warner a notice letter that it had filed an ANDA to market a generic of Loestrin 24. The notice letter contained a Paragraph IV certification that the commercial manufacture, use, or sale of Watson's generic Loestrin 24 would not **[*546]** infringe any valid claim of the '394 Patent. Predictably, Warner filed suit against Watson, alleging that Watson's generic product would infringe the '394 Patent.[6] By doing so, Warner triggered the thirty-month stay of FDA approval of Watson's ANDA for generic Loestrin 24. The stay was scheduled to expire in January 2009.

In January 2009, just before the expiration of the stay, Watson and Warner entered into a stipulation of dismissal and Exclusion Payment Agreement. Under **[**16]** the agreement, Watson agreed that it would delay selling its

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[5] Actavis acquired Warner in October 2013. In addition, Watson acquired Actavis in October 2012. Press Release, Watson Completes Actavis Acquisition, Allergan (Oct. 31, 2012). To avoid confusion with the Supreme Court case of the same name, we refer **[**15]** to the defendants as Warner and Watson, respectively.

[6] In response, Watson challenged the validity and enforceability of the '394 Patent based, in part, on the inconsistent studies regarding Loestrin 24's ineffectiveness in combatting intermenstrual bleeding. Those arguments need not be repeated here, as "it is normally not necessary to litigate patent validity to answer the antitrust question." *Actavis, 133 S. Ct. at 2236*.

Loestrin 24 generic until the earliest of the following: (i) January 22, 2014; (ii) 180 days before Warner gave a third party the right to market a Loestrin 24 generic in the United States; (iii) the date another version of a Loestrin 24 generic entered the market; or (iv) the date on which a third party obtained a final, non-appealable judicial order that the '394 patent is invalid, unenforceable, or not infringed by the third party's generic Loestrin 24. In exchange, Warner agreed to several provisions:

(1) Warner agreed not to market, supply, or license an AG version of Loestrin 24 during Watson's first 180 days of marketing, otherwise known as a "no-AG agreement."

(2) Warner granted Watson a "non-exclusive, fully paid, worldwide, royalty-free irrevocable license" to market Loestrin 24 as of January 22, 2014.

(3) Warner would pay Watson annual fees and a percentage of net sales in connection with Watson's co-promotion of Femring, a Warner hormone therapy product, beginning in 2009.

(4) Warner gave Watson the exclusive right to earn brand sales of a Warner oral contraceptive in late-stage development at the time of the agreement, now **[**17]** known as Generess Fe.

(5) Warner would not grant a license to any other manufacturer to produce a generic version of Loestrin 24 until at least 180 days after Watson entered the market.[7]

(6) Warner agreed to permit Watson to enter the market before January 22, 2014, should another manufacturer enter the market with a generic Loestrin 24 before Watson. This "acceleration clause" allegedly was intended to deter other generic manufacturers from entering the marketplace before Watson.[8]

B. Lupin Litigation and Settlement

Six months after the announcement of Warner and Watson's agreement, on July 30, 2009, defendant Lupin[9] notified Warner that it had filed an ANDA to market a generic version of Loestrin 24. The notice letter contained a Paragraph IV certification. As expected, in September 2009, Warner sued Lupin, alleging infringement **[*547]** of the '394 Patent. Again, by virtue of Warner's **[**18]** filing suit within forty-five days, the FDA was prevented from approving the Lupin ANDA for thirty months.

Before the close of discovery, in October 2010, Warner entered into a non-competition agreement with Lupin and dismissed the suit. Under the agreement, Lupin forfeited its challenge to the '394 Patent and agreed to delay entry of its generic Loestrin 24 until July 22, 2014, the month that the '394 Patent was set to expire and six months after Watson was scheduled to enter the market with its Loestrin 24 generic. In exchange, Warner agreed to the following provisions:

(1) Warner granted Lupin a non-exclusive license as to Femcon Fe, another Warner branded oral contraceptive, which allowed Lupin to market an AG of Femcon Fe in the United States the earlier of (i) 180 days after Teva Pharmaceutical Industries, Ltd. (the Femcon Fe first filer) entered the market with its Femcon Fe generic, or (ii) January 1, 2013.

(2) Warner gave Lupin the right to purchase and sell in the United States a generic version of Asacol 400mg, a branded medication for inflammatory bowel disease, to be supplied by Warner, if a generic Asacol 400mg was launched by another manufacturer **[**19]** in the United States.

(3) Warner paid Lupin an undisclosed amount toward attorney's fees.[10]

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[7] Watson had otherwise forfeited its entitlement to a 180-day exclusivity period under the Hatch-Waxman Act because it had not obtained tentative FDA approval to market its generic Loestrin 24 within thirty months of submitting its ANDA.

[8] Only the EPPs allege that the acceleration clause constitutes a reverse payment under Actavis.

[9] The EPPs, but not the DPPs, list Lupin as a defendant.

[10] The DPPs also allege that, six months after the announcement of the Warner-Lupin agreement, in April 2011, Mylan Pharmaceuticals ("Mylan") sent Warner a notice containing a Paragraph IV certification announcing that it had filed an ANDA to market a generic Loestrin 24. In June 2011, Warner sued Mylan for infringement of the '394 Patent. In July 2013, before a bench trial was scheduled to begin, Warner entered a settlement and license agreement with Mylan and the case was dismissed.

IV. Procedural Background

In their complaint, the DPPs allege that Warner and Watson agreed to keep Watson's generic Loestrin 24 off of the market until January 22, 2014, in exchange for payments that Warner made to Watson when, absent the agreement, Watson could have introduced a generic Loestrin 24 as **[**20]** early as 2009. The DPPs contend that this anticompetitive conduct insulated Loestrin 24 from generic competition, which would typically be priced far below the brand and eventually lead to reduced brand prices. In this way, Warner and Watson's conduct allegedly caused antitrust harm by subjecting the DPPs to artificially inflated prices.

The EPPs allege violations of *§ 1* of the Sherman Act as to both the Warner-Watson and Warner-Lupin agreements. They contend that the agreements required that Warner make payments to Watson and Lupin in exchange for Watson's and Lupin's promise not to market their versions of generic Loestrin 24 until January 22, 2014, and July 22, 2014, respectively. In addition, the EPPs bring state claims for unjust enrichment and allege that the Warner-Watson and Warner-Lupin agreements constituted unlawful restraints of trade in violation of various state antitrust laws.

The defendants filed two motions to dismiss, one as to the DPP complaint and the other as to the EPP complaint, under *Federal Rules of Civil Procedure 12(b)(6)* and *12(c)*. The defendants contended that Actavis **[*548]** was limited to reverse payments in cash. Nevertheless, they argued that the district court need not reach this question, as neither the DPPs **[**21]** nor the EPPs had plausibly pled the existence of a large and unjustified reverse payment under the pleading standards announced in *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*, and *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. The defendants also asserted that the DPPs and EPPs had failed to allege monopoly power in a defined antitrust market as required under the rule of reason test and that their actions were barred on statute of limitations grounds.[11]

The district court granted the motions to dismiss in a single opinion and order on the basis that Actavis was limited to reverse payments in pure cash form. *In re Loestrin 24 Fe Antitrust Litig., 45 F. Supp. 3d 180 (D.R.I. 2014)* [In re Loestrin]. Scouring the language of Actavis, the district court noted that "[t]he discussion of patent settlements in Actavis fixates on the one form of consideration that was at issue in that case: cash." *Id. at 189*. The district court also took into account the five considerations contemplated by the Supreme Court in its determination that subjecting reverse payments to antitrust scrutiny outweighed the benefits of settlement. In the district court's view, these considerations "guide the inquiry as to whether **[**22]** a settlement payment satisfies the rule of reason," and "require[], on the part of the plaintiff, and ultimately the reviewing court (or the jury), an ability to assess or calculate the true value of the payment made by the patentee to the generic competitor." *Id. at 190*. Whereas a court can measure the value of a cash settlement, "a non-cash settlement, particularly one that is multifaceted and complex . . . , is almost impossible to measure against these five factors." *Id. at 191*. In addition, the district court noted that "a cautious approach" was warranted as "Actavis marked a dramatic departure from the approach of the courts of appeal, and an important shift in the common law." *Id. at 192*.

Nevertheless, the district court candidly conceded that it had significant reservations about its holding: if antitrust scrutiny is limited to reverse payments in cash, "non-cash pay for delay arrangements are likely to evade Sherman Act scrutiny so long as pharmaceutical companies take the obvious cue to structure their settlements in ways that avoid cash payments." *Id. at 193*. The district court noted that "the Plaintiffs have asserted, in two robust complaints, facts demonstrating illegal contracts or combinations in restraint **[**23]** of trade undertaken by the Defendants." Id. However, because the district court dismissed the case on the basis that the reverse payments

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Under the agreement, Mylan agreed to drop its challenge to the '394 Patent and delay entry of its generic Loestrin 24 until July 22, 2014, again, the month that the '394 Patent was scheduled to expire. The DPPs do not detail the specific provisions of the agreement, nor do they allege that the Mylan agreement gives rise to independent antitrust claims.

[11] In addition, the defendants provided independent grounds for dismissing the state antitrust and unjust enrichment claims, none of which are relevant here.

were not in cash form, it did not address the subsequent question of whether the individual provisions of the settlement agreements -- including the no-AG agreement, the acceleration clause, and the various side deals -- would have been adequately alleged as unlawful reverse payments were Actavis to extend to non-cash payments.

The district court entered final judgment as to the DPPs' claim under *Rule 58 of the Federal Rules of Civil Procedure*, noting that their case was "immediately appealable" as their complaint has been dismissed in its entirety. The district court entered final judgment as to the EPPs' federal antitrust claims under *Rule 54(b) of the Federal Rules of Civil Procedure* and stayed their remaining claims. The DPPs and EPPs timely appealed the **[*549]** district court's decision, and the parties now dispute whether the district court erred in determining that Actavis was limited to cash and, if so, whether the plaintiffs plausibly alleged that the no-AG agreements, acceleration clause, and side deals constituted unlawful reverse payments.

V. Analysis

A. Standard of Review

HN3[] We review a dismissal under *Rule 12(b)(6)* de novo. *Ocasio-Hernandez v. Fortuño-Burset, 640 F.3d 1, 7 (1st Cir. 2011)*. "For the purposes of our review, **[**24]** we accept as true all well-pled facts alleged in the complaint and draw all reasonable inferences in [the plaintiffs'] favor." *Evergreen Partnering Grp., Inc. v. Pactiv Corp., 720 F.3d 33, 36 (1st Cir. 2013)*. "A motion for judgment on the pleadings [under *Rule 12(c)*] is treated much like a *Rule 12(b)(6)* motion to dismiss," with the court viewing "the facts contained in the pleadings in the light most favorable to the nonmovant and draw[ing] all reasonable inferences therefrom." *Perez-Acevedo v. Rivero-Cubano, 520 F.3d 26, 29 (1st Cir. 2008)* (quoting *R.G. Fin. Corp. v. Vergara-Nunez, 446 F.3d 178, 182 (1st Cir. 2006))*.

HN4[] "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal, 556 U.S. at 678* (quoting *Twombly, 550 U.S. at 570*). The pleadings need not contain "detailed factual allegations" but must provide "more than labels and conclusions, and a formulaic recitation of the elements of the cause of action will not do." *Twombly, 550 U.S. at 555*. Although the pleading standards articulated in Twombly are now ubiquitous in the legal world, it is important to note that *Twombly* addressed the specific question of "what a plaintiff must plead in order to state a claim under *§ 1* of the Sherman Act," *id. at 554-55*, and this court has cautioned against converting Twombly's mandates into a requirement that antitrust plaintiffs provide evidentiary support or set forth other "plus factors" to demonstrate the plausibility **[**25]** of their Sherman Act claims, *Evergreen Partnering Grp., 720 F.3d at 46-47*.

B. Actavis and Non-Cash Payments

As the district court addressed only the question of whether Actavis reached non-cash reverse payments, today we choose to limit ourselves to that query as well. For the reasons discussed herein, we conclude that the district court erred in determining that non-monetary reverse payments do not fall under Actavis's scope.

The district court reasoned that the reverse payments alleged in Actavis involved only cash payments, but that is not so: ***HN5***[] in Actavis, it was alleged that the reverse payments involved side deals in which the generic manufacturers agreed to promote the brand name drug at issue in exchange for multi-million dollar payments from the brand manufacturer. *133 S. Ct. at 2229*; *Watson Pharms., Inc., 677 F.3d at 1305* (describing the terms of the settlement agreements). This fact alone demonstrates that the Supreme Court recognized that a disguised above-market deal, in which a brand manufacturer effectively overpays a generic manufacturer for services rendered, may qualify as a reverse payment subject to antitrust scrutiny and militates against limiting the Supreme Court's decision to pure cash payments.

The district court also analyzed the language of Actavis, noting that **[**26]** the Supreme Court was "fixated" on cash. But the district court overstates its case. Indeed, the Court in Actavis explained that, "in substance, the plaintiff agreed to pay the **[*550]** defendants many millions of dollars to stay out of its market." *133 S. Ct. at 2231* (emphasis added). This language acknowledges that ***HN6***[] antitrust scrutiny attaches not only to pure cash reverse payments, but to other forms of reverse payment that induce the generic to abandon a patent challenge, which unreasonably eliminates competition at the expense of consumers. Moreover, this approach is consistent with ***antitrust law***, which has consistently prioritized substance over form. See, e.g., *Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 191-92, 130 S. Ct. 2201, 176 L. Ed. 2d 947 (2010)* ("'[W]e seek the central substance of the situation' and therefore 'we are moved by the identity of the persons who act, rather than the label of their hats.'" (quoting *United States v. Sealy, Inc., 388 U.S. 350, 353, 87 S. Ct. 1847, 18 L. Ed. 2d 1238 (1967))*; *Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 760, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)* ("[The Sherman Act] is aimed at substance rather than form."); *Podiatrist Ass'n v. La Cruz Azul de P.R., Inc., 332 F.3d 6, 14 (1st Cir. 2003)* (describing the antitrust inquiry as "a functional one"). As the district court itself acknowledged, a narrow construction of Actavis will give drug manufacturers carte blanche to negotiate anticompetitive settlements so long as they involve non-cash reverse payments:

> Many observers welcomed Actavis as a necessary step **[**27]** in confronting the scourge of pay for delay agreements that they contend benefit the pharmaceutical industry at the expense of consumers. But, ultimately, Actavis can only serve as the solution to anticompetitive pay for delay arrangements insofar as it encompasses both cash and these increasingly prevalent non-cash settlements. Of course, it is of relatively little import whether a payment for delay is made in the form of cash or some other form of consideration.

In re Loestrin, 45 F. Supp. 3d at 194 (footnote and citation omitted).

HN7[] True, Actavis does contain references to money. See *Actavis, 133 S. Ct. at 2233* (describing reverse payment settlements as an arrangement "in which A, the plaintiff, pays money to defendant B purely so B will give up the patent fight"); id. (explaining that, in reverse payment settlements, a party "walks away with money simply so it will stay away from the patentee's market"). But the key word used throughout the opinion is "payment," which connotes a much broader category of consideration than cash alone. Black's Law Dictionary (10th ed. 2014) (defining "payment" as the "performance of an obligation by the delivery of money or some other valuable thing accepted in partial or full discharge of the obligation" and "the **[**28]** money or other valuable thing so delivered in satisfaction of an obligation" (emphases added)). As the Third Circuit observed,

> [t]he thrust of the Court's reasoning is not that it is problematic that money is used to effect an end to a patent challenge, but rather that the patentee leverages some part of its patent power . . . to cause anticompetitive harm -- namely, elimination of the risk of competition.

King Drug Co. of Florence, Inc. v. Smithkline Beecham Corp., 791 F.3d 388, 406 (3d Cir. 2015); see also *id. at 409* (holding, post-Actavis, that a no-AG agreement "is subject to antitrust scrutiny under the rule of reason").

Nor are we the first court to determine that ***HN8***[] Actavis should reach non-monetary reverse payments. Of the many district courts and the single court of appeals to have addressed this question, the overwhelming majority have declined to limit Actavis to cash payments. See *King Drug Co. of Florence, Inc., 791 F.3d at 403* ("We do not believe Actavis's holding can be limited to reverse payments of cash."); *In* ***[*551]*** *re Actos End Payor Antitrust Litig., No. 13-cv-9244(RA), 2015 U.S. Dist. LEXIS 127748, 2015 WL 5610752, at *13 (S.D.N.Y. Sept. 22, 2015)* ("This Court shares the majority view that Actavis's holding is not limited to payments made in cash."); *In re Aggrenox Antitrust Litig., 94 F. Supp. 3d 224, 243 (D. Conn. 2015)* ("A settlement agreement may be very simple or tremendously complex, and it may involve all manner of consideration; and if, when viewed holistically, it effects **[**29]** a large and unexplained net transfer of value from the patent-holder to the alleged patent-infringer, it may fairly be called a reverse-payment settlement."); *United Food & Commercial Workers v. Teikoku Pharma USA, 74 F. Supp. 3d 1052, 1069-70 (N.D. Cal. 2014)* (rejecting theory that Actavis only applies to cash reverse payments as "[t]here are many plausible methods by which plaintiffs may calculate the value of non-monetary terms"); *In re Effexor XR Antitrust Litig., No. 11-5479(PGS)(LHG), 2014 U.S. Dist. LEXIS 142206, 2014 WL 4988410, at *19 (D.N.J. Oct. 6, 2014)* ("The common use of the term payment is described as something given to discharge a debt or obligation and does not require the payment to be in the form of money."); *Time Ins. Co. v. Astrazeneca AB, 52 F. Supp. 3d 705, 710 (E.D. Pa. 2014)* ("In my opinion, reverse payments deemed anti-competitive pursuant to

Actavis may take forms other than cash payments."); In re Lipitor Antitrust Litig., 46 F. Supp. 3d 523, 543 (D.N.J. 2014) (finding that Actavis covers situations where "the non-monetary payment [can] be converted to a reliable estimate of its monetary value"); In re Niaspan Antitrust Litig., 42 F. Supp. 3d 735, 751 (E.D. Pa. 2014) (holding "that the term 'reverse payment' is not limited to a cash payment"); In re Nexium (Esomeprazole) Antitrust Litig., 968 F. Supp. 2d 367, 392 (D. Mass. 2013) ("This Court does not see fit to read into the opinion a strict limitation of its principles to monetary-based arrangements alone.").

To be sure, the district court was correct that ***HN9***[] the language of Actavis emphasizes that the value of a reverse payment is a key component in determining whether it is unlawful. In **[**30]** discussing how to apply the rule of reason analysis to reverse payments, the Supreme Court explained, "the likelihood of a reverse payment bringing about anticompetitive effects depends upon its size, its scale in relation to the payor's anticipated future litigation costs, its independence from other services for which it might represent payment, and the lack of any other convincing justification." Actavis, 133 S. Ct. at 2237. Such language emphasizes that the size of the reverse payment, particularly as it relates to potential litigation expenses, is central to the antitrust query and requires that the reviewing court or factfinder assess the value of the payment.

Similarly, as the district court noted, ***HN10***[] the five considerations set forth by the Supreme Court[12] require that the court or **[*552]** factfinder measure the payment's size. The Supreme Court stated that a reverse payment may be justified where it "reflects traditional settlement considerations, such as avoided litigation costs or fair value for services." Id. at 2236. And, for the market power inquiry, the Court explained that "the size of the payment from a branded drug manufacturer to a prospective generic is itself a strong indicator of power." Id. (internal quotation **[**31]** marks omitted). Again, both statements assume that the value of the reverse payment is ascertainable.

On this basis, the district court determined that it was "almost impossible" to measure non-cash settlements such as those at issue here. In re Loestrin, 45 F. Supp. 3d at 191. Although the value of non-cash reverse payments may be much more difficult to compute than that of their cash counterparts, ***HN12***[] antitrust litigation often requires an "elaborate inquiry into the reasonableness of a challenged business practice" and, as a result, is "extensive and complex." Maricopa Cty. Med. Soc'y, 457 U.S. at 343. In other words, antitrust litigation already requires courts to make intricate and complex judgments about market practices.

HN13[] We agree with those courts that, rather than rejecting wholesale Actavis's applicability to non-cash payments, have required that the plaintiffs plead information sufficient "to estimate the value of the term, at least to the extent **[**33]** of determining whether it is 'large' and 'unjustified.'" In re Actos End Payor Antitrust Litig., 2015 U.S. Dist. LEXIS 127748, 2015 WL 5610752, at *13. Consistent with Twombly, which declined to "require heightened fact pleading of specifics," Twombly, 550 U.S. at 570, we do not require that the plaintiffs provide precise figures and calculations at the pleading stage, In re Actos End Payor Antitrust Litig., 2015 U.S. Dist. LEXIS

[12] There is some dispute as to how the five considerations should factor into antitrust litigation going forward. Whereas the district court construed the five considerations as "guid[ing] the inquiry as to whether a settlement payment satisfies the rule of reason," In re Loestrin, 45 F. Supp. 3d at 190, the DPPs contend that these considerations were proffered only as justifications for why subjecting reverse payments to antitrust scrutiny outweigh the public policy in favor of settlements. We agree with the DPPs that the five considerations should not overhaul the rule of reason, nor should they create a new five-part framework in antitrust cases.

HN11[] We note, however, that there is overlap between the five considerations and the preexisting elements of the rule of reason. For example, the First Circuit's rule of reason analysis queries, among other things, whether the "agreement involved the exercise of power in a relevant economic market." Stop & Shop Supermarket Co., 373 F.3d at 61. In that same vein, Actavis explains how to evaluate the market power question: "the size of the payment from a branded drug manufacturer to a prospective generic is itself a strong indicator of **[**32]** power." Actavis, 133 S. Ct. at 2236 (internal quotation marks omitted). Similarly, the First Circuit rule of reason includes as an element the anticompetitive consequences of the alleged agreement, and the first of the five considerations articulated by the Supreme Court explains that a reverse payment may have significant anticompetitive effects where it "amounts to a purchase by the patentee of the exclusive right to sell its product." Id. at 2234.

*127748, 2015 WL 5610752, at *13*. Requiring such a high burden would impose a nearly insurmountable bar for plaintiffs at the pleading stage because "very precise and particularized estimates of fair value and anticipated litigation costs may require evidence in the exclusive possession of the defendants, as well as expert analysis." *In re Aggrenox Antitrust Litig., 94 F. Supp. 3d at 244-45*. Nevertheless, the plaintiffs must allege facts sufficient to support the legal conclusion that the settlement at issue involves a large and unjustified reverse payment under Actavis. See *In re Niaspan Antitrust Litig., 42 F. Supp. 3d at 753* (describing Twombly's applicability to the Actavis inquiry).

On appeal, the defendants do not strenuously argue that Actavis should be limited to cash payments, instead focusing their briefing on whether the plaintiffs adequately pled that the provisions at issue in the Warner-Watson and Warner-Lupin settlement agreements are unlawful reverse payments under Actavis. As the district court did not address these issues, we remand for the district court **[**34]** to evaluate these remaining questions in the first instance. The ***HN14***[] Supreme Court acknowledged that Actavis had opened the door to a new landscape of litigation and "le[ft] to the lower courts the structuring of the present rule-of-reason antitrust litigation." *Actavis, 133 S. Ct. at 2238*. At this juncture, we feel that the most prudent course is to proceed one step at a time, and we therefore leave for another day **[*553]** the question of whether the EPPs and DPPs adequately alleged that the individual provisions of the settlement agreements warranted antitrust scrutiny as unlawful reverse payments.

VI. Conclusion

For the foregoing reasons, the judgment is vacated and the case is remanded for further proceedings consistent with this opinion. No costs are awarded.

Vacated and Remanded.

End of Document

LexisNexis

Inline Packaging, LLC v. Graphic Packaging Int'l, Inc.

United States District Court for the District of Minnesota

February 23, 2016, Decided; February 23, 2016, Filed

Civil No. 15-3183 ADM/LIB

Reporter

164 F. Supp. 3d 1117 *; 2016 U.S. Dist. LEXIS 22342 **; 2016 WL 727112

Inline Packaging, LLC, Plaintiff, v. Graphic Packaging International, Inc., Defendant.

Subsequent History: Related proceeding at *Graphic Packaging Int'l Inc. v. Inline Packaging, LLC, 2016 U.S. Dist. LEXIS 194214, 2016 WL 11641977 (D. Minn., Apr. 6, 2016)*

Motion granted by, in part, Motion denied by, in part, Motion denied by, Without prejudice *Inline Packaging, LLC v. Graphic Packaging Int'l, Inc., 2016 U.S. Dist. LEXIS 192196, 2016 WL 7042117 (D. Minn., July 25, 2016)*

Motion granted by, in part, Motion denied by, in part *Inline Packaging, LLC v. Graphic Packaging Int'l, Inc., 2016 U.S. Dist. LEXIS 205439 (D. Minn., Sept. 6, 2016)*

Objection overruled by *Inline Packaging, LLC v. Graphic Packaging Int'l, Inc., 2016 U.S. Dist. LEXIS 152774 (D. Minn., Nov. 2, 2016)*

Objection overruled by *Inline Packaging, LLC v. Graphic Packaging Int'l, Inc., 2017 U.S. Dist. LEXIS 1764, 2017 WL 62514 (D. Minn., Jan. 5, 2017)*

Related proceeding at *Inline Packaging, LLC v. Graphic Packaging International, Inc., 2017 Pat. App. LEXIS 3431 (P.T.A.B., Feb. 9, 2017)*

Motion granted by, in part, Motion denied by, in part *Packaging v. Graphic Packaging Int'l, Inc., 2017 U.S. Dist. LEXIS 225063, 2017 WL 9325027 (D. Minn., May 5, 2017)*

Request denied by, Motion granted by, in part, Motion denied by, in part, Injunction granted at, in part *Inline Packaging, LLC v. Graphic Packaging Int'l, 2018 U.S. Dist. LEXIS 230597 (D. Minn., Jan. 23, 2018)*

Motion denied by *Inline Packaging, LLC v. Graphic Packaging Int'l, LLC, 2018 U.S. Dist. LEXIS 74102, 2018 WL 9919941 (D. Minn., Mar. 8, 2018)*

Motion denied by *Inline Packaging, LLC v. Graphic Packaging Int'l, Inc., 2018 U.S. Dist. LEXIS 234566 (D. Minn., Mar. 30, 2018)*

Motion granted by, in part, Motion denied by, in part *Inline Packaging, LLC v. Graphic Packaging Int'l, Inc., 2018 U.S. Dist. LEXIS 234486 (D. Minn., June 20, 2018)*

Summary judgment granted by, Partial summary judgment denied by, Objection overruled by, As moot *Inline Packaging, LLC v. Graphic Packaging Int'l, LLC, 351 F. Supp. 3d 1187, 2018 U.S. Dist. LEXIS 188377 (D. Minn., Sept. 5, 2018)*

Reserved by *Inline Packaging, LLC v. Graphic Packaging Int'l, LLC, 2018 U.S. Dist. LEXIS 234481 (D. Minn., Oct. 12, 2018)*

Magistrate's recommendation at *Inline Packaging, LLC v. Graphic Packaging Int'l, LLC, 2019 U.S. Dist. LEXIS 36950, 2019 WL 2016785 (D. Minn., Jan. 11, 2019)*

Motion denied by, Motion granted by, in part, Motion denied by, in part, Costs and fees proceeding at *Inline Packaging, LLC v. Graphic Packaging Int'l, LLC, 2019 U.S. Dist. LEXIS 124711, 2019 WL 3387777 (D. Minn., July 26, 2019)*

Core Terms

packaging, alleges, susceptor, bundled, discount, food, patents, sham, products, buyers, antitrust, customers, food company, trade secret, paperboard, communications, pricing, argues, motion to dismiss, antitrust claim, anticompetitive, competitors, infringement, immunity, Pizza, tortious interference, geographic, relevant market, monopolize, baseless

LexisNexis® Headnotes

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

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

Fed. R. Civ. P. 12 provides that a party may move to dismiss a complaint for failure to state a claim upon which relief can be granted. *Fed. R. Civ. P. 12(b)(6)*. In considering a motion to dismiss under *Rule 12(b)(6)*, the pleadings are construed in the light most favorable to the nonmoving party, and the facts alleged in the complaint must be taken as true. Any ambiguities concerning the sufficiency of the claims must be resolved in favor of the nonmoving party.

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

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

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

A pleading must contain enough facts to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw a reasonable inference that the defendant is liable for the misconduct alleged. Determining whether a complaint states a plausible claim for relief is a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged--but not "shown"--that the pleader is entitled to relief. *Fed. R. Civ. P. 8(a)(2)*.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization

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

HN3[] Regulated Practices, Monopolies & Monopolization

Section 2 (15 U.S.C.S. § 2) of the Sherman Act imposes liability on every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States. 15 U.S.C.S. § 2. To establish a § 2 violation, a plaintiff must plausibly allege that the defendant (1) possessed monopoly power in the relevant market, and (2) willfully acquired or maintained this monopoly power by anticompetitive conduct as opposed to gaining that power as a result of a superior product, business acumen, or historical accident. Minnesota anti-trust law is interpreted consistent with the federal court's construction of the Sherman Act.

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

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

Evidence > Burdens of Proof

HN4[] Scope, Monopolization Offenses

To state a viable claim under Section 2 (15 U.S.C.S. § 2) of the Sherman Act, the plaintiff has the burden of identifying a valid relevant market. A relevant market has components of both a product market and a geographic market. The relevant product market includes all reasonably interchangeable products. The geographic market is defined by considering the commercial realities faced by consumers. It includes the geographic area in which consumers can practically seek alternative sources of product. Without a well-defined relevant market, a court cannot determine the effect that an allegedly illegal act has on competition. Generally, proper market definition can be determined only after a factual inquiry into the commercial realities faced by consumers. However, this rule does not equate to a per se prohibition against dismissal of antitrust claims for failure to plead a relevant market under Fed. R. Civ. P. 12(b)(6).

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

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

HN5[] Actual Monopolization, Claims

The relevant product market should include products that have reasonable interchangeability for the purpose for which they are produced.

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

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

HN6[] Actual Monopolization, Claims

Courts define the relevant geographic market as the geographic area to which consumers can practically turn for alternative sources of the product and in which the antitrust defendants face competition.

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

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

HN7[] **Actual Monopolization, Claims**

Proper market definition is best determined through a factual inquiry into the commercial realities faced by consumers.

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

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

HN8[] **Actual Monopolization, Claims**

The law surrounding bundled discounts as a theory of anticompetitive behavior is far from clearly established. Indeed, the Eighth Circuit has not explicitly addressed the viability of such a claim. In Concord Boat, the Eighth Circuit referenced several out-of-circuit discount bundling cases, appearing to at least implicitly recognize the theory. Of those circuits which have expressly recognized discount bundling as a form of anticompetitive behavior, there is no consensus on the standard utilized to evaluate discount bundling claims.

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

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

HN9[] **Actual Monopolization, Claims**

A predatory pricing claim can be different than a bundled discount theory of anticompetitive behavior. Since the U.S. Supreme Court's holding in Linkline, courts have continued to address these claims under separate standards.

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

HN10[] **Motions to Dismiss, Failure to State Claim**

At the *Fed. R. Civ. P. 12(b)(6)* motion to dismiss stage, the court must construe the complaint and "all reasonable inferences arising therefrom" in the plaintiff's favor.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Right to Petition Immunity

Evidence > Burdens of Proof

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

HN11[] **Noerr-Pennington Doctrine, Right to Petition Immunity**

The Noerr-Pennington doctrine derives from two cases wherein the U.S. Supreme Court established that the right to petition under the *First Amendment* includes a litigant's right to bring a suit in federal or state court. Generally, under the doctrine, the act of filing a lawsuit is viewed as a form of petitioning activity and is therefore immune from antitrust liability. Because the right to petition means more than simply the right to communicate directly with the government, the Noerr-Pennington doctrine necessarily includes those activities reasonably and normally attendant to effective petitioning. Protection under Noerr-Pennington is not limitless, and an exception exists to the immunity it provides. Under the doctrine, immunity does not extend when the petitioning effort taken, or lawsuit filed, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor. This exception applies when the petitioning activities at issue are so clearly baseless as to amount to an abuse of process. The sham exception is narrow, and the party attempting to invoke the exception bears a heavy burden of demonstrating that the activities are objectively meritless.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom to Petition

HN12[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

In contrast to Cardtoons, multiple circuit courts have held that the Noerr-Pennington doctrine does protect pre-litigation activities such as pre-suit demand letters, so long as such letters are not a "sham." A court has stated that where the underlying litigation fell within the protection of the Petition Clause, such incidental conduct would also be protected. Other circuit courts have similarly concluded that pre-litigation activity reasonably attendant to litigation is protected under the doctrine.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom to Petition

HN13[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

The U.S. Supreme Court has cautioned that when determining whether conduct falls within the protection of Noerr-Pennington, a court must give adequate "breathing space" to the right to petition. Accordingly, it follows that "adequate breathing space" would include conduct necessarily relating to initiating a lawsuit.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

HN14[] **Noerr-Pennington Doctrine, Sham Exception**

The Noerr-Pennington doctrine does not apply when the litigation at issue is found to be a mere sham intended to disguise tortious or anticompetitive liability.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

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

HN15[] **Noerr-Pennington Doctrine, Sham Exception**

Whether a party's conduct is a genuine attempt to avail itself of the judicial process or is merely a sham is a question of fact that is inappropriate for a motion to dismiss. The decision about whether the Noerr-Pennington doctrine applies should be left until after discovery, so as to more fully develop the underling acts and possibly establish an exception.

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

HN16[] Complaints, Requirements for Complaint

Fed. R. Civ. P. 8 does not require detailed factual allegations, but it demands more than an unadorned, the-defendant-unlawfully-harmed-me-accusation.

Patent Law > Infringement Actions > Defenses > Marking

HN17[] Defenses, Marking

Patent marking is not mandatory. *35 U.S.C.S. § 287(a)* (stating a patentee "may give notice to the public that the same is patented"). Under *35 U.S.C.S. § 287(a)*, a patentee cannot recover damages "except on proof that the infringer was notified of the infringement and continued to infringe thereafter." When a patentee does not mark a product, *§ 287(a)* requires actual notice to assure that the recipient knew of the adverse patent during the period in which liability accrues, when constructive notice by marking is absent. Thus, marking serves as an option for patentees to ensure that sufficient notice was provided which is required to recover damages for infringement.

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

HN18[] Standing, Requirements

To properly assert an antitrust action, a plaintiff must have suffered an antitrust injury--an injury of the type that the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. Antitrust injury is a threshold issue that plaintiffs must establish in order to have standing to sue under the antitrust laws. A mere causal connection between an antitrust violation and harm to plaintiff cannot be the basis for antitrust compensation unless the injury is directly related to the harm the antitrust laws were designed to protect.

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

HN19[] Standing, Requirements

Indeed, the interplay between injury-to-competition and direct injury to a plaintiff when evaluating antitrust standing is not always clear. The two concepts are closely related, however, and the Eighth Circuit and decisions from the District of Minnesota largely conflate the two and incorporate an injury-to-competition requirement into the analysis of antitrust standing.

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

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

HN20[] Intentional Interference, Elements

To establish tortious interference with an existing contract under Minnesota law, a plaintiff must show: (1) the existence of a contract, (2) the defendant's knowledge of the contract, (3) the defendant's intentional procurement of the breach of contract, (4) the defendant acted without justification, and (5) damages. A claim for tortious interference with prospective economic advantage also has five elements: (1) the existence of a reasonable expectation of economic advantage belonging to the plaintiff; (2) the defendant's knowledge of that expectation; (3) the defendant's wrongful interference with that expectation; (4) a reasonable probability that the plaintiff would have realized the expectation absent the defendant's conduct; and (5) damages. Liability for a tortious interference with prospective economic advantage claim rests on whether the actor's conduct was improper. For purposes of this tort, improper means are those that are independently wrongful such as threats, violence, trespass, defamation, misrepresentation of fact, restraint of trade or any other wrongful act recognized by statute or common law.

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

HN21[] **Motions to Dismiss, Failure to State Claim**

A complaint should be read as a whole, not parsed piece by piece.

Computer & Internet Law > ... > Trade Secrets > Misappropriation > Elements

Computer & Internet Law > ... > Trade Secrets > Misappropriation > Uniform Trade Secrets Act

HN22[] **Misappropriation, Elements**

Under the Minnesota Uniform Trade Secrets Act, a trade secret is defined as information that: (1) is not generally known or readily ascertainable, (2) derives independent economic value from secrecy, and (3) is the subject of reasonable efforts to maintain its secrecy. *Minn. Stat. § 325C.01, subd. 5*. Misappropriation of a trade secret occurs when there is disclosure or use of a trade secret without express or implied consent by a person who, at the time of disclosure or use, knew that the utilization of the trade secret was acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use. *Minn. Stat. § 325C.01, subd. 3(ii)*.

Computer & Internet Law > Intellectual Property Protection > Trade Secrets > Misappropriation

HN23[] **Trade Secrets, Misappropriation**

In the context of pleading a claim for the misappropriation of trade secrets, a plaintiff is understandably hesitant to reveal the exact parameters of the trade secrets it believes have been misappropriated because a trade secret made public is not a secret.

Counsel: [1]** Brent Lorentz, Esq., Robert Weinstine, Esq., and Justice Lindell, Esq., Winthrop & Weinstine, PA, Minneapolis, MN, on behalf of Plaintiff.

Amanda Ames, Esq., David Hamilton, Esq., and Jason Hicks, Esq., Womble Carlyle Sandridge & Rice, LLP, Washington, D.C., and Felicia Boyd, Esq., Barnes & Thornburg LLP, Minneapolis, MN, on behalf of Defendant.

Judges: ANN D. MONTGOMERY, UNITED STATES DISTRICT JUDGE.

Opinion by: ANN D. MONTGOMERY

Opinion

[*1123] MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

On November 24, 2015, the undersigned United States District Judge heard oral argument on Defendant Graphic Packaging International, Inc.'s ("Graphic") Motion to Dismiss [Docket No. 25]. Plaintiff Inline Packaging, LCC ("Inline") opposes the Motion. For the reasons stated herein, Defendant's Motion is granted in part and denied in part.

II. BACKGROUND

Inline and Graphic compete in the susceptor food packaging industry. Compl. **[*1124]** [Docket No. 1] ¶ 2. Susceptor food packaging is a type of active food packaging that converts microwave energy to high surface temperatures which in turn crisps and browns foods. Id. ¶ 60. Inline identifies itself as a small player, whereas Graphic is one of the largest paperboard packaging companies in the United States **[**2]** with at least a 95% share of the susceptor food packaging market. Id. ¶¶ 13-14, 17. Inline and Graphic primarily compete within this susceptor food packaging market for supply contracts with companies such as Nestle, Heinz, Little Lady Foods, Nation Pizza Products, and Smuckers. Id. ¶¶ 20-21.

Inline alleges that Graphic, in response to price competition from Inline and others, engages in anticompetitive conduct to maintain a monopolizing position in the crisping and browning susceptor packaging market. Id. ¶¶ 23-58, 81-110. Inline posits that Graphic's conduct produces no pro-competitive benefits and, because of this conduct, Inline has lost both existing and potential customers. Id. ¶¶ 111, 114. Inline asserts five claims against Graphic: (1) Count I—Tortious Interference with Prospective Business Relations; (2) Count II—Tortious Interference with Existing Contractual Relations; (3) Count III—Misappropriation of Trade Secrets; (4) Count IV—Violation of *Minn. Stat. § 325D.52* for Maintenance or Use of a Monopoly Power; and (5) Count V—Violation of the Sherman Antitrust Act, *15 U.S.C. § 2*. Id. ¶¶ 121-48. Graphic moves to dismiss the Complaint in its entirety.

III. DISCUSSION

A. Motion to Dismiss Standard

HN1[] *Rule 12 of the Federal Rules of Civil Procedure* provides that a **[**3]** party may move to dismiss a complaint for failure to state a claim upon which relief can be granted. *Fed. R. Civ. P. 12(b)(6)*. In considering a motion to dismiss under *Rule 12(b)(6)*, the pleadings are construed in the light most favorable to the nonmoving party, and the facts alleged in the complaint must be taken as true. *Hamm v. Groose, 15 F.3d 110, 112 (8th Cir. 1994)*; *Ossman v. Diana Corp., 825 F. Supp. 870, 879-80 (D. Minn. 1993)*. Any ambiguities concerning the sufficiency of the claims must be resolved in favor of the nonmoving party. *Ossman, 825 F. Supp. at 880*.

HN2[] A pleading must contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw a reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. Determining whether a complaint states a plausible claim for relief is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id*. "But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but not 'shown'—'that the pleader is entitled to relief.'" *Id*. (quoting *Fed. R. Civ. P. 8(a)(2)*).

B. Antitrust Claims

Inline asserts antitrust claims against Graphic under both *Minn. Stat. § 325D.52* (Count IV) and the Sherman Antitrust **[**4]** Act, *15 U.S.C. § 2* (Count V). ***HN3***[] *Section 2 of the Sherman Act* imposes liability on "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States." *15 U.S.C. § 2*. To establish a *§ 2* **[*1125]** violation, Inline must plausibly allege that Graphic (1) "possessed monopoly power in the relevant market," and (2) "willfully acquired or maintained this monopoly power by anticompetitive conduct as opposed to gaining that power as a result of a superior product, business acumen, or historical accident." *Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039, 1060 (8th Cir. 2000)*. "Minnesota anti-trust law is interpreted consistent with the federal court's construction of the *Sherman Act*." *Lamminen v. City of Cloquet, 987 F. Supp. 723, 734 (D. Minn. 1997)* (citing *State by Humphrey v. Road Constructors, Inc., 474 N.W.2d 224, 225 n.1 (Minn. Ct. App. 1991))*; see also *Lorix v. Crompton Corp., 736 N.W.2d 619, 626 (Minn. 2007)* ("As the purposes of Minnesota and federal ***antitrust law*** are the same, it is sensible to interpret them consistently.").

Inline's antitrust claims are premised on several theories of anticompetitive behavior, including: (1) discount bundling; (2) baseless threats of sham litigation; and (3) submarine patent activities. Graphic counters that none of these three antitrust theories advanced by Inline are legally viable, nor are they supported by sufficient factual allegations. Graphic additionally **[**5]** moves for dismissal based on Inline's failure to plead a relevant market and Inline's lack of standing to assert an antitrust claim. The Court will address each argument in turn.

1. Relevant Market

HN4[] To state a viable claim under *Section 2* of the Sherman Act, Inline has the burden of identifying a valid relevant market. *Double D. Spotting Serv., Inc. v. Supervalu, Inc., 136 F.3d 554, 560 (8th Cir. 1998)*. A relevant market has components of both a product market and a geographic market. *Bathke v. Casey's Gen. Stores, Inc., 64 F.3d 340, 345 (8th Cir. 1995)*. "The relevant product market includes all reasonably interchangeable products. The geographic market is defined by considering the commercial realities faced by consumers. It includes the geographic area in which consumers can practically seek alternative sources of product." *Double D. Spotting Serv., 136 F.3d at 560* (internal citations omitted). "Without a well-defined relevant market, a court cannot determine the effect that an allegedly illegal act has on competition." *Little Rock Cardiology Clinic PA v. Baptist Health, 591 F.3d 591, 596 (8th Cir. 2009)* (citing *FTC v. Freeman Hosp., 69 F.3d 260, 270-71 (8th Cir. 1995))*. Generally, "proper market definition can be determined only after a factual inquiry into the commercial realities faced by consumers." *Double D. Spotting Serv., 136 F.3d at 560* (quoting *Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 436 (3d Cir. 1997))*. However, this rule does not equate to "a per se prohibition against dismissal of antitrust claims for failure to plead a relevant market under *Fed. R. Civ. P. 12(b)(6)*." Id. (quoting *Queen City Pizza, 124 F.3d at 436*). Here, Inline defines the product market as the "susceptor **[**6]** food packaging market" and the geographic market as the United States. Graphic disputes these market designations.

Inline has sufficiently pled both the product and geographic components of a relevant market to withstand a motion to dismiss. As to the product market, Graphic contends that the "susceptor food packaging market" is too narrow. Graphic argues that the Complaint refers to the larger markets of "paperboard food packaging" and "microwaveable foods," and that it is "obvious from any trip down a grocery store aisle" that "susceptor technology is only one way for food products to be packaged and microwaves are only one way to cook food." Mem. Supp. Mot. Dismiss **[*1126]** [Docket No. 27] 9. As such, Graphic contends that Inline has not adequately pled facts to identify the susceptor food packaging market as an independently relevant product market because variations in product type do not automatically equate to differing product markets. See *Craftsmen Limousine, Inc. v. Ford Motor Co., 491 F.3d 380, 389-90 (8th Cir. 2007)* (finding that a speciality limousine market was not distinguishable from the general market of limousines).

Graphic's position is without merit. HN5[] "The relevant product market should include 'products that have reasonable interchangeability for the purpose **[**7]** for which they are produced.'" *Little Rock Cardiology Clinic PA, 591 F.3d at 596* (quoting *United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 404, 76 S. Ct. 994, 100 L. Ed. 1264 (1956))*. As alleged in the Complaint, susceptor food packaging serves the specialized purpose of crisping and browning foods when microwaved. See Compl. ¶ 60. The Complaint further alleges that this packaging is unique in the marketplace as it "includes only active packaging that crisps and browns foods, which effect cannot be achieved using standard paperboard packaging." *Id*. Thus, the purposes of susceptor food packaging and paperboard packaging are not necessarily interchangeable. Moreover, the Complaint adequately alleges why there is a lack of reasonable substitutes for susceptor packaging—there are no similarly-priced or effective ways to crisp and brown microwaveable foods. *Id. ¶ 67*. These allegations are sufficient at the this stage. Inline has "alleged specific facts that support a narrow product market in a way that is plausible and bears a rational relation to the methodology courts prescribe." *Anchor Wall Sys., Inc. v. Rockwood Retaining Walls, Inc., No. 06-0466, 2007 U.S. Dist. LEXIS 92919, 2007 WL 4465195, at *7 (D. Minn. Dec. 18, 2007)* (quotation and citation omitted).

Turning next to the alleged geographic market, Graphic argues that Inline has not sufficiently alleged facts in the Complaint to designate the United States as the relevant geographic market. Graphic suggests that **[**8]** it participates, along with Inline, in the worldwide market, as both companies compete for contracts with international food companies (such as Nestle) and companies based in the United States that conduct business worldwide (such as Heinz and Smuckers).

HN6[] Courts define the relevant geographic market as "the geographic area to which consumers can practically turn for alternative sources of the product and in which the antitrust defendants face competition." *Morgenstern v. Wilson, 29 F.3d 1291, 1296 (8th Cir. 1994)* (citing *Baxley-DeLamar Monuments, Inc., v. Am. Cemetery Ass'n, 938 F.2d 846, 850 (8th Cir. 1991))*. The Complaint alleges, with sufficient specificity, that factors such as transportation costs, currency exchange rates, and developing packaging designs remotely are hurdles to consumers looking to the international market for alternative susceptor packaging. See Compl. ¶ 76. These facts support a plausible conclusion that the relevant market is not international.

Inline has properly pled the required components of product and geographic market. Further, given that HN7[] proper market definition is best determined through "a factual inquiry into the commercial realities faced by consumers," the record at this early stage of the proceedings is sufficient for the case to proceed. See *Double D. Spotting Serv., Inc., 136 F.3d at 560*.

2. Bundle Discounts

Inline claims that by offering **[**9]** packaging bundles to consumers, Graphic is engaging **[*1127]** in anticompetitive behavior. Compl. ¶¶ 23-28. This theory of antitrust conduct centers on Graphic's alleged ability to provide differing types of packaging to food company buyers (customers) in a bundled discount. *Id. ¶ 24*. The Complaint alleges Graphic is a large player in the paperboard/cardboard packaging market, a market that is 400 times larger than the susceptor food packaging market. *Id. ¶ 23*. Inline does not participate in the paperboard market. *Id*.

a. Bundling Susceptor and Paperboard Packaging

Specifically, Inline claims that Graphic offers significant discounts if customers purchase large quantities of bundled paperboard packaging and susceptor packaging. *Id*. According to Inline, the volume of susceptor food packaging ordered in such bundles is significantly smaller compared to paperboard packaging, as paperboard packaging is in much higher demand from food company buyers. *Id. ¶ 25*. Due to the high quantity of paperboard packaging within the bundles, buyers receive a significant discount on the paperboard products—but only if they agree to purchase the susceptor packaging included in the bundle. *Id. ¶ 26*. Stated differently, **[**10]** to receive a discount food company buyers must purchase both the susceptor packaging and paperboard packaging together. *Id*.

Inline claims that due to the discount provided through bundle packaging, food company buyers are discouraged from purchasing separate susceptor food packaging from Graphic's smaller competitors like Inline, even though Inline is more efficient at producing susceptor food packaging. Id. ¶¶ 22, 27. In sum, Inline alleges that "[b]ecause food company buyers commonly purchase far greater volumes of paperboard than susceptor food packaging, smaller competitors cannot profitably offer susceptor food packaging at a price low enough to compete with the discounts available on paperboard food packaging through Graphic's bundles." *Id. ¶ 28*.

b. Standard for Discount Bundling Theory

In theory, "[b]undling is the practice of offering, for a single price, two or more goods or services that could be sold separately. A bundled discount occurs when a firm sells a bundle of goods or services for a lower price than the seller charges for the goods or services purchased individually." *Cascade Health Sol. v. PeaceHealth, 515 F.3d 883, 894 (9th Cir. 2008)* (citations omitted). These bundled discounts can in turn be utilized by entities to increase their market share in the **[**11]** competitive product.

HN8[] The law surrounding bundled discounts as a theory of anticompetitive behavior, however, is far from clearly established. Indeed, the Eighth Circuit has not explicitly addressed the viability of such a claim. In *Concord Boat Corp. v. Brunswick Corp.*, the Eighth Circuit referenced several out-of-circuit discount bundling cases, appearing to at least implicitly recognize the theory. *207 F.3d 1039, 1062 (8th Cir. 2000)* ("Because only one product . . . is at issue here and there are no allegations of tying or bundling with another product, we do not find these cases persuasive."). Of those circuits which have expressly recognized discount bundling as a form of anticompetitive behavior, there is no consensus on the standard utilized to evaluate discount bundling claims.

In LePage's Inc. v. 3M, the Third Circuit examined a bundled rebate program that allowed 3M to leverage its monopoly power in Scotch Brand tape to impact other categories in which the plaintiff also competed. *324 F.3d 141 (3d Cir. 2003)*. 3M argued that as a matter of law, above-cost pricing could not give rise to an antitrust **[*1128]** claim because price reduction, so long as it is not below cost, is the type of conduct antitrust laws serve to promote. *Id. at 147*. The Third Circuit **[**12]** rejected this argument, noting that competitors may be unable to compensate buyers for the discount on the competitive product, even in scenarios when the bundled discount scheme is above costs. See *id. at 155* (quoting Phillip E. Areeda & Herbet Hovenkamp, ***Antitrust Law*** ¶ 794, at 83 (Supp. 2002)).

In contrast, in Cascade Health, the Ninth Circuit adopted a "discount attribution" standard for analyzing bundled discounts under *§ 2* of the Sherman Act:

> To prove a bundled discount was exclusionary or predatory for the purposes of a monopolization or attempted monopolization claim under *§ 2* of the Sherman Act, the plaintiff must establish that, after allocating the discount given by the defendant on the entire bundle of products to the competitive product or products, the defendant sold the competitive product or products below its average variable cost of producing them.

Cascade Health, 515 F.3d at 910. Therefore, critical to the discount attribution standard is the component that the defendant is pricing the competitive product below cost. As stated by the Ninth Circuit, "[t]his standard makes the defendant's bundled discounts legal unless the discounts have the potential to exclude a hypothetical equally efficient producer of the competitive **[**13]** product." Id. *at 906* (citation omitted).[1]

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[1] At the hearing, Graphic referenced ("*Bard I*"). In Bard I, the Eighth Circuit did analyze a discount bundling theory wherein the Court seemed to, at least implicitly, endorse a discount bundling test requiring a below cost pricing component after attributing the entire discount on all products within a package to the competitive product. See *Bard I, 616 F.3d at 893*. However, *Bard I* was vacated shortly after its publication and decided on alternative grounds while making no reference to the discount bundling theory. See *Southeast Missouri Hosp. v. C.R. Bard, Inc., 642 F.3d 608 (8th Cir. 2011)* ("Bard II"). Due to the Eighth Circuit's Bard II decision, this Court will place no precedential value on Bard I in determining how the Eighth Circuit may, in the future, evaluate a discount bundling antitrust claim.

To add to this mix, in Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., the Supreme Court held that to prevail on a predatory pricing claim, a plaintiff must prove that (1) "the prices complained of are below an appropriate measure of its rival's costs" and (2) "that the competitor had . . . a dangerous probability, of recouping its investment in below-cost prices." *509 U.S. 209, 222-24, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993)*. In 2009, the Supreme Court reiterated this holding in Pacific Bell Telephone Co. v. Linkline Communications, Inc. **[**14]** , when it stated that "low prices are only actionable under the *Sherman Act* when the prices are below cost and there is a dangerous probability that the predator will be able to recoup the profits it loses from the low prices. *555 U.S. 438, 457, 129 S. Ct. 1109, 172 L. Ed. 2d 836 (2009)* (citing *Brooke Grp., 509 U.S. at 222-24*).

c. Application of Standards to Inline's Discount Bundling Theory

Graphic argues that the bundled discount theory cannot advance the antitrust claims here for several reasons. According to Graphic, this theory should be evaluated under the Linkline standard which it fails because Inline has alleged neither that Graphic's prices are below cost nor that there is a dangerous probability that Graphic will recoup its lost profits.

Graphic maintains that the LePage test for bundling is an outlier, and that the other circuit courts to have addressed the issue, such as the Ninth Circuit in Cascade, **[*1129]** require some below cost pleading component, which Inline has failed to do. In response, Inline posits that Graphic is conflating the standard for a run-of-the-mill predatory pricing claim with a bundling claim and urges this Court to adopt the standard in LePage—that a plaintiff is not required to show that a competitive product **[**15]** is priced below cost to establish a discount bundling claim. Inline further argues that even if this Court were to look to a discount attribution standard as articulated in Cascade, the Complaint can be read to reasonably infer that Graphic is selling susceptor packaging below cost.

The Court agrees with Inline's contention that ***HN9***[] a predatory pricing claim can be different than a bundled discount theory of anticompetitive behavior. Since the Supreme Court's holding in Linkline, courts have continued to address these claims under separate standards. See *Vesta Corp. v. Amdocs Mgmt. Ltd., 129 F. Supp. 3d 1012, 2015 WL 5178073, at *14-19 (D. Or., 2015)* (evaluating a predatory pricing claim under the Brooke Group standard and a bundled discounts claim under the Cascade standard); *Universal Surveillance Corp. v. Checkpoint Sys., Inc., No. 5:11-1755, 2015 U.S. Dist. LEXIS 147105, 2015 WL 6561241, at *5-6 (N.D. Ohio Oct. 19, 2015)* (noting that when a discount is offered on a single product, it is evaluated under "antitrust's ordinary predatory pricing rule" (the Brooke Group standard), whereas a bundled discount offered on more than one product is evaluated under Cascade); see also *Safeway Inc. v. Abbott Labs., 2010 U.S. Dist. LEXIS 2145, 2010 WL 147988, at * 4 (N.D. Cal. Jan. 12, 2010)* (dismissing an argument that Linkline rejected attribution tests like those set forth in Cascade). Because the Court is not convinced that **[**16]** the Brooke Group/Linkline standard for predatory pricing is applicable here, Inline is not required to plead that Graphic has a dangerous probability of recouping its costs.

As to Graphic's contention that Inline has failed to plead the component of below cost allegations, even if this Court were to adopt the discount attribution test articulated in Cascade, Inline's claim does not fail. In the Complaint, Inline specifically alleges that it is more efficient than Graphic in manufacturing susceptor packaging, yet Inline cannot profitably offer susceptor food packaging at a price sufficiently low to compete with the discounts provided in Graphic's bundles. See Compl. ¶¶ 22, 28. These allegations lead to the logical inference that Graphic is selling below its cost; if Inline is more efficient than Graphic at making susceptor packaging and cannot sell the packaging for a profit to compete with Graphic's bundles, Graphic too must be selling below cost because it is less efficient than Inline. ***HN10***[] At this stage, the Court must construe the Complaint and "all reasonable inferences arising therefrom" in Inline's favor and will do so here. *Morton v. Becker, 793 F.2d 185, 187 (8th Cir. 1986)* (citation omitted). Inline's discount bundling claim survives **[**17]** dismissal at this time.

3. Sham Litigation

Inline additionally bases its antitrust claims on a theory of "sham litigation." Under this theory, Inline claims that Graphic directed baseless threats of litigation at Inline and Inline's customers which amounted to anticompetitive behavior. Graphic moves for dismissal of the sham litigation theory based on pleading deficiencies and protection under the Noerr-Pennington doctrine.

a. Graphic's Litigation Threats

Inline alleges Graphic is well-known as a litigious participant in both the susceptor and paperboard food packaging markets. Compl. ¶ 29. According to Inline, Graphic **[*1130]** is able to achieve its "dominant position in the susceptor food packaging market in part by engaging in aggressive and predatory litigation tactics against its smaller rivals and potential new entrants." *Id. ¶ 30*. Inline alleges that Graphic engages in two forms of sham litigation threats to achieve market monopolization: (1) Graphic directly threatens its competitors and their customers with patent infringement pertaining to expired or inapplicable patents; and (2) Graphic communicates directly with Inline's customers to threaten potential suit against Inline and, in so **[**18]** doing, deters those customers from pursuing business with Inline and gains the business for itself. *Id. ¶¶ 31*, 39-42.

As to the first category of behavior, Inline claims that Graphic has directly threatened its competitors and food company buyers with patent infringement suits, including threats made related to expired or inapplicable patents. *Id. ¶ 31*. Through this misuse of intellectual property, Inline alleges Graphic is able to monopolize the market. *Id*.

As to the second category, the Complaint identifies at least two instances where Graphic communicated with Inline's customers by threatening litigation against Inline to reduce Inline's business. Inline alleges that in 2014 after being awarded a bid for 1.1 billion units of susceptor food packaging products from a food company buyer, the buyer ultimately ordered only ten percent of the product in the contract. *Id. ¶ 41*. Inline attributes Graphic's communications with the food company buyer for the reduction; that is, Graphic communicated to the food company buyer that it was planning to sue Inline and therefore the customer should not contract with Inline for susceptor products. *Id*. The Complaint further describes an occasion where **[**19]** Inline was unsuccessful in securing a contract from Nation Pizza Products due to Graphic's assertion to Nation Pizza Products that it would sue Inline if Inline was awarded the Nation Pizza Products contract. *Id. ¶ 42*.

b. The Noerr-Pennington Doctrine

Graphic argues that the sham litigation theory of anticompetitive conduct is barred by Noerr-Pennington immunity. Inline responds that although the doctrine may arguably apply to communications pertaining to litigation directly between Graphic and Inline, it does not extend to Graphic's communications with Inline's customers about threatened litigation against Inline. Even if Noerr-Pennington was applicable, Inline contends that the sham litigation exception saves the claim.

HN11[] The Noerr-Pennington doctrine derives from two cases wherein the Supreme Court established that the right to petition under the *First Amendment* includes a litigant's right to bring a suit in federal or state court. See *E.R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961)*; *United Mine Workers of Am. v. Pennington, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965)*. Generally, under the doctrine, the act of filing a lawsuit is viewed as a form of petitioning activity and is therefore immune from antitrust liability. *Hinshaw v. Smith, 436 F.3d 997, 1003 (8th Cir. 2006)*. Because "[t]he right to petition means more than simply the right to communicate directly with the government," the **[**20]** Noerr-Pennington doctrine "necessarily includes those activities reasonably and normally attendant to effective petitioning." *In re IBP Confidential Bus. Documents Litig., 755 F.2d 1300, 1310 (8th Cir. 1985)* (citations omitted).

Protection under Noerr-Pennington is not limitless, and an exception exists to the immunity it provides. Under the doctrine, immunity does not extend **[*1131]** when the petitioning effort taken, or lawsuit filed, is a "mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor." *Noerr, 365 U.S. at 144*. This exception applies when the petitioning activities at issue are "so clearly baseless as to amount to an abuse of process." *South Dakota v. Kansas City S. Indus., Inc., 880 F.2d 40, 51 (8th*

Cir. 1989) (quoting Razorback Ready Mix Concrete Co. v. Weaver, 761 F.2d 484, 487 (8th Cir. 1985)). "The sham exception is narrow, and the . . . party attempting to invoke the exception bears a heavy burden of demonstrating that the [activities are] objectively meritless." CBS Interactive Inc. v. Nat'l Football League Players Ass'n, Inc., 259 F.R.D. 398, 413 (D. Minn. 2009) (internal quotation omitted).

c. Application of Noerr-Pennington

The parties first contest whether the allegations alleged here are even covered by Noerr-Pennington. As noted above, the Complaint focuses on alleged threats of litigation directed both to Inline and Inline's customers. Inline urges this Court to adopt the reasoning of the Tenth Circuit articulated in Cardtoons, L.C. v. Major League Baseball Players Ass'n **[**21]** , where the court concluded that the right to petition the government under the First Amendment did not extend to immunize private threats of litigation. 208 F.3d 885, 893 (10th Cir. 2000). Inline acknowledges that other circuit courts have held to the contrary, but argues that no court has extended Noerr-Pennington to communications with customers who were not actually the target of the threatened litigation. Graphic maintains that all allegations asserted are immunized by the doctrine.

In Cardtoons, a designer of parody baseball cards sought a declaratory judgment that the cards produced were not in violation of the Major League Baseball Players Association's publicity rights and additionally sought damages for tortious interference. Id. at 886-87. Cardtoons initiated the declaratory judgment action due to a cease and desist letter sent by the League Association. Id. The League Association argued that it was immune under the Noerr-Pennington doctrine. The Tenth Circuit disagreed, holding that "[a] letter from one private party to another private party simply does not implicate the right to petition [the government], regardless of what the letter threatens." Id. at 892. The court distinguished the case, involving tort claims, **[**22]** with other circuits' decisions pertaining to antitrust claims.

HN12[] In contrast to Cardtoons, multiple circuit courts have held that the Noerr-Pennington doctrine does protect pre-litigation activities such as pre-suit demand letters, so long as such letters are not a "sham." For example, in Sosa v. DIRECTTV, Inc., the Ninth Circuit concluded that DIRECTTV was immune from RICO liability under the Noerr-Pennington doctrine for sending settlement demand letters to individuals who had allegedly improperly utilized its satellite signal. 437 F.3d 923, 935 (9th Cir. 2006). In so deciding, the court emphasized that although the letters themselves where not petitions, the First Amendment "may nevertheless preclude burdening them so as to preserve the breathing space required for the effective exercise of the rights it protects." Id. at 933. The court therefore held that "conduct incidental to the prosecution" of a lawsuit was protected under the Noerr-Pennington doctrine, stating "where the underlying litigation fell within the protection of the Petition Clause, such incidental conduct would also be protected." Id. at 935. Other circuit courts have similarly concluded that pre-litigation activity reasonably attendant to litigation is protected under the doctrine. See e.g., Primetime 24 **[*1132]** Joint Venture v. Nat'l Broad. Co. Inc., 219 F.3d 92, 100 (2d Cir. 2000); McGuire Oil Co. v. Mapco, Inc., 958 F.2d 1552, 1560 (11th Cir. 1992) **[**23]** ; Coastal States Mktg., Inc. v. Hunt, 694 F.2d 1358, 1366-67 (5th Cir. 1983).

Here, Graphic argues that Cardtoons is an outlier and inapplicable. Graphic seems to interpret the litigation threats referenced in the Complaint as communications from Graphic to Inline and Inline's customers directly threatening patent enforcement litigation. As such, Graphic maintains that the Court should adhere to the reasoning of Sosa and other judges within this district in finding that the pre-litigation activities here are protected under Noerr-Pennington. Specifically, Graphic argues that because 35 U.S.C. § 287(a) requires that potential infringers be notified before a patentee can recover damages, pre-litigation notice letters would necessarily be encompassed under Noerr-Pennington. See Select Comfort Corp. v. Sleep Better Store, LLC, 838 F. Supp. 2d 889, 899-900 (D. Minn. 2012) (distinguishing Cardtoons and finding pre-litigation letters "reasonably attendant to litigation, especially where the trademark statute explicitly provides for such pre-suit notification to alleged infringers").

The reasoning articulated in Sosa and adopted by the majority of circuit courts to consider this question is sound. ***HN13***[] The Supreme Court has cautioned that when determining whether conduct falls within the protection of Noerr-Pennington, a court must give adequate "breathing space" to the right to **[**24]** petition. See BE & K Constr.

Co. v. NLRB, 536 U.S. 516, 531, 122 S. Ct. 2390, 153 L. Ed. 2d 499 (2002). Accordingly, it follows that "adequate breathing space" would include conduct necessarily relating to initiating a lawsuit. Inline seems to acknowledge this. See Mem. Opp'n Mot. Dismiss [Docket No. 31] 21. Therefore, to the extent Inline is alleging that Graphic made direct threats of patent enforcement litigation to Inline, such actions would be entitled to Noerr-*Pennington* protection unless deemed to be merely a sham.

However, Inline's allegations go beyond direct threats of litigation from Graphic to its competitors such as Inline. The Complaint also alleges that Graphic communicated with Inline's customers, threatening suit against Inline should these customers continue to work with Inline. Graphic has not identified any cases, and this Court has found none, supporting the extension of Noerr-Pennington to scenarios where those receiving the communications were third parties not directly threatened with litigation. Alleged actions against third parties who were not directly threatened with litigation are seemingly unrelated to Graphic's ability to petition a court for redress for Inline's wrongdoing. Moreover, even if such actions came within the purview of Noerr-Pennington **[**25]** , Inline has, for the purposes of this Motion, sufficiently alleged that Graphic's conduct was a sham.

d. Sham Allegations

As noted above, ***HN14***[] the Noerr-Pennington doctrine does not apply when the litigation at issue is found to be "a mere sham intended to disguise tortious or anticompetitive liability." *Datascope Corp. v. Vascular Sols., Inc., 165 F. Supp. 2d 933, 936 (D. Minn. 2001)*. Here, Inline has adequately pled facts to establish that Graphic's litigation activities constituted a sham so as to preclude immunity under the Noerr-Pennington doctrine.

Unsurprisingly, the parties disagree as to what standard applies. Graphic recites the test articulated in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., 508 U.S. 49, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993)* ("PREI"). In that case, the Court found that the sham exception is only applicable **[*1133]** when (1) it is established that the litigation is "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits" and (2) the litigation is subjectively motivated by bad faith in the sense that the litigation is initiated as an "anticompetitive weapon." *PREI, 508 U.S. at 60-61* (quotations omitted). The Eighth Circuit has also elaborated on the sham exception test as set forth in PREI:

> It is only where a defendant's resort to the courts is accompanied or characterized by illegal and reprehensible practices such **[**26]** as perjury, fraud, conspiracy with or bribery of government decision makers, or misrepresentation, or is so clearly baseless as to amount to an abuse of process, that the Noerr-Pennington cloak of immunity provides no protection.

Razorback Ready Mix Concrete, 761 F.2d at 487 (emphasis added) (citation omitted).

Inline responds that the PREI standard should only be utilized in instances when a court is considering whether a single act rises to the level of sham litigation. According to Inline, because it has alleged a "pattern or practice" of behavior, the proper standard is whether there is "a pattern of baseless, repetitive claims . . . which leads the factfinder to conclude that the administrative or judicial processes have been abused." *California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 513, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972)*.

The Eighth Circuit has not yet evaluated the potential interplay between PREI and California Motor. Indeed, "[i]t is unclear whether PREI distinguished or displaced the sham litigation test first propounded in California Motor." *Waugh Chapel S., LLC v. United Food and Comm. Workers Union Local 27, 728 F.3d 354, 363 (4th Cir. 2013)*. However, several circuit courts have drawn a distinction between the two tests. The Ninth Circuit, for example, has interpreted the tests "as applying to different situations" as "Professional Real Estate Investors provides a strict two-step analysis to assess whether **[**27]** a single action constitutes sham petitioning . . . [whereas] California Motor Transport deals with the case where the defendant is accused of bringing a whole series of legal proceedings." USS—*POSCO Indus. v. Contra Costa Cnty. Bldg. & Const. Trades Council, AFL-CIO, 31 F.3d 800, 810-11 (9th Cir. 1994)*.

At this stage, however, the Court need not determine which test is applicable, as Inline has sufficiently alleged sham litigation under both standards. Under the California Motor test, the facts alleged in the Complaint relating to Graphic's litigation activity amount to a pattern or practice. Inline claims that on at least two occasions Graphic targeted Inline by notifying Inline's customers that it planned to sue Inline and this was done with the "intent to maintain and exercise [Graphic's] dominant market position." Compl. ¶ 44. Additionally, Inline generally alleges that Graphic threatened competitors and food company buyers with infringement suits about "expired or inapplicable patents." Id. ¶ 31. This activity, taken together, pleads a "pattern of baseless, repetitive claims" under California Motor to constitute the sham litigation exception to Noerr-Pennington.

The Complaint also adequately pleads the sham exception under the test articulated in PREI. Graphic argues that Inline cannot **[**28]** satisfy the PREI standard as it has failed to allege facts plausibly showing that Graphic's litigation activities were objectively unreasonable. Graphic emphasizes that Inline has not explicitly identified any unsuccessful lawsuit and states that "even if there was an open question about the scope or validity of some of **[*1134]** Graphic's patents, the mere existence of such a dispute would fall well short of the requirements of sham litigation." Mem. Supp. Mot. Dismiss at 20. However, at this stage, Inline is not required to show that the litigation threatened was actually meritless. Inline must only allege facts to plausibly establish that Graphic's litigation activity was objectively baseless. It has done so. Inline alleges that Graphic threatened enforcement of patents that were invalid, expired, or inapplicable. See Compl. ¶ 31. An infringement action based on such patents would be clearly baseless and an abuse of process. Inline further alleges that these enforcement actions were an anticompetitive weapon. According to Inline, these litigation threats were utilized as "a means to monopolize the market through litigation and threats of litigation by raising rivals' costs, both financial **[**29]** and reputational." Id. These allegations, if true, could establish that Graphic's litigation threats were a sham under the PREI test. See *Reg'l Multiple Listing Serv. of Minn., Inc. v. Am. Home Realty Network, Inc. 960 F. Supp. 2d 958, 978-79 (D. Minn. 2013)* (finding that plaintiff had adequately alleged sham litigation when it stated that defendant was asserting a copyright claim over software it allegedly did not design or own).

More fundamentally, the Court finds that a decision as to whether Noerr-Pennington immunizes litigation activity here or if any protected activity constitutes a sham is better reserved until after discovery. See *Scooter Store, Inc. v. SpinLife.com, LLC, 777 F. Supp. 2d 1102, 1115 (S.D. Ohio, 2011)* ***HN15***[] ("[W]hether a party's conduct is a genuine attempt to avail itself of the judicial process or is merely a sham is a question of fact that is inappropriate for a motion to dismiss.") (citing *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, 690 F.2d 1240, 1253 (9th Cir. 1982))*; *Fox News Network, L.L.C. v. Time Warner Inc., 962 F. Supp. 339, 346 (E.D.N.Y. 1997)* ("The decision about whether the Noerr-Pennington doctrine applies should be left until after discovery, so as to more fully develop the underling acts and possibly establish an exception." (quotation omitted)). Here, whether specific communications are covered under Noerr-Pennington immunity can be better deciphered after discovery reveals the contents of such communications and to whom they were directed. Moreover, discovery will undoubtedly reveal the patents at issue so a determination **[**30]** can be made on whether threatened enforcement litigation was so meritless as to constitute a sham. For now, Inline has pled sufficient facts to support a claim that the sham exception is applicable. Graphic's Motion to Dismiss the antitrust claims as it pertains to the sham litigation theory is denied.[2]

4. Submarine Patent Activities

[2] Graphic also challenges the viability of Inline's bundled discount and sham litigation theories for vagueness and lack of sufficient supporting facts. For example, Graphic highlights that the Complaint does not identify the actual products contained in the bundled discounts, the prices of those bundles, or the specific lawsuits and contents of litigation threats. The Complaint is not particularly detailed, but it does state enough facts to raise plausible claims for relief on its face. See *Twombly, 550 U.S. at 570*. The Complaint goes beyond threadbare recitations of the elements of the claims asserted here—it asserts that Graphic bundled susceptor and paperboard packaging and that Graphic made sham litigation threats based on expired or inapplicable patents. Indeed, ***HN16***[] *Rule 8* "does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me-accusation." *Iqbal, 129 S. Ct. At 1949* **[**31]** (quoting *Twombly, 550 U.S. at 555*). Inline has satisfied this pleading standard.

Inline also alleges Graphic violated ***antitrust law*** by engaging in "baiting/submarine **[*1135]** patent activities." Compl. ¶¶ 55-58, 106-10. Inline claims that Graphic purposefully fails to disclose its intellectual property holdings by not marking its packaging with applicable patents. Id. ¶ 106. In so doing, Inline posits that Graphic baits its competitors into investing substantial resources into production efforts on products that Graphic has protected by patent. See id. In some cases, Inline alleges, "Graphic has waited until after such packaging has become commonplace in the market to apply for such patents, and then waited months or years after being issued such patents to threaten or bring an action against its competitors, despite prior knowledge of allegedly infringing competitor products in the marketplace." Id. ¶ 55.

The Complaint specifically identifies an occasion where Graphic stopped competing in a bidding process for a large susceptor food packaging supply contract in 2014. Id. ¶ 58. Instead of participating in the bidding process, Inline alleges that Graphic threatened Inline **[**32]** with litigation based on an undisclosed patent to foreclose Inline's ability to compete in the market. Id.

Graphic moves to dismiss this theory of antitrust liability, identifying it as "a truly novel argument" and stating that it stands in stark contrast to Inline's sham litigation theory which faults Graphic for actively informing food packaging companies of its patents. Reply Mem. Supp. Mot. Dismiss [Docket No. 32] at 7 ("While Plaintiff's 'sham litigation' theory faults Graphic for informing customers about its patents, Plaintiff's 'submarine patent' theory does the exact opposite.").

The Court agrees with Graphic that this claim is illogical. ***HN17***[] Patent marking is not mandatory. See *35 U.S.C. § 287(a)* (stating a patentee "may give notice to the public that the same is patented") (emphasis added). Under *35 U.S.C. § 287(a)*, a patentee cannot recover damages "except on proof that the infringer was notified of the infringement and continued to infringe thereafter." Id. When a patentee does not mark a product, *§ 287(a)* requires actual notice "to assure that the recipient knew of the adverse patent during the period in which liability accrues, when constructive notice by marking is absent." *SRI Int'l, Inc. v. Adv. Tech. Labs., Inc., 127 F.3d 1462, 1470 (Fed. Cir. 1997)*. Thus, marking serves as an option for patentees **[**33]** to ensure that sufficient notice was provided which is required to recover damages for infringement. Inline cannot assert a cognizable antitrust theory based on Graphic's choice not to mark a product—a choice that is contemplated in patent law. Although, Inline argues that Graphic's decision to not mark patented products "has no pro-competitive benefits" and "no legitimate business purpose," these conclusory statements do not give rise to an antitrust claim. Given that Graphic is under no legal obligation to mark its products and Inline has provided no case law to support submarine patent theory as a viable antitrust theory, such claim is dismissed.

5. Antitrust Injury/Standing

In their last argument concerning the antitrust claims, Graphic argues that the claims fail because Inline has not adequately alleged facts to establish that it suffered an antitrust injury and, therefore, lacks standing. ***HN18***[] To properly assert an antitrust action, a plaintiff must have suffered an antitrust injury—an "injury of the type that the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *In re Canadian Import Antitrust Litig., 470 F.3d 785, 791 (8th Cir. 2006)* (quotation omitted). "[A]ntitrust injury is a threshold issue that plaintiffs **[**34]** must establish in order to have standing to sue **[*1136]** under the antitrust laws." *Fischer v. NWA, Inc. 883 F.2d 594, 597 n.5 (8th Cir. 1989)*. "[A] mere causal connection between an antitrust violation and harm to plaintiff cannot be the basis for antitrust compensation unless the injury is directly related to the harm the antitrust laws were designed to protect." *McDonald v. Johnson & Johnson, 722 F.2d 1370, 1374 (8th Cir. 1983)*.

Here, Inline has pled sufficient facts to demonstrate that it was injured by Graphic's anticompetitive behavior. Specifically, Inline alleges that it lost profits from sales not completed due to Graphic's interference/sham litigation tactics and lost profits from sales unrealized due to Graphic's bundled discounts. See Compl. ¶¶ 28, 41-43, 82, 87, 96, 99. At the pleading stage here, this is adequate. See *Fair Isaac Corp. v. Experian Info. Solutions Inc., 645 F. Supp. 2d 734, 748-49 (D. Minn. 2009)* (stating that although the plaintiffs' allegations that it "has been injured in its business and property" due to the defendants' antitrust violations were sufficient to survive a motion for judgment on the pleadings for lack of standing, more was needed at the summary judgment stage).

Graphic further challenges Inline's standing for failure to plead injury to competition. See Reply Mem. Supp. Mot. Dismiss at 7 ("The fact that [Inline] may have lost sales, however, does not mean that competition **[**35]** has been harmed."). ***HN19***[] Indeed, the interplay between injury-to-competition and direct injury to a plaintiff when evaluating antitrust standing is not always clear. "The two concepts are closely related, however, and the Eighth Circuit and decisions from this District largely conflate the two and incorporate an injury-to-competition requirement into the analysis of antitrust standing." *TheMLSonline.com. Inc. v. Regional Multiple Listing Serv. of Minn., Inc., 840 F. Supp. 2d 1174, 1180 (D. Minn. 2012)*. Regardless, the Complaint here contains numerous allegations of injury to competition sufficient to withstand a motion to dismiss.[3] See Compl. ¶¶ 28, 34, 51, 54, 80.

C. Tortious Interference

Inline also alleges that Graphic tortiously interfered with Inline's prospective and actual contractual relationships. **[**36]** ***HN20***[] To establish tortious interference with an existing contract under Minnesota law, a plaintiff must show: (1) the existence of a contract, (2) the defendant's knowledge of the contract, (3) the defendant's intentional procurement of the breach of contract, (4) the defendant acted without justification, and (5) damages. *Kjesbo v. Ricks, 517 N.W.2d 585, 588 (Minn. 1994)*. A claim for tortious interference with prospective economic advantage also has five elements: "(1) the existence of a reasonable expectation of economic advantage belonging to the plaintiff; (2) the defendant's knowledge of that expectation; (3) the defendant's wrongful interference with that expectation; (4) a reasonable probability that the plaintiff would have realized the expectation absent the defendant's conduct; and (5) damages." *Daum v. Planit Sols., Inc., 619 F. Supp. 2d 652, 658 (D. Minn. 2009)* (citations omitted). Liability for a tortious interference with prospective economic advantage **[*1137]** claim rests on whether the actor's conduct was improper. *Fox Sports Net N., L.L.C. v. Minn. Twins P'ship, 319 F.3d 329, 337 (8th Cir. 2003)* (citation omitted). "For purposes of this tort, improper means are those that are independently wrongful such as threats, violence, trespass, defamation, misrepresentation of fact, restraint of trade or any other wrongful act recognized by statute or common law." *Harman v. Heartland Food Co., 614 N.W.2d 236, 241 (Minn. Ct. App. 2000)* (quotation omitted). **[**37]**

Graphic argues that Inline's Complaint asserts only vague and conclusory allegations that are insufficient to state a claim for tortious interference. The Court disagrees. Inline has sufficiently alleged both the existence of a contract and a reasonable expectation of business relations. Furthermore, Inline has pled that Graphic interfered with these contracts or relations.

As to interference with an existing contract, Inline claims that in 2014 it was awarded contracts to supply 1.1 billion units of susceptor packaging products to a food company buyer. Compl. ¶ 41. Inline alleges that due to Graphic's interference with that contract (i.e., Graphic's threat to the food company buyer that it would file suit against Inline), only ten percent of the product order was actually filled. Id. Graphic challenges the sufficiency of these claims, arguing that Inline did not identify the food company supplier, allege the existence of an enforceable contract, Graphic's knowledge of the contract, that the reduction of orders was indeed a breach, and that Graphic caused this breach.

Graphic's argument ignores the language of the Complaint. Inline specifically alleges the existence of a contract. The **[**38]** Complaint states Inline was scheduled to supply 1.1 billion units of susceptor packaging and only ten percent of this amount was filled during "the pendency of the contracts." Id. The Complaint also references

[3] Graphic additionally argues that Inline lacks standing to assert antitrust claims based on threats and litigation directed at third-party manufacturers. See *Disenos Artisticos E. Industriales, S.A. v. Work, 676 F. Supp. 1254, 1286 (E.D.N.Y. 1987)* (stating that the defendant "has no standing to challenge allegedly coercive lawsuits brought against other parties"). The Complaint generally refers to sham litigation activities against "competitors" and "smaller rivals." Compl. ¶¶ 30, 31. The Court will resolve this ambiguity in Inline's favor and interpret such statements to be referring to Inline.

Graphic's knowledge of the contract, in that it alleges Graphic communicated with the food buyer that it "intended to sue Inline and therefore the food company buyer should not source the susceptor products from Inline." Id. Inline additionally clearly alleges Graphic's actions caused the reduction of orders. Id. ("Graphic's conduct led to Inline receiving orders for units of susceptor food packaging products far below the amounts agreed to."); Id. ¶ 129 ("Graphic intentionally caused Inline's customer to breach its agreements with Inline."). Although Inline did not identify the food company buyer by name, this is not fatal to Inline's claim. Inline's allegations are sufficiently detailed to put Graphic on adequate notice of the claim.

Finally, Graphic argues that Inline did not overtly claim that the reduction in orders constituted a breach of Inline's contract with the food company buyer. The Court finds that a breach can logically be inferred from the pleadings—Inline alleges **[**39]** a contract for 1.1 billion units of susceptor packaging, only ten percent of which was ultimately ordered. Moreover, later in the Complaint a breach is specifically alleged. See Id. ¶ 130 ("With full knowledge of those agreements, Graphic intentionally caused Inline's customer to breach its agreements with Inline."). Although the clarity of the Complaint could be improved, the Court reads the Complaint as a whole and the allegations here, taken together, are sufficient. See *Braden v. Wal-Mart Stores, Inc., 588 F.3d 585, 594 (8th Cir. 2009)* ("***HN21***[] [T]he complaint should be read as a whole, not parsed piece by piece.").

Additionally, Inline adequately alleges tortious interference with a prospective economic advantage. Inline references a potential business relationship with Nation Pizza Products. According to Inline, after it met with Nation **[*1138]** Pizza Products, Graphic communicated to Nation Pizza Products that it would sue Inline if Inline was awarded a contract. See Compl. ¶ 42. The Complaint later alleges that Inline had a reasonable expectation of economic advantage with food company buyers, Graphic was aware of this prospective economic advantage, and Graphic "intentionally, tortiously and illegally" interfered with Inline's expectations. Id. ¶¶ 122-24. Absent **[**40]** Graphic's conduct, Inline asserts "it was reasonably probable that Inline would have realized its expected economic advantage or benefit." Id. ¶ 125. Taking these assertions together, Inline sufficiently pled a claim for tortious interference with a prospective economic advantage sufficient to survive the motion to dismiss.

Graphic cites to *Select Comfort Corp. v. Sleep Better Store, LLC* to support its contention that Inline has failed to allege that Graphic's actions were improper or wrongful. *838 F. Supp. 2d 889 (D. Minn. 2012)*. In that case, Sleep Better asserted a counterclaim for tortious interference with a contract against its competitor Select Comfort. *Id. at 891*. The claim centered on Select Comfort sending a cease and desist letter for trademark infringement to Overstock.com regarding the sale of Sleep Better beds, when Overstock was contracted to sell Sleep Better mattresses on its website. *Id*. The court dismissed the claim on a motion to dismiss. *Id. at 893-96*. The court focused on the justification element of tortious interference—that is, whether Select Comfort was justified in sending the cease and desist letter to Overstock.com. *Id*. The court concluded that "there are no factual allegations in the pleadings to support any claims **[**41]** that Select Comfort acted with bad faith or employed improper means. Sleep Better's mere conclusory assertions that Select Comfort's conduct in sending the cease-and-desist letter was 'improper,' 'unjustified,' 'intentional,' and 'willful' do not create a plausible claim of bad faith." *Id. at 895-96*.

Select Comfort is distinguishable because here Inline alleges sufficient facts that Graphic engaged in improper conduct. Inline alleges Graphic's overtures to National Pizza and other food buyers were wrongful because Graphic threatened suit related to "invalid, expired, or inapplicable patents." Compl. ¶ 43. This stands in stark contrast to Select Comfort, where Sleep Better alleged no facts to support its contention that Select Comfort's cease and desist letter seeking to a protect a trademark was improper. "Ordinarily, whether interference is justified is an issue of fact, and the test is what is reasonable conduct under the circumstances." *Kjesbo, 517 N.W.2d at 588*. Discovery will assist in revealing if Graphic's interference was wrongful and unjustified in so far as it was based on clearly invalid or expired patents. At this stage of litigation, Inline's allegations survive. To the extent Graphic seeks to dismiss the tortious **[**42]** interference claim, the motion is denied.

D. Misappropriation of Trade Secrets

Finally, Graphic seeks dismissal of Inline's misappropriation of trade secrets claim (Count III). ***HN22***[] Under the Minnesota Uniform Trade Secrets Act, a trade secret is defined as information that: (1) is not generally known or readily ascertainable, (2) derives independent economic value from secrecy, and (3) is the subject of reasonable efforts to maintain its secrecy. *Minn. Stat. § 325C.01, subd. 5*. Misappropriation of a trade secret occurs when there is disclosure or use of a trade secret without express or implied consent by a person who, at the time of disclosure or use, knew that the utilization of the trade secret was acquired under circumstances **[*1139]** giving rise to a duty to maintain its secrecy or limit its use. Id., *subd. 3(ii)*.

Inline's pleadings for this claim are facially sufficient. Inline alleges that in 2008, Heinz, as the distributor of Weight Watchers' pizza, requested that Inline redesign a susceptor sheet for Weight Watchers' Smart Ones pizza. Compl. ¶ 53. Inline claims that it created a more efficient design, and shared the design with Heinz "under the condition that it remain confidential." Id. Inline alleges that Graphic copied **[**43]** this susceptor sheet design Inline had created for Heinz without Inline's permission. Id. Inline further claims that "Graphic knew or should have known that the design created by Inline, bearing its name, but provided by Heinz, was confidential and that Heinz owed a duty to Inline to maintain the design's secrecy and/or limit its use." Id.

Graphic contends that Inline's misappropriation of trade secrets claim is defective for multiple reasons. Graphic first argues the Complaint neglects to even allege the existence of a trade secret. Again, Graphic's argument misses the mark and attempts to rely on evidentiary failings prior to discovery. The Complaint generally alleges the design at issue comprising the trade secret—the susceptor sheet for Weight Watchers' Smart Ones pizza. See id. ¶ 53. The Complaint is vague for obvious reasons regarding the specifics of this design; a plaintiff is not required to divulge the explicit content of a trade secret in a complaint. As this Court has previously stated, ***HN23***[] "[i]n the context of pleading a claim for the misappropriation of trade secrets, a plaintiff is understandably hesitant to reveal the exact parameters of the trade secrets it believes have been **[**44]** misappropriated because a trade secret made public is not a secret." *TE Connectivity Networks, Inc. v. All Sys. Broadband, Inc., No. 13-1356, 2013 U.S. Dist. LEXIS 180392, 2013 WL 6827348, at *3 (D. Minn. 2013)* (citations omitted).

Graphic further maintains that Inline failed to allege any reasonable efforts it took to maintain the secrecy of its pattern or design. Graphic cites to several cases wherein misappropriation of trade secrets claims were dismissed at the summary judgment stage for lack of evidence that reasonable efforts were taken to maintain the confidentiality of a trade secret. See *Coyne's & Co., Inc. v. Enesco, LLC, No. 07-4095, 2010 U.S. Dist. LEXIS 83630, 2010 WL 3269977, at *16 (D. Minn. Aug. 16, 2010)* ("Coyne's submits no evidence of the steps it took to maintain confidentiality."); *RING Comput. Sys., Inc. v. ParaData Comput. Networks, Inc., No. C4-90-889, 1990 Minn. App. LEXIS 922, 1990 WL 132615, at *2 (Minn. Ct. App. Sept. 18, 1990)* ("[S]igning of a confidentiality agreement, without more, is not enough."). But this is not a motion for summary judgment. The Complaint specifically states that Inline shared the design with Heinz on the condition that it remain confidential, suggesting that Inline took reasonable efforts to maintain the secrecy of its Smart Ones design. The Complaint later generally alleges that the design "was the subject of efforts that were reasonable under the circumstances to maintain its secrecy." Compl. ¶ 134. Taken together, these pleadings rise above a conclusory level. The particulars **[**45]** of Inline's reasonable steps to ensure the secrecy of its Smart Ones design is a question to be explored during discovery.

Graphic lastly argues that Inline did not adequately allege that Graphic improperly acquired the trade secret, arguing that Inline's claims are exceedingly vague and potentially could assert a misappropriation of trade secrets claim against Heinz, but not Graphic. The Court finds the Complaint clear on this point. The Complaint states that in 2013 "Graphic began copying the packaging designed by **[*1140]** Inline for Heinz, without Inline's permission" and "Graphic knew or should have known that the design created by Inline, bearing its name, but provided by Heinz, was confidential." Id. ¶ 53. As noted above, misappropriation of a trade secret occurs when there is a use of a trade secret without consent by a person who, at the time of the use, knew that the trade secret was acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use. *Minn. Stat. § 325C.01, subd. 3(ii)*. Here, Inline alleges that Graphic utilized a trade secret (the Smart Ones susceptor packaging design) and at the time of use, knew that the design was given with an expectation of confidentiality from Heinz. Nothing **[**46]** more is required at this stage. Graphic's Motion to Dismiss the misappropriation of trade secrets claim is denied.[4]

IV. CONCLUSION

Based on the foregoing, and all the files, records and proceedings herein, **IT IS HEREBY ORDERED** that Defendant Graphic Packaging International, Inc.'s Motion to Dismiss [Docket No. 25] is **GRANTED in part** and **DENIED in part** as follows:

A. To the extent Graphic seeks dismissal of Inline's antitrust claims in Counts IV and V that are based on its submarine patent theory, the Motion is granted; and

B. In all other respects, the Motion is denied.

BY THE COURT:

/s/ Ann D. Montgomery

ANN D. MONTGOMERY

U.S. DISTRICT JUDGE

Dated: February 23, 2016.

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[4] In a footnote to its opposition brief, Inline states that while the design for the Smart Ones pizza packaging would have become public once Heinz started utilizing it commercially, Graphic saved "valuable time" in developing a competing design by not waiting until the design became public. Additionally, the footnote states that Graphic's misappropriation caused Inline to "abandon an existing patent application for the design." Mem. Opp'n Mot. Dismiss at 9, n.4. In its reply memorandum, Graphic responds that these facts are fatal to Inline's claim because once information is disclosed in the patent application process, it becomes public and therefore can no longer be classified as a trade secret. Reply Supp. Mot. Dismiss at 9 (citing *B.E. Meyers & Co., Inc. v. United States, 47 Fed. Cl. 375, 378-79 (Fed. Cl. 2000))*. Although the existence of a patent application for the Smart Ones design may eventually be relevant in determining the existence of a trade secret, none of these facts are in the Complaint. On a motion to dismiss the Court is limited to the facts as asserted in the Complaint. The Court therefore will not consider these arguments at this time. **[**47]**

Salveson v. JP Morgan Chase & Co.

United States District Court for the Eastern District of New York

February 24, 2016, Decided; February 24, 2016, Filed

14-CV-3529 (MKB)

Reporter

166 F. Supp. 3d 242 *; 2016 U.S. Dist. LEXIS 22567 **

MELVIN SALVESON, EDWARD LAWRENCE, DIANNA LAWRENCE and WENDY M. ADAMS, on behalf of themselves and all others similarly situated, Plaintiffs, v. JP MORGAN CHASE & CO., J.P. MORGAN BANK, N.A., BANK OF AMERICA CORPORATION, BANK OF AMERICA N.A., CAPITAL ONE F.S.B., CAPITAL ONE FINANCIAL CORPORATION, CAPITAL ONE BANK, HSBC FINANCE CORPORATION, HSBC BANK USA, N.A., HSBC NORTH AMERICAN HOLDINGS, INC. and HSBC HOLDINGS, PLC, Defendants.

Subsequent History: Affirmed by *Salveson v. JP Morgan Chase & Co., 663 Fed. Appx. 71, 2016 U.S. App. LEXIS 18821 (2d Cir. N.Y., Oct. 17, 2016)*

Prior History: *Salveson v. Jp Morgan Chase & Co., 2014 U.S. Dist. LEXIS 203416 (E.D.N.Y., Sept. 26, 2014)*

Core Terms

cardholders, Card, antitrust, interchange, Cartwright Act, factors, allegations, purchasers, Network, reconsideration, consumers, reconsideration motion, issuing bank, merchants, damages, overlooked, Defendants', quotation, indirect, marks, motion to dismiss, state law claim, anticompetitive, anti trust law, highest court, antitrust claim, state law, acquiring, traceable, original jurisdiction

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Judges: MARGO K. BRODIE, United States District Judge.

Opinion by: MARGO K. BRODIE

Opinion

[*247] **MEMORANDUM & ORDER**

MARGO K. BRODIE, United States District Judge:

Plaintiffs Melvin Salveson, Edward Lawrence, Dianna Lawrence and Wendy M. Adams commenced this putative antitrust class action on December 16, 2013, in the United States District Court for the Northern District of California against Defendants, financial institutions who issue general purpose payment cards that consumers use to purchase goods and services, and the affiliates of such institutions.[1] On behalf of a putative nationwide class of consumers using payment cards issued by Defendants, Plaintiffs assert claims pursuant to *Sections 4* and *16 of the Clayton Act*, *15 U.S.C. §§ 15* and *26*, and pursuant to the Cartwright Act, *California Business and Professions Code § 16750(a)*. Defendants moved to dismiss all of Plaintiffs' claims, and by Memorandum **[**3]** and Order filed on November 26, 2014, the Court granted Defendants' motion (the "November 26, 2014 Decision").[2] The Clerk of Court entered judgment on December 4, 2014. (Dec. 4, 2014 J., Docket Entry No. 86.)

Plaintiffs now move to vacate the judgment and, pursuant to *Local Civil Rule 6.3*, for reconsideration of the dismissal of their federal claim. Defendants cross-move for reconsideration pursuant to *Rule 59(e) of the Federal Rules of Civil Procedure* and *Local Civil Rule 6.3*, seeking reconsideration of the Court's refusal to exercise supplemental jurisdiction over Plaintiffs' California state law claim. For the reasons set forth below, Plaintiffs' reconsideration motion is denied. The Court grants Defendants' reconsideration motion and, on reconsideration, dismisses **[**4]** Plaintiffs' state law claim.

I. Background

The Court assumes familiarity with the facts and procedural background as set forth in the November 26, 2014 Decision. (Nov. 26, 2014 Memorandum and Order ("M&O"), Docket Entry No. 83.) The Court summarizes only the pertinent facts.

According to Plaintiffs, in the course of issuing payment cards to consumers, Defendants and their affiliates knowingly participated in an anticompetitive conspiracy to fix fees related to those payment cards. (Compl. ¶¶ 26-29.) These fees are known as interchange fees. (*See id.* ¶¶ 40, 48.) Plaintiffs contend that consumers like Plaintiffs and the putative class used the payment cards to purchase goods and services and "paid supracompetitive [i]nterchange [f]ees to Defendants and their co-conspirators." (*Id.* ¶¶ 19-20.)

Plaintiffs allege that each time a consumer uses a payment card, the following sequence of events occur: the merchant accepts the payment card from the cardholder and relays the transaction information to the merchant's "acquiring bank"; the acquiring bank then transmits the transaction information to the payment card's network — either Visa or MasterCard; and the network then relays the transaction information to the **[**5]** cardholder's "issuing bank" for approval of the transaction. **[*248]** (*Id.* ¶ 49 (quoting *United States v. Visa U.S.A., Inc., 344 F.3d 229, 235 (2d Cir. 2003)*).) If the issuing bank determines the consumer has sufficient credit and approves the transaction, it conveys its approval to the acquiring bank and the acquiring bank then relays its approval to the merchant. (*See*

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[1] On June 4, 2014, the Clerk of Court for the Northern District of California entered a Transfer Order from the United States Judicial Panel on Multi District Litigation, transferring this case to the Eastern District of New York. (MDL Transfer Order, Docket Entry No. 61.)

[2] On December 18, 2014, the United States Judicial Panel on Multidistrict Litigation, with the consent of the Court, ordered that the case be reassigned from Judge John Gleeson to the undersigned. (Order Reassigning Litigation, Docket Entry No. 88.)

id.) Finally, the issuing bank — in this case, one of the Defendants — pays the acquiring bank an amount representing the price of the goods or services purchased by the consumer in the underlying transaction, less an "interchange fee," the fee at issue in this case. (*See id.*)

Plaintiffs allege that Defendants' participation in an anticompetitive conspiracy has injured cardholders by causing them to "pa[y] supracompetitive price-fixed [i]nterchange [f]ees to Defendants" that were higher "than [the fees] they would have paid in the absence of . . . antitrust violations" by Defendants. (*Id. ¶¶ 104-105*.) Plaintiffs contend that a cardholder "pays the gross amount of the transaction, including fees, directly to the [issuing bank], which keeps the [i]nterchang [f]ee and passes on a separate transaction fee to the [acquiring bank] and the net amount to the merchant via the Visa or MasterCard network." (*Id. ¶ 38*.) According to Plaintiffs, the **[**6]** interchange fee is paid "directly" by the cardholders. (*Id. ¶ 6*.) Plaintiffs specifically allege that the initial payment in the transaction is made by cardholders, that the issuing bank "keep[s]" the interchange fee from that payment, and that the payments made by cardholders are "comprise[d]" of the "balance" due to the merchant plus the interchange fee and other fees. (*Id.* ¶¶ 47-48, 81.)

II. Discussion

a. Standards of review

i. Reconsideration

The standard for granting a motion for reconsideration is strict, and "[r]econsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked — matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." *Cedar Petrochemicals, Inc. v. Dongbu Hannong Chem. Co., 628 Fed. Appx. 793, 796, 2015 U.S. App. LEXIS 18008, 2015 WL 5999215, at *3 (2d Cir. 2015)* (quoting *Shrader v. CSX Transp., Inc., 70 F.3d 255, 257 (2d Cir. 1995))*; *Bank of Am. Nat'l Ass'n v. AIG Fin. Prods. Corp., 509 F. App'x 24, 27 (2d Cir. 2013)* ("The standard for granting such a motion is strict . . . ." (quoting *Shrader, 70 F.3d at 257*)), *as amended* (Apr. 5, 2013); *see also* Local Civ. R. 6.3 (The moving party must "set[] forth concisely the matters or controlling decisions which counsel believes the Court has overlooked.").

It is thus "well-settled" that a motion for reconsideration is "not a vehicle for relitigating old issues, presenting the case under new theories, securing a rehearing on the merits, or otherwise taking a 'second bite **[**7]** at the apple.'" *Analytical Surveys, Inc. v. Tonga Partners, L.P., 684 F.3d 36, 52 (2d Cir. 2012)* (quoting *Sequa Corp. v. GBJ Corp., 156 F.3d 136, 144 (2d Cir. 1998))*, *as amended* (July 13, 2012). A motion for reconsideration is "neither an occasion for repeating old arguments previously rejected nor an opportunity for making new arguments that could have previously been made." *Simon v. Smith & Nephew, Inc., 18 F. Supp. 3d 423, 425 (S.D.N.Y. 2014)* (citation and internal quotation marks omitted). In order to prevail on a motion for reconsideration, "the moving party must demonstrate that the Court overlooked controlling decisions or factual matters that were put before the Court on the underlying motion." *Lichtenberg v. Besicorp Grp. Inc., 28 F. App'x 73, 75 (2d Cir. 2002)* (citations and internal quotation marks omitted); *see also* *Stoner v. Young **[*249]** Concert Artists, Inc,, No. 11-CV-7279, 2013 U.S. Dist. LEXIS 79112, 2013 WL 2425137, at *1 (S.D.N.Y. May 20, 2013)* ("A motion for reconsideration is an extraordinary remedy, and this Court will not reconsider issues already examined simply because a party is dissatisfied with the outcome of his case. To do otherwise would be a waste of judicial resources." (alteration, citations and internal quotation marks omitted)); *Henderson v. City of New York, No. 05-CV-2588, 2011 U.S. Dist. LEXIS 130350, 2011 WL 5513228, at *1 (E.D.N.Y. Nov. 10, 2011)* ("In order to have been 'overlooked,' the decisions or data in question must have been put before [the court] on the underlying motion . . . and which, had they been considered, might have reasonably altered the result before the court." (citations and internal quotation marks omitted)).

ii. Motion to dismiss for failure to state **[**8]** a claim

In reviewing a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a court must "accept all factual allegations in the complaint as true and draw inferences from those allegations in the light most favorable to the plaintiff." Tsirelman v. Daines, 794 F.3d 310, 313 (2d Cir. 2015) (quoting Jaghory v. N.Y. State Dep't of Educ., 131 F.3d 326, 329 (2d Cir. 1997)); *see also* Matson v. Bd. of Educ., 631 F.3d 57, 63 (2d Cir. 2011) (quoting Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 320 (2d Cir. 2009)). A complaint must plead "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). A claim is plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Matson, 631 F.3d at 63 (quoting Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)); *see also* Pension Ben. Guar. Corp. ex rel. St. Vincent Catholic Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc., 712 F.3d 705, 717-18 (2d Cir. 2013). Although all allegations contained in the complaint are assumed true, this principle is "inapplicable to legal conclusions" or "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements." Iqbal, 556 U.S. at 678.

b. Plaintiffs' motion for reconsideration of the dismissal of the federal claim

In the November 26, 2014 Decision, the Court granted Defendants' motion to dismiss the Complaint. The Court determined that Plaintiffs are indirect purchasers and therefore the dismissal of the federal claim was appropriate because the claim is barred by the rule set forth in Illinois Brick Company v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977), which denies standing to indirect purchasers' under Section 4 of the Clayton Act. (M&O 6-8.)

[9] i. The November 26, 2014 Decision**

The Court explained in the November 26, 2014 Decision that, pursuant to the Supreme Court decision in *Illinois Brick*, "indirect purchasers — individuals or entities that do not make purchases directly from the defendants alleged to have violated antitrust laws — do not have standing to sue under § 4 of the Clayton Act." (*Id.* at 5.) As the Court stated, "only direct purchasers have standing under § 4 of the Clayton Act to seek damages for antitrust violations." (*Id.* (internal quotation marks omitted) (quoting Delaware Valley Surgical Supply Inc. v. Johnson & Johnson, 523 F.3d 1116, 1120-21 (9th Cir. 2008)).) The Court further explained that the presumption against recovery for plaintiffs who are "not the immediate buyers from the alleged antitrust violations" includes cases "in which immediate buyers pass on 100 percent of their costs to their customers." **[*250]** (*Id.* (internal quotation marks omitted) (quoting Kansas v. Utilicorp United, Inc., 497 U.S. 199, 207-208, 110 S. Ct. 2807, 111 L. Ed. 2d 169 (1990)).)

The Court determined that Plaintiffs failed to allege that they are direct purchasers or that their federal claim came within an exception to the *Illinois Brick* doctrine. (*Id.* at 5-7.) The Court stated that Plaintiffs' allegations — including the allegation that the payments made by cardholders as part of each credit card transaction represented direct payments of the "supracompetitive" **[**10]** interchange fees to Defendants — were insufficient to plead that cardholders are direct purchasers with standing. (*Id.* at 6.)

ii. Plaintiffs' arguments in support of their reconsideration motion

In seeking reconsideration, Plaintiffs argue, in substance, that the Court overlooked the standard applicable to a motion to dismiss by failing to accept Plaintiffs' allegations as true. (Mem. in Support of Pls. Mot. ("Pls. Mem.") 4, Docket Entry No. 91.) Plaintiffs argue that, "[t]here is no question that the cardholders repeatedly alleged that they were the direct payors or purchasers" and that the allegation that cardholders pay the interchange fee is not only plausible but also "manifest and self-evident." (*Id.*) Plaintiffs further argue that the Court overlooked their pleadings as to the role of cardholders in the payment transactions containing the interchange fee.[3] (*Id.* ("[T]his Court explained the structure of the network. . . . Although the [C]ourt included the so-called 'issuing bank,' the 'acquiring bank,' and the merchant, the cardholder consumer was omitted.").)

iii. Plaintiffs fail to satisfy the standard for reconsideration [12]**

The Court neither overlooked Plaintiffs' allegations that the interchange fees are paid directly by cardholders nor ignored the obligation to credit Plaintiffs' factual allegations. Because Plaintiffs have not shown (1) that the Court overlooked critical facts or (2) that the Court overlooked any relevant controlling decisions, there is no basis for the Court to reconsider the dismissal of Plaintiffs' federal law claim for failure to state a claim. *See* *Shrader, 70 F.3d at 257* (holding that a party seeking reconsideration must identify overlooked "controlling decisions or data"); *Analytical Surveys, 684 F.3d at 52* (explaining that a motion for reconsideration is not a vehicle for relitigation of issues already addressed by the court); *Akil Bey v. City of New York, No. 13-CV-9103, 2015 U.S. Dist. LEXIS 123763, 2015 WL 5473155, at *1 (S.D.N.Y. Sept. 16, 2015)* (construing plaintiff's motion for relief **[*251]** from court's order as a motion for reconsideration).

In the Complaint, Plaintiffs quote *United States v. Visa U.S.A., Inc., 344 F.3d 229 (2d Cir. 2003)*, in describing the structure of the transactions giving rise to the incursion and payment of the interchange fee. (Compl. ¶ 48.) Plaintiffs specifically quote a portion of the Second Circuit decision stating "[w]hereas in the market for general purpose *cards*, the issuers are the sellers, and cardholders are the buyers, in the market for general purpose card *network services*, the four networks **[**13]** themselves are the sellers, and the issuers of cards and merchants are the buyers." [4] (*Id. ¶ 48* (quoting *Visa U.S.A., 344 F.3d at 239*).) Thus, based on the allegations, Plaintiffs recognize that there is a distinction between two markets: one for payment cards (the "Payment Card Market"), in which consumers participate by purchasing cards from issuing banks, and another for network services (the "Card Network Services Market"), in which merchants purchase services to facilitate the use of those cards. Plaintiffs also allege that the interchange fee is exchanged between financial institutions in the Card Network Services Market. (*Id. ¶ 48*.) In rejecting their claim, the Court determined that Plaintiffs' "facile contention that cardholders pay interchange fees directly is refuted by their own allegations about how transactions over these two networks occur"

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[3] In support of their argument that cardholders directly pay interchange fees, Plaintiffs file a declaration and exhibits in support of their motion. (Decl. of Joseph M. Alioto **[**11]** , Docket Entry No. 92; *see also* Pls. Reply 1, Docket Entry No. 103 (arguing that the "dispositive charts" in the exhibits "showed that the cardholder paid the money, which included the interchange fee" and that the "charts also showed, in support of the plausibility of the allegations in [P]laintiffs' complaint, that the cardholder paid the issuing bank, which kept the interchange fee and passed on the remainder to the acquiring bank, which kept its fee and in turn passed on the remainder to the merchant").) The Court declines to consider these documents as they were not attached to the Complaint and were not otherwise before the Court when it decided Defendants' motion to dismiss, and, therefore, these documents are not properly before the Court on Plaintiffs' motion for reconsideration. *See* ***Drapkin v. Mafco Consol. Group, Inc., 818 F. Supp. 2d 678, 695 (S.D.N.Y. 2011)*** (explaining that a moving party seeking reconsideration may "not advance new facts, issues or arguments not previously presented to the Court" (internal quotation marks and citation omitted)). Moreover, *Local Civil Rule 6.3* specifies that on a motion for reconsideration "[n]o affidavits shall be filed by any party unless directed by the Court." *Local Civil Rule 6.3*.

[4] Plaintiffs selectively quote the Second Circuit's explanation in *United States v. Visa U.S.A., Inc., 344 F.3d 229 (2d Cir. 2003)* that, "in the market for general purpose [credit cards], the issuers are the sellers, and the cardholders are the buyers" to inaccurately plead that this phrase **[**14]** demonstrates that "the Second Circuit expressly held that Cardholders are 'direct purchasers' for antitrust purposes." (Compl. ¶ 50 (quoting *Visa U.S.A., 344 F.3d at 239*).) The *Visa U.S.A* decision contains no such holding. The standing of cardholders to bring antitrust claims, as direct or indirect purchasers, was not at issue in *Visa U.S.A*. In the phrase cited by Plaintiffs, the Second Circuit was explaining its determination that the district court had correctly found that the payment card networks "compete with one another in a market for 'network services.'" *Visa U.S.A., 344 F.3d at 239*. In doing so, the Second Circuit described that consumers are "buyers" of payment cards, not payers of interchange fees, and did so to provide an explanatory contrast. *Id.* (emphasis in original).

and that Plaintiffs' conclusory and contradictory pleadings did not plausibly allege that the cardholders are direct purchasers. (M&O 6-7.)

Plaintiffs argue that the Court failed to credit the allegations that cardholders are the direct payors of interchange fees and, in so doing, overlooked controlling law, namely the standard applicable to a motion to dismiss. Although the Court may not have expressly referenced the pleading standard in stating that Plaintiffs failed to allege that cardholders are direct purchasers, the Court's determination was based on its rejection of the direct purchaser allegations **[**15]** as conclusory, contradictory and insufficient to support an inference that cardholders are the payors of interchange fees. (*Id.* at 6-7.) "Although factual allegations of a complaint are normally accepted as true on a motion to dismiss, . . . that principle does not apply to general allegations that are contradicted 'by more specific allegations in the Complaint.'" DPWN Holdings (USA), Inc. v. United Air Lines, Inc., 747 F.3d 145, 151-52 (2d Cir. 2014) (citations omitted); *see also* Sherman v. Town of Chester, 752 F.3d 554, 568 n.5 (2d Cir. 2014) (declining to credit allegation that an appeal was timely filed where the complaint also "explicitly state[d]" contradictory allegations); Hirsch v. Arthur Andersen & Co., 72 F.3d 1085, 1095 (2d Cir. 1995) ("[T]he [c]omplaint's attenuated allegations of control are contradicted both by more specific allegations in **[*252]** the Complaint and by facts of which we may take judicial notice . . . .").

The Court accepted Plaintiffs' factual allegations and drew "all reasonable inferences in [P]laintiffs' favor." (M&O 5 (citing Sheppard v. Beerman, 18 F.3d 147, 150 (2d Cir. 1994)). However, the Court was not obligated to credit Plaintiffs' allegation that cardholders are the direct payors of interchange fees, as this allegation is directly contradicted by the specific allegations about the Payment Card and Card Services Markets and the transactions involving the interchange fee. DPWN Holdings, 747 F.3d at 152. The Court considered the applicable standard and determined that Plaintiffs' allegations **[**16]** did not permit a reasonable inference that cardholders are direct payors, given that such a conclusion is at odds with the allegations regarding the structure of the relevant transactions. (M&O 5); *see also* Matson, 631 F.3d at 63 (A claim is plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." (quoting Iqbal, 556 U.S. at 678)). Plaintiffs have not identified any controlling law that the Court overlooked.

Plaintiffs also argue that the Court specifically overlooked allegations that cardholders pay interchange fees directly by initiating the chain of events that occurs as part of each transaction. The Court considered and rejected this claim. *See, e.g.,* Boyd v. J.E. Robert Co., No. 05-CV-2455, 2013 U.S. Dist. LEXIS 140546, 2013 WL 5436969, at *2 (E.D.N.Y. Sept. 27, 2013) (denying reconsideration where "[p]laintiffs' motion . . . merely attempts to relitigate and rehash arguments already considered and rejected by the court"), *aff'd*, 765 F.3d 123 (2d Cir. 2014); PAB Aviation, Inc. v. United States, No. 98-CV-5952, 2000 U.S. Dist. LEXIS 12201, 2000 WL 1240196, at *1 (E.D.N.Y. Aug. 24, 2000) ("Because PAB's motion involves only reformulations of arguments already considered and rejected, reconsideration is not warranted."), *aff'd*, 169 F. App'x 61 (2d Cir. 2006). Plaintiffs disagree with the Court's outcome and are attempting to "relitigat[e] old issues," which is not a basis for reconsideration. *See* Analytical Surveys, 684 F.3d at 52.

Plaintiffs have failed to identify controlling **[**17]** law or allegations that the Court overlooked. The Court therefore declines to reconsider its determination that Plaintiffs are barred from asserting claims under § 4 of the Clayton Act by the *Illinois Brick* doctrine. Plaintiffs' reconsideration motion is denied.

c. Defendants' cross-motion for reconsideration of the state law claim

In the November 26, 2014 Decision, the Court declined to exercise supplemental jurisdiction over Plaintiffs' state law claim and dismissed the claim without prejudice. (M&O 8.) Defendants seek reconsideration of this determination, arguing that the Court overlooked the fact that it had original jurisdiction over Plaintiffs' state law claim pursuant to the Class Action Fairness Act, 28 U.S.C. § 1332(d), ("CAFA"), and that the Court should therefore have addressed the merits of the state law claim. (Defs. Opp'n & Mem. 5, Docket Entry No. 98.) Defendants further argue that on reconsideration of the underlying motion to dismiss, the Court should dismiss the Cartwright Act claim because Plaintiffs have failed to allege a cognizable antitrust injury. (*Id.* at 7-8.)

i. The Court's jurisdiction pursuant to *CAFA*

Defendants argue that *CAFA* provides the Court with original jurisdiction over Plaintiffs' **[**18]** Cartwright Act claim because the claim is asserted on behalf of a nationwide class against diverse Defendants and the damages sought are sufficient that "no permissive or mandatory **[*253]** exceptions apply." (*Id.* at 5.) Plaintiffs oppose Defendants' motion primarily by arguing against the dismissal of the state law claim on the merits. (Pls. Mem in Opp'n to Defs. Mot. ("Pls. Opp'n") 8-9, Docket Entry No. 104.) Plaintiffs do not address Defendants' argument that *CAFA* provides original jurisdiction over the state law claim. (*Id.* at 8.) Plaintiffs also fail to address the argument that because the Court overlooked this controlling law, there are grounds to reconsider Defendants' motion to dismiss. (*Id.*) Instead, Plaintiffs argue that "a federal court has discretion whether to entertain a supplemental state claim, after dismissing federal claims," and appear to argue that the Court should not exercise its discretion to exercise jurisdiction. (*Id.*)

CAFA provides federal district courts "with 'original jurisdiction' to hear a 'class action' if the class has more than 100 members, the parties are minimally diverse, and the 'matter in controversy exceeds the sum or value of $5,000,000.'" *Std. Fire Ins. Co. v. Knowles, 562 U.S. ___, ___, 133 S. Ct. 1345, 1348, 185 L. Ed. 2d 439 (2013)* (quoting *28 U.S.C. § 1332(d)(2)*, *(d)(5)(B)*); *see also* *Estate of Pew v. Cardarelli, 527 F.3d 25, 30 (2d Cir. 2008)* ("*CAFA* **[**19]** amends the diversity jurisdiction statute by adding *§ 1332(d)*, which confers original federal jurisdiction over any class action with minimal diversity (*e.g.*, where at least one plaintiff and one defendant are citizens of different states) and an aggregate amount in controversy of at least $5 million (exclusive of interest and costs).").

CAFA provides three exceptions to original jurisdiction: "the so-called 'local controversy,' 'home state controversy,' and 'interests of justice' exceptions." *Mattera v. Clear Channel Commc'ns, Inc., 239 F.R.D. 70, 77 (S.D.N.Y. 2006)*. The local controversy and home state exceptions to *CAFA* jurisdiction mandate that district courts decline jurisdiction if certain elements are present that identify a case with primarily in-state class members seeking relief principally for in-state harm by citizens of the same state.[5] *Id.* (citing *28 U.S.C. § 1332(d)(4)(A)* and *(d)(3)*); *see also* *Hart v. Rick's N.Y. Cabaret Int'l, Inc., 967 F. Supp. 2d 955, 962 (S.D.N.Y. 2014)* ("The mandatory exceptions are designed to draw a delicate balance between making a federal forum available to genuinely national litigation and allowing the state courts to retain cases when the controversy is strongly linked to that state. . . . [T]hese exceptions are intended to keep purely local matters and issues of particular state concern in the state courts." (internal quotation marks and **[**20]** citation omitted)). A district court may also, in the "interest of justice," decline jurisdiction after considering a set of factors "designed to address similar concerns regarding truly local controversies in cases where neither mandatory exception applies." *Sorrentino v. ASN Roosevelt Ctr., LLC, 588 F. Supp. 2d 350, 355 (E.D.N.Y. 2008)*; *see also* *Mattera, 239 F.R.D. at 77* (listing the statutory factors); *Hart, 967 F. Supp. 2d at 962-69* (finding that neither mandatory exception applied to class claims asserted under New York state law, and declining to invoke the interest of justice exception).

Plaintiffs allege that the Court has original jurisdiction over their state law claim pursuant to *section 1332(d)* and that the claim is asserted on behalf of a nationwide class against diverse Defendants, seeking damages in excess of $5,000,000. (Compl. ¶ 8.) While Plaintiffs do not expressly plead that the class would number more **[*254]** than 100 members, the parties appear to concede that a nationwide class of Visa and Mastercard cardholders would **[**21]** exceed 100 members. (*Id.* ¶¶ 1, 8.) Plaintiffs do not seek relief for primarily in-state class members to remedy in-state harm by citizens of the same state, and thus, the claim does not fall within either of the mandatory exceptions to *CAFA's* grant of original jurisdiction. *28 U.S.C. § 1332(d)(4)(A)*, *(d)(3)*. Neither party argues to the contrary. Finally, it is not in the interests of justice to consider declining jurisdiction, as it is apparent that Plaintiffs'

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[5] The local controversy and home state exceptions have distinct requirements, but both are similarly tailored to address claims involving in-state harms. Plaintiffs have not argued either of these exceptions, and it is clear that this is not a state or local issue, thus the exceptions are not applicable.

allegations relate to the nationwide practices of national financial institutions affecting consumers in every state, as opposed to allegations regarding to a "truly local" controversy. *Sorrentino, 588 F. Supp. 2d at 355*.

In declining to exercise supplemental jurisdiction in the November 26, 2014 Decision, the Court overlooked controlling law, specifically, *CAFA's* provision of original jurisdiction over the state law Cartwright Act claim. The Court therefore grants reconsideration of Defendants' motion to dismiss Plaintiffs' state law claim.

ii. Reconsideration of Defendants' motion to dismiss Plaintiffs' state law claim

Plaintiffs allege that Defendants violated California's Cartwright Act, which "enumerates a relatively broad array of anticompetitive and conspiratorial conduct" and "provides **[**22]** a private right of action to '[a]ny person who is injured in his or her business or property by reason of anything forbidden or declared unlawful by this chapter.'" (Compl. ¶ 112-121); *AT&T Mobility LLC v. AU Optronics Corp., 707 F.3d 1106, 1110 (9th Cir. 2013)* (quoting *Cal. Bus. & Prof. Code § 16720(a)*); *see also Knevelbaard Dairies v. Kraft Foods, Inc., 232 F.3d 979, 986 (9th Cir. 2000)* (The Cartwright Act "prohibits, among other things, any combination '[t]o prevent competition in [the] sale or purchase of . . . any commodity' or to '[a]gree in any manner to keep the price of . . . [any] commodity . . . at a fixed or graduated figure.'" (quoting *Cal. Bus. & Prof. Code § 16720(c)* and *(e)(2)*)); *Clayworth v. Pfizer, Inc., 49 Cal. 4th 758, 770, 111 Cal. Rptr. 3d 666, 233 P.3d 1066 (2010)* (stating that the Cartwright Act "authorizes anyone injured in his or her business or property by actions forbidden" by the statute to seek to recover treble damages (internal quotation marks and citation omitted)); *Asahi Kasei Pharma Corp. v. CoTherix, Inc., 204 Cal. App. 4th 1, 138 Cal. Rptr. 3d 620, 625 (Ct. App. 2012)* (explaining that the Cartwright Act "generally outlaws any combinations or agreements which restrain trade or competition or which fix or control prices" (citations omitted)). Stating a claim under the Cartwright Act requires a plaintiff to allege: "(1) the formation and operation of the conspiracy; (2) illegal acts done pursuant thereto; and (3) damage proximately caused by such acts." *In re High-Tech Employee Antitrust Litig., 856 F. Supp. 2d 1103, 1126 (N.D. Cal. 2012)* (internal quotation marks omitted) (quoting *Kolling v. Dow Jones & Co., 137 Cal. App. 3d 709, 187 Cal. Rptr. 797, 803 (Ct. App. 1982)*; *Asahi, 138 Cal. Rptr. 3d at 626-27* (same).

1. Standing to recover as direct purchasers

Defendants move to dismiss Plaintiffs' **[**23]** Cartwright Act claim, arguing that Plaintiffs have failed to adequately plead an antitrust injury and thus lack standing to recover. (Defs. Not. of Mot. and Mem in Support of Mot. to Dismiss ("Defs. MTD") 12-18, Docket Entry No. 38.) As with the federal claim, Plaintiffs' state law claim is based on allegations that cardholders are the direct payors of interchange fees that were inflated through anti-competitive behavior. (*See, e.g.*, Compl. ¶ 114 (alleging that Defendants with their co-conspirators **[*255]** have acted "to create or carry out restriction of commerce and restraints of trade by agreeing to fix high non-competitive . . . [i]nterchange [f]ees imposed on [c]ardholders in the Visa and MasterCard networks"); *id. ¶ 115* (stating that Defendants "engaged in a California-based horizontal scheme to fix [i]nterchange [f]ees paid by [c]ardholders").) The Complaint alleges that the named Plaintiffs have "been injured by being forced to pay higher [i]nterchange [f]ees than they would pay in the absence of the price-fixing conspiracy alleged herein."[6] (*Id. ¶ 120*.)

Defendants contend that Plaintiffs lack standing to bring a Cartwright Act claim because Plaintiffs cannot satisfy the requirements for an antitrust injury as established by *Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)* ("*AGC* "). Defendants argue

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[6] Plaintiffs also allege that the anti-competitive conspiracy causes "increased retail prices for goods and services paid by [c]ardholders." (Compl. ¶ 101(h)). However, in response to Defendants' motion to dismiss, Plaintiffs expressly **[**24]** state that they plead an injury that is "not . . . damages from the inflated price of goods and services purchased from merchants." (Pls. Opp'n to Defs. MTD ("Pls. MTD Opp'n) 13, Docket Entry No. 52). Plaintiffs also state that construing the Complaint to allege price inflation "is a distortion of the allegations" because the Complaint "does not allege that Plaintiffs' damages are based on inflated costs to merchant which the merchants passed on the Plaintiffs by charging higher prices for goods and services." (*Id. at 14*.)

that Plaintiffs lack standing to recover because, according to Plaintiffs' pleadings, the alleged fixing of interchange fees only occurs in the Card Network Services Market, in which financial institutions provide services to facilitate card transactions, while cardholders participate only in the Payment Card Market, in which consumers purchase payment cards. (MTD Mem. 8.) Defendants argue that cardholders do not purchase network services or pay interchange fees and thus "any **[**25]** alleged downstream impact on the price of retail consumer goods is . . . derivative and too remote to confer standing under well-established antitrust standing principles." (Defs. Reply in Support of Defs. MTD ("MTD Reply") 2, Docket Entry No. 63.) Plaintiffs respond that they have pled a direct, rather than downstream, antitrust injury that confers standing and disagree that the *AGC* factors apply to the California claim, an argument presented for the first time in their motion for reconsideration. (Pls. MTD Opp'n 13; Pls. Cross Mot. Opp'n 3-4.)

A. Standard applicable to determining antitrust standing for a Cartwright Act claim

The Cartwright Act grants a private right of action to "[a]ny person who is injured in his or her business or property by reason of anything forbidden or declared unlawful by this chapter." *Calif. Bus. & Prof. Code § 16750(a)*. The *Clayton Act* uses similar language, entitling "[a]ny person who [is] injured in his business or property by reason of anything forbidden in the antitrust laws" to receive treble damages for those injuries. *15 U.S.C. § 15*; *see also Gatt Commc'ns, Inc. v. PMC Assocs., L.L.C., 711 F.3d 68, 75 (2d Cir. 2013)*. The Supreme Court has explained that the federal statutory language is limited because "Congress did not intend the antitrust laws to provide a remedy in damages **[**26]** for all injuries that might conceivably be traced to an antitrust violation." *Gatt Commc'ns, 711 F.3d at 75* (quoting *AGC, 459 U.S. at 534*); *see also Knevelbaard, 232 F.3d at 987-92* ("The Supreme Court has held that Congress did not intend to afford a remedy to everyone injured by an antitrust violation simply on a showing of causation. The plaintiff must **[*256]** have 'antitrust standing.'" (citing *AGC, 459 U.S. at 534-35*)). Courts consider the following factors, identified in *AGC*, in order to determine whether a federal plaintiff has antitrust standing:

> [W]hether the plaintiff's alleged injury is of the type that the antitrust statute was intended to forestall; . . . the directness or indirectness of the asserted injury; . . . the extent to which the plaintiff's asserted damages are speculative; . . . the potential for duplicative recovery or complex apportionment of damages; . . . and the existence of more direct victims of the alleged conspiracy . . . .

Gatt Commc'ns, 711 F.3d at 76 (internal quotation marks and citations omitted) (quoting *AGC, 459 U.S. at 535, 542, 545)*; *see also Port Dock & Stone Corp. v. Oldcastle Ne., Inc., 507 F.3d 117, 121-22 (2d Cir. 2007)*. The Second Circuit has "distilled these factors into two imperatives": that an antitrust plaintiff allege (1) that "it suffered a special kind of 'antitrust injury,'" and (2) that "it is a suitable plaintiff to pursue the alleged antitrust violations and thus is an 'efficient enforcer' **[**27]** of the antitrust laws." *Gatt Commc'ns, 711 F.3d at 76* (citations omitted).

Consistent with standing more generally, "antitrust standing is a threshold, pleading-stage inquiry and when a complaint by its terms fails to establish this requirement," the claim must be dismissed as a matter of law. *Id. at 75* (internal quotation marks omitted) (quoting *NicSand, Inc. v. 3M Co., 507 F.3d 442, 450 (6th Cir. 2007)* (en banc)); *see also Port Dock, 507 F.3d at 121, 126-27* (dismissing *Clayton Act Section 4* claim for lack of antitrust standing); *Paycom Billing Servs., Inc. v. MasterCard Int'l, Inc., 467 F.3d 283, 290-95 (2d Cir. 2006)* (evaluating the suitability of an antitrust plaintiff by "efficient enforcer" factors, the second through fifth factors articulated in *AGC*). The importance assigned to these factors "will necessarily vary with the circumstances of particular cases." *Daniel, 428 F.3d at 443*.

Where a plaintiff asserts a state law antitrust claim, the "threshold question presented" is whether the *AGC* factors also apply to establish the antitrust injury. *In re Flash Memory Antitrust Litig., 643 F. Supp. 2d 1133, 1151 (N.D. Cal. 2009)*. In the absence of a clear rule provided by state law, federal courts analyzing "unsettled areas of state law" must "carefully predict how the state's highest court would resolve the uncertainties," so as to avoid "distort[ing] established state law." *Runner v. N.Y. Stock Exch., Inc., 568 F.3d 383, 386 (2d Cir. 2009)* (quoting *Travelers Ins. Co. v. Carpenter, 411 F.3d 323, 329 (2d Cir. 2005))*; *see also Empire City Capital Corp. v. Citibank, N.A., No. 10-CV-2601, 2011 U.S. Dist. LEXIS 110543, 2011 WL 4484453, at *2 (S.D.N.Y. Sept. 28, 2011)* (explaining that the court "construe[s] and appl[ies] state law as it believes the state's highest court would" (quoting *Liddle & Robinson, LLP v. Garrett, 720 F. Supp. 2d 417, 424 (S.D.N.Y. 2010))*.

In **[**28]** predicting how a state's highest court would resolve the issue, courts must "give the fullest weight to pronouncements of the state's highest court . . . while giving proper regard to relevant rulings of the state's lower courts." *Runner, 568 F.3d at 386* (quoting *Carpenter, 411 F.3d at 329*); *see also* *Reddington v. Staten Island Univ. Hosp., 511 F.3d 126, 133 (2d Cir. 2007)* (explaining that lower state court's decisions, while not "strictly" binding, may be "helpful indicators of how the [state's highest court] would decide" an issue), *certified question accepted*, *9 N.Y.3d 1020, 881 N.E.2d 214, 851 N.Y.S.2d 118*, *and certified question answered*, *11 N.Y.3d 80, 893 N.E.2d 120, 862 N.Y.S.2d 842 (2008)*; *New York v. Nat'l **[*257]** Serv. Indus., Inc., 460 F.3d 201, 210 (2d Cir. 2006)* ("[T]he judgment of an intermediate appellate state court 'is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.'" (quoting *Comm'r v. Estate of Bosch, 387 U.S. 456, 465, 87 S. Ct. 1776, 18 L. Ed. 2d 886 (1967))*); *Ryman v. Sears, Roebuck and Co., 505 F.3d 993, 994 (9th Cir. 2007)* (If "there is relevant precedent from the state's intermediate appellate court, the federal court must follow the state intermediate appellate court decision unless the federal court finds convincing evidence that the state's supreme court likely would not follow it."). While decisions of federal courts construing state law may also be considered, "no deference" is owed to a "district court's interpretation" of state law. *Reddington, 511 F.3d at 133*.

California's highest court **[**29]** has not directly addressed whether the *AGC* factors should be applied to determine whether a plaintiff has alleged antitrust injury under California law. *In re Flash Memory, 643 F. Supp. 2d at 1151-52*. The California Supreme Court has recently stated that "'[i]nterpretations of federal ***antitrust law*** are at most instructive, not conclusive, when construing the Cartwright Act, given that the Cartwright Act was modeled not on federal antitrust statutes but instead on statutes enacted by California's sister states around the turn of the 20th century.'"[7] *Aryeh v. Canon Bus. Solutions, Inc., 55 Cal. 4th 1185, 1195, 151 Cal. Rptr. 3d 827, 292 P.3d 871 (2013)*; *see also* *In re Cipro Cases I & II, 61 Cal. 4th 116, 142, 187 Cal. Rptr. 3d 632, 348 P.3d 845 (2015)*.

At least one California intermediate appellate court has applied the *AGC* factors to a state antitrust claim. *Vinci v. Waste Mgmt., Inc., 36 Cal. App. 4th 1811, 43 Cal. Rptr. 2d 337, 338-39 (Ct. App. 1995)*. This decision is due particular weight. *See* *Schoenefeld v. New York, 748 F.3d 464, 469 (2d Cir.)* (explaining that "the absence of authority from New York's highest court does not provide us license to disregard lower court rulings nor to analyze the question as though we were presented with a blank **[**31]** slate"), *certified question accepted*, *23 N.Y.3d 941, 987 N.Y.S.2d 593, 10 N.E.3d 1148 (2014) and certified question answered*, *25 N.Y.3d 22, 6 N.Y.S.3d 221, 29 N.E.3d 230 (2015)*; *Statharos v. N.Y. City Taxi & Limousine Comm'n, 198 F.3d 317, 321 (2d Cir. 1999)* ("[T]he ruling of an intermediate appellate state court **[*258]** . . . is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise." (internal quotation marks and citation omitted)). In *Vinci*, a California intermediate appellate court observed that "the Cartwright Act has objectives identical to the federal antitrust acts," and noted that, in the past, California courts construing the

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[7] Plaintiffs argue, for the first time in seeking reconsideration, that the application of the *AGC* factors to claims under the Cartwright Act is precluded by the California Supreme Court's decision in *Clayworth*. (Pl. Opp'n to Defs. Cross Mot. for Reconsideration ("Pls. Cross Mot. Opp'n"), 3-4, Docket Entry No. 104.) Plaintiffs argue that in *Clayworth*, the California Supreme Court "departed" from *AGC*'s "principles in interpreting the Cartwright Act." (*Id. at 3*.) Because Plaintiffs did not rely on this authority in their initial motion, they cannot do so on reconsideration. *Lichtenberg, 28 F. App'x at 75* (explaining that a Court on reconsideration considers only overlooked decisions "that were put before the Court on the underlying **[**30]** motion"). In any event, the issue addressed by the California Supreme Court in *Clayworth* is not before this Court. The issue in *Clayworth* involved the assertion of the so-called "pass-through defense" by alleged antitrust conspirators, who asserted that claims brought by manufacturers were barred because the manufacturers conceded that they had passed the cost of the direct antitrust injury on to their customers. *Clayworth, 49 Cal. 4th at 774*. In deciding the case, the California Supreme Court did not address antitrust standing or the sufficiency of an antitrust injury under the Cartwright Act. *Id.* (noting that *AGC* and *Vinci*, as cases that dealt with antitrust causation, have "nothing to say on the general topic that concerns us: when (as here) causation *has* been properly alleged, how are antitrust damages to be measured?" (first citing *AGC, 459 U.S. at 535*; and then citing *Vinci, 43 Cal. Rptr. 2d at 338*)).

Cartwright Act have looked to cases construing federal antitrust laws for guidance. Vinci, 43 Cal. Rptr. 2d at 338 n.1.

It is also instructive that the Ninth Circuit, although without explanation, has applied the *AGC* factors to an antitrust claim brought under the Cartwright Act. Knevelbaard, 232 F.3d at 987 (holding, after applying the *AGC* factors, that "all elements of antitrust standing are satisfied on the face of the present complaint"). However, despite applying the *AGC* factors, the Ninth Circuit has noted that, "California law grants antitrust standing more liberally than does federal law." Theme Promotions, Inc. v. News Am. FSI, 35 F. App'x 463, 466-67 (9th Cir. 2002) (citing Knevelbaard, 232 F.3d at 987) (reversing the dismissal of federal antitrust claims for failure to allege injury to competition and thus "also **[**32]** revers[ing] the dismissal of the broader, more liberal state antitrust claims"); *see also* In re ATM Fee Antitrust Litig., 686 F.3d 741 (9th Cir. 2012). In *Knevelbaard*, the Ninth Circuit applied the "directness of the injury" *AGC* factor and explained that the "extent to which antitrust injury is recognized under the Cartwright Act is enlarged, by statute, in comparison to federal law." Knevelbaard, 232 F.3d at 991 (As a result of the *Illinois Brock* repealer statute, "the more restrictive definition of 'antitrust injury' under federal law does not apply" to the Cartwright Act. (quoting Cellular Plus, Inc. v. Superior Court, 14 Cal. App. 4th 1224, 18 Cal. Rptr. 2d 308 (Cal. Ct. App. 1993))).

District courts presented with the issue of whether to apply the *AGC* factors in a Cartwright Act case have reached differing conclusions. *See* In re Dairy Farmers of Am., Inc. Cheese Antitrust Litig., No. 9-CV-3690, 2015 U.S. Dist. LEXIS 84152, 2015 WL 3988488, at *8 (N.D. Ill. June 29, 2015) (applying the *AGC* factors to antitrust claims brought under the Cartwright Act); In re Flash Memory, 643 F. Supp. 2d at 1151-52 (finding the *AGC* factors to be applicable to an analysis of antitrust standing for a Cartwright Act claim); In re TFT—LCD (Flat Panel) Antitrust Litig., 586 F. Supp. 2d 1109, 1120-24 (N.D. Cal. 2008) (stating that a clear directive from state legislature or high court was necessary to apply the *AGC* factors, but nevertheless finding that plaintiffs had standing by considering factors); In re Graphics Processing Units Antitrust Litig., 540 F. Supp. 2d 1085, 1097 (N.D. Cal. 2007) (declining to apply *AGC* because, while "some [state] appellate courts have used the *AGC* test," that **[**33]** "is not the same as showing that *AGC* has been adopted").

Giving the "fullest weight to pronouncements of the state's highest court," Runner, 568 F.3d at 386, and mindful that the California Supreme Court has not addressed whether the *AGC* factors may be applied to a Cartwright Act claim and has recently reiterated that federal law provides only guidance for state ***antitrust law***, Aryeh, 55 Cal. 4th at 1195, and because there is no California law contrary to the state appellate court's application of the *AGC* factors in Vinci, the Court applies the AGC factors to Plaintiffs' claim. The decision of both an intermediary court and the Ninth Circuit remain the best predictor of the state's highest court's action on the issue, and the Court is not "convinced" to "disregard" this data by any other indication that "the highest court of the state would decide otherwise." Nat'l Serv. Indus., Inc., 460 F.3d at 210; *see also* In re Dairy Farmers, 2015 U.S. Dist. LEXIS 84152, 2015 WL 3988488, at *8 (applying **[*259]** *AGC* factors "mindful that . . . California's antitrust-standing provision is broader in some respects than federal antitrust-standing law because of California's repealer statute"); *but see* Los Gatos Mercantile, Inc. v. E.I. Dupont De Nemours & Co., No. 13-CV-01180, 2015 U.S. Dist. LEXIS 106292, 2015 WL 4755335, at *19 n.11 (N.D. Cal. Aug. 11, 2015) (concluding that the California Supreme Court "would not find rationale set forth in Vinci persuasive and would not apply *AGC*" given "repeated instruction that federal **[**34]** ***antitrust law*** does not control interpretation of the Cartwright Act"); In re Capacitors Antitrust Litig., 106 F. Supp. 3d 1051, 2015 WL 3398199, at *13 (N.D. Cal. 2015) ("The application of *AGC* to California state antitrust claims has recently become murky, and that murkiness persuades the Court *AGC* should not be applied.").

The Court finds that it is appropriate to apply the *AGC* factors in order to determine whether Plaintiffs have antitrust standing to assert their Cartwright Act claim and that the factors are "instructive, not conclusive." *See* Aryeh, 55 Cal. 4th at 1195. Consistent with the Ninth Circuit's approach in *Knevelbaard*, this Court will apply the *AGC* factors "liberally," and in concert with the broader antitrust standing requirements under California law, particularly with respect to the application of *AGC*'s second factor, the directness of the injury. *See* Knevelbaard, 232 F.3d at 985, 989 ("[F]ederal antitrust precedents are properly included in a Cartwright Act analysis, but their role is limited: they are 'often helpful' but not necessarily decisive." (quoting State of Cal. ex rel. Van de Kamp v. Texaco, Inc., 46 Cal. 3d 1147, 252 Cal. Rptr. 221, 762 P.2d 385, 395 (1988))).

B. Plaintiffs lack antitrust standing under the Cartwright Act as direct purchasers

The Court now applies the *AGC* factors to determine whether Plaintiffs have antitrust standing to assert a claim pursuant to the Cartwright Act. The factors for determining "whether a plaintiff **[**35]** who has borne an injury has antitrust standing" are: "(1) the nature of the plaintiff's alleged injury, (2) the directness of the injury, (3) the speculative nature of the harm, (4) the risk of duplicative recovery and (5) the complexity in apportioning damages." *Abbouds' McDonald's LLC v. McDonald's Corp., No. 05-CV-36032, 2006 U.S. App. LEXIS 17187, 2006 WL 1877247, at *1 (9th Cir. July 7, 2006)* (citing *AGC, 459 U.S. at 535-37*); *see also* *Vinci, 43 Cal. Rptr. 2d at 339* ("The factors identified by the court which favor a finding that the plaintiff is a proper party include the following: (1) the existence of an antitrust violation with resulting harm to the plaintiff; (2) an injury of a type which the antitrust laws were designed to redress; (3) a direct causal connection between the asserted injury and the alleged restraint of trade; (4) the absence of more direct victims so that the denial of standing would leave a significant antitrust violation unremedied; and (5) the lack of a potential for double recovery.").

(1) The nature of Plaintiffs' injury

The first *AGC* factor considers whether the nature of the injury asserted by a plaintiff is "the type the antitrust laws were intended to forestall." *Knevelbaard, 232 F.3d at 987* (quoting *Am. Ad Mgmt., Inc. v. Gen. Tel. Co., 190 F.3d 1051, 1055 (9th Cir. 1999))*. The Ninth Circuit has "identif[ied] four requirements that must be met in order to conclude that there is antitrust injury: (1) unlawful conduct, (2) causing an injury to the **[**36]** plaintiff, (3) that flows from that which makes the conduct unlawful, and (4) that is of the type the antitrust laws were intended to prevent." *Id.* (quoting *Am. Ad Mgmt., 190 F.3d at 1055*). "The requirement that the alleged injury be related to anti-competitive behavior requires, *as a corollary*, that the **[*260]** injured party be a participant in the same market as the alleged malefactors." *In re Flash Memory, 643 F. Supp. 2d at 1153* (internal quotation marks and citation omitted) (quoting *Bhan v. NME Hospitals, Inc., 772 F.2d 1467, 1470 (9th Cir. 1985))*; *see also* *AGC, 459 U.S. at 539* (dismissing claim asserted where plaintiff "was neither a consumer nor a competitor in the market in which trade was restrained"); *Vinci, 36 Cal. App. 4th at 1816* (dismissing for lack of antitrust standing because "plaintiff was neither a consumer nor a competitor in the market in which trade was restrained"); *Tanaka v. Univ. of Southern Cal., 252 F.3d 1059, 1063 (9th Cir. 2001)* (explaining that the anticompetitive effects must be felt in the "relevant market"); *In re Dynamic Random Access Memory (Dram) Antitrust Litig., 516 F. Supp. 2d 1072, 1090 (N.D. Cal. 2007)* (dismissing antitrust claims asserted by plaintiffs who were "participants in separate, albeit related, markets").

Here, Plaintiffs allege that cardholders were injured by the "payment of inflated [i]nterchange [f]ees by payment cardholders to their [i]ssuer banks" and that cardholders pay interchange fees directly in the Payment Card Market "because *the cardholder is the first and only person who pays anything*." (Pls. MTD Opp'n 5.) **[**37]** Plaintiffs assert that "by extracting the price-fixed 'interchange fee' directly from the cardholder's account . . . and keeping it, the [i]ssuer bank inflicts injury and damage on the cardholder . . . within the [i]ssuer-cardholder market." (Pls. MTD Opp'n 7 (citing Compl. ¶¶ 49, 81).)

Defendants' central argument is that Plaintiffs "are not consumers, competitors, or participants in the allegedly restrained market," and that any unlawful conduct by Defendants was not directed at Plaintiffs. (Defs. MTD 7 (citing *Eagle v. Star-Kist Foods, Inc., 812 F.2d 538, 539-43 (9th Cir. 1987)* (affirming a district court determination that plaintiffs failed to satisfy the first *AGC* factor because they were "neither consumers nor competitors in the relevant market" and "because the alleged anticompetitive conduct was directed" at a party other than the plaintiffs)).) In *Eagle*, fishing boat employees and their union sued their employer for its allegedly anticompetitive behavior in the market to buy and sell fish, arguing that the employer's conspiracy to set artificially low prices for tuna reduced their wages and, ultimately, the dues paid to their union. *Eagle, 812 F.2d at 539*. The Ninth Circuit held that the crewmembers lacked standing because, as non-parties to their employer's agreements to sell **[**38]** the fish, they were not participants in the relevant market as either consumers or competitors and the employer's conduct was "directed at the vessel owners, not the crewmembers or the union." *Id. at 541*.

According to Defendants, Plaintiffs "blur the definition of the relevant market" to obscure the distinction between the Payment Card Market, in which cardholders participate, and the Card Network Services Market, in which the interchange fee is paid between financial institutions. (*Id. at 8* (citing Compl. ¶ 94 (alleging that "Visa and MasterCard general purpose Credit cards and Debit cards and Visa and MasterCard credit card network services and Debit card network services are the relevant markets")).) Defendants argue that Plaintiffs fail to allege any participation by cardholders in the Card Network Services Market or any anticompetitive conduct in the Payment Card Market and thus, like the fishing boat employees in *Eagle*, there was no anticompetitive conduct directed at Plaintiffs. (*Id.*)

In attempting to characterize the allegedly anticompetitive conduct of the issuing banks as being directed at cardholders, **[*261]** Plaintiffs emphasize that cardholders are in privity with issuing banks in the Payment Card **[**39]** Market. For example, Plaintiffs argue that Defendants' reliance on *Eagle* is misplaced and the facts are distinguishable because, "unlike cardholders" who do have a contractual relationship with the issuing banks, the fishing boat employees were "not parties to their employer's . . . agreement" to sell fish. (Pls. MTD Opp'n 8 (citing *Eagle, 812 F.2d at 539*).) In *Eagle*, the fishing boat employees had a contractual relationship with their employer in a separate and distinct market for the fishing services provided by the fishing boat employees, but were nevertheless not parties to the agreement relevant to the anticompetitive behavior. *Eagle, 812 F.2d at 539*. The same is true here. Plaintiffs allege in the Complaint that cardholders "participate in the . . . card market in that they are issued payment cards" rather than in the Card Network Services Market, which facilitates the purchases of goods and services when cardholders use their payment cards to obtain goods and services from merchants. (Compl. ¶ 81.) Although cardholders and issuing banks transact in the Payment Card Market, that is insufficient to overcome the fact that the allegedly anticompetitive interchange fee is set and paid between financial institutions in the **[**40]** Card Network Services Market, not between issuing banks and cardholders in the Payment Card Market.

Plaintiffs also argue that the Ninth Circuit's decision in *Knevelbaard*, where the court found sufficient antitrust injuries despite conduct by the defendants across multiple relevant markets, supports a finding of sufficient injuries here. (Pls. MTD Opp'n 9 (citing *Knevelbaard, 232 F.3d at 987*).) Plaintiffs' reliance on *Knevelbaard* is misplaced. In *Knevelbaard*, the milk-seller plaintiffs asserted a claim against milk-buyer defendants, who the plaintiffs alleged had rigged the price of bulk cheese with the direct effect of creating "artificially depressed milk prices." *Knevelbaard, 232 F.3d at 987-88*. The Ninth Circuit concluded that the defendants' actions in the market for bulk cheese caused economic loss to the plaintiffs in the related market for milk, in which the defendants both participated and sought to fix prices. *Id. at 989* ("[T]he complaint's allegations unmistakably place all parties in the milk market — the defendants as buyers and the plaintiffs as sellers — and even have them transacting business with each other."). Unlike the milk seller plaintiffs in *Knevelbaard*, Plaintiffs have not alleged that issuing banks directed anticompetitive fees at **[**41]** cardholders in the Payment Card Market or that cardholders suffered any resulting economic harm when issuing banks "kept" the interchange fee charged within the Card Network Services Market. Although conduct across multiple markets may result in an antitrust injury, Plaintiffs have not alleged such injury.

Plaintiffs further argue that cardholders suffer an injury analogous to those experienced by purchasers at the low end of a distribution chain. (Pls. MTD Opp'n 9-10.) Plaintiffs argue that the Payment Card Market and the Card Network Services Market are "inextricably linked" because "without the card with its card number, the network is inoperable." (*Id. at 8*.) Plaintiffs contend that, because no transaction could take place without cardholders and their accounts, the interchange fees are sufficiently "traceable" to cardholders to provide antitrust standing, similar to damages that are passed along a distribution chain. (*Id. at 8-9*.) Plaintiffs argue repeatedly that the similarity between their injury and that of secondary purchasers renders the damages to cardholders traceable. (*Id. at 9* (first citing *In re Cathode Ray Tube (CRT) Antitrust Litig., 738 F. Supp. 2d 1011, 1024 (N.D. Cal. 2010)* (finding an alleged overcharge for cathode ray tubes significantly intertwined and traceable **[*262]** through market **[**42]** for televisions and computer monitors that contain cathode ray tubes); then citing *In re Flash Memory, 643 F. Supp. 2d at 1150-56* (finding antitrust injury across markets for NAND flash memory and finished products containing NAND flash memory); then citing *In re TFT-LCD, 586 F. Supp. 2d at 1123-24* (identifying traceable antitrust injury across market for TFT-LCD panels and market for finished products containing TFT-LCD panels); and then citing *In re Graphics Processing Units, 540 F. Supp. 2d at 1098-99* (finding an antitrust injury traceable from a market for GPUs through a market for computers that contain GPUs)).) Defendants contend that the "inextricably linked" exception to participating in the relevant market is a narrow one, and requires a plaintiff to suffer a direct injury. (Defs. MTD Reply 3.) Defendants argue that Plaintiffs have not alleged any injury, including one traceable to a secondary market. (*Id.*)

Plaintiffs have expressly alleged in the Complaint that cardholders are directly injured when interchange fees are assessed from the funds extracted from cardholders' accounts, and have disclaimed the allegation that the cost of supracompetitive interchange fees are passed onto cardholders through merchants. (Compl. ¶¶ 49, 81; *see also* Pls. MTD Opp'n 13-14; MTD Reply 5 (arguing that "plaintiffs expressly disavow reliance **[**43]** on an overcharge pass-through theory, or a claim that the prices they paid for goods and services were inflated at all").) As such, the cases Plaintiffs rely on to argue that their harm is traceable or similar to damages passed through a distribution change are inapposite.

With respect to demonstrating the presence of "unlawful conduct causing an injury to the plaintiff," *Knevelbaard, 232 F.3d at 987*, because Plaintiffs are "neither consumer[s] nor competitor[s] in the market in which trade was restrained," anticompetitive behavior by issuing banks within the Card Network Services Market was not directed at Plaintiffs, *AGC, 459 U.S. at 539*. Rather, cardholders are "consumer[s] of goods sold by merchants who happen to be part of the affected market." *Nass-Romero v. Visa U.S.A. Inc., 2012- NMCA 058, 279 P.3d 772, 778 (N.M. Ct. App. 2012)* (affirming dismissal of federal antitrust claims asserted by cardholders against Visa entities for lack of standing, including because cardholders are not in the restrained market)). Plaintiffs have failed to plead that anticompetitive behavior by Defendants, the issuing banks, was directed at cardholders or caused an economic injury to cardholders, and thus, have failed to allege an antitrust injury that satisfies the first *AGC* factor. The failure to satisfy this factor is grounds to dismiss Plaintiffs' claim. *See, e.g.,* ***[**44]*** *Crouch v. Crompton Corp., No. 02-CV-4375, 2004 NCBC LEXIS 6, 2004 WL 2414027, at *26 (N.C. Super. Ct. Oct. 26, 2004)* ("This factor alone would strongly support a finding of no standing . . . ."). The Court nevertheless addresses the additional factors.

(2) The directness of Plaintiffs' injury

To assess the directness of a plaintiff's injury, pursuant to the second *AGC* factor, the court "look[s] to the chain of causation between [plaintiff's] injury and the alleged restraint in the market." *Knevelbaard, 232 F.3d at 989* (internal quotation marks omitted) (quoting *Am. Ad Mgmt., 190 F.3d at 1058*). In *AGC*, the Supreme Court identified "two separate considerations" within the directness inquiry: "(1) the chain of causation alleged by the plaintiffs; and (2) the existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement." *In re Dairy Farmers of Am., Inc. Cheese Antitrust Litig., No. 09-CR-3690, 2013 U.S. Dist. LEXIS 119962, 2013 WL 4506000, at *12* ***[*263]*** *(N.D. Ill. Aug. 23, 2013)* (citing *AGC, 459 U.S. at 540-42*); *see also* *In re Refrigerant Compressors Antitrust Litig., 2013 U.S. Dist. LEXIS 50737, 2013 WL 1431756, at *14-15 (E.D. Mich. Apr. 9, 2013)* (explaining that the "causal nexus between the alleged conspiracy" and the alleged injury cannot be "too remote and attenuated" for it to provide antitrust standing"). However, as explained above, "[t]he extent to which antitrust injury is recognized under the Cartwright Act is enlarged, by statute, in comparison to federal law" because an action "may be brought by any person who is injured in his or her business or property by reason of anything **[**45]** forbidden or declared unlawful by this chapter, *regardless of whether such injured person dealt directly or indirectly with the defendant*." *Knevelbaard, 232 F.3d at 991* (internal quotation marks omitted) (quoting *Calif. Bus. & Prof. Code § 16750(a)*).

The parties' arguments with respect to the directness of the injury to Plaintiffs are the same as their arguments about the nature of the injury to Plaintiffs. Defendants contend that "any impact on Plaintiffs" through final consumer prices "would be at most derivative" of the effect on the Card Network Services Market. (Defs. MTD 9.) Plaintiffs assert that Defendants have misconstrued their allegations, and that the payment of the interchange fee from funds withdrawn from cardholders' accounts renders a direct injury to Plaintiffs. (Pls. MTD Opp'n 11.) Plaintiffs argue that the injury is directly incurred from issuing bank to cardholder, rather than passed along through the merchant and the cost of the good or service purchased by the cardholder. (*Id.*) Plaintiffs also reiterate their argument that their injuries are traceable and, thus, "adequate to show that there is a chain of causation between . . . allegedly anticompetitive conduct" and the injury to cardholders. (*Id.* (quoting *In re Flash Memory, 643 F. Supp. 2d at 1155*).)

When considering **[**46]** the application of the directness factor to a Cartwright Act claim, the Court is aware that California law allows recovery for antitrust injuries that result from a more attenuated and indirect causal chain than is permitted under federal law. *See* Knevelbaard, 232 F.3d at 989 (explaining the development of the Cartwright Act in response to *Illinois Brick*); In re Dairy Farmers, 2015 U.S. Dist. LEXIS 84152, 2015 WL 3988488, at *8 (explaining that "California's antitrust-standing provision is broader in some respects than federal antitrust-standing law because of California's repealer statute"). Plaintiffs' allegations are deficient, not because they fail to assert a direct injury, but because they fail to plead that the cardholders suffered any plausible economic injury. Although Plaintiffs argue that the interchange fee is paid from "the cardholder's account *first* before paying *the balance* to the acquirer bank and the merchant," their allegations also acknowledge that the amount withdrawn from a cardholder's account is due, in its entirety, to a merchant for goods or services, and thus there is no increased cost to cardholders from the interchange fee. (Pls. MTD Sur-Reply 2.) Plaintiffs concede that the amount withdrawn from the cardholder's account is the price to purchase the goods, **[**47]** rather than the price of the goods combined with a surcharge for any interchange fee. (Pls. MTD Opp'n 11.) The Court finds that Plaintiffs cannot satisfy the second *AGC* factor because, as explained above, the allegedly anticompetitive conduct of the issuing banks was not directed at cardholders and has not resulted in an injury for the Court to assess for its directness.

(3) Speculative nature of the harm, the risk of duplicative recovery, and the complexity in apportioning damages

The Court considers the final three *AGC* factors together, as they reflect overlapping concerns. Under the third factor, **[*264]** courts consider whether a plaintiff's damages are only speculative, in that "(1) the alleged injury was indirect; and (2) 'the alleged effects . . . may have been produced by independent factors.'" Am. Ad Mgmt., 190 F.3d at 1059 (quoting AGC, 459 U.S. at 542); *see also* Knevelbaard, 232 F.3d at 991 (Where "the alleged effects on the [plaintiff] may have been produced by independent factors, the [plaintiff's] damages claim" may also be "highly speculative."); Eagle, 812 F.2d at 542 (citing these considerations). As to the fourth factor, "[t]he risk to be avoided . . . is that potential plaintiffs may be in a 'position to assert conflicting claims to a common fund . . . thereby creating the danger **[**48]** of multiple liability.'" Am. Ad Mgmt., 190 F.3d at 1059 (quoting AGC, 459 U.S. at 544); *see also* Eagle, 812 F.2d at 542. Finally, the court considers whether, "if the plaintiff is allowed standing, any attempt to ascertain damages would lead to 'long and complicated proceedings involving massive evidence and complicated theories.'" Eagle, 812 F.2d at 543 (quoting AGC, 459 U.S. at 544).

Plaintiffs argue that merchants asserting claims arising from the same allegedly anticompetitive interchange fees "are not better positioned to assert injury to card holders as they are not direct payers" of the interchange fee, and thus the recovery to Plaintiffs is neither speculative nor complex to apportion. (Pls. MTD Opp'n 12.) Plaintiffs also argue that the injury is concrete and simple, and rely on their assertion that cardholders' injury need not be traced through inflated costs passed on by merchants. (*Id.* at 12-13.) Similarly, Plaintiffs state that because damages are "traceable by cardholder account number, there is no risk of duplicative recovery." (*Id.* at 13.) Defendants counter that other parties "are better positioned to bring these claims" and have an adequate economic motivation to do so, including both merchants and the acquiring banks who pay the interchange fees in the Card Network Services Market. (Defs. MTD 10.) **[**49]**

Assuming that there is harm to Plaintiffs caused by the interchange fees and also that it would be feasible to determine the amount of such harm, there remains a large and predictable risk of duplicative recovery against the issuing banks as well as the need for "long and complicated proceedings" to determine the damages due to cardholders and merchants. Eagle, 812 F.2d at 543. Plaintiffs do not address the certified class of merchants before the Court who have asserted essentially identical claims to Plaintiffs, and the fact that duplicative recovery — and thus the need to apportion damages — is not merely hypothetical. Thus, assuming an injury to cardholders, Plaintiffs have not shown that their claims can be litigated without expensive and duplicative efforts.

The Court finds that Plaintiffs have failed to assert a direct antitrust injury that confers standing to bring a claim under the Cartwright Act because Plaintiffs are not in the relevant market of the alleged antitrust conduct and because allowing such a claim would inevitably result in duplicative and expensive litigation.

2. Standing to recover as indirect purchasers

On reconsideration, Plaintiffs for the first time argue that the Court may decline **[**50]** to dismiss their state law claim on an alternative ground that cardholders are indirect purchasers. (Pls. Cross Mot. Opp'n 1-2.) In response, Defendants argue that "it is neither in dispute nor relevant" that California has "no *per se* bar against actions by indirect purchasers" because Plaintiffs have "never alleged that they were *indirect* purchasers" but rather have only alleged that cardholders are the *direct* payors of interchange fees. (Defs. **[*265]** Cross Mot. for Reconsideration Reply 2, Docket Entry No. 106.) Defendants also argue that Plaintiffs are not permitted to "amend [the] complaint through statements made in moving papers." (*Id. at 3* (quoting *Hernandez v. City of New York, No. 11-CV-3521, 2013 U.S. Dist. LEXIS 31793, 2013 WL 593450, at *4 n.5 (E.D.N.Y. Feb. 13, 2013)*).)

Arguments "raised for the first time in [a] motion for reconsideration" are "not properly presented to the district court" and, absent a reason to excuse the untimeliness, are waived by the party. *Phillips v. City of New York, 775 F.3d 538, 544 (2d Cir.)*, *cert. denied sub nom., Phillips v. City of New York, N.Y., 136 S. Ct. 104, 193 L. Ed. 2d 37 (2015)* (finding that a party had waived arguments based on documents obtained in discovery and asserted for the first time in a motion for reconsideration); *see also Harris v. Millington, 613 F. App'x 56, 57 (2d Cir. 2015)* ("We do not generally consider claims that were raised for the first time in a motion for reconsideration."); *Sompo Japan Ins. Co. of Am. v. Norfolk S. Ry. Co., 762 F.3d 165, 188 (2d Cir. 2014)* (declining to consider arguments raised without excuse **[**51]** for the first time on a motion to reconsider); *Official Comm. of Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP, 322 F.3d 147, 159 (2d Cir. 2003)* (explaining that the appeals court retains discretion to consider "issues not timely raised below," including those raised for the first time on reconsideration, particularly in instances where "(1) consideration of the issue is necessary to avoid manifest injustice or (2) the issue is purely legal and there is no need for additional factfinding"); *Goldberg v. UBS AG, 690 F. Supp. 2d 92, 98 (E.D.N.Y. 2010)* ("[B]y failing to timely raise such an argument during the briefing of its motion to dismiss, defendant waived its right to seek reconsideration of this point.").

In opposing Defendants' original motion to dismiss, Plaintiffs argued that cardholders satisfy the requirements for standing as direct purchasers. Plaintiffs stated that they "sue herein for direct payment by them to their issuer banks" of the allegedly *supra*-competitive price-fixed interchange fees. (Pls. MTD Opp'n 14.) Plaintiffs' only mention of indirect purchasers prior to their motion for reconsideration was in a passing reference to the fact that the Cartwright Act "contains an *Illinois Brick* repealer for indirect purchasers," not in connection with an argument by Plaintiffs that cardholders sought to recover as indirect purchases. **[**52]** (*Id. at 5*.) Plaintiffs now direct the Court's attention to cases concluding that the Cartwright Act is a so-called "Repealer Act," which, unlike federal antitrust statutes, provides standing to indirect purchasers to assert claims for antitrust injury. (Pls. June 22, 2015 Ltr 1, Docket Entry No. 109 (citing *In re Capacitors, 106 F. Supp. 3d 1051, 2015 WL 3398199, at *13)*).) These arguments are untimely and "not properly presented" to the Court, as they were not made prior to the motion for reconsideration. *Phillips, 775 F.3d at 544*. Plaintiffs have not presented any compelling excuse for the untimeliness of this argument, and the Court therefore declines to consider whether cardholders could have standing to assert antitrust claims as indirect purchasers.

III. Conclusion

For the foregoing reasons, the Court denies Plaintiffs' motion for reconsideration. The Court grants Defendants' cross-motion for reconsideration, and, on reconsideration, dismisses Plaintiffs' claim under the Cartwright Act.

SO ORDERED:

/s/ MKB

MARGO K. BRODIE

United States District Judge

Dated: February 24, 2016

Brooklyn, New York

Am. Steel Erectors, Inc. v. Local Union No. 7, Int'l Ass'n of Bridge

United States Court of Appeals for the First Circuit

February 25, 2016, Decided

Nos. 13-1531, 13-1665, 13-1705, 13-1714

Reporter

815 F.3d 43 *; 2016 U.S. App. LEXIS 3386 **; 205 L.R.R.M. 3558; 166 Lab. Cas. (CCH) P10,863; 26 Wage & Hour Cas. 2d (BNA) 169; 2016-1 Trade Reg. Rep. (CCH) P79,517

AMERICAN STEEL ERECTORS, INC.; AJAX CONSTRUCTION COMPANY, INC.; AMERICAN AERIAL SERVICES, INC.; BEDFORD IRONWORKS, INC.; AND D.F.M. INDUSTRIES, INC., Plaintiffs-Appellants/Cross-Appellees, RONALD BEAUREGARD, D/B/A INDEPENDENT WELDING SERVICES INDUSTRIES, INC., Plaintiffs, v. LOCAL UNION NO. 7, INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL & REINFORCING IRON WORKERS, Defendant-Appellee/Cross-Appellant, CHARLES WRIGHT; STEEL ERECTION AND ORNAMENTAL IRON INDUSTRY ADVANCEMENT FUND, Defendants.

Prior History: [1]** APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS. Hon. Richard G. Stearns, U.S. District Judge.

Am. Steel Erectors, Inc. v. Local Union No. 7, Int'l Ass'n of Bridge, 932 F. Supp. 2d 240, 2013 U.S. Dist. LEXIS 41489 (D. Mass., 2013)

Core Terms

erector, fabricator, signatory, steel, nonunion, general contractor, plaintiffs', bids, site, subcontract, costs, vertical, district court, antitrust, erection, laborers, horizontal, replacement, damages, antitrust claim, exemption, anticompetitive, picketing, pricing, target, antitrust liability, group boycott, job site, conspiracy, summary judgment

LexisNexis® Headnotes

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

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

The appellate court reviews the merits de novo and considers all trial evidence in the light most favorable to the plaintiffs.

Labor & Employment Law > ... > Unfair Labor Practices > Union Violations > Secondary Activities

HN2[] **Union Violations, Secondary Activities**

The Labor Management Relations Act, *29 U.S.C.S. § 187*, extends a private right of action to those injured in business or property by reason of certain unlawful union practices proscribed by the National Labor Relations Act (NLRA). As explained in ASE I, § 8(b)(4)(ii) of the NLRA, *29 U.S.C.S. § 158(b)(4)(ii)(A)* and *(B)*, makes it an unfair labor practice for a union to threaten, coerce, or restrain an employer with an object of forcing the employer to enter into an agreement prohibited by § 8(e) of the NLRA, or to cease doing business with another party. An illegal § 8(e) agreement is, in turn, defined in part as an agreement by an employer to cease doing business with any other person. *29 U.S.C.S. § 158(e)*. In other words, a union may incur liability under (B) of § 8(b)(4)(ii) if it coerces an employer to cease doing business with another party or under (A) of § 8(b)(4)(ii) if it coerces an employer to enter into an agreement to cease doing business with another party. Such an agreement can be express or implied and it need not be of a generalized exclusionary nature to fall afoul of § 8(e); rather, the use of coercive measures by a union to pressure a single neutral employer into a single agreement to cease doing business with a single non-union employer, or the application of such measures on a project-by-project basis" is sufficient to find liability.

Labor & Employment Law > ... > Unfair Labor Practices > Union Violations > Secondary Activities

HN3[] **Union Violations, Secondary Activities**

A neutral employer's mere decision to acquiesce to a union's unlawful coercion and cut ties with the nonunion party is not, standing alone, sufficient to imply the existence of a § 8(e), *29 U.S.C.S. § 158(e)*, agreement and incur liability under subparagraph A. Such an interpretation would allow subparagraph B to swallow subparagraph A whole.

Civil Procedure > ... > Standards of Review > Substantial Evidence > Sufficiency of Evidence

HN4[] **Substantial Evidence, Sufficiency of Evidence**

Although the appellate court must ensure that the judgment rests upon more than conjecture and speculation or a mere scintilla of evidence, it is mindful that it is not the appellate court's role to assess witness credibility, resolve evidentiary conflicts, or weigh the evidence.

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

Evidence > Inferences & Presumptions > Inferences

Civil Procedure > ... > Standards of Review > Substantial Evidence > Sufficiency of Evidence

HN5[] **Jury Trials, Province of Court & Jury**

The appellate court's repeated and unwavering pronouncements of respect for a jury's credibility findings and rational inferences are not merely appellate flourishes or rote recitation.

Civil Procedure > ... > Discovery > Methods of Discovery > Depositions

Civil Procedure > ... > Methods of Discovery > Interrogatories > General Overview

HN6[] **Methods of Discovery, Depositions**

The mere mention of a name in a deposition or interrogatory is insufficient to satisfy *Fed. R. Civ. P. 26(a)(1)(A)(i)*, especially when the case involves an expansive record and a multitude of individuals.

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

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

Civil Procedure > ... > Jury Trials > Verdicts > General Overview

HN7[] **Standards of Review, Abuse of Discretion**

Great deference is accorded a jury's award of damages, and the district court's decision to abide by the award is reviewed for abuse of discretion. The jury is free to select the highest figures for which there is adequate evidentiary support, as long as the figure remains in the universe of acceptable awards. In the end, the appellate court will not disturb a jury's damages award unless it is grossly excessive, inordinate, shocking to the conscience of the court, or so high that it would be a denial of justice to permit it to stand.

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

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

HN8[] **Sherman Act, Scope**

The Sherman Act, *15 U.S.C.S. § 1 et seq.*, protects against unlawful impairments to competition, not to individual competitors. If a party drives down the cost of its products in the hopes of pummeling a less-efficient competitor into submission, a court does not permit the competitor to reach for relief through an antitrust claim. Doing so would thwart the very purposes of the antitrust laws: encouraging efficiency, lowering costs, and increasing output. As such, claims under the Sherman Act require care because overly interventionist enforcement could backfire and dampen the competitive spirit that the laws were intended to foster and protect.

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

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

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

HN9[] **Scope, Monopolization Offenses**

The Sherman Act, *15 U.S.C.S. § 1*, prohibits unreasonable restraints of trade or commerce through contracts, combinations, or conspiracies; it thus applies only to concerted action that unreasonably restrains trade. *15 U.S.C.S. § 2* forbids monopolization, attempted monopolization, and conspiracies to monopolize any part of trade or commerce. The latter covers both concerted and independent action which monopolizes or threatens actual monopolization, a category that is narrower than restraint of trade. In evaluating such claims under the Sherman Act, one of the first considerations a court faces is determining the appropriate framework for its review: per se, quick look, or rule of reason. Admittedly, this decision requires putting the cart before the horse to some extent, since the court must engage with the functional and factual contents of the claim in order to decide how it will proceed to evaluate that claim.

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

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

HN10[] **Per Se Rule & Rule of Reason, Sherman Act**

Under the Sherman Act, *15 U.S.C.S. § 1*, certain kinds of agreements will so often prove so harmful to competition and so rarely prove justified that the antitrust laws do not require proof that an agreement of that kind is, in fact, anticompetitive in the particular circumstances. An agreement of such a kind is unlawful per se. When faced with an agreement of that rare species, such as a horizontal price-fixing or a market-division agreement, the plaintiffs can demonstrate *§ 1* liability without need for proof of power, intent or impact. Only those restraints that would always or almost always tend to restrict competition and decrease output, or those with manifestly anticompetitive effects and that lack any redeeming virtue, may be deemed per se illegal.

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

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

HN11[] **Per Se Rule & Rule of Reason, Sherman Act**

If the agreement in question does not quite fit the bill of per se liability, but nonetheless would seem to have an anticompetitive effect on customers and markets to an observer with even a mere rudimentary understanding of economics, the district court might opt to take a quick look at preliminary evidence. Under that purgatorial standard, the agreement is not subject to immediate per se condemnation and may yet ascend to a full rule-of-reason review. Quick-look analysis in effect shifts to a defendant the burden to show empirical evidence of procompetitive effects. Such a preliminary evaluation may be appropriate where the agreement seems anticompetitive at first glance, but the competitive justification offered by the defendant appears plausible or the agreement arises in a unique or unfamiliar context.

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > Sherman Act

HN12[] **Per Se Rule & Rule of Reason, Sherman Act**

The vast majority of agreements, however, need only be found to constitute a reasonable restraint of trade after a rule of reason analysis to avoid Sherman Act, *15 U.S.C.S. § 1*, liability. As the United States Supreme Court has made clear, the Sherman Act's prohibition of every agreement in restraint of trade, prohibits only agreements that unreasonably restrain trade. Because all agreements restrain trade in some respect, *§ 1* only prohibits those classes of contracts or acts which the common law had deemed to be undue restraints of trade and those which new times and economic conditions would make unreasonable.

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

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

HN13[] **Per Se Rule & Rule of Reason, Sherman Act**

The rule of reason analysis typically requires a plaintiff to show that the defendants' actions enhanced market power, for example, the power to raise prices or exclude competition, which in turn requires some economic analysis of the relevant market. That demanding calculus compels an antitrust plaintiff to show, inter alia, that the alleged agreement involved the exercise of power in a relevant economic market, and that the exercise had anti-competitive consequences. For exclusive dealing arrangements, foreclosure levels are unlikely to be of concern where they are less than 30 or 40 percent low numbers make dismissal easy.

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

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

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

In order to evaluate whether an agreement truly deserves the fatal per se label, or instead merits a more nuanced quick-look or rule-of-reason review, courts are obliged to seek the central substance of the situation. That usually involves careful delineation of the parties' horizontal and vertical relationships. Under a group boycott theory, a violation of the Sherman Act, *15 U.S.C.S. § 1*, may well occur when a group of independent competing firms engage in a concerted refusal to deal with a particular supplier, customer, or competitor. A group boycott arrangement sometimes is called a per se violation. The rhetoric of older group boycott cases cannot be taken at face value, and that any per se group boycott label is minimally useful. That is because precedent limits the per se rule in the boycott context to cases involving horizontal agreements among direct competitors.

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > Sherman Act

HN15[] **Per Se Rule & Rule of Reason, Sherman Act**

Horizontal restraints are agreements between competitors at the same level of market structure, whereas vertical restraints are combinations of persons at different levels of market structure such as manufacturers and distributors.

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

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

HN16[] **Scope, Exemptions**

As the United States Court of Appeals for the First Circuit has noted in ASE I, there is an inherent tension between national antitrust policy, which seeks to maximize competition, and national labor policy, which encourages cooperation among workers to improve the conditions of employment. Whereas antitrust laws protect the consumer at the expense of individual market participants with a singular focus on price and output, labor laws protect the livelihood of the employee on the other end of the long chain of production and consumption. The courts have sought to reconcile those competing directives via two labor exemptions from the antitrust laws, one statutory and one nonstatutory.

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

Labor & Employment Law > ... > Unfair Labor Practices > Union Violations > Secondary Activities

HN17[] **Scope, Exemptions**

The statutory exemption stems from the United States Supreme Court's attempt to harmonize the goals of the Sherman, Clayton, and Norris-LaGuardia Acts. Reading the three statutes together, the United States Supreme Court held that union activity is exempt from antitrust liability so long as the union acts in its self-interest and does not combine with non-labor groups. Yet, this exemption, while helpful in protecting the organization of union activity itself, did not adequately encompass the need to protect legitimate collective bargaining activity from antitrust liability. This is because such activity necessarily constitutes a combination between labor unions and non-labor employers.

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

Labor & Employment Law > Collective Bargaining & Labor Relations > Interpretation of Agreements

HN18[] **Scope, Exemptions**

The United States Supreme Court has recognized that a proper accommodation between the congressional policy favoring collective bargaining under the National Labor Relations Act, *29 U.S.C.S. § 187*, and the congressional policy favoring free competition in business markets requires that some union-employer agreements be accorded a limited nonstatutory exemption from antitrust sanctions. That nonstatutory exemption shields some restraints on competition imposed through the bargaining process, where the alleged anticompetitive conduct is anchored in the collective-bargaining process, concerns only the parties to the collective bargaining relationship, and relates to wages, hours, conditions of employment, or other mandatory subjects of collective bargaining.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > Boycotts

HN19[] **Horizontal Refusals to Deal, Boycotts**

Precedent limits the per se rule in the boycott context to cases involving horizontal agreements among direct competitors.

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

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

HN20[] **Per Se Rule & Rule of Reason, Sherman Act**

While it remains true that one group of employers may not conspire to eliminate competitors from the industry and the union is liable with the employers if it becomes a party to the conspiracy, sufficient proof of concerted anti-competitive action among independent business entities remains necessary to state a successful the Sherman Act, *15 U.S.C.S. § 1*, claim.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > Boycotts

HN21[] **Horizontal Refusals to Deal, Boycotts**

A group boycott in the strongest sense is a group of competitors, threatening to withhold business from third parties, unless those third parties would help them injure their directly competing rivals.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > Boycotts

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > Sherman Act

HN22[] **Horizontal Refusals to Deal, Boycotts**

Without unlawful agreement among participants at any given horizontal plane, a Sherman Act, *15 U.S.C.S. § 1*, claim cannot fall within the narrow category of per se unlawful group boycott agreements.

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > Sherman Act

HN23[] **Scope, Monopolization Offenses**

The freedom to switch suppliers lies close to the heart of the competitive process and that applying per se liability to a buyer's decision to switch suppliers, even though not made for competitive reasons, would transform cases involving business behavior that is improper for various reasons into treble-damages antitrust cases.

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > Sherman Act

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

HN24[] **Per Se Rule & Rule of Reason, Sherman Act**

A rule of reason analysis requires a burdensome multi-part showing: that the alleged agreement involved the exercise of power in a relevant economic market, that that exercise had anti-competitive consequences, and that those detriments outweighed efficiencies or other economic benefits.

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

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > Sherman Act

HN25[] **Per Se Rule & Rule of Reason, Sherman Act**

Generally speaking, to make out a claim of exclusive dealing under the rule of reason, the plaintiffs would need to show that they were foreclosed from competing in a substantial portion of the relevant market. For exclusive dealing, foreclosure levels are unlikely to be of concern where they are less than 30 or 40 percent.

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

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > Sherman Act

HN26[] **Per Se Rule & Rule of Reason, Sherman Act**

The Sherman Act, *15 U.S.C.S. § 1*, does not reach independent decisions, even if they lead to the same anticompetitive result as an actual agreement among market actors. To survive a motion for summary judgment, the plaintiffs needed to demonstrate a genuine dispute as to whether the defendant's actions caused an injury to competition, as distinguished from impact on themselves.

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

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

HN27[] **Sherman Act, Scope**

Some antitrust cases are intrinsically hopeless because they merely dress up in antitrust garb what is, at best, a business tort or contract violation.

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

HN28[] **Scope, Monopolization Offenses**

A predatory pricing claim under the Sherman Act, *15 U.S.C.S. § 2*, requires plaintiffs to prove that the prices complained of were below an appropriate measure of costs and that there was a dangerous probability that the difference between those values could be recouped.

Counsel: Michael E. Avakian, with whom Wimberly, Lawson & Avakian, Thomas M. Triplett, Schwabe Williamson & Wyatt, Geoffrey R. Bok, and Stoneman, Chandler & Miller LLP were on brief, for appellants/cross-appellees.

Indira Talwani, with whom Paul F. Kelly, Jasper Groner, and Segal Roitman, LLP were on brief, for appellee/cross-appellant.

Maurice Baskin and Littler Mendelson, PC on brief for Associated Builders and Contractors, Inc., amicus curiae in support of appellants/cross-appellees.

Judges: Before Howard, Chief Judge, Stahl and Lipez, Circuit Judges.

Opinion by: HOWARD

Opinion

[*48] HOWARD, Chief Judge. On December 2, 2004, five structural steel contractors filed a complaint against a local union alleging ***antitrust law*** violations under the Sherman Act, labor law **[*49]** violations under the Labor Management Relations Act ("LMRA"), and other violations under state law. Over the intervening decade, the case has evolved in complex ways. Although we reviewed this matter once before, *Am. Steel Erectors, Inc. v. Local Union No. 7, Int'l Ass'n of Bridge, Structural, Ornamental & Reinforcing Iron Workers ("ASE I"), 536 F.3d 68 (1st Cir.*

2008), [**2] we found elements pertaining to the federal claims undeveloped and remanded for further proceedings. The case now reaches us again following trial, with both parties appealing and cross-appealing aspects of the final judgment. After considerable reflection, and for the reasons set forth below, we affirm.

I. Background

A. Factual History

As we explained in ASE I, the structural steel industry is comprised of steel fabricators, who manufacture steel products to meet design specifications, and steel erectors, who assemble the fabricated steel. When a developer or owner taps a general contractor to lead the construction of a building, that general contractor typically solicits bids for a combined "fab and erect" package, which is submitted by the fabricator and includes the combined price for both the fabrication and erection of the structural steel. As such, the steel fabricators must themselves solicit bids for the erection work from the steel erectors in order to finalize their combined bid price. And, in turn, the erection companies must incorporate the significant costs associated with paying their laborers into their own steel erection price.

In New England, at the time of the complaint, [**3] there were relatively few fabricators (around twenty) and many erectors (over 200). The plaintiffs in this case are five nonunionized steel erector companies,[1] and the defendant is Labor Union No. 7 of the International Association of Bridge, Structural, Ornamental & Reinforcing Iron Workers ("Local 7"), a teamsters local union for member iron workers (including steel erector laborers) in eastern Massachusetts. Local 7 has a collective bargaining agreement ("CBA") with the Building Trades Employers' Association of Boston and Eastern Massachusetts ("BTEA"), which is an entity that represents hundreds of construction companies. Among the "union signatory" firms that have agreed to the CBA are numerous erector companies with whom the plaintiffs compete.

Under the CBA, the signatory erectors must pay Local 7 workers a union scale wage. Nonunion erectors, on the other hand, are not [**4] bound to the CBA and can negotiate their own labor costs with their employees. Because labor expenditures account for approximately half of the total steel erection costs, nonunion erectors are often able to submit lower bids for erection contracts to fabricators looking to formulate a combined "fab and erect" bid. Over time, not unexpectedly, that can lead to nonunion erectors and laborers gaining market share from union erectors and laborers.

In order to prevent such erosion in its labor market share, Local 7 incorporated a "Market Recovery Program" ("MRP") into its 2000-2006 CBA. Under the MRP, signatory erectors withheld a fraction of each union laborer's paycheck, which was then paid into a target fund (the "Fund") operated by Local 7. Local 7 could then identify [*50] construction projects likely to draw competition from nonunion erectors and, on a case-by-case basis, send "blast faxes" or "project alerts" to its signatory union erectors with an offer to subsidize their bids and make them more competitive with nonunion bids. In the event that a union signatory won the subcontract, Local 7 (sometimes in conjunction with other regional unions) would enter into a job targeting fund agreement [**5] with that erector company governing the terms of the MRP subsidy for that specific project ("JTF agreement").

B. Procedural History

In 2004, the plaintiffs filed a complaint in federal district court in Massachusetts alleging, in addition to state law claims, that actions of Local 7 violated both (1) the LMRA, which provides civil liability for damages resulting from

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[1] The plaintiffs are Arial Services, Inc., D.F.M. Industries, Inc., American Steel Erectors, Inc., Bedford Ironworks, Inc., and Ajax Construction, Inc. As plaintiffs D.F.M. Industries and Ajax Construction are most heavily involved in the foundational facts, we refer to them throughout as "DFM" and "Ajax" for ease.

unfair labor practices, 29 U.S.C. §§ 158, 187; and (2) Sections 1 and 2 of the Sherman Act, which forbid practices that unlawfully impair competition, 15 U.S.C. §§ 1, 2. In general, the complaint alleged that Local 7 employed coercion and unlawful economic pressure to ensure that contracts were awarded to signatory erectors, rather than plaintiffs, and to foreclose nonunion erectors from a large portion of the structural steel erection market in the greater Boston area.

After the district court granted Local 7's request for summary judgment on all claims, we reversed in part. See ASE I, 536 F.3d at 76-85. We agreed that the plaintiffs' state claims were preempted, but remanded the surviving federal labor and antitrust claims for further proceedings. The district court set the plaintiffs' LMRA claims for trial and reserved the antitrust claims to be addressed after several of the factual disputes **[**6]** underlying both claims had been resolved by the jury.

At trial on the LMRA claims, the court limited the plaintiffs to presenting evidence about union conduct relating to four particular construction projects: two, referred to as Cardi's Furniture and Archstone Apartments, involved plaintiff Ajax; the other two projects, Fox 25 and Brickworks, involved plaintiff DFM. The jury found for the plaintiffs on each of the four projects, awarding Ajax $211,956.00 in damages and awarding DFM $78,757.60. The district court denied Local 7's motion for judgment as a matter of law or a new trial, see Fed. R. Civ. P. 50(b), 59, which challenged the sufficiency of the evidence supporting liability and the damages calculations.

Following the jury verdict, the district court relied on the evidence presented at trial in its subsequent consideration of the antitrust issues, as the plaintiffs had represented earlier in the litigation that identical evidence undergirded both the LMRA claims and the antitrust claims. Ultimately, the court entered judgment on the Sherman Act claims in favor of Local 7, concluding that the plaintiffs' evidence failed to give rise to antitrust liability as a matter of law. **[**7]** See *Am. Steel Erectors, Inc. v. Local Union No. 7, Int'l Ass'n of Bridge, Structural, Ornamental & Reinforcing Iron Workers ("ASE II"), 932 F. Supp. 2d 240, 252 (D. Mass. 2013)*.

II. Analysis

The plaintiffs appeal from the summary judgment decision on their antitrust claims. Local 7 cross-appeals the court's decision to keep in place the jury's verdict on the LMRA claims. We address the appeals in reverse order, ***HN1***[] review the merits de novo, and consider all trial evidence in the light most favorable to the plaintiffs. See *Long v. Fairbank Reconstruction Corp., 701 F.3d 1, 3 (1st Cir. 2012)*.

[*51] A. Labor Law Claims

1. Liability

The LMRA ***HN2***[] extends a private right of action to those injured in business or property by reason of certain unlawful union practices proscribed by the National Labor Relations Act ("NLRA"). See 29 U.S.C. § 187. As we explained in ASE I, § 8(b)(4)(ii) of the NLRA makes it an unfair labor practice for a union to threaten, coerce, or restrain an employer with an object of forcing the employer (A) to enter into an agreement prohibited by § 8(e) of the NLRA, or (B) to cease doing business with another party. See 29 U.S.C. § 158(b)(4)(ii)(A) & (B); *Intercity Maint. Co. v. Local 254, Serv. Employees Int'l Union, 241 F.3d 82, 87 (1st Cir. 2001)*. An illegal § 8(e) agreement is, in turn, defined in relevant part as an agreement by an employer to cease doing business with any other person. See 29 U.S.C. § 158(e). In other words, a union may incur liability under subparagraph B of § 8(b)(4)(ii) if it coerces an employer to cease doing **[**8]** business with another party or under subparagraph A of § 8(b)(4)(ii) if it coerces an employer to enter into an agreement to cease doing business with another party.

Such an agreement can be express or implied, ASE I, 536 F.3d at 83, and it need not be of a "generalized exclusionary nature to fall afoul of § 8(e); rather, the use of coercive measures by a union to pressure a single neutral employer into a single agreement to cease doing business with a single non-union employer, or the application of such measures on a project-by-project basis" is sufficient to find liability. Id. (citing *N.L.R.B. v. Bangor Bldg. Trades Council, 278 F.2d 287, 289-90 (1st Cir. 1960))*.

Of course, Local 7 rightfully points out that ***HN3***[] a neutral employer's mere decision to acquiesce to a union's unlawful coercion and cut ties with the nonunion party is not, standing alone, sufficient to imply the existence of a § 8(e) agreement and incur liability under subparagraph A. Such an interpretation would allow *subparagraph B* to swallow *subparagraph A* whole. Local 7 points to the decision of the National Labor Relations Board ("NLRB") in Local Freight Drivers *Local 208, 224 N.L.R.B. 1116 (1976)*, for support.

In Local Freight Drivers, the NLRB held that the union had violated subparagraph B by making the termination of its unlawful picketing contingent upon the neutral party's **[**9]** decision to sever its relationship with a nonunion employer. See *224 N.L.R.B. at 1121*. The NLRB stopped short, however, of finding a subparagraph A violation, noting that the union had "specifically made removal of the [nonunion] . . . the quid pro quo for cessation of the picketing," and that "[n]o other requirement was attributed to [the union] as a condition for cessation of the picketing." *Id. at 1123*. Because the union did not go one step further and require that the nonunion employer be replaced with a union employer, the NLRB found that the factual elements required for subparagraph A liability were absent from the record. See *id. at 1121-23*.

In ASE I, we deemed any subparagraph B claims waived due to the plaintiffs' failure to "sort out their allegations and develop their arguments sufficiently." *536 F.3d at 83*. On remand, we offered the plaintiffs an opportunity to flesh out "the nature and extent of Local 7's allegedly coercive tactics" and show that "Local 7 through use of those tactics pressured neutral employers into agreements to refrain from using non-union contractors in violation of *§ 8(e)*." *Id. at 84* (emphasis added).

[*52] The permissible grounds for liability were narrowed even further at trial by jury instructions that required the plaintiffs to **[**10]** show that Local 7 "threatened, coerced, or restrained one or more of the steel fabricators" with an object of "obtaining . . . an agreement, explicit or implicit, from the steel fabricators to cease doing business with the plaintiffs." (emphasis added). Although subparagraph A liability might well have been premised on coercion directed at other neutral employers, such as site owners or general contractors, the plaintiffs failed to object to the jury instructions below. With this somewhat whittled basis for liability in mind, we examine the record to ensure that a sufficient evidentiary foundation exists to prove the allegations.

HN4[] Although we must ensure that the judgment rests upon more than conjecture and speculation or a mere scintilla of evidence, see *Trigano v. Bain & Co., Inc., 380 F.3d 22, 28-29 (1st Cir. 2004)*, we are mindful that it is not our role to assess witness credibility, resolve evidentiary conflicts, or weigh the evidence, see *Gibson v. City of Cranston, 37 F.3d 731, 735 (1st Cir. 1994)*. In the end, we are compelled to honor the jury's verdict unless the facts and inferences point so strongly and overwhelmingly in favor of Local 7 that a reasonable jury could not have returned the verdict for plaintiffs DFM and Ajax. See *Long, 701 F.3d at 3*.

At trial, DFM president Glen Pisani described how union members regularly **[**11]** filmed job sites where his company's laborers were working and formed picket lines ostensibly protesting DFM's pay scale as being out of step with prevailing wage standards. Pisani testified that he understood that unions might engage in this conduct lawfully in order to place pressure on erectors to sign a CBA. At one point, Pisani made efforts to determine whether his workforce wanted to unionize, and they did not. Even after this, however, members of Local 7 would show up at work sites and, in his words, "harass" his crew. He found it "kind of ironic" that the union picketed publicly funded job sites that were governed by state-regulated pay scales.

Pisani further described that occasionally he hired a union crane laborer to work at a particular job alongside his nonunionized workforce, but the pressure of union picketers would provoke the crane operator to leave the site in order to avoid being "blackballed" by the union. Union picketing intensified when Pisani's company secured erector jobs closer to Boston: "I want to work in the city. Every time I get close, I get picketed and they make problems for me."

The president of Ajax, Donald Morel, also described union picketing at his **[**12]** company's job sites. He further testified about an incident in July 2003 in which about "fifty union iron workers stormed" one of his job sites in downtown Boston at 85 New Market Street, threatening Ajax laborers as not "belong[ing] in downtown." Fights broke out and property was damaged, but no one was ever held responsible for the incident. As of the time of trial, Ajax had not worked in downtown Boston since that incident.

At times, the developing hostilities in the erector labor market ensnared neutral steel fabricators. John Paulding of Cape & Island Steel, a fabricator company, testified that Local 7 had pressured him on several occasions to award bids to union signatories, rather than to nonunion erector companies. He described his first meeting with Eddie Wright, a former president of Local 7, in the early 1990s after Paulding had awarded a job to a nonunion company. Wright "let [him] know [that] the project needed to go union," and **[*53]** Paulding responded that he "couldn't afford" to carry the "additional costs." After pressure from Wright and the general contractor, Paulding retained a union signatory for the job. Still, Paulding continued to use nonunionized laborers at future job sites while also **[**13]** continuing to feel the heat from Local 7 representatives who at times threatened to picket in order to "stop the job."

In 2003, Paulding again was approached by Local 7 representatives, who told him that they "wanted a lot of work for their people" and that "there [were] opportunities out there with target money." They explained that target money would be provided to the union "installers . . . to give them a leg up on the job" and that "it would ultimately . . . help [Paulding's company] win work." "[I]t actually never quite worked like that," Paulding explained, "it was sort of a mystery to me, the target fund money, because it was always promised how much it could do for me, but it never really did a thing for me." Paulding continued to resist the union's pressure but acknowledged that there came a time when his company only hired union signatories for all erector work in Boston except for smaller jobs lasting only one or two days.

Another steel fabricator, Ann Gavin of FAMM Steel, also testified about pressure to subcontract with union signatories that her company experienced, more directly from owners and general contractors. Gavin testified that there were several instances in which **[**14]** the general contractor or owner would require her to replace the nonunion erector at the site with a union signatory. She testified, "[M]ost of them were Stop & Sho[p] [supermarkets], . . . depending upon what happened with the union, they would change their mind." "We would put the nonunion erector on notice, because in some cases they had mobilized cranes and . . . were at the site and had done the initial work in the field before the union erector came on board. So we had to get costs for them. We couldn't just cancel them and walk away." Gavin estimated that the same pattern occurred "[p]robably half a dozen [times] . . . if we're talking just about Stop & Shops." She acknowledged her company's participation in deciding "to make a change" and cancel a subcontract commitment due to "pressure or . . . an incentive being offered"; "[i]t was an abuse. It was unethical what we did."

This general gloss informed more particular evidence and testimony that was submitted with respect to four job sites where fabricators cancelled subcontracts with DFM and Ajax during project kickoff and replaced them with union signatories despite a higher subcontract cost. We review events surrounding these projects in chronological **[**15]** order.

<u>Cardi's Furniture</u>

In the spring of 2002, plaintiff Ajax pursued erector work on a project in Attleboro, Massachusetts for a commercial building, Cardi's Furniture, and was awarded the job by fabricator FAMM Steel. Having in hand a $370,000 purchase order for twelve weeks of erector work, Ajax began the normal kickoff preparations. Ultimately, however it was prevented from ever being able to start the work.

During kickoff, Gavin of FAMM Steel received some "initial calls," advising her that "there were issues occurring at the site"--"something was up with the union." The general contractor relayed to her that he and the owner now were "considering going from open shop to union." When Ajax learned of the trouble, Morel contacted Gavin "pretty much pleading with them not to remove us." Gavin told him that "it was beyond her control" and that he **[*54]** "could call

Mr. Cardi himself." Morel also spoke with the owner on two occasions, to no avail: in the midst of project kickoff, Gavin chose to cancel FAMM Steel's subcontract with Ajax "to put a union erector on" the site. FAMM Steel replaced Ajax with Griffin Ironworks, a union signatory erector, at a higher subcontract price. Gavin acknowledged **[**16]** that "[i]t wasn't the first time" that this occurred with Morel's company and she had been "forced to change erectors."

Several entities, including three local union chapters and Local 7, paid Griffin Ironworks $120,000 in "target money" for the Cardi's Furniture job in order to reduce the $570,000 replacement bid to $450,000--still a significantly higher cost than the Ajax subcontract. Griffin Ironworks began work in the fall of 2002 and, after fifty percent completion, sent a letter to Local 7 to request an installment of the promised payment. The December 2002 letter opens with the following, "Through a concerted effort with the New England District Council and Griffin Ironworks, Cardi's new furniture store was turned around from a nonunion project to a union project."

Fox 25

The following year, in 2003, plaintiff DFM sought work at a job site in Dedham, Massachusetts. It submitted a quote to fabricator Cape & Island Steel for the second construction phase at a Fox 25 television facility, because the erector company that "had done the job wasn't going to be there to finish it." DFM and Cape & Island Steel agreed to a purchase order of $18,000 for the erector work for a new side entrance **[**17]** of the building. Trouble with Local 7 soon began.

Within days of DFM laborers arriving on site, a Local 7 business representative, Wright, "had words" with DFM laborers, "questioning [them] being on the site" and upset that the fabricator had brought DFM onto the job. Wright also spoke with Paulding of Cape & Island Steel "about getting [DFM] off the site" and "had conversations" with the general contractor. At some point Wright called Paulding, "extremely upset that the project was subcontracted by C&I Steel, Inc. to DFM," telling Paulding that the job "was going union." Paulding responded that his company had solicited separate bids from both union and nonunion firms, that Wright was unreasonable to expect continued negotiations with unionized erectors, and that DFM had "a reasonable price and a schedule that would work." For the fabricator, "the schedule was tight . . . we needed to get things rolling." Wright's ire escalated. He told Paulding that DFM was "one of the companies targeted by the Local 7 union," that "DFM should not be on this project," and that "there will be a strike at Fox 25." He also warned Paulding that the union had put other companies out of business before **[**18]** and that he planned to follow suit by "letting the gorilla out of the cage" on both Cape & Island Steel and DFM.

The conversation continued. Paulding reminded Wright that his fabricator company had provided "millions of dollars in revenue for union forces through the calendar year of 2002" and "hoped [for] some consideration for this effort." Wright, nonetheless, strenuously insisted that "the union erectors had been hurt as a result of [Cape & Island Steel's] subcontracting to DFM" which was "a big mistake." The discussion ended with Wright telling Paulding that "DFM [had] been targeted by the union," that the Fox 25 job "is a high-profile project," and that DFM's "non-union forces should not be there"--he assured Paulding that "Local 7 would be striking this site continuously."

[*55] When Cape & Island Steel nevertheless "went forward with DFM," union picketers arrived, causing the general contractor to contact the fabricator about the union difficulties at the job site. DFM was asked to leave "until things got straightened out." The nonunion laborers did so but later returned to work and found that DFM's equipment and material had been damaged. Pisani wrote a letter to the fabricator, stating **[**19]** that DFM had been targeted even though his employees were not interested in joining the union, vandalism had occurred at the site, and his crew's safety needed to be protected. Receiving assurances, DFM laborers returned to work.

Later, however, the fabricator sent Pisani a fax with the following cover: "Union BS from 'Edwin Wright' that I guess we must live with." The attached document summarized the phone call exchange between Paulding and Wright. The fabricator dismissed DFM from the job and retained an erector company that was considered friendly with the union. The replacement erector, however, worked at the site for only one week before Paulding "called DFM back, hat in hand," because the new erector could not meet the site needs. DFM returned and finished the job.

Archstone Apartments

That summer, plaintiff Ajax pursued erector work on the Archstone Apartments project in Watertown, Massachusetts. It was a "medium-sized," multi-phase project, expected to generate about eight weeks of erector work. Following the bidding process, Ajax was awarded a $160,000 erector subcontract in June by fabricator Mandate Erectors & Steel. Ajax's project manager attended the usual kickoff meetings, **[**20]** sequencing the job site but, again, Ajax was never able to begin the erector work.

In early September, Local 7 sent out a "project alert" on the Archstone Apartments project, and Morel of Ajax soon learned from Ajax personnel of "a problem" with the union and that his company was "going to lose the job." After Morel had already "earmarked the crane for the job and the people," he urged the fabricator "to try and get the owner to stay with our contract." His effort failed; the fabricator broke the subcontract and hired a union signatory erector as a replacement.

Brickworks

The following year, in the winter of 2004, plaintiff DFM pursued erector work at a condominium construction project called Brickworks in Cambridge, Massachusetts, at the site of an old brick factory. DFM was awarded the job by fabricator Capone Iron, an $80,050 subcontract for five to six weeks of labor to begin in November 2004. During kickoff, DFM personnel met with the general contractor to ensure that safety expectations, among other things, were satisfied. With the anticipation of union picketing, a "two-gate system" was planned so that DFM laborers would enter the site by a designated gate where the union could **[**21]** lawfully picket, and other trade laborers would use a separate access gate.

In mid-November, however, DFM received from the fabricator a packet of correspondence involving union efforts to obtain the erector work at Brickworks. One document was a handwritten proposal from Bel-Lin Corporation, a union signatory, showing a total bid of $115,200 for the Brickworks erector work. The note reflected an original pricing of $136,000, reduced by some $21,000--cast as a "good guy discount." A second document was a letter from Wright of Local 7 addressed to fabricator Capone Iron, indicating that "Walter Belmonte [of union signatory Bel-Lin Corporation] will cut $9,000" and Local 7 will use $12,000 in target money for a total of $21,000 as "concession and market **[*56]** recovery." The union letter requested that the fabricator send the offer to the general contractor. The last item in the packet that the fabricator provided to DFM was a note from the project manager of Capone Iron addressed to the general contractor, stating: "Please see the attached documents from Local 7 Agent Edwin Wright, run this up the flag pole and see who salutes it."

Ultimately, DFM did not begin the erector work because the fabricator **[**22]** dismissed DFM from the job to give the erector work to the selected union signatory. The December 3 dismissal letter stated in part, "[A]s advised during our recent telephone conversations and due to last-minute lobbying efforts by [Local 7,] Columbia Construction Company, the General Contractor, has demanded that Union forces install the steel for the Brickworks project." Citing the "for convenience" provision in the contract, the fabricator's letter cancelled DFM's installation order, stating: "We regret taking this action considering our long-term relationship. Unfortunately, we have no other choice but to proceed with this project utilizing a union subcontractor."

The fabricator acknowledged that DFM "did [not] do anything at all" to cause Capone to cancel the contract. Less than a week later, Capone Iron entered into a subcontract for $109,200 with Bel-Lin Corporation to perform the erector work for the project. Capone testified that it did not "make commercial sense" to take a higher bid, but that the increased cost was paid by the general contractor.

Despite the narrow prism of liability available to the plaintiffs as a result of our holding in ASE I and the district court's jury **[**23]** instructions, we have viewed the record as a whole and hold that there was sufficient evidence to justify the jury's findings. After the plaintiffs entered into a subcontract with each fabricator at each site, Local 7 targeted the mid-size to larger project in order to seize the work from the prominent nonunion erectors. While Local

7 had pressured fabricators before, on these four occasions the fabricators responded (albeit reluctantly) to the site troubles by agreeing to cancel Ajax's and DFM's subcontracts and to hire replacement union signatories. None of the fabricators took this action for otherwise legitimate business reasons, such as saving money or saving the job site from deficient or untimely performance by Ajax or DFM. In fact, the replacement subcontracts cost more than the cancelled ones, sometimes significantly so. And, on each occasion, the fabricator took the counterintuitive action almost immediately after the union had stirred up trouble on the site, and in the midst of kickoff, when any potential work delays threaten to be a particularly expensive proposition. The jury rationally could have seen these circumstances as signifying a tacit agreement, attributable to **[**24]** the coercion itself, between each fabricator and Local 7 for a specific course of action: oust the targeted nonunion erector and hire a union signatory replacement for the benefit of Local 7 in order to vitiate union obstacles that had been causing project interference. See *N.L.R.B. v. Int'l Broth. of Teamsters, Local 251, 691 F.3d 49, 57 (1st Cir. 2012)* (determining whether an arrangement comprises an illegal § 8(e) agreement through a "holistic" inquiry into all surrounding circumstances).

Local 7 protests this reading of the record and contends that it was the general contractors or owners, rather than Local 7, who sought and secured agreements with each fabricator to cease doing business with either Ajax or DFM at the four construction projects. No doubt there is evidence in the record that would also support a jury finding that the fabricators **[*57]** principally acted at the behest of the site owners and general contractors. And perhaps we, sitting as a factfinder in the first instance, might have come to the same conclusion that Local 7 implores us to arrive at on appeal. But that is not our job.

Here, the evidence is quite sufficient to infer that Local 7 took a multi-pronged approach and applied pressure at multiple points to achieve the maximum intended effect. The fact **[**25]** that direct evidence may show that pressure was applied to one party does not somehow negate circumstantial evidence that shows that pressure was applied to another party. The task of weighing these pressures and considering whether these facts, in the aggregate, satisfied the jury instructions provided by the court falls within the province of the jury, and we will only upset that determination if no reasonable jury could have arrived at the same conclusion.

Moreover, ***HN5***[🡅] this Court's repeated and unwavering pronouncements of respect for a jury's credibility findings and rational inferences are not merely appellate flourishes or rote recitation. The jury was entitled to rely upon industry context, witness credibility, and other subtle cues in order to feel out the true pulse of the case; a pulse that is oftentimes difficult for this Court to detect through a cold stack of transcripts. Testimonial references to "troubles," "issues," or "problems" do not arise in a vacuum and may be considered within the broader record, which is sufficient to show Local 7's exploitation of the "time-is-money" pressures present during kickoff and the interruption (or threatened interruption) of worksite activity. **[**26]**

Finally, we think the evidence is more than clear that the pressure applied, and the agreements obtained, went well beyond merely unseating the nonunion fabricator. The jury was well within reason, based on the record, to find that the replacement erector's union affiliation was not just a happy coincidence but rather a necessary condition to mollify Local 7's demands.

Evidence about the lawfulness of union conduct, especially at a common situs for primary and secondary employers, often "will be conflicting and confused, and the inferences to be drawn susceptible of more than one interpretation," the selection of which is left to the factfinder. *Abreen Corp. v. Laborers' Int'l Union, 709 F.2d 748, 755 (1st Cir. 1983)*. It is the jury's role to decide among competing, reasonable interpretations of the evidence, and the record here allowed the path it took by a preponderance of the evidence.

With Local 7's LMRA liability left in place,[2] we turn to the damages award.

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[2] We reject a number of both parties' subsidiary challenges. First, we reject Local 7's evidentiary challenges to the record. Local 7 first takes issue with Morel's brief testimony about union workers storming the construction site at 85 New Market Street in July 2003, as irrelevant and highly prejudicial. **[**27]** See *Fed. R. Evid. 404(b)*. We see no abuse of discretion where the July 2003 event was close in time to the Archstone Apartments project and provided context for the hostilities between the union and Ajax during the relevant time period. Moreover, the event was explored briefly on redirect, perhaps in response to a possible

[*58] 2. Damages

The jury awarded Ajax $211,956.00 and DFM $78,757.60, the precise amounts requested by plaintiffs' counsel. Local 7 contends **[**29]** that the damages award is excessive and unwarranted by the evidence for two reasons. First, it argues that two-thirds of the award is based on what it calls a "lost man hours" theory, which amounts to a factual fiction in this case. Second, Local 7 argues that the damages award amounts to a double recovery because the plaintiffs were awarded their ordinary lost profits for the job sites, as well as "lost man hours" costs which also included a profit margin in the hourly wages calculus. Rather than a new trial on damages as urged below, Local 7 seeks remittitur here. Assuming that remittitur is available in the context of this appeal, we conclude that Local 7 fails to show sufficient cause for disturbing the jury's damages award.

HN7[] Great deference is accorded a jury's award of damages, and the district court's decision to abide by the award is reviewed for abuse of discretion. See *Loan Modification Group, Inc. v. Reed, 694 F.3d 145, 154 (1st Cir. 2012)*; *Rodriguez-Garcia v. Miranda-Marin, 610 F.3d 756, 765 (1st Cir. 2010)*. "[T]he jury is free to select the highest figures for which there is adequate evidentiary support," *Reed, 694 F.3d at 154* (internal quotation marks omitted), as long as the figure remains in the "universe of acceptable awards," *Blinzler v. Marriott Int'l, Inc., 81 F.3d 1148, 1162 (1st Cir. 1996)*. In the end, we will not disturb a jury's damages award unless it is "grossly excessive, inordinate, shocking **[**30]** to the conscience of the court, or so high that it would be a denial of justice to permit it to stand." *Reed, 694 F.3d at 154* (internal quotation marks omitted).

The district court instructed the jury that it may award compensatory damages, meaning "lost profits, both actual and reasonably anticipated but for the effect of the boycott, and any uncompensated out-of-pocket expenses a plaintiff incurred because of the defendant's wrongful contact." It admonished the jury not to speculate or otherwise guess when deciding damages but to use common sense and deduce from the evidence an award that "fairly and reasonably compensate[s] a plaintiff for the full extent of its losses," without "understat[ing] [or] exceed[ing] compensation for the entire injury." The court further explained that "a plaintiff has a continuing duty to mitigate his damages by seeking out suitable substitute replacement work where there is the opportunity **[*59]** to do so." Ultimately, the jury awarded the plaintiffs both ordinary lost profits and damages associated with "additional manpower costs" for keeping the displaced workforce employed.

The portion of the awards first deemed excessive by Local 7 amounts to $89,600 for Ajax and $45,760 for DFM. According to Local 7, because the **[**31]** plaintiffs elected to put their displaced laborers to work at alternative job sites, they continued to receive an economic benefit from their labor force, leaving their costs theory

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misimpression left by defense counsel's cross-examination of Morel regarding an unsuccessful NLRB charge against the union. The issue of unfair prejudice is largely left to the district court, and we see no abuse of discretion given that union intent was a highly contested issue at trial.

Local 7's generic challenges to evidence of labor disputes, including primary lawful picketing and secondary labor activity, likewise fail. Despite the court's pretrial ruling allowing some measure of "background" evidence, Local 7 points to no trial objection in which it challenged testimony as out of bounds. Additionally, the jury received instructions on the difference between legal primary and illegal secondary union conduct, and Local 7 gives us no reason to conclude that the jury was inattentive to the careful line drawing it was called upon to do. See *Connolly v. Roden, 752 F.3d 505, 515 n.14 (1st Cir. 2014)*.

Next, we reject the plaintiffs' allegations **[**28]** that the district court improperly foreclosed evidence at the LMRA trial of eleven other construction sites and that the district court abused its discretion in excluding four witnesses. The district court properly excluded information regarding the additional eleven job sites based on insufficient evidence that Local 7 engaged in threats, restraints, or coercion on any of these sites. The district court also properly exercised its discretion to exclude four witnesses that it deemed to be inadequately disclosed by the plaintiffs. The witnesses were not included in the plaintiffs' Rule 26 statement and were only referred to on a handful of occasions within a voluminous record. Although the plaintiffs contend that an amended Rule 26 statement is not necessary when additional information has "otherwise been made known to the other parties during the discovery process," ***Fed. R. Civ. P. 26(e)(1)(A)***, ***HN6***[] the "mere mention of a name in a deposition or interrogatory is insufficient to satisfy ***Rule 26(a)(1)(A)(i)***," especially where, as here, the case involves an expansive record and a multitude of individuals, see, e.g., *Lujan v. Cabana Mgmt., Inc., 284 F.R.D. 50, 72 (E.D.N.Y. 2012)*.

unsubstantiated on the record. This argument assumes that the displaced laborers must have been actually idle in order for each company to have experienced tangible financial losses aside from lost profits. It also assumes that the evidence compelled a finding that the plaintiffs' ousted workforce generated profits at the alternative site where they were reassigned. Local 7, however, both misunderstands the nature of the "additional manpower costs" requested and unduly restricts the impact of the evidence presented.

Steel erector companies often schedule several jobs simultaneously and in immediate succession in order to prevent their labor force from becoming idle. The evidence allowed a reasonable inference that any alternative work sites where the plaintiffs' displaced crews were reassigned already had fixed profit returns under a fixed subcontract. The jury could have concluded rationally that readily securing true replacement erector work in the steel market for the plaintiffs' displaced erector workforce **[**32]** was nearly impossible on short notice, and that keeping the individuals employed meant carrying the costs of their wages, as well as taking on costs of other business inefficiencies in a time-is-money industry, without the benefit of any additional income. See *Kerry Coal Co. v. United Mine Workers, 637 F.2d 957, 966 (3d Cir. 1981)* (evidence showing "a reasonable basis" for a causal relationship between damages requested and the union's unlawful conduct is all that is required to sustain the damages award). Accordingly, we cannot say on this record that the plaintiffs' estimation of "additional manpower costs" during the time related to the cancelled subcontracts generated grossly excessive damages.

In making their double recovery argument, Local 7 points to the profit margin built into the hourly wage calculus used for the costs theory. Assuming, without deciding, that this issue is preserved for appellate review, Local 7's brief argument again fails.

While the record shows the possibility of some overlap, it does not necessarily demonstrate that a double recovery was incorporated in the hourly wage calculus beyond actual wages paid. Not only did the plaintiffs pay the base wages for the displaced laborers, but Pisani testified about the "scrambling" that **[**33]** was required after the sudden loss of a significant erector subcontract. The jury reasonably could have inferred that both companies faced similar circumstances common to the industry and that the costs attributable to these business inefficiencies were absorbed by both plaintiffs here and were thus recoverable as costs beyond actual wages paid to the reassigned workers. Cf. *Landstrom v. Chauffeurs, Teamsters, etc., 476 F.2d 1189, 1195 (2d Cir. 1973)* (remanding for new trial on damages where "[t]he most that was shown is a lost gross profit, but not a loss of net income"). Also, Local 7 makes no effort to reckon with the evidence, from which plaintiffs' counsel argued to the jury, that the financial hit taken by DFM and Ajax reduced in some measure reasonably expected future profits **[*60]** by diminishing their ability to reinvest in their companies for competitive growth.

After reviewing the record, we conclude that the district court did not abuse its discretion in upholding the LMRA damages award as a fair estimate of compensable harm. Thus, in addition to the LMRA liability verdict, the damages awards withstand Local 7's appellate challenges.

B. ***Antitrust Law*** Claims

The district court entered summary judgment for Local 7 on the plaintiffs' antitrust claims, concluding **[**34]** that the plaintiffs' evidence failed to give rise to antitrust liability as a matter of law. The plaintiffs now appeal this determination. Because the plaintiffs' claim bobs at the crosscurrents of antitrust liability and labor rights, we must carefully navigate conflicting statutory directives and cut a course as close to congressional intent as we can.

The Sherman Act ***HN8***[] protects against unlawful impairments to competition, not to individual competitors. See *Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 344, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)*; *Sterling Merch., Inc. v. Nestlé, S.A., 656 F.3d 112, 121 (1st Cir. 2011)*. If a party drives down the cost of its products in the hopes of pummeling a less-efficient competitor into submission, we do not permit the competitor to reach for relief through an antitrust claim. Doing so would thwart the very purposes of the antitrust laws: encouraging efficiency, lowering costs, and increasing output. As such, claims under the Sherman Act require care because overly interventionist enforcement could backfire and dampen the competitive spirit that the laws were intended to foster and protect.

Here, the plaintiffs allege violations of *Section 1* and *Section 2* of the Sherman Act. *Section 1* of the Act ***HN9***[] prohibits unreasonable restraints of trade or commerce through contracts, combinations, or conspiracies; it thus applies only to concerted **[**35]** action that unreasonably restrains trade. *15 U.S.C. § 1*; see *Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 189-90, 130 S. Ct. 2201, 176 L. Ed. 2d 947 (2010)*. *Section 2* forbids monopolization, attempted monopolization, and conspiracies to monopolize any part of trade or commerce. *15 U.S.C. § 2*. The latter "covers both concerted and independent action" which "monopolizes" or "threatens actual monopolization"--"a category that is narrower than restraint of trade." *Am. Needle, 560 U.S. at 190* (internal quotation marks and brackets omitted).

In evaluating such claims under the Sherman Act, one of the first considerations a court faces is determining the appropriate framework for its review: per se, "quick look," or rule of reason. Admittedly, this decision requires putting the cart before the horse to some extent, since the court must engage with the functional and factual contents of the claim in order to decide how it will proceed to evaluate that claim.

HN10[] Under *Section 1*, for example, "certain kinds of agreements will so often prove so harmful to competition and so rarely prove justified that the antitrust laws do not require proof that an agreement of that kind is, in fact, anticompetitive in the particular circumstances. An agreement of such a kind is unlawful per se." *NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 133, 119 S. Ct. 493, 142 L. Ed. 2d 510 (1998)* (internal citations omitted). When faced with an agreement of this rare species **[**36]** such as a horizontal price-fixing or a market-division agreement, see id., plaintiffs can demonstrate Section 1 liability "without need for proof of power, intent or **[*61]** impact," *Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield of R.I., 373 F.3d 57, 61 (1st Cir. 2004)*. See *Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 886, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007)* (noting that only those restraints "that would always or almost always tend to restrict competition and decrease output," or those with "manifestly anticompetitive effects and [that] lack any redeeming virtue," may be deemed per se illegal (internal quotation marks and ellipses omitted)).

HN11[] If the agreement in question does not quite fit the bill of per se liability, but nonetheless would seem to have an anticompetitive effect on customers and markets to "an observer with even a mere rudimentary understanding of economics," *F.T.C. v. Actavis, Inc., 133 S. Ct. 2223, 2237, 186 L. Ed. 2d 343 (2013)* (internal quotation marks omitted), the district court might opt to take a "quick look" at preliminary evidence. Under this purgatorial standard, the agreement is not subject to immediate per se condemnation and may yet ascend to a full rule-of-reason review. "[Q]uick-look analysis in effect" shifts to "a defendant the burden to show empirical evidence of procompetitive effects." *Cal. Dental Ass'n v. F.T.C., 526 U.S. 756, 775 n.12, 119 S. Ct. 1604, 143 L. Ed. 2d 935 (1999)*. Such a preliminary evaluation may be appropriate where the agreement seems anticompetitive at first glance, but the competitive **[**37]** justification offered by the defendant appears plausible or the agreement arises in a unique or unfamiliar context. See *id. at 770*.

HN12[] The vast majority of agreements, however, need only be found to constitute a "reasonable" restraint of trade after a rule of reason analysis to avoid Section 1 liability. As the Supreme Court has made clear, "the Sherman Act's prohibition of '[e]very' agreement in 'restraint of trade,' 26 Stat. 209, as amended, *15 U.S.C. § 1*, prohibits only agreements that unreasonably restrain trade." *NYNEX, 525 U.S. at 133*. Because all agreements "restrain trade" in some respect, *Section 1* only prohibits "those classes of contracts or acts which the common law had deemed to be undue restraints of trade and those which new times and economic conditions would make unreasonable." *Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 211, 79 S. Ct. 705, 3 L. Ed. 2d 741 (1959)* (citing *Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 59-60, 31 S. Ct. 502, 55 L. Ed. 619 (1911))*.

HN13[] The "[r]ule of reason analysis typically requires a plaintiff to show that the defendants' actions enhanced market power--i.e., the power to raise prices or exclude competition--which in turn requires some economic analysis of the relevant market." *Díaz Aviation Corp. v. Airport Aviation Servs., 716 F.3d 256, 265 (1st Cir. 2013)*. This demanding calculus compels an antitrust plaintiff to show, inter alia, "that the alleged agreement involved the exercise of power in a relevant economic market," and "that this exercise had anti-competitive consequences." **[**38]** *Stop & Shop, 373 F.3d at 61*. For exclusive dealing arrangements, "foreclosure levels are unlikely to be of concern where they are less than 30 or 40 percent . . . low numbers make dismissal easy." *Sterling Merch., 656 F.3d at 123-24* (internal quotation marks omitted).

Of course, ***HN14***[] in order to evaluate whether an agreement truly deserves the fatal per se label, or instead merits a more nuanced quick-look or rule-of-reason review, courts are obliged to "seek the central substance of the situation." *Am. Needle, 560 U.S. at 191*. This usually involves careful delineation of the **[*62]** parties' horizontal and vertical relationships. For example, the plaintiffs here advance a "group boycott" theory of liability. Under a group boycott theory, "[a] violation of *section 1* may well occur when a group of independent competing firms engage in a concerted refusal to deal with a particular supplier, customer, or competitor." *González-Maldonado v. MMM Healthcare, Inc., 693 F.3d 244, 249 (1st Cir. 2012)* (citing *Klor's, 359 U.S. at 212*). A group boycott arrangement "sometimes [is] called [a] per se violation[]." *Stop & Shop, 373 F.3d at 61*. We have cautioned, however, that the "rhetoric of older group boycott cases" cannot be "taken at face value," and that any per se group boycott "label" is "minimally useful." *Id. at 61, 63-64*. This is because "precedent limits the per se rule in the boycott context to cases involving horizontal agreements among **[**39]** direct competitors." *NYNEX, 525 U.S. at 135*.

HN15[] Horizontal restraints are "agreements between competitors at the same level of market structure," whereas vertical restraints are "combinations of persons at different levels of market structure such as manufacturers and distributors." *M & H Tire Co., Inc. v. Hoosier Racing Tire Corp., 733 F.2d 973, 978 (1st Cir. 1984)* (internal quotation marks omitted). For example, the vertical chain in this case runs from the laborers to the erectors, from the erectors to the fabricators, and from the fabricators to the general contractors. Meanwhile, the nonunion erector companies compete on the same horizontal plane as the union-signatory erector companies, with each erector company (whether union or nonunion) competing for bids against every other erector company (whether union or nonunion).

As if our framework for analysis were not convoluted enough, we are faced here with an antitrust claim lodged against a labor organization. Because the labor laws accord specific protections and rights to unions, there are qualifications and carve-outs that must be considered before we proceed.

HN16[] As we noted in ASE I, "there is an inherent tension between national antitrust policy, which seeks to maximize competition, and national labor policy, which encourages cooperation **[**40]** among workers to improve the conditions of employment." *536 F.3d at 76* (quoting *H.A. Artists & Assocs., Inc. v. Actors' Equity Ass'n, 451 U.S. 704, 713, 101 S. Ct. 2102, 68 L. Ed. 2d 558 (1981))*. Whereas antitrust laws protect the consumer at the expense of individual market participants with a singular focus on price and output, labor laws protect the livelihood of the employee on the other end of the long chain of production and consumption. The courts have sought to reconcile these competing directives via two labor exemptions from the antitrust laws, one statutory and one nonstatutory.

HN17[] The statutory exemption stems from the Supreme Court's attempt to harmonize the goals of the Sherman, Clayton, and Norris-LaGuardia Acts. Id. "Reading the three statutes together, the Supreme Court held that union activity is exempt from antitrust liability 'so long as [the] union acts in its self-interest and does not combine with non-labor groups.'" Id. (quoting *United States v. Hutcheson, 312 U.S. 219, 232, 61 S. Ct. 463, 85 L. Ed. 788 (1941))*.

Yet, this exemption, while helpful in protecting the organization of union activity itself, did not adequately encompass the need to protect legitimate collective bargaining activity from antitrust liability. This is because such activity necessarily "constitute[s] a combination between labor unions and non-labor employers." *Id. at 77*. In ASE I, for example, we pointed out that the CBA **[**41]** (and the MRP) clearly could **[*63]** not qualify for the statutory exemption because it represented a combination between Local 7 (labor) and the signatory contractors (non-labor). Id.

Thus, ***HN18***[] the Supreme Court has recognized "that a proper accommodation between the congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in business markets requires that some union-employer agreements be accorded a limited nonstatutory exemption from antitrust sanctions." *Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 622,* 95 S. Ct. 1830, 44 L. Ed. 2d 418 (1975). This nonstatutory exemption "shields some restraints on competition imposed through the bargaining process, where the alleged anticompetitive conduct is anchored in the collective-bargaining process, concerns only the parties to the collective bargaining relationship, and relates to wages, hours, conditions of employment, or other mandatory subjects of collective bargaining." ASE I, 536 F.3d at 77 (citing Brown v. Pro Football, Inc., 518 U.S. 231, 250, 116 S. Ct. 2116, 135 L. Ed. 2d 521 (1996)).

It is within this detailed framework that our evaluation of the plaintiffs' antitrust claims begins. We described the plaintiffs' antitrust claims in ASE I as asserting a "conspiracy between Local 7 and its signatory contractors to pressure fabricators to hire only union employers, through a combination **[**42]** of threats, disruptive behavior, and MRP subsidies." Id. at 74. The plaintiffs had "paint[ed] the MRP as only one part--if the central part--of a wider conspiracy between Local 7, its signatory contractors, and the general contractors and steel fabricators from which they solicit steel erection work, to shut open-shop outfits such as Plaintiffs out of the steel erection market in the greater Boston area." Id. at 80. Although we ultimately held that Local 7's alleged conduct in combination with the signatory erectors was not protected by the statutory labor exemption, we remanded for further fact-finding to determine whether the nonstatutory exemption applied. Id. at 78-81. We reserved any opinion on the merits of the plaintiffs' antitrust claims. See id. at 76 n.6.

On remand, the district court resolved the antitrust issues after the jury's verdict on the LMRA claims. While ruling that the illegal § 8(e) agreements could not enjoy the protections of the nonstatutory exemption, the court concluded that summary judgment for Local 7 was still warranted. ASE II, 932 F. Supp. 2d at 247, 252. Its reasoning: the plaintiffs had "failed to demonstrate an unlawful anticompetitive effect of any aspect of Local 7's accused conduct." Id. at 252. We review this judgment de novo and may affirm on any **[**43]** ground made manifest in the record, untethered to the district court's rationale. See Euromodas, Inc. v. Zanella, Ltd., 368 F.3d 11, 16 (1st Cir. 2004).

Before us now, the plaintiffs argue that the court erroneously focused only on the four § 8(e) agreements, and thus failed to abide by our directive in ASE I to consider the "entirety of the alleged activity" in the industry as a whole. 536 F.3d at 80. Given a wider field of vision, they argue, the record shows that the defendant is guilty of "conspiracies to monopolize, group boycott, and horizontal monopoly." We have attempted to piece together these claims to the best of our ability given the rather murky briefing, but we cannot find that antitrust liability exists on the facts and theories presented.[3]

[*64] 1. Section 1 Group Boycott

The plaintiffs initially attempt to circumvent a typical rule of reason analysis by incanting the magic, per se words of "group boycott." But, the plaintiffs' attempt to twist the record into reflecting a per se violation is unavailing. As discussed above, ***HN19***[] "precedent limits the **[**44]** per se rule in the boycott context to cases involving horizontal agreements among direct competitors." NYNEX, 525 U.S. at 135. As such, plaintiffs' allegations of questionable vertical arrangements, whether between Local 7 and fabricators or Local 7 and general contractors, do little to advance their claim to per se treatment. In order to potentially generate per se antitrust liability, Local 7's vertical relationships would at least need to intersect with or give rise to an unlawful horizontal relationship. Cf. MM Steel, L.P. v. JSW Steel 7 (USA) Inc., 806 F.3d 835 (5th Cir. 2015); United States v. Apple, Inc., 791 F.3d 290 (2d Cir. 2015). Here, there is no such horizontal arrangement to speak of.

To the extent the plaintiffs claim that there is any horizontal conspiracy among the fabricators as a class or the general contractors as a class to shut nonunion erectors out of bidding opportunities, there is no such evidence in the record. Despite isolated instances of nonunion erectors being removed from jobs, there was no evidence of any horizontal agreement among general contractors or among fabricators to foreclose the plaintiffs from the structural steel erection market at Local 7's request. Compare Klor's, 359 U.S. at 208-09 (holding boycott unlawful when appliance manufacturers and distributors agreed that distributors **[**45]** would not sell to one retailer at another

[3] To the extent the plaintiffs fault the district court for declining to engage in a free-ranging review of the defendant's behavior and conjure coherent claims into existence on the plaintiffs' behalf, we certainly find no error.

retailer's request) with NYNEX, 525 U.S. at 133, 136-37 (antitrust rule that group boycotts are illegal per se did not apply to a single buyer's decision to favor "one seller over another, albeit for an improper reason" because the combination involved only a vertical agreement and a vertical restraint depriving a supplier of a potential customer).

To the contrary, the fabricators' testimony evinced a willingness and desire to work with the nonunion erectors, and there appeared to be no general, horizontally consistent scheme of market foreclosure. One witness described DFM and Ajax as "extremely large" and "prominent" in the steel erection industry during the pertinent time frame. Pisani started DFM in the early 1990s, and the company gained stability with about twenty-five employees, primarily working in Rhode Island and Massachusetts. By the middle of the next decade, DFM had grown to about 110-120 employees and $13 million in sales. First entering the industry in the 1970s, Ajax had varying employee numbers over time, ranging from thirty to 120. Its business territory covered much of New England, including Massachusetts, Connecticut, New Hampshire, and Rhode Island. **[**46]** Ajax and DFM, as well as other named plaintiffs, regularly entered into subcontracts with various fabricators.

Nor does one find any meaningful evidence of unlawful horizontal conspiracy among the signatory erector firms. To the extent the plaintiffs bemoan the operation of the MRP in conjunction with signatory erector firms, there can be little doubt that this program was part and parcel of the CBA protected from antitrust scrutiny by the nonstatutory exemption. The MRP was clearly "anchored in the collective-bargaining process, concer[ned] only the parties to the collective bargaining relationship, and relat[ed] to wages, hours, **[*65]** conditions of employment, or other mandatory subjects of collective bargaining." *ASE I, 536 F.3d at 77* (citing *Brown, 518 U.S. at 250*). As we mentioned in ASE I, such agreements, as a general matter, have been widely upheld. *Id. at 79-80*.

Beyond this point of wage agreement, however, the plaintiffs' accusations of horizontal conspiracy among the signatory erectors ring hollow on this record, especially in light of the rigorously enforced Section 1 demands for sufficient proof of concerted conduct. See *Am. Needle, 560 U.S. at 190 n.2*; *Fisher v. City of Berkeley, 475 U.S. 260, 266, 106 S. Ct. 1045, 89 L. Ed. 2d 206 (1986)*; *White v. R.M. Packer Co., 635 F.3d 571, 576 (1st Cir. 2011)*. ***HN20***[] While it remains true that "[o]ne group of employers may not conspire to eliminate competitors from the industry and the union is liable with **[**47]** the employers if it becomes a party to the conspiracy," *United Mine Workers of Am. v. Pennington, 381 U.S. 657, 665-66, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965)*; see also *Allen Bradley Co. v. Local Union No. 3, Int'l Bhd. of Elec. Workers, 325 U.S. 797, 800, 65 S. Ct. 1533, 89 L. Ed. 1939 (1945)*, sufficient proof of concerted anti-competitive action among independent business entities remains necessary to state a successful Section 1 claim.

In the end, evidence of conduct by the union erector signatories as market participants that remains ambiguous as to whether the actors have engaged in an illegal antitrust conspiracy, as opposed to independent action or conscious parallelism, is insufficient to survive summary judgment. See *White, 635 F.3d at 577* & n.5; *Euromodas, 368 F.3d at 19*. After careful review of the record, we conclude that the plaintiffs' evidence fails to clear this hurdle and that any purported tacit horizontal agreement among union signatory erectors remains illusory. See *Euromodas, 368 F.3d at 18* (noting that antitrust plaintiffs bear the burden "to make at least a prima facie showing of concerted action" with "an illicit objective").

Beyond the bare wage agreement and operation of the MRP, which are protected from antitrust scrutiny under the nonstatutory exemption, each company acted as its own profit-maximizing entity pursuant to its own economic interest when seeking to win a fabricator's favor with the lowest erector bid, whether competing against a nonunion firm or **[**48]** another union signatory. Each union signatory erector formulated its own bid either with assurances of an MRP subsidy or by taking a corresponding cut in profits to account for nonunion bidders who were not bound to CBA wages. There is no evidence that the union signatories relinquished independent, competitive decision-making when receiving blast faxes and opting to submit a bid on the projects targeted by Local 7 or when later entering into a JTF agreement with the union for a winning bid. Rather, the evidence tends to show that the hundred-plus signatory erectors remained independently profit-driven in their respective bidding decisions--with or without the promised subsidy.

This precludes us from holding that the instant case falls within a category of "what may be called ***HN21***[] a group boycott in the strongest sense: A group of competitors[, i.e., signatory erectors,] threaten[ing] to withhold business from third parties[, i.e., fabricators or general contractors,] unless those third parties would help them injure their directly competing rivals[, i.e., nonunion erectors]." *NYNEX, 525 U.S. at 135*; see also *Fashion Originators' Guild of Am., Inc. v. F.T.C., 312 U.S. 457, 61 S. Ct. 703, 85 L. Ed. 949, 32 F.T.C. 1856 (1941)* (applying per se liability to an agreement among clothing designers, manufacturers, **[*66]** and suppliers to withhold selling **[**49]** clothes to retailers who bought clothes from competing manufacturers and suppliers).

HN22[] Without unlawful agreement among participants at any given horizontal plane, a Section 1 claim cannot fall within the narrow category of per se unlawful group boycott agreements. Because the plaintiffs failed to demonstrate any agreement among general contractors, any agreement among fabricators, or any non-wage-based agreement among signatory erectors,[4] the plaintiffs' group boycott theory of antitrust liability fails.

2. Section 1 Vertical Restraints

This leaves us with the plaintiffs' attack on Local 7's alleged vertical arrangements with individual signatory erectors, fabricators, and general contractors. **[*67]** Assuming that, from our labor analysis above, at least four vertical

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[4] The plaintiffs continue to allege that the wage-based agreement among and between the signatory erectors and Local 7 cannot be sheltered from antitrust scrutiny because it involved taking deductions from laborer wages and providing contractor subsidies on public projects in violation of the Davis-Bacon Act, *40 U.S.C. §§ 3141-3148*. See *ASE I, 536 F.3d at 74*; see id. n.5 (providing contours of Davis-Bacon Act). In ASE I, we recognized that "the MRP may very well violate the Davis-Bacon Act" to the extent it draws deductions from public projects or offers subsidies to contractors to win public projects. *Id. at 81*. We also recognized, however, that the plaintiffs themselves had not pursued, and likely could not pursue, a cause of action under the Davis-Bacon **[**50]** Act. Id. We left it to the plaintiffs on remand to flesh out their theory. In the final analysis, we do not believe that the plaintiffs have successfully landed their "acrobatic attempt to shoehorn a possible Davis-Bacon violation into their antitrust claims." Id.

"The Davis—Bacon Act was originally enacted in 1931 as a 'minimum wage law designed for the benefit of construction workers' which 'protects . . . employees from substandard earnings by fixing a floor under wages on Government projects.'" *Int'l Bhd. of Elec. Workers, Local 357, AFL-CIO v. Brock, 68 F.3d 1194, 1199 (9th Cir. 1995)* (quoting *United States v. Binghamton Constr. Co., 347 U.S. 171, 177-178, 74 S. Ct. 438, 98 L. Ed. 594 (1954))*. "When Congress enacted the Davis-Bacon Act, it intended to remove labor as [a] competitive element." *In the Matter of: Bldg. & Constr. Trades Unions Job Targeting Programs, WAB Case No. 90-02, 1991 DOL Wage App. Bd. LEXIS 34, 1991 WL 494718, at *1 (June 13, 1991)*.

When an otherwise-lawful MRP is utilized on such public projects, however, the funds deducted from the Davis-Bacon projects are used "as subsidies on private sector projects," and the prevailing wage surveys might thereby become "distorted to the extent the subsidy was distributed to [a] contractor on a private sector project." *1991 DOL Wage App. Bd. LEXIS 34, [WL] at *6*. "Over time, the government would pay more on Davis-Bacon . . . projects than the actual area wage rate, a result clearly outside the public interest and definitely not contemplated by the Congress which enacted Davis-Bacon." Id.

Although the recycling **[**51]** of wages through fixed-wage public projects and competitive private projects via the MRP may ultimately have an anticompetitive effect, this outcome is partially a result of the Davis-Bacon Act's anticompetitive prevailing wage mechanism. In other words, the plaintiffs' frontal assault on the MRP seems to necessarily entail a collateral, predicate attack on the Davis-Bacon Act itself.

Thus, while we agree that Congress presumably did not intend to permit such deductions under the Davis-Bacon Act, we find it equally unlikely that Congress intended the Sherman Act to provide the remedy that the plaintiffs request. See *ASE I, 536 F.3d at 81* (noting that "Reich and its progeny do not appear to stand for the proposition that a Davis-Bacon violation exposes an otherwise exempt job targeting program to antitrust liability"). Allowing particular deductions or subsidies that violate Davis-Bacon to eviscerate the categorical protections provided against Sherman Act liability would radically alter the careful balance struck between labor rights and antitrust liability.

That is not to say that a theory of liability more tailored to the specific offending characteristics or applications of the MRP might not allow for **[**52]** antitrust scrutiny. Rather, it is simply to say that the plaintiffs' broadside attack on the nonstatutory exemption fails. The plaintiffs have attempted to pin antitrust liability on the MRP as a whole, but we think the tail fails to find the donkey.

agreements exist, the plaintiffs allege a wider pattern of exclusive dealing between Local 7 and fabricators or Local 7 and general contractors.

Yet, this basis for antitrust liability also fails. First, to the extent any given fabricator or contractor replaced a nonunion erector with a union erector for improper reasons and in the face of higher costs, this alone is insufficient to prevail on an antitrust claim. See *NYNEX, 525 U.S. at 136-37* (noting that ***HN23***[] "[t]he freedom to switch suppliers lies close to the heart of the competitive process" and that applying per se liability to a buyer's decision to switch suppliers, even "though not made for competitive reasons, . . . would transform cases involving business behavior that **[**53]** is improper for various reasons . . . into treble-damages antitrust cases").

Second, any vertical agreements struck by the union are, on this record, insufficient to survive the district court's summary judgment. That is not to say that vertical agreements with exclusionary components can always escape antitrust liability. In Connell Construction, for example, a local union entered two sets of agreements: (1) a multiemployer bargaining agreement with a "most favored nation" clause that promised in essence to eliminate competition between all signatory mechanical trade subcontractors and any other subcontractors that the union might organize, and (2) a series of parallel, vertical agreements with general contractors that prohibited the general contractor from using any subcontractor that did not have an agreement with the union. *421 U.S. at 619, 623-25*. Thus, the union's agreements with general contractors not only reached beyond the laborers' primary employers, but also made nonunion subcontractors completely ineligible to compete for a substantial portion of all available work and imposed an anticompetitive restraint on the business market that was not limited to the elimination of competition over wages **[**54]** and working conditions. *Id. at 625*. Without deciding whether the union's vertical agreement with the general contractor actually violated the Sherman Act, the Supreme Court held that the agreement could provide the basis for a federal antitrust suit and remanded the case. *Id. at 637*.

Simply put, however, this case is no Connell. In the absence of evidence that Local 7 entered into a systemic or interlocking set of vertical exclusive dealing agreements with third-party neutrals so as to effectively foreclose the plaintiffs' access to a significant portion of competitive opportunities in the market for structural steel erection, we cannot disagree with the district court's decision to dispose of the antitrust claims on summary judgment.

To the extent Local 7 can be said to have entered into a handful of project-by-project vertical "exclusionary" agreements, the district court properly noted that such agreements are usually adjudged under the rule of reason. See *Leegin, 551 U.S. at 907*; *Continental T. V. v. GTE Sylvania, 433 U.S. 36, 59, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977)*. ***HN24***[] A rule of reason analysis "requires a burdensome multi-part showing: that the alleged agreement involved the exercise of power in a relevant economic market, that this exercise had anti-competitive consequences, and that those detriments outweighed **[**55]** efficiencies or other economic benefits." *Stop & Shop, 373 F.3d at 61*.

But, ***HN25***[] generally speaking, to make out a claim of exclusive dealing under the rule of reason, the plaintiffs would need to show that they were foreclosed from competing **[*68]** in a substantial portion of the relevant market. See *id. at 68* ("For exclusive dealing, foreclosure levels are unlikely to be of concern where they are less than 30 or 40 percent."); *ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 303 (3d Cir. 2012)* (holding that parallel long-term agreements between a single, upstream supplier and all downstream purchasers that contained exceedingly high market-penetration-target rebates constituted de facto exclusive dealing agreements and were, in the aggregate, anticompetitive under the rule of reason). Based on the trial record, the district court found that spending in the relevant market "has exceeded $200,000,000 each year since 1999" and that the four opportunities foreclosed "constitute only a fraction of a percent of the defined market, nowhere near the percentage impact necessary to make out an exclusionary claim under the rule of reason."[5] *ASE II, 932 F. Supp. 2d at 248*. Rather, the district court found that the plaintiffs were not "shorn of the ability to remain as competitors in the market" and that there was "no evidence that they **[**56]** were excluded from bidding on other jobs." *Id. at 249*.

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[5] The court assumed for purposes of summary judgment that spending for steel erection in the agreed-upon market exceeded $200 million each year since 1999, and the plaintiffs agree with this calculation.

To overcome this factual inconvenience, plaintiffs argue that the four deprivations presented at trial are illustrative of a broader pattern of exclusion from the Boston-area steel erection market, as evidenced by (1) the undisputed fact that seventy percent of the steel erection work within the geographical bounds of the agreed-upon market was performed by union signatory erectors, and (2) the trial testimony indicating that at some point nearly all significant erector work in Boston itself was performed by union signatory companies.

Although these numbers might paint a more compelling picture if the plaintiffs could show that they were the result of widespread or systemic anticompetitive agreements or conduct, we side with the district court in finding the record lacking in this regard. *Section 1* ***HN26***[] "does not reach independent decisions, even if they lead to the same anticompetitive result as an actual agreement among market actors." *White, 635 F.3d at 575*. "To survive [a] **[**57]** motion for summary judgment, [the] plaintiffs needed to demonstrate a genuine dispute as to whether defendant['s] actions caused an injury to competition, as distinguished from impact on themselves." *R.W. Int'l Corp. v. Welch Food, Inc., 13 F.3d 478, 487 (1st Cir. 1994)* (emphasis in original).

None of the discrete agreements involved a refusal to deal on an on-going basis, a fact that the plaintiffs acknowledged before the district court. Cf. *Sterling Merch., 656 F.3d at 124* ("'Short contract terms and low switching costs generally allay most fears of injury to competition,'" as do vertical agreements that are "not entirely exclusive." (quoting 11 Areeda & Hovenkamp, ***Antitrust Law***, ¶ 1802, at 94)). Moreover, there is insufficient evidence to establish widespread collusive agreements between Local 7 and steel fabricators or general contractors to foreclose open-shop erector companies as a general matter. We briefly revisit the record on the latter point.

Of the twenty steel fabricators referenced at trial, only four agreed to break subcontracts with DFM and Ajax and retain a union signatory replacement at a higher cost due to the pressure imposed by Local 7. Indeed, Paulding of fabricator **[*69]** Cape & Island Steel testified to his resistance against union pressure, and the evidence relating **[**58]** to the Brickworks project also evinces fabricator opposition toward Local 7's interference. Furthermore, DFM and Ajax were not excluded from bidding on other jobs or on future jobs with the same fabricators. It is telling that fabricator Cape & Island recalled DFM to finish the erector work at the Fox 25 site, and afterward the two entities continued their business relationship. Similarly, fabricator Capone Iron continued hiring DFM after dismissing that nonunion company from the Brickworks site.

Additionally, both DFM and Ajax flourished financially during the relevant time frame, two other plaintiffs also experienced economic growth, and three of the five plaintiffs entered the steel erector market since the inception of the MRP. Pisani himself testified that in the "past couple of years [DFM had] been doing a lot of pharmaceutical companies" and was "very competitive" on "very large jobs . . . a testament to what [his company] has done," and he agreed that as of 2006 his company "[had] been working pretty steady with about 20 fabricators."

While Local 7 certainly put direct pressure on some third-party neutrals to award work to union signatory companies, in the end (and after years **[**59]** of litigation and protracted discovery), the plaintiffs proved only four occasions in which individual fabricators agreed to replace a nonunion company with a union signatory erector company.

Nor is it sufficient to point to the MRP alone as evidence of an unlawful vertical agreement. Fabricators are entitled to respond to lower prices from erectors, and signatory erectors are entitled to float lower bids in an attempt to win erection work. A job lost to price competition is not one the antitrust laws were intended to restore or vindicate.[6]

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[6] As we discuss above, there may perhaps be reason to believe that a more narrowly tailored challenge to applications of the MRP could survive summary judgment, but the plaintiffs cannot render all contracts stemming from the MRP wholly unlawful under ***antitrust law*** merely by showing that the MRP sometimes functioned unlawfully under unrelated laws. As such, the plaintiffs cannot transform a vertical agreement entered into between a union signatory and a fabricator on the basis of price into an unlawful "exclusionary" agreement simply by pointing to a secondary JTF agreement between Local 7 and that union signatory.

Moreover, the record gives other reasons **[**60]** for the concentration of union labor in Boston. For instance, early on in the litigation, the district court noted that "[t]he largest Boston area construction projects employing structural steel workers are government-financed public works projects, including the 'Big Dig,' the Boston Harbor clean up, and the renovation of the terminals and parking facilities at Logan Airport." At trial, both Pisani and Morel testified that they generally opted not to submit bids for publicly funded projects because they did not want to sign the required project labor agreement. In short, the record evidence does not point inevitably toward a conclusion that union labor dominance for erector work in Boston stemmed from any set of unlawfully restrictive agreements, rather than some other cause not regulated under the Sherman Act. See *NYNEX, 525 U.S. at 136-37*; *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 224-25, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993)*; *Atl. Richfield, 495 U.S. at 344*; *Apex Hosiery Co. v. Leader, 310 U.S. 469, 503, 60 S. Ct. 982, 84 L. Ed. 1311 (1940)*.[7]

[*70] ***HN27***[] "[S]ome antitrust cases are intrinsically hopeless" because "they merely dress up in antitrust garb what is, at best, a business tort or contract violation." *Stop & Shop, 373 F.3d at 69*; see also *E. Food Servs., Inc. v. Pontifical Catholic Univ. Servs. Ass'n, Inc., 357 F.3d 1, 4 (1st Cir. 2004)*. Ultimately, the plaintiffs' antitrust claims here are dressed in the same vestment. And so, given the record before us, we agree with the **[**62]** district court's bottom line that the evidence was only sufficient to demonstrate the existence of a handful of sporadic vertical restraints resulting in harm to the plaintiffs, and not the existence of a systemic set of exclusionary restraints resulting in harm to competition in the marketplace for structural steel erection services itself. See *Stop & Shop, 373 F.3d at 66*; *Euromodas, 368 F.3d at 21*; *R.W. Int'l, 13 F.3d at 487*.

3. *Section 2*

Lastly, we note that the plaintiffs have invoked *Section 2* of the Sherman Act as well, although their allegations pertaining to "conspiracy to monopolize" and "horizontal monopolization" are dubious and difficult to divine. Their brief mingles *Section 1* and *Section 2* advocacy, with little attention to the latter.

There is, perhaps, an argument to be made that the bids of signatory erectors on particular private projects could have been below-cost, predatory bids offset by supracompetitive prices enabled by the Davis-Bacon Act's prevailing wage mechanism and the artificial inflation of the local prevailing wage rate. Hints of a novel theory of this nature seem to be scattered throughout the plaintiffs' papers. Yet, once again, we are faced with a situation where the plaintiffs have provided such skimpy evidence and entangled briefing that this theory of liability **[**63]** must be considered waived. See *ASE I, 536 F.3d at 83* ("[I]f [p]laintiffs cannot sort out their allegations and develop their arguments sufficiently, it is not for us to do so for them.").

The plaintiffs' buckshot Davis-Bacon accusations have always seemed to suggest that the alleged violations of that statute should unwind the nonstatutory exemption as a whole, thereby causing otherwise-lawful and non-conspiratorial activity to incur antitrust liability. On remand, the district court addressed the MRP in the context of the plaintiffs' larger conspiracy theory, and we agree that the plaintiffs' alleged Davis-Bacon violations do not impact the MRP's broader eligibility for the nonstatutory exemption.

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[7] It is true that Gavin of fabricator FAMM Steel testified that her company had agreed on numerous occasions to replace a nonunion erector with a union signatory at the behest of the general contractor or owner (and through union pressure), including about "half a dozen Stop & Shops." However, she is the only fabricator witness who testified to an apparent company pattern **[**61]** of subcontract breaches targeting nonunion erectors. Also, the plaintiffs offered no evidence that Gavin's company accepted higher priced contracts with union signatories beyond the Cardi's Furniture project. On this record, we should not leap to a conclusion that one fabricator's potential business torts or contract breaches are indicative of antitrust liability. See *Stop & Shop, 373 F.3d at 69*. This is particularly true in view of the fact that DFM, Ajax, and other willing open-shop erectors continued to participate in the fiercely competitive structural steel erection market. Cf. *Sterling Merch., 656 F.3d at 124* (holding that exclusive agreements were not proven to have impaired competition where, inter alia, distributors historically competed for the agreements with retailers, plaintiff succeeded in winning over one of defendant's largest customers, other avenues of distribution remained available, and new competitors entered the market).

Beyond this, however, the plaintiffs have sporadically implied that the deductions and subsidies themselves were part of an unlawful predatory pricing scheme. While we do not foreclose the viability of the suggested theory as a matter of law in **[*71]** future cases, any leeway that we may grant to parties who present evolving legal theories on appeal has limits. See generally *Genereux v. Raytheon Co., 754 F.3d 51, 59 (1st Cir. 2014)*; *MaCaulay v. Anas, 321 F.3d 45, 52 (1st Cir. 2003)*.

The plaintiffs have exceeded those limits. ***HN28***[] A predatory pricing claim under *Section 2* requires plaintiffs to prove that the prices complained of were below an appropriate **[**64]** measure of costs and that there was a dangerous probability that the difference between these values could be recouped. *Brooke Group, 509 U.S. at 222, 224*.

Here, the plaintiffs haphazardly invoke variant strands of antitrust case law and have failed to make any coherent argument to support their predatory pricing claim. *Stop & Shop, 373 F.3d at 65* ("[S]ubstitut[ing] innuendo for analysis [is] fatal" to antitrust claims since antitrust plaintiffs must "explain in detail . . . just what the arrangements were and why they plausibly constituted antitrust violations."). The plaintiffs fail to explain at all, for example, how recoupment via the unlawful exploitation of a statutory mechanism rather than recoupment via monopolistic power would affect a predatory pricing analysis. If this unconventional approach is economically unsound, then there is a good chance that the "unsuccessful predation [would be] . . . a boon to consumers," *Brooke Group, 509 U.S. at 224*, and we would be wise to stay our hand, at least as far as antitrust liability is concerned. If the plaintiffs wish to cut a bold new path through ***antitrust law*** with a seemingly unique claim, they must show us the way.

Equally fatal, the plaintiffs' brief feints in this direction inexplicably fault Local 7 for failing to provide evidence **[**65]** of above-cost pricing. But as the district court recognized, "[t]his contention . . . stands the burden of proof on its head. Plaintiffs bear the ultimate burden of proving their claims, and on summary judgment must identify some evidence on which a jury could reasonably find in their favor . . . . That they have not done." *ASE II, 932 F. Supp. 2d at 251 n.13*.[8] We can hardly disagree. See *Brooke Group, 509 U.S. at 222* ("[A] plaintiff seeking to establish competitive injury from a rival's low prices must prove that the prices complained of are below an appropriate measure of its rival's costs.").

Because the plaintiffs have failed to offer sufficient evidence or argument to support a predatory pricing or "monopolization" claim, we find that their *Section 2* claim, like their **[**66]** Section 1 claims, fails. Accordingly, the plaintiffs are left without antitrust recourse.[9]

[*72] III. Conclusion

We **AFFIRM** the district court's decisions upholding the LMRA jury verdict and award of damages for plaintiffs DFM and Ajax, and granting summary judgment for defendant Local 7 on the antitrust claims. **Parties to bear their own costs**.

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[8] Insofar as the plaintiffs point to Dr. Kenneth Clarkson's expert report and argue that the MRP resulted in millions of dollars in harm due to "gross lost profits" by the plaintiffs, this continues to both presume the MRP is wholly unlawful and confuse harm to competition with harm to competitors. More importantly, Local 7 successfully moved to preclude him from testifying at the LMRA trial, and the plaintiffs failed to reanimate and adequately support these arguments in their post-trial briefing.

[9] As with the LMRA claims, the plaintiffs gain no traction by faulting the district court for excluding evidence on the eleven other construction projects. The court rendered these rulings in relation to the LMRA trial, and the jury's verdict has withstood Local 7's appellate attack. The plaintiffs do not adequately tie their evidentiary challenges to their antitrust appeal, and we will not craft a connection for them. Moreover, while they had the opportunity post-trial to readdress evidentiary boundaries for the antitrust litigation, the plaintiffs' 2011 summary judgment pleadings nearly exclusively relied on the trial evidence. Accordingly, we have no need to address the merits of their arguments.

In re K-Dur Antitrust Litig.

United States District Court for the District of New Jersey

February 25, 2016, Decided; February 25, 2016, Filed

Civil Action No. 01-cv-1652 (SRC)(CLW); MDL Docket No. 1419

Reporter

2016 U.S. Dist. LEXIS 22982 *; 2016-1 Trade Reg. Rep. (CCH) P79,573; 2016 WL 755623

IN RE K-DUR ANTITRUST LITIGATION This document relates to: All Actions

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Prior History: *In re K-Dur Antitrust Litig., 2010 U.S. Dist. LEXIS 28918 (D.N.J., Mar. 24, 2010)*

Core Terms

settlement, conspiracy, generic, patent, parties, license, brand-name, manufacturer, anticompetitive, spokes, Defendants', marketing, effects, summary judgment motion, procompetitive, FDA, infringement, fact finder, rule of reason, rule-of-reason, antitrust, products, interdependence, Reply, license agreement, pharmaceutical, settle, terms, prima facie case, burden of proof

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Opinion by: STANLEY R. CHESLER

Opinion

CHESLER, District Judge

This matter comes before the Court upon three motions: (1) Defendants Merck & Co., Inc. and Upsher-Smith Laboratories' ("Defendants") motion for summary judgment as to all claims brought by Direct Purchaser Plaintiffs ("Plaintiffs") related to the Upsher-Smith settlement [Docket Entry 839]; (2) Defendants' motion for summary judgment as to all claims brought by Plaintiffs related to the ESI settlement [Docket Entry 840]; and (3) Plaintiffs' motion to strike Sections I and II of the reply memorandum submitted by Defendant Merck & Co., Inc., in support of its motion for summary judgment on all claims related to the ESI settlement [Docket Entry 848]. The Court has considered the papers filed by the parties, and heard oral argument on these motions on July 22, 2015 [Docket Entry 859]. For the reasons discussed below, the Court will deny Plaintiffs' motion to strike Sections I and II of Defendants' reply memorandum related to the ESI settlement. The Court will also deny Defendants' motion for summary judgment as to all claims brought by Plaintiffs **[*9]** related to the Upsher-Smith settlement. The Court will grant Defendants' motion for summary judgment as to all claims brought by Plaintiffs related to the ESI settlement.

I. INTRODUCTION

Plaintiffs in this action challenge the lawfulness of two patent litigation settlements between a brand-name pharmaceutical company and generic pharmaceutical companies who sought to enter the market with generic drugs, prior to expiration of the brand-name manufacturer's relevant patent for the drug. In the events leading to this case, brand-name pharmaceutical manufacturer Schering-Plough Corporation ("Schering") settled two separate patent infringement litigation cases with generic manufacturers Upsher-Smith Laboratories ("Upsher") and ESI-Lederle ("ESI"), related to Schering's sustained-release potassium supplement K-Dur. These settlements provided for cash payments from Schering to each generic company, in exchange for the generic company's promise to not enter the market with a generic version of K-Dur for a period of time.

The type of settlement described above is commonly known as a reverse payment settlement, or a "pay-for-delay" settlement. Reverse payment settlements typically occur between **[*10]** brand-name pharmaceutical companies, who ordinarily hold the patents at issue in patent infringement litigation, and generic pharmaceutical companies, who seek to compete in the same drug market as the brand-name company and thus run the risk of infringing the brand-name company's patents. In a reverse payment settlement, the patent holder pays the generic company (also usually an alleged patent infringer) substantial consideration, in exchange for the generic company's agreement to settle the patent litigation and delay entry into the market for a set period of time. Reverse payment settlements occur almost exclusively in pharmaceutical drug litigation, usually under the auspices of the Hatch-Waxman Act's provisions allowing generic manufacturers to challenge the validity of a patent owned by a brand-name manufacturer. *FTC v. Actavis, Inc., 133 S. Ct. 2223, 2227-28, 186 L. Ed. 2d 343 (2013)*.

Plaintiffs allege that the settlements between Schering and Upsher ("the Schering-Upsher settlement") and Schering and ESI ("the Schering-ESI settlement") were anticompetitive agreements that prevented and delayed the market entry of generic substitutes for K-Dur, and that Schering, Upsher, and ESI engaged in a conspiracy to restrain trade of K-Dur and to fix the price **[*11]** of K-Dur, in violation of Section 1 of the Sherman Act, *15 U.S.C. § 1*. (First Am. Class Action Compl. ¶¶ 119-22, Docket Entry 839-4).

This case has had a long factual and procedural history, which has been recounted in numerous previous opinions. The relevant regulatory and procedural background, as well as the facts germane to the motions addressed in this Opinion, are reviewed below.

a. REGULATORY BACKGROUND

A brand-name drug manufacturer seeking to market a "pioneer" new prescription drug in the United States first must file a New Drug Application ("NDA") with the federal Food and Drug Administration ("FDA"). *21 U.S.C. § 355(b)(1) (2012)*; *Actavis, 133 S. Ct. at 2228*. The brand-name manufacturer must then provide data to the FDA to verify the safety and efficacy of the new drug, and must also provide the FDA with information on how the drug is manufactured, processed, and packed. *Id.* This information is printed in the publication Approved Drug Products with Therapeutic Equivalence Evaluations, otherwise known as the "Orange Book." FDA Electronic Orange Book, http://www.fda.gov/cder/ob/ . The FDA may grant a brand-name manufacturer permission to market the pioneer drug in the United States, after a review process. 21 U.S.C. § 355(b)(1); Actavis, 133 S. Ct. at 2228.

Regulation of the approval of generic drugs in the United States **[*12]** is governed by the provisions of the Drug Price Competition and Patent Term Restoration Act of 1984, commonly known as the Hatch-Waxman Act. Pub. L. 98-419, 98 Stat. 1585 (1984) (codified at 21 U.S.C. §§ 355, 360cc, 35 U.S.C. §§ 156, 271), *amended by* the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, *Pub. L. No. 108-173, 117 Stat. 2066 (2003)*. The Hatch-Waxman Act permits generic manufacturers to avoid the long and expensive process of obtaining FDA approval for a pioneer brand-name drug. After the FDA has approved a pioneer brand-name drug for marketing, a generic drug manufacturer can file an Abbreviated New Drug Application ("ANDA") with the FDA to seek marketing approval. The ANDA applicant must declare that the generic drug has the "same active ingredients" as and is biologically equivalent to the brand-name drug. *Caraco Pharm. Labs., Ltd. v. Novo Nordisk A/S, 132 S. Ct. 1670, 1676, 182 L. Ed. 2d 678 (2012)* (citing 21 U.S.C. §§ 355(j)(2)(A)(ii), (iv)); *see also* Actavis, 133 S. Ct. at 2228.

The Hatch-Waxman Act also provides special procedures for patent disputes arising between brand-name manufacturers and generic manufacturers. For example, brand-name manufacturers are required to list the patent number and expiration date for any relevant patents for the drug in the NDA. 21 U.S.C. § 355(b)(1); Actavis, 133 S. Ct. at 2228. In addition, generic manufacturers must provide written notice to each patent owner listed in the Orange Book who may be impacted by an ANDA. 21 U.S.C. § 355(j)(2)(B)(iii)(I). Generic **[*13]** manufacturers also must assert in the ANDA that the generic drug does not infringe the brand-name drug's patents, and may do so in a variety of ways. Actavis, 133 S. Ct. at 2228 (citing Caraco, 132 S. Ct. at 1672). A generic manufacturer may assert that the brand-name manufacturer has not listed any relevant patents in its NDA, or that any relevant patents listed in the NDA have expired. 21 U.S.C. §§ 355(j)(2)(A)(vii)(I)-(II). It may request approval to market its generic drug once the brand-name drug's patents expire. 21 U.S.C. §§ 355(j)(2)(A)(vii)(III). Finally, under a certification commonly known as the "Paragraph IV route," it may certify that any relevant patent listed in the NDA "is invalid or will not be infringed by the manufacture, use, or sale" of the generic drug listed in the ANDA. 21 U.S.C. § 355(j)(2)(A)(vii)(IV). Using the Paragraph IV route in an ANDA application is an automatic act of patent infringement (per 35 U.S.C. § 271(e)(2)(A)), and oftentimes spurs the brand-name patent holder to start litigation proceedings against the generic ANDA filer. Actavis, 133 S. Ct. at 2228 (citing Caraco, 132 S. Ct. at 1677). When the brand-name manufacturer brings an infringement suit against the ANDA applicant within 45 days of a Paragraph IV filing, the FDA may not grant final approval of the generic drug until either (1) 30 months has passed, or (2) the court hearing the patent infringement or validity suit **[*14]** has found that the patent is either invalid or not infringed, whichever is earlier. 21 U.S.C. § 355(j)(5)(B)(iii)(I).

Under the current Hatch-Waxman Act provisions, the first generic manufacturer to file an ANDA application is entitled to 180 days of marketing exclusivity over other generic companies, starting on (1) the first day it commercially markets its generic drug, or (2) from the date of a court decision[1] of patent invalidity or non-infringement. 21 U.S.C. § 355(j)(5)(B)(iv). If a first-to-file generic company forfeits the exclusivity right for a particular drug, no other generic company can receive it. 21 U.S.C. § 355(j)(5)(D). Generic companies value this exclusivity right highly; oftentimes most of the profits a generic company makes on a particular generic drug are earned during the exclusivity period. *See, e.g.*, C. Scott Hemphill, *Paying for Delay: Pharmaceutical Patent Settlement as a Regulatory Design Problem*, 81 N.Y.U. L. Rev. 1553, 1588-94 (2006).

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[1] The meaning of "court decision" has been refined by the courts over time. At the time of the Schering-Upsher and Schering-ESI settlements, the FDA applied the interpretation that a court decision on validity or non-infringement had been rendered either when the Federal Circuit affirmed a district court decision, or when the time for filing an appeal **[*15]** had lapsed. In *Mylan Pharmaceuticals, Inc. v. Shalala, 81 F. Supp. 2d 30, 41-42 (D.D.C. 2000)*, the court held that "decision of a court" meant "all court decisions, whether subsequently vacated, settled, appealed or otherwise mooted," and that the 180-day exclusivity period began on the date a district court rendered a decision of patent invalidity, non-infringement, or unenforceability. The FDA acknowledged that it would follow this approach prospectively in its March 2000 Guidance to Industry on this topic.

Starting in the late 1990s, some parties to patent infringement suits under the Hatch-Waxman regime began to settle their disputes using reverse payment settlements, where the brand-name patent holder gave valuable consideration to the generic manufacturer, primarily in exchange for the generic manufacturer's agreement to refrain from entering the market with a generic drug for a set period of time. Congress observed that many of these agreements may have potentially anticompetitive elements, and thus amended the Hatch-Waxman Act as part of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 to require parties who settle patent litigation under the Hatch-Waxman Act to submit their settlement agreements to the Federal Trade Commission **[*16]** and the Department of Justice for antitrust review. Pub. L. No. 108-173, §§ 1111-1118, 117 Stat. 2066, 2461-64 (codified as amended at *21 U.S.C. § 355(j)*).

b. Factual And Procedural Background of Schering's Settlements with Upsher and ESI[2]

i. Parties

Lead Plaintiff Louisiana Wholesale Drug represents the Direct Purchaser Plaintiff class in this action, comprised of all persons or entities who purchased K-Dur directly from Schering from November 20, 1998 through September 1, 2001. (First Am. Class Action Compl. ¶ 2, Docket Entry No. 839-4.) Direct Purchaser Plaintiffs include direct purchasers of K-Dur, as well as health maintenance organizations, hospitals, retail drug store chains, and wholesalers. (*Id.*)

Former Defendant Schering was a New Jersey corporation involved in drug discovery, development, and marketing of brand-name and generic drugs. (*Id.* ¶ 3.) Schering merged with Defendant Merck in 2009. Defendant Upsher is a Minnesota corporation involved in drug discovery, development, and marketing of brand-name and generic drugs. (*Id.* ¶ 4.) Former Defendant Wyeth Laboratories ("Wyeth"), previously known as American Home Products, **[*17]** Inc. ("AHP"), was a Delaware corporation involved in drug discovery, development, and marketing of brand-name and generic drugs. (*Id.* ¶ 5.) Former Defendant ESI was a business unit of Wyeth, engaged in the research, manufacture, and sale of generic drugs. (*Id.*)

ii. K-Dur and Schering's '743 Formulation Patent[3]

In the time period before the events leading to this litigation, Schering marketed a brand-name sustained-release potassium chloride supplement known as K-Dur. (Defs.' SUF Upsher ¶ 1; Pls.' SDF Upsher ¶ 1.) The compound potassium chloride itself could not be patented due to prior art in the field. (Pls.' SDF Upsher ¶ 2; Defs.' SDF Reply Upsher ¶ 2.) Schering's subsidiary Key Pharmaceuticals ("Key") held a formulation patent (U.S. Patent No. 4,863,743 ("the '743 patent")) on the controlled-release coating used to package the potassium chloride crystals. (Defs.' SUF Upsher ¶ 2; Pls.' SDF Upsher ¶¶ 2, 55; Defs.' SDF Reply Upsher ¶ 55.) Schering listed the '743 patent in the Orange Book, as a patent that would be infringed by a generic version of K-Dur. (Pls.' SDF Upsher **[*18]** ¶ 56; Defs.' SDF Reply Upsher ¶ 56.) The '743 patent expired on September 5, 2006. (Defs.' SUF Upsher ¶ 2; Pls.' SDF Upsher ¶ 2.)

iii. Schering's Patent Litigation and Settlement with Upsher

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[2] The facts pertinent to the current motions are drawn primarily from the parties' pleadings and respective statements filed pursuant to *Local Rule 56.1*.

[3] The details of this patent and its prosecution are described in the Special Master's 2009 Report and Recommendation in this case. *In re K-Dur Antitrust Litig., No. 1-1652, 2009 U.S. Dist. LEXIS 126249, 2009 WL 508869, at *4-5 (D.N.J. Feb. 6, 2009)*.

Upsher filed the first ANDA related to K-Dur in August 1995, seeking approval for its generic version of K-Dur: a microencapsulated, controlled-release potassium chloride tablet. (Defs.' SUF Upsher ¶ 3; Pls.' SDF Upsher ¶ 3.) In its Paragraph IV certification, Upsher claimed that its generic drug was bioequivalent to K-Dur, but did not infringe the '743 patent. (Defs.' SUF Upsher ¶¶ 4-6, Pls.' SDF Upsher ¶¶ 4-6, 57; Defs.' SDF Reply Upsher ¶ 57.)

Schering (through Key) then filed a patent infringement suit against Upsher in the District of New Jersey on December 15, 1995, seeking to enjoin Upsher from marketing its generic version of K-Dur until the '743 patent expired in September 2006. (Defs.' SUF Upsher ¶ 7; Pls.' SDF Upsher ¶¶ 7, 58; Defs.' SDF Reply Upsher ¶ 58.) Upsher denied the infringement claims, and brought declaratory judgment counterclaims for invalidity, non-infringement, and unenforceability of the '743 patent. (Defs.' SUF Upsher ¶ 8; Pls.' SDF Upsher ¶ 8.)

The parties reached a settlement on the morning of June 18, 1997 ("the **[*19]** Schering-Upsher settlement," dated June 17, 1997), on the eve of trial in the patent litigation action. (Defs.' SUF Upsher ¶¶ 14-20, 27, 43-44; Pls.' SDF Upsher ¶¶ 14-20, 27, 43-44, 64-74, 76; Defs.' SDF Reply Upsher ¶¶ 64-74, 76.) The settlement included the following main terms: (1) Upsher would not market its generic potassium chloride drug or any other sustained-release microencapsulated potassium chloride tablet before September 1, 2001; (2) effective September 1, 2001, Schering would grant Upsher a non-exclusive, non-royalty bearing license to market its generic potassium chloride products in the United States; (3) Upsher granted Schering an overseas license to Niacor-SR© ("Niacor"), a sustained-release niacin drug, as well as five other products[4]; and (4) Schering agreed to pay Upsher $60 million in three installments over two years, up to a further $10 million in milestone payments upon marketing of Niacor in certain countries, and 10 to 15 percent royalties on net Niacor sales.[5] (Defs.' SUF Upsher ¶ 43; Pls.' SDF Upsher ¶ 43; Docket Entry 843, Ex. 1.)

iv. SCHERING'S LITIGATION, MEDIATION, AND SETTLEMENT WITH ESI

On December 29, 1995, ESI filed an ANDA application on a sustained-release potassium chloride version of K-Dur, including a Paragraph IV certification. (Defs.' SUF ESI ¶ 1; Pls.' SDF ESI ¶ 1.) Schering (through Key) subsequently sued ESI in the Eastern District of Pennsylvania on February 16, 1996, alleging infringement of the '743 patent. (Defs.' SUF ESI ¶ 2; Pls.' SDF ESI ¶ 2.) Schering and ESI proceeded to court-supervised mediation in the fall of 1996, on the suggestion of presiding District Judge Jan DuBois. (*Id.*) United States Magistrate Judge Thomas Rueter **[*21]** served as mediator in this case, and met with the parties separately and jointly to encourage settlement. (*Id.*)

Judge DuBois held a *Markman* hearing on January 21 and 22, 1998, after which he directed the parties to Magistrate Judge Rueter to attempt to settle the case.[6] (Defs.' SUF ESI ¶¶ 11-13; Pls.' SDF ESI ¶¶ 11-13.) The parties eventually settled on the following terms on January 23, 1998 ("the Schering-ESI settlement"): (1) ESI agreed that it would not enter the K-Dur market with a generic product until January 1, 2004; (2) Schering would grant ESI a royalty-free, non-exclusive license of the '743 patent starting on January 1, 2004; (3) Schering would pay ESI $5 million upfront; and (4) Schering would pay ESI additional cash, the amount depending on when the FDA approved ESI's ANDA application for generic K-Dur. (Defs.' SUF ESI ¶¶ 15-18; Pls.' SDF ESI ¶¶ 15-18, 22; Defs.' SDF Reply ESI ¶ 22; Docket Entry 843-52.) Schering agreed to pay ESI a maximum of $10 million if the FDA

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[4] As a part of the Schering-Upsher settlement, in addition to the Niacor license Upsher granted Schering licenses to its products **[*20]** KLOR CON© 8, KLOR CON© 10, KLOR CON© M20, PREVALITE©, and pentoxifylline. (Docket Entry 843, Ex. 1.)

[5] Schering paid Upsher $28 million upon approval of the settlement by Schering's Board of Directors, $20 million on the first anniversary of the approval of the settlement, and $12 million on the second anniversary of the approval of the settlement. The settlement included payment schedules for milestones and royalties related to Schering's sales of Niacor, but Schering did not pursue the production and marketing of Niacor so these payments were never made. (Docket Entry 843, Ex. 1.)

[6] The parties dispute the admissibility and relevance of comments made by Judge Rueter and Judge DuBois during the mediation process. (Defs.' SUF ESI ¶¶ 5, 11-19; Pls.' SDF ESI ¶¶ 5, 11-19.)

approved ESI's ANDA before July 1999. (Defs.' SUF ESI ¶¶ 16-18; Pls.' SDF ESI ¶¶ 16-18, 22; Defs.' SDF Reply ESI ¶ 22; Docket Entry 843-52.) If the FDA did not approve ESI's ANDA until 2002, Schering agreed to pay ESI **[*22]** only $625,000. (*Id.*)

The FDA approved ESI's generic K-Dur product in May 1999, and Schering paid ESI the $10 million specified by the Schering-ESI settlement. (Defs.' SUF ESI ¶ 20; Pls.' SDF ESI ¶ 20.) In July 2001, ESI announced that it was exiting the oral generics business, and ESI left the oral generics market in 2002 without ever marketing a generic K-Dur product. (Defs.' SUF ESI ¶ 21; Pls.' SDF ESI ¶ 21.)

c. PROCEDURAL HISTORY

i. FTC ACTION AND APPEAL TO THE ELEVENTH CIRCUIT

On March 30, 2001, the FTC's Complaint Counsel filed a Complaint against Schering, Upsher, and AHP.[7] *In the Matter of Schering-Plough Corp., No. 9297, Initial Decision, 136 F.T.C. 956, 1092 (2002)*. The Complaint alleged that Schering's settlements with Upsher and ESI violated *Section 5* of the Federal Trade Commission Act, because Schering, Upsher, and ESI entered into unlawful agreements to delay the entry of generic K-Dur onto the market. *Id.*

The FTC held a nine week trial in this action in early 2002, and at its conclusion the Administrative Law Judge ("ALJ") presiding over the case dismissed the Complaint, because he found no evidence to support the FTC's challenge on either settlement. *Id. at 1092, 1263*. The ALJ determined that the Schering-Upsher settlement did not include a reverse payment, because the parties separately valued the Niacor license deal included in the settlement. *Id. at 1168-80*. Thus, the ALJ concluded that Schering did not pay Upsher impermissibly for delaying its entry onto the market. *Id. at 1243*. The ALJ also found that the Schering-ESI settlement did not maintain Schering's monopoly unlawfully in the potassium chloride market. *Id. at 1236, 1262-63*.

The ALJ adopted the antitrust rule-of-reason approach to analyze the legality of both settlements.[8] In doing so, the ALJ rejected the FTC's preferred *per se* approach, which presumes that such settlements are illegal due to the need to consider the exclusionary power of the patent in the analysis of the legality of the settlements. *Id. at 1225-35*. The ALJ found "no basis in law or fact" to make the presumption that the '743 patent was invalid, or that Upsher and ESI's products did not infringe the patent. *Id. at 1097*. Overall, **[*24]** the ALJ rejected the FTC's argument that without Schering's payments to Upsher and ESI, the generic companies could have entered the market earlier, given the exclusionary power of Schering's '743 patent and the court's inability to predict the outcome of the patent litigations at issue. *Id. at 1193-94*.

The full Federal Trade Commission ("the Commission") unanimously reversed the ALJ's decision in December 2003. *In the Matter of Schering-Plough Corp., Final Order, 136 F.T.C. 956, 1003-04 (2003)*. On its own fact findings, the Commission determined that Schering's $60 million payment compensated Upsher not only for the Niacor license but also for its delayed entry onto the K-Dur market. *Id. at 1061*. The Commission also determined that the Schering-ESI agreement violated the antitrust laws, given that Schering did not effectively rebut the presumption that the purpose of its payment to ESI was to guarantee ESI's delayed entry into the market. *Id. at 1056-57*. Although the Commission did not hold that Schering's payments to Upsher and ESI were *per se* illegal, it also did not adopt the rule-of-reason analysis used by the ALJ. *Id. at 965*. Instead, the Commission required the FTC's Complaint Counsel to first demonstrate that the agreements had anticompetitive effects, **[*25]** after which the "[r]espondents must demonstrate that the challenged provisions are justified by procompetitive benefits that are both cognizable and plausible." *Id.* The Commission found that the FTC's Complaint Counsel had demonstrated the

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[7] As noted above, ESI was a division of AHP, engaged in the manufacture, research, and sale of generic drugs. AHP became Wyeth in 2002. (First **[*23]** Am. Class Action Compl. ¶ 5.)

[8] The details of the rule-of-reason approach are reviewed in Section III.

Schering-Upsher and Schering-ESI settlements had anticompetitive effects, and found that with inadequate procompetitive justifications on the record, "it is logical to conclude that the *quid pro quo* for the payment was an agreement by the generic to defer entry beyond the date that represents an otherwise reasonable litigation compromise." *Id. at 988*. The Commission essentially concluded that settlements with reverse payments in excess of $2 million (to cover estimated legal fees) paid for market delay, and were thus illegal. *Id. at 968*.

On appellate review, the United States Court of Appeals for the Eleventh Circuit reversed the Commission's Final Order and dismissed the Complaint. *Schering-Plough Corp. v. FTC, 402 F.3d 1056 (11th Cir. 2005)*, *cert. denied*, *548 U.S. 919, 126 S. Ct. 2929, 165 L. Ed. 2d 977 (2006)*. Rather than using a *per se* or a rule-of-reason approach, the Eleventh Circuit found that courts must determine "the extent to which the exclusionary effects of the agreement fall within the scope of the patent's protection." *Id. at 1065, 1076*. Under this rule, the settlements at issue fell within the **[*26]** protections of the '743 patent, and thus were not illegal. *Id. at 1076*. The Eleventh Circuit determined specifically that the $60 million payment in the Schering-Upsher settlement did not constitute an illegal reverse payment. In fact, the court found by "overwhelming evidence" that Schering's payment was for the license. *Id. at 1069-71*. Furthermore, although the court found that the Schering-ESI settlement included a reverse payment, given policy rationales favoring the settlement of litigation, the court found that this payment "'reflect[ed] a reasonable implementation' of the protections afforded by patent law." *Id. at 1072* (quoting *Valley Drug Co. v. Geneva Pharms., Inc., 344 F.3d 1294, 1312 (11th Cir. 2003))*. These settlements allowed Upsher to enter the market more than five years before the '743 patent expired, and allowed ESI to enter the market more than two years before the '743 patent expired. *Id. at 1067-68*. At the time, no allegations had been raised that the '743 patent was invalid, or that Schering's infringement suits against the generic companies were shams. *Id. at 1068*. In addition, the court found no evidence on the record to support the Commission's conclusion that the parties would have compromised on earlier entry dates without Schering's payments. *Id. at 1074*. The court further noted that the Hatch-Waxman Act changes the risk assessment for brand-name and generic **[*27]** manufacturers:

> [T]he Hatch-Waxman Amendments grant generic manufacturers standing to mount a challenge without incurring the cost of entry or risking enormous damages flowing from any possible infringement. Hatch-Waxman essentially redistributes the relative risk assessments and explains the flow of settlement funds and their magnitude. Because of the Hatch-Waxman scheme, ESI and Upsher gained considerable leverage in patent litigation: the exposure to liability amounted to litigation costs, but paled in comparison to the immense volume of generic sales and profits. This statutory scheme could then cost Schering its patent.
>
> By entering into the settlement agreements, Schering realized the full potential of its infringement suit—a determination that the '743 patent was valid and that ESI and Upsher would not infringe in the future. Furthermore, although ESI and Upsher obtained less than they what they would have received from successfully defending the lawsuits (the ability to immediately market their generics), they gained more than if they had lost. A conceivable compromise, then, directs the consideration from the patent owner to the challengers.

Id. (internal citations omitted). Under this logic, the Eleventh Circuit explicitly **[*28]** stated that settlements should be available as a remedy for brand-name and generic companies involved in Hatch-Waxman litigation, and should not be prevented due to the presence of a reverse payment—even when the payment is large. *Id. at 1075*.

ii. PRIVATE DAMAGES CASES

The action currently before this Court stems from private damage cases filed in 2001, after the FTC filed its Complaint against Schering, Upsher, and AHP (of which ESI was a subsidiary). Plaintiffs originally filed these cases in several districts, but the Judicial Panel on Multi-District Litigation consolidated the pending action in the District of New Jersey. *In re K-Dur Antitrust Litig., 176 F. Supp. 2d 1377 (J.P.M.L. 2001)*. By consent in 2006, the district court appointed Stephen Orlofsky as Special Master, with the responsibility of handling all motions in this case [Docket Entry 316]. On April 14, 2008, the Special Master certified a class of plaintiffs of wholesalers and retailers who purchased K-Dur directly from Schering. *In re K-Dur Antitrust Litig., No. 1-1652, 2008 U.S. Dist. LEXIS 118396, 2008 WL 2699390, at *1 (D.N.J. April 14, 2008)*.

Defendants Schering and Upsher filed summary judgment motions in 2008, asserting that to raise concerns about antitrust liability, Plaintiffs had to demonstrate either that Schering's underlying patent litigation was baseless, **[*29]** that the '743 patent was obtained by fraud, or that the settlement terms extended beyond the "scope of the patent." *In re K-Dur Antitrust Litig., No. 01-1652 (JAG), 2009 U.S. Dist. LEXIS 126249, 2009 WL 508869, at *12 (D.N.J. Feb. 6, 2009)*. Specifically on the Schering-Upsher settlement, Defendants also asserted that the evidence on the record was legally insufficient to prove that Schering's $60 million payment was anything other than a bona fide licensing payment for Niacor. *Id.* The Special Master recommended that summary judgment be granted for Defendants on these motions, because the settlements at issue were lawful under the "scope of the patent" test. *2009 U.S. Dist. LEXIS 126249, [WL] at *27-30*. The opinion applied the presumption that the '743 patent was valid, and that Schering had, by right, the ability to exclude others from making infringing products until patent expiration, even through the use of reverse payments. *Id.* Under this framework, these settlements would be subject to antitrust scrutiny only if they exceeded the scope of the '743 patent, or if the underlying patent infringement suits were baseless. In this case, the Special Master found that neither of these exceptions applied. *Id.* On March 24, 2010, after *de novo* review, the Court adopted the Special Master's report and recommendation. *In re K-Dur Antitrust Litig., No. 01-1652, 2010 U.S. Dist. LEXIS 28918, 2010 WL 1172995 (D.N.J. Mar. 24, 2010)*.

In 2012, the Third Circuit reversed the district court's decision on **[*30]** the issue of the proper test to use to determine antitrust liability.[9] *In re K-Dur Antitrust Litig., 686 F.3d 197, 218 (3d Cir. 2012)*. In doing so, the court adopted the "quick look" test for the analysis of the potential antitrust liability of reverse payment settlements, which requires that the plaintiff initially present proof of a payment from a patent holder to a would-be generic entrant onto the market, after which the overall burden of proof shifts to the defendant to demonstrate that the payment was justified. *Id.* The Third Circuit explicitly rejected the "scope of the patent" test, stating that "litigated patent challenges are necessary to protect consumers from unjustified monopolies by name brand drug manufacturers," and that although the "scope of the patent" test encourages settlements, courts must consider other factors when determining the legality of a settlement. *Id.* The Third Circuit noted that "the only settlements subject to antitrust scrutiny [under the 'quick look' test] are those involving a reverse payment from the brand-name manufacturer to the generic challenger," and that the vast majority of pharmaceutical settlements would be unaffected by this rule. *Id.*

Following the Third Circuit's 2012 decision, Defendants Merck and Upsher filed petitions for certiorari, based on a circuit split as to the applicable standard under which reverse payment settlements should be analyzed. Brief of Petitioner for Certiorari, *Merck & Co. v. La. Wholesale Drug Co., No. 12-245, 133 S. Ct. 2849, 186 L. Ed. 2d 904 (Aug. 24, 2012)*; Brief of Petitioner for Certiorari, *Upsher-Smith Labs., Inc. v. La. Wholesale Drug Co., No. 12-265, 133 S. Ct. 2849, 186 L. Ed. 2d 904 (Aug. 29, 2012)*. To settle the circuit split, the Supreme Court granted certiorari on a reverse payment settlement case from the Eleventh Circuit. *FTC v. Watson Pharms., 133 S. Ct. 787, 184 L. Ed. 2d 527 (2012)*, *sub nom.* *FTC v. Actavis, Inc., 133 S. Ct. 2223, 186 L. Ed. 2d 343 (2013)*. In *FTC v. Actavis, Inc.*, the Supreme Court directed lower courts to analyze reverse payments settlements using the rule-of-reason standard, and rejected both the "scope of the patent" and "quick look" tests. *Id. at 2237*. The Court held that "a reverse payment, where large and unjustified, can bring with it a risk of significant anticompetitive effects." *Id. at 2237*. Section III details the *Actavis* decision and its application to the analysis of reverse payment settlements.

Following the decision in *Actavis*, the Supreme Court granted Defendants' petitions for certiorari, vacated the Third Circuit's 2012 decision, and remanded the case to the Third Circuit. *Merck & Co. v. La. Wholesale Drug Co., 133 S. Ct. 2849, 186 L. Ed. 2d 904 (2013)*; *Upsher-Smith Labs., Inc. v. La. Wholesale Drug Co., 133 S. Ct. 2849, 186 L. Ed. 2d 904 (2013)*. At the request of all parties, the Third Circuit remanded the case to this **[*32]** Court for further proceedings. *In re K-Dur Antitrust Litig., Nos. 10-2077, 10-2078, 10-4571, 2013 U.S. App. LEXIS 18859, 2013 WL 5180857 (3d Cir. Sept. 9, 2013)*.

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[9] The Third Circuit also affirmed the district court's certification **[*31]** of the Direct Purchaser Plaintiff class. *In re K-Dur Antitrust Litig., 686 F.3d at 224*.

Currently before this Court are three motions: (1) Defendants' motion for summary judgment on all claims related to the Schering-Upsher settlement; (2) Defendants' motion for summary judgment on all claims related to the Schering-ESI settlement; and (3) Plaintiffs' motion to strike sections I and II of the reply memorandum submitted by Defendant Merck & Co., Inc. in support of its motion for summary judgment on all claims related to the ESI settlement. The Court heard oral argument on all motions on July 22, 2015 [Docket Entry 859].

II. LEGAL STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate under *Fed. R. Civ. P. 56(c)* when the moving party demonstrates that there is no genuine issue of material fact and the evidence establishes the moving party's entitlement to judgment as a matter of law. *Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. A factual dispute is genuine if a reasonable jury could return a verdict for the non-movant, and it is material if, under the substantive law, it would affect the outcome of the suit. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. "In considering a motion for summary judgment, a district court may not make credibility determinations or engage in any weighing **[*33]** of the evidence; instead, the non-moving party's evidence 'is to be believed and all justifiable inferences are to be drawn in his favor.'" *Marino v. Indus. Crating Co., 358 F.3d 241, 247 (3d Cir. 2004)* (quoting *Anderson, 477 U.S. at 255*).

"When the moving party has the burden of proof at trial, that party must show affirmatively the absence of a genuine issue of material fact: it must show that, on all the essential elements of its case on which it bears the burden of proof at trial, no reasonable jury could find for the non-moving party." *In re Bressman, 327 F.3d 229, 238 (3d Cir. 2003)* (quoting *United States v. Four Parcels of Real Prop., 941 F.2d 1428, 1438 (11th Cir. 1991))*. "[W]ith respect to an issue on which the nonmoving party bears the burden of proof . . . the burden on the moving party may be discharged by 'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case." *Celotex, 477 U.S. at 325*.

Once the moving party has satisfied its initial burden, the party opposing the motion must establish that a genuine issue as to a material fact exists. *Jersey Cent. Power & Light Co. v. Lacey Twp., 772 F.2d 1103, 1109 (3d Cir. 1985)*. The party opposing the motion for summary judgment cannot rest on mere allegations and instead must present actual evidence that creates a genuine issue as to a material fact for trial. *Anderson, 477 U.S. at 248*; *Siegel Transfer, Inc. v. Carrier Express, Inc., 54 F.3d 1125, 1130-31 (3d Cir. 1995)*. "[U]nsupported allegations . . . and pleadings are insufficient to repel summary judgment." *Schoch v. First Fid. Bancorporation, 912 F.2d 654, 657 (3d Cir. 1990)*; *see also* *Fed. R. Civ. P. 56(e)* (requiring the nonmoving party **[*34]** to "set out specific facts showing a genuine issue for trial"). "A nonmoving party has created a genuine issue of material fact if it has provided sufficient evidence to allow a jury to find in its favor at trial." *Gleason v. Norwest Mortg., Inc., 243 F.3d 130, 138 (3d Cir. 2001)*.

If the nonmoving party has failed "to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial, . . . there can be 'no genuine issue of material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Katz v. Aetna Cas. & Sur. Co., 972 F.2d 53, 55 (3d Cir. 1992)* (quoting *Celotex, 477 U.S. at 322-23*).

III. Standard for Establishing Antitrust Liability under *Actavis*

The parties spend significant effort in their briefing on these motions debating how *Actavis* and the rule of reason should be applied in reverse payment settlement cases. This Section outlines the Court's views on these topics.

a. Reverse Payment Settlements: The *Actavis* Decision

In *Actavis*, the Supreme Court directed lower courts to use the antitrust rule of reason to examine the legality of reverse payment settlements on a case-by-case basis. *Id. at 2236-37*. In doing so, it explicitly rejected both the "scope of the **[*35]** patent" and the "quick look" tests for determining antitrust liability of reverse payment settlements. *Id. at 2225, 2236-37*. The Court identified five main considerations in its decision: (1) reverse payment settlements have the "potential for genuine adverse effects on competition"; (2) the anticompetitive results of these settlements may sometimes be unjustified, for example where payments are not intended only to offset litigation costs; (3) patent holders often possess the market power necessary to cause anticompetitive harm; (4) litigating patent validity may not be necessary to determine whether a settlement is legal under antitrust laws, as "large and unexplained" reverse payment settlements indicate that the patent holder has doubts about the patent's ability to withstand scrutiny; and (5) parties can still settle patent litigation, despite the risk of antitrust scrutiny, by avoiding reverse payment settlements. *Id. at 2234-37*.

The FTC encouraged the Supreme Court to adopt the "quick look" test for the analysis of potential antitrust liability for reverse payment settlements. This test shifts the burden of proof to the defendant to show procompetitive effects of the reverse payment settlement in question. *Id. at 2237*. **[*36]** The Supreme Court declined to do so, and cited *California Dental Association v. FTC* for the proposition that the rule of reason should be abandoned for the "quick look" test "only where 'an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets.'" *Id.* (quoting *Cal. Dental Ass'n v. FTC, 526 U.S. 756, 770, 119 S. Ct. 1604, 143 L. Ed. 2d 935 (1999))*. The Supreme Court stated that reverse payment settlements do not meet this criterion, given that:

> [T]he likelihood of a reverse payment bringing about anticompetitive effects depends upon its size, its scale in relation to the payor's anticipated future litigation costs, its independence from other services for which it might represent payment, and the lack of any other convincing justification. The existence and degree of any anticompetitive consequence may also vary as among industries. These complexities lead us to conclude that the FTC must prove its case as in other rule-of-reason cases.

Id. The Supreme Court did explain, however, that the FTC need not "litigate the patent's validity, empirically demonstrate the virtues or vices of the patent system, present every possible supporting fact or refute every possible **[*37]** pro-defense theory" under the rule-of-reason approach. *Id.*

b. Application of *Actavis* to Rule of Reason Analysis

As noted above, in *Actavis*, the Supreme Court directed lower courts to analyze reverse payment settlements using the antitrust rule-of-reason test. *Id. at 2237-38*. "The true test of legality [under the rule-of-reason test] is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." *Race Tires Am., Inc. v. Hoosier Racing Tire Corp., 614 F.3d 57, 75 (3d Cir. 2010)* (quoting *Orson, Inc. v. Miramax Film Corp., 79 F.3d 1358, 1368 (3d Cir. 1996))*. The traditional rule-of-reason analysis directs the finder of fact to:

> [W]eigh all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition. The plaintiff bears an initial burden under the rule of reason of showing that the alleged combination or agreement produced adverse, anti-competitive effects within the relevant product and geographic markets. The plaintiff may satisfy this burden by proving the existence of actual anticompetitive effects, such as reduction of output, increase in price, or deterioration in quality of goods or services. Such proof is often impossible to make, however, due to the difficulty **[*38]** of isolating the market effects of challenged conduct. Accordingly, courts typically allow proof of the defendant's market power instead. Market power, the ability to raise prices above those that would prevail in a competitive market, is essentially a surrogate for detrimental effects.
>
> If a plaintiff meets his initial burden of adducing adequate evidence of market power or actual anti-competitive effects, the burden shifts to the defendant to show that the challenged conduct promotes a sufficiently pro-

> competitive objective. . . . To rebut, the plaintiff must demonstrate that the restraint is not reasonably necessary to achieve the stated objective.

United States v. Brown Univ., 5 F.3d 658, 668-69 (3d Cir. 1993) (alterations, citations, footnotes, and internal quotations omitted).

The Supreme Court left development of the application of the rule-of-reason test in reverse payment settlement cases primarily to the lower courts, indicating that lower courts should focus on the "basic question" of whether a settlement has "significant unjustified anticompetitive consequences." *Actavis, 133 S. Ct at 2237*. Recently, the Third Circuit directed a district court to apply the rule of reason as described in *Actavis*:

> First, to prove anticompetitive effects, the plaintiff must prove payment **[*39]** for delay, or, in other words, payment to prevent the risk of competition. [T]he likelihood of a reverse payment bringing about anticompetitive effects depends upon its size, its scale in relation to the payor's anticipated future litigation costs, its independence from other services for which it might represent payment, and the lack of any other convincing justification.
> Second, the burden then shifts to the defendant to show that legitimate justifications are present, thereby explaining the presence of the challenged term and showing the lawfulness of that term under the rule of reason.
>> The reverse payment, for example, may amount to no more than a rough approximation of the litigation expenses saved through the settlement. That payment may reflect compensation for other services that the generic has promised to perform—such as distributing the patented item or helping to develop a market for that item. There may be other justifications.
>
> The Court does not foreclose other justifications, and we need not decide today what those other justifications might be.
>
> Finally, the plaintiff will have the opportunity to rebut the defendant's explanation.

King Drug Co. of Florence, Inc. v. Smithkline Beecham Corp., 791 F.3d 388, 412 (3d Cir. 2015) (internal citations, quotations, and footnotes **[*40]** omitted). The Supreme Court gave lower courts further guidance on the application of the rule of reason to reverse payment settlement cases, noting that antitrust considerations only arise if a "reverse payment" has occurred, and that the reverse payment in question must be "large and unexplained." *Actavis, 133 S. Ct. at 2236-37*. "Large" payment sums should be scrutinized more carefully, as a large payment may "provide a workable surrogate for a patent's weakness." *Id.* Reverse payment settlements also may be anticompetitive when the size of the settlement is too large when compared to the potential cost of future litigation, or where other reasonable justification for the settlement cannot be shown. *Id. at 2237-38*. Finally, the Supreme Court directed lower courts to consider "traditional antitrust factors such as likely anticompetitive effects, redeeming virtues, market power, and potentially offsetting legal considerations present in the circumstances, such as here those related to patents." *King Drug, 791 F.3d at 412* (quoting *Actavis, 133 S. Ct. at 2231*).

This Court notes that the rule-of-reason test puts the ultimate burden of proof to show anticompetitive conduct onto the plaintiff. Once the plaintiff establishes a prima facie case for antitrust liability, as described above, **[*41]** the defendant may rebut by showing why the conduct in question was procompetitive in nature. The "quick look" test, by contrast, creates the presumption that the conduct in question is in fact anticompetitive, thereby shifting the ultimate burden of proof to the defendant to show that the conduct in question is procompetitive.

Since the *Actavis* decision, several courts[10] have examined the application of the rule of reason to the context of reverse payment settlements. In particular, district courts in the District of Massachusetts and the Eastern District of Pennsylvania have examined the burdens held by each party at each stage of analysis.

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[10] The questions of burdens and elements in a rule-of-reason analysis of reverse payment settlements have been addressed by two district courts prior to this Opinion: the Eastern District of Pennsylvania in *King Drug Co. of Florence, Inc. v. Cephalon, Inc., 88 F. Supp. 3d 402 (E.D. Pa. 2015)*; and the District of Massachusetts in *In re Nexium (Esomeprazole) Antitrust Litigation, 42 F.*

First, the District of Massachusetts interpreted *Actavis* to apply to the examination of "large and unjustified" reverse payments. *In re Nexium (Esomeprazole) Antitrust Litig., 42 F. Supp. 3d 231, 262 (D. Mass. 2014)*. This court's theory of burden shifting **[*42]** under the rule of reason is as follows. The plaintiff must first demonstrate that the settlement in question included a payment from the brand-name to the generic company, and notes that "[t]he size and scale of such a payment . . . can be an indicator of anticompetitive intent, because '[a] large payment would be an irrational act unless the patentee believed that generic production would cut into its profits.'" *Id.* (quoting Herbert Hovenkamp, *Anticompetitive Patent Settlements and the Supreme Court's Actavis Decision, 15 Minn. J.L. Sci. & Tech. 3, 25 (2013))*. If the plaintiff can make this showing, the burden shifts to the defendant to show that the payment may be justified by a procompetitive goal, such as avoided litigation costs or payment of fair value for services or goods rendered. *Id.* If the defendant shows a procompetitive justification for the payment, the burden shifts back to the plaintiff to show that, on balance, the settlement is anticompetitive. *Id. at 262-63*.

In *King Drug Co. of Florence, Inc. v. Cephalon, Inc.*, the Eastern District of Pennsylvania laid out a slightly different interpretation of *Actavis*, where the plaintiff must establish in the first step of the rule-of-reason analysis that the payment in question was "large." *88 F. Supp. 3d 402, 414 (E.D. Pa. 2015)*. Although the court did not impose a "threshold burden" on the plaintiff **[*43]** to show that the reverse payment is large and unjustified, it noted that "evidence of a large payment is required for a plaintiff to satisfy its initial burden of demonstrating anticompetitive effects under the *Actavis* rule of reason analysis." *Id. at 415*. If the plaintiff can satisfy this burden, "the burden shifts to the defendant to show that the challenged conduct promotes a sufficiently procompetitive objective . . . with the defendant bearing the burden of providing evidence that the reverse payment is justified by procompetitive considerations." *Id.* Should the defendant satisfy this burden, the plaintiff must rebut the defendant's justifications and "raise a genuine dispute of material fact as to the defendant's justifications," after which a finder of fact will weigh the anticompetitive and procompetitive effects of the agreement. *Id.*

If this Court adopted the approach espoused in these opinions, to satisfy their initial burden Plaintiffs would be required to produce evidence that a large amount of consideration (monetary or otherwise) had been transferred from the brand-name company (Schering) to a generic company, and that at least a component of the settlement compensated the generic **[*44]** company for delaying entry onto the market. Defendants would then bear the burden to show that the payment compensated the generic company for reasonable litigation costs and other products and services, given that "[f]ailure to provide a legitimate justification results in antitrust liability." *Id. at 416*. This Court is concerned that any sort of requirement for Plaintiffs to establish at the outset that a settlement payment in question was "large" creates a threshold burden not delineated under the rule of reason. Furthermore, this Court notes that the Supreme Court explicitly rejected the "quick look" test, so any analysis of the legality of a reverse payment settlement must place the overall burden to prove the settlement was anticompetitive onto Plaintiffs, and furthermore must put the initial burden of proof to establish a prima facie case in the first step of the rule-of-reason analysis onto Plaintiffs as well. Thus, the burden must be on Plaintiffs to show that the settlement delayed the generic company's entry onto the market, that the brand-name company paid the generic company consideration of some kind, and that the consideration exchanged in the settlement exceeded the estimated cost of **[*45]** litigation and the costs of other services and products, in order to establish a prima facie case. Antitrust implications for a reverse payment only arise if the payment is separate from compensation for the fair market value of other products and services bargained for in the settlement, as well as the potential litigation costs that the settlement effectively saves.

This Court also believes that in most cases it is likely that the defendants will have better access to information about the value of the payments in question, including the value of products, services, and estimated litigation costs saved by the settlement. Although the plaintiff must bear the initial burden of proof to establish a prima facie case, it is logical that the defendant should bear the burden of production to present this evidence. If the defendant can show evidence on this issue, the plaintiff would then need to show that that the payment exceeded the value of litigation costs or other products or services to satisfy its overall burden in this step of the rule-of-reason analysis.

Supp. 3d 231 (D. Mass. 2014). The California Supreme Court has also addressed the burdens required in examining a reverse payment settlement case under the rule of reason in *In re Cipro Cases I & II, 61 Cal. 4th 116, 187 Cal. Rptr. 3d 632, 348 P.3d 845 (Cal. 2015)*.

Given the above discussion, the Court finds the logic behind the burden shifting in the recent California Supreme Court decision **[*46]** *In re Cipro Cases I & II, 61 Cal. 4th 116, 187 Cal. Rptr. 3d 632, 348 P.3d 845 (Cal. 2015)*[11] compelling. The California Supreme Court summarizes their application of the rule of reason to reverse payment settlement cases as follows:

> To make out a prima facie case that a challenged agreement is an unlawful restraint of trade, a plaintiff must show the agreement contains both a limit on the generic challenger's entry into the market and compensation from the patentee to the challenger. The defendants bear the burden [of production] of coming forward with evidence of litigation costs or valuable collateral products or services that might explain the compensation; if the defendants do so, the plaintiff has the burden of demonstrating the compensation exceeds the reasonable value of these. If a prima facie case has been made out, the defendants may come forward with additional justifications to demonstrate the settlement agreement nevertheless is procompetitive. A plaintiff who can dispel these justifications has carried the burden of demonstrating the settlement agreement is an unreasonable restraint of trade . . .

Id. at 871. This Court will adopt the framework outlined above in its analysis of these motions for summary judgment.

IV. Discussion[12]

a. Motion for Summary Judgment on All Claims Related to the Schering-Upsher Settlement

Defendants have moved for summary judgment on all claims related to the Schering-Upsher settlement. The parties dispute two main points in their briefing: how burdens of proof operate under the rule of reason for each party post-*Actavis*, and whether Schering's payment for the Niacor license was indeed fair market value. The Court has addressed how it will apply the rule of reason in the previous Section, and will now examine whether Plaintiffs have satisfied their burden under the rule of reason sufficiently to survive summary judgment, with special focus on the factual issue of the fair market value of the Niacor license.

Plaintiffs have offered sufficient evidence such that a reasonable finder of fact could find that Plaintiffs have established a prima facie case for antitrust liability. Although Defendants have offered procompetitive justifications for the reverse payment settlement, particularly **[*49]** evidence that may indicate that Schering paid fair market value for the Niacor license, Plaintiffs have offered sufficient evidence such that a reasonable jury could conclude that Schering's payment to Upsher did not merely compensate Upsher for the fair market value of the Niacor license.

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[11] *In re Cipro Cases I & II* focuses on the application of *Actavis* ***[*47]*** to the Cartwright Act, California's state ***antitrust law***. The Cartwright Act and the Sherman Act are not perfectly analogous, but both statutes have implied exceptions that "validate reasonable restraints of trade" under the rule of reason. *In re Cipro Cases I & II, 348 P.3d at 855* (citing *Standard Oil Co. v. United States, 221 U.S. 1, 31 S. Ct. 502, 55 L. Ed. 619 (1911)*; *People v. Bldg. Maint. Contractors' Ass'n, Inc., 41 Cal. 2d 719, 264 P.2d 31 (Cal. 1953))*.

[12] Plaintiffs filed a motion to strike Sections I and II of Defendants' reply memorandum in support of the motion for summary judgment on all claims related to the Schering-ESI settlement, asserting that Defendants raised subjects in their reply brief that had not been raised in the moving papers for the motion for summary judgment [Docket Entry 848]. In particular, Plaintiffs objected to arguments related to the existence of a single conspiracy, and whether Plaintiffs could prove that Upsher's entry onto the market was delayed. Following oral argument on this motion on July 22, 2015 [Docket Entry 859], the Court permitted Plaintiffs and Defendants to submit sur-replies on the issues of whether Plaintiffs could prove a three-way conspiracy between Schering, Upsher, and ESI, and whether Plaintiffs could prove that entry of Upsher's generic K-Dur product was delayed by the alleged single conspiracy [Docket Entries 856, 858]. **[*48]** Considering that both parties have had the opportunity to address these arguments, the Court will deny Plaintiffs' motion to strike as moot, and will consider all briefing to decide these summary judgment motions.

1. Plaintiffs' Prima Facie Case Under *Actavis*

To establish a prima facie case that the Schering-Upsher settlement was an unlawful restraint of trade, Plaintiffs must first show that the agreement limited Upsher's entry into the market for generic K-Dur, and that Schering paid Upsher as a part of the settlement. Once this is done, Defendants then have the burden of production (but not the ultimate burden of proof) to show the value of litigation costs, products, or services the settlement covered. If this is done, Plaintiffs then have the burden of proof to demonstrate that the compensation exceeded the reasonable value of litigation costs, products, and/or services. As noted earlier, if a finder of fact concludes that such a prima facie case has been made out, Defendants then can show evidence to demonstrate why the agreement is nevertheless procompetitive.

The parties do not dispute that the Schering-Upsher **[*50]** settlement did in fact limit Upsher's entry into the K-Dur market, as Upsher agreed to an entry date of September 1, 2001. (Defs.' SUF Upsher ¶ 19; Pls. SDF Upsher ¶ 19, Docket Entry 843, Ex. 1.) Furthermore, it is undisputed that Schering paid Upsher $60 million as a term of the settlement. (Defs.' SUF Upsher ¶ 43; Pls.' SDF Upsher ¶ 43.) Defendants have put forth evidence that Schering's payment to Upsher paid for the license to Niacor, as well as other licenses, satisfying their burden of production on this issue. (Defs.' SUF Upsher ¶¶ 18, 21-51.) Plaintiffs have offered expert testimony showing that Schering's payment to Upsher exceeded the value of the Niacor license, in an attempt to discredit Defendants' evidence. (Pls.' SDF Upsher ¶¶ 72-149.) As outlined in more detail below, Plaintiffs' evidence on this point raises significant questions as to Defendants' justification for the value of the Schering-Upsher settlement payment. The Court concludes that there is indeed a genuine dispute of material fact as to whether Schering's payment exceeded the fair value of the licenses coupled with litigation costs. Accordingly, there is sufficient evidence on this record such that a reasonable **[*51]** finder of fact could find that Plaintiffs have established a prima facie case for antitrust liability as to the Schering-Upsher settlement.

2. Fair Market Value of the Niacor Licensing Transaction: Justifications and Rebuttal

a. Defendants' Procompetitive Justifications for the Payment

Defendants assert that the Niacor license stands on its own merit, and that the $60 million Schering paid for Niacor was a good faith, fair market value purchase of the Niacor license. (Defs.' SUF Upsher ¶¶ 18, 21-51.) Defendants first offer evidence that Schering informed Upsher several times during settlement negotiations that it would not pay money to delay Upsher's entry onto the market. (Defs.' SUF Upsher ¶¶ 15-18.) Schering's in-house counsel stated during negotiations that it would pay Upsher in a settlement only for "business deals that stand on their own two feet." (Defs.' SUF Upsher ¶ 20.) Schering also told Upsher that any licensing deal must be valued such that Schering would have entered into it with or without the contemporaneous settlement of litigation. (Defs.' SUF Upsher ¶ 21.)

Furthermore, Defendants offer evidence to show that Schering had a genuine interest in Niacor at the time of the **[*52]** Schering-Upsher settlement. (Defs.' SUF Upsher ¶¶ 22-25.) Schering had previously pursued an opportunity with Kos Pharmaceuticals to co-promote Niaspan, a sustained-release niacin product, in the months before the Upsher settlement. (Defs.' SUF Upsher ¶¶ 24-25.) The talks between Schering and Kos fell through. (Defs.' SUF Upsher ¶¶ 25, 40.) At the time of the Schering-Upsher settlement, Niacor was in the late stages of development and Upsher had minimized previous issues with side effects of the drug, leading to Schering's interest in the product. (Defs.' SUF Upsher ¶¶ 26-27.)

According to Defendants, Schering also conducted an internal review of Niacor before signing the Schering-Upsher settlement, including a commercial assessment and a review of clinical trial results. (Defs.' SUF Upsher ¶¶ 29-31, 34, 35, 36-38.) Schering also created a sales forecast for Niacor outside of the United States, Canada, and Mexico. (Defs.' SUF Upsher ¶ 36.) Defendants have also produced sales projections for Niaspan which they claim support Schering's sales projections for Niacor. (Defs.' SUF Upsher ¶¶ 37-40.) Based on the sales projections, Schering head of Global Marketing Thomas Lauda testified that **[*53]** he believed that overseas rights to Niacor were "well worth" $60-70 million. (Defs.' SUF Upsher ¶¶ 42.)

Finally, Defendants offer evidence that Schering's Board of Directors reviewed the proposed Niacor deal prior to signing the Schering-Upsher agreement, using the same standard corporate finance model used for all license deals it reviewed. (Defs.' SUF Upsher ¶ 44.) This model gave the present economic value[13] of the Niacor license at $225-265 million. (*Id.*) Furthermore, the Board of Directors were instructed to approve the Niacor license only if the deal could stand on its own merits, independent of the settlement of the K-Dur litigation. (Defs.' SUF Upsher ¶¶ 45-46.) The Board of Directors reviewed the sales projections and commercial assessment conducted by Schering employees on Niacor, prior to approving the Schering-Upsher settlement. (Defs.' SUF Upsher ¶ 45.)

Defendants have offered evidence that could persuade a reasonable jury that Schering paid fair market value for Niacor, **[*54]** and that the payment at issue in the Schering-Upsher settlement did not compensate Upsher for delaying its market entry.

b. Plaintiffs' Rebuttal of Defendants' Procompetitive Justifications for the Payment

Plaintiffs, however, have offered evidence that counters Defendants' claims and that raises a genuine dispute of material fact that the reverse payment in the Schering-Upsher settlement was not merely compensation for the Niacor license.

First, Plaintiffs offer evidence that the Schering-Upsher agreement lacked terms that would typically be present in a pharmaceutical licensing agreement, including terms the in-house Schering lawyer who drafted the Schering-Upsher agreement recommends that pharmaceutical license agreements include. (Pls.' SDF Upsher ¶ 84.) These terms include: the communication infrastructure for drug development; parties responsible for additional development work; parties responsible for regulatory filings; whether the licensee will gain access to the licensor's "know-how" as part of the license agreement; parties responsible for reporting adverse events and pharmacovigilance; whether audit rights for royalties are part of the bargain; duration of rights and obligations; **[*55]** publicity and publication for the licensed drug; regulatory issues in foreign countries, if related to the license; and any needed representations and warranties. (Pls.' SDF Upsher ¶¶ 84, 87.) Plaintiffs also cite the testimony of Schering head of Global Marketing Thomas Lauda on this point, who stated that, when reviewing a licensing agreement, he looks for the term (or duration) of the agreement, Schering's rights and obligations under the agreement, dispute resolution terms, termination provisions, the respective obligations of the licensing partners, identification of the party responsible for regulatory approvals, and a provision requiring the other party to exercise reasonable diligence in filing an NDA if the licensor is to provide regulatory data. (Pls.' SDF Upsher ¶ 85.) The record contains several samples of other licensing agreements to which Schering was a party. These agreements include provisions on the license's term, the obligations of the parties to commercialize the drug, respective responsibilities for research and development, and how adverse events should be reported. (Pls.' SDF Upsher ¶ 86.) Plaintiffs note that none of the provisions listed above appear in the **[*56]** Schering-Upsher agreement. (Pls.' SDF Upsher ¶ 87.) Plaintiffs support this observation with expert testimony stating that the Schering-Upsher agreement was missing "critical" terms, including the term of the agreement, the diligence obligations of the parties, and indemnification provisions. (Pls.' SDF Upsher ¶ 89.) The expert noted that, under this agreement, Schering was obligated to pay a large part of the bargained-for consideration upfront, whether or not the parties executed a subsequent agreement or Schering developed the Niacor product. (Pls.' SDF Upsher ¶ 88.)

Second, Plaintiffs provide evidence to show the types of due diligence a company interested in purchasing a drug license will typically conduct before the license agreement is executed. Plaintiffs also offer evidence that may indicate Schering did not conduct its typical diligence on the Niacor license. According to Schering's employees, at the time of the Schering-Upsher settlement, typically Schering reviewed the following aspects of a potential product

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[13] This figure represented the net present value of the expected revenue stream for Niacor over the product's expected lifetime, after subtracting the royalties Schering would pay to Upsher. (Defs' SUF Upsher ¶ 44.)

before signing a licensing agreement: (1) the science behind the product, including necessary additional research and development; (2) the regulatory status of the **[*57]** product; (3) the manufacturing and supply issues; (4) the intellectual property rights and potential infringement risks; and (5) the commercial potential of the product. (Pls.' SDF Upsher ¶¶ 92-94.) Typically a large number of employees worked on these reviews. (Pls.' SDF Upsher ¶¶ 94-95.) On some drugs, Schering took over a year to conduct due diligence. (Pls.' SDF Upsher ¶ 96.) But only a single employee of Schering conducted due diligence on Niacor, over the time period of two days. (Pls.' SDF Upsher ¶ 97.) This review only examined the commercial prospects of Niacor, and did not examine potential regulatory, intellectual property, or manufacturing issues. (*Id.*) Furthermore, Schering's reviewing employee did not independently verify any of the information in the package he received on Niacor, unlike when he attempted to verify facts during his due diligence examination of Niaspan. (Pls.' SDF Upsher ¶¶ 99-100.) Plaintiffs contend that Defendants' expert, who finalized licenses for twenty products while working at Bristol Myers Squibb, never conducted such an abbreviated due diligence process as the process Schering conducted for Niacor. (Pls.' SDF Upsher ¶¶ 102-03.)

Plaintiffs offer **[*58]** expert testimony that, typically, parties begin to commercialize a licensed drug soon after signing a licensing agreement, but that Schering did not move to commercialize Niacor with immediacy. (Pls.' SDF Upsher ¶¶ 104-07.) Plaintiff's expert stated that, following execution of a licensing agreement, typically a licensee will appoint responsible personnel, form joint committees to oversee product development, exchange relevant legal, scientific, development, and regulatory materials, and start communicating frequently in an effort to develop and market the product. (Pls.' SDF Upsher ¶ 104.) In contrast, in the days following the signing of the Schering-Upsher agreement, Schering's Global Marketing group was assigned to be responsible for international registration and marketing of Niacor, and the employee who conducted due diligence on Niacor was appointed to manage these efforts. (Pls.' SDF Upsher ¶ 105.) Schering made a few requests for information from Upsher, but Plaintiffs assert that no substantive information was exchanged. (Pls.' SDF Upsher ¶ 107.)

Plaintiffs also declare that multiple contemporary valuations of Niacor indicate that Schering overpaid for the Niacor license in **[*59]** its agreement with Upsher. (Pls.' SDF Upsher ¶¶ 109-14.) Plaintiffs offer comparative evidence of several licensing deals for sustained-release niacin products, none of which approach $60 million in value. (*Id.*)

Additionally, Plaintiffs assert that Schering failed to acknowledge substantial risks with the Niacor licensing deal in its evaluation process. First, the $60 million payment Schering made to Upsher was, at the time, Schering's largest upfront non-contingent payment ever for a license, despite the fact that the FDA had not granted Niacor marketing approval at the time of the payment. (Pls.' SDF Upsher ¶¶ 115-16.) Furthermore, Niacor was not expected to be a blockbuster drug with huge sales. (*Id.*) The Board of Directors did not discuss these issues or other potential risks for licensing Niacor in their evaluation of the settlement, despite the fact that a Schering subsidiary employee had identified significant downsides to licensing Niaspan.[14] (Pls.' SDF Upsher ¶¶ 117-22.)

Plaintiffs also challenge Defendants' evidence on the economic value of the Niacor deal, asserting that the value of the license was significantly lower than the $60 million Schering paid Upsher. Plaintiffs offer expert quantitative analysis on this issue using three valuation methods. First, using the 25 percent rule, under which in general a licensor would expect to receive about 25 percent of the pretax profits from a licensed product, Plaintiffs' expert asserted that the $60 million payment far exceeded 25 percent of the pretax profits from expected Niacor sales. (Pls.' SDF Upsher ¶ 138.) The expert noted that the other payments outlined in the Schering-Upsher agreement for Niacor approximated 25 percent of pretax profits expected for Niacor. (*Id.*) Second, in a comparable transactions analysis, Plaintiffs' expert compared the licensing agreement **[*61]** for Niacor to other Schering license agreements and other sustained-release niacin licensing agreements, and found that the value of Niacor approximated the $10 million in milestones and the 10 to 15 percent royalties outlined in the Schering-Upsher agreement. (Pls.' SDF

[14] Furthermore, the sales forecast for Niaspan in the United States may not have been analogous to the sales forecast for Niacor in Europe, given Niaspan's likely position as first mover on the market. (Pls.' SDF **[*60]** Upsher ¶ 123.) Europe also may not have been as receptive to niacin products as the United States was at the time, given that European doctors had access to fibrate products with the same characteristics as niacin, while American doctors did not since these drugs had not been approved for marketing in the United States. (Pls.' SDF Upsher ¶ 124.)

Upsher ¶ 139.) Plaintiffs' expert found that these comparable agreements could not explain the $60 million upfront payment. (*Id.*) Third, Plaintiffs' expert conducted a net present value analysis, which indicated that Niacor was not worth the $60 million Schering paid Upsher. (Pls.' SDF Upsher ¶¶ 142-43.) The expert also testified that the Schering sales forecast was predicated on faulty assumptions, including the unlikely prospect that Niacor could be approved for sale in Europe in only one year, and that Niacor would be the only sustained-release niacin product on the market. (Pls.' SDF Upsher ¶ 140.) Plaintiffs' expert also noted that Niaspan was likely a superior product to Niacor in terms of safety, efficacy, and dosing issues, and that Niaspan could be used in conjunction with statin drugs while Niacor could not. (*Id.*)

The parties devote much of their efforts to discussing the implications of prior proceedings **[*62]** against Schering and Upsher before the FTC and the Eleventh Circuit. *In the Matter of Schering-Plough Corp., No. 9297, Initial Decision, 136 F.T.C. 956, 1092 (2002)*; *In the Matter of Schering-Plough Corp., Final Order, 136 F.T.C. 956, 1003-04 (2003)*; *Schering-Plough Corp. v. FTC, 402 F.3d 1056 (11th Cir. 2005)*. Those proceedings were before another adjudicative body with different parties and a different factual record. These prior proceedings will not be considered by this Court, since it necessarily can only consider the factual record before it.

While Defendants challenge the reliability and method of Plaintiffs' experts, nevertheless Plaintiffs have put this material on the record. Although Defendants may be able to successfully impeach the expert opinions and evidence Plaintiffs have presented, Plaintiffs' evidence is sufficient to raise a genuine issue of material fact on the question of the fair market value of the Niacor license. A reasonable jury could conclude that the payment in the Schering-Upsher settlement was aimed, at least in part, to delay entry of Upsher's generic K-Dur product, not to compensate Upsher for the Niacor license. "In the event a genuinely disputed issue of fact exists regarding the reasonableness of the restraint, the determination is for the jury," given that the jury is ultimately responsible for balancing the procompetitive justifications **[*63]** and anticompetitive rebuttals presented by the parties under the rule of reason. *In re Ins. Brokerage Antitrust Litig., 618 F.3d 300, 316 n.12 (3d Cir. 2010)*. For these reasons, Defendants' motion for summary judgment on all claims related to the Schering-Upsher settlement is denied.

b. Motion for Summary Judgment on All Claims Related to The Schering-ESI Settlement

Defendants have also moved for summary judgment on all claims related to the Schering-ESI settlement. On this motion, the parties primarily dispute whether Schering, Upsher, and ESI formed a single conspiracy covering all actions related to K-Dur. Plaintiffs have conceded that the Schering-ESI settlement did not cause direct competitive market harm, given that "[Plaintiffs] do not intend to prove at trial that ESI was actually delayed." (7/22/15 Hrg. Tr. at 57) [Docket Entry 859]. Rather, "[Plaintiffs] intend to prove at trial that there was a violation [of ***antitrust law***] by means of the ESI settlement which was part of the overall conspiracy that [Plaintiffs] allege." (*Id.*) This scenario, according to Plaintiffs, would impute civil liability onto ESI for the actions of all parties to the alleged single conspiracy (Schering, Upsher, and ESI). Defendants assert that, on this record, there is no evidence **[*64]** of a three-party conspiracy, given that Upsher and ESI settled separately with Schering on very different terms.

i. Legal Standard

1. Antitrust Conspiracy under The Sherman Act

To prevail on a Section 1 conspiracy claim under the Sherman Act, *15 U.S.C. § 1*, the plaintiff must prove the existence of a single agreement that unreasonably restrains trade, whether tacit or express. *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 553, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. "The existence of an agreement is the hallmark of a Section 1 claim. Liability is necessarily based on some form of concerted action."[15] In re Baby Food Antitrust Litig., 166 F.3d 112, 117 (3d Cir. 1999) (citation omitted); *see also* Ins. Brokerage Antitrust Litig., 618 F.3d at 315.

The plaintiff may prove the existence of a single agreement by either direct or circumstantial evidence. Direct evidence "is explicit and requires no inferences to establish the proposition or conclusion being asserted." InterVest, Inc. v. Bloomberg, L.P., 340 F.3d 144, 159 (3d Cir. 2003) (quoting In re Baby Food Antitrust Litig., 166 F.3d at 118). In the absence of direct evidence of an actual agreement or conspiracy to restrain trade, finders of fact typically use proof by inferences, drawn from circumstantial evidence, to establish a violation of Section 1 of the Sherman Act. *Id.* The use of circumstantial evidence **[*65]** can be problematic, as finders of fact may draw incorrect inferences based on the evidence before them, and thus mistake legitimate competition for unlawful cooperation. "[M]istaken inferences in [antitrust] cases . . . are especially costly, because they chill the very conduct the antitrust laws were designed to protect"—procompetitive conduct. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 594, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). Given this legitimate concern, the Supreme Court has found that "***antitrust law*** limits the range of permissible inferences [that may be drawn] from ambiguous evidence in a § 1 case." Id. at 588. To survive summary judgment, "[t]here must be evidence that tends to exclude the possibility that the [alleged conspirators] were acting independently." Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984). Put another way, if conduct can be explained in an equally plausible manner by an illegal conspiracy or by permissible competition, the finder of fact is not permitted to draw an inference of conspiracy. *Id.*

2. Numbers and Types of Conspiracies

In *United States v. Kelly*, the Third Circuit adopted a three-step test to determine whether a set of events comprises a single conspiracy or separate, unrelated conspiracies. 892 F.2d 255, 259 (3d Cir. 1989) (citing United States v. DeVarona, 872 F.2d 114 (5th Cir. 1989)). The court first determines whether there was a common goal among the conspirators. *Id.* Second, the court **[*66]** examines the nature of the scheme to find whether the agreement sought to create a result that would require the "continuous cooperation of the conspirators." *Id.* (quoting DeVarona, 872 F.2d at 119). Finally, the court examines the level to which participants overlap in the various dealings. *Id.* "[T]he government need not prove that each defendant knew all the details, goals, or other participants in order to find a single conspiracy." Id. at 260 (quotation omitted). "The absence of one [*Kelly*] factor does not necessarily defeat an inference of the existence of a single conspiracy." United States v. Padilla, 982 F.2d 110, 115 (3d Cir. 1992). Furthermore, "courts treat civil and criminal conspiracy alike—apart of course from standard of proof and other respects in which civil and criminal procedure differ—so that the abundant precedents on the meaning of criminal conspiracy are available for use in the civil context." Hartford Accident & Indem. Co. v. Sullivan, 846 F.2d 377, 383 (7th Cir. 1988); *see also* Interstate Circuit v. United States, 306 U.S. 208, 227, 59 S. Ct. 467, 83 L. Ed. 610 (1939) (citing United States v. Schenck, 253 F. 212, 213 (E.D. Pa. 1918), *aff'd*, 249 U.S. 47, 39 S. Ct. 247, 63 L. Ed. 470, 17 Ohio L. Rep. 26, 17 Ohio L. Rep. 149 (1919) (Espionage Act) and Levey v. United States, 92 F.2d 688, 691 (9th Cir. 1937), *cert. denied*, *303 U.S. 639, 58 S. Ct. 609, 82 L. Ed. 1099 (1938)* (mail fraud) as examples of situation where a conspiracy may be formed in a civil context).

Conspiracies are often described as taking one of two forms: a "chain" conspiracy, where conspirators act separately and successively; or a "wheel" or "hub-and-spoke" conspiracy, where a central figure (the "hub") **[*67]** interacts separately with peripheral parties (the "spokes") in furtherance of a single, illegal enterprise. In a hub-and-spoke conspiracy, each peripheral party "spoke" is a member of the conspiracy, even though these parties may not directly interact with each other. For a single conspiracy to exist, the parties serving as spokes must have been aware of the existence of other spokes, and each spoke must have done something in furtherance of a single, illegal endeavor. Kotteakos v. United States, 328 U.S. 750, 755, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946); *see also*

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[15] The Third Circuit has noted that the term "concerted action" is generally used as shorthand to refer to any activity meeting the "contract, combination or conspiracy" element for Section 1 liability. In re Baby Food Antitrust Litig., 166 F.3d at 117 n.3.

Blumenthal v. United States, 332 U.S. 539, 556-57, 68 S. Ct. 248, 92 L. Ed. 154 (1947); United States v. Castro, 776 F.2d 1118, 1124 n.4 (3d Cir. 1985). The Supreme Court explained in *Kotteakos* that the existence of a single party common to several conspiracies does not necessarily establish that a single conspiracy existed between all parties in the criminal context. 328 U.S. at 755. For a single conspiracy to exist, a "rim" must connect the spokes, and typically a rim takes the form of connecting agreements between the spokes. Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield, 552 F.3d 430, 435 n.3 (6th Cir. 2008); *see also* Dickson v. Microsoft Corp., 309 F.3d 193, 203 (4th Cir. 2002) ("A rimless wheel conspiracy is one in which various defendants enter into separate agreements with a common defendant, but where the defendants have no connection with one another, other than the common defendant's involvement in each transaction.") (citing Kotteakos, 328 U.S. at 755). But "[i]t is elementary that an unlawful conspiracy may be and often is formed **[*68]** without simultaneous action or agreement on the part of the conspirators." Interstate Circuit, 306 U.S. at 227. Moreover, a party seeking to prove a conspiracy "need not prove that each defendant knew all of the conspiracy's details, goals, or other participants." United States v. Gibbs, 190 F.3d 188, 197 (3d Cir. 1999).

The Third Circuit opinion in *United States v. Kemp* emphasized that "there must be overlap among the spokes, not just between the hub and the various spokes," to find a single hub-and-spoke conspiracy on a given set of facts. 500 F.3d 257, 291 (3d Cir. 2007). In determining whether the facts support a single or multiple conspiracies, "the inquiry must focus . . . on the character of the agreement between the spokes." *Id.* Likewise, "[i]n all hub-and-spoke conspiracies, the horizontal agreement among the spokes supports the [vertical] agreements between the hub and each spoke, and vice versa." In re Ins. Brokerage Antitrust Litig., 618 F.3d at 347.

ii. Analysis

At the summary judgment stage, the movant is the party without the burden of proof at trial. Therefore, the Court must determine whether there is sufficient evidence on the question of whether Schering, Upsher, and ESI formed a single conspiracy such that the question should go to the jury.

Plaintiffs envision a single hub-and-spoke conspiracy, with Schering as the hub and with Upsher and ESI **[*69]** as spokes due to their respective settlements with Schering, working together to eliminate generic competition for K-Dur. In Plaintiffs' scenario, ESI would be civilly liable for all of the conspiracy's actions, including any competitive harm caused by the conspiracy's actions to delay Upsher's entry onto the market. Plaintiffs characterize Schering's payment to ESI as inducement to convince ESI to join the conspiracy with Schering and Upsher.

Conversely, Defendants assert that there is no evidence of a single three-party conspiracy on this record, given that Schering and Upsher settled their patent litigation without the involvement of ESI, and that Schering and ESI settled their patent litigation without the involvement of Upsher. According to Defendants, ESI should not be civilly liable for the Schering-Upsher settlement, because ESI knew nothing about the legality of the Schering-Upsher agreement—which hinges on whether Schering paid fair market value for the Niacor license. Under *Kotteakos* and *Kemp*, Defendants argue that because alleged spokes Upsher and ESI were not part of each other's settlement agreements, the evidence before this Court does not indicate any agreement between **[*70]** the spokes. Given the lack of evidence on the record that ESI would have actually won the litigation, Defendants also dispute that ESI could have entered the market with a generic version of K-Dur after winning a ruling of non-infringement in the ongoing patent case.

i. Direct Evidence of a Single Conspiracy

For this Court to treat the evidence Plaintiffs have offered as direct evidence of a single conspiracy between Schering, Upsher, and ESI, a reasonable finder of fact must be able to use the evidence to find a conspiracy with no further extrapolation. In re Ins. Brokerage Antitrust Litig., 618 F.3d at 324 n.23. If, based on the evidence presented, a finder of fact must make an additional logical step to conclude that a conspiracy occurred, the evidence is circumstantial, not direct. *Id.* Courts have found evidence such as a "document or conversation explicitly manifesting the existence of the agreement in question" to be direct evidence. *Id.*; *see also* Monsanto, 465

U.S. at 765 (finding that supplier's advice to distributors that they would be terminated if suggested price levels were not maintained was direct evidence); InterVest, 340 F.3d at 162-63 (listing examples of direct evidence, including "a direct threat to the plaintiff from a competitor that if he went into business his competitors **[*71]** would do anything they could to stop him[;]. . . a memorandum . . . detailing the discussions from a meeting of a group of alleged conspirators," and "a public resolution by a professional association recommending that its members withdraw their affiliation with an insurer" (internal quotations omitted)).

Plaintiffs have offered several types of evidence intended to directly demonstrate a conspiracy between Schering, Upsher, and ESI. Plaintiffs first offer evidence intended to show that ESI knew that Schering and Upsher had entered into an unlawful settlement. During the Schering-ESI patent litigation, ESI filed a motion to compel the production of a copy of the Schering-Upsher agreement, and in that motion stated that the Schering-Upsher agreement "may have been crafted collusively with anticompetitive purpose, and [the agreement was] therefore reasonably calculated to be admissible evidence of patent misuse or an antitrust violation." (Pls.' SDF ESI ¶ 28.) Plaintiffs also assert that Schering and ESI exchanged market forecasts predicting the potential impact of multiple versions of K-Dur on Schering, Upsher, and ESI. (Pls.' SDF ESI ¶ 24.) Finally, Plaintiffs argue that the Defendants **[*72]** all had similar motives to cooperate—allegedly, all parties sought to share Schering's monopoly profits through blocking the entry of generic competitors onto the K-Dur market. (Pls.' Sur-Reply Br. at 3, 9-10.)

The Court finds that none of the evidence offered by Plaintiffs is direct evidence of a single conspiracy, because it does not establish on its own any concerted action between Schering, Upsher, and ESI. Proving a violation of Section 1 of the Sherman Act requires that the parties have unlawfully agreed, not simply that the parties had the opportunity to conspire or that competitors may be aware of similar conduct by other parties. *In re Insurance Brokerage Antitrust Litig., 618 F.3d at 349-50*. Plaintiffs do not offer a "smoking gun" to show that Defendants directly colluded, and the evidence Plaintiffs have offered is not similar to the examples of direct evidence listed above. Plaintiffs have offered no direct evidence, such as a conversation or document, that ESI and Upsher agreed amongst themselves to collude in this market, much less that all parties agreed to collude in the K-Dur market. Instead, Plaintiffs have provided evidence of agreements between Schering and Upsher (Docket Entry 843-1), and between Schering and ESI (Docket Entry 843-52). **[*73]** These agreements do not have similar structures or terms, as the parties agreed on different market entry dates, for different types of consideration. (*Id.*) A reasonable finder of fact would need to make inferences to conclude that these agreements indicated a single conspiracy between the parties. Thus, Plaintiffs have not provided direct evidence sufficient for a reasonable finder of fact to find a single conspiracy.

ii. Circumstantial Evidence of a Single Conspiracy

Plaintiffs urge the Court to find that the record has sufficient circumstantial evidence such that a reasonable jury could find, under the three-part test outlined in *Kelly*, that Schering, Upsher, and ESI entered into a single conspiracy to delay the entry of generic K-Dur.[16] Under Plaintiffs' theory, the conspirators shared the common goals of delaying generic competition for K-Dur, and sharing the financial benefits of such delay. Allegedly, the Schering-ESI settlement was one part of a larger scheme to prevent generic K-Dur from entering the market, which required Schering to eliminate all other threats to its monopoly by cooperating with all potential generic challengers. Plaintiffs base their assertions on an intricate **[*74]** analysis of the FDA's enforcement of the Hatch-Waxman Act's exclusivity provisions at the time of the Schering-ESI settlement, which is examined in detail below. Finally,

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[16] Plaintiffs offer two theories as to how ESI participated in the overall conspiracy: either ESI formed a conspiracy with Schering and Upsher, presumably at the time of the Schering-ESI agreement; or ESI joined the Schering-Upsher conspiracy already in existence at the time of the Schering-ESI agreement. It is established Third Circuit law that a party who did not participate in the formation of a conspiracy "may nevertheless join belatedly and become responsible for the actions that antedated his arrival should he knowingly 'co-operate in the common effort to obtain the unlawful results.'" *United States v. Vasquez-Uribe, 426 F. App'x 131, 135 (3d Cir. 2011)* (quoting *United States v. Lester, 282 F.2d 750, 753 (3d Cir. 1960))*. How ESI allegedly entered the single conspiracy is not outcome determinative on these facts. The Court finds that the issues of interdependence and overlap are the key issues in this analysis, and the analysis provided herein would apply in either scenario.

Plaintiffs assert that there is overlap as to the parties involved in the alleged sub-conspiracies since Schering is a party to both conspiracies.

The Court finds that **[*75]** there is not sufficient circumstantial evidence presented here to persuade a reasonable jury that Schering, Upsher, and ESI had a common goal, sought to maintain the continuous operation of the single conspiracy, or that the parties overlap sufficiently to support an inference of a single conspiracy. In particular, Plaintiffs have failed to offer sufficient evidence of the interdependence of the Schering-Upsher and Schering-ESI settlements to support the finding of an inference of conspiracy by a reasonable finder of fact.

a. Interdependence of Alleged Conspiracies

As noted above, Plaintiffs allege that Schering, Upsher, and ESI shared the same goals: (1) delaying generic competition; and (2) sharing the financial benefits of delay, presumably through Schering's distribution of monopoly profits in settlement payments to generic companies. It is not sufficient that Plaintiffs demonstrate that Schering, Upsher, and ESI had the same goal, however. To demonstrate a single conspiracy under *Kelly*, Plaintiffs must demonstrate that the parties had a *common* goal. *892 F.2d at 259*. Furthermore, Plaintiffs allege that, in order to prevent generic competition for K-Dur, Schering, Upsher, and ESI had to work together **[*76]** and continuously. To demonstrate both of these elements, Plaintiffs must provide evidence tending to show that the settlements were interdependent in nature. To evaluate interdependence, the court engages in an inquiry focused on "the extent to which the success or failure of one conspiracy is independent of a corresponding success or failure by the other." *United States v. Macchia, 35 F.3d 662, 671 (2d Cir. 1994)*; *see also* *Kemp, 500 F.3d at 289* ("In evaluating interdependence, we consider how helpful one individual's contribution is to another's goals.").

Plaintiffs propose the following theory of motivation for Schering, Upsher, and ESI to conspire in an interdependent fashion. Plaintiffs contend that, at the time of the Schering-ESI settlement, ESI posed a competitive threat to Schering's monopoly on the K-Dur market given that under the FDA's successful defense requirement,[17] ANDA first-filer Upsher was not entitled to 180 days of marketing exclusivity. Upsher thus could not use its exclusivity period to block ESI's entry onto the market, and had it won its patent litigation with Schering, ESI could have entered the market immediately. After the FDA stopped enforcing the successful defense requirement in June 1998, Plaintiffs assert that ESI could have triggered **[*77]** [18] Upsher's newly-instated exclusivity period by winning its

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[17] When Schering and ESI entered into their settlement on January 23, 1998, the FDA actively enforced a Final Rule implementing patent and marketing exclusivity provisions of the Hatch-Waxman Act known as the "successful defense requirement." *21 C.F.R. § 314.107(c)(1)*; *Abbreviated New Drug Applications, 59 Fed. Reg. 50338, 50367 (Oct. 3, 1994)*. Under this requirement, a first-filer ANDA applicant using a Paragraph IV certification was not entitled to receive the statutory 180-day **[*78]** exclusivity period unless it had successfully defended a patent infringement suit. *Id.* Litigants challenged these requirements, and the District of the District of Columbia ruled in *Inwood Laboratories, Inc. v. Young, 723 F. Supp. 1523 (D.D.C. 1989)*, *vacated as moot*, ***43 F.3d 712, 310 U.S. App. D.C. 61 (D.C. Cir. 1989)***, and ***Mova Pharmaceutical Corp. v. Shalala, 955 F. Supp. 128 (D.D.C. 1997)***, that the 180-day marketing exclusivity period should be granted to the first ANDA applicant who files a Paragraph IV certification for a specific generic drug, whether or not the applicant is sued subsequently for patent infringement. Conversely, the Eastern District of North Carolina ordered the FDA to enforce the successful defense requirement in its decision in *Granutec, Inc. v. Shalala*, No. 5:97-cv-485, 1997 WL 1403894 (E.D.N.C. July 3, 1997). In response to these decisions, the FDA published a policy clarification on November 28, 1997 that reiterated its intent to continue its enforcement of the successful defense requirement, at least until appeals in the 1997 cases had been completed. FDA, Policy on 180-Day Marketing Exclusivity for Drugs Marketed Under Abbreviated New Drug Applications; Clarification (Nov. 28, 1997). Following the decisions from Courts of Appeal in *Mova Pharmaceutical Corp. v. Shalala, 140 F.3d 1060, 329 U.S. App. D.C. 341 (D.C. Cir. 1998)* and ***Granutec, Inc. v. Shalala, 139 F.3d 889 (4th Cir. 1998)*** (unpublished opinion) that both overturned the successful defense requirement, the FDA expressed its intent to no longer enforce the requirement **[*79]** as of June 1998. HHS Center for Drug Evaluation and Research (CDER), Guidance for Industry: 180-Day Generic Drug Exclusivity under the Hatch-Waxman Amendments to the Federal Food, Drug, and Cosmetic Act (June 1998).

[18] As noted above, a first-filer ANDA applicant may receive 180 days of exclusivity upon the earlier of the first commercial marketing of the first-filer's generic drug under its ANDA, or a court decision of patent invalidity or non-infringement, which

patent litigation against Schering, even before Upsher had the right to enter the market per its agreement with Schering. Under this scenario, ESI could have entered the market as a competitor to Schering after Upsher's exclusivity expired. According to Plaintiffs, Schering's payment to ESI eliminated the threat that ESI would enter the market before January 2004, which benefitted both Schering and Upsher. Schering's payment also prevented ESI from triggering Upsher's exclusivity period before Upsher could enter the market in September 2001, and so gave Upsher a reason to collude with ESI. Plaintiffs further assert that Schering provided ESI incentive to collude with the overall conspiracy through the cash payment included in the Schering-ESI settlement.

To find a single conspiracy, a rim must have connected the spokes Upsher and ESI, as a single conspiracy can only be found where "the evidence clearly indicated that the defendants would not have undertaken their common action without reasonable assurances that all would act in concert." *In re Insurance Brokerage Antitrust Litig., 618 F.3d at 332*. In essence, the transactions must have been contingent on each other to establish interdependence. *Kemp, 500 F.3d at 291*. Plaintiffs bear the burden to offer evidence tending **[*80]** to indicate that the spokes of the alleged single conspiracy made some kind of agreement, whether explicit or tacit.

The Court finds that Plaintiffs have not put sufficient evidence onto the record to support their theory, such that a reasonable finder of fact could conclude that the Schering-Upsher and Schering-ESI deals were interdependent. Plaintiffs assert that the settlements were interdependent because Schering had to settle with both Upsher and ESI to guarantee that it would be free of generic competition until Upsher entered the market in September 2001. This theory indicates a possible motivation for Schering to collude with Upsher and with ESI, as Schering's success in the K-Dur market may have depended on the agreements it made with Upsher and ESI. Theories about one party's motivations in entering into a settlement are not evidence of a conspiracy, however, particularly on these facts where the Court's inquiry must necessarily focus on the evidence related to the interdependence or horizontal agreement between alleged spokes Upsher and ESI. Likewise, awareness of a competitor's actions is not enough to create an inference of a conspiracy. *See* *In re Insurance Brokerage Antitrust Litig., 618 F.3d at 349-50*. For ESI in particular, its **[*81]** awareness that Schering and Upsher had settled their patent litigation, even on potentially anticompetitive terms, does not establish a single conspiracy. Plaintiffs point to no other evidence that would indicate ESI's motive in settling with Schering somehow involved an interest in entering into a single, overall conspiracy.

Moreover, the evidence before this Court does not suggest that Upsher and ESI in any way interfered with the other party's settlement with Schering. Upsher and ESI structured different deals with Schering, supporting an inference that their goals in settling their respective patent litigations were not interdependent.[19] The plain language of the

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"triggers" the start of the exclusivity period. A court decision triggering the exclusivity period need not involve the first-filing ANDA applicant, however. A subsequent ANDA filer may obtain a ruling of invalidity or non-infringement, and that ruling triggers the first-filer ANDA applicant's exclusivity period. *Minn. Mining & Mfg. Co. (3M) v.* *Barr Labs., Inc., 139 F. Supp. 2d 1109 (D. Minn. 2001)*, *aff'd*, *289 F.3d 775 (Fed. Cir. 2002)*.

[19] The Court notes that two recent district court decisions have examined whether a single conspiracy existed with a brand-name pharmaceutical company who entered into basically the same settlement agreement, including a reverse payment, with several generic companies. *King Drug Co. of Florence v. Cephalon, Inc., No. 06-1797, 2014 U.S. Dist. LEXIS 84818, 2014 WL 2813312 (E.D. Pa. June 23, 2014)*; *In re Nexium (Esomeprazole) Antitrust Litig., 42 F. Supp. 3d 231 (D. Mass. 2014)*. In the settlement agreements, each generic company agreed to enter the market on the same date, with a contingent launch provision. The court in *King Drug Co.* granted summary judgment on the issue of a single conspiracy between the brand-name and generic manufacturers. *No. 06-1797, 2014 U.S. Dist. LEXIS 84818, 2014 WL 2813312, at *14 (E.D. Pa. June 23, 2014)*. Conversely, the court in *In re Nexium* denied summary judgment on the issue of a single conspiracy. *42 F. Supp. 3d at 258*. Both courts compared their fact pattern to two hub-and-spoke conspiracy cases in which the hub made the same agreement with a series of spokes: *Interstate Circuit, 306 U.S. at 215-16*, and *Toys "R" Us, Inc. v. FTC, 221 F.3d 928, 930, 935-36 (7th Cir. 2000)*. These cases relied on findings of interdependence and the presence **[*83]** of "plus factors," predominantly an assessment of each spoke's economic interest, to establish that the parties tacitly cooperated. *See* *Interstate Circuit, 306 U.S. at 222*; *Toys "R" Us, 221 F.3d at 936*. *In re Nexium*, *King Drug Co.*, *Interstate Circuit*, and *Toys "R" Us* are all distinguishable from the instant case, because all of the alleged spokes in those cases made the same vertical agreement with their respective hub, at or around the same time. But the Schering-Upsher and Schering-ESI settlements differ in their material terms. Schering's settlement with Upsher set a different generic entry date from the Schering-ESI settlement, and the generic companies did not receive the same

settlements at issue in this case does indicate that both Upsher and ESI sought market entry prior to patent expiration, and that a term of ending patent litigation against Schering was a cash payment. But Upsher and ESI negotiated with Schering for different settlement dates, and arranged different payment amounts and schedules. Furthermore, Plaintiffs have offered no evidence that Upsher acted with the involvement of ESI in settling with Schering. Upsher also had no knowledge at the time of the Upsher-Schering settlement **[*82]** that ESI eventually would settle with Schering. Upsher knew ESI and Schering were engaged in patent litigation at the time of its settlement with Schering, and that, if ESI won that litigation before Upsher's settlement entry date of September 1, 2001, that ESI would be able to enter the market before Upsher. (Docket Entry 843-1.)

Plaintiffs likewise have not offered sufficient evidence to show that ESI's settlement with Schering was dependent on Upsher or the Schering-Upsher settlement. In fact, Upsher's settlement likely did not affect ESI's ability to enter the market in January 1998. At the **[*84]** time of the Schering-ESI settlement, Upsher had not satisfied the successful defense requirement, because it settled with Schering in June 1997 rather than successfully defending Schering's patent suit.[20] Under the successful defense requirement, the first generic to file an ANDA with a Paragraph IV certification could not receive the 180-day exclusivity period unless it successfully defended a patent infringement suit. *21 C.F.R. § 314.107(c)(1)*; *Abbreviated New Drug Applications, 59 Fed. Reg. 50338, 50367 (Oct. 3, 1994)*. Accordingly, Upsher arguably could not have used its exclusivity right to block ESI's entry into the market in January 1998, and therefore ESI could not have triggered Upsher's 180 days of exclusivity by winning its patent litigation at this time. ESI could have reached the market earlier if it had won its patent litigation with Schering, given these facts. But none of this evidence suggests that Upsher and ESI had motives to collude with each other. In fact, if ESI had been able to trigger Upsher's exclusivity period, Upsher may have had an incentive to collude with ESI to protect its exclusivity right. But Upsher faced no such threat from ESI. Plaintiffs' arguments about ESI's potential behavior if it had chosen to continue litigation against Schering after the **[*85]** demise of the successful defense requirement in June 1998 are pure speculation, not supported by the evidence before this Court, and will not be entertained.

In light of the reasoning above, the Court finds that Plaintiffs have not established that a rim existed between spokes Upsher and ESI. There is a dearth of evidence on which a reasonable jury could conclude that the Schering-Upsher and Schering-ESI agreements were interdependent, as would be required to support an inference of a single conspiracy between Schering, Upsher, and ESI. Given that Plaintiffs must show that it is more likely than not that a single conspiracy was formed, Plaintiffs have not made the requisite evidentiary showing on the issue of interdependence to support such a claim.

b. Overlap of Alleged Conspirators

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consideration for their agreements. (Docket Entry 843, Ex. 1; Docket Entry 843-52.) Unlike in the cases referenced above, the parties in this case did not settle in a near-contemporaneous fashion: Schering settled with Upsher in June 1997, while Schering settled with ESI in January 1998. (*Id.*)

[20] *See, e.g., In re K-Dur Antitrust Litig., No. 1-1652, 2009 U.S. Dist. LEXIS 126249, 2009 WL 508869, at *24 (D.N.J. Feb. 6, 2009)* (noting that the agreements in this case did not manipulate the 180-day exclusivity period to create a "bottleneck" blocking the entry of other generic companies onto the market, as Upsher could have transferred or relinquished its exclusivity right, and furthermore that because the successful defense requirement existed when Schering and Upsher settled, "Upsher arguably was not entitled to the exclusivity period."); *see also In re Tamoxifen Citrate Antitrust Litig., 277 F. Supp. 2d 121 (E.D.N.Y. 2003)*, *aff'd*, *466 F.3d 187 (2d Cir. 2006)* (as amended), *abrogated by FTC v. Actavis, Inc., 133 S. Ct. 2223, 186 L. Ed. 2d 343 (2013)*. In 1985, generic manufacturer Barr filed the first ANDA with a Paragraph IV notice for tamoxifen, a treatment for breast cancer. *277 F. Supp. 2d at 124-25*. Brand-name manufacturer Zeneca and Barr settled the ensuing patent litigation in 1993. *Id.* Subsequently, several other generic manufacturers filed ANDAs for tamoxifen in 1994 and 1996. *Id. at 126-27*. While the suits related to these subsequent ANDAs were pending in district court, the FDA stopped enforcing the successful defense requirement. *466 F.3d at 195*. The Second Circuit noted that the successful defense requirement **[*86]** "would have excluded Barr from benefitting from the exclusivity period," given that it settled with Zeneca. *Id.* In June 1998, after the FDA removed the successful defense requirement, Barr attempted to block final FDA approval of other generic versions of tamoxifen by asserting its rights to the 180-day exclusivity period. *Id.*

Furthermore, Plaintiffs' view of what constitutes sufficient overlap between the parties under *Kelly* does not comport with established Third Circuit case law regarding hub-and-spoke conspiracies. Plaintiffs assert that they have satisfied **[*87]** the third element of the *Kelly* test by noting that Schering, the alleged hub in the overall hub-and-spoke conspiracy, is a member of both alleged sub-conspiracies. But the Supreme Court has ruled that the presence of a single party common to several illegal agreements with other parties does not necessarily establish a single conspiracy. *Kotteakos, 328 U.S. at 755*. Plaintiffs also ignore the Third Circuit opinions that require the showing of at least a reasonable inference of a horizontal agreement between the spokes of a hub-and-spoke conspiracy to find a single conspiracy, not just vertical agreement between the hub and each individual spoke. *See, e.g., Kemp, 500 F.3d at 291* (finding that when determining whether the facts support a single or multiple conspiracies, "the inquiry must focus . . . on the character of the agreement between the spokes"); *In re Ins. Brokerage Antitrust Litig., 618 F.3d at 347* ("In all hub-and-spoke conspiracies, the horizontal agreement among the spokes supports the agreements between the hub and each spoke, and vice versa").

Under *Kotteakos*, Plaintiffs have not offered evidence such that a finder of fact could reasonably determine that the spokes of the alleged hub-and-spoke conspiracy—Upsher and ESI—made any type of horizontal agreement or overlapped **[*88]** in any other way. On this point, Plaintiffs discuss the motives of Schering in wishing to end the threat of generic competition for K-Dur, and assert that Upsher and ESI were incentivized to enter into the conspiracy through Schering's payments. But Plaintiffs do not offer facts that this Court can construe as showing any type of agreement between Upsher and ESI. In fact, as part of the settlement with Schering, Upsher agreed to not assist ESI with its ongoing patent litigation against Schering, and to not assist any other party challenging the '743 patent. (Docket Entry 843, Ex. 1 ¶ 6.) And there is no evidence on this record that ESI even knew about the Schering-Upsher settlement until after it occurred.

Plaintiffs cannot succeed on the third *Kelly* factor simply by showing that both Upsher and ESI settled with Schering, and then asking the Court to infer that the parties had illegal motives for settling. As discussed above, Plaintiffs' evidence does not establish that ESI had a motive to enter into a single conspiracy, that Upsher and ESI acted in a collusive manner by interacting or agreeing in any sort of horizontal manner, or that ESI would have benefitted from some sort of tacit agreement **[*89]** to collude with Schering and Upsher.

Plaintiffs have not satisfied their burden on the issue of overlap by stating that ESI knew about the alleged conspiracy between Schering and Upsher, or even by stating that in court documents, ESI acknowledged that the Schering-Upsher settlement may have been anticompetitive. (Pls.' SDF ESI ¶ 28; Defs.' SDF Reply ESI ¶ 28.) Plaintiffs must present evidence tending to show either that ESI agreed to join the Schering-Upsher conspiracy, or that it formed a conspiracy with Schering and Upsher at the time it signed a settlement agreement with Schering, and furthermore that ESI knowingly cooperated in the common effort to obtain unlawful results. On this evidence, no reasonable jury could conclude that it is more likely that ESI joined a single conspiracy with Schering and Upsher rather than that ESI bargained with Schering for its own benefit.

Plaintiffs have not provided sufficient direct or circumstantial evidence such that a reasonable finder of fact could find in favor of Plaintiffs on the issue of a single conspiracy between Schering, Upsher, and ESI. Plaintiffs have thus failed to cite evidence sufficient to defeat Defendants' summary judgment motion, **[*90]** and accordingly the Court will grant Defendants' motion for summary judgment on all claims related to the Schering-ESI settlement.

V. Conclusion

For the foregoing reasons, the Court will deny as moot Plaintiffs' motion to strike Sections I and II of Defendants' reply memorandum related to the ESI settlement. The Court will also deny Defendants' motion for summary judgment as to all claims brought by Plaintiffs related to the Schering-Upsher settlement. The Court will grant Defendants' motion for summary judgment as to all claims brought by Plaintiffs related to the Schering-ESI settlement. An appropriate Order will be filed herewith.

/s/ Stanley R. Chesler

STANLEY R. CHESLER

United States District Judge

Dated: February 25, 2016

In re Opana ER Antritrust Litig.

United States District Court for the Northern District of Illinois, Eastern Division

February 25, 2016, Decided; February 25, 2016, Filed

MDL Docket No. 2580; Case No. 14 C 10150

Reporter

2016 U.S. Dist. LEXIS 23319 *; 2016-1 Trade Reg. Rep. (CCH) P79,572; 2016 WL 738596

IN RE OPANA ER ANTITRUST LITIGATION

Prior History: *In re Opana Er Antritrust Litig., 162 F. Supp. 3d 704, 2016 U.S. Dist. LEXIS 16700, Trade Reg. Rep. (CCH) P 79505 (N.D. Ill., Feb. 10, 2016)*

Core Terms

Opt-Out, generic, Settlement, antitrust, Wholesalers, assign, sales, patent, Defendants', Complaints, purchaser, partially-assigned, launch, memorandum opinion, Sherman Act, infringement, partial assignment, opt out, delegate, obligor, required to pay, anti trust law, class action, class member, certification, unjustified, provisions, Royalties, threshold, profits

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Judges: Harry D. Leinenweber, United States District Judge.

Opinion by: Harry D. Leinenweber

Opinion

MEMORANDUM OPINION AND ORDER

In addition to the claims brought by Direct Purchaser Plaintiffs (the "DPPs") and End-Payor Purchaser Plaintiffs (the "EPPs"), two groups of retailers, Walgreen Co., *et al.*, and Rite Aid Corporation, *et al.* (collectively, the "Opt-Out Plaintiffs"), have brought claims in this multi-district litigation against Endo Health Solutions Inc., Endo Pharmaceuticals Inc., Penwest Pharmaceuticals Co. (collectively, "Endo"), and Impax Laboratories, Inc. ("Impax") (collectively, the "Defendants"), pursuant to the Supreme Court's decision in *FTC v. Actavis, Inc., 133 S.Ct. 2223, 186 L. Ed. 2d 343 (2013)*. Opt-Out Plaintiffs, like DPPs and EPPs, allege that Defendants violated the Sherman Act when they entered into an illegal reverse payment agreement to settle ongoing patent infringement litigation thereby delaying the entry of generic versions of Opana ER to the Oxymorphone ER Market.

Currently before the Court is Defendants' Motion to Dismiss Opt-Out Plaintiffs' Complaints pursuant to *Federal Rules of Civil Procedure 12(b)(1)* and *12(b)(6)* [ECF No. 119]. For the reasons stated herein, the **[*6]** Motion to Dismiss is granted.

I. BACKGROUND

Except where noted, the following facts are contained in both of Opt-Out Plaintiffs' Complaints, as well as documents attached to, referenced in, and critical to, the Complaints. *Geinosky v. City of Chicago, 675 F.3d 743, 745 n.1 (7th Cir. 2012)*.

A. Hatch-Waxman Regulatory Framework

For a complete discussion of the Hatch-Waxman regulatory framework underpinning this case, the Court incorporates by reference the discussion on pages 2-6 of its February 10, 2016 Memorandum Opinion and Order [ECF No. 151].

B. Endo-Impax Patent Litigation

Up until early spring of 2012, Defendant Endo manufactured Opana ER, an extended release form of oxymorphone hydrochloride marketed for the relief of moderate to severe pain. Rite Aid Complaint ("RAC") ¶ 53; Walgreen Complaint ("WC") ¶ 57. Endo began selling Opana ER on or about June 21, 2006. RAC ¶ 55; WC ¶ 59. At the time, Endo had three years of regulatory protection from generic competition, which prevented the Food and Drug Administration ("FDA") from approving an Abbreviated New Drug Application ("ANDA") for Opana ER through June 22, 2009, after which point Endo's Opana ER monopoly would be subject to generic competition. RAC ¶ 57; WC ¶ 61. Knowing this, Endo purchased the **[*7]** rights to four patents — U.S. Patent No. 5,128,143 (the "'143 patent"), No. 5,958,456 (the "'456 patent"), No. 5,662,933 (the "'933 patent"), and No. 7,276,250 (the "'250 patent") (collectively, the "Penwest Patents") — that could be used to block generic entry beyond those three years. RAC ¶¶ 51-52, 68; WC ¶¶ 55-56, 72. Endo then listed the '143 patent in the "Approved Drug Products with Therapeutic Equivalence Evaluations" (commonly known as the "Orange Book") as covering Opana ER, and later added the '250, '456 and '933 patents. RAC ¶¶ 65, 68; WC ¶¶ 69, 72.

In November of 2007, Impax filed an ANDA seeking to market a generic version of Opana ER, and submitted a Paragraph IV certification stating that the Penwest Patents would not be infringed by Impax's generic. *See*, *21 U.S.C. § 355(j)(2)(A) (vii)*; RAC ¶ 70; WC ¶ 74. On December 13, 2007, Impax sent Endo notice of its Paragraph IV filing. RAC ¶ 72; WC ¶ 76. On January 25, 2008, Endo sued Impax for patent infringement — triggering the 30-month Hatch-Waxman stay. RAC ¶ 73; WC ¶ 76. Other generic companies later filed ANDAs seeking to market generic versions of Opana ER before the expiration of the Penwest Patents, and Endo sued each for patent infringement. RAC ¶¶ 84-109; WC ¶¶ 80-105. Because Impax was the first company to file a Paragraph IV ANDA (commonly **[*8]** known as the "first-filer") for the 5, 10, 20, 30, and 40 mg strengths of Opana ER, upon obtaining FDA approval it was entitled to 180 days of exclusivity for those strengths as against the other ANDA filers. RAC ¶¶ 74, 77; WC ¶¶ 78, 81. Thus, by filing suit and delaying Impax's entry for 30 months, Endo delayed all generics from launching 5, 10, 20, 30 and 40 mg strengths of generic Opana ER.

On May 13, 2010, a month before the 30-month stay was set to expire, the FDA tentatively approved Impax's ANDA for all strengths of Opana ER. RAC ¶ 111; WC ¶ 115. This meant that, upon the expiration of the 30-month stay on June 14, 2010, Impax was free to make an "at-risk" launch of its generic without waiting for the trial court's final ruling in the Impax patent litigation. RAC ¶ 112; WC ¶ 116. But, for whatever reason, Impax agreed not to launch its generic through the last day of trial. RAC ¶ 113; WC ¶ 117. The bench trial commenced on June 3, 2010, and proceeded for two days. RAC ¶ 114; WC ¶ 118. On June 8, 2010, Endo and Impax settled. RAC ¶ 116; WC ¶ 120.

C. Endo-Impax Settlement

The Endo-Impax Settlement consisted of two agreements entered into simultaneously: (1) the Settlement and License **[*9]** Agreement ("SLA"), and (2) the Development and Co-Promotion Agreement ("DCA"). Under the SLA, Impax agreed to delay its launch of generic Opana ER until the earlier of: (i) January 1, 2013, (ii) thirty days after a non-appealable federal court decision finding that Endo's patents were invalid or not infringed, or (iii) Endo's withdrawal of its patents from the Orange Book. SLA § 3.2. Impax further agreed to refrain from challenging the validity or enforceability of the '933 and '456 patents, as well as the '250 patent, which Endo had not even accused Impax of infringing. SLA § 3.3. In return, Endo covenanted not to sue Impax on, and granted Impax a license as to, any then-existing or subsequently obtained patents relating to Opana ER. *Id.* at § 4.1(a), (b). Additionally, Endo agreed to refrain from launching an Authorized Generic ("AG") version of Opana ER marketed under Endo's NDA during Impax's 180-day exclusivity period ("No-AG Agreement"). *Id.* at § 4.1(c).

The SLA was also structured so that, depending on the volume of Opana ER sales at the time Impax's generic entered the market, one of three things would occur. First, if at the time Impax entered the market sales of Opana ER had declined below a certain threshold defined in the SLA, then Endo was required **[*10]** to pay Impax under the "Endo Credit" provision. *Id.* at § 4.4. The amount of the Endo Credit payment depended on the amount of decline in Opana ER sales — the greater the decline in sales, the larger the payment required under the Endo Credit provision. *Id.* Second, if Opana ER sales exceeded a certain threshold defined in the SLA by the time Impax entered the market, then Impax was required to pay Endo a 28.5% royalty on net sales of Impax's generic under the "Royalties" provision. *Id.* at § 4.3. Finally, if sales of Opana ER remained somewhere between the Endo Credit and the Royalties threshold amounts, neither party was required to pay anything.

The other aspect of the Endo-Impax Settlement was the DCA, which resulted in a $10 million cash payment from Endo to Impax. DCA § 3.1. Under the DCA, Endo and Impax agreed to work together on the development and promotion of a drug for the treatment of Parkinson's disease. *Id.* at § 2.1. Among other things, Endo agreed to support the product's development through a $10 million up-front payment, and to make additional future payments to Impax if Impax successfully completed various clinical and commercial milestones. *Id.* at §§ 3.1, 3.2, 3.3. In return, Endo received an exclusive license to promote **[*11]** the product to non-neurologists in the United States. *Id.* at §§ 2.1, 2.2. Endo also received the right to keep between 75% and 100% of the profits from the sale of the drug to non-neurologists in the United States. *Id.* at § 3.4.

D. Aftermath

Endo knew that when generics for Opana ER entered the market in 2013 there would be "substantial share erosion" for brand Opana ER, so it immediately set about "working at multiple levels to combat that." RAC ¶ 148; WC ¶ 152. Accordingly, shortly after entering into the Endo-Impax Settlement, Endo set about switching the market from Opana ER to a crush resistant formula of Opana ER ("Opana ER CRF"). RAC ¶ 149; WC ¶ 153. The FDA approved Endo's supplemental new drug application ("sNDA") for Opana ER CRF on December 9, 2011. RAC ¶ 150; WC ¶ 154. To accomplish the switch between Opana ER and Opana ER CRF, Endo discontinued the sale of Opana ER, thus forcing physicians desiring to prescribe extended release oxymorphone hydrochloride to prescribe Opana ER CRF instead. RAC ¶ 150; WC ¶ 154.

Generic drugs that are "therapeutically equivalent" to their brand counterpart receive an "AB" rating from the FDA. An AB-rated generic may be automatically substituted at the pharmacy **[*12]** counter for the brand drug. Because generic versions of Opana ER are not AB-rated equivalents of Opana ER CRF and therefore are not automatically substitutable, they were unable to capture the sales of Opana ER CRF when they eventually entered the market in 2013. RAC ¶ 151; WC ¶ 155. Without generic competition, Endo continues to sell Opana ER CRF at supracompetive prices. RAC ¶ 152; WC ¶ 156.

As a result of Endo's market shift from Opana ER to Opana ER CRF, by the time Impax's generic entered the market in line with the terms of the Endo-Impax Settlement Agreement, in January 2013, sales of Opana ER had declined below the threshold defined in the SLA, triggering the Endo Credit provision. SLA § 1.1. The amount Endo was required to pay Impax under the Endo Credit was determined based on the sales of Opana ER in the quarter immediately prior to the launch of Impax's generic. SLA § 1.1; RAC ¶ 5; WC ¶ 123. Ultimately, in April 2013, Endo paid Impax $102,049,000 pursuant to the Endo Credit provision. RAC ¶ 5; WC ¶ 123.

E. Assignment of Claims to Opt-Out Plaintiffs

Opt-Out Plaintiffs bring suit as assignees of pharmaceutical wholesalers Cardinal Health, Inc. ("Cardinal"), McKesson Corporation ("McKesson"), **[*13]** and AmeriSource Bergen Drug Corporation ("ABDC") (collectively, "the Wholesalers"). Each of the Wholesalers, in turn, purchased Opana ER directly from Endo pursuant to Distribution Service Agreements ("DSAs"). The DSAs govern Endo's sale of Opana ER to the Wholesalers, and include general provisions for product distribution, inventory management services, and distribution channel information, among other services.

Each DSA includes a provision that prohibits the Wholesalers from assigning the agreement without Endo's consent. Specifically, the Cardinal DSA states, "[n]either party may assign this Agreement without the prior written consent of the other party. . . ." Cardinal DSA § 4.3. The McKesson DSA states, "[n]either party may assign this Agreement or delegate any of its respective duties or responsibilities under this Agreement without the prior written consent of the other party which consent shall not be unreasonably withheld." McKesson DSA § 5.3. Similarly, the ABDC DSA states, "[n]either Party may assign this Agreement or delegate any of its respective duties or responsibilities *[sic]* this Agreement without prior written consent of the other Party which shall not be unreasonably withheld. . . ." ABDC DSA § 13.2. Endo did not consent to the assignment **[*14]** of claims by the Wholesalers to any of the Opt-Out Plaintiffs.

II. ANALYSIS

Opt-Out Plaintiffs, like DPPs and EPPs, make claims against Defendants based on the Supreme Court's opinion in *FTC v. Actavis*, which decided whether it is illegal for a brand-name company to provide a payoff to a potential generic competitor, to keep it from entering the market earlier than it otherwise might have. *Actavis, 133 S.Ct. at 2223*. The Supreme Court held that a reverse settlement payment, that is, a payment by a patentee to a claimed infringer, may be a restraint of trade under a "rule of reason" analysis when the payment is large and unjustified. *Id. at 2230, 2237-38*. The Court explained, the "likelihood of a reverse payment bringing about anticompetitive effects depends upon its size, its scale in relation to the payor's anticipated future litigation costs, its independence from other services for which it might represent payment and the lack of any other convincing justification." *Id. at 2237*. For a complete discussion of the *Actavis* decision, the Court incorporates by reference the discussion on pages 12-15 of its February 10, 2016 Memorandum Opinion and Order [ECF No. 151].

Following the Court's lead in *Actavis*, Opt-Out Plaintiffs allege that the Endo-Impax **[*15]** Settlement contained a large and unjustified reverse settlement payment that satisfies a "rule of reason" analysis. Defendants, in their Motions to Dismiss Opt-Out Plaintiffs' Complaints, make five arguments: (1) the Endo-Impax Settlement Agreement did not involve a reverse payment at the time the settlement was entered; (2) the alleged reverse payment was not large and unjustified; (3) Opt-Out Plaintiffs have failed to allege antitrust injury; (4) Opt-Out Plaintiffs lack standing to bring these claims; and (5) Opt-Out Plaintiffs claims may only be pursued as part of DPP class, and therefore must be dismissed or at least stayed until DPPs achieve class certification. The Court will address the last two arguments first, as they go to the Court's power to consider Opt-Out Plaintiffs' claims. *Warth v. Seldin, 422 U.S. 490, 498, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975)* (stating that whether a plaintiff has standing is "the threshold question in every federal case, determining the power of the court to entertain the suit.").

A. Standing

The doctrine of standing acts as a limitation on the power of the federal courts. It "requires federal courts to satisfy themselves that 'the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant **[*16]** *his* invocation of federal-court jurisdiction.'" *Summers v. Earth Island Inst., 555 U.S. 488, 493, 129 S. Ct. 1142, 173 L. Ed. 2d 1 (2009)* (quoting *Warth, 422 U.S. at 498-499* (internal quotation marks omitted)).

Private suits to enforce the Sherman Act are authorized by Section 4 of the Clayton Act, *15 U.S.C. § 15(a)*, which provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor. . . ." Despite the apparent breadth of the phrase "any person," numerous doctrines have arisen to clarify the circumstances under which a particular person may recover from an antitrust violator. At times these doctrines are referred to as "antitrust standing." The Supreme Court, however, has made clear that these doctrines are separate and distinct from Article III standing, which tests "whether a plaintiff has suffered a redressable injury in fact, entitling the federal courts to hear such a 'case or controversy'. . . ." *Loeb Indus., Inc. v. Sumitomo Corp., 306 F.3d 469, 480 (7th Cir. 2002)* (citing *Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992))*. There is no dispute that Opt-Out Plaintiffs allege that they have been injured by paying supracompetive prices for Opana ER and Opana ER CRF as a result of the illegal agreement between Endo and Impax, and therefore they have Article III standing. The more difficult question is whether, under the Sherman Act, Opt-Out Plaintiffs **[*17]** have antitrust standing to bring this suit for antitrust damages.

To establish antitrust standing a plaintiff must prove that he or she has been (1) "injured in his business or property"; (2) "by reason of anything forbidden in the antitrust laws. . . ." *See*, *15 U.S.C. § 15(a)*. Under the first element, a plaintiff must demonstrate injury to his or her business or property interests, which injury is causally linked to an antitrust violation. Generally speaking, an allegation that plaintiff consumers paid higher prices for goods purchased due to defendants' conduct satisfies this element. *See, e.g.*, *Reiter v. Sonotone Corp., 442 U.S. 330, 342, 99 S. Ct. 2326, 60 L. Ed. 2d 931 (1979)* ("[W]here petitioner alleges a wrongful deprivation of her money because the price of the [good] she bought was artificially inflated by reason of respondents' anticompetitive conduct, she has alleged an injury in her 'property' under § 4."). Under the more critical second element, a plaintiff must also demonstrate "injury of the type the antitrust laws were intended to prevent" (commonly referred to as "antitrust injury"). *See*, *Atl. Richfield Co. v. USA Petroleum, 495 U.S. 328, 334, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)*.

Even assuming, however, that a plaintiff is able to show antitrust injury, it is "not always sufficient to establish standing under section 4 because a party may have suffered antitrust injury but **[*18]** may not be the proper plaintiff under section 4 for other reasons." *Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 110 n.5, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986)*. For example, where a plaintiff's injury is derivative of a more direct injury to some other person, and that person would have a strong motivation to pursue its own antitrust claim against the defendant, standing is likely to be denied. This is the rationale underlying *Illinois Brick*, in which the Supreme Court held that indirect purchasers are too remote to suffer true antitrust injury, and therefore do not have standing under federal ***antitrust law*** to pursue antitrust claims. *Illinois Brick v. Illinois, 431 U.S. 720, 728 n.7, 745-46, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*.

Defendants argue that Opt-Out Plaintiffs lack antitrust standing pursuant to *Illinois Brick* because their injury is derivative of the Wholesalers' direct injury. Opt-Out Plaintiffs respond that their injury is not derivative because they are standing in the shoes of the Wholesalers by virtue of the assignments. Defendants, in turn, contend that the assignments under which Opt-Out Plaintiffs purportedly bring their claims are invalid. Ultimately, whether Opt-Out Plaintiffs have antitrust standing to recover against Defendants turns on whether the assignments are valid.

The validity of assignments under the Sherman and Clayton Acts is a matter of federal **[*19]** common law. *Gulfstream III Associates, Inc. v. Gulfstream Aerospace Corp., 995 F.2d 425, 437 (3d Cir. 1993)*. There is no serious doubt that an antitrust claim can be expressly assigned. In many cases, such assignments are accepted *sub silentio. See, e.g.*, *Jefferson Cnty. Pharm. Ass'n, Inc. v. Abbott Lab., 460 U.S. 150, 103 S. Ct. 1011, 74 L. Ed.*

2d 882 (1983); Chiropractic Coop. Ass'n of Michigan v. Am. Med. Ass'n, 867 F.2d 270 (6th Cir. 1989); Hahn v. Oregon Physicians' Service, 786 F.2d 1353 (9th Cir. 1985); *see also,* In re Fine Paper Litig., 632 F.2d 1081, 1090 (3d Cir. 1980) (recognizing validity of assignment after discussion); D'Ippolito v. Cities Service Co., 374 F.2d 643, 647 (2d Cir. 1967) (same); Hicks v. Bekins Moving & Storage Co., 87 F.2d 583, 585 (9th Cir. 1937) (same); Mercu-Ray Industries, Inc. v. Bristol-Myers Co., 392 F. Supp. 16, 18 (S.D.N.Y.), aff'd mem., 508 F.2d 837 (2d Cir. 1974) (same).

However, this does not answer fully the question raised by Defendants: whether the particular assignments upon which Opt-Out Plaintiffs base their claims are valid. Defendants argue they are not because a provision in each DSA prohibited the Wholesalers from assigning "this Agreement" and/or from "delegate[ing]" any "duties or responsibilities" under the agreement without Endo's consent. Opt-Out Plaintiffs argue that this language does not affect the validity of their assignments because the Wholesalers did not assign the DSAs to Opt-Out Plaintiffs, nor did they assign or delegate any of their duties or obligations under the DSAs. Instead, Opt-Out Plaintiffs argue that the Wholesalers have simply assigned their antitrust overcharge claims against Endo and its co-conspirators.

The Court agrees with Opt-Out Plaintiffs. Unless intent to the contrary is shown, a contractual prohibition against "assignment of the contract" is presumed **[*20]** as a matter of law to refer only to delegation of contractual duties, not assignment of rights. *See,* Cedar Point Apartments, Ltd. v. Cedar Point Inv. Corp., 693 F.2d 748, 753 (8th Cir. 1982); Charles L. Bowman & Co. v. Erwin, 468 F.2d 1293, 1297-98 (5th Cir. 1972); *Restatement (Second) of Contracts § 322(1)* (1981); 3 S. Williston, *A Treatise on the Law of Contracts* § 422, at 138-39 (3d ed. 1961); 4 A. Corbin, *Corbin on Contracts* § 872, at 484 (1951). The non-assignment provision in each DSA may be read to prohibit the assignment of the parties' contractual duties and obligations under the DSA, but it cannot be read to prohibit the assignment of the parties' rights.

Even under a broad reading of the non-assignment provisions, the prohibition on assigning "this Agreement" or "delegat[ing]" any "duties or responsibilities" would only serve to limit the parties' ability to assign their rights and obligations under the DSA. The Court does not read this language to include statutorily-based antitrust claims, because such claims are not based on any substantive right or duty found in the DSAs themselves. *See, e.g.,* United Food & Comm. Workers Local 1776 & Participating Emp'rs Health & Welfare Fund v. Teikoku Pharma USA, Inc., 2015 U.S. Dist. LEXIS 94220, 2015 WL 4397396, at *4 (N.D. Cal. July 17, 2015); In re TFT-LCD (Flat Panel) Antitrust Litig., 2011 U.S. Dist. LEXIS 88723, 2011 WL 3475408, at *4 (N.D. Cal. 2011); Meijer, Inc. v. Barr Pharms. Inc., 572 F. Supp. 2d 38, 64 (D.D.C. 2008); Cedar Point Apartments v. Cedar Point Inv. Corp., 693 F.2d 748, 753 (8th Cir. 1982). The existence of a boilerplate duty to abide by applicable law does not manifest the requisite intent to expand the scope of the non-assignment provisions beyond their plain language. The DSAs do not specifically mention ***antitrust law*** or the assignment **[*21]** of legal claims.

It is undisputed that the wholesalers did not delegate their duties or obligations under "th[e] Agreement" — the DSA — nor was the DSA as a whole assigned to Opt-Out Plaintiffs. What was assigned is a *cause of action* that arose from the DSA. Such an assignment is not prohibited by the language of the non-assignment provisions. Accordingly, the Court finds that Defendant's standing argument lacks merit.

B. Dismiss or Stay Pending DPP Class Certification

Defendants next argue that even if the assignments are valid, they are only partial assignments, and therefore Opt-Out Plaintiffs should be required to pursue their claims as part of the direct purchaser class under Fed. R. Civ. P. 19. Defendants contend that a partial assignment multiplies the number of lawsuits brought against Defendants on the basis of the Wholesalers' purchases and impermissibly forces Defendants to face a multiplicity of suits. While normally a class member with an individual claim may opt out of the class to pursue his or her claim separately, Defendants propose that a different rule applies when a class member partially assigns his or her claim to a third party. Under such circumstances, Defendants assert that the holder **[*22]** of the partially-assigned claims loses the right to opt out and must litigate its claims as part of the relevant class. Opt-Out Plaintiffs contend that Defendants' proposed rule has been repeatedly rejected by the federal courts and that this multidistrict litigation sufficiently consolidates the cases to alleviate any of the concerns raised by Defendants.

Class members with individual claims for actual damages may always opt out of the class to pursue their claims separately. *Murray v. GMAC Mortg. Corp., 434 F.3d 948, 953 (7th Cir. 2006)*. A different rule applies, however, when a class member partially assigns its claim to a third party:

> An assignment of a fractional part of a single and entire right against an obligor is operative as if the part had been a separate right. But unless the obligor has consented, the partial assignee may not maintain the original suit against the obligor unless all parties having the collective right to the entire claim are joined in the proceeding.

Restatement (Second) of Contracts § 326 (1981).

The Third Circuit extensively examined this principle in *Fine Paper* when it addressed whether the holder of partially-assigned claims may opt out of a certified class action. *Fine Paper, 632 F.2d at 1089*. The court first concluded that partial assignments "pose no threat to the rule of law **[*23]** enunciated in [*Illinois Brick*]." *Id. at 1090*. In fact, the court found that both of the policies behind *Illinois Brick* — the risk of multiple liability and complex problems of proof and apportionment — weigh in favor of recognizing partially-assigned claims in class actions. *Id.* Specifically, the Court stated:

> Adjudicating the partial assignments at this stage will provide defendants with assurance against multiple liability. With all the claims in one proceeding, . . . the parties and the court can monitor each claim against the defendants. Moreover, the presence of the partial assignments will not add to the complexity of the lawsuit. Proof of the assignment bears no resemblance to attempts to ascertain the numbers of indirect purchases or overcharges in the *Illinois Brick* setting.

Id. Therefore the court held that the partially-assigned claims should be included in the class action, as this would provide the defendants with assurance against multiple liabilities. *Id.*

But the court went on to conclude that the holder of the partially-assigned claims, "unlike other class members, [did] not have the right to opt out" of the class action. *Id. at 1090-91*. The court explained that although partial assignments are **[*24]** recognized, "the rights of the obligor to be free of successive and repeated suits growing out of the same basic facts" must also be protected. *Id. at 1091*. Thus, the court held that "[t]he compulsory joinder provisions of *Rule 19*" required the holder of the partially-assigned claims to pursue those claims as a member of the relevant class. *Id.*

The Court agrees with the reasoning and the rule announced by the Third Circuit in *Fine Paper*, and believes that its application to this case would compel a certain result but for a key factual distinction that renders the issue premature. Specifically, in *Fine Paper*, the partially-assigned claims were assigned by *members* of the certified direct purchaser class. *Id. at 1089*. In the instant case, the direct purchaser class has not been certified, and therefore its membership is indeterminate. Although the Wholesalers — Cardinal, McKesson, and ABDC — fit the description of membership for the direct purchaser class, it is uncertain whether the class will ultimately obtain certification. Moreover, even if the class is certified, there remains a chance that the Wholesalers will exercise their right to opt out. Under such circumstances, the *Fine Paper* rule would require Opt-Out Plaintiffs **[*25]** to be joined in the Wholesalers' opt-out suit (should they choose to pursue one) — not in the direct purchaser class suit. *See, Fine Paper, 632 F.2d at 1091* ("[U]nless the obligor has consented, the partial assignee may not maintain the original suit against the obligor unless all parties having the collective right to the entire claim are joined in the proceeding.").

Thus, the current status of this litigation makes a decision to dismiss or stay Opt-Out Plaintiffs' partially-assigned claims premature. Although DPPs have filed a class action complaint, none of the Wholesalers appear as named plaintiffs, and DPPs have not yet moved for class certification. At this stage, it remains unclear whether the Wholesalers have reserved for themselves any portion of their right to sue Defendants, and if so, how they will choose to pursue that right. Therefore, Defendants' Motion to Dismiss or Stay Opt-Out Plaintiffs' claims is denied.

C. Sherman Act Arguments

Turning to Defendants' remaining arguments, the Court finds Opt-Out Plaintiffs' pleadings substantially similar in many relevant respects to DPPs' and EPPs' pleadings; thus, in the interests of judicial economy, the Court will restate briefly its findings as Defendants' Sherman **[*26]** Act arguments, and discuss any meaningful distinctions in Opt-Out Plaintiffs' pleadings. The Court incorporates by reference its more thorough analysis of Defendants' Sherman Act arguments on pages 16-27 of its February 10, 2015 Memorandum Opinion and Order [ECF No. 151].

Defendants first argue that the Endo Credit was not a reverse payment. The Court disagrees. When the Court views the components of the Endo-Impax Settlement as a whole, it finds plausible and persuasive Opt-Out Plaintiffs' allegation that the Endo Credit and No-AG Agreement worked in conjunction with one another to ensure payment to Impax. Specifically, Plaintiffs allege that the settlement guaranteed Impax would receive a large reverse payment either through the Endo Credit if sales of Opana ER dropped, or through the No-AG Agreement if sales of Opana ER remained steady or rose after two-and-one-half years. Moreover, even if Impax had been required to pay Endo under the Royalties provision, Impax would still have received significant value through the Settlement in the form of the No-AG Agreement. This is because the Royalties provision was only triggered if sales of Opana ER rose by a predefined amount. If this rise **[*27]** in sales occurred, by the time Impax entered the market with its generic there would be more Opana ER sales for it to capture, and Endo's promise not to compete through an AG during Impax's 180-day exclusivity period would become even more valuable.

In *Actavis*, the Supreme Court recognized generally that the 180—day exclusivity period is "possibly 'worth several hundred million dollars,'" and may be where the bulk of the first-filer's profits lie. *Actavis, 133 S.Ct. at 2229* (quoting C. Scott Hemphill, *Paying for Delay: Pharmaceutical Patent Settlement as a Regulatory Design Problem*, *81 N.Y.U. L. Rev. 1553, 1579 (2006)*). At the same time, Endo's commitment not to produce an AG means that it gave up the valuable right to capture profits in the new two-tiered market. As such, the No-AG Agreement transferred the profits Endo would have made from its AG to Impax — plus potentially more, in the form of higher prices, because it enabled Impax to have a generic monopoly instead of a generic duopoly. *See*, *King Drug Co. of Florence v. Smithkline Beecham Corp., 791 F.3d 388, 405 (3d Cir. 2015)*. Thus, even though Endo was free to compete with Impax in other areas of the market, by agreeing not to launch an AG during Impax's 180-day exclusivity period, Endo conveyed significant value to Impax.

Despite the form and amount of the reverse payment **[*28]** under the settlement being contingent on future occurrences, taking the Plaintiffs' allegations as true, it was certain at the time of the Endo-Impax Settlement that Impax would at least receive a reverse payment of significant value in the form of the No AG-Agreement, and an additional $10 million under the DCA. Therefore, Opt-Out Plaintiffs have alleged sufficiently that the Endo-Impax Settlement contained a reverse payment.

Next, Defendants contend that Opt-Out Plaintiffs have failed to establish sufficiently that the alleged reverse payment was large or unjustified. Defendants argue that Opt-Out Plaintiffs do not even attempt to value the reverse payment, and only allege summarily that the No-AG Agreement was worth "many millions of dollars" to Impax. RAC ¶¶ 120, 122; WC ¶¶ 124, 126. In this respect, Opt-Out Plaintiffs' Complaints differ significantly from the complaints of DPPs and EPPs. This variance in the pleadings leads the Court to reach a different outcome than in the Motion to Dismiss DPPs' and EPPs' Complaints.

When, as here, "an alleged reverse payment involves a non-monetary payment of any kind, it must be valued in terms of a monetary amount in order to determine if it **[*29]** is 'large' within the meaning of *Actavis*." *In re Effexor XR Antitrust Litig., 2014 U.S. Dist. LEXIS 142206, 2014 WL 4988410, at *21 (D.N.J. Oct. 6, 2014)*. Simply alleging that the No-AG Agreement was worth "many millions of dollars," absent a reliable foundation supporting that value, does not establish the plausibility required by *Rule 12(b)(6)*. The Court is aware that a precise valuation may require discovery, as it will likely depend on evidence in Defendants' exclusive possession and on expert analysis. *In re Aggrenox Antitrust Litig., 94 F.Supp.3d 224, 244 (D. Conn. 2015)*. But in order to raise a right to relief above the speculative level, Opt-Out Plaintiffs must provide some reliable foundation to show an estimated value of the reverse payment and how that estimate was calculated. Further, Opt-Out Plaintiffs' allegation that the reverse payment was "an amount far above any litigation costs saved by Endo (or Impax) by settling," RAC ¶ 119; WC ¶ 123, fails to calculate what those saved costs actually were. Without this information, it is impossible to determine whether the payment was "large" or "unjustified" in comparison to the avoided litigation costs and any other services provided from Impax to Endo. *See, Actavis, 133 S.Ct. at 2236*; *see also, In re Lipitor Antitrust Litig., 46 F.Supp.3d 523, 547 (D.N.J. 2014)* ("Plaintiffs failed to plausibly allege an estimate of the monetary value of the non-monetary payment. . . .").

Therefore, the Court grants Defendants' **[*30]** Motion to Dismiss Opt-Out Plaintiffs' Complaints for failure to state a Sherman Act claim under *Actavis*. Opt-Out Plaintiffs are granted leave to file an amended complaint within 21 days of the date of this memorandum opinion and order.

In light of this conclusion, the Court will not delve into an in-depth analysis of Defendants' argument that Out-Out Plaintiffs have failed to allege antitrust injury. But to save time and energy on future briefing, the Court notes that this argument, which is identical to that made in the Motion to Dismiss DPPs' and EPPs' Complaints, is unavailing. *See*, February 10, 2016 Memorandum Opinion and Order, p. 24-27. [ECF No. 151].

The anticompetitive harm, under *Actavis*, is that the reverse-payment settlement seeks to prevent the risk of competition. *Actavis, 133 S.Ct. at 2236*. Opt-Out Plaintiffs contend that: (1) Endo used a large reverse payment to buy itself freedom from generic competition; (2) but for Endo's unlawful and large reverse payment, Impax would have launched its generic earlier than it finally did; (3) Endo and Impax conspired to allocate the Oxymorphone ER Market in a manner that gave each company more exclusivity than it was lawfully entitled to in order to maximize **[*31]** profits; (4) Endo used that market exclusivity to further stifle generic competition by switching the market to its new formulation, Opana ER CRF; and (5) Impax ensured it received full compensation either through the valuable No-AG Agreement if Endo did not switch the market or through the Endo Credit and less valuable No-AG Agreement if Endo did switch the market. These allegations, if true, raise a reasonable expectation that discovery will reveal evidence sufficient to prove that the reverse payment was made to prevent competition on various fronts. *Aggrenox Antitrust Litig., 94 F.Supp.3d. at 245-46*.

III. CONCLUSION

For the reasons stated herein, Defendants' Motion to Dismiss Opt-Out Plaintiffs' Complaints [ECF No. 119] is granted. Opt-Out Plaintiffs are granted leave to replead within twenty-one (21) days of the date of this Memorandum Opinion and Order.

IT IS SO ORDERED.

/s/ Harry D. Leinenweber

Harry D. Leinenweber, Judge

United States District Court

Dated: 2/25/2016

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[Obesity Research Inst., LLC v. Fiber Research Int'l, LLC]

United States District Court for the Southern District of California

February 25, 2016, Decided; February 25, 2016, Filed

Case No. 15-cv-00595-BAS(MDD)

Reporter

165 F. Supp. 3d 937 *; 2016 U.S. Dist. LEXIS 24028 **

OBESITY RESEARCH INSTITUTE, LLC, Plaintiff, v. FIBER RESEARCH INTERNATIONAL, LLC, Defendant. AND RELATED COUNTERCLAIM

Prior History: *Obesity Research Inst., LLC v. Fiber Research Int'l, LLC, 2015 U.S. Dist. LEXIS 167668 (S.D. Cal., Dec. 15, 2015)*

Core Terms

Fiber, allegations, laches, unfair competition, false advertising, motion to dismiss, glucomannan, unfair, clinical study, weight loss, argues, fraudulent, quotations, likelihood of confusion, false designation, misleading, assignee, clinical, prong, cause of action, advertising, deception, commerce, injuries, economic injury, marketing, consumer, damages, Konjac, tested

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

Opinion by: Cynthia Bashant

Opinion

[*943] ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF AND COUNTERDEFENDANT [2] OBESITY RESEARCH INSTITUTE'S MOTION TO DISMISS DEFENDANT'S FIRST AMENDED COUNTERCLAIMS**

(ECF No. 43)

On March 16, 2015, Obesity Research Institute, LLC ("Obesity Research") filed a Complaint for Declaratory Judgment against Fiber Research International, LLC ("Fiber Research") asking the Court to declare that it has no liability under either the *Lanham Act*, *15 U.S.C. §§ 1125 et seq.*, or the *Federal Food, Drug, and Cosmetic Act ("FFDCA")*, *21 U.S.C. §§ 301 et seq.* (ECF No. 1.) On May 28, 2015, Fiber Research filed an Answer, in which it asserts the affirmative defense of unclean hands, and a First Amended Counterclaims. (ECF No. 41 ("FACC").) The FACC alleges a violation of the *Lanham Act* (false advertising, unfair competition and false designation in violation of *section 1125(a)(1)*), a violation of California's unfair competition law ("UCL"), *Cal. Bus. & Prof. Code §§17200 et seq.*, and a violation of California's false advertising law ("FAL"), *Cal. Bus. & Prof. Code §§ 17500 et seq.* (*Id.*)

Presently before this Court is a Motion to Dismiss the FACC filed by Obesity Research pursuant to *Federal Rule of Civil Procedure 12(b)(6)*. (ECF No. 43.) Obesity Research argues the FACC should be dismissed because: (1) Fiber Research lacks statutory standing to bring the claims; (2) the FACC fails to state a claim for a violation of the *Lanham Act* and for a violation of the UCL; (3) **[**3]** the FACC fails to allege sufficient particularity under *Federal Rule of Civil Procedure 9(b)*; and (4) the allegations in the FACC are barred by laches. Fiber Research opposes. (ECF No. 48.)

The Court finds this motion suitable for determination on the papers submitted and without oral argument. *See* Civ. *L.R. 7.1(d)(1)*. For the reasons set forth below, Court **GRANTS IN PART** and **DENIES IN PART** Obesity Research's Motion to Dismiss (ECF No. 43).

I. BACKGROUND

As alleged in Fiber Research's FACC, "Glucomannan is a dietary fiber derived from Konjac, a root vegetable." (FACC at ¶ 24.) Shimizu Chemical Corporation ("Shimizu") "has developed a proprietary, patented process for extracting and refining Konjac root to produce the highest-quality glucomannan available in the world, called 'Propol.'" (*Id.*) "Numerous clinical studies support the efficacy of Propol glucomannan in assisting weight loss." (*Id.*)

[*944] "In 2006, Obesity Research introduced a weight loss product called Lipozene." (*Id.* at ¶ 25.) Although Obesity Research's marketing campaign highlights Propol's strong clinical testing results, "Lipozene contains neither Propol glucomannan, nor any substantially equivalent glucomannan that would justify Obesity Research relying on Propol clinical **[**4]** studies to support its Lipozene weight loss claims." (*Id.* at ¶¶ 25, 26.)

Specifically, Fiber Research alleges that Obesity Research repeatedly says Lipozene is "clinically proven," when, in fact, the clinical studies it relies on are those using Shimizu's Propol. (*Id.* at ¶¶ 50, 55, 57, 58-61.) Lipozene, to the contrary, "contains poor-quality, cheap ingredients and adulterants that do not have the same functional chemical profile as Propol. Hence, Lipozene does not have the weight loss benefits of Propol as demonstrated by Propol's clinical testing." (*Id.* at ¶ 65.) "Instead, there is no reliable clinical data supporting Lipozene's efficacy in . . . promoting weigh loss." (*Id.* at ¶ 66.) Additionally, Fiber Research alleges that Obesity Research falsely represents that at least one of the clinical studies is "sponsored by [Obesity Research]" and that Obesity Research falsely refers to one of the clinical studies of Propol as a "Lipozene Clinical Study," when in fact Lipozene was not involved in the study at all. (*Id.* at ¶¶ 70-71.) Finally, Fiber Research claims that Obesity Research falsely represents on its label that there are "[n]o known allergens in this product" when, in fact, there **[**5]** are quantities of sulfites in Lipozene such that an allergen warning is warranted. (*Id.* at ¶ 67.)

"Pursuant to an exclusive sales contract with Shimizu, Fiber Research markets Propol in the United States." (*Id.* at ¶ 28.) Fiber Research is also "the assignee of Shimizu's legal rights of action in the United States for any damages incurred by Shimizu by virtue of any unlawful selling or marketing of products in unfair or unlawful competition with Propol." (*Id.* at ¶ 29.) Fiber Research brings this action for injuries both "sustained directly, and as the legal assignee for injuries sustained by Shimizu." (*Id.* at ¶ 30.) "Fiber Research has been injured in its efforts to sell Propol as a result of Obesity Research's unfairly passing off its sub-standard, adulterated, unrefined Konjac root product as the same or substantially the same as that studied in clinical trials of Shimizu's Propol glucomannan (even going so far as to call these the 'Lipozene Clinical Studies.') Fiber Research is also injured by the loss of good will to Propol caused by Obesity Research's passing off an inferior product as Propol." (*Id.* at ¶ 28.)

Fiber Research seeks: (1) a permanent injunction against Obesity Research **[**6]** from falsely advertising, marketing, packaging, labeling, and/or selling Lipozene using any false representations; (2) damages suffered by Fiber Research (directly and as Shimizu's assignee) "as measured by Shimizu's lost sales to Obesity Research and by Obestity [sic] Research's Lipozene profits"; (3) Obesity Research's profits "attributable to its willful false advertising, unfair competition, and deceptive acts or practices"; (4) treble damages under *15 U.S.C. §1117*; and (5) attorney's fees and costs. (*Id.* at ¶ 106.)

II. LEGAL STANDARD

A motion to dismiss pursuant to *Rule 12(b)(6) of the Federal Rules of Civil Procedure* tests the legal sufficiency of the claims asserted in the complaint. *Fed. R. Civ. P. 12(b)(6)*; *Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001)*. The court must accept all factual allegations pleaded in the complaint as true and must construe them and draw all reasonable inferences from them in favor of the nonmoving party. *Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337-38 **[*945]** (9th Cir. 1996)*. To avoid a *Rule 12(b)(6)* dismissal, a complaint need not contain detailed factual allegations, rather, it must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (citing *Twombly, 550 U.S. at 556*). "Where **[**7]** a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Id.* (quoting *Twombly, 550 U.S. at 557*) (internal quotations omitted).

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

When a claim is based on fraud or mistake, the circumstances surrounding the fraud or mistake must be alleged with particularity. *Fed. R. Civ. P. 9(b)*. If the allegations fail to satisfy the heightened pleading requirements of *Rule 9(b)*, a district court may dismiss the claim. *Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1107 (9th Cir. 2003)*. To satisfy the particularity requirement of *Rule 9(b)*, "[a]verments of fraud must be accompanied by 'the who, what, when, where, and how' of the misconduct charged." *Vess, 317 F.3d at 1106* (quoting *Cooper v. Pickett, 137 F.3d 616, 627 (9th Cir. 1997))*. Plaintiffs must plead **[**8]** enough facts to give defendants notice of the time, place, and nature of the alleged fraud, together with the content of any alleged misrepresentation and explain why it is false or misleading. *See id. at 1107*. The circumstances constituting the alleged fraud must "be specific enough to give defendants notice of the particular misconduct . . . so that they can defend against the charge and not just deny that they have done anything wrong." *Vess, 317 F.3d at 1106* (quoting *Bly-Magee v. California, 236 F.3d 1014, 1019 (9th Cir. 2001)* (internal quotation marks omitted)); *see also In re GlenFed, Inc. Sec. Litig., 42 F.3d 1541, 1547 (9th Cir. 1994)*, superseded by statute on other grounds as stated in *Ronconi v. Larkin, 253 F.3d 423, 429 n. 6 (9th Cir. 2001)*. "Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." *Fed. R. Civ. P. 9(b)*.

III. DISCUSSION

A. Standing

1. *Lanham Act*

Failure to allege sufficient statutory standing requires dismissal under *Federal Rules of Civil Procedure 12(b)(6)* for failure to state a claim. *Maya v. Centex Corp., 658 F.3d 1060, 1067 (9th Cir. 2011)*. "'For purposes of ruling on a motion to dismiss for want of standing, [the court] must accept as true all material allegations of the complaint and must construe the complaint in favor of the complaining party.'" *Id. at 1068* (quoting *Warth v. Seldin, 422 U.S. 490, 501,* **[*946]** *95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975))*; *see also Vaughn v. Bay Envtl. Mgmt., 567 F.3d 1021, 1024 (9th Cir. 2009)*.

The *Lanham Act* "authorizes suit by 'any person who believes that he or she is likely to be damaged' by a defendant's false advertising." *Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 1388, 188 L. Ed. 2d 392 (2014)* (quoting *15 U.S.C. § 1125(a)(1)*). The Supreme Court has determined **[**9]** that a statutory cause of action under the Act extends only to plaintiffs "whose interests 'fall within the zone of interests protected by the law invoked,'" *id.* (quoting *Allen v. Wright, 468 U.S. 737, 751, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984))*, and "whose injuries are proximately caused by violations of the statute, *id. at 1390*. Therefore, to allege statutory standing under the *Lanham Act*, Fiber Research's Counterclaims must first meet the "zone of interest" test. *Id.* Second, Fiber Research must sufficiently allege that the injuries were proximately caused by a violation of the statute. *Id.*

The "zone of interest" test is not a particularly demanding one, and the benefit of the doubt goes to the one alleging the cause of action. *Id. at 1389*. "[T]he test forecloses suit only when a plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress authorized the plaintiff to sue." *Id.* (citation and quotations omitted). In the false advertising context, Congress' goal was to protect persons engaged in commerce against unfair competition. *Id.* Thus, "to come within the zone of interests in a suit for false advertising under *§1125(a)*, a plaintiff must allege an injury to a commercial interest in reputation **[**10]** or sales" as opposed to an allegation a consumer or business was misled into purchasing disappointing or inferior products. *Id. at 1390*.

To establish proximate cause under *section 1125(a)*, a plaintiff "ordinarily must show economic or reputational injury flowing directly from the deception wrought by the defendant's advertising; and that that occurs when deception of consumers causes them to withhold trade from the plaintiff." *Id. at 1391*. "That showing is generally not made when the deception produces injuries to a fellow commercial actor that in turn affect the plaintiff." *Id.* Although it may be more difficult to establish proximate causation when the parties do not directly compete, there need not be an allegation that the parties are in direct competition with each other. *Id. at 1392*; *see also* *Merck Eprova AG v. BrookStone Pharms., LLC, 920 F. Supp. 2d 404, 416 (S.D.N.Y. 2013)* (finding that Merck had standing to bring a *Lanham Act* claim "[a]lthough Merck and Acella are not direct competitors, insofar as Merck does not produce finished consumer products, [where] Merck and Acella both produce competing sources of folate for use in dietary supplements"); *Luxul Tech. Inc. v. Nectarlux, LLC, 78 F. Supp. 3d 1156, 1170 (N.D. Cal. 2015)*.

"At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations **[**11]** embrace those specific facts that are necessary to support the claim." *Maya, 658 F.3d at 1068* (citation and quotations omitted); *see also* *Luxul Tech. Inc., 78 F. Supp. 3d at 1170* ("At the pleading stage, plaintiff must allege an injury to a commercial interest in sales or business reputation proximately caused by the defendant's misrepresentations." (citation omitted)).

[*947] In its FACC, Fiber Research alleges that it has an exclusive sales contract to sell Propol in the United States. (FACC at ¶ 28.) It alleges it has been injured in its efforts to sell Propol because Obesity Research is "unfairly passing off its sub-standard, adulterated, unrefined Konjac root product as the same or substantially the same as that studied in clinical trials of . . . Propol." (*Id. at ¶ 28*.) Thus, Fiber Research has sufficiently alleged that its commercial interests in reputation or sales have been damaged by Obesity Research's conduct, and its injuries fall with the zone of interest protected by the *Lanham Act*. Additionally, Fiber Research claims that it has "been injured by the loss of good will to Propol caused by Obesity Research's passing off an inferior product as Propol."

(*Id.*) Thus, it has sufficiently alleged economic or reputation injury proximately caused **[**12]** by Obesity Research's deception.

Obesity Research argues that it is not in direct competition with Fiber Research because Propol is sold to manufacturers only as an ingredient, whereas Obesity Research sells directly to consumers. However, as discussed above, there is no requirement that the parties be in direct competition with one another. Fiber Research alleges its ability to sell Propol has been injured because of Obesity Research's allegedly false representations. Therefore, the Court finds Fiber Research has alleged sufficient facts to establish standing under the *Lanham Act*.

2. UCL and FAL

Proposition 64, passed in November 2004, narrowed the standing in California for either an unfair competition or a false advertising cause of action to those actually injured by a defendant's unlawful business practice. *See Clayworth v. Pfizer, Inc., 49 Cal. 4th 758, 788, 111 Cal. Rptr. 3d 666, 233 P.3d 1066 (2010)*. Pursuant to *section 17204 of the California Business and Professions Code*, only a "person who has suffered injury in fact and has lost money or property as a result of the unfair competition" may seek relief under the UCL." *Cal. Bus. & Prof. Code § 17204*. Similarly, pursuant to *section 17535 of the California Business and Professions Code*, only a person "who has suffered injury in fact and has lost money or property as a result of a violation of" the FAL. *Cal. Bus. & Prof. Code § 17535*. Therefore, in order to bring a claim under the UCL or FAL, a plaintiff **[**13]** must "(1) establish a loss or deprivation of money or property sufficient to qualify as injury in fact, i.e., *economic injury*, and (2) show that the economic injury was the result of, i.e., *caused by*, the unfair business practice or false advertising that is the gravamen of the claim." *Kwikset Corp. v. Super. Ct., 51 Cal. 4th 310, 322, 120 Cal. Rptr. 3d 741, 246 P.3d 877 (2011)*. A plaintiff must also establish that it has "personally suffered such harm." *Id. at 323*.

The economic injury must be an invasion of a legally protected interest which is "concrete and particularized" and "actual or imminent," not "conjectural or hypothetical." *Id. at 322*. The causation requirement does not require a plaintiff "to allege that the challenged misrepresentations were the sole or even the decisive cause of the injury-producing conduct." *Id. at 327*. (citation and quotations omitted). "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice." *Id.* (citation omitted).

There are innumerable ways a plaintiff may demonstrate economic injury, including the following: "[a] plaintiff may (1) surrender in a transaction more, or acquire in a transaction less, than he or she otherwise would have; (2) have a present or future property interest diminished; (3) be deprived of money **[**14]** or property to **[*948]** which he or she has a cognizable claim; or (4) be required to enter into a transaction, costing money or property, that would otherwise have been unnecessary." *Id. at 323*. Courts have also found "lost sales, revenue, market share, and asset value" sufficient to allege an economic injury. *Allergan, Inc., v. Athena Cosmetics, 640 F.3d 1377, 1381, 1382 (Fed. Cir. 2011)*; *see also AngioScore, Inc. v. TriReme Medical, LLC, 70 F. Supp. 3d 951, 962 (N.D. Cal. 2014)* (finding an alleged "injury to market share suffered as a result of a competitor's unfair business practice" to be a cognizable injury under the UCL); *Overstock.com v. Gradient Analytics, Inc., 151 Cal. App. 4th 688, 716, 61 Cal. Rptr. 3d 29 (2007)* (finding allegations of "diminution of value of . . . assets and decline in market capitalization and other vested interests" to satisfy the UCL injury in fact requirement). There is no requirement that there be allegations of business dealings between the parties. *See Allergan, Inc., 640 F.3d at 1383*.

Obesity Research first argues that Fiber Research lacks standing to assert either a UCL or FAL claim because it seeks, in part, a non-restitutionary remedy. Citing *Buckland v. Threshold Enters., 155 Cal. App. 4th 798, 66 Cal. Rptr. 3d 543 (2007)* and *Citizens of Humanity, LLC v. Costco Wholesale Corp., 171 Cal. App. 4th 1, 89 Cal. Rptr. 3d 455 (2009)*, Obesity Research argues standing for UCL or FAL claims is limited to those who suffer losses of money or property entitling them to restitution. However, ineligibility for restitution is not a basis for denying standing under either the UCL or FAL. *See Kwikset Corp., 51 Cal. 4th at 335-36*; *Clayworth, 49 Cal. 4th at 789*; *see also Allergan, Inc., 640 F.3d at 1381-82* (stating that *Kwikset* and *Clayworth* ***[**15]*** found that ineligibility for restitution is not a basis for denying standing and to the extent *Citizens* and *Buckland* concluded otherwise, they have been disapproved by the California Supreme Court). Obesity Research's "argument conflates the issue of standing with the issue of the remedies to which a party may be entitled. That a party may ultimately be unable to prove a right to

. . . restitution . . . does not demonstrate that it lacks standing to argue for its entitlement to them." *Clayworth, 49 Cal. 4th at 789*.

Therefore, to the extent Fiber Research alleges it has been directly injured in its efforts to sell Propol, in that it lost sales, market share, and goodwill,[1] because of Obesity Research's "unfairly passing off its sub-standard, adulterated, unrefined Konjac root product as the same or substantially the same as that studied in clinical trials of . . . Propol," the Court finds it has sufficiently alleged standing.

Obesity Research next argues that Fiber Research lacks standing to prosecute the UCL and FAL claims on behalf of Shimizu, who is not a party to this action. The Court agrees. An uninjured assignee does **[**16]** not have standing to sue in a representative capacity. *Amalgamated Transit Union, Local 1756, AFL-CIO v. Super. Ct., 46 Cal. 4th 993, 1002, 95 Cal. Rptr. 3d 605, 209 P.3d 937 (2009)* ("To allow a *noninjured assignee* of an unfair competition claim to stand in the shoes of the *original, injured claimant* would confer standing on the assignee in direct violation of the express statutory requirement in the unfair competition law." (emphasis in original)); *see also In re WellPoint, Inc. Out-of-Network UCR Rates Litig., 903 F. Supp. 2d 880, 898-99 (C.D. Cal. 2012)* (to the extent assignees suffered **[*949]** their own independent and direct injuries as a result of the unfair competition or false advertising, they may pursue their own UCL/FAL claims). Therefore, to the extent that Fiber Research alleges it was injured indirectly as an assignee of Shimizu, the Court finds it lacks standing. Fiber Research may only pursue claims under the UCL and FAL with respect to injuries it has suffered directly as the exclusive seller of Propol in the United States.

B. Failure to State a Claim

1. *Lanham Act*

Fiber Research's first cause of action alleges a violation of the *Lanham Act*, *15 U.S.C. §1125(a)(1)*, including false advertising, unfair competition, and false designation. (FACC at ¶¶ 79-86.) *Section 43(a)* of the Lanham Act, *15 U.S.C. § 1125(a)*, prohibits the use of false designations of origin, false descriptions, and false representations in the advertising and sale of goods and services. **[**17]** *See Cleary v. News Corp., 30 F.3d 1255, 1259 (9th Cir. 1994)*; *15 U.S.C. § 1125(a)*. To establish a false advertising claim under the *Lanham Act*, a plaintiff must allege: "(1) a false statement of fact by the defendant in a commercial advertisement about its own or another's product; (2) the statement actually deceived or has the tendency to deceive a substantial segment of its audience; (3) the deception is material, in that it is likely to influence the purchasing decision; (4) the defendant caused its false statement to enter interstate commerce; and (5) the plaintiff has been or is likely to be injured as a result of the false statement, either by direct diversion of sales from itself to defendant or by a lessening of the goodwill associated with its products." *Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134, 1139 (9th Cir. 1997)*; *see also Newcal Indus., Inc. v. Ikon Office Solution, 513 F.3d 1038, 1052 (9th Cir. 2008)*. "To demonstrate falsity within the meaning of the *Lanham Act*, a plaintiff may show that the statement was literally false, either on its face or by necessary implication, or that the statement was literally true but likely to mislead or confuse consumers." *Id.*

In order to succeed on a false designation of origin claim under the *Lanham Act*, a plaintiff must show: "(1) defendant uses a designation (any word, term, name, device, or any combination thereof) or false designation of origin; **[**18]** (2) the use was in interstate commerce; (3) the use was in connection with goods or services; (4) the designation or false designation is likely to cause confusion, mistake, or deception as to (a) the affiliation, connection, or association of defendant with another person, or (b) as to the origin, sponsorship, or approval of defendant's goods, services, or commercial activities by another person; and (5) plaintiff has been or is likely to be damaged by these acts." *Summit Tech., Inc. v. High-Line Med. Instruments, Co., 933 F. Supp. 918, 928 (C.D. Cal. 1996)*; *see also Freecycle Network, Inc. v. Oey, 505 F.3d 898, 902 (9th Cir. 2007)*; *Luxul Tech. Inc., 78 F. Supp. 3d at 1170*. "The test for likelihood of confusion is whether a 'reasonably prudent consumer' in the marketplace is likely

[1] Goodwill is a protected property interest and harm to goodwill is a cognizable injury. *See Soranno's Gasco, Inc. v. Morgan, 874 F.2d 1310, 1316 (9th Cir. 1989)*.

to be confused as to the origin of the good or service." *Dreamwerks Prod. Grp., Inc. v. SKG Studio, 142 F.3d 1127, 1129 (9th Cir. 1998)*. The likelihood of confusion must be probable, not just possible. *Murray v. Cable Nat. Broad. Co., 86 F.3d 858, 861 (9th Cir. 1996)*.

Even though the allegations in this case do not involve trademark infringement, in order to determine the likelihood of confusion, courts use the trademark infringement analysis. *See Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763, 781, 112 S. Ct. 2753, 120 L. Ed. 2d 615 (1992)* (Stevens, J., concurring) ("Whether we call the violation infringement, unfair competition or false **[*950]** designation of origin, the test is identical—is there a likelihood of confusion?"); *Spearmint Rhino Cos. Worldwide, Inc. v. Chiappa Firearms, Ltd., No. CV 11-05682-R-MAN, 2012 U.S. Dist. LEXIS 189112, 2012 WL 8962882, at *2 (C.D. Cal. Jan. 20, 2012)* (citing *Walter v. Mattel, 210 F.3d 1108 (9th Cir. 2000))*; *Celebrity Chefs Tour, LLC v. Macy's Inc., 16 F. Supp. 3d 1141, 1153 (S.D. Cal. 2014)* (citing *Brookfield Commc'ns, Inc. v. W. Coast Ent. Corp., 174 F.3d 1036, 1046 n. 6 (9th Cir. 1999))* (a claim for **[**19]** false designation of origin is subject to the same standard as trademark infringement but does not require the mark to be registered).

Thus, the Court may look to the *Sleekcraft* factors in its analysis: (1) strength of the mark, (2) relatedness of the goods, (3) similarity of sight, sound and meaning, (4) evidence of actual confusion, (5) marketing channels, (6) type of goods and purchaser care, (7) intent and (8) likelihood of expansion. *AMF, Inc. v. Sleekcraft Boats, 599 F.2d 341, 348-49 (9th Cir. 1979)*, abrogated on other grounds by *Mattel, Inc. v. Walking Mountain Prods., 353 F.3d 792, 810, n. 19 (9th Cir. 2003)*. As Fiber Research points out, several of these factors are uniquely applicable to trademark infringement and, thus, are not helpful here, but the overall framework is helpful to the analysis. *See E & J Gallo Winery v. Gallo Cattle Co., 967 F.2d 1280, 1290 (9th Cir. 1992)* ("This list of factors . . . is neither exhaustive nor exclusive. Rather, the factors are intended to guide the court in assessing the basic question of likelihood of confusion."); *Entrepreneur Media, Inc., v. Smith, 279 F.3d 1135, 1140 (9th Cir. 2002)* ("Although the *Sleekcraft* test plays an important role in the analysis of whether a likelihood of confusion exists, it is the totality of facts in a given case that is dispositive." (citation and internal quotations omitted)).

Obesity Research argues the *Lanham Act* cause of action should be dismissed for failure to state a claim because: (1) the **[**20]** allegations regarding likelihood of confusion are conclusory; (2) the cause of action fails to allege Propol is used in U.S. commerce; (3) the FACC fails to allege the notice required for treble damages under *15 U.S.C. §1111*; (4) the alleged false statements are not false or misleading; and (5) the FACC fails to allege plausible facts showing Fiber Research suffered economic injury.

With respect to likelihood of confusion, the Court finds Fiber Research alleges sufficient relation and similarity between Propol and Lipozene to justify the conclusion that confusion is likely. Fiber Research alleges that Lipozene specifically uses the Propol research studies to bolster its claims, without justification. Furthermore, the type of purchaser, those buying weight loss supplements, is not likely to have the resources to analyze whether the content of the supplements are as represented or not. Fiber Research alleges that Obesity Research makes these misleading statements intentionally to encourage customer confusion. Therefore, the allegations of "likelihood of confusion" are sufficient to support Fiber Research's *Lanham Act* claims at this stage.

Furthermore, the Court finds Fiber Research sufficiently alleges **[**21]** both Lipozene and Propol are used in commerce in the United States. (*See* FACC at ¶ 25 ("Lipozene has become the United States' best-selling weight loss product."); and ¶ 28 ("Fiber Research markets Propol in the United States.").) This is sufficient to meet the requirement under *15 U.S.C. §1125(a)(1)* that the goods or services at issue be used "in commerce." Fiber Research need not allege that Obesity Research uses the Propol trademark in commerce in a false designation of origin claim. *See Summit Tech., Inc., 933 F. Supp.* ***[*951]*** *at 928*; *Luxul Tech. Inc., 78 F. Supp. 3d at 1170*.

Obesity Research's argument that Fiber Research failed to allege notice under 15 U.S.C. §1111[2] is not well-founded. First, this section, by its terms, applies to an action for trademark infringement, which is not the case here. Second, Obesity Research, in its Complaint, alleges Propol was listed, with the letter R enclosed within a circle, in the letter sent to Obesity Research on March 10, 2015 prior to this suit being initiated. (Compl. at ¶¶ 4, 10.) Therefore, Obesity Research's argument on this ground must fail.

The Court further finds that Fiber Research has sufficiently alleged that the purported false statements are false or misleading under its false advertising claim. The FACC alleges that since late 2006, Obesity Research has been marketing and advertising Lipozene as being "clinically proven" to help reduce body fat and weight, in reliance on studies that tested Propol, and not Lipozene, which does not have "the same functional chemical profile as Propol." (*See* FACC at ¶¶ 44-73.) One of the studies the FACC alleges Lipozene relies on is a 2004 study entitled "A Randomized Double-Blinded Placebo-Controlled Study of Overweight Adults Comparing the Safety and Efficacy of a Highly Viscous Glucomannan Dietary Supplement (*Propol* ™)" ("Kaats Study"). (*See* FACC at ¶ 46, Exh. 2.) The other is a 1984 study entitled "Effect of Glucomannan on Obese Patients: A Clinical Study," which tested "Glucomannan fiber (from konjac root)" ("Walsh Study"). (*See* FACC at ¶ 45, Exh. 1.) Among the allegations in the FACC is that Obesity Research's Lipozene website has been falsely characterizing **[**23]** the Walsh Study as a "Lipozene Clinical Study." (*Id. at ¶ 71*.)

Obesity Research argues that the alleged false statements are not false and misleading because the Walsh Study does not explicitly say it used Propol in its testing, and the FACC insufficiently alleges it advertised using the Kaats Study. However, the FACC alleges that the Walsh Study tested Propol, which Fiber Research defines as glucomannan extracted from Konjac, a root vegetable, by means of a propriety, patented process. (FACC at ¶¶ 24, 45, 60-61.) At this stage, the Court finds these allegations sufficient. Furthermore, with respect to the Kaats Study, the FACC alleges that many Lipozene commercials "contain textual, small-print sentences stating that participants in the clinical study to which the commercials refer lost 4.93 pounds, of which 3.86 was body fat (thus forming Obesity Research's '78% was body fat' figure: 3.86 / 4.93 = 0.78296)" and this was the exact finding in the Kaats Study. (FACC at ¶ 54; *see also* FACC at ¶ 55 ("Obesity Research highlighted the fact that the study on which it relies was conducted during the holiday season, as was the Kaats [S]tudy"); ¶ 56 (Obesity Research commercials state "[c]linical data shows **[**24]** that the amount of weight loss experienced between the active and placebo group was 4.93 lbs. and of the 4.93 lbs of weight loss experienced by the active group 3.86 lbs was body fat.") The Court also finds these allegations sufficient at this stage.

Obesity Research further argues that there is nothing false or misleading about its statement on its website that "[n]umerous **[*952]** clinical studies confirm Lipozene's active ingredient, Glucomannan, is safe and effective for weight loss and body fat loss." In other words, Obesity Research is claiming that the Glucomannan used in its product is safe and effective for weight loss and body fat loss. Fiber Research alleges that a chemical analysis of Lipozene by Japan Food Research Laboratories, which it attaches to its FACC, "demonstrates that Lipozene, unlike Propol glucomannan or a substantial equivalent, contains poor-quality, cheap ingredients and adulterants that do not have the same functional chemical profile as Propol. Hence, Lipozene does not have the weight loss benefits of Propol as demonstrated by Propol's clinical testing," which Fiber Research is relying on in making its statement. (*See* FACC at ¶¶ 64-66.) Accordingly, the Court finds these **[**25]** allegations sufficient to plausibly allege this statement is false or misleading.

Lastly, as discussed above under the Court's standing discussion, the Court finds the FACC alleges plausible facts showing Fiber Research has been or is likely to suffer economic injury.

2. UCL

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[2] Section 1111 requires that "a registrant of a mark registered in the Patent and Trademark Office . . . give notice that his mark is registered by ... the letter R enclosed within a circle" prior to bringing any "suit for infringement." **[**22]** 15 U.S.C. § 1111. However, "section 1111 is not a defense to infringement, but a limitation on remedies." *mophie, Inc. v. Shah, No. SA CV 13-01321-DMG(JEMx), 2014 U.S. Dist. LEXIS 185196, 2014 WL 10988347, at *22 (C.D. Cal. Nov. 12, 2014)* (citing *United States v. Sung, 51 F.3d 92, 94 (7th Cir. 1995))*.

The UCL prohibits, and provides civil remedies for, unfair competition, which it defines as "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." *Kwikset Corp., 51 Cal. 4th at 322* (quoting *Cal. Bus. & Prof. Code § 17200*). "Because the statute is written in the disjunctive, it is violated where a defendant's act or practice is (1) unlawful, (2) unfair, (3) fraudulent, or (4) in violation of *section 17500*," *i.e.*, the FAL. *Lozano v. AT&T Wireless Servs., Inc., 504 F.3d 718, 731 (9th Cir. 2007)*. Obesity Research moves to dismiss Fiber Research's UCL claim to the extent Fiber Research alleges a violation of the "unfair" prong, arguing that it relies on an outdated definition of "unfair," and the "unlawful" and "fraudulent" prongs, arguing that the FACC's allegations are insufficiently specific to pass muster under *Rule 9(b) of the Federal Rules of Civil Procedure*.

a. *Fraudulent prong*

To state a claim under the UCL's "fraudulent" prong, Fiber Research must plead that Obesity Research's allegedly fraudulent business practice is one in which "members of **[**26]** the public are likely to be deceived." *Schnall v. Hertz Corp., 78 Cal. App. 4th 1144, 1167, 93 Cal. Rptr. 2d 439 (2000)*. "Unless the challenged conduct targets a particular disadvantaged or vulnerable group, it is judged by the effect it would have on a reasonable consumer." *Puentes v. Wells Fargo Home Mortg., Inc., 160 Cal. App. 4th 638, 645, 72 Cal. Rptr. 3d 903 (2008)* (quotations and citation omitted).

Obesity Research argues the Counterclaims are pled with insufficient specificity under *Rule 9(b)*. Because this claim is based on fraud, the circumstances surrounding the fraud must be alleged with particularity. *Fed. R. Civ. P. 9(b)*; *see also* *Kearns v. Ford Motor Co., 567 F.3d 1120, 1125 (9th Cir. 2009)* (*Rule 9(b)* applies to UCL claims based on fraud). The FACC goes into great detail as to who, what, and when the fraudulent conduct was allegedly committed, even attaching copies of the allegedly fraudulent marketing materials. Obesity Research's argument on this ground must fail.

b. *Unlawful prong*

The UCL's "unlawful" prong is essentially an incorporation-by-reference provision. *See* *Cel-Tech, 20 Cal. 4th at 180* ("By proscribing any unlawful business practice, *section 17200* borrows **[*953]** violations of other laws and treats them as unlawful practices that the [UCL] makes independently actionable." (citations and internal quotation marks omitted)). "Violation of almost any federal, state, or local law may serve as the basis for a UCL claim." *Plascencia v. Lending 1st Mortg., 583 F. Supp. 2d 1090, 1098 (N.D. Cal. 2008)* (citing *Saunders v. Super. Ct., 27 Cal. App. 4th 832, 838-39, 33 Cal. Rptr. 2d 438 (1994)*). "When a statutory claim fails, a derivative UCL claim **[**27]** also fails." *Aleksick v. 7-Eleven, Inc., 205 Cal. App. 4th 1176, 1185, 140 Cal. Rptr. 3d 796 (2012)*.

Fiber Research alleges Obesity Research's conduct was "unlawful" because it violates the *Lanham Act*, the *FFDCA Act*, the FAL, and the *Sherman Act*. (FFAC at ¶ 90.) Again, Obesity Research argues this is insufficient particularity under *Rule 9(b)*. The Court disagrees. As discussed above, the FACC lays out in great detail how each of these Acts were allegedly violated. Furthermore, this Court has already found the allegations are sufficient to constitute a violation of the *Lanham Act*. Hence Obesity Research's motion on this ground must also fail.

c. *Unfair prong*

Under the UCL, "[w]hen a plaintiff who claims to have suffered injury from a direct competitor's 'unfair' act or practice invokes *section 17200*, the word 'unfair' in that section means conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Cel-Tech, 20 Cal. 4th at 187*.[3] Thus, Fiber Research must allege that Obesity Research's conduct "(1) violates the policy or spirit of the

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[3] Fiber Research argues this test does not apply, relying on a footnote in *Cel-Tech*, which states this test does not apply to "actions by consumers or by competitors alleging other kinds of violations of the unfair competition law such as "fraudulent" or "unlawful" business practices or "unfair, deceptive, untrue or misleading advertising." *Cel-Tech, 20 Cal. 4th at 187, n. 12*. The Court disagrees. This is not an action by a consumer and the Court is not applying this test to the other prongs of the UCL.

antitrust laws because the effect of the conduct is comparable to or the same as a violation **[**28]** of the antitrust laws, or (2) it otherwise significantly threatens or harms competition." *People's Choice Wireless, Inc. v. Verizon Wireless, 131 Cal. App. 4th 656, 662, 31 Cal. Rptr. 3d 819 (2005)* (citing *Cel-Tech, 20 Cal. 4th at 187*). Notably, "[i]njury to a competitor is not equivalent to injury to competition; only the latter is the proper focus of antitrust laws." *Cel-Tech, 20 Cal. 4th at 186*. Acts that violate the spirit of the antitrust laws include "horizontal price fixing, exclusive dealing, or monopolization." *See Celebrity Chefs Tour, LLC v. Macy's Inc., 16 F. Supp. 3d 1141, 1156 (S.D. Cal. 2014)*.

In its opposition to the motion, Fiber Research states that the FACC "does not allege 'anticompetitive practices.'" (Opp. at p. 18.) The Court agrees. Although the purpose of the *Lanham Act* is to protect persons engaged in commerce against unfair competition, *POM Wonderful LLC v. Coca-Cola Co., 134 S. Ct. 2228, 2234, 189 L. Ed. 2d 141 (2014)*, Plaintiff only alleges harm to its own commercial interests, rather than harm to competition. *See Watson Labs., Inc. v. Rhone-Poulenc Rorer, Inc., 178 F. Supp. 2d 1099, 1117 (C.D. Cal. 2001)* (finding the plaintiff **[**29]** could not prevail where the evidence merely indicated harm to its commercial interests rather than harm to **[*954]** competition). Accordingly, the Court grants Obesity Research's motion to dismiss Fiber Research's claim under the "unfair" prong of the UCL.

C. Laches

Obesity Research argues that all of Fiber Research's Counterclaims are barred by laches because they allege Obesity Research began marketing Lipozene in 2006, and many of the advertisements complained of aired in 2006 and 2007, and this suit was not filed until 2015. "Laches is an equitable defense that prevents a plaintiff, who with full knowledge of the facts, acquiesces in a transaction and sleeps upon his rights." *Danjaq, LLC v. Sony Corp., 263 F.3d 942, 950-51 (9th Cir. 2001)* (internal quotations and citation omitted). Laches is a valid defense to *Lanham Act* claims, including those for false advertising. *Jarrow Formulas, Inc., v Nutrition Now, Inc., 304 F.3d 829, 835 (9th Cir. 2002)*.

"To demonstrate laches, the defendant must prove both an unreasonable delay by the plaintiff and prejudice to itself." *Danjaq, 263 F. 3d at 951* (quotations omitted). The delay is measured from the time a plaintiff knew, or should have known, about a cause of action. *Jarrow, 304 F.3d at 838*; *see also Danjaq, 263 F. 3d at 952*. "[I]f the plaintiff legitimately was unaware of the defendant's conduct, laches is no bar to suit." *Id.* When determining reasonableness, **[**30]** courts look at the cause of delay. *Danjaq, 263 F. 3d at 954*. A defendant can demonstrate prejudice in two ways: either evidentiary, showing that evidence has been lost or memories have faded, or expectations-based, showing that the defendant has taken actions or suffered consequences it would not have had plaintiff brought timely suit. *Id. at 955*.

"Because laches is an equitable remedy, laches will not apply if the public has a strong interest in having the suit proceed." *Jarrow, 304 F.3d at 840*. However, "[t]he public's interest will trump laches only when the suit concerns allegations that the product is harmful or otherwise a threat to public safety and well being." *Id. at 841*. Furthermore, a party with unclean hands may not assert laches. *Id.* This bar to laches for unclean hands applies "only if the court is left with a firm conviction that the defendant acted with a fraudulent intent in making the challenged claims." *Id. at 842*.

A quick review of this law makes it obvious how inappropriate the motion is at this stage of the proceedings. The issue is primarily a fact-based issue. *See Dirk Ter Haar v. Seaboard Oil Co. of Del., 1 F.R.D. 598, 598 (S.D. Cal. 1940)* ("The defense of laches . . . may not be asserted by motion to dismiss, but should be set forth affirmatively in defendant's answer"); *24/7 Customer, Inc. v. 24-7 Intouch, No. 5:14-cv-02561-EJD, 2015 U.S. Dist. LEXIS 43935, 2015 WL 1522236, at *4 (N.D. Cal. Mar. 31, 2015)* **[**31]** ("laches and statute of limitations defenses often require a fact-intensive investigation that is inappropriate on a motion to dismiss.") Looking at the FACC and assuming everything in it is true, there are no allegations that support Obesity Research's claim of laches. There is no allegation as to when Fiber Research knew or should have known of the cause of action. If there was a delay, there is no information as to the cause of delay. There is no evidence or allegation that Obesity Research has been in any way prejudiced by any delay. Finally, Fiber Research has alleged an affirmative defense of unclean hands. It will require fact-based discovery to determine whether evidence supports either a public interest that trumps the defense of laches or fraudulent intent on the part of Obesity Research. The Court agrees with Fiber Research. The motion to dismiss based on laches is premature.

[*955] IV. CONCLUSION

For the foregoing reasons, the Court **GRANTS IN PART** and **DENIES IN PART** Obesity Research's Motion to Dismiss the First Amended Counterclaims (ECF No. 43). The Court **GRANTS** Obesity Research's motion to the extent it moves to limit Fiber Research's claims under the UCL and FAL to damages it **[**32]** suffered directly, as opposed to indirectly as an assignee of Shimizu, and to the extent it moves to dismiss Fiber Research's claim under the "unfair" prong of the UCL. However, in all other respects, Obesity Research's motion is **DENIED**.

IT IS SO ORDERED.

DATED: February 25, 2016

/s/ Cynthia Bashant

Hon. Cynthia Bashant

United States District Judge

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Castaneda v. Wells Fargo Home Mortg.

United States District Court for the Central District of California

February 26, 2016, Decided; February 26, 2016, Filed

Case No. 2:15-cv-08870-ODW-KS

Reporter
2016 U.S. Dist. LEXIS 23998 *; 2016 WL 777862

CYNTHIA CASTANEDA, Plaintiff, v. WELLS FARGO HOME MORTGAGE, CAL-WESTERN CORPORANTION WELLS FARGO BANK, N.A., and DOES 1 to 100, inclusive, Defendants.

Subsequent History: Motion granted by *Castaneda v. Wells Fargo Home Mortg., 2016 U.S. Dist. LEXIS 50544 (C.D. Cal., Apr. 13, 2016)*

Related proceeding at *Castaneda v. Wells Fargo Home Mortg., 2018 U.S. Dist. LEXIS 98700 (C.D. Cal., June 12, 2018)*

Core Terms

modification, alleges, notice, violations, borrower, accounting, covenant, lender, unfair, mortgage, default, material change, recorded, trust deed, fraudulent, servicer, tracking, Savings, amend, dual, motion to dismiss, second loan, documentation

Counsel: **[*1]** For Cynthia Castaneda, Plaintiff: Joseph Richard Manning, Jr, LEAD ATTORNEY, Law Offices of Joseph R Manning Jr APC, Newport Beach, CA.

For Wells Fargo Bank, N.A., a business entity form unknown, Successor Wells Fargo Bank Southwest, N.A., formerly known as Wachovia Mortgage, FSB, formerly known as World Savings Bank, FSB (Wells Fargo), Erroneously Sued As Wells Fargo Home Mortgage, Defendant: Dean A Reeves, Anglin Flewelling Rasmussen Campbell and Trytten LLP, Pasadena, CA.

For NBS Default Services LLC, Defendant: Stephen T Hicklin, LEAD ATTORNEY, Buckley Madole PC, Long Beach, CA.

Judges: OTIS D. WRIGHT, II, UNITED STATES DISTRICT JUDGE.

Opinion by: OTIS D. WRIGHT, II

Opinion

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS [9]

I. INTRODUCTION

After falling behind on her mortgage payments, Plaintiff Cynthia Castaneda attempted to modify her loan with Defendant Wells Fargo Bank, N.A. ("Wells Fargo")—the ultimate successor of World Savings Bank, FSB ("World

Savings Bank").[1] Castaneda alleges that Wells Fargo recorded a Notice of Trustee's Sale prematurely; that it failed to provide her with a written denial of her third loan modification application; that it added unfair and duplicative fees for default-related services; **[*2]** and that it was negligent. Castaneda also makes a claim for accounting. Wells Fargo removed the case and now moves to dismiss. For the reasons stated below, the Court **GRANTS** Wells Fargo's Motion to Dismiss.

II. FACTUAL BACKGROUND

In September 2004, Castaneda obtained a $223,300.00 loan from World Savings Bank which was secured with a Deed of Trust against the real property at 8231 Quoit Street, Downey, California. (ECF No 10-1, Ex. A.)[2] World Savings Bank was a federal savings bank, regulated at the time by the Office of Thrift Supervision. (*Id.*, Ex. G.) After several mergers, Wells Fargo became the legal successor to World Savings Bank. (ECF No. 9.)

Castaneda defaulted on her loan and on August 3, 2012, Wells Fargo recorded **[*3]** a Notice of Default and Election to Sell Under Deed of Trust. (ECF No. 1-1, Ex. A (Compl.) ¶¶ 37-38.) On or around September 19, 2013, Castaneda submitted a complete application for a loan modification, and in December 2013 she received two letters from Wells Fargo indicating that she did not qualify. (*Id.* ¶¶ 39-41.) Around July 2014, she submitted a second complete application for a loan modification, naming her husband as a contributor. (*Id.* ¶ 42.) On August 13, 2014, while Castaneda's second complete loan application was under review, Wells Fargo recorded a Notice of Trustee's Sale. (*Id.* ¶ 43.) In October 2014, Wells Fargo sent Castaneda a written denial of her second loan modification application and indicated that she did not qualify for any modification program with $4,100 of monthly income. (*Id.* ¶ 44.) Castaneda filed a timely appeal, which was denied. (*Id.*)

Castaneda soon retained counsel to assist her with the loan modification process. Her counsel requested information from Wells Fargo relating to Castaneda's loss mitigation options and transaction history. (*Id.* ¶ 46.) Wells Fargo responded with a loan history statement, which included various charges such as, "Misc. Application **[*4]** Pay," "After NOD Exp," "Late Charge Adjust," and others. (*Id.* ¶ 47.)

Around April 13, 2015, Castaneda submitted a third loan modification application, stating a material change in circumstances. (*Id.* ¶ 65.) Specifically, she mentioned that her husband began working more overtime. (*Id.*) His monthly income was now $5,200, a $1,100 difference from the monthly income contained in the October 2014 denial letter. (*Id.*) Castaneda, through her counsel, contacted Wells Fargo on April 17, 2015 to inquire about her pending application. (*Id.* ¶ 66.) A Wells Fargo representative confirmed that a complete application was received, but it noted that it would not be opening a modification review. (*Id.*) To date, Wells Fargo has not provided Castaneda a written denial of the third complete loan modification application. (*Id.*)

On October 18, 2015, Castaneda filed suit against Wells Fargo in Los Angeles County Superior Court alleging several violations of California's Homeowner *Bill of Rights* ("HOBR") and California's Unfair Competition Law ("UCL"), negligence, and a breach of the covenant of good faith and fair dealing. (*Id.*) Castaneda also makes a demand for accounting. (*Id.*) On November 13, 2015, Wells Fargo removed **[*5]** the action invoking diversity jurisdiction. (ECF No. 1.)

On November 20, 2015, Wells Fargo moved to dismiss Castaneda's Complaint for failure to state a claim. (ECF No. 9.) The parties filed a timely opposition and reply. (ECF Nos. 11, 14.) Wells Fargo's Motion is now before the Court for decision.

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[1] National Bankruptcy Services, LLC, ("NBS") was named as a defendant but is a nominal party to this lawsuit. NBS replaced Cal-Western Reconveyance Corporation as the trustee in the deed of trust encumbering the party at issue. Plaintiff fails to state any facts that materially tie NBS to any alleged wrongdoing. (ECF No. 1, p. 6.)

[2] The Court **GRANTS** Defendant's Request for Judicial Notice to the extent that the Court uses the documents adduced in this Order. (ECF No. 10.)

III. LEGAL STANDARD

A court may dismiss a complaint under *Rule 12(b)(6)* for lack of a cognizable legal theory or insufficient facts pleaded to support an otherwise cognizable legal theory. *Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990)*. To survive a dismissal motion, a complaint need only satisfy the minimal notice pleading requirements of *Rule 8(a)(2)*—a short and plain statement of the claim. *Porter v. Jones, 319 F.3d 483, 494 (9th Cir. 2003)*. The factual "allegations must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. That is, the complaint must "contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*.

The determination whether a complaint satisfies the plausibility standard is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id. at 679*. A court is generally limited to the pleadings and must construe all "factual allegations set forth in the complaint . . . as true and . . . in **[*6]** the light most favorable" to the plaintiff. *Lee v. City of L.A., 250 F.3d 668, 688 (9th Cir. 2001)*. But a court need not blindly accept conclusory allegations, unwarranted deductions of fact, and unreasonable inferences. *Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001)*.

As a general rule, a court should freely give leave to amend a complaint that has been dismissed. *Fed. R. Civ. P. 15(a)*. But a court may deny leave to amend when "the court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency." *Schreiber Distrib. Co. v. Serv-Well Furniture Co., 806 F.2d 1393, 1401 (9th Cir.1986)*; *see* *Lopez v. Smith, 203 F.3d 1122, 1127 (9th Cir. 2000)*.

IV. DISCUSSION

Wells Fargo contends that Castaneda's causes of action fail to state a claim on their allegations. The Court will address each issue in turn.

A. HBOR Claims

Castaneda's first cause of action asserts claims under the California Homeowner *Bill of Rights* ("HBOR"). Specifically, she alleges that Wells Fargo violated *California Civil Code section 2923.6(c)* while handling her second loan modification application, *section 2923.6(g)* while handling her third loan modification application, and, as a consequence, also violated *sections 2923.6(d)* and *2923.6(f)*.

a. Cal. Civ. Code § 2923.6(c)

Castaneda alleges that Wells Fargo violated California's law against dual tracking. The HBOR forbids a mortgage servicer from "dual tracking," or "record[ing] a notice of default or notice of sale . . . while the [borrower's] complete first lien loan modification is pending." *Cal. Civ. Code § 2923.6(c)*.

Her allegation **[*7]** of dual tracking under *section 2923.6(c)* occurred when: (1) Castaneda submitted her second loan modification application to Wells Fargo in July 2014, and (2) Wells Fargo recorded a Notice of Trustee's Sale on August 13, 2014 without providing Castaneda with a determination on her pending application.

Wells Fargo claims that Castaneda's allegation of dual tracking is moot because it subsequently provided her with written notice denying both her application and appeal in October and November 2014, respectively, thus remedying the violations. The Court agrees. If a mortgage servicer corrects and remedies a violation prior to the recordation of a trustee's deed upon sale, it is not liable for violating *section 2923.6(c)*. *Cal. Civ. Code § 2924.12(c)*. *See* *Jerviss v. Select Portfolio Servicing, Inc., No. 2:15-cv-01904-MCE-KJN, 2015 U.S. Dist. LEXIS 159630, 2015*

*WL 7572130, at *5 (N.D. Cal. Nov. 25, 2015)* (holding a dual tracking claim was moot after defendant sent written denial of plaintiff's application before a sale was recorded); *Diamos v. Specialized Loan Servicing LLC, No. 13-CV-04997 NC, 2014 U.S. Dist. LEXIS 158092, 2014 WL 3362259, at *5 (N.D. Cal. July 7, 2014)* (holding that a cause of action for dual tracking is moot when defendant rescinded notice of default); *Jent v. N. Trust Corp., No. 13-cv-01684 WBS, 2014 U.S. Dist. LEXIS 5478, 2014 WL 172542, at *5 (E.D. Cal. Jan. 15, 2014)* (holding that liability was precluded when defendants had rescinded the notice of default and no trustee's deed upon sale had been recorded); *see also* *Pearson v. Green **[*8]** Tree Servicing, LLC, No. 14-CV-04524-JSC, 2015 U.S. Dist. LEXIS 18297, 2015 WL 632457, at *2 (N.D. Cal. Feb. 13, 2015)* (explaining that if the *servicer* takes action to correct the HBOR violation before proceeding to foreclosure, no liability results) (emphasis added).

Here, Castaneda does not allege that a trustee's deed upon sale has been recorded. Furthermore, the Complaint shows that Wells Fargo cured the alleged violation of *section 2923.6(c)* by delivering a written denial to Castaneda's second loan application in October 2014. (Compl. ¶ 44.) Accepting Castaneda's allegations as true, Wells Fargo cured any purported violation of *section 2923.6(c)* by complying with *2924.12(c)*. As such, the Court **GRANTS** Defendant's Motion as to *section 2923.6(c)*.

b. Cal. Civ. Code § 2923.6(g)

Castaneda next alleges that Wells Fargo violated *section 2923.6(g)*, which requires a mortgage servicer to evaluate applications from borrowers who have already been evaluated for a first lien loan modification if "there has been a material change in the circumstances since the date of the borrower's previous application . . . ." *Cal. Civ. Code § 2923.6(g)*. Castaneda claims that her husband's monthly income at the time of her third loan modification application in April 2015 was $5,200—a $1,100 increase from her second application in July 2014—and that Wells Fargo failed to evaluate her application despite this **[*9]** material change. (Compl. ¶¶ 65, 66.)

Wells Fargo argues that Plaintiff's second application included her husband's income; therefore it had already considered the change in circumstance Castaneda argues is relevant here. (ECF No. 9, p. 5.) Additionally, Wells Fargo argues that Castaneda has not provided the requisite documentation for her third application showing a material change in circumstance.[3] (*Id.* at p. 14.)

Indeed, Castaneda must do more than plausibly plead a material change in circumstance to state a claim under *section 2923.6(g)*. Castaneda must allege that she provided documentation of her updated circumstances to Wells Fargo. *Salazar v. U.S. Bank Nat. Ass'n, No. ED CV 14-514-GHK (DTBx), 2015 U.S. Dist. LEXIS 49172, 2015 WL 1542908, at *4 (C.D. Cal. Apr. 6, 2015)*. Construing the facts in Plaintiff's favor as is required at this stage, the Court finds that Castaneda has not met her burden. In her Complaint, Castaneda alleges that she faxed a loan modification application noting that her husband was working more overtime, resulting in the $1,100 increase in income from the second loan **[*10]** modification application. (Compl. ¶ 65.) "[A]lthough the precise nature of the documentation required under this code is not clear, the plaintiff must do more than submit a new loan modification with different financial information." *Saber v. JPMorgan Chase Bank, N.A., 2014 U.S. Dist. LEXIS 8718, 2014 WL 255700, at *2 (C.D. Cal. Jan. 23, 2014)*; *see also* *Salazar, 2015 U.S. Dist. LEXIS 49172, 2015 WL 1542908, at *4*. To find otherwise would be to defeat the intent of *subsection (g)*, which is to "relieve mortgage servicers from evaluating multiple loan applications submitted for the purpose of delay." *Winterbower v. Wells Fargo Bank, N.A., 2013 U.S. Dist. LEXIS 44087, 2013 WL 1232997, at *3 (C.D. Cal. Mar. 27, 2013)*.

As such, Castaneda must allege what, if any, proper documentation she submitted to Wells Fargo to support her material change in circumstance for the third loan modification application. *See* *Winterbower, 2013 U.S. Dist. LEXIS 44087, 2013 WL 1232997 at *3* (documenting and submitting a material change in circumstance "means more than simply stating one's [income] has increased and then providing two numbers"). The Court **GRANTS** Defendant's motion to dismiss Plaintiff's *2923.6(g)* claim with leave to amend.

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[3] Plaintiff provides documentation for a fourth loan modification application filed in October 2015, but did not provide documentation for her third loan modification application. (ECF No. 11, Ex. A, pp. 14-64.)

c. Cal. Civ. Code §§ 2923.6(d), 2923.6(f)

Castaneda alleges other HBOR violations stemming from Wells Fargo's decision not to review her third loan modification application. She alleges a violation of *section 2923.6(f)*, which requires a servicer to provide written notice to the borrower that includes the reason for denial, and a violation of *2923.6(d)*, which grants the borrower thirty days after **[*11]** the written denial to file an appeal. *Cal. Civ. Code §§ 2923.6(d)*, *2923.6(f)*.

These claims are premised on the assumption that Wells Fargo had any obligation to review Castaneda's third application under *section 2923.6(g)*. Because Castaneda has not adequately stated a claim for relief under *2923.6(g)*, the Court **GRANTS** Defendant's Motion to Dismiss these derivative claims with leave to amend.

B. Negligence

Castaneda's next cause of action is for negligence. Wells Fargo contends that Castaneda failed to state a claim for negligence because lenders do not generally owe their borrowers a duty of care.

Under California law, the "existence of a duty of care owed by a defendant to a plaintiff is a prerequisite to establishing a claim for negligence." *Nymark v. Heart Fed. Sav. & Loan Ass'n, 231 Cal. App. 3d 1089, 1095, 283 Cal. Rptr. 53 (1991)*. Generally, a financial institution does not owe its borrower a duty of care "when the institution's involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money." *Id. at 1096*. A lender exceeds its "conventional role" as a money lender when it "actively participates" in the financed enterprise "beyond the domain of the usual money lender." *Wagner v. Benson, 101 Cal. App. 3d 27, 35, 161 Cal. Rptr. 516 (1980)* (quoting *Connor v. Great W. Sav. & Loan Ass'n, 69 Cal. 2d 850, 864, 73 Cal. Rptr. 369, 447 P.2d 609 (1968))*.

Castaneda does not allege in her Complaint any facts suggesting that Wells Fargo exceeded the normal role of **[*12]** a lender during the default/foreclosure process; she simply reiterates that it failed to comply with the procedures set forth in *section 2923.6*, as stated above. (Compl. ¶¶ 75-77.)

While Castaneda's allegations under *section 2923.6* may make out statutory violations if sufficiently pled, they still do not establish that Wells Fargo "actively participate[d]" in Castaneda's loan "beyond the domain of the usual money lender." *See Wagner, 101 Cal. App. 3d at 35*. Rather, these actions—or inactions such as they are—fall squarely within the class of conduct a lender might take during the default process. The Court thus **GRANTS** Defendant's Motion on this claim.

C. Unfair Competition Law

Castaneda next brings a claim against Wells Fargo for violating the California Unfair Competition Law ("UCL"). The UCL prohibits "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." *Cal. Bus. & Prof. Code § 17200*. Wells Fargo contends that Castaneda both lacks standing to bring a UCL claim and fails to adequately plead allegations of unlawful, fraudulent, or unfair conduct. (ECF No. 9, pp. 19-20.)

1. UCL standing

To have standing to sue under the UCL, a plaintiff must have "suffered injury in fact and [have] lost money or property as a result of the **[*13]** unfair competition." *Id. § 17204*. The California Supreme Court held that to satisfy this requirement, the plaintiff must "(1) establish a loss or deprivation of money or property sufficient to qualify as injury in fact, i.e., *economic injury*, and (2) show that the economic injury was the result of, i.e., *caused by*, the unfair business practice or false advertising that is the gravamen of the claim." *Kwikset Corp. v. Superior Court, 51 Cal. 4th 310, 322, 120 Cal. Rptr. 3d 741, 246 P.3d 877 (2011)*.

Wells Fargo argues that Castaneda has not alleged any injury or a loss of money or property that was caused by its conduct because the foreclosure sale has not occurred yet. (ECF No. 9, p. 19.) Instead, it contends that any of Castaneda's injuries would be due to her *own* failure to pay her mortgage as she promised. *Id.*

But Castaneda does allege that she suffered economic injury as a result of Wells Fargo's conduct, namely the loss of home equity. (Compl. ¶ 102.) Castaneda asserts that Wells Fargo's decision to charge marked up and excess fees caused her to lose title to, and interest in, her home. (*Id.* ¶ 103.) These economic detriments easily satisfy the California Supreme Court's interpretation of *section 17204*. *See* *Kwikset, 51 Cal. 4th at 323* (interpreting the phrase "lost money or property").

The Court therefore finds that the Castaneda **[*14]** has standing to sue under the UCL.

2. "Unlawful" conduct

UCL's "unlawful" prong "borrows" violations of other laws such that a "defendant cannot be liable under *§ 17200* for committing unlawful business practices without having violated another law." *Ingels v. Westwood One Broad. Servs., Inc., 129 Cal. App. 4th 1050, 1060, 28 Cal. Rptr. 3d 933 (2005)* (internal quotation marks omitted); *see also* *Farmers Ins. Exch. v. Superior Court, 2 Cal. 4th 377, 383, 6 Cal. Rptr. 2d 487, 826 P.2d 730 (1992)*.

Wells Fargo attacks Castaneda's allegations that it violated various provisions of *section 2923.6* or was otherwise unlawful in its dealings with Plaintiff.

a. 18 U.S.C. §§ 1341, 1343, 1962

Castaneda alleges, rather vaguely, that Wells Fargo's decision to omit material facts with respect to her third loan modification application constitutes "unlawful" conduct because it violates *18 U.S.C. section 1341* (mail fraud), *section 1343* (wire fraud), and *section 1962* (criminal racketeering). Even after sifting through the Complaint with a fine-toothed comb, the Court cannot find enough facts to support any cognizable violation under the aforementioned sections of Title 18.

b. Cal. Civ. Code § 2923.6

Further, because the Court has already found that Castaneda did not adequately plead a violation of the HBOR, any alleged violations under *section 2923.6* cannot serve as a predicate for a UCL claim. *See* *Martinez v. Wells Fargo Home Mortg., Inc., 598 F.3d 549, 558 (9th Cir. 2010)*.

3. "Fraudulent" conduct

A "fraudulent" business act or practice is one which is likely to deceive members of the public. *Weinstat v. Dentsply Intern., Inc., 180 Cal. App. 4th 1213, 1223, 103 Cal. Rptr. 3d 614 (2010)*. UCL claims premised **[*15]** on fraudulent conduct trigger the heightened pleading standard under *Rule 9(b) of the Federal Rules of Civil Procedure*. *Kearns v. Ford Motor Co., 567 F.3d 1120, 1125 (9th Cir. 2009)*.

Here, the Complaint fails to meet the heightened pleading standard required for fraud claims because Castaneda only vaguely alleges how members of the public are likely to be deceived by Wells Fargo's actions. She alleges that Wells Fargo instituted improper or premature foreclosure proceedings to generate fees for default-related services, all while concealing the true character, quality and nature of the fees—or simply put, the fees themselves were marked-up and unwarranted. (*E.g.*, Compl. ¶¶ 94, 99.) She jumps to the conclusion that these practices are likely to deceive the public. However, these allegations are insufficient to meet the heightened pleading standard required to plead a fraudulent business act.

4. "Unfair" conduct

In interpreting the UCL's "unfair" term, the California Supreme Court held that "the word 'unfair' in that section means conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 20 Cal. 4th 163, 187, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)*.

Castaneda **[*16]** has not alleged how Defendant's actions rose anywhere near the mandatory level of anticompetitive activity.

Accordingly, the Court **GRANTS** Defendant's Motion as to the UCL claim with leave to amend the unlawful prong only.

D. Implied Covenant of Good Faith and Fair Dealing

Castaneda alleges that Wells Fargo breached the implied covenant of good faith and fair dealing by denying her request for a loan modification and by imposing unnecessary and marked up fees in conjunction with its default-related services. This allegation suggests that Castaneda's loan agreement contained an implicit promise that Wells Fargo would assist her as she attempts to obtain a loan modification or pursue other loss mitigation alternatives. Castaneda tried with the *section 2923.6* claim to persuade the Court that Wells Fargo is legally obligated to accept her request for a loan modification, and with the UCL claim to argue certain fees were imposed incorrectly and inconsistently onto her. The implied covenant approach is different in form, but not in substance.

The covenant of good faith and fair dealing is implied to protect the express covenants of a contract, not a general public policy interest indirectly tied to the contract's **[*17]** purpose. *Racine & Laramie, Ltd. v. Cal. Dep't of Parks and Recreation, 11 Cal. App. 4th 1026, 1031, 14 Cal. Rptr. 2d 335 (1992)*. The covenant is implied as a supplement to the express contractual covenants "to prevent a contracting party from engaging in conduct" that does not technically breach the express covenants, but otherwise "frustrates the other party's rights to the benefits of the contract." *Id. at 1028*.

The obvious purpose of the mortgage loan is to memorialize the terms on which Castaneda will pay back the money borrowed. There is no reason to believe that somewhere in the agreement is an implicit promise to permit Plaintiff to change the terms of repayment due to her default. Such an implied promise would directly undermine, not protect, the contract's express terms. Regarding the fees for Well Fargo's default-related services, Castaneda has failed to identify how they were improperly assessed, or how the charges themselves undermine, rather than protect, the terms of the loan agreement. Therefore, the Court **GRANTS** Wells Fargo's Motion as to this cause of action.

E. Accounting

Lastly, Castaneda makes a demand for accounting based on the fees alleged to be improper and unnecessary. For her to be entitled to accounting, Castaneda must demonstrate a relationship between the plaintiff and defendant exists **[*18]** that requires an accounting, and that some balance is due to the plaintiff that can only be ascertained by an accounting. *See* *Teselle v. McLoughlin, 173 Cal. App. 4th 156, 179, 92 Cal. Rptr. 3d 696 (2009)*.

Other than merely concluding that Wells Fargo owes her a duty, Castaneda has not demonstrated why that is the case. As stated once before, a mortgage lender or trustee under a deed of trust generally does not owe a fiduciary duty to the borrower. *See* *Nymark, 231 Cal. App. 3d 1089, 1093 n. 1, 283 Cal. Rptr. 53 (1991)*. Castaneda claims, however, that a relationship for accounting exists because Wells Fargo collected money that it actually did not have forthcoming. This notwithstanding, Castaneda has failed to plead sufficient facts regarding these fees to survive a motion to dismiss. *See* *Williams v. Wells Fargo Bank, NA, No. EDCV 13-02075 JVS (DTBx), 2014 U.S. Dist. LEXIS 17215, 2014 WL 1568857, *9 (C.D. Cal. Jan. 27, 2014)* ("The [c]omplaint is devoid of any factual details regarding when these charges were assessed, the venders involved, or why [Plaintiff] . . . concluded that these charges were excessive."). Thus, the Court **GRANTS** Wells Fargo's Motion on the demand for accounting.

V. CONCLUSION

For the reasons discussed above, the Court **GRANTS** Defendant's Motion to Dismiss. (ECF No. 9.) Castaneda may amend her Complaint within 14 days with respect to the HBOR claims and the UCL's unlawful prong only.

IT IS SO ORDERED.

February **[*19]** 26, 2016

/s/ Otis D. Wright, II

OTIS D. WRIGHT, II

UNITED STATES DISTRICT JUDGE

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Isenberg v. United Teachers L.A.

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

February 26, 2016, Opinion Filed

B259611

Reporter
2016 Cal. App. Unpub. LEXIS 1379 *

LEONARD ISENBERG, Plaintiff and Appellant, v. UNITED TEACHERS LOS ANGELES et al., Defendants and Respondents.

Notice: NOT TO BE PUBLISHED IN OFFICIAL REPORTS. *CALIFORNIA RULES OF COURT, RULE 8.1115(a)*, PROHIBITS COURTS AND PARTIES FROM CITING OR RELYING ON OPINIONS NOT CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED, EXCEPT AS SPECIFIED BY *RULE 8.1115(b)*. THIS OPINION HAS NOT BEEN CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED FOR THE PURPOSES OF *RULE 8.1115*.

Subsequent History: Request denied by *Isenberg v. United Teachers Los Angeles, 2016 Cal. LEXIS 3582 (Cal., May 18, 2016)*

Summary judgment granted by *Isenberg v. United Teachers L.A., 2018 Cal. Super. LEXIS 3954 (Cal. Super. Ct., Jan. 16, 2018)*

Prior History: [*1] APPEAL from a judgment of the Superior Court of Los Angeles County, No. BC486517, Laura C. Ellison, Judge.

Disposition: Reversed and remanded.

Core Terms

teacher, Cartwright Act, fair representation, union member, allegations, exemption, unfair, unfair practice, dismissal proceeding, Relations, legal representation, labor union, collective bargaining agreement, trial court, matters, exclusive jurisdiction, cause of action, legal services, violations, cases, employee organization, motion to dismiss, law firm, employer-employee, decisions, subject matter jurisdiction, exclusive representative, proceedings, restraint of trade, alternative basis

Counsel: Ronald C. Lapekas, for Plaintiff and Appellant.

Musick, Peeler & Garrett, Cheryl A. Orr for Defendants and Respondents United Teachers Los Angeles.

Kaufman Dolowich & Voluck, Elizabeth Williams, for Defendants and Respondents Trygstad, Schwab & Trygstad.

Judges: COLLINS, J.; EPSTEIN, P. J., MANELLA, J. concurred.

Opinion by: COLLINS, J.

Opinion

INTRODUCTION

Appellant Leonard Isenberg, a teacher and former member of the United Teachers Los Angeles labor union (UTLA or the union), sued the union and a law firm, Trygstad, Schwab & Trygstad (Trygstad), alleging that they violated the Cartwright Act (*Bus. & Prof. Code, §16720, et seq.*) and the Unfair Competition Law (*id.*, *§ 17200, et seq.*) (UCL). Isenberg alleged that an exclusive representation agreement between UTLA and Trygstad limited the legal representation available to union members because UTLA would pay Trygstad, but no other attorneys or firms, to represent UTLA members in teacher disciplinary and dismissal proceedings. Isenberg alleged that this agreement unlawfully restrained trade in the relevant legal market. On the day set for trial, Trygstad moved to dismiss the case, arguing that **[*2]** that the Public Employee Relations Board (PERB) had exclusive jurisdiction over Isenberg's claims. The trial court granted the motion, and Isenberg appealed.

We hold that the trial court erred in finding that PERB had exclusive jurisdiction over Isenberg's claims. PERB's jurisdiction extends only to issues that have a substantial impact on the relationship between union members and their employers; PERB does not exercise jurisdiction over matters involving the internal activities of a union. PERB has ruled that disagreements between a union and its members relating to outside legal representation are solely internal matters beyond the scope of PERB's jurisdiction. Moreover, PERB does not exercise discretion over issues governed by the Education Code rather than by the Educational Employment Relations Act (EERA). Dismissal proceedings involving certificated teachers—the proceedings at issue in Isenberg's allegations—are governed by the Education Code, not the EERA, and therefore are not within PERB jurisdiction.

Defendants request that we affirm the trial court's dismissal on the alternative basis that the Cartwright Act exempts labor unions from liability. In fact, the Cartwright Act **[*3]** exempts a labor union from liability only when the union does not act with the purpose of restraining trade. There is insufficient evidence in the record to determine UTLA's purpose in employing only a single law firm. On this record, the labor exemption of the Cartwright Act therefore does not provide an alternative basis to affirm the dismissal.

FACTUAL AND PROCEDURAL BACKGROUND

A. Isenberg's allegations

Isenberg was a teacher in the Los Angeles Unified School District (LAUSD) and is a former member of UTLA. The parties agree that UTLA is the exclusive bargaining agent for certificated LAUSD teachers. UTLA works with defendant Trygstad, which UTLA says "has a long-standing familiarity with the union and representation of teachers with respect to employment decisions." UTLA provides union members with legal representation by Trygstad as follows: "As a benefit of union membership, and at its discretion, UTLA affords its members reimbursement of $1,000 to $1,500 for legal fees for the services provided by Trygstad to the member. If, however, a union member wishes to retain legal counsel of his or her own choosing, the union member is free to do so."

Isenberg sued UTLA and Trygstad[1] in June **[*4]** 2012, alleging that together they conspired to monopolize the market for all UTLA members needing legal services. Isenberg alleged that UTLA and Trygstad entered into agreements "for the purpose of limiting access to legal services provided by any attorney except those employed by [Trygstad]. [¶] The purpose and goal of the conspiracy were [sic] to restrain and restrict the availability of legal services to UTLA members so that [Trygstad] could maintain a monopoly over such services in the relevant market."[2] The relevant market consisted of "more than 35,000 UTLA members." Isenberg alleged that union

[1] Isenberg added the "Educators Liability Insurance Fund" as a Doe defendant, but the record gives no indication that this entity ever answered or participated in proceedings below. UTLA's trial brief suggested that there is **[*5]** no such entity.

[2] The allegations vary somewhat in the different versions of the complaint filed. We focus on only the third amended complaint, which was operative at the time of the dismissal.

members who do not want to use Trygstad as their law firm must pay for their own legal representation. According to the complaint, UTLA purported to keep a list of law firms "approved" by UTLA, but in fact there was no process by which any other law firm or attorney could gain UTLA approval. Isenberg alleged that Trygstad had held this monopoly for more than 30 years.

Isenberg alleged that he and other UTLA members were harmed by the exclusive relationship between UTLA and Trygstad. Isenberg alleged that when LAUSD initiated dismissal proceedings against him, he initially worked with Trygstad attorney Richard Schwab but later wanted different counsel. UTLA refused to pay any amount for a non-Trygstad attorney or law firm, even though UTLA had authorized a $15,000 fee for Trygstad to represent him. As a result, Isenberg alleged, he incurred fees and litigation expenses because he had to pay for his own attorney. In addition, Isenberg alleged that other UTLA members were damaged by the relationship between UTLA and Trygstad because Trygstad has "persuaded almost all of the teachers it has represented to accept a settlement agreement from LAUSD, including those who were factually and legally innocent of the charges." Isenberg also alleged that Trygstad routinely failed to assert critical affirmative defenses on behalf of teachers.

Isenberg asserted causes of action **[*6]** against UTLA and Trygstad for violations of the Cartwright Act (*Bus. & Prof. Code, §16720, et seq.*) and UCL (*id.*, *§ 17200, et seq.*). He alleged that the agreement between UTLA and Trygstad "restrains competition by refusing to authorize payment of legal fees and expenses [from UTLA] to any law firm except [Trygstad]." He also alleged that this conspiracy "interferes with the client's right to choose his or her own attorney." Affected parties were damaged because they had to pay attorney fees for other attorneys or accept substandard representation by Trygstad.

Isenberg asserted an additional cause of action against UTLA for fraudulent business practices, alleging that UTLA fraudulently represented to Isenberg and other members that it had a properly funded legal defense program in place. He alleged that UTLA concealed information from union members, including "the procedures to be followed to submit a claim, the standards for determining whether a claim will be paid, the name of the insurance company(ies) providing benefits, and procedures for appealing UTLA's decision not to provide payment for attorney's fees." Isenberg also alleged that "UTLA, acting as a quasi-fiduciary, may not act arbitrarily or discriminate between or among **[*7]** claimants."[3]

In response to Isenberg's first and second amended complaints, UTLA and Trygstad demurred and moved for judgment on the pleadings on the basis that as a labor union, UTLA was exempt from the Cartwright Act. They cited *Business and Professions Code section 16703* (*section 16703*), which states, "Within the meaning of this chapter, labor, whether skilled or unskilled, is not a commodity." The trial court rejected the defendants' arguments, holding that the face of the complaint did not indicate that UTLA was exempt from the Cartwright Act, and therefore Isenberg's complaint stated a valid cause of action.

B. Trygstad's motion to dismiss

The day trial was set to begin, Trygstad filed a document titled, "Motion to Dismiss **[*8]** for Lack of Subject Matter Jurisdiction." In it, Trygstad asserted for the first time that "the Public Employment Relations Board ('PERB') has exclusive and initial jurisdiction over matters involving the unfair practices claims relating to unions." Trygstad cited part of the EERA, *Government Code section 3541.5*, which states, "The initial determination as to whether the charges of unfair practices are justified, and, if so, what remedy is necessary to effectuate the purposes of this chapter, shall be a matter within the exclusive jurisdiction of the board."

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[3] Isenberg also asserted a cause of action for professional negligence against Trygstad and partner Richard Schwab. Isenberg alleged that when he was involved in the disciplinary process with LAUSD, UTLA referred him to Trygstad, which did not adequately represent him. According to the complaint, Trygstad and Schwab did not disclose relevant conflicts of interest and failed to assert certain affirmative defenses. Isenberg dismissed this cause of action about three months before the parties were scheduled to go to trial.

In support of its argument, Trygstad said, "It cannot be disputed that Plaintiff's operative claims are for 'unfair practices' as contemplated under *Section 3541.5*." Trygstad pointed to a paragraph in Isenberg's complaint that quoted the language of the UCL, alleging that the defendants' actions constituted an "unlawful, unfair or fraudulent business act or practice." (*Bus. & Prof. Code, § 17200*.) Trygstad also argued that because Isenberg alleged a conspiracy between the union and Trygstad, the cause of action should be interpreted as alleging an "attempt by a union to restrain members' rights as contemplated by *Government Code section 3543* and *3543.6(b)* — claims properly subject to PERB."[4]

Trygstad conceded that PERB does not exercise jurisdiction over exclusively internal union matters, but argued that PERB jurisdiction applies because this case involves issues between union members and employers: "Plaintiff's claims in this Action involve a union member's ability to obtain legal representation at dismissal proceedings which ultimately determine whether this employer-employee relationship will continue or terminate. It cannot be reasonably argued that this issue and alleged restraint on representation does [sic] not have a substantial impact on this relationship." Trygstad also repeated its earlier argument that labor union activity is exempt from the Cartwright Act. UTLA joined the motion.

The trial court allowed Isenberg to file an opposition **[*10]** the same day. Isenberg argued that the case was not within PERB's jurisdiction because his allegations did not involve any issue arising under a collective bargaining agreement or within the employer-employee relationship. Isenberg pointed out, "There are no facts nor is there an allegation that any act or omission involved plaintiff and his employer, LAUSD." Therefore, Isenberg argued, the issue is not unfair *labor* practices under the EERA, but rather unfair *business* practices under the UCL and antitrust under the Cartwright Act. Isenberg also opposed the renewed argument that the actions in this case fall under the labor exemption to the Cartwright Act.

The following day, the court granted Trygstad's motion. The court held, "The Public Employment Relations Board ('PERB'), has exclusive and initial jurisdiction over matters involving unfair practice claims relating to unions. [¶] Mr. Isenberg's Third Amended Complaint alleges causes of action for unfair practices by the United Teachers Los Angeles ('UTLA') and Trygstad, Schwab, & Trygstd [sic] ('TST') specifically that these organizations conspired to monopolize the market for legal services and restricting the availability of these **[*11]** services. The Educational Employment Relations Act ('EERA'), makes clear that the initial determination as to whether an unfair practice charge is justified SHALL not MAY be [sic] within the exclusive jurisdiction of the PERB. *California Government Code Section 3541.5*." The minute order further stated, "It is undisputed that the benefits at issue here, i.e., the provision by the UTLA of attorney benefits . . . directly impacts the ability of a union member such as Mr. Isenberg to defend himself in dismissal proceedings brought by his employer. This very clearly substantially affects the relationship between employer and employee. [¶] For these reasons I must dismiss this matter as being outside of this Court's jurisdiction." (Ellipsis in original.) The court stated that it was not deciding whether UTLA was immune from Cartwright Act liability under the labor exception in that statute. The court dismissed the case with prejudice.

The court entered a judgment and awarded costs to defendants. Isenberg timely appealed.

STANDARD OF REVIEW

"Subject matter jurisdiction . . . is the power of the court over a cause of action or to act in a particular way." (*Greener v. Workers' Comp. Appeals Bd. (1993) 6 Cal.4th 1028, 1035, 25 Cal. Rptr. 2d 539, 863 P.2d 784*.) Here, the court found that it did not have subject matter jurisdiction over **[*12]** this case. An appeal from a dismissal for lack of subject matter jurisdiction presents a question of law that this court reviews de novo. (*Robbins v. Foothill*

[4] *Government Code section 3543, subdivision (a)* provides that public school employees may form **[*9]** and join unions, and that those unions may be exclusive representatives of the employees in employment relations with the employer. *Subdivision (b) of section 3543* discusses grievance procedures. *Government Code section 3543.6, subdivision (b)* says it is unlawful for a union to "[i]mpose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter."

Nissan (1994) 22 Cal.App.4th 1769, 1774, 28 Cal. Rptr. 2d 190; see also *Finnie v. Dist. No. 1 -* Pacific Coast Dist. etc. Assn. (1992) 9 Cal.App.4th 1311, 1318, 12 Cal. Rptr. 2d 348 [a dismissal for lack of subject matter jurisdiction presents a question of law similar to a demurrer].)

DISCUSSION

A. PERB did not have initial exclusive jurisdiction over Isenberg's allegations.

1. *PERB jurisdiction extends to alleged violations of the EERA*.

"The Legislature created the Educational Employment Relations Board (EERB) in 1975 to administer the Educational Employment Relations Act (EERA). ([Coachella Valley Mosquito and Vector Control Dist. v. California Public Employment Relations Bd. (2005) 35 Cal.4th 1072], 1084-1085, 29 Cal. Rptr. 3d 234, 112 P.3d 623.) In 1977 the Legislature expanded the EERB's jurisdiction to encompass unfair practice charges under the former State Employer-Employee Relations Act (§ 3512 et seq. [now the Ralph C. Dills Act]) and renamed the entity 'Public Employment Relations Board.' (Coachella Valley, at p. 1085.)" (County of Los Angeles v. Los Angeles County Employee Relations Com. (2013) 56 Cal.4th 905, 916, fn.10, 157 Cal. Rptr. 3d 481, 301 P.3d 1102.)

"The EERA governs employer-employee relations within public school systems. Government Code sections 3543.5 and 3543.6 set forth conduct deemed to constitute unfair employment practices by employers or employee organizations. Government Code section 3541.5 provides, '[t]he initial determination as to whether the charges of unfair practices are justified, and, if so, what remedy is necessary to effectuate the purposes of **[*13]** this chapter, shall be a matter within the exclusive jurisdiction of [PERB].' PERB's exclusive jurisdiction extends to all alleged violations of the EERA, not just those which constitute unfair practices. [Citation.]" (Personnel Com. v. Barstow Unified School Dist. (1996) 43 Cal.App.4th 871, 885, 50 Cal. Rptr. 2d 797 (*Barstow Unified*).)

Barstow Unified characterized PERB's jurisdiction as "preempting" superior court jurisdiction. It noted, "The decisions considering PERB preemption of superior court jurisdiction can be divided into three categories. In the first category are cases in which the plaintiff alleges only a violation of the Education Code, and no arguable EERA violation is evident. In these cases, the courts find no preemption. [Citations.] [¶] In the second category are cases in which the plaintiff alleges only conduct constituting an unfair practice or other violation of the EERA. In these cases, the courts find preemption. [Citations.] [¶] In the third category are cases in which the plaintiff alleges both a violation of the Education Code and an unfair practice or other violation of the EERA. In these cases, the courts again find preemption. [Citations.]" (Barstow Unified, supra, 43 Cal.App.4th at pp. 886-887.)

This case does not fit into any of the three categories because Isenberg has not alleged that UTLA violated **[*14]** either the EERA or the Education Code.[5] Rather, Isenberg has alleged that defendants violated the Cartwright Act and the UCL. The Cartwright Act is California's principal ***antitrust law***, intended to "rein in the burgeoning power of monopolies and cartels" by preserving consumer welfare. (In re Cipro Cases I & II (2015) 61 Cal.4th 116, 136, 187 Cal. Rptr. 3d 632, 348 P.3d 845.) "The act 'generally outlaws any combinations or agreements which restrain trade or competition or which fix or control prices' (Antitrust and Trade Reg. Law Section of the State Bar of Cal., Cal. ***Antitrust Law*** (1991) p. 4), and declares that, with certain exceptions, 'every trust is unlawful, against public policy and void' ([Bus. & Prof. Code,] § 16726)." (Pacific Gas & Electric Co. v. County of Stanislaus (1997) 16 Cal.4th 1143, 1147, 69 Cal. Rptr. 2d 329, 947 P.2d 291.) Isenberg has alleged that the same actions constitute a violation of the UCL, which prohibits "any unlawful, unfair or fraudulent business act or practice." (Bus. & Prof. Code, § 17200.) "The UCL's purpose is to protect both consumers and competitors by promoting fair competition in

[5] Respondents make a passing argument that **[*15]** this case also involves the Meyers-Milias-Brown Act (Gov. Code, § 3500 et seq.; the MMBA), specifically Government Code section 3502, which states that employees "shall have the right to represent themselves individually in their employment relations with the public agency." Isenberg's allegations do not touch on whether UTLA members have a right to represent themselves in employment relations, and therefore this statute is not relevant.

commercial markets for goods and services." (*Kasky v. Nike, Inc. (2002) 27 Cal.4th 939, 949, 119 Cal. Rptr. 2d 296, 45 P.3d 243*.) "By defining unfair competition to include any '*unlawful* . . . business act or practice' (*§ 17200*, italics added), the UCL permits violations of other laws to be treated as unfair competition that is independently actionable." (*Ibid.*)

Trygstad and UTLA argue that despite Isenberg's characterization of his causes of action in the complaint, his claims nonetheless fall under the EERA. They argue that the actions underlying Isenberg's allegations are properly interpreted as implicating the "unfair labor practices" prohibited by the EERA, including a subset of unfair practices generally characterized as a "duty of fair representation." (See *Gov. Code §§ 3544.9* [a union "shall fairly represent each and every employee in the appropriate unit"], 3543.6 [it is unlawful for a union to discriminate against employees "because of their exercise of rights guaranteed by this chapter"]; *Los Angeles Council of School Nurses v. Los Angeles Unified School Dist. (1980) 113 Cal.App.3d 666, 672, 169 Cal. Rptr. 893* [violation of the duty of fair representation constitutes an unfair practices claim].) Trygstad admits that "there is no definition of 'unfair practices' provided" in the relevant **[*16]** statutes, but Trygstad quotes a PERB decision for the proposition that "[i]t is possible that the range of actions which may be deemed as unfair practices may have been left to PERB's own determination." (Quoting *Mt. Diablo Unified School District (Quarrick)* (1978) PERB Dec. 68E at p. 12 [2 PERC ¶ 2174].)

Trygstad is correct that courts generally defer to PERB's interpretation of the EERA's scope. PERB has the power and duty "[t]o determine in disputed cases whether a particular item is within or without the scope of representation" under the EERA. (*Gov. Code, § 3541.3, subd. (b)*.) "Under established principles PERB's construction is to be regarded with deference by a court performing the judicial function of statutory construction, and will generally be followed unless it is clearly erroneous." (*San Mateo City School Dist. v. Public Employment Relations Bd. (1983) 33 Cal.3d 850, 856, 191 Cal. Rptr. 800, 663 P.2d 523*.)

2. *PERB does not exercise jurisdiction over purely internal union matters, including choice of counsel for union members*.

PERB has held that it "will not intervene in matters involving the solely internal activities or relationships of an employee organization which do not impact employer-employee relations." (*California State Employees Association (Hutchinson)* (1998) PERB Dec. No. 1304-S [1998 Cal. PERB Lexis 61 at p. *5].) In other words, **[*17]** "only those activities that have a substantial impact on the relationship of unit members to their employer are subject to the duty of fair representation." (*El Centro Elementary Teachers Assoc. (Willis)* (1982) PERB Dec. No. 232 at p. 14 [6 PERC ¶ 13186].) The question, therefore, is whether a union's provision of legal representation for union members is a matter that impacts only the relationship between the employee and the union, or one that impacts the employer-employee relationship.

PERB's past decisions establish that a union's decision as to which attorney will represent a member, or whether a union will pay for an attorney to represent a member, is an internal issue that is beyond the scope of PERB's jurisdiction. In a similar case, *United Teachers Los Angeles (Bracey) (1987) PERB Dec. No. 616 [1987 Cal. PERB LEXIS 28]*, LAUSD placed a teacher and UTLA member on medical leave and began dismissal proceedings. UTLA put the teacher in contact with an attorney at Trygstad, Mr. Schwab (who also represented Isenberg in some of his proceedings involving LAUSD, but the teacher failed to return his calls and letters. The teacher later argued that she did not contact Mr. Schwab because she wanted to work directly with Mr. Trygstad instead, and **[*18]** she filed a complaint with PERB alleging that UTLA breached its duty of fair representation. PERB rejected the teacher's argument. After noting that PERB would not address "matters which do not involve the employer or which are strictly internal union matters" (*id. at, p. *17*), PERB stated, "Charging party [the teacher] is thus essentially alleging that UTLA violated its duty of fair representation toward her by failing to provide her with the attorney of her choice. However, this is an internal union matter." (*Id. at p. *19*.) The decision went on to say that "an employee organization's denial of a member's request for a particular attorney, without more, does not establish arbitrary, discriminatory, or bad faith conduct on the part of the employee organization." (*Ibid.*)

All parties cite *National Education Assoc.-Jurupa (Norman) (2014) PERB Dec. No. 2371 [2014 Cal. PERB LEXIS 11]* in support of their respective positions. In *Norman*, a teacher who had been placed on leave and was facing dismissal proceedings alleged that his union (NEA-J) and the California Teachers Association (CTA) promised he would be provided an attorney throughout the leave and dismissal hearing process. (*Id. at p. *2*.) He alleged that although the union provided an attorney for a portion of the **[*19]** proceedings, it did not appoint an attorney or pay for a private attorney for the remainder, including his dismissal proceeding. (*Id. at p.*5*.)

PERB rejected the teacher's claim. It noted, "PERB has long held that the duty of fair representation extends only to contractually [ ] based remedies under the exclusive control of the exclusive representative." (*Norman, supra, at pp. *15-16*.) Therefore, "[a]n exclusive representative owes no duty of fair representation to a unit member unless the exclusive representative possesses the exclusive means by which such member can vindicate an individual right, and the right in question derives from a collective bargaining agreement." (*Id. at p. *16*.) PERB went on to add, "Permanent teacher dismissal proceedings are governed exclusively by the Education Code, and are beyond the scope of negotiations under EERA. [Citations.] Therefore, it was legally impossible for permanent teacher dismissal proceedings to be a term and condition contained in a [collective bargaining agreement] between the District and NEA-J. NEA-J, the exclusive bargaining representative, owed no duty of fair representation for the statutory teacher dismissal procedure." (*Id. at pp. *17-18*.)

PERB also held that it had no jurisdiction over Norman's contract-based **[*20]** claim that CTA owed him representation. "Any alleged contract to provide legal services to members is not a part of a collective bargaining agreement negotiated between the [school district employer] and NEA-J, but instead an alleged promise made only to CTA members. PERB does not have jurisdiction to enforce such contracts. PERB's jurisdiction over employee organizations is confined to remedying alleged violations of EERA, including *EERA sections 3543.6* and 3544.9. Nothing in EERA requires employee organizations to offer members economic benefits such as legal services, and nothing in EERA envisions PERB enforcing such alleged individual contracts between an employee organization and its members, especially where the employee organization is not the exclusive representative." (*Norman, supra, at pp. *19-20*.) Here, UTLA admits that its provision of legal representation to its members is "a benefit of union membership" that UTLA provides "at its discretion." UTLA's provision of legal representation is therefore not a result of any collective bargaining agreement involving employer LAUSD.

UTLA argues, "The fact that the PERB reached the merits of the union members' arguments in *Norman* and *Bracey* confirms that the PERB exercised its **[*21]** jurisdiction over the claims and thus believed those disputes within the purview of the PERB." This argument is not persuasive. *Norman* cannot reasonably be read to mean that PERB had jurisdiction over Norman's claims to the extent they were outside of any collective bargaining agreement. After finding that Norman's claims did not fall within PERB's jurisdiction, PERB commented that Norman also failed to adequately allege facts that would constitute a prima facie case because he did not allege that his union—as opposed to other entities referenced in Norman's complaint—denied him fair representation. For example, PERB noted, "Norman alleges no facts that NEA-J, the only named respondent, denied representation to Norman at any stage of his dismissal-related procedure," and "Norman has not alleged that any of the above-referenced entities were alter egos or agents of each other." (*Norman, supra, p. *21-22*.) PERB's observation that Norman failed to allege facts sufficient to show that his exclusive representative breached the duty of fair representation is not a holding on the merits of Norman's non-EERA claims.

PERB looked more closely at the facts in *Bracey* because the teacher there alleged that UTLA violated **[*22]** the duty of fair representation under the EERA. (*Bracey, supra, at p. *1*.) This does not merit a conclusion that Isenberg's claims are within PERB's jurisdiction. To reach such a conclusion would require us to ignore *Bracey*'s holding that failing to provide a union member her attorney of choice is an internal union matter. Indeed, *Bracey* highlights that a union's choice to use a particular attorney—the issue alleged here—is distinct from whether the union breached the duty of fair representation in proceedings involving the employer. *Bracey* states that choice of a particular attorney is not within PERB's jurisdiction, but the duty of fair representation is. Here, Isenberg's allegations focus on the former, and PERB's examination of the latter in *Bracey* does not compel us to reach a different result.

Other PERB decisions reach similar conclusions. In *California State Employees Association (Fox) (1995) PERB Dec. No. 1099-S [1995 Cal. PERB LEXIS 24]*, for example, PERB denied a teacher's allegation that her union breached the duty of fair representation, stating, "Because CSEA is under no obligation to represent you before the State Personnel Board, a denial of financial assistance to hire private counsel would **[*23]** also be outside the duty of fair representation." (*Fox, supra, at p. *10*.) In *Valley of the Moon Teachers Association (McClure) (1996) PERB Dec. No. 1165 [1996 Cal. PERB LEXIS 40]*, a teacher alleged that the California Teacher's Association violated the duty of fair representation by requiring a union member to either choose an attorney "affiliated" with the teacher's association or waive the right to a union-provided attorney. PERB rejected the allegation, stating, "[A]n employee organization's denial of a member's request for a particular representative, without more, does not establish arbitrary, discriminatory or bad faith conduct on the organization's part. [Citation.] Similarly, where an employee chooses self representation or representation by an outside agent, the Association has no obligation to provide representation or assistance." (*Id. at p. *20*.) Another PERB decision, *Service Employees Int'l Union (Banks)* (2004) PERB Dec. No. 1636M [2004 Cal. PERB LEXIS 257], noted that "a union is not obligated to assist an employee with . . . proceedings before a Commission on Professional Competence." (*Id.* at p. *5.) Here, Isenberg alleges that his damages arose because he needed to hire an attorney to represent him in a dismissal proceeding before the Commission on Professional **[*24]** Competence. Moreover, as noted in *Norman*, the dismissal procedure for permanent teachers such as Isenberg falls under the Education Code, not the EERA, and therefore is not within PERB's jurisdiction. (*Barstow Unified, supra, 43 Cal.App.4th at pp. 886-887* [claims falling under the Education Code are not within PERB's jurisdiction].) Under the reasoning of these PERB decisions, UTLA did not have a duty to provide representation under the EERA under the circumstances alleged in Isenberg's complaint, and therefore PERB's jurisdiction does not extend to Isenberg's claims.

In its order granting Trygstad's motion to dismiss, the trial court held that UTLA's manner of providing attorneys to its members "very clearly substantially affects the relationship between employer and employee." This conclusion contradicts PERB's rulings that a union's provision of legal services outside the parameters of a collective bargaining agreement is an internal union matter that does not affect the employer-employee relationship. "PERB decisions are entitled to deference and its interpretation of pertinent statutes will be followed unless clearly erroneous." (*Williams v. Public Employment Relations Bd. (2012) 204 Cal.App.4th 1119, 1127, 139 Cal. Rptr. 3d 618*.) We see no basis for finding *Bracey, Norman, Fox, McClure*, or *Banks* clearly erroneous.

3. *UTLA's voluntary* ***[*25]*** *provision of legal representation to members does not place this issue within PERB's jurisdiction*.

Trygstad argues that even if UTLA did not initially have a duty to represent Isenberg and therefore may not have been subject to the duty of fair representation, "the analysis rightfully changes, when, as here, the exclusive representative voluntarily assumes a duty to an individual member collateral to the collective bargaining agreement." Trygstad cites *Lane v. I.U.O.E. Stationary Engineers (1989) 212 Cal.App.3d 164, 260 Cal. Rptr. 634* (*Lane*) for the proposition that "if the union had no formal obligation to represent plaintiff but voluntarily undertook to do so it owed him the duty to act with the requisite degree of care." (*212 Cal.App.3d at p. 171*.) Trygstad argues that because "PERB has never definitively stated whether or not *Lane* creates an unfair practice right of action for voluntarily assumed obligations," it is fair to assume that PERB would accept a *Lane*-based theory of duty and breach.

Contrary to Trygstad's argument, however, PERB has rejected *Lane*'s reasoning as a basis for a claim under PERB jurisdiction. "PERB has never adopted the *Lane* theory as a basis for an unfair practice charge. PERB has viewed such a theory as implicating a cause of action in state court rather than **[*26]** a matter within its jurisdiction." (*Oakland Education Association (McKeel) (2000) PERB Dec. No. 1383 [2000 Cal. PERB LEXIS 17 at pp. *12-13*]; see also *California State Employees Assoc. (Cohen) (1993) PERB Dec. No. 980-S [1993 Cal. PERB LEXIS 19]*["Even assuming facts were alleged to demonstrate that the Association promised to undertake representation in these arenas, and then negligently forfeited Cohen's rights, such conduct would not be within PERB's jurisdiction, but her recourse, if any, would be in the State courts."] (*Id at pp. *19-*20*.))

PERB's decisions therefore demonstrate that the manner by which a union chooses legal representatives for its members is not within the scope of PERB's jurisdiction under the EERA. Because UTLA was not obligated to provide Isenberg (or other UTLA members) legal representation under the EERA or any collective bargaining agreement, and PERB has rejected *Lane*'s theory of an assumed duty of representation as a basis for relief under

PERB's jurisdiction, UTLA and Trygstad have failed to show that Isenberg was required to address his allegations with PERB before filing suit in superior court.

The trial court erred by finding that Isenberg's claims were subject to PERB's exclusive jurisdiction, and it erred by dismissing the **[*27]** case on that basis.

B. On this record, the labor exemption to the Cartwright Act does not apply.

Defendants ask that if we find that the trial court erred by dismissing the case on jurisdictional grounds, we should nonetheless affirm the judgment on the alternative basis that UTLA, as a labor union, is exempt from liability under the Cartwright Act. Although Trygstad asserted this argument in the motion to dismiss below, the trial court explicitly declined to decide the issue in ruling on the final motion to dismiss. Based on the record before us, this defense does not provide a basis to affirm the judgment.

UTLA articulates the argument as follows: "Trygstad [is] serving the union's interests in a matter relating to the members' interests in their continued employment and the continuation of their compensation. Therefore, the relationship between the UTLA and Trygstad is immunized under *Business and Professions Code 16703* and a cause of action for violation of the Cartwright Act will not lie against UTLA or Trygstad." Trygstad argues that "the fact that UTLA is a labor union mandates a finding that UTLA is exempt from the Cartwright Act and therefore, it is legally impossible for [Trygstad] to 'conspire' with UTLA to **[*28]** violate the Act and the UCL."

Defendants base their argument on *section 16703*, which states, "Within the meaning of this chapter, labor, whether skilled or unskilled, is not a commodity." In some cases, a question of statutory immunity can be a pure question of law that may be addressed for the first time on appeal. (See, e.g., *Inland Empire Health Plan v. Superior Court (2003) 108 Cal.App.4th 588, 592, 133 Cal. Rptr. 2d 735* ["governmental immunity from liability is a jurisdictional matter that can be raised for the first time on appellate review."].) But defendants cite no authority, and we have found none, indicating that *section 16703* provides immunity to a labor union for alleged Cartwright Act violations as a matter of law.

The application of the labor exemption in *section 16703* relies on findings of fact relating to the union's primary purpose in taking the allegedly improper actions: "[A] labor union, acting alone, violates the Cartwright Act . . . when its primary purpose is to accomplish a restraint of trade [citations], not when its purpose is to obtain a valid labor objective [citations]." (*Messner v. Journeymen Barbers, Hairdressers and Cosmetologists, Intern. Union of America, Local 256 (1960) 53 Cal.2d 873, 886, 4 Cal. Rptr. 179, 351 P.2d 347*.) This is because "*section 16703* was intended to insulate from antitrust liability concerted activities by workers seeking to improve their working terms and conditions. . . . [T]he exemption broadly covers combinations, agreements, and **[*29]** concerted activities *for the purpose of negotiating or otherwise fixing workers' rates of wages or compensation*." (*California Dental Assn. v. California Dental Hygienists' Assn. (1990) 222 Cal.App.3d 49, 63, 271 Cal. Rptr. 410* (emphasis added).) Therefore, the purposes and effects of the allegedly improper actions must be considered: "The relevant question, in every case, is whether the practice in question is meant to further the interest of tradesmen as employees in a collective bargaining context, or whether it is designed to advance their interests as entrepreneurs." (*Marin County Bd. of Realtors, Inc. v. Palsson (1976) 16 Cal.3d 920, 927-928, 130 Cal. Rptr. 1, 549 P.2d 833*.)

UTLA argues that its "primary objective is a legitimate and valid labor objective; namely, securing affordable and experienced employment attorneys to represent its members' interests . . . not to restrain trade in the legal profession." Isenberg, however, has alleged that defendants' objectives were to "restrain and restrict the availability of legal services to UTLA members so that [Trygstad] could maintain a monopoly over such services in the relevant market," and that this was "an unlawful conspiracy in restraint of trade."

Determining the purposes and effects of an exclusive dealing arrangement such as the one Isenberg has alleged is a fact-intensive endeavor. (See, e.g., *Fisherman's Wharf Bay Cruise Corp. v. Superior Court (2003) 114 Cal.App.4th 309, 335, 7 Cal. Rptr. 3d 628* ["[A] determination of illegality is tested **[*30]** under a rule of reason and 'requires knowledge and analysis of the line of commerce, the market area, and the affected share of the relevant market. . . . The resulting factual inquiry often makes summary judgment inappropriate."].) Here, the motion to dismiss was granted on jurisdictional grounds; the court did not admit or consider any evidence relating to the merits of Isenberg's Cartwright Act allegations. We will not address these disputed issues of fact for the first time on appeal.

In short, a labor union does not have statutory immunity from Cartwright Act violations as a matter of law, as Trygstad and UTLA argue. We therefore reject defendants' argument that *section 16703* provides an alternative basis for affirming the judgment below.

DISPOSITION

The trial court erred by dismissing the case for lack of subject matter jurisdiction. The court's dismissal also cannot be affirmed on the alternative basis of the Cartwright Act labor exemption in *section 16703*. We therefore reverse and remand for further proceedings consistent with this opinion. Isenberg shall recover his costs on appeal.

COLLINS, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.

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Joe Hand Promotions, Inc. v. Bragg

United States District Court for the Southern District of California

February 29, 2016, Decided; February 29, 2016, Filed

Case No. 13-cv-02725-BAS(KSC)

Reporter

2016 U.S. Dist. LEXIS 24752 *; 2016 WL 773223

JOE HAND PROMOTIONS, INC., Plaintiff, v. MARC S. BRAGG, et al., Defendants. AND RELATED COUNTERCLAIM AND THIRD PARTY COMPLAINT

Prior History: *Joe Hand Promotions, Inc. v. Bragg, 2014 U.S. Dist. LEXIS 190693 (S.D. Cal., Feb. 18, 2014)*

Core Terms

counterclaims, motion to dismiss, alleges, advertisements, license, false advertising, leave to amend, fails, prong, misrepresentations, particularity, misleading, parties, amend, unfair competition, cause of action, quotations, breached, consumer, deceived, appears, courts, representations, programming, unfair

Counsel: **[*1]** For Joe Hand Promotions, Inc., Plaintiff, Counter Defendant: Thomas P Riley, LEAD ATTORNEY, Law Offices of Thomas P Riley, South Pasadena, CA.

For Marc S. Bragg, individually doing business as Sally and Henry's Doghouse Bar & Grill, Cynthia Motsch, individually doing business as Sally and Henry's Doghouse Bar & Grill, Defendants: Marc S. Bragg, LEAD ATTORNEY, Law Offices of Marc S. Bragg, San Diego, CA.

For Directv, LLC, Defendant, ThirdParty Defendant, Counter Claimant: Christian Anstett, Ryan G. Baker, Baker Marquart LLP, Los Angeles, CA.

For Marc S. Bragg, individually, dba Sally and Henry's Doghouse, LLC, Cynthia Motsch, individually, dba Sally and Henry's Doghouse, LLC, Counter Claimants, Counter Defendants: Marc S. Bragg, LEAD ATTORNEY, Law Offices of Marc S. Bragg, San Diego, CA.

For Marc S. Bragg, individually, Cynthia Motsch, individually, ThirdParty Plaintiffs, Counter Claimants, Counter Defendants: Marc S. Bragg, LEAD ATTORNEY, Law Offices of Marc S. Bragg, San Diego, CA.

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

Opinion by: Cynthia Ann Bashant

Opinion

ORDER:

(1) GRANTING DIRECTV'S MOTION TO DISMISS (ECF NO. 64);

(2) GRANTING DIRECTV'S MOTIONFOR LEAVE TO FILE FIRST AMENDED COUNTERCLAIM [*2] (ECF NO. 84);

(3) DENYING AS MOOT COUNTERDEFENDANTS' MOTION TO DISMISS COUNTERCLAIMS (ECF NO. 68); AND

(4) DENYING COUNTERDEFENDANTS' MOTION TO FILE A SUPPLEMENTAL EXHIBIT (ECF NO. 95)

Joe Hand Promotions, Inc. ("Joe Hand"), a commercial distributor and licensor of sporting events, commenced this action against Marc S. Bragg and Cynthia Motsch, both individually and doing business as Sally and Henry's Doghouse Bar and Grill (collectively "Doghouse") alleging Doghouse improperly broadcast the "Ultimate Fighting Championship Program" ("the Program") at the Bar and Grill on November 17, 2012, without obtaining the proper licensing to do so from Joe Hand. (ECF No. 1.) Doghouse filed counterclaims against Joe Hand. (ECF Nos. 25, 36.)

On June 25, 2014, Doghouse filed a Third Party Complaint against DirecTV, LLC ("DirecTV") alleging DirecTV's misrepresentations caused it to broadcast the Program without proper licensing. (ECF No. 26.) On July 28, 2014, Doghouse filed an Amended Third Party Complaint against DirecTV. (ECF No. 37 ("ATPC").)

Joe Hand and the Doghouse jointly dismissed the original complaint and counterclaims, so that the only remaining complaint was the ATPC. (ECF Nos. 57, 58.) DirecTV **[*3]** thereafter filed counterclaims against Doghouse. (ECF No. 63.)

Presently before this Court are (1) DirecTV's Motion to Dismiss the ATPC (ECF No. 64); (2) Doghouse's Motion to Dismiss DirecTV's counterclaims (ECF No. 68) to which no opposition has been filed; (3) DirecTV's Motion for Leave to File First Amended Counterclaims (ECF No. 84); and (4) Doghouse's Motion to File a Supplemental Exhibit (ECF No. 95).

For the following reasons, this Court **GRANTS** DirecTV's Motion to Dismiss (ECF No. 64); **GRANTS** DirecTV's Motion to File First Amended Counterclaims (ECF No. 84); **DENIES AS MOOT** Doghouse's Motion to Dismiss the Counterclaims (ECF No. 68); and **DENIES** Doghouse's Motion to File a Supplemental Exhibit (ECF No. 95).

I. DIRECTV'S MOTION TO DISMISS THE ATPC

DirecTV moves to dismiss the ATPC pursuant to *Federal Rule of Civil Procedure 12(b)(6)* arguing: (1) the allegations of fraud and deceit lack sufficient particularity; (2) Doghouse fails to allege any term of the contract that was breached; (3) since there was no breach of contract, and no allegation of a special fiduciary relationship, there can be no breach of the covenant of good faith and fair dealing; (4) the UCC does not apply to contracts for goods as opposed to services; **[*4]** (5) Doghouse fails to identify any false advertisements with particularity; and (6) Doghouse fails to allege sufficient facts to support an unfair competition claim.

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

"[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of **[*5]** action will not do." *Twombly, 550 U.S. at 555* (quoting *Papasan v. Allain, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986)*. A court need not accept "legal conclusions" as true. *Iqbal, 556 U.S. at 678*. Despite the deference the court must pay to the plaintiff's allegations, it is not proper for the court to assume that "the [plaintiff] can prove facts that [he or she] has not alleged or that defendants have violated the...laws in ways that have not been alleged." *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 526, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*.

Generally, courts may not consider material outside the complaint when ruling on a motion to dismiss. *Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1555 n.19 (9th Cir. 1990)*. However, documents specifically identified in the complaint whose authenticity is not questioned by parties may also be considered. *Fecht v. Price Co., 70 F.3d 1078, 1080 n.1 (9th Cir. 1995)* (superseded by statute on other grounds). Moreover, the court may consider the full text of those documents even when the complaint quotes only selected portions. Id. It may also consider material properly subject to judicial notice without converting the motion into one for summary judgment. *Barron v. Reich, 13 F.3d 1370, 1377 (9th Cir. 1994)*.

As a general rule, a court freely grants leave to amend a complaint which has been dismissed. *Fed. R. Civ. P. 15(a)*. However, leave to amend may be denied when "the court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency." *Schreiber Distrib. Co. v. Serv-Well Furniture Co., 806 F.2d 1393, 1401 (9th Cir. 1986)*.

A. Preliminary Considerations

In its **[*6]** Opposition, Doghouse requests that the Court incorporate by reference an Opposition filed in another case, involving different parties, before a different Judge. (ECF No. 79 at p. 3.) Although this Court understands that there is a pending Motion to Consolidate in that other case, requesting that the case be consolidated with this one, that Motion has not been granted, the cases are not consolidated, and this Court declines to allow Doghouse to incorporate by reference a pleading filed in a different, as of yet, unrelated, case.

In addition, Doghouse filed a Motion to File a Supplemental Exhibit to its Opposition. (ECF No. 95.) Doghouse requests that this Court take judicial notice of a Final Judgment and Permanent Injunction issued by the San Diego Superior Court against DirecTV on December 10, 2010. Since this Final Judgment is ultimately not relevant to the decisions reached by the Court in this Order, the Motion to File a Supplemental Exhibit is **DENIED**.

B. Count One: Fraud and Deceit

DirecTV moves to dismiss Count One of the ATPC alleging Doghouse fails to allege sufficient particularly to withstand a challenge under *Rule 12(b)(6)*. In order to establish a cause of action for fraud, Doghouse must **[*7]** allege: (1) a misrepresentation (false representation, concealment, or nondisclosure); (2) DirecTV's knowledge of this falsity; (3) DirecTV's intent to defraud; (4) Doghouse's justifiable reliance; and (5) resulting damage. *Engalla v. Permanente Med. Grp., Inc., 15 Cal. 4th 951, 974, 64 Cal. Rptr. 2d 843, 938 P.2d 903 (1997)*.

Rule 9(b) of the Federal Rules of Civil Procedure holds fraud claims to a heightened pleading standard and claimants must plead fraud with particularity. *Fed. R. Civ. P. 9(b)*. A plaintiff must state the "time, place and specific content of the false representations as well as the identities of the parties to the misrepresentations" with particularity. *Sanford v. MemberWorks, Inc., 625 F.3d 550, 558 (9th Cir. 2010)* (citation omitted). A plaintiff must also "set forth what is false or misleading about a statement, and why it is false." *Vess v. Ciba-Geigy Corp. USA,* 317 F.3d 1097, 1106 (9th Cir. 2003) (citation omitted). In other words, the pleading must be "specific enough to give defendants notice of the particular misconduct . . . so that they can defend against the charge and not just deny they have done anything wrong." Sanford, 625 F.3d at 558 (citation omitted).

In the ATPC, Doghouse alleges that at the time DirecTV solicited Doghouse to buy its service in 2012, it "represented that it was providing . . . Doghouse a commercial license and that all the content it distributed to the DirecTV equipment it installed . . . was properly licensed by DirecTV with the full knowledge and **[*8]** consent of any content provider." (ATPC at ¶¶ 7, 15.) Doghouse further alleges "DirecTV's representations made by it at the time it induced . . . Doghouse to subscribe to its services," included the representation "that all programs were properly licensed," and this "was knowingly and intentionally false." (*Id.* at ¶ 34.) According to the ATPC, "DirecTV's representations . . . made by DirecTV during the continuation of the subscription during verbal conversations with its telephonic sales agents and on its website promoting various programs, . . . along with its purchase and license, were intended to and did in fact lead . . . Doghouse to justifiably believe that the . . . [Program] . . . [was] . . . lawfully licensed and authorized." (*Id.* at ¶ 36.)

In its Opposition, Doghouse appears to concede that the representations in the ATPC are insufficient. Doghouse provides insufficient specifics as to what misrepresentations were made and by whom. Instead, Doghouse offers a Second Amended Third Party Complaint and requests the Court allow it to amend its allegations. Hence this Court **GRANT**S the Motion to Dismiss Count One. Since the Court finds it possible Doghouse may be able to amend to **[*9]** allege sufficient allegations of fraud, the Doghouse is given leave to amend. However, Doghouse is cautioned that any allegation of fraud and deceit must include the specific content of the allegedly false representations as well as the individual who made them.

C. Count Six: Breach of Contract

To state a breach of contract claim under California law, a plaintiff must allege: (1) the existence of a contract; (2) the plaintiff's performance or excuse for nonperformance: (3) the defendant's breach; and (4) the resulting damage to the plaintiff. CDF Firefighters v. Maldonado, 158 Cal. App. 4th 1226, 1239, 70 Cal. Rptr. 3d 667 (2008). A plaintiff must allege the substance of the relevant terms of the contract, set them out verbatim in the complaint, or attach a copy of the contract to the complaint and incorporated by reference. N. Cnty. Commc'ns Corp. v. Verizon Global Networks, Inc., 685 F. Supp. 2d 1112, 1122 (S.D. Cal. 2010) (citing McKell v. Wash. Mut., Inc., 142 Cal. App. 4th 1457, 1489, 49 Cal. Rptr. 3d 227 (2006)). In addition, the complaint must "identify the specific provision of the contract allegedly breached by the defendant." Donohue v. Apple, Inc., 871 F. Supp. 2d 913, 930 (N.D. Cal. 2012) (citing Progressive West Ins. Co. v. Yolo Cnty. Super. Ct., 135 Cal. App. 4th 263, 281, 37 Cal. Rptr. 3d 434 (2005)). Moreover, a plaintiff must allege how the defendant breached the relevant term(s) of the alleged contract. *See* Parrish v. Nat'l Football League Players Ass'n, 534 F. Supp. 2d 1081, 1096 (N.D. Cal. 2007).

In the ATPC, Doghouse alleges DirecTV had a contract with Doghouse for the provision of satellite television service and for the purchase of the Program. (ATPC at ¶ 110.) Doghouse claims the contract **[*10]** required DirecTV to provide programming paid for by Doghouse. (*Id.* at ¶ 111.) Without further specificity, Doghouse claims DirecTV breached this contract.

In its Opposition to DirecTV's Motion to Dismiss, Doghouse appears again to admit that the allegations in the ATPC are insufficient to state a breach of contract claim. It is unclear what provision of the contract DirecTV is alleged to have violated. In fact, assuming everything in the ATPC is true, it appears DirecTV did provide satellite television service and the programming paid for by Doghouse, including the Program. Therefore, the Court **GRANTS** DirecTV's Motion to Dismiss Count Six with leave to amend. However, Doghouse is cautioned that any amended Complaint must include the details as to what provision was allegedly violated and how.

D. Count Two: Breach of Good Faith and Fair Dealing

In California, "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." *Foley v. Interactive Data Corp., 47 Cal. 3d 654, 684, 254 Cal. Rptr. 211, 765 P.2d 373 (1988)* (citing *Rest. 2d Contracts §205*). Thus, in order to bring an action for breach of the implied covenant of good faith and faith dealing, the complainant must first allege the existence of a contract. *Spencer v. DHI Mortgage Co., Ltd., 642 F. Supp. 2d 1153, 1165 (E.D. Cal. 2009)* (citing *Smith v. City and Cnty. Of S.F., 225 Cal. App. 3d 38, 49, 275 Cal. Rptr. 17 (1990))*. Since this **[*11]** Court has determined Doghouse has not sufficiently alleged the existence of a contract or that Doghouse failed to receive the benefits of any contract, this cause of action must also be dismissed. Hence, the Motion to Dismiss Count Two is **GRANTED** with leave to amend.

E. Count Three: Breach of Warranty of Fitness for Particular Purpose

In Count Three, Doghouse alleges a breach of warranty under Article II of the California Uniform Commercial Code ("UCC"). Doghouse alleges DirecTV breached this warranty "by deceiving and inducing . . . Doghouse into believing the Program that was purchased and paid for was had [sic] clear title and was transmitted without infringing on the rights of any third parties." (ATPC at ¶ 32.) Thus, DirecTV breached the warranty of fitness for a particular purpose "when it sold, licensed, and transmitted the Program to . . . Doghouse" (*Id.* at ¶ 80.)

The UCC only applies to contracts for sale of goods and not to contracts for the sale of services. *Cal. Com. Code § 2102*. The UCC defines "goods" as "all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale." *Cal. Com. Code § 2105*; *see also Simulados Software, Ltd. v. Photon Infotech Private, Ltd., 40 F. Supp. 3d 1191, 1199 (N.D. Cal. 2014)*. When something is a combination of goods and services, **[*12]** courts look to "whether the thrust is the rendition of service with goods incidentally involved or whether the transaction is a sale of goods with labor incidentally involved." *TK Power, Inc. v. Textron, Inc., 433 F. Supp. 2d 1058, 1061 (N.D. Cal. 2006)*.

This Court agrees with DirecTV (and Doghouse appears to concede) that the transmission of cable television programming is a service rather than a good. The leased equipment is only incidentally involved and merely makes it possible for DirecTV to provide clients its television services. Hence, DirecTV's Motion to Dismiss Count Three is **GRANTED** without leave to amend.

F. Count Four: Unfair Practices/Fraud in Advertising

In Count Four, Doghouse alleges DirecTV violated California's False Advertising Law found in the *California Business and Professions Code §§ 17500-17509*. This law prohibits the dissemination of statements that are "untrue or misleading, and which [are] known, or which by the exercise of reasonable care should be known, to be untrue or misleading." *Cal. Bus. & Prof. Code §17500*. Courts have interpreted this provision broadly to "embrace not only advertising which is false, but also advertising which although true, is either actually misleading or which has a capacity, likelihood or tendency to deceive or confuse the public." **[*13]** *Inter-Mark USA, Inc. v. Intuit, Inc., No. C-07-04178 JCS, 2008 U.S. Dist. LEXIS 18834, 2008 WL 552482, at *9 (N.D. Cal. 2008)* (quoting *Leoni v. State Bar, 39 Cal. 3d 609, 626, 217 Cal. Rptr. 423, 704 P.2d 183 (1985))*.

Where a plaintiff alleges fraud as a basis for a violation of his false advertising claim, he will be subject to the higher "particularity" pleading standard required under *Rule 9(b)*. *In re Sony Grand Wega KDF-E A10/A20 Series Rear Projection HDTV Television Litig., 758 F. Supp. 2d 1077, 1093 (S.D. Cal. 2010)*. Since Doghouse alleges fraud as the basis for its false advertising claim, it is subject to this higher pleading standard.

Accordingly, to properly plead its false advertising claim, Doghouse must identify specific advertisements, when and where they were shown, and why they were untrue or misleading. *Id.; see also Williams v. Gerber Prods. Co., 552 F.3d 934, 938 (9th Cir. 2008)* ("[T]he primary evidence in a false advertising case is the advertising itself.") (quotation omitted); *VP Racing Fuels, Inc. v. Gen. Petroleum Corp., 673 F. Supp. 2d 1073, 1088 (E.D. Cal. 2009)* ("The underlying element of a false advertising claim is some type of advertising statement.") In *In re Sony Grand*

Wega, for example, the Court granted defendant's motion to dismiss the false advertising claim because plaintiffs failed to identify specific advertisements, when and where they were shown, or why they were untrue or misleading. *In re Sony Grand Wega, 758 F. Supp. 2d at 1093-94*.

In this case, Doghouse alleges DirecTV sent Doghouse "advertisements that [DirecTV] was the authorized distributor and source for the Program" and "paper advertisements and advertisements over the Internet that solicited **[*14]** the sale of the Program but did not disclose that DirecTV's sale of the Program required as a condition of the sale, a separate price or fee to be paid over to [Joe Hand]." (ATPC at ¶¶ 87, 88.) Doghouse fails to identify any specific advertisement, let alone when and where it was shown. Doghouse's allegations of false advertising are insufficient even under the notice pleading standard of *Rule 8(a)* and certainly lack the particularity required under *Rule 9(b)*.

Therefore, DirecTV's Motion to Dismiss Count Four is **GRANTED**. Again, since Doghouse may be able to cure this deficiency, this Court gives Doghouse leave to amend. Any amended cause of action must include specifics as to what advertisement was received, when and where, and specifically what in the advertisements is alleged to be misleading or false.

G. Count Five: Unfair Competition

In Count Five, Doghouse alleges unfair competition in violation of California's Unfair Competition Law ("UCL"), *Cal. Bus. & Prof. Code §§ 17200 et seq.* This law prohibits business acts or practices that are "unlawful," "unfair," or "fraudulent." *Id.* *§17200*. Each of these three prongs constitutes a separate and independent cause of action. *See* *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 180, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)*.

Doghouse alleges DirecTV deceived the public by "knowingly licens[ing] and sell[ing] the Program **[*15]** to commercial customers improperly . . . designated as 'residential.'" (ATPC at ¶ 98.) Doghouse claims that by misrepresenting the owner and licensor of the Program, DirecTV was able to sell the Program at significantly reduced rates to small business owners and other members of the public, who were then deceived into purchasing DirecTV. (*Id.* at ¶¶ 100-102.) Finally, Doghouse alleges DirecTV "created a strict pricing model for the licensing of the Program which not only confuses the general public as a result of the concealed terms and license rights, but also inhibits competition in the marketplace as the Program is unique and not otherwise available to the general public." (*Id.* at ¶ 103.) Doghouse claims this constitutes unfair competition because the purpose of the "dividing of the license fees into two discrete categories of 'residential' and 'commercial' is to restrain competition." (*Id.* at ¶ 104.)

This Court will analyze these allegations under each of the three prongs of the unfair competition law.

1. Unlawful prong

The UCL's "unlawful" prong is essentially an incorporation-by-reference provision. *See* *Cel-Tech, 20 Cal. 4th at 180* ("By proscribing 'any unlawful' business practice, *section 17200* borrows violations of other **[*16]** laws and treats them as unlawful practices that the [UCL] makes independently actionable." (citations and some internal quotation marks omitted)). "Violation of almost any federal, state, or local law may serve as the basis for a UCL claim." *Plascencia v. Lending 1st Mortg., 583 F. Supp. 2d 1090, 1098 (N.D. Cal. 2008)* (citing *Saunders v. Super. Ct., 27 Cal. App. 4th 832, 838-39, 33 Cal. Rptr. 2d 438 (1994))*. "When a statutory claim fails, a derivative UCL claim also fails." *Aleksick v. 7-Eleven, Inc., 205 Cal. App. 4th 1176, 1185, 140 Cal. Rptr. 3d 796 (2012)*.

In the ATPC, Doghouse fails to allege that DirecTV violated any law. Therefore, the claim under the unlawful prong must fail.

2. Unfair prong

Under the UCL, for suits brought by consumers, courts have applied either the balancing test set forth in *S. Bay Chevrolet v. Gen. Motors Acceptance Corp., 72 Cal. App. 4th 861, 85 Cal. Rptr. 2d 301 (1999)*, the test set forth in *Cel-Tech*, or the three-pronged test set forth in the FTC Act. *Davis v. HSBC Bank Nev., N.A., 691 F.3d 1152, 1169-70 (9th Cir. 2012)*. However, the Ninth Circuit has declined to apply the FTC standard to consumer actions "in the absence of a clear holding from the California Supreme Court" that it should be applied. *Lozano v. AT&T Wireless Servs., Inc., 504 F.3d 718, 736 (9th Cir. 2007)*.

Under the balancing test, "unfair" conduct occurs when that practice "offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." *Davis, 691 F.3d at 1169* (citing *S. Bay Chevrolet, 72 Cal. App. 4th at 886-87*). "Under this approach, courts must examine the practice's impact on its alleged victim, balanced against the reasons, **[*17]** justifications and motives of the alleged wrongdoer. In short, this balancing test must weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim." *Id.* (internal citations and quotations omitted). Under the *Cel-Tech* test, which was expressly limited in *Cel-Tech* to actions by competitors, but has been applied by courts to consumer actions, an "unfair" practice means "conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Id. at 1169-70* (citing *Cel-Tech., 20 Cal. 4th at 187* & n. 12).

Although Doghouse alleges DirecTV's conduct "inhibit[ed] competition," it does not identify the established public policy being offended, or make clear how DirecTV's conduct is immoral, unethical, unscrupulous or substantially injurious to consumers. Doghouse also fails to allege any acts that threaten an incipient violation of an ***antitrust law*** or violate the spirit of the antitrust laws. Therefore, any claim under this prong must also fail.

3. Fraudulent prong

To state a claim under the UCL's "fraudulent" prong, Doghouse **[*18]** must plead that DirecTV's allegedly fraudulent business practice is one in which "members of the public are likely to be deceived." *Schnall v. Hertz Corp., 78 Cal. App. 4th 1144, 1167, 93 Cal. Rptr. 2d 439 (2000)*. "Unless the challenged conduct targets a particular disadvantaged or vulnerable group, it is judged by the effect it would have on a reasonable consumer." *Puentes v. Wells Fargo Home Mortg., Inc., 160 Cal. App. 4th 638, 645, 72 Cal. Rptr. 3d 903 (2008)* (internal quotations and citation omitted). Reduced to the elements, a plaintiff must allege with specificity that a defendant's alleged misrepresentations: "(1) were relied upon by the named plaintiffs; (2) were material; (3) influenced the named plaintiffs' decision to purchase the product [or enter into an agreement]; and (4) were likely to deceive members of the public." *Yastrab v. Apple, Inc., No. 5:14-cv-01974-EJD, 2015 U.S. Dist. LEXIS 37119, 2015 WL 1307163, at *19 (N.D. Cal. Mar. 23, 2015)* (quotations omitted).

As discussed above, Doghouse fails to allege with sufficient particularity what alleged misrepresentations were made and by whom they were made. However, it appears Doghouse may be able to allege more specific misrepresentations, therefore, Doghouse is given leave to amend.

III. DIRECTV'S MOTION TO AMEND COUNTERCLAIMS

DirecTV moves to amend its counterclaims. (ECF No. 84.) As it points out, this case is procedurally in its infancy. No answer has been filed. No scheduling **[*19]** order has been issued. No discovery has been conducted. *Rule 15(a)(2) of the Federal Rules of Civil Procedure* directs that "a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." *Fed. R. Civ. P. 15(a)(2)*. "[T]his policy is to be applied with extreme liberality." *Morongo Band of Mission Indians v. Rose, 893 F.2d 1074, 1079 (9th Cir. 1990)*. Although the decision whether to allow amendment is in the court's discretion, "[i]n exercising its discretion, a court must be guided by the underlying purpose of *Rule 15*—to facilitate decision on the merits rather than on the pleadings or technicalities." *DCD Programs, Ltd. v. Leighton, 833 F.2d 183, 186 (9th Cir. 1987)* (internal quotations omitted). Denial of a request to amend is only proper when it "would be clearly frivolous, unduly prejudicial, cause undue delay or a finding of bad faith is made." *United Union of Roofers, Waterproofers and Allied Trades No. 40 v. Ins. Corp. of Am., 919 F.2d 1398, 1402 (9th Cir. 1990)*; *see also* *Owens*

v. Kaiser Found. Health Plan, Inc., 244 F.3d 708, 712-13 (9th Cir. 2001) (no prejudice where amended pleading would not delay proceedings and not require additional discovery).

There is no evidence the amendment is clearly frivolous or made in bad faith. Furthermore, there is no evidence of undue delay. The original counterclaim was filed October 21, 2014 (ECF No. 63) and ten days later, upon the joint motion of the parties, the matter was stayed (ECF No. 67, 70-74). The stay was lifted on July 6, 2015 (ECF No. 78), and DirecTV attempted **[*20]** to file its Amended Counterclaim on August 17, 2015 (ECF No. 82). The Amended Counterclaim was rejected on August 24 because DirecTV had failed to request permission from the Court pursuant to *Rule 15*, so five days later, on August 29, 2015, DirecTV filed this motion seeking leave from the Court to file the Amended Counterclaim. The Court finds DirecTV has not delayed filing the Amended Counterclaim.

Doghouse's primary opposition appears to be based on an argument that the amendment would be unduly prejudicial because it is duplicative of a pleading filed in another action, involving other parties, in front of a different judge. Although this Court understands a motion to consolidate that action with this one is pending in that other court, currently two separate actions exist. The fact that DirecTV amended in that other action does nothing to amend the counterclaims in this case. Therefore, this Court rejects Doghouse's argument that it would be unduly prejudiced because the amended counterclaim is "identical and redundant" to a pleading filed in another case. Doghouse fails to show that filing the Amended Counterclaim would be unduly prejudicial at this early stage of the proceedings. In **[*21]** fact, omitting one cause of action could save Doghouse time and energy.

Accordingly, DirecTV's Motion for Leave to File a First Amended Counterclaim (ECF No. 84) is **GRANTED**. Consequently, Doghouse's Motion to Dismiss the original counterclaim (ECF No. 68) is **DENIED AS MOOT**.

IV. CONCLUSION

DirecTV's Motion to Dismiss the ATPC (ECF No. 64) is **GRANTED**. Doghouse is given leave to amend all counts except for Count Three which is dismissed with prejudice. Any Second Amended Third Party Complaint must be filed no later than **March 21, 2016**. DirecTV's Motion to file amended counterclaims (ECF No. 84) is **GRANTED**. The amended counterclaims must be filed no later than **March 21, 2016**.

Neither party may add any new causes of action. Furthermore, both parties are cautioned that they must comply with Civil *Local Rule 15.1* when filing any amended pleading, including *Local Rule 15.1(c)* requiring that "[a]ny amended pleading . . . must be accompanied by a version of that pleading that shows—through redlining, underlining, strikeouts, or other similarly effective typographic methods—how that pleading differs from the previously dismissed pleading." *Civ. L.R. 15.1(c)*.

Lastly, Doghouse's Motion to Dismiss the Counterclaims (ECF No. 68) is **DENIED AS MOOT**, and **[*22]** Doghouse's Motion to File a Supplemental Exhibit (ECF No. 95) is **DENIED**.

IT IS SO ORDERED.

DATED: February 29, 2016

/s/ Cynthia Ann Bashant

Hon. Cynthia Ann Bashant

United States District Judge

Merced Irrigation Dist. v. Barclays Bank PLC

United States District Court for the Southern District of New York

February 29, 2016, Decided; February 29, 2016, Filed

15-cv-4878 (VM)

Reporter

165 F. Supp. 3d 122 *; 2016 U.S. Dist. LEXIS 28890 **; 2016-1 Trade Reg. Rep. (CCH) P79,523

MERCED IRRIGATION DISTRICT, Plaintiff, - against - BARCLAYS BANK PLC, Defendant.

Subsequent History: Reconsideration denied by *Merced Irrigation Dist. v. Barclays Bank PLC, 178 F. Supp. 3d 181, 2016 U.S. Dist. LEXIS 46516 (S.D.N.Y., Apr. 1, 2016)*

Motion denied by *Merced Irrigation Dist. v. Barclays Bank PLC, 220 F. Supp. 3d 412, 2016 U.S. Dist. LEXIS 163006 (S.D.N.Y., Nov. 7, 2016)*

Settled by, Class certification granted by, Costs and fees proceeding at, Judgment entered by *Merced Irrigation Dist. v. Barclays Bank PLC, 2018 U.S. Dist. LEXIS 159381 (S.D.N.Y., Sept. 14, 2018)*

Core Terms

prices, trading, contracts, electricity, manipulation, alleges, swap, anticompetitive, antitrust, monopoly power, conspiracy, hub, unjust enrichment, markets, argues, restraint of trade, Sherman Act, parties, motion to dismiss, relevant market, monopolization, defendants', pled, traders, fraudulent concealment, statute of limitations, economic injury, notice, unfair competition, concerted action

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Judges: VICTOR MARRERO, United States District Judge.

Opinion by: VICTOR MARRERO

Opinion

[*128] DECISION AND ORDER

VICTOR MARRERO, United States District Judge.

Plaintiff Merced Irrigation District ("Merced") is a state-recognized irrigation district located in Merced, California. On behalf of itself and others similarly situated (the "Proposed Class"), Merced alleges federal antitrust violations against defendant Barclays Bank PLC ("Barclays"), a financial services corporation headquartered in the United Kingdom. Merced's claims arise out of an alleged unlawful conspiracy to manipulate daily index prices for electricity between November 1, 2006 and December 31, 2008 (the "Class Period") in violation **[**2]** of *Sections 1* and *2* of the Sherman Antitrust Act ("Sherman Act"), *15 U.S.C. Sections 1*, *2* ("*Section 1*" and "*Section 2*"), and the California Unfair Competition Law ("UCL"), Cal. Bus. & Prof. *Section 17200*. Merced also alleges claims of unjust enrichment in its complaint. ("Complaint", Dkt. No. 1.)

Barclays filed a motion to dismiss the Complaint in its entirety pursuant to *Rule 12(b)(6) of the Federal Rules of Civil Procedure* ("*Rule 12(b)(6)*"), asserting that Merced fails to state a claim upon which relief may be granted. ("Motion", Dkt. No. 12.) Merced filed opposition papers ("Opposition", Dkt. No. 14) and Barclays replied. ("Reply", Dkt. No. 17.) For the reasons stated below, Barclays' motion is GRANTED in part and DENIED in part.

I. FACTUAL BACKGROUND[1]

A. THE ELECTRICITY MARKET

As an irrigation district engaged in the business of generating, distributing, purchasing, and selling electricity to customers, Merced purchased peak electricity[2] from another California irrigation district during the Class Period. Those contracts settled according to the Dow Jones Daily Index price for peak power at the northern California trading hub known as North Path 15, which is set by averaging market prices for electricity-related contracts at North Path 15. North Path 15 was also one of four western electricity trading **[*129]** hubs (the "Trading Hubs")[3] in which Barclays bought and sold electricity-related contracts through its West Power Desk in New York City.

Two types of electricity-related contracts are relevant to this case: contracts for next-day delivery of physical electricity, or "dailies", and financial "swap" contracts by which parties agree to exchange payments depending on the daily index price on a specified settlement date at a specified location. The prices at which dailies and swap contracts settle are based on the index price published by certain exchanges. Those exchanges calculate index prices based on transactions for electricity at specific trading locations. One of these exchanges is the Intercontinental Exchange ("ICE"), which calculates a Daily Index price based on the weighted average price of all day-ahead fixed-price physical electricity transactions at the relevant location. Dow Jones also calculates prices based on the same dates and trading hub locations, which Merced alleges move in lockstep with the ICE Daily Index price (collectively with the ICE Daily Index price, the "Daily Index Prices"). Market participants trading in physical positions have the obligation to deliver or receive electricity at the Daily Index Prices, while those trading in purely financial positions, including swap contracts, **[**5]** have no obligation to deliver or receive physical electricity.

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[1] The factual summary below, except where otherwise noted, derives from the Complaint and the documents cited or relied upon for the facts pleaded therein, which the Court accepts as true for the purposes of ruling on a motion to dismiss. See *Spool v. World Child Int'l Adoption Agency, 520 F.3d 178, 180 (2d Cir. 2008)* ; see also *Chambers v. Time Warner, Inc., 282 F.3d 147, 152 (2d Cir. 2002)* . Except where specifically quoted, no further citation will be made to the Complaint or the documents referred to in it. As discussed infra, documents drawn upon by the Court include the Federal Energy Regulatory Commission's Order Assessing Civil Penalties against Barclays (the "FERC Order"), which is referenced **[**3]** in and integral to the Complaint. See *Chambers, 282 F.3d 152-53*; *Int'l Audiotext Network, Inc. v. American Tel. and Tel. Co., 62 F.3d 69, 71-72 (2d Cir. 1995)*.

[2] Electricity contracts are traded for both peak and off-peak products. Peak electricity includes power provided Monday through Saturday between the hours of 7:00 a.m. to 10:00 a.m., excluding holidays.

[3] The four Western United States trading hubs that used the Daily Index Prices for peak or non-peak power are known as Mid-Columbia, located in Washington; Palo Verde, located in Arizona; South Path 15, located in southern California; and North Path 15, located in northern **[**4]** California.

Although Barclays did not have the capability to provide or accept physical electricity, during the Class Period it traded both short-term contracts for physical electricity -- which it then "flattened", or offset, by purchasing or selling physical contracts for an equal volume of electricity in the opposite direction prior to delivery -- and longer-term swap contracts that settled at prices set by the ICE Daily Index. Merced bought peak electricity under contracts settled according to the Dow Jones index price for North Path 15 during the Class Period, including between April and June 2 007. The Proposed Class is defined as "any individual or entity that held any contract which settled against the ICE or Dow Jones published daily index prices for peak or non-peak power" at any of the Trading Hubs during the Class Period, and was damaged by movements in index prices caused by Barclays' manipulation. (Dkt. No. 1 at ¶119.)

B. BARCLAYS' ALLEGED INDEX PRICE MANIPULATION

Merced asserts that Barclays, seeking greater revenues on its financial swap contracts, engaged in trading at noncompetitive prices that purposely inflated or **[**6]** depressed ICE Daily Index prices in the direction that benefited Barclays' swap contracts.

The alleged manipulation had three steps. First, Barclays' traders entered into a swap contract that would settle on a particular date based on the ICE Daily Index price. Then the traders purchased physical electricity contracts in the opposite direction from the swap (i.e. contracts to buy if Barclays was a seller in the swap, or vice versa). Finally, Barclays' traders bought or sold large quantities of underlying daily contracts at artificial money-losing prices, ostensibly for the purpose of flattening the contracts for physical electricity, but also enabling Barclays to trade large volumes of daily contracts that would impact the ICE Daily Index price at which **[*130]** Barclays' swap contract then settled. Although Barclays would lose money on the daily transactions,[4] those losses were more than offset by the profit it accrued by settling the swap contracts at artificial ICE Daily Index prices. Those prices would be either artificially high, if Barclays held a "long" swap contract as a buyer and bought a high volume of daily contracts at inflated prices to raise the index price, or artificially low, **[**7]** if Barclays held a "short" swap contract as a seller and sold daily contracts at less-than-market prices to drive down the index price on the settlement date.

As an illustration, if Barclays held a long swap contract to be settled on a particular day at the North Path 15 trading hub, it would create a large short physical position in the daily markets at that hub by entering into contracts to sell electricity. Then, to avoid having to deliver the physical electricity provided for in the daily contracts while simultaneously inflating the Daily Index Prices to generate maximum revenue for its swap contract, Barclays would "flatten" its entire short physical position prior to the contract's settlement date by buying large quantities of next-day physical contracts at higher than market prices, driving up the weighted average price of electricity and, consequently, the Daily Index Prices. When the swap contract settled, Barclays would have made a sizeable profit even after losing money overpaying for the next-day physical contracts.

Merced alleges that Barclays' large position in swap contracts **[**8]** and significant trading in daily contracts at anticompetitive prices caused increases or decreases in the ICE Daily Index price as well as the Dow Jones Daily Index, which moved in lockstep with the ICE Daily Index rate. Barclays accumulated a net loss of more than $4 million in dailies contract trading but gained $34.9 million on its swap contracts.

C. THE FERC INVESTIGATION AND ORDER

After commencing an investigation in 2 007, the United States Federal Energy Regulatory Commission ("FERC") Office of Enforcement issued an order to show cause in October 2012 directing Barclays and four individual Barclays traders[5] to show cause why they should not be found to have violated FERC's Anti-Manipulation Rule, *18 C.F.R. Section 1c.2*, promulgated under *Section 222* of the Federal Power Act ("FPA"), *16 U.S.C. Section 824v(a)*, by manipulating California electricity markets from November 2006 to December 2008. See Order to Show Cause

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[4] The FERC Report alleges that Barclays lost money on daily trading at an average of $117,404 per month.

[5] The four West Power Desk traders -- Scott Connelly, Daniel Brin, Karen Levine and Ryan Smith -- are named in the Complaint but are not defendants in this action. The traders' deposition testimony, emails, and instant messages were evidence in the FERC investigation, FERC Report, and FERC Order, and are thereby incorporated into the Complaint.

and Notice of Proposed Penalty, *FERC Docket No. 08-0800, 14 FERC ¶ 61,084 (Oct. 31, 2012)* ("FERC Report"). Subsequently, FERC issued an order concluding that Barclays and the individual traders violated the Anti-Manipulation Rule through the use of a "coordinated, fraudulent scheme" to manipulate wholesale power markets on 655 product days over 35 product months[6] at the Trading Hubs **[**9]** named in Merced's Complaint. Order **[*131]** Assessing Civil Penalties, FERC Docket No. 08-0800, 144 FERC ¶ 61, 041 (July 16, 2013) ("FERC Order") at 3. The FERC Order estimated that Merced's manipulations resulted in net profits of $34.9 million while causing at least $139.3 million in losses to other market participants who either paid higher than competitive prices for electricity or sold electricity at lower than competitive prices during the Class Period. Although Barclays disputed that its trading had a. material effect on prices, the FERC Order found that it had, in fact, "distorted market outcomes." The FERC Order assessed Barclays a civil penalty of $4 35 million and disgorgement of $34.9 million in profits.

Merced **[**10]** alleges that it did not learn of Barclays' price manipulation until April 5, 2012, when FERC released a public notice of Barclays' alleged violations of the FPA. Because Barclays' unlawful conduct was not revealed until that time, and because Barclays' traders concealed their price manipulation during the Class Period and afterward, Merced argues that the statute of limitations applicable to its claims should not begin to run until April 5, 2012.

E. MOTION TO DISMISS

Merced brought the instant case against Barclays, claiming that, through its manipulation of the Daily Index Prices, Barclays unreasonably restrained trade and monopolized prices in violation of federal ***antitrust law***. Barclays filed the instant Motion seeking to dismiss the Complaint pursuant to *Rule 12(b)(6)*. Barclays argues that Merced failed to allege an adequate claim for federal antitrust violations in the Complaint because it has not shown that Barclays: 1) acted in concert with another party or restrained the competitive freedom of anyone to trade electricity-related products, as required for a *Section 1* claim, or 2) possessed monopoly power in a relevant market or excluded competitors, as required for a *Section 2* claim. Barclays further moves **[**11]** the Court to decline to exercise supplemental jurisdiction over Merced's state law claims and to dismiss Merced's claims for unjust enrichment for failure to plead a contractual or quasi-contractual relationship between Merced and Barclays.

In response, Merced argues that Barclays violated both *Section 1* and *Section 2*, as well as California and New York state law, by entering into daily and longer-term swap contracts that unreasonably restrained trade in the markets in which the Daily Index Prices were set, and by exercising monopoly power over electricity prices as demonstrated through Barclays' direct control over Daily Index Prices during the Class Period.

II. LEGAL STANDARD

A. 12(b)(6) MOTION TO DISMISS

Under *Rule 12(b)(6)*, a complaint should be dismissed if the plaintiff has not offered sufficient factual allegations that render the claim facially plausible. See *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* . The complaint should not be dismissed if the factual allegations "raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. The pleadings must include more than "a formulaic recitation of the elements of a cause of action," *Twombly, 550 U.S. at 555*; it must include "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct **[**12]** alleged." *Iqbal, 556 U.S. at 678*.

The role of a court in ruling on a motion to dismiss is to "assess the legal feasibility of the complaint, not to assay the weight of **[*132]** the evidence which might be offered in support thereof." *In re Initial Pub. Offering Sec. Litig., 383 F. Supp. 2d 566, 574 (S.D.N.Y. 2005)* (internal quotation marks omitted). A court must accept all well-pleaded factual allegations in the complaint as true, and draw all reasonable inferences in the plaintiff's favor. See

[6] "Product days" denote trading of a specific contract related to a specific trading hub for a specific calendar day. "Product months" refer to the same information for a specific calendar month.

Chambers v. Time Warner, Inc., 282 F.3d 147, 152 (2d Cir. 2002). Even so, a court should not accept as true any "legal conclusion couched as a factual allegation." Iqbal, 556 U.S. at 678-79.

Federal Rule of Civil Procedure 8 (a) ("Rule 8(a)") requires only a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Where Rule 8(a)'s pleading standard governs, "dismissal is improper as long as the complaint furnishes adequate notice of the basis of the plaintiff's claim . . . and * relief could be granted under [some] set of facts consistent with the allegations.'" In re Global Crossing, Ltd. Sec. Litig., No. 02 Civ. 910, 2005 U.S. Dist. LEXIS 26942, 2005 WL 2990646, at *8 (S.D.N.Y. Nov. 7, 2005) (alteration in original) (quoting Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512-14, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002)).

When adjudicating a motion to dismiss, a Court may consider documents incorporated in it by reference. See Cortec Indus., Inc. v. Sum Holding L.P., 949 F.2d 42, 47 (2d Cir. 1991) ; see also ATSI Commc'ns, Inc. v. Shaar Fund, Ltd., 493 F.3d 87 (2d Cir. 2007)(considering "documents possessed by or known to the plaintiff upon which it relied in bringing suit" in a 12(b) (6) motion to dismiss) . When **[**13]** a plaintiff chooses not to attach to the complaint or incorporate by reference a document on which it relies and which is integral to the complaint "the court may nevertheless take the document into consideration in deciding the defendants' motion to dismiss, without converting the proceeding to one for summary judgment." Intfl Audiotext Network, Inc. v. American Tel, and Tel. Co., 62 F.3d 69, 71-72 (2d Cir. 1995) ; see also Chambers, 282 F.3d at 152.

III. DISCUSSION

Merced asserts causes of action for violation of Sections 1 and 2 of the Sherman Act, violation of California state law, and unjust enrichment on the basis of Barclays' alleged rate manipulation in the electricity markets described above. Merced argues that Barclays' manipulation of Daily Index Prices in favor of its swap contracts restrained normal market forces of supply and demand, causing Merced and other buyers and sellers during the Class Period to pay supracompetitive prices or to accept subcompetitive prices. Because the FERC Report and FERC Order are public documents integral to and incorporated into Merced's Complaint, the Court considers them in deciding the Motion.

A. STANDING

As a threshold matter, the Court must determine whether Merced has established standing to bring a federal antitrust claim. Private plaintiffs suing under either Section 1 **[**14]** or Section 2 of the Sherman Act must bring their claim by way of Section 4 of the Clayton Act, 15 U.S.C. Section 15, which confers standing on any private plaintiff who "shall be injured in his business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. § 15. For a plaintiff to sue pursuant to the Clayton Act, it must show 1) an antitrust injury and 2) that it is a proper plaintiff in light of four "efficient enforcer" factors. In re DDVAP Direct Purchaser Antitrust Litig., 585 F.3d 677, 688 (2d Cir. 2009). The Court will consider each of these requirements in turn.

[*133] 1. Antitrust Injury

The Second Circuit described the process for determining whether a plaintiff has suffered an antitrust injury in Gatt Commc'ns, Inc. v. PMC Assocs., L.L.C., 711 F.3d 68, 76 (2d Cir. 2013). First, the plaintiff must identify the anticompetitive practice. Second, the court must identify the actual injury the plaintiff alleges. Finally, the court must compare the anticompetitive effect of the practice to the actual injury alleged. Id. at 76. The Circuit Court observed:

> [i]t is not enough for the actual injury to be causally linked to the asserted violation. Rather, in order to establish antitrust injury, the plaintiff must demonstrate that its injury is of the type the antitrust laws were intended to prevent and that flows from that which makes [or might make] defendants' acts unlawful.

Id; see also Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990). Merced has pled an antitrust injury causally linked to Barclay's practices: it is a purchaser of electricity on the daily markets in which it alleges it paid higher supra-competitive prices or received lower sub-competitive prices as a result of Barclays' rate-manipulation. (See Dkt. No. 1 at ¶ 112.) This is an injury "of the type the antitrust laws were intended to prevent." Id.; see also *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*.

Conduct **[**15]** similar to the conduct alleged in the Complaint was found sufficient to support antitrust injury in *In re Aluminum Warehousing Antitrust Litig., 95 F. Supp. 3d 419 (S.D.N.Y. 2015)*. In that case, the court found that "the winners and losers of defendants' scheme are not only the counterparties to their trades, but also those who actually need the physical commodity underpinning the trades. . . . [T]his scheme is alleged to have substituted supply and demand-based pricing with pricing driven by the webbed conspiracy described above." *Id. at 443*. As an electricity distributor, Merced was obligated to purchase electricity at the daily rates to fulfill its contracts with customers. Those daily rates, in turn, were dictated by Barclay's high-volume trading at non-market prices instead of the forces of supply and demand for electricity.

Merced has also demonstrated the connection between Barclays's alleged misconduct and the supracompetitive rates Merced paid for electricity. Barclays argues that it traded only on the Dow Jones index while Merced traded exclusively on the ICE index, and therefore any injury Merced suffered was removed from Barclays's action. That Merced and Barclays traded on different indices is not fatal to Merced's standing, however, because Merced has alleged facts **[**16]** showing that the Dow Jones and ICE indices for peak power at the North Path hub moved in lockstep during the time period in which Barclays manipulated prices. The two indices are "intertwined", Merced alleges, because they published daily index prices for the same dates, trading hub locations and products. (Dkt. No. 1 at ¶35.) The Complaint includes a chart displaying peak power rates for Dow Jones and ICE at North Path 15 for April through June 2007, months during which Barclays allegedly engaged in manipulative trading on that hub. (Dkt. No. 1 at ¶35, Ex. B.) On only two trading days did the peak rate differ by more than one point between the two indices. "[W]hen market prices move in lockstep, . . . the distinction between them is of no consequence to antitrust standing analysis." *In re Copper Antitrust Litig., 98 F. Supp. 2d 1039, 1049 (W.D. Wis. 2000)*. Merced's allegations are **[*134]** sufficient to establish an actual injury caused by Barclays's anticompetitive actions.

2. Efficient Enforcer

In addition to establishing antitrust injury, a plaintiff must also satisfy the four "efficient enforcer factors": 1) the directness or indirectness of the asserted injury; 2) the existence of an identifiable class of persons whose self-interest would normally motivate them to **[**17]** vindicate the public interest in antitrust enforcement; 3) the speculativeness of the alleged injury; and 4) the difficulty of identifying damages and apportioning them among direct and indirect victims so as to avoid duplicative recoveries. *In re DDAVP, 585 F.3d at 688* (citing *Associated Gen. Contractors of California, Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 542, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983))*.

Each of the four "efficient enforcer" factors favors granting standing to Merced. As to the first factor -- the directness of the asserted injury -- the chain of causation between Barclays's alleged market restraint and Merced's injury is not so remote as to preclude antitrust standing. Although Barclays argues that Merced's injuries are too "indirect and remote" to confer antitrust standing (Dkt. No. 13 at 13), Merced has alleged facts showing how Barclays's price manipulation had a demonstrable effect on the prices Merced paid for electricity. Second, Merced belongs to an identifiable class -- the very Proposed Class it seeks to certify in this action -- of individuals and entities that were injured by movements in the Daily Index Prices caused by Barclays's manipulative trading during the Class Period, and therefore are motivated to enforce the antitrust laws due to their "natural economic self-interest" in avoiding overpaying for **[**18]** electricity. See *Daniel v. Am. Bd. of Emergency Med., 428 F.3d 408, 444 (2d Cir. 2005)*. Third, the allegations presented in Merced's Complaint, supported by the detailed analysis contained in the FERC Report and FERC Order, are not unduly speculative as to nature or amount of loss during the months that Barclays allegedly manipulated electricity markets. An exact accounting of damages is not required at this stage of the proceedings, "especially . . . when the most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." *In re DDAVP, 585 F.3d at 689* (internal quotation omitted). Finally, identifying and apportioning damages would not be prohibitively difficult and would not lead to duplicative recoveries.

The Court is persuaded that Merced has satisfied both factors required for antitrust standing under Section 4 of the Clayton Act, thereby establishing that Merced is a proper plaintiff to bring suit against Barclays for federal antitrust violations.

B. STATUTE OF LIMITATIONS AND FRAUDULENT CONCEALMENT

Having determined that Merced has standing to bring a private civil antitrust action under *15 U.S.C. Section 15*, the Court will now consider whether those claims and Merced's state law claims are timely filed or, alternatively, **[**19]** whether Merced has sufficiently alleged fraudulent concealment to toll the statute of limitations.

Private civil antitrust actions have a statute of limitations of four years. *15 U.S.C. § 15b*. "An antitrust action accrues and the statute of limitations begins to run when the defendant commits an act that injures the plaintiff." *In re Nine West Shoes Antitrust Litig., 80 F. Supp. 2d 181, 191 (S.D.N.Y. 2000)*. In an alleged **[*135]** price-fixing conspiracy, "each overt act that is part of the violation and that injures the plaintiff . . . starts the statutory period running again, regardless of the plaintiff's knowledge of the alleged illegality at much earlier times." *Id. at 192*. Plaintiffs may only recover damages based on acts falling within the statutory period, and not based on previous acts. See *Hinds Cty., Miss. v. Wachovia Bank N.A., 620 F. Supp. 2d 499, 519 (S.D.N.Y. 2009)*. Merced's state law claims are similarly subject to statutes of limitations: the UCL bars claims brought more than four years after the cause of action accrued, *Cal. Bus. Prof. Code § 17208*; and New York law establishes a six-year statute of limitations for unjust enrichment claims, accruing at the time of the wrongful act. See *N.Y. C.P.L.R. § 213*.

The alleged acts giving rise to the Complaint took place between November 1, 2006 and December 31, 2008. Merced did not file suit until June 23, 2015, more than six years after the last wrongful act alleged. **[**20]** Merced's claims, then, are all based on events outside of the relevant limitations periods. However, Merced argues that the doctrine of fraudulent concealment prevented the statute of limitations from taking effect prior to April 2012, when the FERC first made public its investigation of Barclays's market manipulation.

To show fraudulent concealment, a plaintiff must show: 1) that the defendant concealed the existence of the antitrust violation; 2) that the plaintiff remained in ignorance of the violation until sometime within the four-year antitrust statute of limitations; and 3) that the plaintiff's continuing ignorance was not the result of lack of diligence. See *Hinds County, 620 F. Supp. 2d at 520*; *In re Nine West, 80 F. Supp. 2d at 192*; *State of N.Y. v. Hendrickson Bros., 840 F.2d 1065, 1083 (2d Cir. 1988)*. A claim for fraudulent concealment must be pled with particularity, in accordance with the heightened pleading standards of *Rule 9(b) of the Federal Rules of Civil Procedure* ("*Rule 9(b)*"). See *Hinds County, 620 F. Supp. 2d at 520*; *In re Nine West, 80 F. Supp. 2d at 192*. The doctrine of fraudulent concealment also applies to claims under California's Unfair Competition Law, see *Yumul v. Smart Balance, Inc., 733 F. Supp. 2d 1117, 1132 (C.D. Cal. 2010)*, and to claims for unjust enrichment under New York law, see *Grynberg v. ENI S.p.A., No. 06 Civ. 6495, 2009 U.S. Dist. LEXIS 71563, 2009 WL 2482181, at *5 (S.D.N.Y. Aug. 13, 2009)*.

In the Second Circuit, a plaintiff may prove concealment by showing that a defendant "took affirmative steps to prevent the plaintiff's discovery of his claim or injury or that the wrong itself was of such a nature **[**21]** to be self-concealing." *In re Natural Gas Commodity Litig., 337 F. Supp. 2d 498, 513 (S.D.N.Y. 2004)*. Allegations of price-fixing conspiracies in violation of ***antitrust law*** constitute the type of unlawful activity that is inherently self-concealing. See *In re Nine West, 80 F. Supp. 2d at 193* ("By alleging a price-fixing scheme, the plaintiff sufficiently has alleged the first prong of fraudulent concealment and . . . there is no need to require the pleading of affirmative actions taken by the defendants to prevent the plaintiff's discovery of its claim."). Here, Merced has alleged in extensive detail throughout the Complaint the self-concealing nature of Barclays's unlawful price manipulation scheme, which Merced further alleges could only be discerned by access to internal emails and non-public data. (Dkt. No. 1 at ¶ 115.)

Merced must allege the two remaining prongs of the fraudulent concealment test -- ignorance of the violation until sometime within the limitations period and due **[*136]** diligence -- with particularity. See *In re Issuer Plaintiff Initial Pub. Offering Antitrust Litig., No. 00 Civ. 7804, 2004 U.S. Dist. LEXIS 3892, 2004 WL 487222, at *4 (S.D.N.Y. Mar. 12, 2004)*. Merced states in its Complaint that "prior to FERC's staff's April 5, 2012 public notice of alleged violations by Barclays for the course of conduct described herein, Plaintiff did not discover, and could not with reasonable due diligence have discovered, facts indicating Barclays **[**22]** was engaged in the misconduct alleged herein." (Dkt. No. 1 at ¶ 113.) For purposes of this Motion, the Complaint's pinpointing of the precise date when Merced became aware of the violation satisfies the second prong of the test.

Merced must also plead facts supporting the third prong, which requires that the plaintiff's ignorance of the alleged violations before April 2012 was not for a lack of due diligence. As an initial matter, Merced must have been on inquiry notice of some illegality before having a responsibility to respond with reasonable diligence. See *In re Nine West, 80 F. Supp. 2d at 193*. The Complaint asserts that at no point prior to April 5, 2012 was Merced aware of Barclays's alleged misconduct. If that is the case, it would not have been "apprised of sufficient facts to put [it] on notice" of Barclays's price manipulation such that it could have known of the manipulation "through the exercise of reasonable diligence". *Cerbone v. Int'l Ladies' Garment Workers' Union, 768 F.2d 45, 48 (2d Cir. 1985)*. Merced alleges that "the nature, existence and extent of unlawful activity could only be discerned and uncovered by access to Barclays's emails and detailed review by qualified experts of immense amounts of non-public data." (Dkt. No. 1 at ¶ 115.) Only with the release of public notice by **[**23]** FERC in April 2012 was Merced alerted to Barclays's manipulation with any specificity, at which point it engaged in investigation and due diligence in preparation to file suit. (Dkt. No. 1 at ¶ 1.)

Barclays argues that a July 2007 article in the "Friday Burrito," a regional energy trade publication, should have alerted Merced to Barclays's alleged manipulation of western electricity markets. The article conjectured about the "specter" of "large physical positions in the [dailies] market," wondering "[w]hat the hell is going on out there?" (Dkt. No. 13 at 16.) But as the Complaint points out, Barclays took action to head off inquiries related to the "Friday Burrito" article, publishing an anonymous response to the "Friday Burrito" article that provided intentionally "false and misleading explanations" for Barclays's large physical trading positions. (Dkt. No. 14 at 20.) The single, speculative "Friday Burrito" article, about which there is no evidence plaintiffs were aware at the time, is an insufficient basis on which to conclude that Merced should have been on notice of Barclays's misconduct. Moreover, in spite of the fact that the Daily Index Prices were published openly, "the issue is **[**24]** not whether plaintiffs knew that the prices paid were higher than they should have been, rather, the primary issue is whether the . . . plaintiffs . . . knew of the alleged conspiracy." *In re Issuer, 2004 U.S. Dist. LEXIS 3892, 2004 WL 487222, at *5* (quoting *In re Mercedes-Benz Antitrust Litig., 157 F. Supp. 2d 355, 373 (D.N.J. 2001))*.

At the very least, no facts in the pleadings "conclusively indicate that [Merced] did have or should have had knowledge of the violation within the statute of limitations." *In re Natural Gas, 337 F. Supp. 2d at 514*. Merced has demonstrated that Barclays engaged in inherently self-concealing conduct, and that questions of fact exist as to whether Merced could have discovered Barclays's unlawful conduct prior to the expiration of the statute of limitations period. "The question of constructive **[*137]** knowledge and inquiry notice may be one for the trier of fact and therefore ill-suited for determination on a motion to dismiss." *In re Sumitomo Copper Litig., 120 F. Supp. 2d at 347*; see also *In re Issuer, 2004 U.S. Dist. LEXIS 3892, 2004 WL 487222, at *5*. The Court is persuaded that, for purposes of a motion to dismiss, Merced has pled particularized facts sufficient to make out fraudulent concealment so as to toll the statute of limitations on its federal and state law claims. Accordingly, the Court concludes that dismissal of the Complaint on statute of limitations grounds is unwarranted.

C. SECTION 1 OF THE SHERMAN ACT

1. Legal Standard

Section 1 of the Sherman Act provides that "[e]very contract, **[**25]** combination in the form of trust or otherwise, or conspiracy, in restraint of trade of commerce among the several States, or with foreign nations, is declared to be illegal." *15 U.S.C. § 1*. To establish a claim under *Section 1*, a plaintiff must establish that the defendants "contracted, combined or conspired among each other, that the combination or conspiracy produced adverse, anticompetitive effects within relevant product and geographic markets, that the objects of and conduct pursuant to that contract or conspiracy were illegal and that the plaintiff was injured as a proximate result of that conspiracy." *Laydon v. Mizuho Bank, Ltd., 12 Civ. 3419, 2014 U.S. Dist. LEXIS 46368, 2014 WL 1280464, at *10 (S.D.N.Y. Mar. 28, 2014)*.

The critical question for purposes of a Section 1 claim is whether the challenged anticompetitive conduct "stems from independent decision or from an agreement, tacit or express." Twombly, 550 U.S. at 553; see also Mayor & City Council of Baltimore, Md. v. Citigroup, Inc., 709 F.3d 129, 135 (2d Cir. 2013). The Supreme Court clarified in Copperweld Corp. v. Indep. Tube Corp. that Section 1 of the Sherman Act prohibits only concerted conduct among distinct legal entities and does not reach restraints of trade that are "wholly unilateral." 467 U.S. 752, 768, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984). Copperweld addressed whether coordinated acts of a company and its wholly owned subsidiary could constitute a "combination or a conspiracy" under Section 1. Answering **[**26]** in the negative, the Supreme Court closed the door to the "intra-enterprise conspiracy doctrine" used by some circuits at the time in favor of a rule that a company and its wholly owned subsidiary are "incapable of conspiring with each other for purposes of Section 1." Id. at 777. Copperweld discussed at length the complementary purposes of Section 1 of the Sherman Act and Section 2, which bars monopolization by a single entity, observing that "[h]ad Congress intended to outlaw unreasonable restraints of trade as such, Section 1's requirement of a contract, combination, or conspiracy would be superfluous, as would the entirety of Section 2." Id. at 775; see also E&L Consulting, Ltd. v. Doman Indus. Ltd., 472 F.3d 23, 29 (2d Cir. 2006) ("Section 1 generally requires a combination or other form of concerted action between two legally distinct entities resulting in an unreasonable restraint on trade."); In re Aluminum Warehousing Antitrust Litig., 95 F. Supp. 3d 419, 438 (S.D.N.Y. 2015) ("[T]o run afoul of Section 1, the unreasonable restraint must result from an agreement between two or more entities.").

The nature of an agreement required to sustain a Section 1 claim has been defined by the Second Circuit and the Supreme Court. Behavior resulting from "mere interdependence unaided by **[*138]** an advance understanding among the parties" will not suffice. Starr v. Sony BMG Music Entm't, 592 F.3d 314, 322 (2d Cir. 2010) (quoting Twombly, 550 U.S. at 556 n.4). Nor will a series of commercial contracts furthering one parties' alleged unlawful **[**27]** objective, since both parties must have "a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement." Anderson News, L.L.C. v. Am. Media, Inc., 680 F.3d 162, 183 (2d Cir. 2012). That meeting of minds may be shown by a contract that eliminates competition or by evidence of a conspiracy to do so. See Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984) (conspiracy to maintain prices established by evidence tending to exclude possibility of independent-action); United States v. First Nat. Bank & Trust Co. of Lexington, 376 U.S. 665, 669, 84 S. Ct. 1033, 12 L. Ed. 2d 1 (1964) (bank consolidation that eliminated competition was unreasonable restraint on trade despite "predatory purpose").

If a plaintiff establishes the existence of an illegal contract or combination, it must then demonstrate that the alleged agreement unreasonably restrains trade. Certain restraints on trade, such as minimum price fixing, may have "such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit" that they are deemed per se unreasonable. State Oil Co. v. Khan, 522 U.S. 3, 17, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997). Most restraints are analyzed instead under the so-called "rule of reason" which looks to determine whether the alleged restraint is unreasonable because its "anticompetitive effects outweigh its precompetitive benefits." E & L Consulting, Ltd., 472 F.3d at 29.

2. Merced's Allegations

Merced claims that Barclays's daily contracts and swap contracts operated **[**28]** to unreasonably restrain trade in the Trading Hubs during the Class Period. Those contracts, Merced argues, "compensated Barclays for engaging in uneconomic conduct to restrain . . . the normal competitive forces of supply and demand" in those markets. (Dkt. No. 1 at ¶¶ 62-65.) By intentionally interfering with competitive market forces through its purchases and sales of daily electricity contracts, Merced argues' that Barclays injected "false and non-competitive" prices into markets that were intended to be based "exclusively on freely-competitive market transactions." (Id.)

Barclays argues in its Motion that Merced has failed to allege any entities acting in concert, as required to establish a Section 1 violation. It points out that the Complaint describes no "concerted action between at least two legally distinct economic entities" as required by Copperweld and subsequent Second Circuit cases. See E&L Consulting Ltd., 472 F.3d at 29. Merced responds that to state a Section 1 cause of action it need only allege the existence of a contract which resulted in an unreasonable restraint of trade -- here, Barclays's execution of numerous daily electricity contracts with an aggregated anti-competitive effect. Because its high-volume trading **[**29]** in daily and swap contracts restrained normal forces of supply and demand, it argues, it need not additionally plead that the parties had a common purpose.

A similar argument was rejected in *Rio Grande Royalty Co., Inc. v. Energy Transfer Partners, L.P., 786 F. Supp. 2d 1190 (S.D. Tex. 2009)*. The plaintiff alleged that defendants' below-market rate contracts with natural gas customers constituted concerted action cognizable under *Section 1*. **[*139]** The Rio Grande court found no concerted action, observing that "the fact that a person accepts the terms of a contract does not, without more, generate the type of concerted action necessary to violate *Section 1*." *Id. at 1199*. The contracts at issue here, as in Rio Grande, are trades involving unidentified buyers and sellers of a commodity. In Rio Grande, the court found that under such circumstances the plaintiff had "failed to make sufficient allegations to suggest that there was no independence of action between Defendants and their natural gas customers." *Id. at 1199*.

Merced cites two district court cases, *Eskofot A/S v. E.I. Du Pont De Nemours & Co., 872 F. Supp. 81 (S.D.N.Y. 1995)* and *Procaps S.A. v. Patheon Inc., 36 F. Supp. 3d 1306 (S.D. Fla. 2014)* for the proposition that where a plaintiff alleges a contract or combination in restraint of trade, "there is no need to show a common purpose in order to prove the absence of independent action because the relevant merger or contract amply demonstrates that there was no independence **[**30]** of action.". *Eskofot, 872 F. Supp. at 92*. Eskofot involved allegedly anticompetitive merger and supply agreements between the defendant, a printing equipment supplier, and third parties. The court discussed the distinction between a *Section 1* conspiracy claim, which requires proof of a common purpose to differentiate independent action from concerted action, and a *Section 1* contract claim, which does not require such a showing because the existence of the contract itself demonstrates concerted action. It found that to survive a motion to dismiss, the plaintiff needed only to allege the specific merger agreements and allege that they resulted in an unreasonable restraint of trade. Procaps similarly involved a "collaboration agreement" allocating customers and territories among competitors, which on a summary judgment motion was found to violate *Section 1* of the Sherman Act despite one party's lack of specific agreement to unlawful conduct. The Procaps court distinguished conspiracy claims under *Section 1*, like that in Monsanto, from "situations where an express contract is itself alleged to restrain trade." *Procaps, 36 F. Supp. 3d at 1320*.

Eskofot, Procaps, and two other decisions Merced cites, *National Society of Professional Engineers v. United States, 435 U.S. 679, 690, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978)* and *United States v. American Express Co., 88 F. Supp. 3d 143, 167 (E.D.N.Y. 2015)*, are distinguishable by the fact that in each of those cases the disputed contract **[**31]** 1) demonstrated a lack of independent action and 2) by its terms, created an anti-competitive effect. Each contract on its own operated to diminish competition: by executing a merger, (Eskofot), sharing price information (National Society of Professional Engineers), defining market share (Procaps), imposing a restrictive pricing provision (American Express) or otherwise restraining trade. Here, by contrast, Merced alleges that the aggregate effect of Barclays's trades at non-market rates with unidentified counterparties restrained market competition. The only "meetings of the minds" alleged in the Complaint, though, are agreements between parties acting independently to buy or sell electricity -- even if Barclays had an ultimately anticompetitive purpose in mind. The terms of an immediate agreement to sell "does not . . . without more, place illicit restrictions on the parties' behavior." *Rio Grande, 786 F. Supp. 2d at 1199*.

In short, what Merced alleges is the type of unilateral action more properly characterized as a *Section 2* claim. The Court is not persuaded that the mere existence of a series of contracts between a **[*140]** defendant and unidentified counterparties in the service of the defendant's unilateral scheme constitutes an **[**32]** agreement to unreasonably restrain trade under *Section 1* of the Sherman Act. Accordingly, the Court finds that Merced's Section 1 claim falls short of alleging an agreement or concerted effort in restraint of trade. Because no claim may be brought under *Section 1* in the absence of such a cognizable agreement, the Court need not discuss further whether Merced has pled a restraint of trade or a relevant product market to find that Merced has failed to "raise a right to relief above the speculative level" as to Count One of the Complaint. *Twombly, 550 U.S. at 555*. Accordingly, the Court grants the Motion with regard to Merced's Section 1 claim.

D. SECTION 2 OF THE SHERMAN ACT

1. Legal Standard

Where a Section 1 claim demands a showing of concerted actions, Section 2 of the Sherman Act, 15 U.S.C. Section 2, outlaws "both concerted and unilateral behavior" that threatens actual monopolization. Copperweld, 467 U.S. at 767 n.13. Plaintiffs alleging a claim of monopolization under Section 2 must allege: "1) the possession of monopoly power in the relevant market and 2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen or historic accident." PepsiCo, Inc, v. Coca-Cola Co., 315 F.3d 101, 105 (2d Cir. 2002) (quoting United States v. Grinnell Corp., 384 U.S. 563, 571, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)). The purpose of Section 2 of the Sherman Act is to prevent conduct which "unfairly tends to destroy competition itself" **[**33]** and to protect the public from the failure of the market. Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993). "To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct." Verizon, Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004).

A claim of monopoly power may be alleged by pleading power to control prices or exclude competition, or possession of a predominant share of the relevant market. Grinnell Corp., 384 U.S. at 571; Bonded Concrete, Inc, v, D.A. Collins Constr. Co., 29 F. App'x 725, 726 (2d Cir. 2002) ; Tops Markets, Inc. v. Quality Markets, Inc., 142 F.3d 90 (2d Cir. 1998). Monopoly power is more commonly established by showing that the defendant holds a large percentage share of the relevant market. In order to make this type of showing, a plaintiff proceeds by defining the relevant market in geographic terms and alleging the defendants' share of that market relative to other participants. See United States v. Eastman Kodak Co., 63 F.3d 95, 104 (2d Cir. 1995); see also Todd v. Exxon Corp., 275 F.3d 191, 199 (2d Cir. 2001); AD/SAT, Div. of Skylight, Inc, v. Associated Press, 181 F.3d 216, 226 (2d Cir. 1999). Determining a relevant geographic and product market is a "deeply fact-intensive inquiry," and for that reason courts often hesitate to grant motions to dismiss for failure to plead a relevant product market. Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 482, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992); Todd, 275 F. 3d at 199-200.

2. Merced's Monopolization Claim

Merced's Section 2 claims of monopolization and, in the alternative, attempted **[*141]** monopolization, are premised on Barclays's intent and ability to dictate the Daily Index prices on both the ICE and Dow Jones exchanges. By intentionally **[**34]** engaging in large quantities of money-losing purchases and sales in the daily markets to reap profits from its swap contracts, Merced argues, Barclays used its monopoly power to prevent free markets from operating and control prices. (Dkt. No. 1 at ¶ 66-68.) As a result "prices under contracts that settled against or were tied to the Daily Index Prices at the manipulated locations during the Class Period did not result from legitimate market information, supply factors, and demand factors." (Id. at ¶ 135.)

Barclays objects, first, that Merced's Section 2 claim falls short because it does not describe a relevant product market or barriers to entry for other participants in the market. (Dkt. No. 13 at 19.) It contends that although courts may consider ability to control prices in assessing monopoly power, Merced has not shown that a monopoly can be alleged on that basis alone. It relies on United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 393, 76 S. Ct. 994, 100 L. Ed. 1264 (1956), to argue that analysis of price control makes sense only in the context of other firms' ability to compete.

As Merced points out, though, monopoly power need not be shown through allegations of a defendant's relative market share. (Dkt. No. 14 at 17.) A plaintiff may also establish Section 2 monopoly power by way of **[**35]** direct evidence of a defendants' power to control prices, as the Second Circuit made clear in Tops Markets. Tops Markets held that monopoly power for purposes of a Section 2 claim "may be proven directly by evidence of the control of prices or the exclusion of competition, or it may be inferred from one firm's large percentage share of the relevant market." 142 F.3d at 98 (citing K.M.B. Warehouse Distribs., Inc, v. Walker Mfg. Co., 61 F.3d 123, 128 (2d Cir. 1995)).

The Second Circuit has repeatedly reaffirmed that pleading a defendant's direct control over prices is an alternative to pleading relevant market share. See Heerwagen v. Clear Channel Commc'ns, 435 F.3d 219, 227 (2d Cir. 2006); Geneva Pharms. Tech. Corp. v. Barr Labs., Inc., 386 F.3d 485, 500 (2d Cir. 2 004) ("Monopoly power . . . can be proven directly through evidence of control over prices or the exclusion of competition, or it may be inferred from a firm's large percentage share of the relevant market."); PepsiCo, Inc., 315 F.3d at 107 (finding "authority to support [plaintiff's] claim that a relevant market definition is not a necessary component of a monopolization claim"). The Circuit Court clarified in Heerwagen that a plaintiff seeking to prove monopoly power by direct evidence must still show that the defendant controlled prices "with reference to a particular market." 435 F.3d at 229. Summarizing Circuit law on the question of direct evidence of monopoly power, a recent district court decision, Shak v. JP Morgan **[**36]** Chase & Co., held that "monopoly power may be established, not only by proof of a defendant's market share in a relevant market, but alternatively by direct evidence of a defendant's price control or exclusion of competitors from a particular market in a manner indicative of its possession of monopoly power." No. 15 Civ. 992, 156 F. Supp. 3d 462, 2016 U.S. Dist. LEXIS 3686, 2016 WL 154119, at *12 (S.D.N.Y. Jan. 12, 2016). Other courts have upheld claims of price manipulation in commodities trading through direct evidence of pricing power. See In re Term Commodities Cotton Futures Litig., No. 12 Civ. 5126, 2013 U.S. Dist. LEXIS 184374, 2013 WL 9815198, at *24 (S.D.N.Y. Dec. 20, 2013) (finding "market anomalies" reasonably suggested Defendants' ability to control prices); **[*142]** In re Crude Oil Commodity Futures Litig., 913 F. Supp. 2d 41, 53 (S.D.N.Y. 2012) (finding plaintiff pled monopolization by showing close correlation between price shifts and defendants' actions).

Under the standard set out in Top Markets and subsequent case law, Merced presents factual allegations that Barclays did successfully capture market share sufficient to move index prices in its favor. The Complaint incorporates the FERC Report's conclusions that Barclays manipulated the ICE Daily Index Prices during 655 product days over 35 product months. (See Dkt. No. 1 at ¶11 45, Ex. A.) The table appended to Merced's Complaint, taken from the FERC Report, offers a detailed breakdown of Barclays's trading by month, trading hub, product, **[**37]** and price. It shows the number of days during each month that Barclays benefited from its alleged manipulative trades: during 27 out of 35 product months in which Barclays is alleged to have engaged in manipulative trades, the number of days in which it benefited was greater than 25. (Dkt. No. 1, Ex. A.) The duration of time during which Barclays engaged in anticompetitive trading, and the correlation between those trades and the ICE Daily Index prices' increases and decreases in response, make out a plausible claim that Barclays engaged in improper conduct that "ha(d) the effect of controlling prices." PepsiCo, 315 F.3d at 108.

Barclays contends that even if it can be shown that it established large trading positions for the purpose of benefiting its financial swaps, Merced has not pled facts showing that it did so through anti-competitive or exclusionary conduct. (Dkt. No. 13 at 19.) Regardless of Barclays's trading positions, it argues, no competing traders were excluded from accessing or trading on the ICE's electronic platform. Further, it argues, citing Brooke Grp. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 224, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993), that proof of above- or below-cost pricing is insufficient to establish anticompetitive conduct.

Barclays's narrow definition of anticompetitive or **[**38]** exclusionary conduct is not supported by Second Circuit law. The Second Circuit has defined anticompetitive conduct as "conduct without a legitimate business purpose that make sense only because it eliminates competition." In re Adderall XR Antitrust Litig., 754 F.3d 128, 133 (2d Cir. 2014); see also New York ex rel Schneiderman v. Actavis PLC, 787 F.3d 638 (2d Cir. 2015) (finding "willingness to forsake short-term profits to achieve an anticompetitive end" indicative of anticompetitive behavior). Conduct may be characterized as exclusionary if it "does not further competition on the merits or does so in an unnecessarily restrictive way." Meredith Corp. v. SESAC, LLC, 1 F. Supp. 3d 180, 222 (S.D.N.Y. 2014); see also Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 605, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985) (whether conduct is exclusionary depends on "whether it has impaired competition in an unnecessarily restrictive way").

Merced has pled facts showing that Barclays "controlled the ICE Daily Index when it wanted to for its own pecuniary benefit" on its financial swaps, through anticompetitive daily contracts that moved the ICE Daily Index. (Dkt. No. 14 at 13.) Barclays's payment of supra-competitive prices to benefit its financial swaps is the type of conduct that "makes sense only because it eliminates competition." Adderall, 754 F.3d at 133. The Court need not infer Barclays's motive for engaging in money-losing daily contract transactions, however, because Merced has included facts in its Complaint **[**39]** that plainly suggest **[*143]** Barclays's conduct was intended to artificially inflate or deflate market prices and constrain the market for other buyers and sellers of electricity. The allegations in support of Merced's Section 2 claim include specific communications, drawn from the FERC Report, that show Barclays's traders' intentional efforts to achieve and use monopoly power to manipulate prices. For instance, Merced cites one trader telling another via instant message that he was "trying to drive price in fin[ancial] direction" (Dkt. No. 1 at ¶¶ 75-76) and another asking a colleague "how far did you move the index," to which the colleague replied "not too far . . . shoulda started earlier, but my goal was to keep the sp/palo tighter[.)" (Id. at ¶71.) One trader asked the head of the West Power Desk whether he was "going to have fun with the index all month." (Id. at ¶89.)

Not only did Barclays's money-losing trades have no legitimate business purpose, they had an actual exclusionary and anticompetitive effect on the relevant market. Merced alleges in its Complaint that the quantity of electricity available for trading in each Trading Hub is not unlimited, meaning that Barclays's high-volume purchases of daily **[**40]** contracts at money-losing prices, solely for the purpose of maximizing swap contract profits, displaced legitimate purchasers from trading in the supply of electricity encumbered by Barclays. (See Dkt. No. 14 at 16.)

Taking into consideration the preceding allegations of Barclays's ability to distort ordinary forces of supply and demand in setting the Daily Index Prices, and its willful maintenance of that power through uneconomical physical trading positions, the Court is persuaded that Merced has alleged facts sufficient to state a claim for unlawful monopolization under *Section 2* of the Sherman Act and denies the Motion as to Counts Two and Three of the Complaint.

E. CALIFORNIA UNFAIR COMPETITION LAW

1. Legal Standard

California's Unfair Competition Law ("UCL") bans "any unlawful, unfair or fraudulent business act or practice." *Cal. Bus. & Prof. Code § 17200 et seq.* To state a claim under the UCL, a plaintiff must show "a loss of deprivation of money or property sufficient to qualify as injury in fact, i.e., economic injury, and that the economic injury was the result of, i.e. caused by, the unfair business practice." *Allergan, Inc. v. Athena Cosmetics, Inc., 640 F.3d 1377, 1379 (Fed. Cir. 2011)*.

Under its "unlawful" prong, "the UCL borrows violations from other laws by making them independently actionable **[**41]** as unfair competitive practices." *Korea Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134, 1143, 131 Cal. Rptr. 2d 29, 63 P.3d 937 (Cal. 2003)*; see also *Berryman v. Merit Prop. Mgmt., Inc., 152 Cal. App. 4th 1544, 1554, 62 Cal. Rptr. 3d 177 (Cal. Ct. App. 2007)* (quoting *Lazar v. Hertz Corp., 69 Cal. App. 4th 1494, 1505, 82 Cal. Rptr. 2d 368 (Cal. Ct. App. 1999)*. Other federal courts have permitted parties to plead UCL claims predicated on an antitrust violation. See, e.g., *In re LIBOR-Based Fin. Instruments Antitrust Litigation, No. 11 MDL 2262, 2015 U.S. Dist. LEXIS 147561, 2015 WL 6243526, at *95 (S.D.N.Y. Oct. 20, 2015)*. However, if a plaintiff fails to plead the claim under the 'borrowed' law, it cannot state a UCL claim either. See *Tuck Beckstoffer Wines LLC v. Ultimate Distributors, Inc., 682 F. Supp. 2d 1003, 1020 (N.D. Cal. 2010)*.

The statute also proscribes unfair practices not specifically denoted under another law. An act or practice is deemed unfair "if the consumer injury is substantial, **[*144]** is not outweighed by any countervailing benefits to consumers or to competition, and is not an injury the consumers themselves could reasonably have avoided." *Berryman, 152 Cal. App. 4th at 1555*. California cases look to whether the alleged unfair practice affects customers and the public generally rather than an individual holder of a contract. See, e.g., *In re Webkinz Antitrust Litigation, 695 F. Supp. 2d 987, 998-99 (N.D. Cal. 2010)* (finding the "central issue" to the UCL to be "whether the public at large, or consumers generally, are affected by the alleged unlawful business practice of defendants.") .

The UCL permits a plaintiff to recover only restitution, not general civil damages. See *Korea Supply Co., 29 Cal. 4th at 1144*. Because recovery is limited to restitution, a plaintiff pleading a violation of the UCL must show **[**42]** that the defendant "obtained something of value to which [it] was not entitled." *In re LIBOR, 2015 U.S. Dist. LEXIS 147561, 2015 WL 6243526, at *95*. However, this need not be as a result of direct business dealings between the parties. See *Law Offices of Matthew Higbee v. Expungement Assistance Servs., 214 Cal. App. 4th 544, 557, 153 Cal. Rptr. 3d 865 (Cal. Ct. App. 2015)*. Lost market share by a business competitor, for instance, is recognized as an injury sufficient to establish a claim under the UCL. See *id. at 565*.

2. Merced's Allegations under the UCL

In connection with its state law claims, Merced alleges that Barclays' price manipulation constituted "unfair, unconscionable, deceptive or fraudulent acts" causing injury to Merced and other parties trading in the Trading Hubs during the Class Period. Merced seeks restitution under the UCL. (Dkt. No. 1 at ¶¶ 145-48.)

In adjudicating the Motion as it relates to Merced's UCL claim, the Court must first decide whether Merced has pled an economic injury cognizable under the UCL. Merced alleges injury in the form of its payment of supracompetitive prices for physical electricity under contracts that settled based on Daily Index Prices manipulated by Barclays. The California Supreme Court has stated that there are "innumerable" ways in which economic injury from unfair competition may be shown. *Kwikset Corp. v. Superior Court, 51 Cal. 4th 310, 323, 120 Cal. Rptr. 3d 741, 246 P.3d 877 (Cal. 2011)*. These ways include overpaying or receiving less **[**43]** in a transaction than a plaintiff otherwise would have. Id.

In its Motion, Barclays takes the position that the UCL's limitation to restitutionary relief, rather than monetary damages, requires Merced to show it lost money directly to Barclays or has an interest in Barclays's earnings on its electricity trades. (See Dkt. No. 13 at 22.) It cites Korea Supply Co.'s holding that "an individual may recover profits unfairly obtained to the extent that these profits represent monies given to the defendant or benefits in which the plaintiff has an ownership interest." *29 Cal. 4th at 1148*.

The question of relief, however, is distinct from the question of whether Merced has pled a cognizable claim of unfair competition. Under the UCL, there are "innumerable ways" to show economic injury from unfair competition. *Allergan, Inc. v. Athena Cosmetics, Inc., 640 F.3d 1377, 1382 (Fed. Cir. 2011)*. Allergan rejected a "direct business dealings" requirement, noting that if a complaint sufficiently alleges an injury that was caused by the defendants' unfair business practices, it has satisfied the requirements of the UCL.

[*145] Here, Merced has alleged economic injury on behalf of itself and other members of the Proposed Class. By overpaying for electricity, or receiving less than market rates in sales of **[**44]** electricity, Merced and others holding contracts that settled according to the Daily Index Prices were injured. See *Clayworth v. Pfizer, Inc., 49 Cal. 4th 758, 788, 111 Cal. Rptr. 3d 666, 233 P.3d 1066 (Cal. 2010)* (finding plaintiffs could bring UCL claim where they paid more than they otherwise would have because of a price-fixing conspiracy in violation of state law); *Hall v. Time Inc. 158 Cal. App. 4th 847, 854, 70 Cal. Rptr. 3d 466 (Cal. Ct. App. 2008)* (finding UCL standard is satisfied when the plaintiff has "expended money due to the defendant's acts of unfair competition."). Having concluded that Merced has alleged an economic injury, the Court must also decide whether Merced has alleged facts describing an unlawful practice by Barclays. Upon its findings, supra, that Merced has made out a claim for unlawful monopolization by Barclays in violation of federal ***antitrust law***, the Court is persuaded that Merced has adequately pled an unlawful business practice under the UCL causing the economic injury described above.

Although it remains for discovery to shed light on whether Merced will ultimately be able to prove its entitlement to restitution at trial, this "does not demonstrate that it lacks standing to argue for its entitlement to [it]." *Clayworth, 49 Cal. 4th at 789*; see also *Allergan, 640 F.3d at 1382*. The question of whether Merced is entitled to restitution, and how much, is a factual issue not to be decided **[**45]** on a motion to dismiss. Merced's allegations in the Complaint set forth an unlawful act -- Barclays's violations of federal ***antitrust law*** -- and an economic injury: Merced and other proposed Class members' overpayment for electricity. These allegations are sufficient to state a claim under the UCL. Accordingly, the Court denies the Motion as to Count IV, violation of the UCL.

F. UNJUST ENRICHMENT

a. Legal Standard

Under New York choice of law rules, an interest analysis is applied to claims arising in equity, such as claims for unjust enrichment. See *In re Grand Theft Auto Video Game Consumer Litig., 251 F.R.D. 139, 149 (S.D.N.Y. 2008)* (applying significant contacts test to determine which state law to apply). In their briefing both parties, without conducting an overt interest analysis, address the unjust enrichment cause of action as a claim under New York law. (See Dkt. No. 13 at 23; Dkt. No. 14 at 24.) Therefore, the Court will address the claim under New York law.[7]

To state a claim of unjust enrichment under New York law, the **[**46]** plaintiff must allege: "(1) that the defendant was enriched; (2) that the enrichment was at the plaintiff's expense; and (3) that the circumstances are such that in equity and good conscience the defendant should return the money or [benefit] to the plaintiff." *Golden Pacific Bancorp v. Fed. Deposit Ins. Corp., 273 F.3d 509, 519 (2d Cir. 2001)*; *Kaye v. Grossman, 202 F. 3d 611, 616 (2d Cir. 2000)*; see also *Kidz Cloz, Inc. v. Officially for Kids, Inc., 320 F. Supp. 2d 164, 177* ***[*146]*** *(S.D.N.Y. 2004)*. Under New York law, "there is no requirement that the aggrieved party be in privity with the party enriched at his or her expense," see *Sperry v. Crompton Corp., 8 N.Y.3d 204, 215, 863 N.E.2d 1012, 831 N.Y.S.2d 760 (N.Y. 2007)*, but an unjust enrichment claim requires "some type of direct dealing or actual, substantive relationship" with a defendant. *Reading Int'l, Inc. v. Oaktree Capital Mgmt., 317 F. Supp. 2d 301, 334 (S.D.N.Y. 2003)*.

b. Merced's Claims

Barclays argues in its Motion that Merced fails to allege facts that, if proven, would establish any direct dealing or relationship between it and Barclays. Merced responds that privity is not required under New York law, and that it has sufficiently alleged a direct relationship between it and Barclays on the basis of both parties having purchased electricity on the North Path trading hub. In *In re Amaranth, 587 F. Supp. 2d 513 at 547*, the court dismissed an unjust enrichment claim where plaintiff alleged losses based on defendants' market manipulation because the alleged link "from defendants' market manipulations to the general natural gas futures market to plaintiffs' trades" **[**47]** did not make out a direct relationship, trading or otherwise, between the parties to support an unjust enrichment claim. Id.

Merced entered into contracts with other California irrigation districts that settled based on market-derived Daily Index Prices. At no time does it allege that it or any members of the proposed Class traded or dealt directly with Barclays in any manner. Since Merced has not pled facts that make out any direct or substantive relationship between itself, or any other members of the purported Class, and Barclays, the facts alleged in the Complaint do not sustain an unjust enrichment claim. Therefore, the Court grants the Motion as to Count Five, Merced's unjust enrichment claim.

G. LEAVE TO AMEND

Rule 15 of the Federal Rules of Civil Procedure provides that courts "should freely give leave [to amend] when justice so requires." *Fed. R. Civ. P. 15(a)(2)*. Leave to amend should be granted unless there is "any apparent or declared reason - such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of the amendment . . . ." *Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962)*; see also *Commander Oil Corp. v. Barlo Equip. Corp., 215 F.3d 321, 333 (2d Cir. 2000)* (noting that leave to amend **[**48]** is "discretionary" but should be "freely given"); *Block v. First Blood Assocs., 988 F.2d 344, 350 (2d Cir. 1993)* ("The rule in this Circuit has been to allow a party to amend its pleadings in the absence of a showing by the nonmovant of prejudice or bad faith.").

The Court has concluded that Plaintiff's allegations fail to state a claim under *Section 1* of the Sherman Act and also fail to state a claim for unjust enrichment. The Court is not persuaded that it would be futile for Plaintiff to be given the opportunity to amend its Complaint by adding new factual allegations to restate the claims dismissed. Accordingly, the Court will afford plaintiffs the opportunity to submit a three-page letter to the Court within ten days of the date of this Decision and Order, explaining how it would correct the deficiencies in its Complaint if granted leave to replead.

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[7] Under such an analysis, it would appear that California might have the most significant contacts as the state in which plaintiffs reside and suffered losses. However, there is no cause of action in California for unjust enrichment. See *Grund v. Delaware Charter Guarantee & Trust Co., 788 F. Supp. 2d 226, 251 (S.D.N.Y. 2011)* (citing *Levine v. Blue Shield of California, 189 Cal. App. 4th 1117, 1138, 117 Cal. Rptr. 3d 262 (Cal. Ct. App. 2010))*.

[*147] IV. ORDER

For the reasons stated above, it is hereby

ORDERED that the Motion (Dkt. No. 12) filed by defendant Barclays Bank PLC to dismiss the Complaint ("Complaint", Dkt. No. 1) of plaintiff Merced Irrigation District ("Plaintiff"), is **GRANTED** as to Counts I and V of the Complaint and **DENIED** as to Counts II, III, and IV of the Complaint, and it is further

ORDERED that, should Plaintiff wish to seek leave **[**49]** to file an amended complaint, Plaintiff may submit a letter of no more than three pages within ten days of the date of this Decision and Order, setting forth their position as to why leave to amend would not be futile and should be granted.

SO ORDERED.

Dated: New York, New York

29 February 2016

/s/ Victor Marrero

Victor Marrero

U.S.D.J.

Mkt. Am., Inc. v. Doyle

North Carolina Superior Court, Guilford County

February 29, 2016, Decided

15 CVS 9658

Reporter
2016 NCBC LEXIS 182 *; 2016 NCBC Order 5

MARKET AMERICA, INC., Plaintiff, v. KEITH DOYLE, TAMI GAINES, and JAVITA, INC., Defendants.

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

Core Terms

Designation, antitrust, complex business, material issue, trade secret, unfair, counterclaim, distributors, trade-secret, mandatory

LexisNexis® Headnotes

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

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > Limited Jurisdiction

HN1[] **Deceptive & Unfair Trade Practices, State Regulation**

N.C. Gen. Stat. § 7A-45.4(a)(3) explicitly excludes disputes that are based solely on *N.C. Gen. Stat. § 75-1.1*.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > Limited Jurisdiction

HN2[] **Jurisdiction Over Actions, Limited Jurisdiction**

Designation as a complex business case may be appropriate if disputes within the scope of *N.C. Gen. Stat. § 7A-45.4(a)* have not been expressly pleaded but must necessarily be resolved in order to litigate the claims that have been asserted. However, case law cannot be fairly read to support designation merely because the pleadings include factual allegations that arguably touch upon facts that, when read together with other allegations, might have been a basis for a claim that the plaintiff chose not to allege.

Judges: **[*1]** James L. Gale, Chief Special Superior Court Judge.

Order by: James L. Gale

Order

ORDER

THIS MATTER is before the Court on Plaintiff's Opposition to Designation as Mandatory Complex Business Case and Motion to Vacate Order of Designation ("Opposition"). The Court concludes that the Opposition should be ALLOWED.

Plaintiff Market America, Inc. ("Market America") instituted this action by filing a verified complaint on November 17, 2015, which was not served on Defendant Javita, Inc. ("Javita") until January 5, 2016, after Defendant Keith Doyle ("Doyle") had answered and asserted a counterclaim on November 30, 2015.

Market America's complaint alleged two claims: (1) a breach-of-contract claim brought solely against Doyle, and (2) a claim for tortious interference with contractual relations against all Defendants.

Javita timely filed its Notice of Designation as Complex Business Case under *N.C. Gen. Stat. § 7A-45.4* ("Notice of Designation"), asserting that this matter should be designated as a mandatory complex business case because it contains disputes that involve material issues arising under ***antitrust law*** within the scope of *section 7A-45.4(a)(3)*, as well as trade secrets within the scope of *section 7A-45.4(a)(8)*. *N.C. Gen. Stat. § 7A-45.4(a)(3)*, *(8)* (2015). The Notice of Designation was proper if, in fact, **[*2]** the case involves such material issues, but was improper if the case does not involve such material issues. Javita draws upon Market America's complaint and Doyle's counterclaim in seeking designation.

The dispute arises from Doyle's prior independent-contractor relationship with Market America, during which Doyle executed an Advisory Council Agreement ("ACA") that included provisions restricting Doyle after the termination of his position from competing in a defined geographical area for a six-month period and from soliciting other Market America distributors for two years.

Doyle did not seek to designate the case as a mandatory complex business case. He filed counterclaims against Market America on November 30, 2015, alleging claims for libel and for unfair and deceptive trade practices under *N.C. Gen. Stat. § 75-1.1*. The *section 75-1.1* counterclaim is based on allegations that Market America made false statements and engaged in a pattern of unfair conduct, such as sending spies to Doyle's business meetings at which confidential information was discussed.

Superior Court Judge Richard Doughton issued a preliminary injunction against Doyle in Market America's favor on December 3, 2015, directing that Doyle comply with the **[*3]** ACA's restrictions, including the use of Market America's confidential information.

The Notice of Designation states that Defendant Tami Gaines ("Gaines") had also been an earlier distributor for Market America, in a relationship that ended on October 13, 2014. Market America had earlier obtained a preliminary injunction against Gaines in litigation brought against her. The parties dispute whether Gaines solicited Doyle to leave Market America or to join Javita in violation of her contract or the injunction entered against her.

In its Notice of Designation, Javita contends that this lawsuit includes material issues that are grounded in ***antitrust law*** and trade-secrets law, even though no specific claim has been stated in either Market America's complaint or Doyle's counterclaim that asserts relief for antitrust violations or trade-secret misappropriation. While Doyle does assert a claim for unfair and deceptive trade practices under *section 75-1.1*, ***HN1***[] *subsection 7A-45.4(a)(3)* explicitly excludes disputes that are based solely on *section 75-1.1*. *See id.* *§ 7A-45.4(a)(3)*. The Notice of Designation further contends that the pleadings should be construed to present a claim for common-law unfair competition. No such claim is included within the provisions **[*4]** of *section 7A-45.4(a)* unless a claim for unfair competition can be classified as a "[d]ispute involving ***antitrust law***." *Id.*

It is self-evident that Market America did not assert an actual claim for common-law unfair competition or for trade-secret misappropriation. However, this Court has previously recognized that ***HN2***[] designation as a complex business case may be appropriate if disputes within the scope of *section 7A-45.4(a)* have not been expressly pleaded but must necessarily be resolved in order to litigate the claims that have been asserted. See Order on Opposition to Designation of Action as Mandatory Complex Business Case, *Union Corrugating Co. v. Viechnicki*, No. 14-CVS-6240 (N.C. Super. Ct. Sept. 9, 2014). However, *Union Corrugating* cannot be fairly read to support designation merely because the pleadings include factual allegations that arguably touch upon facts that, when read together with other allegations, might have been a basis for a claim that the plaintiff chose not to allege.

Here, the breach-of-contract claim does not necessarily present the Court with a dispute involving trade-secret misappropriation merely because a term in the contract states that Market America owns trade secrets that Doyle agreed to **[*5]** honor. Market America has not asserted that any trade secrets have been misappropriated, and resolving the breach-of-contract claim does not require the Court to assess whether certain information does or does not constitute a trade secret. The Court is not persuaded otherwise by Javita's argument that, because one of Market America's claims involves the solicitation of other distributors, and because Market America contends that its list of distributors is a trade secret, it logically must follow that this case contains a dispute involving trade secrets.

The Court likewise concludes that there is no material issue of ***antitrust law*** that must be resolved to litigate the claims that have been asserted. In its effort to define an antitrust dispute, Javita claims that the impact of a prohibition on soliciting any Market America distributor based on a covenant that Defendants believe is overly broad and unsupported by consideration necessarily extends beyond just the parties in the case, therefore affecting competition in some way that rises to the level of an antitrust issue. Javita's logic appears to be that such a covenant is an agreement in restraint of trade, and when the effect of **[*6]** enforcing the covenant has an impact beyond just the parties to the covenant so as to restrict competition by others, there is some special antitrust injury that falls within the scope of *section 7A-45.4(a)(3)*. The Court gives Javita fair credit for creativity, but it is not persuaded by this argument.

In sum, the Court concludes that Javita is not entitled to have the case designated as a mandatory complex business case because it has not shown that the case involves material issues involving either an antitrust dispute or a trade-secrets dispute. Consequently, designation is improper. Market America's Opposition should be allowed, and the case should continue as a regular civil matter on the Guilford County Superior Court docket.

This Order is without prejudice to any parties' right to request the senior resident superior court judge to request that the case be designated as an exceptional matter under *Rule 2.1 of the General Rules of Practice for the Superior and District Courts.*

IT IS SO ORDERED, this the 29th day of February, 2016.

/s/ James L. Gale

James L. Gale

Chief Special Superior Court Judge

for Complex Business Cases

End of Document

Costco Wholesale Corp. v. AU Optronics Corp.

United States District Court for the Western District of Washington

March 3, 2016, Decided; March 3, 2016, Filed

CASE NO. C13-1207RAJ

Reporter

2016 U.S. Dist. LEXIS 54495 *; 2016-1 Trade Reg. Rep. (CCH) P79,545

COSTCO WHOLESALE CORPORATION, Plaintiff, v. AU OPTRONICS CORPORATION, et al., Defendants.

Prior History: Costco Wholesale Corp. v. Au Optronics Corp., 2014 U.S. Dist. LEXIS 127727 (W.D. Wash., Sept. 11, 2014)

Core Terms

panels, antitrust, conspirators, finished product, prices, conspiracy, domestic, price-fixed, products, subsidiaries, commerce, new trial, purchaser, import, ownership, amend, motion for judgment as a matter of law, sufficient evidence, evidence show, documents, customer, motions

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Judges: Honorable Richard A. Jones, United States District Judge.

Opinion by: Richard A. Jones

Opinion

ORDER

I. INTRODUCTION

This matter comes before the Court on the Defendants LG Display Co., Inc. and LG Display America, Inc. and AU Optronics Corporation and AU Optronics Corporation America's (collectively, "Defendants") Combined Motions for Judgment as a Matter of Law, in the Alternative, New Trial, and Amendment of the Findings in Bench Trial. Dkt. # 689. Although Defendants have requested oral argument, the Court finds that oral argument is unnecessary. For the reasons set forth below, the Court **DENIES** Defendants' Motions.

II. BACKGROUND

In brief, this case concerns Plaintiff Costco Wholesale Corporation's ("Plaintiff") claims regarding a conspiracy spanning nearly a decade to fix the prices for thin-film transistor liquid crystal display panels (or "TFT-LCD panels"). Plaintiff, more specifically, claims that it paid too much for finished products that incorporated the price-fixed panels. Following a lengthy jury trial, judgment **[*3]** was entered in favor of Plaintiff and against Defendants for $61,971,040 based on the jury's verdict and this Court's findings of fact and conclusions of law. *See* Dkt. # 682. These motions follow.

III. LEGAL STANDARD

a. Motion for Judgment as a Matter of Law

Federal Rule of Civil Procedure 50(b) permits a party to renew a motion for judgment as a matter of law previously raised under *Rule 50(a)* before the case was submitted to a jury. *See E.E.O.C. v. Go Daddy Software, Inc., 581 F.3d 951, 961 (9th Cir. 2009)*. "A party cannot raise arguments in its post-trial motion for judgment as a matter of law under *Rule 50(b)* that it did not raise in its pre-verdict *Rule 50(a)* motion." *Freund v. Nycomed Amersham, 347 F.3d 752, 761 (9th Cir. 2003)* (citing *Fed. R. Civ. P. 50* advisory committee note to 1991 amendment).

In ruling on a motion for judgment as a matter of law, a court may not make credibility determinations or weigh the evidence and must draw all reasonable inferences in favor of the nonmoving party. *See Josephs v. Pac. Bell, 443 F.3d 1050, 1062 (9th Cir. 2005)* (citing *Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 149-50, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000))*. *Rule 50* permits a court to grant judgment as a matter of law "when the evidence permits only one reasonable conclusion and the conclusion is contrary to that reached by the jury." *Ostad v. Or. Health Servs. Univ., 327 F.3d 876, 881 (9th Cir. 2003)* (citing *Monroe v. City of Phx., 248 F.3d 851, 861 (9th Cir. 2001))*.

A court reviews "a jury's verdict for substantial evidence in ruling on a properly made motion under *Rule 50(b)*." *Go Daddy Software, 581 F.3d at 961* (citing *Janes v. Wal-Mart Stores, Inc., 279 F.3d 883, 888 (9th Cir. 2002))*. In other words, a court must sustain a jury verdict so long as there is "evidence adequate to **[*4]** support the jury's conclusion, even if it is also possible to draw a contrary conclusion." *See Harper v. City of L.A., 533 F.3d 1010, 1021 (9th Cir. 2008)* (quoting *Pavao v. Pagay, 307 F.3d 915, 918 (9th Cir. 2002))* (internal quotation marks omitted). In contrast, a court reviewing a *Rule 50(b)* motion "based on grounds not previously asserted in a *Rule 50(a)* motion" is "limited to reviewing the jury's verdict for plain error." *Go Daddy Software, 581 F.3d at 961* (quoting *Janes, 279 F.3d at 888*; citing *Yeti by Molly, Ltd. v. Deckers Outdoor Corp., 259 F.3d 1101, 1109 (9th Cir. 2001))*.

b. Motion for New Trial

Federal Rule of Civil Procedure 59(a) provides that a "court may, on motion, grant a new trial on all or some of the issues . . . after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court." *Fed. R. Civ. P. 59(a)*.

Because "*Rule 59* does not specify the grounds on which a motion for a new trial may be granted," courts are "bound by those grounds that have been historically recognized." *Zhang v. Am. Gem Seafoods, Inc., 339 F.3d 1020, 1035 (9th Cir. 2003)*. Included among these historically recognized grounds are claims "that the verdict is against the weight of the evidence, that the damages are excessive, or that, for other reasons, the trial was not fair to the party moving." *Molski v. M.J. Cable, Inc., 481 F.3d 724, 729 (9th Cir. 2007)* (quoting *Montgomery Ward & Co v. Duncan, 311 U.S. 243, 251, 61 S. Ct. 189, 85 L. Ed. 147 (1940))*. Ordinarily, a "trial court may grant a new trial only if the verdict is contrary to the clear weight of the evidence, is based upon false or perjurious evidence, or to prevent a miscarriage of justice." *Id.* (quoting *Passantino v. Johnson & Johnson Consumer Prods., 212 F.3d 493, 510 n.15 (9th Cir. 2000))*.

c. Motion for Amendment

Federal Rule of Civil Procedure 52(b) permits a court **[*5]** to "amend its findings--or make additional findings" and to correspondingly amend the judgment on a party's motion filed no later than 28 days after the entry of judgment. "Motions under *Rule 52(b)* are primarily designed to correct findings of fact which are central to the ultimate decision; the Rule is not intended to serve as a vehicle for a rehearing." *Crane-McNab v. Cty. of Merced, 773 F. Supp. 2d 861, 873 (E.D. Cal. 2011)* (citing *Davis v. Mathews, 450 F. Supp. 308, 318 (E.D. Cal. 1978))*. Such motions are only "granted in order to correct manifest errors of law or fact or to address newly discovered evidence or controlling case law." *Perez v. State Farm Mut. Auto. Ins. Co., 291 F.R.D. 425, 431 (N.D. Cal. 2013)* (quoting *ATS Prods. Inc. v. Ghiorso, No. 10-4880, 2012 U.S. Dist. LEXIS 43117, 2012 WL 1067547, at *1 (N.D. Cal. Mar. 28, 2012))*.

IV. ANALYSIS

a. Proof of Plaintiff's Antitrust Injury

Defendants begin by arguing that Plaintiff has not shown that it suffered an injury as a result of their conduct. *See* Dkt. # 689 at 12. Defendants argue that the evidence Plaintiff presented at trial was insufficient to show that Plaintiff actually paid any overcharges. *See id.*

The Ninth Circuit has held that the rule "in seeking damages for loss of profits in antitrust cases is that the plaintiff is required to establish with reasonable probability the existence of some causal connection between defendant's wrongful act and some loss of anticipated revenue." *Flintkote Co. v. Lysfjord, 246 F.2d 368, 392 (9th Cir. 1957)*. In other words, "[t]o recover treble damages, plaintiffs must prove **[*6]** actual causation—'injury in fact.'" *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig., 691 F.2d 1335, 1341 n.7 (9th Cir. 1982)* (citing *id.*).

Defendants argue that Plaintiff was required to establish with "certainty that LCD panels manufactured by Defendants or co-conspirators were incorporated into the finished products" that Plaintiff purchased. *See* Dkt. # 689 at 13. They argue, essentially, that Plaintiff presented only generalized evidence of increases in finished product prices and improperly relied on Dr. Douglas Bernheim's model. *See id.* Plaintiff, for its part, properly characterizes Defendants' proposed standard as requiring proof of "panel-by-panel impact." *See* Dkt. # 695 at 11 (quoting MDL Dkt. # 4848 at 5).

Defendants propose too strong of a rule in considering antitrust injury. Far from requiring "certainty," courts have held that "[t]o demonstrate injury in fact, it is 'generally sufficient to show with reasonable probability some causal connection between the antitrust violation and [plaintiff's alleged injury].'" *Sun Microsystems Inc. v. Hynix Semiconductor Inc., 608 F. Supp. 2d 1166, 1195 (N.D. Cal. 2009)* (quoting *Nw. Publ'ns, Inc. v. Crumb, 752 F.2d 473, 476 (9th Cir. 1985))*. To be sure, "[i]n antitrust cases, a lesser level of proof is needed to support the amount of damages than to support the fact of antitrust injury." *Los Angeles Memorial Coliseum Comm'n v. Nat'l Football League, 791 F.2d 1356, 1360 (9th Cir. 1986)* (quoting *Handgards, Inc. v. Ethicon, Inc., 743 F.2d 1282, 1297 (9th Cir. 1984))*. But that does not mean that such evidence cannot be shown through circumstantial evidence **[*7]** and inference. *See Sun Microsystems, 608 F. Supp. 2d at 1197* (citing *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 125, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969)*; *William Inglis & Sons Baking Co. v. ITT Cont'l Baking Co., 668 F.2d 1014, 1051 (9th Cir. 1981))*. In fact, this Court - and the MDL court - has essentially held as much. *See* Dkt. # 681 at 8-9 (concluding "that the MDL court's rulings relieve Costco of any burden to prove its standing panel-by-panel").

With this in mind, the Court finds that the evidence sufficiently supports the jury's verdict and that much of this evidence is not specifically tied to Dr. Bernheim's regression model. To begin, this Court has already found sufficient evidence showing that Plaintiff purchased products containing price-fixed panels. *See* Dkt. # 681 at 9. Plaintiff presented substantial evidence showing sales of price-fixed panels from conspirators to Plaintiff's vendors. *See e.g.*, Trial Ex. 51, 80, 81, 103, 104, 110, 114, 118, 5613 (Defendants' exhibit showing distribution chain). Multiple witnesses testified to the same effect. *See e.g.*, Trial Tr. Oct. 1, 2014 [Do Hoi Koo Test.] 1080:16-24; Trial Tr. Oct. 16, 2014 [Masahiro Yakota Test.] 2752:24-2753:7. Plaintiff's evidence suffices to show that it purchased products containing price-fixed panels.

Furthermore, Plaintiff presented sufficient evidence to show that increases in panel prices were passed through. For one, **[*8]** several witnesses acknowledged monitoring and sharing information regarding finished product demand and pricing. *See* Trial Tr. Oct. 8, 2014 [Soo Chul Park Test.] 1883:15-19; Trial Tr. Oct. 9, 2014 [Yul Rak Sohn Test.] 2085:22-2087:8. Plaintiff also presented evidence showing that the relationship between panel price and finished product prices was well understood. *See* Trial Ex. 221, 239, 318, 398. Furthermore, there was evidence showing that the conspirators supplied information regarding their views on the market for finished products with each other. *See* Trial Tr. Sept. 30, 2014 [Makoto Chiba Test.] 928:1-929:15.

Plaintiff also presented evidence showing that a large portion of the price of the products it purchased was attributable to the price-fixed panels. *See e.g.*, Trial Tr. Oct. 6, 2014 [Geoff Shavey Test.] 1403:15-21; Trial Tr. Oct. 20, 2014 [Douglas Bernheim Test.] 2992:4-2993:19; *see also* Trial Tr. Oct. 16, 2014 [Dean Snyder Test.] 2613:7-16. In fact, there was substantial evidence that the prices of finished products is closely tied to that of panels. *See e.g.*, Trial Tr. Sept. 24, 2014 [Douglas Bernheim Test.] 443:11-445:5.

This evidence was sufficient to show that Plaintiff **[*9]** suffered antitrust injury as a result of Defendants' wrongdoing. Moreover, contrary to Defendants' assertions, this was not evidence merely generalized to the industry as a whole. Dr. Bernheim himself testified that he based his analysis, in part, on tracing where panels came from for particular products that Plaintiff purchased. *See* Trial Tr. Sept. 24, 2014 [Douglas Bernheim Test.] 558:1-559:1. On this record, the jury could have found that it was more likely than not that Plaintiff was injured as a result of the Defendants' conduct.

Because the Court finds that Plaintiff met its burden on this element, it declines to address the Parties' arguments regarding judicial estoppel.

b. Proof of Plaintiff's Antitrust Standing

Next, Defendants argue that Plaintiff did not establish that it had standing to recover under *Associated Gen. Contractors of Cal. v. Cal. State Council of Carpenters, 459 U.S. 519, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)* ("*AGC*"). Of course, this Court and the MLD Court have already held that Plaintiff had standing to pursue its antitrust claims. *See* Dkt. # 681 at 10; MDL Dkt. # 6931 at 3-4; MDL Dkt. # 9144 at 3-4. And, contrary to Defendants' argument, this Court's ruling was not made in response to a defense summary judgment motion, but on evidence adduced at trial. *See* Dkt. # 681. This Court's **[*10]** ruling in large part was based on its finding that Plaintiff purchased products containing price-fixed LCD panels. *See id.* at 11.

As discussed, *supra*, Plaintiff introduced evidence demonstrating that it purchased products containing price-fixed panels from the members of the price-fixing conspiracy. *See also id.* at 11. Furthermore, as mentioned above, Plaintiff also presented evidence establishing that a significant portion of the price of finished products was related to the price of the price-fixed panels. This evidence suffices to establish Plaintiff's standing, as it shows that the market for LCD products and LCD panels was inextricably linked. This formulation of *AGC* antitrust standing is well established. *See* *Dang v. San Francisco Forty Niners, 964 F. Supp. 2d 1097, 1112-13 (N.D. Cal. 2013)* (collecting cases and finding that anti competitive effect on market for licensing of sports team logos and trademarks necessarily would affect consumer retail market for apparel bearing these logos and trademarks).

c. The Foreign Trade Antitrust Improvements Act ("FTAIA")

Defendants next argue that no reasonable jury could have found that Plaintiff's claims were permitted under the FTAIA. *See* Dkt. # 689 at 22.

The FTAIA "lays down a general rule placing *all* (nonimport) activity involving foreign **[*11]** commerce outside the *Sherman Act's* reach." *F. Hoffmann-La Roche Ltd v. Empagran S.A., 542 U.S. 155, 162, 124 S. Ct. 2359, 159 L. Ed. 2d 226 (2004)*. However, the FTAIA "brings such conduct back within the *Sherman Act's* reach" if "the conduct *both* (1) sufficiently affects American commerce . . . *and* (2) has an effect of a kind that ***antitrust law*** considers harmful." *Id.* (quoting *15 U.S.C. §§ 6a(1)* & *(2)*). Furthermore, "[u]nder its plain terms, the FTAIA does not affect import trade." *United States v. Hsiung ("Hsiung II"), 778 F.3d 738, 754 (9th Cir. 2014)* (citing *id.*; *Dee-K Enters., Inc. v. Heveafil Sdn. Bhd., 299 F.3d 281, 287 (9th Cir. 2002))*. In short, the FTAIA does not affect the *Sherman Act's* coverage of import trade or commerce and excludes nonimport trade or commerce with foreign nations unless the domestic effect exception is met. *See* *Fenerjian v. Nongshim Co., Ltd., 72 F. Supp. 3d 1058, 1080 n.30* (quoting *United States v. Hsiung ("Hsiung I"), 758 F.3d 1074, 1086 (9th Cir. 2014))*.

The Court instructed the jury that the *Sherman Act* applied if "[s]ales of LCD panels whose prices were fixed by the conspiracy or finished products containing LCD panels whose prices were fixed by the conspiracy . . . were sold in a transaction between a member of the conspiracy and a customer in the United States." Dkt. # 622 at 30. Defendants contend that the jury could not reasonably have found this to be the case because vendors from whom Plaintiff ultimately purchased the finished products were separate from the conspirators identified **[*12]** in the verdict. *See* Dkt. # 689 at 23. As Plaintiff correctly notes, however, the instruction permitted the jury to find that the import commerce exception was met based on evidence that conspirators sold their panels or finished products for resale to Plaintiff in the United States. Indeed, some witnesses testified that vendors would purchase finished products from conspirators to specifically be resold to American customers. *See e.g.*, Trial Tr. Oct. 16, 2014 [Masahiro Yakota Test.] 2751:10-2753:7. Indeed, Plaintiff's theory falls well within an accepted theory of the FTAIA import commerce exclusion. Although the Ninth Circuit declined to address the "outer bounds of import trade" in *Hsiung II*, it nevertheless acknowledged that it could include defendants whose conduct was merely *directed* at an American import market. *See Hsiung II, 778 F.3d at 755 n.8* (citing *Animal Sci. Prods., Inc. v. China Minmetals Corp., 654 F.3d 462, 471 n.11 (3d Cir. 2011))*.

Whatever the case, even if the import commerce exclusion did not apply, Plaintiff presented sufficient evidence to show that the domestic effects exception was satisfied. Much of Defendants' argument on this point simply repeats its theory that Plaintiff was required to show specific, panel-by-panel impact. As discussed, *supra*, this Court and the MLD Court **[*13]** have repeatedly rejected such a stringent level of proof.

This Court instructed the jury that they could find that the domestic effect exception was met if "[t]he panels or products were sold by a member of the conspiracy outside the United States to a customer outside the United States, and the sale had a direct, substantial, and reasonably foreseeable effect on later sales to a customer in the United States." *See* Dkt. # 622 at 30. Furthermore, for an effect to be "direct," the Court instructed that it must have an "immediate impact on the later sales." *See* *id.* The jury's finding on this point was well established by the same evidence showing that that the prices Plaintiff paid were directly affected by the conspirators' conduct — i.e., the evidence showing that Plaintiff suffered antitrust injury.

The Ninth Circuit's holding in *Hsiung II* simply reinforces this point. The court there addressed substantially the same conspiracy at issue in this case — manufacturers of TFT-LCD panels conspired to set and stabilize their prices. *See Hsiung II, 778 F.3d at 743*. The court found that sufficient evidence was presented to satisfy the domestic effects exception. *See id. at 759*. The court noted that the evidence showed that "TFT-LCDs **[*14]** are a substantial cost component of the finished products." *Id.* Witnesses testified as to the correlation between panel cost and finished product prices. *Id.* Furthermore, the evidence established that "[i]t was well understood that substantial numbers of finished products were destined for the United States and that the practical upshot of the conspiracy would be and was increased prices to customers in the United States." *Id.* This "constellation of events that surrounded the conspiracy [led] to one conclusion—the impact on the United States market was direct and followed 'as an immediate consequence' of the price fixing." *Id.* Plaintiff presented substantially the same evidence in the instant case, as this Court has already outlined above.

Defendants now assert that in order to meet the "gives rise to" prong of the domestic effects exception, Plaintiff must specifically show that its specific injury arose from the domestic effect of which it complains. *See* Dkt. # 696 at 18. But *Motorola Mobility LLC v. AU Optronics Corp., 775 F.3d 816 (7th Cir. 2015)*, which Defendants cite, dealt with a decidedly different scenario than that here. In *Motorola*, the court found that the effect of anticompetitive conduct on domestic U.S. commerce did not give rise to an antitrust **[*15]** cause of action because "the immediate victims of the price fixing were [Motorola's] *foreign subsidiaries*." *See* *id. at 819-20* (emphasis added). The court stressed that "Motorola's subsidiaries are governed by the laws of the countries in which they are incorporated and operate." *See* *id. at 820*. Because Motorola and its foreign subsidiaries were treated as separate entities for other purposes, the court reasoned that they should be similarly treated in applying the FTAIA. *See id.* As such, there was no domestic effect - the harm was suffered in the foreign subsidiaries' countries. *See id.*

But Plaintiff did not make its purchases through foreign subsidiaries as Motorola did. It purchased the finished products from U.S. vendors who, in turn, purchased from conspirators. The domestic effect — the increased prices as a result of the cartel's price fixing — was felt by Plaintiff entirely in the U.S. Additionally, the increased prices that Plaintiff paid for the products containing fixed-price panels was, of course, specific to Plaintiff. The domestic effects exception was satisfied.

Finally, Defendants urge this Court to find that Plaintiff's claim does not survive under Washington's Consumer Protection Act ("CPA"). **[*16]** *See* Dkt. # 696 at 18. Given that the Court has already found that Plaintiff's claims survive application of the FTAIA, it is functionally irrelevant whether the CPA incorporates those same limitations, though Defendants have provided some authority suggesting that it does. *See* *In re Optical Disk Drive Antitrust Litig., No. 3:10-MD-2143 RS, 2014 U.S. Dist. LEXIS 99965, 2014 WL 3378336, at *3 (N.D. Cal. July 10, 2014)*; *cf.* *Ass'n of Wash. Pub. Hosp. Dists. v. Philip Morris Inc., 241 F.3d 696, 706 (9th Cir. 2001)* (citing *RCW § 19.86.920*) ("Washington courts are directed to interpret the CPA in light of federal court decisions interpreting federal ***antitrust law***").

d. Plaintiff's Burden of Proving Antitrust Impact

Defendants next argue that Plaintiff's burden in showing antitrust injury, antitrust standing, and domestic effect was not lessened by the Ninth Circuit's holding in *Royal Printing Co. v. Kimberly-Clark Corp., 621 F.2d 323, 327 (9th Cir. 1980)*. *See* Dkt. # 689 at 25. Essentially, Defendants contend that Plaintiff was required to present upstream pass-on evidence showing that the inflated prices for the fixed-price panels was directly traceable to the prices Plaintiff paid for the finished products. *See* Dkt. # 696 at 20.

As this Court has previously ruled, such evidence is ordinarily not permitted pursuant to *Royal Printing* because permitting it "would 'involve all of the evidentiary and **[*17]** economic complexities' that the Supreme Court 'clearly forbade' in *Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*." *See* Dkt. # 569 at 3. This was because *Illinois Brick* foreclosed both offensive and defensive use of such pass-on theories by imposing a direct purchaser rule that eliminated the problems associated with apportioning overcharges between direct and indirect purchasers. *See* *431 U.S. at 728, 731-33*.

First, Defendants urge that the Court should have required Plaintiff to show such upstream pass-on evidence because the instant case involved components rather than finished products. *See* Dkt. # 689 at 26-28. To this end, Defendants cite *In re ATM Fee Antitrust Litig., 686 F.3d 741 (9th Cir. 2012)*, arguing that the Ninth Circuit changed the rule set forth in *Royal Printing*. *See* Dkt. # 689 at 27. But Defendants read too much into *ATM Fee* - the court there did not modify the *Royal Printing* rule. Rather, the *ATM Fee* court mentioned "pass on" just two times, each time simply repeating the plaintiffs' allegations. *See* *686 F.3d at 750, 753*. There is simply no indication that *ATM Fee* changed *Royal Printing*'s standard. To the contrary, *ATM Fee* affirms *Royal Printing's* holding that indirect purchasers may sue when a conspiring seller owns or controls the direct purchaser. *See* *id. at 749*.

Next, Defendants contend that *Royal Printing*'s rule does **[*18]** not extend to *AGC*'s standing requirements or to the FTAIA's exceptions. *See* Dkt. # 689 at 28-29. Consequently, Defendants contend that Plaintiff was required to adduce upstream pass-on evidence to show these requirements. *See id.* Simply put, Defendants argue that Plaintiff was put to a more stringent burden of proof on antitrust standing under *AGC* and to show that Plaintiff's claim fell within the exceptions to the FTAIA. Of course, Defendants do not cite any authority actually standing for requiring separate standards for these elements. This Court sees no reason to do so. *AGC* established a multi-factor test for determining whether a given plaintiff was a proper party to bring a private antitrust action. *See* 459 U.S. at 535, 537-44 & n.1. And the Court in *AGC* was well aware of the standard set forth in *Illinois Brick* and expressly stated that "[t]he same concerns" guided its holding governing standing. *See* AGC, 459 U.S. at 544. There seems little reason, then, that different burdens of proof should apply to *Illinois Brick*'s ownership/control rule and to AGC's standard for antitrust standing. Likewise, this Court finds no reason to deviate from the *Illinois Brick* standard in evaluating whether a party's claims fall within the exceptions **[*19]** to the FTAIA.

e. Sufficiency of the Evidence Regarding Philips and Panasonic

Next, Defendants argue that the jury could not have reasonably found that Philips or Panasonic participated in the conspiracy. Dkt. # 689 at 30. Defendants thus argue that the Court should reduce the jury's award by approximately $11.7 million prior to trebling. *Id.* The Court disagrees. There was sufficient evidence for the jury to find that Philips and Panasonic participated in the conspiracy.

With respect to Philips, Plaintiff presented evidence showing that Philips was exchanging confidential information regarding panels.[1] Several internal Epson documents reflect communications with Philips in October and November 2004 discussing price and future production information. *See e.g.*, Trial Ex. 924 ("With Amazon, the supply schedule is being moved up from January to December. 500k/month. Q4: $18.75 Q1:$17.75").[2] Additional documents reflect communications between other conspirators and Philips regarding TFT-LCD panels. *See* Trial Exs. 788 (discussing panel shortages and production and demand forecasts); 914 at 2 (explaining that "[p]rice requests from (Ph) for cell sales have become severe" and attaching an email explaining **[*20]** a meeting to discussing methods of reducing "TFT cell costs"); 936 at 3 (discussing "Active" panel quantities); 1056 at 1 (explaining that "Active LCDs" included TFTs). Indeed, as Plaintiff points out, much of this evidence establishes opportunity, method, and actual exchanges of information about non-STN panels. Finally, to the extent that Defendants contend that these exhibits merely show permissible buyer-seller exchanges, the Court disagrees. Many of these documents show impermissible price-fixing - and the jury could well conclude that the referenced discussions with Philips were part of the same scheme.

Likewise, the evidence supports the jury's finding that Panasonic was a conspirator. For one, numerous witnesses (including those who testified to early meetings and exchanges of confidential price information) testified to meeting with Panasonic. *See e.g.*, Trial Tr. Sept. 25, 2014 [Genichi Watanabe Test.] 715:11-18; Trial Tr. Oct. 1, 2014 [C.C. Liu Test.] 1107:8-13, 1108:7-25, 1111:6-10, 1133:4-11 ("Q:You weren't concerned about [Panasonic's] pricing, were you? A: We tried to learn from them."). Other documents indicate that representatives of Panasonic may have met with representatives of other conspirators after 2001. *See e.g.*, Trial Exs. 979; 1024. Additionally, other documents reflect that conspirators had learned Panasonic's willingness to abandon its supply of 15 inch panels to "Viewsonics" if the price dropped below $220. *See* Trial Ex. 99. Given **[*22]** the contents of that communication, the jury could well have inferred that a representative of Panasonic was the "separate source" who provided this information. *See id.* This evidence amply supports the jury's finding that Panasonic was a conspirator.

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[1] Defendants argue that it was undisputed that Philips never attended a Crystal Meeting. *See* Dkt. # 689 at 30. That is true, but Defendants' expert admitted that physical presence was not necessary to be part of a conspiracy. *See* Trial Tr. Oct. 15, 2014 [Dennis Carlton Test.] 2399:16-2400:9. Furthermore, the MDL Court itself held that parties could be conspirators even without attending the Crystal Meetings. *See* In re TFT-LCD (Flat Panel) Antitrust Litig., No. 12-CV-4114 SI, 2013 WL 3387652, at *1 (N.D. Cal. July 8, 2013).

[2] This exchange itself provides evidence that Philips could have exchanged price and production information regarding **[*21]** TFT-LCD panels for the same time period as Epson produced such panels. Although Defendants point out testimony that Epson did not produce such panels in fall 2004 (*see* Dkt. # 696 at 22 (citing Trial Tr. Oct. 8, 2014 [Takato Imai Test.] 1942:3-19, 1943:1-12)), this email reflects Philips' information for winter 2004-2005 and spring 2005.

Because the jury could have reasonably found that Philips and Panasonic were conspirators based on this evidence, the Court need not address Plaintiff's alternative theory based on Philips and Panasonic's ownership/control relationship of other conspirators.

f. Motion to Amend the Court's Findings of Fact and Conclusions of Law

The final portion of Defendants' Motion is their request that the Court amend its Findings of Fact and Conclusions of Law. *See* Dkt. # 689 at 33. Such motions are typically only granted "to correct manifest errors of law or fact or to address newly discovered evidence or controlling case law." *Perez, 291 F.R.D. at 431*.

Defendants first contend that the Court should amend its conclusion that wholly owned subsidiaries of conspirators or conspirators' subsidiaries were "controlled by members of a subsidiary." *See* Dkt. # 689 at 34 (quoting Dkt. # 681 at 11). Defendants aver that the Court applied the incorrect legal test in reaching this conclusion; **[*23]** rather, they contend that the proper test was expounded by *In re Vitamin C Antitrust Litig., 279 F.R.D. 90, 101 (E.D.N.Y. 2012)*. *See id.* Of course, *Vitamin C* is not binding on this Court and Defendants did not previously raise this argument with this Court, meaning that they are barred from raising it on this Motion. *See Diocese of Winona v. Interstate Fire & Cas. Co., 89 F.3d 1386, 1397 (8th Cir. 1996)* (citing *Concordia College Corp. v. W.R. Grace & Co., 999 F.2d 326, 330 (8th Cir. 1993))* ("Motions to amend a judgment cannot be used to raise arguments which could have been raised prior to the issuance of judgment").

Furthermore, to the extent that *Vitamin C* holds that a parent-subsidiary relationship standing alone may not satisfy the ownership/control exception (*see Vitamin C, 279 F.R.D. at 101-02*), that is not the law of this circuit. The Ninth Circuit held in *ATM Fee* that control may exist through either majority ownership of stock *or* actual control over a corporation's conduct. *See 686 F.3d at 757* (citing *Weinstein Enters., Inc. v. Orloff, 870 A.2d 499, 506-08 (Del. 2005)*; *Kaplan v. Centex Corp., 284 A.2d 119, 120-23 (Del. Ch. 1971))* (analogizing necessary control for application of ownership/control exception to rules governing shareholder duties). Defendants have not identified any error to justify the Court's amendment of its findings.

Defendants next contend that the Court incorrectly found that Panasonic controlled JVC after Panasonic's equity ownership declined to less than a majority. *See* Dkt. # 689 at 35-37. However, the Court also found that there was no realistic possibility **[*24]** that JVC would have sued prior to July 2007 because it was under the control of Panasonic for the duration of the conspiracy. *See* Dkt. # 681 at 11-12. Furthermore, this Court does not believe that *ATM Fee* created a rule categorically precluding standing when a conspirator has less than a majority interest in the direct purchaser. To the contrary, as the MDL Court noted, "the fact that a company's shareholder interest is less than 50% and/or its representation on the board of directors of another company is less than 50% does not necessarily preclude control." MDL Dkt. # 7422 at 5-6. In addition, this Court rejected the Defendants' proposed date-of-suit rule (*see* Dkt. # 558), meaning that the Court's conclusion that there was no realistic possibility JVC would have sued prior to July 2007 sufficiently establishes Plaintiff's right to recover for its purchases from JVC.

V. CONCLUSION

For the reasons stated above, the Court **DENIES** Defendants' Motions for Judgment as a Matter of Law, in the Alternative, New Trial, and Amendment of the Findings in Bench Trial. Dkt. # 689.

DATED this 3rd day of March, 2016.

/s/ Richard A. Jones

The Honorable Richard A. Jones

United States District Court

Procaps S.A. v. Patheon Inc.

United States District Court for the Southern District of Florida, Miami Division

March 14, 2016, Decided; March 14, 2016, Entered on Docket

CASE NO. 12-24356-CIV-GOODMAN

Reporter

2016 U.S. Dist. LEXIS 32520 *; 2016-1 Trade Reg. Rep. (CCH) P79,538; 2016 WL 1028008

PROCAPS S.A., Plaintiff, v. PATHEON INC., Defendant.

Prior History: Procaps S.A. v. Patheon Inc., 2013 U.S. Dist. LEXIS 35640 (S.D. Fla., Feb. 22, 2013)

Core Terms

costs, taxable costs, posting, costs award, supersedeas bond, parties, argues, bad guy, antitrust

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Judges: Jonathan Goodman, UNITED STATES MAGISTRATE JUDGE.

Opinion by: Jonathan Goodman

Opinion

ORDER ON DEFENDANT PATHEON'S MOTION FOR ENTRY OF JUDGMENT

In his 1977 hit song, English singer/songwriter/guitarist Dave Mason, co-founder of the band Traffic, explained: "There ain't no good guy, there ain't no bad guy, There's only you and me and we just disagree."[1]

The song lyric phrase "we just disagree" can surely be applied to the relationship between Plaintiff Procaps S.A. ("Procaps") and Defendant Patheon Inc. ("Patheon") in this antitrust lawsuit. Procaps and Patheon have disagreed about pretty much everything in this case, which is now on appeal and which was filed in December 2012. The trial court record has generated 1046 docket entries. The parties have disagreed about substantive issues. They have disagreed about procedural issues. They have disagreed about discovery issues. They have disagreed about whether Patheon is entitled to attorney's fees after prevailing on its summary **[*3]** judgment motion and whether the Court should stay a fees analysis pending an appellate court ruling.

So it is no surprise that the parties now disagree about whether the Court should enter a judgment against Procaps in connection with an order awarding Patheon $173,480.80 in taxable costs. Procaps has not paid the taxable costs or filed a supersedeas bond. Noting that it cannot execute on a mere order granting a costs application, Patheon has now filed a motion for entry of judgment [ECF No. 1044]. Following Dave Mason's classic musical mantra, Procaps disagrees and filed a response [ECF No. 1045] opposing the motion. Patheon filed a reply. [ECF No. 1046].

The Dave Mason lyrical reference is not *completely* applicable, though, as the parties do in fact have perceived "good guys" and "bad guys." Without going into detail, suffice it to say that each party views the other as the so-called "bad guy" and has said as much more than once during this case. Regardless of who between them is the bad guy and regardless of whether there even is a bad guy (as opposed to a mere litigation adversary), the parties still continue to "just disagree."

Factual Background

After obtaining summary judgment in **[*4]** this antitrust claim, Patheon filed a bill of taxable costs. [ECF No. 1023]. Patheon supported its application with a memorandum of law, a declaration and myriad exhibits. Procaps filed an opposition [ECF No. 1026], asking that the costs bill be stayed, that the Court deny all costs or, alternatively, significantly reduce them.

The Undersigned previously entered a stay [ECF No. 1040], at Procaps' request, in connection with Patheon's motion for attorney's fees (of almost $23 million, under three separate theories) and non-taxable costs (of approximately $1.6 million). The order granting the stay was based on the fact that most of the fees and non-taxable costs sought by Procaps arose from the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"), which provides that an award cannot be entered until all appeals have been exhausted. Procaps' appeal is pending and is only in its preliminary stages. The taxable costs, however, did not arise from FDUTPA, so the Undersigned granted, in part, the taxable costs bill and awarded Patheon $173,480.80 in costs against Procaps. [ECF No. 1043].

The Parties' Positions

Patheon says that it needs a monetary judgment in order to execute on the costs **[*5]** award. Noting that the Undersigned previously denied a Procaps request to stay the entry of a costs award, Patheon contends that Procaps must file a supersedeas bond if it wishes to postpone its obligation to pay the costs award. Patheon argues that there are no grounds to justify an order postponing Procaps' obligation to pay the costs award in the absence of a supersedeas bond.

Procaps contends that the Court has discretion to delay entry of a costs judgment where the appellate issue is based upon a split of decisions between Circuits or is a case of first impression. Procaps submitted a copy of its

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[1] From the "We Just Disagree" song, released on the Let It Flow album (Columbia Records).

initial appellate brief and argues that its appeal raises antitrust issues which the Eleventh Circuit "has not addressed in this context." It also contends that there is "tension" between "certain Eleventh Circuit decisions and United States Supreme Court precedent and decisions from other Circuit Courts of Appeal." Concluding that "the underlying merits judgment is subject to potential reversal in the Eleventh Circuit based on significant questions of ***antitrust law***," Procaps raises a practical point: if the summary judgment were to be reversed, then a costs judgment in Patheon's favor **[*6]** would be a nullity.

Procaps also argues that this Court has discretion to stay execution of a judgment without the posting of a bond under "proper circumstances," such as where the judgment debtor "objectively demonstrates a present financial ability to facilely respond to a money judgment and presents to the Court a financially secure plan for maintaining the same degree of solvency during the period of appeal." Procaps says that procuring a bond to cover $190,828.88[2] would be a waste of money because it is "a multi-million dollar company fully capable of satisfying this amount."[3] It further points out that the costs award is accruing post-judgment interest from the date of the merits judgment, which it says means that "a costs judgment *appears* unnecessary to secure Patheon's ability to collect post-judgment interest on its costs award should it later prevail in the Eleventh Circuit." (emphasis added).

Patheon argues that the posting of a bond is required to obtain a stay here and that staying execution of a judgment without a bond is rare. It contends that parties seeking a stay without a bond must present an alternate form of security or present a financially secure plan to pay a judgment after appeal. Noting that Procaps has done neither, Patheon emphasizes that Procaps is a Colombian company and that "collecting will be complicated and could require legal proceedings in a foreign country **[*8]** if a bond is not posted." And it argues that the non-payment risk "is particularly prevalent here given the acrimonious relationship between the parties."

Applicable Legal Principles and Analysis

It is certainly true that reversal of the summary judgment in Patheon's favor would render the costs judgment a nullity. But that point is also a *truism* -- it could be said about **every** money judgment (or fees award or costs award) which the losing party has appealed. If the possibility of reversal was by itself sufficient to justify a stay or a delay in entering a money judgment, then there would never be need for a supersedeas bond (because all judgments would be stayed simply because the appeal could lead to a reversal, thereby rendering moot the appellant's obligation to pay the appellee).

Thus, the Undersigned does not consider that theoretical possibility a convincing reason to not enter a costs judgment.

Federal Rule of Civil Procedure 58(b) requires that a judgment be entered "promptly." Procaps' position is, of course, fundamentally at odds with this requirement. In effect, Procaps seeks a stay without posting a bond, without posting alternate security and without articulating a plan to pay the judgment should it lose its **[*9]** appeal.[4]

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[2] Procaps used this amount because *Local Rule 62.1(a)* provides that a supersedeas bond shall be in the amount of 110% of the judgment (but that the Court may "direct otherwise"). 110% of the costs award would be $190,828.88.

[3] Procaps did not submit any evidence of its own to support its claim of being a multi-million-dollar **[*7]** company. Instead, it referred to Patheon's initial fees motion, which contained a section entitled "Procaps Can Pay a Fee Award." [ECF No. 1030]. The specifics of that section were filed under seal. The Undersigned has access to the unredacted, under-seal motion. [ECF No. 1028]. The motion was accompanied by an exhibit which summarized Procaps' financial results and revealed its market value as of December 2012. Because the financial details were filed under seal, the Undersigned cannot discuss the specifics here. However, the Undersigned notes that the information fully supports Procaps' contention, assuming that its current financial condition has not dramatically changed from December 2012.

[4] Staying execution *without* a bond is rare. *Advanced Estimating Sys., Inc. v. Riney, 171 F.R.D. 327, 328 (S.D. Fla. 1997)* (defendants "must post a full security supersedeas bond under normal conditions and courts "should only allow lesser bonds on extraordinary occasions"). A bond secures the rights of the non-appealing party. *United States v. O'Callaghan, 805 F. Supp. 2d*

Courts apply a 5-factor test to determine whether a stay is appropriate:

> (1) the complexity of the collection process; (2) the amount of time required to obtain a judgment **[*10]** after it is affirmed on appeal; (3) the degree of confidence that the district court has in the availability of funds to pay the judgment . . . ; (4) whether the defendant's ability to pay the judgment is so plain that the cost of a bond would be a waste of money . . . ; and (5) whether the defendant is in such a precarious financial situation that the requirement to post a bond would place other creditors of the defendant in an insecure position.

O'Callaghan, 805 F. Supp. 2d at 1326 (quoting *Dillon v. City of Chicago, 866 F.2d 902, 904-05 (7th Cir. 1988))*.

Although Procaps may indeed be a "multi-million-dollar" company, this alone does not generate significant confidence in Patheon's ability to collect. Procaps is a foreign entity and collection proceedings might not necessarily be easy.

Procaps has not called the Court's attention to a case where a bond-free stay was issued without alternative security. *Cf.* *Avirgan v. Hull, 125 F.R.D. 185, 186 (S.D. Fla. 1989)* (mentioning "financially secure plan" and rejecting appellant's argument that posting a bond would render it insolvent). If Procaps is indeed a multi-million-dollar company, then it can post 110% of the judgment and avoid the need to obtain a bond and pay a premium to the bonding company. *Lary v. Boston Sci. Corp., No. 11-cv-23820, 2015 U.S. Dist. LEXIS 27579, 2015 WL 1000966, at *2 (S.D. Fla. March 6, 2015)* (rejecting motion for a stay of execution or **[*11]** waiver of supersedeas bond pending appeal and explaining that "defendants have substantial cash or cash equivalents on hand to post the required amount plus 10% with the Court, thus not incurring the expense of a bond.").

Procaps argues that the Court has discretion to not enter judgment until the appeal is resolved. But the Undersigned does not find the few cases it cites to be applicable or persuasive. *Hartford Acc. & Indem. Co. v. Crum & Forster Specialty Ins. Co., No. 10-24590-CIV, 2012 U.S. Dist. LEXIS 113547, 2012 WL 3291986 (S.D. Fla. Aug. 13, 2012)* held that a pending appeal is *not* a valid ground for a stay. Moreover, the issue concerned whether the court should stay *consideration* of a bill of costs, not whether it should postpone judgment once it ruled on the costs application. The other cases Procaps relied upon authorize a stay of execution on a judgment without bond where the appellant presents a financially secure plan -- but Procaps failed to present the required plan. *See* *Poplar Grove, 600 F.2d at 1191*.

Procaps suggests that there is a Circuit split on an appellate issue it raised in this case, but Patheon filed a response to Procaps' Civil Appeal Statement and advised the Eleventh Circuit Court of Appeals that the appeal was "unlikely" to reach the issue concerning *Levine v. Central Florida Medical Affiliates, Inc., 72 F.3d 1538 (11th Cir. 1996)*, which **[*12]** requires that an antitrust plaintiff like Procaps prove that the challenged conduct had no procompetitive benefit or justification. Moreover, Patheon also pointed out that the Undersigned **denied** Patheon's summary judgment motion on the procompetitive benefit issue addressed in *Levine* -- which makes that argument irrelevant for purposes of reversing the summary judgment.

Procaps has not come anywhere close to convincing the Undersigned to not enter a judgment or to stay execution of a costs judgment without posting a bond. The Court will enter a separate costs judgment. Procaps, of course, can prevent Patheon from executing on it by posting a supersedeas bond or depositing sufficient cash security with the Court Clerk.

1321, 1324 (M.D. Fla. 2011) (a bond "compensates [the prevailing party] for delay in the entry of final judgment"). The appealing party must "objectively demonstrate" the stay is appropriate. *Poplar Grove Planting & Ref. Co., Inc. v. Bache Halsey Stuart, Inc., 600 F.2d 1189, 1191 (5th Cir. 1979)* (explaining that full a full security supersedeas bond is the "usual requirement"); *United States v. Dornbrock, No. 06-61669—CIV, 2008 U.S. Dist. LEXIS 51331, 2008 WL 2894829, at *1 (S.D. Fla. 2008)*.

Parties seeking a stay without bond must present an alternative form of security or at least present a specific "financially secure plan" to pay a judgment after the appeal. *Riney, 171 F.R.D. at 328* (citing *Poplar Grove, 600 F.2d at 1191*). "Even if a judgment debtor presents sufficient reason to depart from the requirement of a full bond, *Poplar Grove* strongly suggests that the judgment debtor must provide substitute security that 'furnish[es] equal protection to the judgment creditor.'" *O'Callaghan, 805 F. Supp. 2d at 1325* (quoting *Poplar Grove, 600 F.2d at 1191*).

Conclusion

For the reasons stated above, the Undersigned grants Patheon's motion to enter a costs judgment and rejects Procaps' opposition and *de facto* request for a stay.[5]

DONE AND ORDEED in Chambers, in Miami, Florida, March 14, 2016.

/s/ Jonathan Goodman

Jonathan Goodman

UNITED STATES MAGISTRATE JUDGE

JUDGMENT ON TAXABLE COSTS AWARD

This case is **[*13]** before the Undersigned on the parties' consent to magistrate judge jurisdiction. The Undersigned has granted in part [ECF No. 1043] the Defendant's motion for taxable costs, and it is therefore **ORDERED, ADJUDGED AND DECREED** that **JUDGMENT IS ENTERED** in favor of Defendant Patheon Inc.. Plaintiff Procaps S.A. shall pay Patheon $173,480.80 plus interest[1] in taxable costs.

DONE and ORDERED, in Chambers, in Miami, Florida, March 14, 2016.

/s/ Jonathan Goodman

Jonathan Goodman

UNITED STATES MAGISTRATE JUDGE

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[5] *See generally*, the song "Disagreement," by Chumbawamba ("but now we both agree that we disagree"). (*http://www.metrolyrics.com/disagreement-lyrics-chumbawamba.htl* , last visited March 11, 2016).

[1] Interest accrues from the date of the original Order of Final Judgment [ECF No. 1021] entered on October 29, 2015. *See* *BankAtlantic v. Blythe Eastman Paine Webber, Inc., 12 F.3d 1045, 1052 (11th Cir. 1994)* ("When a district court taxes costs against a losing party, the award of costs bears interest from the date of the original judgment.").

Balmes v. Ill. Bell Tel. Co.

United States District Court for the Northern District of Illinois, Eastern Division

March 15, 2016, Decided; March 15, 2016, Filed

15 C 2685

Reporter
2016 U.S. Dist. LEXIS 33339 *; 2016 WL 1019764

ROBERT BALMES, Plaintiff, vs. ILLINOIS BELL TELEPHONE CO. d/b/a AT&T ILLINOIS, Defendant.

Prior History: *Blakes v. Ill. Bell Tel. Co., 2011 U.S. Dist. LEXIS 43147 (N.D. Ill., Apr. 21, 2011)*

Core Terms

tolled, class action, overtime, collective bargaining agreement, collective action, job site, lunch, employees, allegations, preempted, guarding, shifts, travelling, second amended complaint, perform work, lunch break, preemption, documents, handbooks, parties, motion to dismiss, three year, inappropriate, disclaimer, timesheets, statute of limitations, limitations period, state law claim, time spent, time-barred

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Judges: Gary Scott Feinerman, United States District Judge.

Opinion by: Gary Scott Feinerman

Opinion

MEMORANDUM OPINION AND ORDER

Robert Balmes and 140 other plaintiffs jointly sued their employer, Illinois Bell Telephone Co., for shortchanging them on overtime pay in violation of the Fair Labor Standards Act ("FLSA"), *29 U.S.C. § 201 et seq.* Doc. 21 at ¶ 8. Chief Judge Castillo severed the plaintiffs' claims under *Federal Rule of Civil Procedure 21*, and Balmes's suit was reassigned to the undersigned judge's calendar. Doc. 1-2; Doc. 21 at ¶ 9. Balmes then filed two amended complaints, Docs. 7, 21, the second of which alleges that Illinois Bell, when calculating his wages, routinely ignored time that he spent working before his official shifts and during lunch breaks, and that in so doing it violated the FLSA, the Illinois **[*2]** Minimum Wage Law ("IMWL"), *820 ILCS 105/1 et seq.*, and the Illinois Wage Payment and Collection Act ("IWPCA"), *820 ILCS 115/1 et seq.* Doc. 21 at ¶¶ 15-53. Illinois Bell has moved to dismiss parts of the second amended complaint under *Rule 12(b)(6)*. Doc. 28. That motion is granted in part and denied in part; Balmes's FLSA and IMWL claims based on pre-shift work and certain lunch break work are dismissed with prejudice to the extent that work was performed before February 28, 2011, but his IWPCA claims survive in their entirety.

Background

In deciding the motion to dismiss, the court assumes the truth of the second amended complaint's factual allegations, though not its legal conclusions. *See* *Lodholtz v. York Risk Servs. Grp., Inc., 778 F.3d 635, 639 (7th Cir. 2015)*; *Munson v. Gaetz, 673 F.3d 630, 632 (7th Cir. 2012)*. The court must also consider "documents attached to the [second amended] complaint, documents that are critical to the [second amended] complaint and referred to in it, and information that is subject to proper judicial notice," along with additional facts set forth in Balmes's brief opposing dismissal, so long as those facts "are consistent with the pleadings." *Geinosky v. City of Chicago, 675 F.3d 743, 745 n.1 (7th Cir. 2012)*; *see also* *Runnion ex rel. Runnion v. Girl Scouts of Greater Chi. & Nw. Ind., 786 F.3d 510, 528 n.8 (7th Cir. 2015)*. The following facts are set forth as favorably to Balmes as those materials allow. *See* *Meade v. Moraine Valley Cmty. Coll., 770 F.3d 680, 682 (7th Cir. 2014)*.

Balmes worked as a Cable Splicer for Illinois Bell from June 15, 1999 until at least September **[*3]** 8, 2015, when he filed his second amended complaint. Doc. 21 at ¶¶ 16, 19. At all relevant times, his employment was governed by collective bargaining agreements negotiated between the International Brotherhood of Electrical Workers and Illinois Bell. *Id.* at ¶ 22; Doc. 28 at 4. The agreements required Illinois Bell to pay employees "at the overtime rate of one and one-half ... times their basic hourly wage rate including applicable differentials" for all "[t]ime worked in excess of eight ... hours in a day" and for all "[t]ime worked in excess of forty ... hours in a week." Doc. 28-1 at 3, 27. Illinois Bell reiterated those overtime requirements in internal documents titled "AT&T Code of Business Conduct" and "Reporting Time Worked." Doc. 21 at ¶ 24; Doc. 28-1 at 38, 42. The Code of Business Conduct states that "all overtime hours worked by nonexempt employees must be paid regardless of whether they were approved," Doc. 28-1 at 40, and the Reporting Time Worked document states that "[n]on-exempt employees are eligible for overtime pay for all hours actually worked in excess of 40 hours in a workweek" and that "[n]on-exempt employees must be paid properly for all time worked," including "[p]reparatory work before the **[*4]** start of shift that is necessary for [their] job[s]" and "work during lunch periods," *id.* at 42.

Nevertheless, for years Illinois Bell required Balmes to perform work-related tasks without pay before his official shift and during lunch breaks. Doc. 21 at ¶¶ 33-38. Specifically, Balmes had to appear before his shift to check for supplies, review blueprints, discuss the day's jobs with other Cable Splicers and managers, finish timesheets, and perform other administrative tasks, *id.* at ¶ 34; and he typically had to work through lunch to secure job sites (which often featured open manholes on public streets), test equipment, and travel between job sites, *id.* at ¶¶ 37-38.

On January 17, 2011, other Illinois Bell employees sued Illinois Bell in *Blakes v. AT&T Corp.*, 11 C 336 (N.D. Ill.), alleging that the company violated the FLSA and the IMWL by requiring Cable Splicers to guard open manholes during lunch breaks, travel between job sites during lunch breaks, and complete timesheets after their shifts, all without pay. Doc. 21 at ¶¶ 6-7; Amended Complaint, *Blakes*, 11 C 336 (Doc. 11). Section 16(b) of the FLSA, *29 U.S.C. § 216(b)*, allows workers to bring claims as "collective actions," which operate much like class actions under *Rule 23* except that "plaintiffs who wish to be included in a collective action must affirmatively **[*5]** opt-in to the suit by filing a written consent with the court, while the typical class action includes all potential plaintiffs that meet the class definition and do not opt-out." *Alvarez v. City of Chicago, 605 F.3d 445, 448 (7th Cir. 2010)*. The *Blakes* plaintiffs sought to bring the IMWL claims as a class action and the FLSA claims as a collective action. Complaint, *Blakes*, 11 C 336 (Doc. 1 at ¶ 3). Magistrate Judge Kim, who was hearing *Blakes*, conditionally certified three FLSA claims for collective treatment under *§ 216(b)*: (1) claims based on time spent guarding open manholes during lunch breaks; (2) claims based on time spent travelling between job sites during lunch breaks; and (3) claims based on time spent completing timesheets after shifts had ended. *See* *Blakes v. Ill. Bell Tel. Co., 2011 U.S. Dist. LEXIS 63225, 2011 WL 2446598, at *3-4 (N.D. Ill. June 15, 2011)*. Those three claims will be called the "*Blakes* claims." The *Blakes* plaintiffs voluntarily withdrew their IMWL class claims on June 23, 2011, and Balmes opted into the FLSA collective action on July 28, 2011. Doc. 31 at 3.

On December 17, 2013, Magistrate Judge Kim decertified the collective action with respect to both lunch-break claims, but not the post-shift claim, and stayed his ruling until February 28, 2014. Doc. 21 at ¶ 7; *see* *Blakes v. Ill. Bell Tel. Co., 2013 U.S. Dist. LEXIS 176496, 2013 WL 6662831, at *21 (N.D. Ill. Dec. 17, 2013)*. On the last day of the stay, Balmes and 140 other members of the *Blakes* **[*6]** collective filed a new complaint against Illinois Bell in

Tinoco v. Illinois Bell Telephone Co., 14 C 1456 (N.D. Ill.), as co-plaintiffs rather than as a collective action. Doc. 21 at ¶ 8; Doc. 28 at 3. *Tinoco* was assigned to Chief Judge Castillo, and the court issued summons on May 1, 2014. *See* Docket Sheet, *Tinoco*, 14 C 1456. Chief Judge Castillo ultimately held that a non-collective action suit joining the individual FLSA claims of 141 different plaintiffs would be too unruly, and so he severed the plaintiffs' claims, which the Clerk then distributed to judges throughout the District. *See* *Adkins v. Ill. Bell. Tel. Co., 2015 U.S. Dist. LEXIS 40246, 2015 WL 1508496, at *9-10 (N.D. Ill. Mar. 24, 2015)*. Balmes's present suit, one of the severed *Tinoco* actions, was assigned to the undersigned judge's calendar. Doc. 2.

On September 8, 2015, Balmes filed a second amended complaint setting out his personal allegations against Illinois Bell. Doc. 21. The second amended complaint alleges that Illinois Bell violated the FLSA and the IMWL by requiring Balmes to work more than 40 hours per week without paying him one and a half times his normal wage for the extra time, as those statutes require. *Id.* at ¶¶ 51-52; *29 U.S.C. § 207(a)(1)*; *820 ILCS 105/4a(1)*. He also alleges that Illinois Bell violated the IWPCA by breaking its promises of overtime pay. Doc. 21 at ¶ 53. He seeks to recover for all of his unpaid work dating back to July 28, 2008—exactly three years before he opted into the *Blakes* collective action. Doc. 31 at 6 n.1, 9 n.3, 10 n.4. (A section heading in Balmes's brief gives a different start date—"August 25, 2008"—but because that contradicts other assertions in his brief as well as basic arithmetic, the court assumes it was a mistake.) Balmes's suit includes not only the *Blakes* claims (guarding job sites and travelling during lunch, completing timesheets after shifts), but also allegations **[*7]** regarding unpaid time spent preparing for the day's jobs before shifts and testing equipment during lunch, which will be called the "non-*Blakes* claims." Doc. 21 at ¶¶ 32-38.

Discussion

Illinois Bell moves to dismiss parts of Balmes's FLSA and IMWL claims as time-barred. Doc. 28 at 6-10 & n.3; Doc. 38 at 12 n.9. It also moves to dismiss Balmes's IWPCA claims on the grounds that they are completely preempted by § 301 of the Labor Management Relations Act ("LMRA"), *29 U.S.C. § 185*, and that the Code of Business Conduct and Reporting Time Worked documents are not "agreements" between Balmes and Illinois Bell that could give rise to IWPCA liability. Doc. 28 at 10-16.

I. The FLSA Claims

Illinois Bell argues that Balmes's FLSA claim is partly time-barred. Doc. 28 at 6-10. Balmes argues that it is inappropriate to resolve timeliness questions on a Rule 12(b)(6) motion. Doc. 31 at 4-5. It is true that a Rule 12(c) motion for judgment on the pleadings may have been a more appropriate vehicle for Illinois Bell's limitations argument. *See* *Brownmark Films, LLC v. Comedy Partners, 682 F.3d 687, 690 n.1 (7th Cir. 2012)* ("Though district courts have granted Rule 12(b)(6) motions on the basis of affirmative defenses and this court has affirmed those dismissals, we have repeatedly cautioned that the proper heading for such motions is **[*8]** *Rule 12(c)*, since an affirmative defense is external to the complaint."). Still, no rule categorically prohibits courts from ruling on arguments about timeliness on Rule 12(b)(6) motions. "[I]f it is plain from the complaint that the defense is indeed a bar to the suit[,] dismissal is proper *without further pleading*." *Jay E. Hayden Found. v. First Neighbor Bank, N.A., 610 F.3d 382, 383 (7th Cir. 2010)* (emphasis added); *see also* *Chi. Bldg. Design, P.C. v. Mongolian House, Inc., 770 F.3d 610, 613-14 (7th Cir. 2014)* ("[A] motion to dismiss based on failure to comply with the statute of limitations should be granted only where the allegations of the complaint itself set forth everything necessary to satisfy the affirmative defense.") (internal quotation marks omitted); *Indep. Trust Corp. v. Stewart Info. Servs. Corp., 665 F.3d 930, 935 (7th Cir. 2012)* ("[W]hen a plaintiff's complaint nonetheless sets out all of the elements of an affirmative defense, dismissal under *Rule 12(b)(6)* is appropriate."). That is the case here.

Balmes also contends that it is inappropriate for the court "to scrutinize [his] complaint by 'line item'"—that is, to dismiss a portion of a given claim as untimely while allowing the other portion to proceed. Doc. 31 at 5. But that is not even a remarkable practice, much less an inappropriate one. *See* *Chi. Bldg. Design, 770 F.3d at 612* (holding that, because some infringing acts occurred within three years of when the suit was filed, it was inappropriate to dismiss the case outright, but noting **[*9]** that "[t]o the extent that [the plaintiff] seeks recovery for earlier infringing acts, the issue may have to be revisited on remand ..."); *Lyons P'ship, L.P. v. Morris Costumes, Inc., 243 F.3d 789, 797 (4th Cir. 2001)* (holding that the district court "erred to the extent that it dismissed Lyons' claims that were premised upon acts that occurred within the applicable [limitations] periods"); *Global Cash Network, Inc. v. Worldpay, US, Inc., 148 F. Supp. 3d 716, 2015 U.S. Dist. LEXIS 163443, 2015 WL 8013464, at *2 (N.D. Ill. Dec. 7, 2015)* ("That then means that Global Cash has no enforceable right of recovery for breach of contract as to any conduct predating June 12, 2009, and Count I is dismissed to that extent.") (footnote omitted); *Hill v. City of Chicago, 2014 U.S. Dist. LEXIS 66609, 2014 WL 1978407, at *8 (N.D. Ill. May 14, 2014)* ("Count IX is dismissed with prejudice to the extent it is based on time-barred events but may proceed with respect to the issuance of the June 6, 2013 warrant.").

Illinois Bell has moved to dismiss Balmes's non-*Blakes* claims, insofar as they pertain to work he performed before February 28, 2011, on the ground that they are barred by the FLSA's three-year statute of limitations for willful violations, *29 U.S.C. § 255(a)*. Illinois Bell concedes that Balmes's second amended complaint relates back to the original complaint in *Tinoco* filed on February 28, 2014, and therefore that claims based on work that Balmes performed on or after February 28, 2011 are at least plausibly timely. Doc. 28 at 6. Illinois **[*10]** Bell also concedes for purposes of its motion that Balmes's *Blakes* claims are timely to the extent they are based on work performed on or after July 28, 2008, which is three years before he opted into the *Blakes* collective action on July 28, 2011. *Id.* at 7. But Illinois Bell contends that Balmes's non-*Blakes* claims are time-barred to the extent they are based on work performed before February 28, 2011, a date three years before the *Tinoco* suit was filed. *Id.* at 7-10.

Balmes counters that *Blakes* tolled the limitations period on his FLSA claims. Doc. 31 at 6. In support, he cites *American Pipe and Construction Co. v. Utah, 414 U.S. 538, 94 S. Ct. 756, 38 L. Ed. 2d 713 (1974)*, which holds that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." *Id. at 554* (footnote omitted); *see also Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 352-53, 103 S. Ct. 2392, 76 L. Ed. 2d 628 (1983)*; *Sawyer v. Atlas Heating & Sheet Metal Works, Inc., 642 F.3d 560, 561 (7th Cir. 2011)*. *American Pipe* tolling, Balmes insists, applies to collective actions under the FLSA as well as to class actions, which means that he can recover for unpaid work performed as early as July 28, 2008. Doc. 31 at 6-10.

Illinois Bell does not dispute that *American Pipe* tolling can apply to collective actions under the FLSA. Doc. 28 at 7. Illinois Bell also admits that *Blakes* ***[*11]*** tolled the statute of limitations for the *Blakes* claims—which, again, allege that Illinois Bell refused to pay workers for guarding job sites during lunch, for travelling between job sites during lunch, and for completing timesheets after shifts. *Ibid.* Illinois Bell and Balmes disagree, however, about whether *Blakes* tolled the statute of limitations on Balmes's FLSA claims based on his non-*Blakes* claims—namely, that he often worked before his shifts and that he routinely did work during lunch other than guarding job sites and driving from one job site to another. Doc. 28 at 7-10; Doc. 31 at 10.

Judges in this District handling severed *Tinoco* suits have split over whether *American Pipe* tolled the limitations periods for non-*Blakes* claims. Some decisions hold that the lunch-break claims were tolled while the pre-shift claims were not. *See, e.g.*, *Niemiec v. Ill. Bell Tel. Co., 2016 U.S. Dist. LEXIS 16351, 2016 WL 521060, at *2-3 (N.D. Ill. Feb. 10, 2016)*; *Tennessen v. Ill. Bell Tel. Co., 2016 U.S. Dist. LEXIS 16334, 2016 WL 521046, at *2-3 (N.D. Ill. Feb. 10, 2016)*; *Jones v. Ill. Bell Tel. Co., 2015 U.S. Dist. LEXIS 170277, 2015 WL 9268418, at *2-3 (N.D. Ill. Dec. 21, 2015)*; *Alphonse v. Ill. Bell Tel. Co., 2015 U.S. Dist. LEXIS 155000, 2015 WL 7251953, at *2 (N.D. Ill. Nov. 17, 2015)*; *Wiggins v. Ill. Bell Tel. Co., 2015 U.S. Dist. LEXIS 144445, 2015 WL 6408122, at *4-6 (N.D. Ill. Oct. 22, 2015)*. Other decisions hold that none of the non-*Blakes* claims were tolled. *See Passi v. Ill. Bell Tel. Co., 2016 U.S. Dist. LEXIS 5381, 2016 WL 193401, at *4 (N.D. Ill. Jan. 15, 2016)*; *Malkowski v. Ill. Bell Tel. Co., 2016 U.S. Dist. LEXIS 5382, 2016 WL 193399, at *4 (N.D. Ill. Jan. 15, 2016)*; *Bowen v. Ill. Bell Tel. Co., 2016 U.S. Dist. LEXIS 4903, 2016 WL 164415, at *4 (N.D. Ill. Jan. 14, 2016)*.[*] The court agrees with the second set of decisions, and

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[*] Other decisions hold that *American Pipe* tolling is irrelevant and that it is more appropriate to analyze the severed *Tinoco* suits **[*12]** under *Rule 15(c)(1)(B)*. *See, e.g.*, *Ballard v. Ill. Bell Tel. Co., 2015 U.S. Dist. LEXIS 143163, 2015 WL 6407574, at *3 & n.1 (N.D. Ill. Oct. 21, 2015)*. Both Balmes and Illinois Bell agree that *American Pipe* tolling is the correct framework for

holds that none of Balmes's non-*Blakes* claims were tolled by *Blakes. See* Scott v. Ill. Bell Tel. Co., 2016 U.S. Dist. LEXIS 30905, 2016 WL 910507 (N.D. Ill. Mar 10, 2016).

As the Supreme Court explained in *Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 95 S. Ct. 1716, 44 L. Ed. 2d 295 (1975)*, *American Pipe* applies only when the earlier class suit "involve[s] exactly the same cause of action subsequently asserted." *Id. at 467*. And as the Seventh Circuit held in *In re Copper Antitrust Litigation, 436 F.3d 782 (7th Cir. 2006)*, *American Pipe* does not apply when the class claim and subsequent individual claim turn on the same factual allegations but advance different legal theories. *Id. at 794* (holding that a class suit in state court alleging violations of state ***antitrust law*** did not toll the limitations period for a later-filed suit for violations of federal ***antitrust law*** based on the same alleged misconduct); *see also* *Sawyer, 642 F.3d at 562* ("[T]he point of [*Copper Antitrust*] ... was not that a change of forum was dispositive; it was that state and federal antitrust laws differ."); *Williams v. Boeing Co., 517 F.3d 1120, 1135-36 (9th Cir. 2008)* (holding that *American Pipe* did not apply because the class suit alleged that the defendant violated *42 U.S.C. § 1981* with discriminatory failures to promote and by allowing a hostile work environment, while the later individual suit alleged **[*13]** that the defendant violated *§ 1981* by compensating black workers differently); *Spann v. Cmty. Bank of N. Va., 2004 U.S. Dist. LEXIS 5148, 2004 WL 691785, at *5-6 (N.D. Ill. Mar. 30, 2004)* (holding that the statute of limitations on an individual claim under the federal Truth in Lending Act was not tolled by a class complaint that alleged violations of state law); *Stutz v. Minn. Mining Mfg. Co., 947 F. Supp. 399, 404 n.2 (S.D. Ind. 1996)* ("For the legal fiction of tolling to be equitable to the defendant, the claims in both the class action and the individual action must be identical.").

Balmes points out that the *Blakes* complaint put Illinois Bell on notice that it was being sued "for unpaid wages dating back to January 17, 2008." Doc. 31 at 9. But notice to the defendant is not enough to trigger *American Pipe*; otherwise, the doctrine would apply to claims dealing with identical facts but different legal theories or vice versa, which *Copper Antitrust, Williams*, and the other above-cited cases disprove. Instead, *American Pipe* tolling exists to prevent "needless duplication" of litigation. *American Pipe, 414 U.S. at 554*. If an absent class member stands to recover in a putative class action but worries that her individual claim will be time-barred if the court eventually decides not to certify a class or to decertify a certified class, she might file an individual suit just to cover her bases. *American* ***[*14]*** *Pipe* tolling allays that worry, and therefore dissuades absent class members from filing protective suits. *See* *Chardon v. Fumero Soto, 462 U.S. 650, 659, 103 S. Ct. 2611, 77 L. Ed. 2d 74 (1983)*; *American Pipe, 414 U.S. at 553-54*. To have that effect, though, *American Pipe* need only apply to *identical* causes of action. As the Eighth Circuit recently explained:

> A broader rule would not enhance the "efficiency and economy" of Rule 23 class actions. The Supreme Court's concern was that without tolling, putative class members would needlessly bring motions to intervene or a multiplicity of actions raising identical claims. But where a putative class member wishes to pursue a claim *that is outside the scope of the class action*, his separate timely lawsuit is not "needless," because the class action would not prosecute his different claim.

Zarecor v. Morgan Keegan & Co., 801 F.3d 882, 888 (8th Cir. 2015) (emphasis added, citations omitted).

That is exactly what happened here. The lead plaintiffs in *Blakes* sued for pay for the time they spent guarding manholes during lunch, travelling between job sites during lunch, and filling out timesheets after shifts—the *Blakes* claims. If Balmes wanted to recover only for the *Blakes* claims, it would have been a waste for him to file an individual suit while the *Blakes* collective action was pending, and so it makes sense that the collective **[*15]** action tolled the statute of limitations for those specific claims. But Balmes also wants to recover for non-*Blakes* claims—time he spent preparing for work before his shifts, and time he spent doing work during lunch other than guarding manholes and driving between jobs. He could not reasonably have expected for the *Blakes* collective action to provide recovery for those claims, so it would *not* have been a waste for him to file an individual suit stating those claims. *American Pipe* tolling is therefore inappropriate for the non-*Blakes* claims.

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analyzing this suit, so the court need not address *Rule 15(c)(1)(B)* here. For the undersigned's analysis of the *Rule 15(c)(1)(B)* issue, see *Scott v. Ill. Bell Tel. Co., 2016 U.S. Dist. LEXIS 30905, 2016 WL 910507 (N.D. Ill. Mar. 10, 2016)*.

In fairness, Balmes's contrary position has support in decisions of the Second and Ninth Circuits. *See* Cullen v. Margiotta, 811 F.2d 698, 720 (2d Cir. 1987) (holding that *American Pipe* tolling, much like relation back under Rule 15(c), applies whenever the later-filed claims "involve the same evidence, memories, and witnesses as were involved in the initial putative class action," regardless of "the differences between the legal theories advanced" in the two actions), *overruled on other grounds by* Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143, 107 S. Ct. 2759, 97 L. Ed. 2d 121 (1987); Tosti v. City of Los Angeles, 754 F.2d 1485, 1489 (9th Cir. 1985) ("We find no persuasive authority for a rule which would require that the individual suit must be identical in every respect to the class suit for the statute to be tolled."); *see also* In re Cmty. Bank of N. Va., 622 F.3d 275, 299-300 (3d Cir. 2010) (describing the circuit **[*16]** split and collecting cases); *but see* Zarecor, 801 F.3d at 888 (8th Cir. 2015) (rejecting the contention that "*American Pipe* tolling should apply because the [individual claims], although different causes of action, were based on the same factual information that underlay the class action complaint"); Raie v. Cheminova, Inc., 336 F.3d 1278, 1283 (11th Cir. 2003) ("As we explained ..., however, a wrongful death action under Florida law is different in kind from any action based on a defective product. Because of this difference, a class action asserting primarily product liability claims would not include wrongful death claims unless wrongful death claims were explicitly included in the class action."). But this court follows the dictates of the Seventh Circuit in *Copper Antitrust* and *Sawyer*, not of the Second or the Ninth. *See* United States v. Glaser, 14 F.3d 1213, 1216 (7th Cir. 1994) ("A district court in Wisconsin must follow [the Seventh Circuit's] decisions, but it owes no more than respectful consideration to the views of other circuits.").

II. The IMWL Claims

A similar analysis applies to Balmes's IMWL claims. Three putative class IMWL claims were pending in *Blakes* between January 17, 2011, when the original complaint was filed, and June 23, 2011, when the *Blakes* plaintiffs voluntarily withdrew their class claims that Illinois Bell violated **[*17]** the IMWL by forcing workers: (1) to guard job sites during lunch; (2) to travel during lunch; and (3) to report their time after their shifts. Doc. 21 at ¶ 13; Complaint, *Blakes*, 11 C 336 (Doc. 1). Illinois Bell concedes that the limitations periods for Balmes's IMWL claims based on those allegations were tolled under *American Pipe* during that time. Doc. 38 at 12 n.9. (Illinois Bell does state that Balmes has "at most, six potential weeks of additional IMWL claims based on what was pled in *Blakes*." *Ibid.* That is incorrect. January 17 through June 23, a period of 158 days, is more like five months than six weeks.) And while Balmes argues that *all* of his IMWL claims were tolled during that period, Doc. 31 at 11, that argument fails for the same reason the parallel argument about his FLSA claims fails. The statute of limitations governing Balmes's IMWL claims was tolled from January 17, 2011 until June 23, 2011, but only to the extent that the claims were based on the same allegations as the IMWL claims in *Blakes*. So Balmes's *Blakes* claims under the IMWL are dismissed to the extent they are based on work performed before September 23, 2010, which is three years and 158 days before the *Tinoco* suit was **[*18]** filed.

III. The IWPCA Claims

Unlike the IMWL and the FLSA, which require employers to pay employees a minimum wage and to pay time and a half for overtime work no matter what, the IWPCA requires only that employers pay their employees whatever they agreed to pay them. *See* DeMarco v. Nw. Mem'l Healthcare, 2011 U.S. Dist. LEXIS 88541, 2011 WL 3510896, at *6 (N.D. Ill. Aug. 10, 2011). The IWPCA states that "[e]very employer shall be required, at least semi-monthly, to pay every employee all wages earned during the semi-monthly pay period," *820 ILCS 115/3*, and it defines "wages" as "any compensation owed an employee by an employer pursuant to an employment contract or agreement between the 2 parties," 820 ILCS 115/2. Balmes alleges that Illinois Bell violated the IWPCA by reneging on an agreement to pay him time and a half for overtime work. He cites four documents as evidence of the agreement: the two collective bargaining agreements between Balmes's union and Illinois Bell, the Code of Business Conduct, and the Reporting Time Worked document. Doc. 31 at 12-15.

As noted, the Code of Business Conduct states that "all overtime hours worked by nonexempt employees must be paid regardless of whether they were approved," Doc. 28-1 at 40, and the Reporting Time Worked document states that "[n]on-exempt employees are eligible for overtime pay **[*19]** for all hours actually worked in excess of 40 hours in a workweek" and that "[n]on-exempt employees must be paid properly for all time worked," *id.* at 42. Illinois Bell argues that, as a matter of law, those documents cannot establish an agreement between Balmes and Illinois Bell for purposes of the IWPCA.

Illinois Bell first points out that the Code of Business Conduct contains a disclaimer stating (in all capital letters) that "the Code of Business Conduct is not a contract of employment and does not create contractual rights of any kind between AT&T and its employees." Doc. 28 at 14; Doc. 28-1 at 39. But an "employment agreement [within the meaning of the IWPCA] need not be a formally negotiated contract"; it is "broader than a contract and requires only a manifestation of mutual assent on the part of two or more persons." *Landers-Scelfo v. Corp. Office Sys., Inc., 356 Ill. App. 3d 1060, 827 N.E.2d 1051, 1059, 293 Ill. Dec. 170 (Ill. App. 2005)* (quoting *Zabinsky v. Gelber Grp., Inc., 347 Ill. App. 3d 243, 807 N.E.2d 666, 671, 283 Ill. Dec. 61 (Ill. App. 2004))*; *see also* *Hess v. Kanoski & Assocs., 668 F.3d 446, 452 (7th Cir. 2012)* ("Illinois courts have explained that an agreement under the IWPCA is broader than a contract.") (internal quotation marks omitted); *Catania v. Local 4250/5050 of Commc'ns Workers of Am., 359 Ill. App. 3d 718, 834 N.E.2d 966, 972, 296 Ill. Dec. 161 (Ill. App. 2005)* ("Although a plaintiff must prove the existence of a valid and enforceable contract in order to recover under a common law action for breach of contract, the same cannot be said in an action **[*20]** under the Wage Payment Act."). The disclaimer establishes only that the Code of Business Conduct does not create a *contract*; it is still possible, viewing all facts in the light most favorable to Balmes, that the Code represents an *agreement* between Balmes and Illinois Bell for purposes of the IWPCA. *See* *Wharton v. Comcast Corp., 912 F. Supp. 2d 655, 659 (N.D. Ill. 2012)* ("The disclaimers' statements that the handbooks do not create a 'contract' therefore say nothing, by themselves, about whether the handbooks create an agreement.").

The disclaimer here is unlike the broader disclaimers in *Brand v. Comcast Corp., 2013 U.S. Dist. LEXIS 52098, 2013 WL 1499008 (N.D. Ill. Apr. 11, 2013)*, and *Martino v. MCI Communications Services, Inc., 2008 U.S. Dist. LEXIS 95155, 2008 WL 4976213 (N.D. Ill. Nov. 20, 2008)*, which stated not only that the handbooks did not create contracts, but also that the employers did not assent to be bound in any way by statements in the handbooks. *See* *Brand, 2013 U.S. Dist. LEXIS 52098, 2013 WL 1499008, at *5* ("The individual provisions of the Employee Handbook are simply guidelines, and Comcast reserves sole discretion to interpret them and resolve any conflict between or among policies.") (alteration omitted); *Martino, 2008 U.S. Dist. LEXIS 95155, 2008 WL 4976213, at *6* ("The Compensation Plan, including all related materials and documentation, is neither a contract *nor a guarantee of employment or compensation of any kind*.") (emphasis added). And while the disclaimer here is very similar to the one that *Harris v. Seyfarth Shaw LLP, 2010 U.S. Dist. LEXIS 93911, 2010 WL 3701322, at *2 (N.D. Ill. Sept. 9, 2010)*, held prevented a handbook from creating an agreement **[*21]** under the IWPCA, the undersigned is not bound by that decision and respectfully disagrees with its reasoning.

Illinois Bell next argues that the Code of Conduct and the Reporting Time Worked document are not agreements under the IWPCA because they state only that Illinois Bell will pay time and a half for overtime, which the IMWL and the FLSA already require it to do. Doc. 28 at 14-16. Again, though, that argument confuses agreements with contracts. Contracts require consideration, which usually means that parties cannot contract to do things that they already were required to do. *See* *Contempo Design, Inc. v. Chi. and Ne. Ill. Dist. Council of Carpenters, 226 F.3d 535, 550 (7th Cir. 2000)* (en banc) ("The pre-existing duty rule states that promising to perform a duty that already is owed under an existing contract is not consideration, and, thus, a modification to the contract is unenforceable."); *Johnson v. Maki & Assocs., Inc., 289 Ill. App. 3d 1023, 682 N.E.2d 1196, 1199, 225 Ill. Dec. 119 (Ill. App. 1997)*. But an agreement under the IWPCA is only "a manifestation of mutual assent," and nothing prevents an employer and an employee from mutually assenting to follow the law. *See* *Wharton, 912 F. Supp. 2d at 660-61* (rejecting an employer's argument that, because a handbook promised only that the employer "w[ould] comply with existing employment law," it could not be an employment agreement under the IWPCA).

Illinois Bell finds more success **[*22]** arguing that it is inappropriate for Balmes to rely on the collective bargaining agreements for purposes of his IWPCA claims. Section 301 of the Labor Management Relations Act ("LMRA") provides:

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a). As interpreted by the Supreme Court, the provision does more than authorize federal courts to hear labor disputes; it also completely preempts state law claims "founded directly on rights created by collective-bargaining agreements, and also claims substantially dependent on analysis of a collective-bargaining agreement." Caterpillar Inc. v. Williams, 482 U.S. 386, 394, 107 S. Ct. 2425, 96 L. Ed. 2d 318 (internal quotation marks omitted); *see also* Nelson v. Stewart, 422 F.3d 463, 467-69 (7th Cir. 2005); In re Bentz Metal Prods. Co., 253 F.3d 283, 285-86 (7th Cir. 2001) (en banc). Preemption under § 301 "covers not only obvious disputes over labor contracts, but also any claim masquerading as a state-law claim that nevertheless is deemed 'really' to be a claim under a labor contract." Crosby v. Cooper B-Line, Inc., 725 F.3d 795, 797.

"[T]o determine whether a purported **[*23]** state-law claim 'really' arises under Section 301, a federal court must look beyond the face of plaintiff's allegations and the labels used to describe her claims and ... evaluate the *substance* of plaintiff's claims." Id. at 800 (internal quotation marks omitted). "[A] state-law claim is 'completely preempted' only when it is 'inextricably intertwined with consideration of the terms of [a] labor contract.'" *Ibid.* (quoting Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 213, 105 S. Ct. 1904, 85 L. Ed. 2d 206 (1985)). Put another way, § 301 preempts any state law claim whose resolution "requires the interpretation of a collective-bargaining agreement." Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 413, 108 S. Ct. 1877, 100 L. Ed. 2d 410 (1988) (footnote omitted); *see also* Crosby, 725 F.3d at 800 ("[O]nly those state-law claims that require 'interpretation' of a CBA are inevitably federal."); Kimbro v. Pepsico, Inc., 215 F.3d 723, 727 (7th Cir. 2000) (holding that § 301 preempted a tortious interference claim because the claim required the plaintiff to prove that his employer breached a collective bargaining agreement).

Section 301 preemption is not boundless. A state law claim is not preempted simply because it "require[s] reference to" a collective bargaining agreement. Bentz, 253 F.3d at 285. Thus, "the mere need to 'look to' the collective-bargaining agreement for damages computation is no reason to hold the state-law claim defeated by § 301." Livadas v. Bradshaw, 512 U.S. 107, 125, 114 S. Ct. 2068, 129 L. Ed. 2d 93 (1994). Moreover, even a state law claim that turns on the meaning of a collective bargaining **[*24]** agreement will escape preemption "when the particular contractual provision is so clear as to preclude all possible dispute over its meaning ... [or] if the parties do not dispute the interpretation of the relevant ... provisions." Wis. Cent., Ltd. v. Shannon, 539 F.3d 751, 758 (7th Cir. 2008) (internal quotation marks, brackets, and citations omitted) (discussing the Railway Labor Act, 45 U.S.C. § 151 et seq.); *see also* Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246, 260, 114 S. Ct. 2239, 129 L. Ed. 2d 203 (1994) (describing the RLA preemption standard as "virtually identical to the pre-emption standard the Court employs in cases involving § 301 of the LMRA"). Thus, a state law claim is not completely preempted under circumstances where a defendant contending that the claim requires interpretation of a collective bargaining agreement advances a frivolous or insubstantial reading of the agreement; preemption applies only where the parties' respective interpretations of the agreement are arguable or plausible. *See* Baker v. Kingsley, 387 F.3d 649, 659 (7th Cir. 2004) ("Because defendants' interpretation is plausible, and demonstrates a genuine dispute between the parties that can affect liability, it is a sufficient basis for preemption.").

Balmes's IWPCA claims will not *require* interpretation of the collective bargaining agreements—as explained above, Balmes can rely entirely on the Code of Business Conduct and the Reporting Time **[*25]** Worked document to prove that Illinois Bell broke an employment agreement—so the claims are not preempted. That said, Balmes may not rely on the collective bargaining agreements to prove that Illinois Bell owed him "wages" under the IWPCA. Both collective bargaining agreements state that "[e]mployees shall be paid at the overtime rate of one and one-half ... times their basic hourly wage rate including applicable differentials for work performed ... in excess of forty (40) hours in a week." Doc. 28-1 at 3, 27. So, to the extent that the IWPCA claims rely on the collective bargaining agreements, the court would have to determine whether the work-related tasks that Balmes performed outside of normal hours count as "work" under the agreements. That question mirrors the question whether those tasks count as "work" under the FLSA and the IMWL, and it likely will be just as fiercely disputed. *See* Mitchell v. JCG Indus., *Inc., 745 F.3d 837, 844 (7th Cir. 2014)* (holding that time spent donning and doffing mandatory protective gear was not compensable work under the FLSA or the IMWL). Accordingly, if Balmes continues to try to root his IWPCA claims in the collective bargaining agreements, the claims will be preempted; but they will not be preempted if he relies solely **[*26]** on the Code of Business Conduct and the Reporting Time Worked document. *Cf. Firestone v. S. Cal. Gas Co., 219 F.3d 1063, 1066-67 (9th Cir. 2000)* (holding that a suit under California's overtime laws was completely preempted because it would have required the court to determine "whether the plaintiffs were receiving a 'premium wage rate' for overtime under the collective bargaining agreement," which would have exempted them from the state overtime law).

Conclusion

Illinois Bell's partial motion to dismiss is granted in part and denied in part. Balmes's non-*Blakes* claims under the FLSA and the IMWL—meaning claims pertaining to work that did *not* consist of guarding job sites or travelling between job sites during lunch—are dismissed with prejudice to the extent they are based on work performed before February 28, 2011. Balmes's *Blakes* claims under the IMWL were tolled only between January 17, 2011 and June 23, 2011—a period of 158 days—so they are dismissed to the extent they are based on work performed before September 23, 2010, which is three years and 158 days before the *Tinoco* suit was filed. Balmes's IWCPA claims are not dismissed, but he may not rely on the collective bargaining agreements to prove them.

March 15, 2016

/s/ Gary Scott Feinerman

United **[*27]** States District Judge

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In re Lithium Ion Batteries Antitrust Litig.

United States District Court for the Northern District of California

March 16, 2016, Decided

Case No.: 13-MD-2420 YGR

Reporter

2016 U.S. Dist. LEXIS 34566 *; 2016-1 Trade Reg. Rep. (CCH) P79,540; 2016 WL 1054584

IN RE: LITHIUM ION BATTERIES ANTITRUST LITIGATION. This Order Relates to: All Direct and Indirect Purchaser Actions

Subsequent History: Motion granted by *In re Lithium Ion Batteries Antitrust Litig., 2016 U.S. Dist. LEXIS 41105 (N.D. Cal., Mar. 24, 2016)*

Prior History: *In re Lithium Ion Batteries Antitrust Litig., 2016 U.S. Dist. LEXIS 34641 (N.D. Cal., Mar. 14, 2016)*

Core Terms

battery, conspiracy, lithium, cells, genuine, material fact, withdrew, summary judgment, withdrawal, packs, manufacturing equipment, co-conspirators, conspirator, sales

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For Charles Carte, Plaintiff: Guido Saveri, LEAD ATTORNEY, Cadio R. Zirpoli, David Yau-Tian Hwu, Geoffrey Conrad Rushing, Lisa Maria Saveri, Richard Alexander Saveri, Saveri and Saveri, Inc., San Francisco, CA; Brian P. Murray, Gregory Bradley Linkh, Lee Albert, Susan Gilah Kupfer, Glancy Prongay & Murray LLP, New York, NY; Carl Nils Hammarskjold, Saveri and Saveri, San Francisco, CA; R Alexander Saveri, Saveri and Saveri Inc, San Francisco, CA; Todd Anthony Seaver, Berman DeValerio, San Francisco, CA.

For Brian Hanlon, Plaintiff: Brent W Johnson, Kit A. Pierson, LEAD ATTORNEYS, Cohen Milstein Sellers and Toll PLLC, Washington, DC; Jeff D Friedman, LEAD ATTORNEY, Hagens Berman Sobol Shapiro LLP, Berkeley, CA; Laura M **[*2]** Alexander, Cohen Milstein Sellers and Toll, Washington, DC.

For Nichole M. Gray, Plaintiff: Guido Saveri, LEAD ATTORNEY, David Yau-Tian Hwu, Lisa Maria Saveri, Richard Alexander Saveri, Saveri and Saveri, Inc., San Francisco, CA; Aaron James Broussard, Broussard and Hart LLC, Lake Charles, LA; Carl Nils Hammarskjold, Saveri and Saveri, San Francisco, CA; Douglas A. Millen, Freed Kanner London & Millen LLC, Bannockburn, IL; R Alexander Saveri, Saveri and Saveri Inc, San Francisco, CA; Richard Kirchner, Bonsignore & Brewer, Belmont, NH; Robert J. Bonsignore, Bonsignore Trial Lawyers, PLLC, Las Vegas, NV; Todd Anthony Seaver, Berman DeValerio, San Francisco, CA.

For Woodrow Clark, II, Plaintiff: Brian Joseph Barry, Law Offices of Brian Barry, Los Angeles, CA; James E. Cecchi, Lindsey H. Taylor, Carella Byrne, Roseland, NJ; Todd Anthony Seaver, Berman DeValerio, San Francisco, CA.

For Rebecca Cervenak, Plaintiff: William James Doyle, II, LEAD ATTORNEY, Doyle Lowther LLP, Vancouver, WA.

For John Russo, Plaintiff: William James Doyle, II, LEAD ATTORNEY, Doyle Lowther LLP, Vancouver, WA; James Robert Hail, Doyle Lowther, San Diego, CA; Katherine S. DiDonato, Shustak Reynolds & Partners, P.C., **[*3]** San Diego, CA.

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For Bradley Van Patten, Plaintiff: Alex M Tomasevic, Craig McKenzie Nicholas, Nicholas and Butler LLP, San Diego, CA; George D. Rikos, Law Offices of George Rikos, San Diego, CA; Rosa Estela Shelton, Del Mar, CA.

For Benjamin Kramer, James A. Smith, Angela Turner, Katherine A. Wirkus, Plaintiffs: Christopher M. Burke, LEAD ATTORNEY, Scott Scott LLP, San Diego, CA; John Jasnoch, San Diego, CA; Joseph P. Guglielmo, Scott & Scott LLP, New York, NY; Todd Michael Schneider, Schneider Wallace Cottrell Konecky Wotkyns LLP, Emeryville, CA; Walter W. Noss, Scott+Scott LLP, San Diego, CA.

For Michael Barbat, Plaintiff: Jason Scott Hartley, LEAD ATTORNEY, Stueve Siegel Hanson, LLP, San Diego, CA; Todd Anthony Seaver, Berman DeValerio, San Francisco, CA.

For David Brownlee, Plaintiff: Jason Scott Hartley, LEAD ATTORNEY, Stueve Siegel Hanson, LLP, San **[*4]** Diego, CA; Joseph R. Saveri, Ryan James McEwan, Joseph Saveri Law Firm, Inc., San Francisco, CA; Todd Anthony Seaver, Berman DeValerio, San Francisco, CA.

For Robert Alan Dishman, Joan Goodman, David McAfee, Dawn Thompson, Plaintiffs: David D. Dishman, LEAD ATTORNEY, Law Office of David D. Dishman, Boston, MA.

For The Stereo Shop, Plaintiff: Lindsey A. Davis, LEAD ATTORNEY, Zelle Hofmann Voelbel & Mason LLP, Minneapolis, MN; Christopher Thomas Micheletti, Heather T. Rankie, Judith A. Zahid, Zelle LLP, San Francisco, CA; Craig C. Corbitt, Zelle Hofmann Voelbel & Mason LLP, San Francisco, CA; Daniel E. Gustafson, PRO HAC VICE, Jason Kilene, Joshua J. Rissman, Gustafson Gluek PLLC, Minneapolis, MN; Dennis Stewart, Hulett Harper Stewart LLP, San Diego, CA; Dianne M. Nast, NastLaw LLC, Philadelphia, PA; Francis Onofrei Scarpulla, Patrick Bradford Clayton, Law Offices of Francis O. Scarpulla, San Francisco, CA; Todd Anthony Seaver, Berman DeValerio, San Francisco, CA.

For Michele Criden, Plaintiff: James E. Cecchi, LEAD ATTORNEY, Lindsey H. Taylor, Carella Byrne, Roseland, NJ; Peter A. Barile, III, LEAD ATTORNEY, Grant & Eisenhofer, P.C., New York, NY; Jay W. Eisenhofer, Grant & Eisenhofer, **[*5]** P.A., New York, NY; Linda Phyllis Nussbaum, Nussbaum Law Group, P.C., New York, NY; Todd Anthony Seaver, Berman DeValerio, San Francisco, CA.

For Brian Caleb Batey, Drake Dailey-Chawlibog, Meghan Dowling, Michael Hull, David Shawn, Plaintiffs: Christopher M. Burke, LEAD ATTORNEY, Scott + Scott LLP, San Diego, CA; Danielle Evelyn Leonard, James M. Finberg, Altshuler Berzon LLP, San Francisco, CA; James E. Cecchi, Lindsey H. Taylor, Carella Byrne, Roseland, NJ; James Gerard Stranch, IV, Branstetter Stranch & Jennings, Nashville, TN; John Jasnoch, San Diego, CA; Joseph P. Guglielmo, Scott & Scott LLP, New York, NY; Todd Michael Schneider, Schneider Wallace Cottrell Konecky Wotkyns LLP, Emeryville, CA; Walter W. Noss, ScottScott LLP, San Diego, CA.

For A-1 Computers Inc, Thomas R. Tuohy, Plaintiffs: NICOLE M. ACCHIONE, LEAD ATTORNEY, TRUJILLO RODRIGUEZ & RICHARDS, LLP, HADDONFIELD, NJ; John G. Emerson, Emerson Scott LLP, Houston, TX; Lisa J. Rodriguez, Trujillo Rodriguez & Richards LLC, Haddonfield, NJ; Scott E. Poynter, Steel, Wright & Collier, PLLC, Little Rock, AR.

For Yevgeniya Lisitsa, Plaintiff: James E. Cecchi, Lindsey H. Taylor, Carella Byrne, Roseland, NJ; Jamie E. Weiss, Complex **[*6]** Litigation Group LLC, Highland Park, IL; Jeffrey A Leon, Quantum Legal LLC, Highland Park, IL; Lindsey H. Taylor, Carella Byrne, Roseland, NJ; Paul M. Weiss, Complex Litigation Group LLC, Highland Park, IL; Todd Anthony Seaver, Berman DeValerio, San Francisco, CA.

For Daniel Meir, Plaintiff: Robert Samuel Kitchenoff, LEAD ATTORNEY, Weinstein Kitchenoff and Asher LLC, Philadelphia, PA; Jeremy S. Spiegel, Steven A. Asher, Weinstein Kitchenoff & Asher LLC, Philadelphia, PA; Lisa J.

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For Kimberly Raimondo, Plaintiff: David Francis Sorensen, Eric L. Cramer, Berger & Montague, P.C., Philadelphia, PA; James E. Cecchi, Lindsey H. Taylor, Carella Byrne, Roseland, NJ; Sarah Rebecca Schalman-Bergen, Berger and Montague, P.C., Philadelphia, PA; Todd Anthony Seaver, Berman DeValerio, San Francisco, CA.

For Deweese Smith, Plaintiff: James E. Cecchi, Lindsey H. Taylor, Carella Byrne, Roseland, NJ; Joseph T. Lukens, Faruqi and Faruqi LLP, Jenkintown, PA; Kendall S. Zylstra, Stephen E. Connolly, PRO HAC VICE, Faruqi and Faruqi, LLP, Jenkintown, **[*7]** PA; Todd Anthony Seaver, Berman DeValerio, San Francisco, CA.

For Regina Shannon, Plaintiff: Bruce Daniel Greenberg, LEAD ATTORNEY, Lite DePalma Greenberg, LLC, Newark, NJ; Anne T Regan, Zimmerman Reed PLLP, Minneapolis, MN; Brian Gudmundson, Attorney at Law, Minneapolis, MN; David M. Cialkowski, Zimmerman Reed, PLLP, Minneapolis, MN; James W. Andeson, Heins Mills & Olson PLC, Minneapolis, MN; Renae Diane Steiner, Vincent J. Esades, Heins Mills & Olson, P.L.C., Minneapolis, MN; Todd Anthony Seaver, Berman DeValerio, San Francisco, CA.

For Kim Billingsley, Plaintiff: Casey Langston Lott, Langston Lott P A, Booneville, MS; E. Kirk Wood, Wood Law Firm LLC, Birmingham, AL; James E. Cecchi, Lindsey H. Taylor, Carella Byrne, Roseland, NJ.

For Renee Meier, Plaintiff: NICOLE M. ACCHIONE, LEAD ATTORNEY, TRUJILLO RODRIGUEZ & RICHARDS, LLP, HADDONFIELD, NJ; Garrett D. Blanchfield, Jr., Mark Reinhardt, Reinhardt Wendorf & Blanchfield, St. Paul, MN; Gary B Friedman, Friedman Law Group LLP, New York, NY; Lisa J. Rodriguez, Trujillo Rodriguez & Richards LLC, Haddonfield, NJ; Noah Shube, PRO HAC VICE, The Law Offices of Noah Shube, New York City, NY; Todd Anthony Seaver, Berman DeValerio, San Francisco, **[*8]** CA.

For First Choice Marketing Inc, Plaintiff: Beth Targan Seltzer, LEAD ATTORNEY, Barrack Rodos and Bacine, Philadelphia, PA; Donald L Perelman, Jeffrey Steven Istvan, Roberta D. Liebenberg, Fine Kaplan and Black, RPC, Philadelphia, PA; Gerald J Rodos, Barrack Rodos and Bacine, Philadelphia, PA; Jeffrey B. Gittleman, Barrack Rodos & Bacine, Newark, NJ; Joshua D. Snyder, Michael J. Boni, Boni & Zack LLC, Bala Cynwyd, PA; Robert G. Eisler, Grant & Eisenhofer P.A., Wilmington, DE; Todd Anthony Seaver, Berman DeValerio, San Francisco, CA; William John Ban, Barrack, Rodos and Bacine, New York, NY.

For Michael James Doyle, Plaintiff: Christopher M. Burke, LEAD ATTORNEY, Scott + Scott LLP, San Diego, CA; Dan W. Taliaferro, Gregory Louis Davis, Davis and Taliaferro, LLC, Montgomery, Al; James E. Cecchi, Lindsey H. Taylor, Carella Byrne, Roseland, NJ; James Gerard Stranch, IV, Branstetter Stranch & Jennings, Nashville, TN; John Jasnoch, San Diego, CA; Joseph P. Guglielmo, Scott & Scott LLP, New York, NY; Todd Michael Schneider, Schneider Wallace Cottrell Konecky Wotkyns LLP, Emeryville, CA; Walter W. Noss, ScottScott LLP, San Diego, CA.

For Rebecca Cohen, Ellis Greenspan, Louis Messina, Patrice **[*9]** Nealon, Elizabeth Porter, Dawn Potvin, Marylin Sharp, Grace Shire, Dan Wehking, Steven Wiley, Plaintiffs: Timothy A. C. May, LEAD ATTORNEY, Messina Law Firm, Holmdel, NJ; Brian Douglas Penny, Goldman Scarlato Karon and Penny, P.C., Wayne, PA; Daniel R. Karon, Karon LLC, Cleveland, OH; Gil D. Messina, Messina Law Firm PC, Holmdel, NJ; Isaac L. Diel, Sharp McQueen, Overland Park, KS; John D. Zaremba, Zaremba Brownell & Brown PLLC, New York, NY; Kevin Peter Roddy, Wilentz Goldman & Spitzer, PA, Woodbridge, NJ; Krishna Brian Narine, Meredith Narine, Philadelphia, PA.

For Nancy Ruan, Plaintiff: Stephen M. Sohmer, LEAD ATTORNEY, The Sohmer Law Firm LLC, Bloomfield, NJ; Eugene A. Spector, Jeffrey Lawrence Spector, Spector Roseman Kodroff & Willis, PC, Philadelphia, PA; Jonathan M. Jagher, Spector Roseman Kodroff & Willis PC, Philadelphia, PA; Jonathan Marc Jagher, Spector Roseman & Kodroff, Philadelphia, PA; Todd Anthony Seaver, Berman DeValerio, San Francisco, CA; William G. Caldes, Spector, Roseman, Kodroff & Willis, P.C., Philadelphia, PA.

For Chad Conover, Plaintiff: Eric S. Somers, Howard Judd Hirsch, Lexington Law Group, San Francisco, CA; James E. Cecchi, Lindsey H. Taylor, Carella Byrne, **[*10]** Roseland, NJ; Mark N. Todzo, Lexington Law Group, LLP, San Francisco, CA.

For Susanne Hiller, Robert Hyams, Matthew Weiner, Plaintiffs: Eric S. Somers, Howard Judd Hirsch, Lexington Law Group, San Francisco, CA; James E. Cecchi, Lindsey H. Taylor, Carella Byrne, Roseland, NJ.

For Gerasimos Molfetas, Plaintiff: Natalie Finkelman Bennett, LEAD ATTORNEY, Shepherd, Finkelman, Miller & Shah, LLP, Collingswood, NJ; James Craig Shah, Collingswood, NJ; Jayne Arnold Goldstein, PRO HAC VICE, Pomerantz LLP, Weston, FL.

For Beverlee Sclar, Plaintiff: Christopher M. Burke, LEAD ATTORNEY, Scott + Scott LLP, San Diego, CA; James E. Cecchi, LEAD ATTORNEY, Lindsey H. Taylor, Carella Byrne, Roseland, NJ; John Jasnoch, San Diego, CA; Joseph P. Guglielmo, Scott & Scott LLP, New York, NY; Todd Michael Schneider, Schneider Wallace Cottrell Konecky Wotkyns LLP, Emeryville, CA; Walter W. Noss, ScottScott LLP, San Diego, CA.

For David Petree, Plaintiff: Jennie Lee Anderson, Andrus Anderson LLP, San Francisco, CA; Peter James Mougey, Levin Papantonio Thomas Mitchell Rafferty and Proctor P.A., Pensacola, FL.

For Mike Katz-Lacabe, Plaintiff: Eric B. Fastiff, LEAD ATTORNEY, Brendan Patrick Glackin, Elizabeth Joan Cabraser, **[*11]** Lieff, Cabraser, Heimann & Bernstein LLP, San Francisco, CA; Richard Martin Heimann, Lieff Cabraser Heimann & Bernstein, San Francisco, CA.

For James O'Neil, Plaintiff: Danielle A. Stoumbos, LEAD ATTORNEY, Finkelstein Thompson LLP, San Francisco, CA; Douglas Graham Thompson, Jr., Eugene Joseph Benick, III, L. Kendall Satterfield, Michael Glenn McLellan, Rosemary M. Rivas, Finkelstein Thompson LLP, Washington, DC; Todd Anthony Seaver, Berman DeValerio, San Francisco, CA.

For Lloyd Ranola, Plaintiff: Elizabeth Cheryl Pritzker, LEAD ATTORNEY, Jonathan Krasne Levine, PRITZKER LEVINE LLP, Oakland, CA; Eric H. Gibbs, Scott M. Grzenczyk, Girard Gibbs LLP, San Francisco, CA; Janice Seyoung Yi, Law Offices of Ronald B. Bass, Walnut Creek, CA; Todd Anthony Seaver, Berman DeValerio, San Francisco, CA.

For Alfred H. Siegel, Plaintiff: Bruce Lee Simon, LEAD ATTORNEY, Aaron M. Sheanin, Robert George Retana, William James Newsom, Pearson, Simon & Warshaw, LLP, San Francisco, CA; Alexander Robert Safyan, Bobby Pouya, Clifford H. Pearson, Daniel L. Warshaw, Pearson, Simon & Warshaw, LLP, Sherman Oaks, CA; Steven Todd Gubner, Ezra Brutzkus Gubner LLP, Woodland Hills, CA; Todd Anthony Seaver, Berman DeValerio, **[*12]** San Francisco, CA.

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For Automation Engineering, LLC, Plaintiff: Allan Steyer, Steyer Lowenthal Boodrookas Alvarez & Smith LLP, San Francisco, CA; Amy Dawn Fitts, Kansas City, MO; Brian D Clark, Elizabeth R. Odette, Heidi M Silton, Lockridge Grindal Nauen P.L.L.P., Minneapolis, MN; Daniel D. Owen, PRO HAC VICE, Shughart Thomson & Kilroy, P.C., Kansas City, MO; G. Gabriel Zorogastua, Jack Brady, Polsinelli Shughart PC, Kansas City, MO; Gabriel Dash Zeldin, Steyer Lowenthal Boodrookas Alvarez Smith LLP, San Francisco, CA; Jill Michelle Manning, Steyer Lowenthal, San Francisco, CA; Todd Anthony Seaver, Berman DeValerio, San Francisco, **[*13]** CA; W. Joseph Bruckner, Lockridge Grindal Nauen P.L.L.P, Minneapolis, MN.

For Edward Klugman, Plaintiff: Allan Steyer, Steyer Lowenthal Boodrookas Alvarez & Smith LLP, San Francisco, CA; Brian D Clark, Elizabeth R. Odette, Heidi M Silton, Lockridge Grindal Nauen P.L.L.P., Minneapolis, MN; Daniel D. Owen, PRO HAC VICE, Shughart Thomson & Kilroy, P.C., Kansas City, MO; G. Gabriel Zorogastua, Jack Brady, Polsinelli Shughart PC, Kansas City, MO; Gabriel Dash Zeldin, Steyer Lowenthal Boodrookas Alvarez Smith LLP, San Francisco, CA; Jill Michelle Manning, Steyer Lowenthal, San Francisco, CA; Todd Anthony Seaver, Berman DeValerio, San Francisco, CA; W. Joseph Bruckner, Lockridge Grindal Nauen P.L.L.P, Minneapolis, MN.

For Gene Powers, Plaintiff: Alan Mayer Caplan, Roderick P. Bushnell, Bushnell & Caplan LLP, San Francisco, CA; Alexandra Senya Bernay, Robbins Geller Rudman and Dowd LLP, San Diego, CA; Samuel H. Rudman, Robbins Geller Rudman & Dowd LLP, Melville, NY.

For Richard S.E. Johns, Plaintiff: Jeffrey Farley Keller, LEAD ATTORNEY, Eric A. Grover, Kathleen R. Scanlan, Keller Grover LLP, San Francisco, CA.

For Brandon Martinez, Plaintiff: Lesley Elizabeth Weaver, LEAD ATTORNEY, Whitney E. **[*14]** Street, Block & Leviton LLP, Oakland, CA; James Robert Noblin, Green and Noblin, P.C., Long Beach, CA; Jeffrey C. Block, Mark A. Delaney, Block & Leviton LLP, Boston, MA; Robert S. Green, Green & Noblin, P.C., Larkspur, CA.

For Angelo Michael D'Orazio, Plaintiff: Lesley Elizabeth Weaver, LEAD ATTORNEY, Block & Leviton LLP, Oakland, CA; Domenico Minerva, New York, NY; James Robert Noblin, Green and Noblin, P.C., Long Beach, CA; Peter G.A. Safirstein, Morgan & Morgan P.C., New York, NY; Robert S. Green, Green & Noblin, P.C., Larkspur, CA.

For Ron Nelson, Jr., Plaintiff: Guido Saveri, LEAD ATTORNEY, Cadio R. Zirpoli, Richard Alexander Saveri, David Yau-Tian Hwu, Lisa Maria Saveri, Saveri and Saveri Inc., San Francisco, CA; R Alexander Saveri, LEAD ATTORNEY, Saveri and Saveri Inc, San Francisco, CA; Carl Nils Hammarskjold, Saveri and Saveri, San Francisco, CA; Douglas A. Millen, Steven A. Kanner, Freed Kanner London & Millen LLC, Bannockburn, IL; Geoffrey Conrad Rushing, Saveri & Saveri Inc., San Francisco, CA; Harry Shulman, Shulman Law Firm, San Francisco, CA; Michael Jerry Freed, Freed Kanner London Millen LLC, Bannockburn, IL; Thomas H. Johnson, The Law Firm of Thomas H. Johnson, P.A., **[*15]** Texarkana, AR; Todd Anthony Seaver, Berman DeValerio, San Francisco, CA.

For Univision-Crimson Holding, Inc., Plaintiff: Todd Anthony Seaver, LEAD ATTORNEY, Joseph J. Tabacco, Jr., Sarah Khorasanee McGrath, Victor Santiago Elias, Berman DeValerio, San Francisco, CA; Patrick Howard, Simon Bahne Paris, Saltz Mongeluzzi Barrett and Bendesky, Philadelphia, PA.

For Piya Robert Rojanasathit, Plaintiff: Joseph M. Breall, LEAD ATTORNEY, Jill L. Diamond, Breall & Breall, LLP, San Francisco, CA.

For Michael S. Wilson, Plaintiff: Adam C. Belsky, Terry Gross, LEAD ATTORNEYS, Monique Alonso, Sarah Crowley, Gross Belsky Alonso LLP, San Francisco, CA; Ari Yale Basser, MARKUN ZUSMAN FRENIERE AND COMPTON, LLP, Pacific Palisades, CA; Daniel J Mogin, The Mogin Law Firm, San Diego, CA; Guido Saveri, R. Alexander Saveri, Saveri and Saveri Inc., San Francisco, CA; Randy R. Renick, Hadsell Stormer & Renick LLP, Los Angeles, CA.

For Ritz Camera & Image, LLC, Plaintiff: R. Alexander Saveri, LEAD ATTORNEY, Cadio R. Zirpoli, Guido Saveri, Lisa Maria Saveri, Richard Alexander Saveri, Saveri and Saveri Inc., San Francisco, CA; Carl Nils Hammarskjold, Saveri and Saveri, San Francisco, CA; Matthew A. Seligman, Kellogg **[*16]** Huber Hansen Todd Evans and Figel PLLC, Washington, DC; Richard Kirchner, Bonsignore & Brewer, Belmont, NH; Robert J. Bonsignore, Bonsignore Trial Lawyers, PLLC, Las Vegas, NV; Steven F. Benz, Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C., Washington, DC; Todd Anthony Seaver, Berman DeValerio, San Francisco, CA.

For Steven Bugge, Plaintiff: Ralph B. Kalfayan, LEAD ATTORNEY, Krause Kalfayan Benink & Slavens, San Diego, CA; David E. Azar, Milberg LLP, Los Angeles, CA; Elizabeth Anne McKenna, Milberg LLP, NY, NY; Merjanian A. Vic, Vic A. Merjanian, Krause Kalfayan Benink and Slavens LLP, San Diego, CA; Paul F. Novak, PRO HAC VICE, Milberg LLP, Detroit, MI; Peggy Wedgworth, Milberg LLP, New York, NY.

For A. Keith Thrower, Plaintiff: Sydney Jay Hall, Law Offices of Sydney Jay Hall, Burlingame, Ca; Todd Anthony Seaver, Berman DeValerio, San Francisco, CA.

For Kristina Yee, Plaintiff: Nanci Eiko Nishimura, LEAD ATTORNEY, Adam John Zapala, Joseph W. Cotchett, Nancy L. Fineman, Steven N. Williams, Steven Noel Williams, Cotchett Pitre & McCarthy LLP, Burlingame, CA; Elizabeth Tran, Cotchett, Pitre and McCarthy, Burlingame, CA; Joanna Weil LiCalsi, Cotchett Pitre McCarthy LLP, Burlingame, **[*17]** CA.

For Joseph G. O'Daniel, Plaintiff: Gregory P. Forney, LEAD ATTORNEY, Shaffer Lombardo Shurin, Kansas City, MO; Thomas J.H. Brill, Law Office of Thomas H. Brill, Leawood, KS.

For William Cabral, Plaintiff: Daniel Edward Birkhaeuser, Bramson, Plutzik, Mahler & Birkhaeuser, Walnut Creek, CA.

For Jason Ames, Wilbur Franklin, Beatriz Hernandez, Linda Lincoln, Plaintiffs: Christopher M. Burke, LEAD ATTORNEY, Scott + Scott LLP, San Diego, CA; John Jasnoch, San Diego, CA; Joseph P. Guglielmo, Scott & Scott LLP, New York, NY; Walter W. Noss, ScottScott LLP, San Diego, CA.

For Kristin Starr Barnes, Mark Bergeron, Michael Janusa, Adam Ronquillo, Plaintiffs: Daniel E. Becnel, Jr., LEAD ATTORNEY, Becnel Law Firm, L.L.C., Reserve, LA; Kevin Partick Klibert, Law Offices of Daniel E. Becnel, Jr., Reserve, LA; Toni Becnel, Becnel Law Firm LLC, Reserve, LA.

For Terri Walner, Plaintiff: Carl Nils Hammarskjold, Saveri and Saveri, San Francisco, CA; Gary Laurence Specks, Kaplan Fox & Kilsheimer LLP, Highland Park, IL; Gregory K Arenson, Richard Jo Kilsheimer, Kaplan Fox and Kilsheimer LLP, New York, NY; Guido Saveri, Richard Alexander Saveri, Saveri & Saveri, Inc., San Francisco, CA; Lisa Maria Saveri, **[*18]** Saveri & Saveri Inc., San Francsico, CA; Robert N. Kaplan, Kaplan Kilsheimer & Fox LLP, New York, NY; Todd Anthony Seaver, Berman DeValerio, San Francisco, CA.

For Anna Jawor, Plaintiff: Kalpana Srinivasan, Susman Godfrey, Los Angeles, CA; Kathryn Parsons Hoek, Marc M. Seltzer, Steven Gerald Sklaver, Susman Godfrey LLP, Los Angeles, CA; Lindsey Godfrey Eccles, Susman Godfrey L.L.P., Seattle, WA.

For Krista Lepore, Plaintiff: Bryan L. Clobes, LEAD ATTORNEY, Cafferty Clobes Meriwether & Sprengel LLP, Philadelphia, PA; Shana E. Scarlett, Hagens Berman Sobol Shapiro LLP, Berkeley, CA.

For The Nationwide Group, Plaintiff: Christopher M. Burke, Scott + Scott LLP, San Diego, CA.

For Matt Bryant, Plaintiff: Michael J. Flannery, LEAD ATTORNEY, Cuneo Gilbert & LaDuca, LLP, St. Louis, MO; Jonathan W. Cuneo, Cuneo Gilbert and LaDuca, LLP, Washington, DC USA; Katherine Van Dyck, Cuneo Gilbert & LaDuca LLP, Washington, DC; Victoria Romanenko, Cuneo Gilbert Laduca, Washington, DC.

For Laura Gallardo, Plaintiff: Michael J. Flannery, LEAD ATTORNEY, Cuneo Gilbert & LaDuca, LLP, St. Louis, MO; Jon A Tostrud, Tostrud Law Group, P.C., Los Angeles, CA; Jonathan W. Cuneo, Cuneo Gilbert and LaDuca, LLP, Washington, **[*19]** DC USA; Katherine Van Dyck, Cuneo Gilbert & LaDuca LLP, Washington, DC; Victoria Romanenko, Cuneo Gilbert Laduca, Washington, DC.

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For Alexandra Le, Robert McGranahan, Plaintiffs: Michael J. Flannery, LEAD ATTORNEY, Cuneo Gilbert & LaDuca, LLP, St. Louis, MO; Jonathan W. Cuneo, Cuneo Gilbert and LaDuca, LLP, Washington, DC USA; Katherine Van Dyck, Cuneo Gilbert & LaDuca LLP, Washington, DC, Victoria Romanenko, Cuneo Gilbert Laduca, Washington, DC.

For Patrick McGuinness, Plaintiff: Michael J. Flannery, LEAD ATTORNEY, Cuneo Gilbert & LaDuca, LLP, St. Louis, MO; Daniel Cohen, Cuneo Gilbert & LaDuca, LLP, Washington, DC; Jonathan W. Cuneo, Cuneo Gilbert and LaDuca, LLP, Washington, DC USA; Katherine Van Dyck, Cuneo Gilbert & LaDuca LLP, Washington, DC, Victoria Romanenko, Cuneo Gilbert Laduca, Washington, DC.

For Erinn Tozer, Plaintiff: Daniel **[*20]** Hume, Kirby McInerney LLP, New York, NY; Joseph Mario Patane, Lauren Clare Capurro, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Mario Nunzio Alioto, Trump Alioto Trump & Prescott LLP, San Francisco, CA; Robert J. Gralewski, Jr., Gergosian & Gralewski LLP, San Diego, CA.

For David Gibbons, Alexander C. Eide, Plaintiffs: Daniel R. Shulman, Gray, Plant, Mooty, Mooty & Bennett, P.A., Minneapolis, MN; Joseph R. Saveri, Joseph Saveri Law Firm, Inc., San Francisco, CA.

For Valentina Juncaj, Plaintiff: Ralph B. Kalfayan, LEAD ATTORNEY, Krause Kalfayan Benink & Slavens, San Diego, CA; David E. Azar, Milberg LLP, Los Angeles, CA; Elizabeth Anne McKenna, Milberg LLP, NY, NY; Vic A.

Merjanian, Krause Kalfayan Benink and Slavens LLP, San Diego, CA; Paul F. Novak, PRO HAC VICE, Milberg LLP, Detroit, MI; Peggy Wedgworth, Milberg LLP, New York, NY.

For Valentina Juncaj, Violet Selca, Plaintiffs: Ralph B. Kalfayan, LEAD ATTORNEY, Krause Kalfayan Benink & Slavens, San Diego, CA; David E. Azar, Milberg LLP, Los Angeles, CA; Elizabeth Anne McKenna, Milberg LLP, NY, NY; Paul F. Novak, PRO HAC VICE, Milberg LLP, Detroit, MI; Peggy Wedgworth, Milberg LLP, New York, NY; Vic A. Merjanian, Krause **[*21]** Kalfayan Benink & Slavens LLP, San Diego, CA.

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Judges: YVONNE GONZALEZ ROGERS, UNITED STATES DISTRICT COURT JUDGE.

Opinion by: YVONNE GONZALEZ ROGERS

Opinion

ORDER DENYING TOSHIBA [*31] CORPORATION'S MOTION FOR SUMMARY JUDGMENT ON WITHDRAWAL

Re: Dkt. No. 735

On June 30, 2015, defendant Toshiba Corporation ("Toshiba") moved for summary judgment, arguing plaintiffs' claims are time-barred because Toshiba withdrew from any conspiracy by no later than 2004. (Dkt. No. 735.) Having carefully considered the papers submitted, the record in this case, and the arguments of counsel, and good cause shown, the Court **DENIES** the motion.

I. BACKGROUND

This multidistrict litigation stems from allegations of a multi-year conspiracy, extending back to 2002, among Japanese and Korean corporations and their U.S. subsidiaries to fix the prices of lithium ion battery cells, the chemical core of rechargeable batteries found ubiquitously in consumer electronics products. Toshiba was purportedly a member of the conspiracy, and at the hearing appeared to stipulate to membership solely for purposes of resolving the instant motion. However, Toshiba asserts it withdrew from any conspiracy by the end of 2004 through the sale of its lithium ion cell manufacturing business.

Two groups of plaintiffs, denominated the direct purchaser plaintiffs ("DPPs") and indirect purchaser plaintiffs ("IPPs") (collectively, **[*32]** "plaintiffs"), seek to represent putative classes of persons, businesses, and, in the case of the IPPs, municipal and regional governments injured by the alleged overcharge. The DPPs sue for both injunctive relief and money damages under the federal antitrust laws, and seek to represent classes of purchasers who bought certain lithium ion batteries and products containing them for purposes of resale. (Dkt. No. 1038 at vii.) The IPPs, by contrast, sue for injunctive relief under federal ***antitrust law***, but seek money damages under state antitrust and consumer protection laws. The IPPs seek to represent classes of purchasers who bought certain lithium ion battery products and replacement batteries for their own use. (Dkt. No. 1036 at 1.) The Court has previously detailed the allegations. (Dkt. No. 512.)[1] Thus, the Court now summarizes the facts relevant to resolution of the instant motion.

On July 15, 2003, Toshiba met with alleged co-conspirator LG Chem to discuss a sale of Toshiba's lithium ion battery business. (SMF, Issue 1, Fact 6.)[2] On July 22, 2003, LG Chem sent a letter to Toshiba expressing **[*33]** its "great interest in acquiring the whole battery business [of] Toshiba Corporation as you proposed." (*Id.*, Issue 1, Fact 7.)

However, by December 2003, Toshiba instead reached an agreement with alleged coconspirator Sanyo for the sale of Toshiba's cylindrical and electrode battery cell manufacturing equipment located at A&T Battery. (*Id.*, Issue 1, Fact 8.) On January 27, 2004, Toshiba's management approved the plan to transfer the equipment to Sanyo in

[1] Subsequent consolidated complaints have been filed generally alleging the same conspiracy.

[2] "SMF" refers to the parties' chart of facts, including undisputed material facts, as reflected in Docket Number 957-1. Unless otherwise noted, the references to the material facts include the underlying evidence referenced by either party in support of the fact.

June 2004. (*Id.*, Issue 1, Fact 10.) That same day, Toshiba notified the Tokyo Stock Exchange that it would "terminate its lithium-ion rechargeable battery business by December 2004" and "dissolve its subsidiary company A&T Battery Co., Ltd." (*Id.*, Issue 1, Fact 11.) The announcement was widely reported around the world and Toshiba likewise informed various customers, suppliers, and government agencies. (*Id.*, Issue 1, Facts 12-13.)

After announcing its plans to sell the business, **[*34]** Toshiba contacted alleged co-conspirators Sony and LG Chem to ascertain whether they could supply batteries to Toshiba's existing customers going forward. (*Id.*, Issue 1, Fact 14.) Toshiba also entered into discussions with at least one alleged conspirator regarding the sale of Toshiba's remaining battery cell manufacturing equipment. (*Id.*, Issue 1, Fact 15.) On July 1, 2004, Toshiba instead reached an agreement with Sojitz Machinery for the sale of that manufacturing equipment. (*Id.*, Issue 1, Fact 16.)

On July 22, 2004, Toshiba executed the previously contemplated asset transfer agreement with Sanyo. (*Id.*, Issue 1, Fact 17.) Toshiba discarded certain cell manufacturing equipment that Sanyo and Sojitz ultimately did not agree to purchase. (*Id.*, Issue 1, Fact 18.)

After selling its battery business, Toshiba remained a member of the trade group Battery Association of Japan (SMF, Add'l Fact 56), although Toshiba apparently withdrew from the Small Size Secondary Batteries Committee in September 2004 (Dkt. No. 993, Declaration of J. Frank Hogue, Ex. H at 259:5-260:13).

Toshiba also stored lithium ion battery cells it had previously manufactured for future use. (SMF, Add'l Fact 42.) It subsequently **[*35]** packed the cells and sold the completed lithium ion battery packs to customers through at least 2007. (*Id.)* A Toshiba witness, Daiichiro Eguchi, testified at a September 1, 2015 deposition that those sales totaled approximately $900,000:

> Q. So is your—is your testimony that Toshiba earned $900,000 in the sale of lithium ion battery packs between 2004 and 2007?
> A. It wasn't an earning. It was the total value of sales.
> Q. And—and how—what is the source of your information?
> A. That is my recollection.

(Dkt. No. 957-2, Declaration of Jessica Moy ("Moy Decl."), Ex. 13, at 190:24-191:6; *see also* SMF, Add'l Facts 45, 55.)

Furthermore, in the sales to Sanyo and Sojitz, Toshiba did not transfer its patents relating to lithium ion batteries. (SMF, Add'l Facts 47-48.) Toshiba referred to these hundreds of patents as "important IP," stating in an internal document that it had "not completely withdrawn from the [battery] business" as of August 9, 2005. (Moy Decl., Ex. 89; SMF Add'l Facts 47-48.) The Court acknowledges that some of these patents may have been subject to cross-license agreements with certain purported conspirators. (SMF, Add'l Facts 50-51.) Toshiba also considered going after Samsung and **[*36]** LG for millions of dollars in royalties for their purported use of covered technologies in 2006 and potentially beyond. (*Id.*, Add'l Facts 52-53.)

The first complaint in this multidistrict litigation naming Toshiba as a defendant was filed in December 2012. (*Id.*, Issue 2, Fact 25.)

II. LEGAL STANDARD

A party seeking summary judgment bears the initial burden of informing the court of the basis for its motion, and of identifying those portions of the pleadings and discovery responses that demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. Material facts are those that might affect the outcome of the case. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. A dispute as to a material fact is "genuine" if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *Id.*

Where the moving party will have the burden of proof at trial, it "must affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party." *Soremekun v. Thrifty Payless, Inc., 509 F.3d 978, 984 (9th*

Cir. 2007). Here, Toshiba acknowledges (Dkt. No. 735 at 13) that it bears the initial burden. *See also* In re TFT-LCD (Flat Panel) Antitrust Litig., 820 F. Supp. 2d 1055, 1060 (N.D. Cal. 2011) ("[W]ithdrawal is an affirmative defense on which defendants bear the burden of proof.").

If the moving party meets its initial burden, the opposing party must then set out specific **[*37]** facts showing a genuine issue for trial in order to defeat the motion. Anderson, 477 U.S. at 250; Soremekun, 509 F.3d at 984; *see* Fed. R. Civ. P. 56(c), (e). The opposing party's evidence must be more than "merely colorable" and must be "significantly probative." Anderson, 477 U.S. at 249-50. Further, the opposing party may not rest upon mere allegations or denials of the adverse party's evidence, but instead must produce admissible evidence showing a genuine dispute of material fact exists. *See* Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc., 210 F.3d 1099, 1102-03 (9th Cir. 2000). "Disputes over irrelevant or unnecessary facts will not preclude a grant of summary judgment." T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987).

Nevertheless, when deciding a summary judgment motion, a court must view the evidence in the light most favorable to the nonmoving party and draw all justifiable inferences in its favor. Anderson, 477 U.S. at 255; Hunt v. City of Los Angeles, 638 F.3d 703, 709 (9th Cir. 2011). A district court may only base a ruling on a motion for summary judgment upon facts that would be admissible in evidence at trial. In re Oracle Corp. Sec. Litig., 627 F.3d 376, 385 (9th Cir. 2010); Fed. R. Civ. P. 56(c). It is not a court's task "to scour the record in search of a genuine issue of triable fact," but rather the Court is entitled to "rely on the nonmoving party to identify with reasonable particularity the evidence that precludes summary judgment." Keenan v. Allan, 91 F.3d 1275, 1279 (9th Cir. 1996) (quoting Richards v. Combined Ins. Co., 55 F.3d 247, 251 (7th Cir. 1995)); *see also* Carmen v. San Francisco Unified Sch. Dist., 237 F.3d 1026, 1031 (9th Cir. 2001) ("The district court need not examine the entire file for evidence establishing a genuine issue of fact, where **[*38]** the evidence is not set forth in the opposing papers with adequate references so that it could conveniently be found.").

III. DISCUSSION

Toshiba argues the claims against it should be dismissed with prejudice on statute of limitations grounds because it purportedly withdrew from the lithium ion battery industry—and therefore the alleged conspiracy—in 2004. Plaintiffs contend there are genuine disputes of material fact as to whether: (1) Toshiba effectively withdrew from the conspiracy in 2004; and, in the alternative, (2) Toshiba engaged in fraudulent concealment, such that the claims are timely even with a 2004 withdrawal. The parties also contest whether Toshiba can be liable, as a matter of law, for post-2004 conduct of alleged co-conspirators—an issue which turns on the threshold question of whether Toshiba in fact withdrew from the conspiracy. As the Court finds a genuine dispute of material fact as to whether Toshiba withdrew from the conspiracy by the end of 2004, it need not reach the other issues at this time.

A. Legal Framework

"A defendant can establish withdrawal from a conspiracy in various ways." Virginia v. McKesson Corp., No. C 11-02782 SI, 2013 U.S. Dist. LEXIS 46999, 2013 WL 1287423, at *3 (N.D. Cal. Mar. 28, 2013). Generally speaking, "[a]ffirmative acts inconsistent **[*39]** with the object of the conspiracy and communicated in a manner reasonably calculated to reach co-conspirators" are typically "sufficient to establish withdrawal or abandonment." *See* United States v. U.S. Gypsum Co., 438 U.S. 422, 464-65, 98 S. Ct. 2864, 57 L. Ed. 2d 854 (1978); *see also* United States v. Lothian, 976 F.2d 1257, 1261 (9th Cir. 1992) ("Withdrawal negates the element of agreement to the conspiracy's unlawful objective because it 'marks [the] conspirator's disavowal or abandonment of the conspiratorial agreement.'") (alteration in original).

The Eleventh Circuit has held that a defendant's exit from "an otherwise legitimate business enterprise" that is involved in a business conspiracy may constitute effective withdrawal from the conspiracy where the defendant "retired from the business, severed all ties to the business, and deprived the remaining conspirator group of the services which he provided to the conspiracy." Morton's Mkt., Inc. v. Gustafson's Dairy, Inc., 198 F.3d 823, 839

(11th Cir. 1999) *amended in part*, *211 F.3d 1224 (11th Cir. 2000)*; *see also* *United States v. Nerlinger, 862 F.2d 967, 974 (2d Cir. 1988)*; *United States v. Steele, 685 F.2d 793, 803 (3d Cir. 1982)*. "However, the sale of an operating business does not automatically establish the defense." *In re Cathode Ray Tube (CRT) Antitrust Litig., No. 07-5944 SC, 2010 U.S. Dist. LEXIS 145617, 2010 WL 9543295, at *12 (N.D. Cal. Feb. 5, 2010)* ("There must be factual inquiries—again, with the burden of proof on the defendants—into such subjects as the defendants' continued financial interest in the business that was sold, some continued **[*40]** participation, or some continued benefit from the alleged conspiracy.").

B. Analysis

On the present record, although plaintiffs' evidence is hardly robust, genuine disputes of material fact exist as to whether Toshiba continued to benefit from and participate in the purported conspiracy. For instance, Toshiba potentially remained a member of and participated in a battery trade association alongside alleged conspirators; held onto and selectively licensed "valuable IP" relating to lithium ion battery technology; and discarded certain manufacturing equipment that might have been sold to non-conspirators. Notably, Toshiba admittedly stored cells it had produced prior to selling the manufacturing business, aggregated those cells into battery packs, and sold the lithium ion battery packs through at least 2007—earning nearly $1 million in revenue. Toshiba argues sales of packs in Japan are "irrelevant to whether Toshiba participated in any conspiracy on the price of LiB Cells after 2004." (Dkt. No. 992 at 8.) At this juncture, however, the Court does not resolve the question of whether sales of packed cells, as a matter of law, have no impact on the market for the cells that comprise them. **[*41]**

IV. CONCLUSION

For the foregoing reasons, the Court **DENIES** the motion. The Court declines to render any further preliminary findings at this time, as such issues must be resolved on a more fulsome record at trial.

This Order terminates Docket Number 735.

IT IS SO ORDERED.

Dated: March 16, 2016

/s/ Yvonne Gonzalez Rogers

YVONNE GONZALEZ ROGERS

UNITED STATES DISTRICT COURT JUDGE

Gumwood HP Shopping Partners, L.P. v. Simon Prop. Grp., Inc.

United States District Court for the Northern District of Indiana, South Bend Division

March 18, 2016, Decided; March 18, 2016, Filed

Case No. 3:11-CV-268 JD

Reporter
2016 U.S. Dist. LEXIS 35759 *

GUMWOOD HP SHOPPING PARTNERS, L.P., Plaintiff, v. SIMON PROPERTY GROUP, INC., Defendant.

Prior History: *Gumwood HP Shopping Partners, L.P. v. Simon Prop. Group, 2012 U.S. Dist. LEXIS 188553 (N.D. Ind., Aug. 8, 2012)*

Core Terms

Heritage, Square, lease, limitations period, negotiations, tying arrangement, tied product, opening, renewals, damages, buyer, summary judgment, overt act, properties, retailers, malls, competitors, tie, tying product, antitrust, parties, argues, coercion, communicated, threats, lender, seller, statute of limitations, collateral source doctrine, Woodbury

LexisNexis® Headnotes

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

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

HN1[] **Summary Judgment, Entitlement as Matter of Law**

On summary judgment, the moving party bears the burden of demonstrating that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(a)*. A "material" fact is one identified by the substantive law as affecting the outcome of the suit. A "genuine issue" exists with respect to any material fact when the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Where a factual record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial, and summary judgment should be granted.

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

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

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

HN2[] **Summary Judgment, Entitlement as Matter of Law**

In determining whether a genuine issue of material fact exists, the court must construe all facts in the light most favorable to the non-moving party and draw all reasonable and justifiable inferences in that party's favor. However, the non-moving party cannot simply rest on the allegations or denials contained in its pleadings, but must present sufficient evidence to show the existence of each element of its case on which it will bear the burden at trial.

Antitrust & Trade Law > Sherman Act > Scope

HN3[] Antitrust & Trade Law, Sherman Act

Section 1 of the Sherman Act prohibits combinations or conspiracies in restraint of trade, while § 2 prohibits the use of anticompetitive means to create or maintain a monopoly.

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

HN4[] Tying Arrangements, Sherman Act Violations

In a typical tying arrangement, a seller agrees to sell a product over which the seller has a monopoly (the tying product) only if the buyer also purchases a separate product (the tied product) from the seller, or agrees not to purchase that product from a competing seller. The traditional antitrust concern with such an agreement is that if the seller of the tying product is a monopolist, the tie-in will force anyone who wants the monopolized product to buy the tied product from him as well, and the result will be a second monopoly. In the Seventh Circuit, to demonstrate that a tying arrangement is unlawful per se, a plaintiff must prove the following four elements: (1) two separate products have been tied together; (2) the tying seller has sufficient economic power in the market for the tying product to restrain free competition in the tied product market; (3) the tie affects a not-insubstantial amount of interstate commerce in the tied product; and (4) the tying seller has some economic interest in the sales of the tied product.

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

HN5[] Tying Arrangements, Sherman Act Violations

The essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer might have preferred to purchase elsewhere on different terms. Thus, an unlawful tie depends on some sort of coercion by the seller to cause the buyer to accept a condition—either purchasing the tied product from the seller or refraining from purchasing that product from a competitor—on the sale of the tying product. Strong persuasion, encouragement, or cajolery to the point of obnoxiousness to induce a buyer to accept a package deal do not suffice. Rather, the seller must somehow convey to the buyer that the buyer must accept the condition in order to receive the tying product.

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

HN6[] Tying Arrangements, Sherman Act Violations

Actual coercion supporting a finding of a tying violation is present only if the manufacturer goes beyond persuasion and conditions its retailer's purchase of one product on the purchase of another product.

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

HN7[] **Tying Arrangements, Sherman Act Violations**

If a defendant threatens to withhold the tying product unless a buyer accepts the condition, and the defendant has the market power to make that threat meaningful, then the buyer is coerced to accept the condition.

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

HN8[] **Tying Arrangements, Sherman Act Violations**

The U.S. Supreme Court has never stated that proof of harm to competition is required. Likewise, the Seventh Circuit has on multiple occasions articulated the elements of a per se tying claim, and it has not included harm to competition among them.

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

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

HN9[] **Tying Arrangements, Per Se Rule**

Under a per se rule analysis, a plaintiff is not required to prove any anti-competitive consequences of a defendant's activity.

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

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

HN10[] **Tying Arrangements, Per Se Rule**

Some circuits have required plaintiffs to prove harm to competition as an element of a per se tying claim.

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

HN11[] **Tying Arrangements, Sherman Act Violations**

The existence of harm to competition is encompassed in the element of whether the tie affects a not-insubstantial amount of commerce in the tied product. The Seventh Circuit has further stated that this element can be broken into two sub-questions: (1) Is there at least one competitor in the tied product market other than the defendant; and (2) Is the quantity of interstate commerce affected not-insubstantial?

Antitrust & Trade Law > Sherman Act > Defenses

Governments > Legislation > Statute of Limitations > Time Limitations

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

HN12[] **Sherman Act, Defenses**

A civil antitrust action is barred by the statute of limitations unless it is commenced within four years after the cause of action accrued. *15 U.S.C.S. § 15b*. Generally, a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business.

Antitrust & Trade Law > Sherman Act > Defenses

Governments > Legislation > Statute of Limitations > Time Limitations

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

HN13[] **Sherman Act, Defenses**

Antitrust law provides that, in the case of a continuing violation, say, a price-fixing conspiracy that brings about a series of unlawfully high priced sales over a period of years, each overt act that is part of the violation and that injures the plaintiff, e.g., each sale to the plaintiff, 'starts the statutory period running again, regardless of the plaintiff's knowledge of the alleged illegality at much earlier times. An overt act that restarts the statute of limitations is characterized by two elements: (1) it must be a new and independent act that is not merely a reaffirmation of a previous act; and (2) it must inflict new and accumulating injury on the plaintiff.

Antitrust & Trade Law > Sherman Act > Defenses

Governments > Legislation > Statute of Limitations > Time Limitations

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

HN14[] **Sherman Act, Defenses**

A plaintiff may only recover damages that accrued within the limitations period, not damages that were caused by the same course of conduct but that predated the limitations period.

Antitrust & Trade Law > Sherman Act > Defenses

Governments > Legislation > Statute of Limitations > Time Limitations

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

HN15[] **Sherman Act, Defenses**

To start a new limitations period, an overt act must be a new and independent act that is not merely a reaffirmation of a previous act. As some circuits have articulated this rule, overt acts must be more than the "abatable but unabated inertial consequences of some pre-limitations action" in order to trigger a new limitations period. Thus, where a party makes an irrevocable, immutable, permanent and final decision prior to the limitations period, subsequent acts within the limitations period that simply reflect that prior decision will not restart the clock. Conversely, when a party decides to embark on an unlawful course of conduct prior to the limitations period, but that initial decision requires further action to implement, or a party's actions within the limitations period manifest a commitment to renewing and enforcing a prior decision or agreement, those subsequent actions will restart the limitations period. In the context of a tying arrangement, this typically means that a plaintiff must show that the defendant had the ability to and actually did enforce the tie' during the limitations period.

Antitrust & Trade Law > Sherman Act > Defenses

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

HN16[] **Sherman Act, Defenses**

For overt acts to restart the limitations period, they must inflict new and accumulating injury on the plaintiff. As a matter of ***antitrust law***, when a purchaser is "forced" to buy a product he would not have otherwise bought even from another seller in the tied product market, there can be no adverse impact on competition because no portion of the market which would otherwise have been available to other sellers has been foreclosed.

Torts > Remedies > Damages > Collateral Source Rule

HN17[] **Damages, Collateral Source Rule**

Typically, the collateral source doctrine applies where a plaintiff receives insurance payments or some other benefits that are triggered by or compensate the plaintiff for the injury in question. In those circumstances, the collateral benefits received by the plaintiff cannot be used to reduce the damages owed by the defendant.

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Judges: JON E. DEGUILIO, United States District Judge.

Opinion by: JON E. DEGUILIO

Opinion

OPINION AND ORDER

This is an antitrust case in which the developer of an upscale shopping center asserts that the defendant, the largest public real estate company in the country, engaged in anticompetitive tactics to coerce retailers to stay out of the new development and **[*2]** instead sign leases at its nearby mall. The plaintiff, Gumwood HP Shopping Partners, L.P., was developing an outdoor shopping center in Mishawaka, Indiana, named Heritage Square, where it hoped to attract high-end retailers such as Ann Taylor Loft, Coldwater Creek, and Chico's. The defendant, Simon Property Group, Inc., owned an established mall less than a mile away, known as University Park Mall. Around the same time that Gumwood was developing Heritage Square, Simon was redeveloping a portion of University Park to add an outdoor component that also hoped to attract some of the same high-end retailers. According to Gumwood, Simon threatened certain retailers, in particular Ann Taylor, that if they opened stores at Heritage Square instead of University Park, Simon would terminate their leases in some of Simon's best properties elsewhere in the country.

Though Ann Taylor initially signed a lease at Heritage Square, it never opened a store there, and it eventually signed a lease and opened a Loft store at University Park instead.

In this action, Gumwood asserts that Simon's conduct constituted an unlawful tying arrangement, so it has asserted claims under *Sections 1* and *2* of the Sherman Act. Discovery **[*3]** is now closed, and the parties have filed cross-motions for summary judgment. Simon has also filed two motions to strike and a motion for oral argument. For the following reasons, the motions for summary judgment and the other ancillary motions are each denied.

I. FACTUAL BACKGROUND[1]

Simon is a real estate entity that owns hundreds of retail properties around the country and around the world. Simon owns various types of shopping centers, including regional and super-regional malls, lifestyle centers, and outlet malls. Regional and super-regional malls are typically large, indoor shopping centers that are anchored by one or more department stores. Lifestyle centers are smaller, outdoor shopping centers that typically include national retail chains mixed with restaurants and possibly entertainment outlets like a movie theater. Outlet centers **[*4]** typically house national retailers selling reduced-price versions of their products. While malls and lifestyle centers typically draw customers from five to fifteen miles away, outlet centers may draw customers from up to seventy-five miles away.

Among Simon's properties are Dadeland Mall, located in Miami, Florida, and Lenox Square, in Atlanta, Georgia, both of which are super-regional malls. Simon also owns an outlet center known as Woodbury Common Premium Outlets in New York, which is regarded as one of the premier outlet malls in the country. Simon also owns University Park, a super-regional mall in Mishawaka, Indiana. University Park opened in 1979, and has nearly one million square feet of leasable space. Though it is located near a dense shopping area with strip malls, standalone stores, and plazas with big-box retailers, University Park is the only mall in the area. In 2006, the Marshall Field's department store, which was one of University Park's anchors, closed its store. Rather than replace the store with another department store, Simon demolished the building and constructed an outdoor "streetscape" with outward facing retail stores. In essence, this addition was a lifestyle **[*5]** center appended to the existing mall.

Beginning around 2005, Gumwood began developing Heritage Square, a lifestyle center located less than a mile from University Park. Heritage Square was anchored by a grocery store, and it also included retail space that it hoped to fill with national retailers like Ann Taylor, Coldwater Creek, Chico's, Lane Bryant, Talbot's, and Barnes and Noble. In April 2006, after negotiations with Gumwood's leasing agent, Ann Taylor internally approved a proposed deal to open one of its Loft stores at Heritage Square. After further negotiations, Ann Taylor executed a ten-year lease for Heritage Square on June 14, 2006, and Gumwood executed the lease shortly thereafter. As is common in the industry, the lease included certain contingencies based on other retailers having signed leases at the shopping center. In particular, the lease stated that Ann Taylor would not be required to open its store at Heritage Square unless certain other retailers had also signed leases, including Coldwater Creek, Brooks Brothers, Ruth's Chris Steak House, and Martin's Super Market. If those requirements were not met but Ann Taylor chose to open its store anyway, it would be entitled **[*6]** to pay rent at a reduced rate.

Immediately after the lease was executed, Ann Taylor requested to rescind the lease, indicating that it was concerned about the co-tenancy provision. Gumwood refused to rescind the lease, but the parties agreed to an amendment that altered the co-tenancy provision. Under the amendment, Ann Taylor would not be required to open the Loft store at Heritage Square or to pay rent until each of Coldwater Creek, Brooks Brothers 346 (a new concept store being tested by Brooks Brothers), White House/Black Market, and Martin's Super Market had also opened. The parties executed that amendment in mid-August 2006.

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[1] Simon has filed two motions to strike certain exhibits and factual assertions. [DE 156, 159]. Having reviewed each of the respective filings, the Court has determined that none of the exhibits or facts that are subject to the motions are necessary to the resolution of the motions for summary judgment. Accordingly, both motions to strike are denied as moot.

Around this same time, Simon learned that Ann Taylor signed a lease at Heritage Square. That came as a surprise to Simon, which believed that Ann Taylor had already orally committed to coming to University Park, and which viewed the Loft store as important to the success of the new lifestyle center component of University Park. Gumwood alleges that, in response, Simon began to impose a tying arrangement by which it threatened to cancel Ann Taylor's leases at Dadeland, Lenox, and Woodbury (where it had very successful stores whose leases were about to expire) **[*7]** if Ann Taylor opened its store at Heritage Square or did not come to University Park. An internal Simon document that recaps a meeting with Ann Taylor's representatives on August 15, 2006, outlines the following strategy for Simon's business with Ann Taylor: "Create leverage with renewals on more mature accounts . . . . We need a positive decision on University Park before we will move forward with any key renewals. Woodbury and Lenox would be prime centers to kill if the negotiations go south." [DE 129-8].

In an internal email describing that meeting, one of Simon's negotiators wrote:

> [T]hey [Ann Taylor] do have an executed lease, with [H]eritage, however, the developer has yet to satisfy the co tenancy. . . . We are putting the full court pressure on all others who are interested in the market[.] I was very clear that their decision can and will jeopardize our willingness to proceed on new deals and renewals.

[DE 129-33]. The following month, that same individual wrote in another internal email:

> I will still help where needed but in essence DS [David Simon, Simon's CEO] is trying to meet with Kay Krill [Ann Taylor's CEO]. I don't believe John [Scotti, Ann Taylor's negotiator] has told Kay the severity **[*8]** of the situation. If they go ahead with Heritage we're going to cancel Woodbury and Dadeland. Lose a pinky - take an arm!

[DE 129-34 (punctuation and capitalization modified for clarity)]. In addition, Simon decided at that time to begin negotiating its leases with Ann Taylor on a portfolio basis. Thus, it negotiated the fifty-plus new leases or lease renewals that were pending as a single package, with the understanding that none of the leases would be final until the entire package had been agreed on. Accordingly, it held certain lease agreements that had already been negotiated until the entire portfolio negotiations were complete.

Meanwhile, while its discussions with Simon were ongoing, Ann Taylor took possession of the premises at Heritage Square in August 2006 and began construction of the store with the goal of opening in time for the Christmas shopping season. By taking possession of the premises, Ann Taylor lost its right to terminate the lease after the first year if Heritage Square had not yet satisfied the co-tenancy provisions. However, after about two weeks of construction, during which it incurred over $100,000 in construction costs, Ann Taylor abruptly halted construction. **[*9]** Ann Taylor had no ability to terminate the lease, and it gave no definitive indication to Gumwood as to its future intent, but the premises began to sit idle, with no efforts being made towards the store's opening. In addition, in December 2006, Brooks Brothers decided that it was going to discontinue its "346" concept stores, so it gave notice to Gumwood that it was not going to open at Heritage Square. Because the "346" store was a required co-tenant under Ann Taylor's lease, that meant that Gumwood would never be able to satisfy the co-tenancy provision and that Ann Taylor would never be required to open its store at Heritage Square. It could still choose to do so, though, and pay rent at a reduced rate.

Then, in April 2007, Ann Taylor initiated discussions with Gumwood to negotiate a *second amendment* to its lease at Heritage Square. It indicated that it wished to immediately resume construction and open the store at Heritage Square. The lease amendment would have eliminated Brooks Brothers 346 as a required cotenant, and would have called for Ann Taylor to resume construction and open its store. The amendment would have also provided an additional construction allowance for Ann Taylor. However, **[*10]** on April 20, 2007, after negotiating and drafting the terms of the amendment, Ann Taylor decided not to sign it, and progress again stalled. Subsequently, in July 2007, Ann Taylor considered the possibility of opening an Ann Taylor Factory store at Heritage Square instead of a Loft store, but it decided not to open a Factory store in Mishawaka at all. After that point, Ann Taylor did not take any further concrete steps towards opening a Loft store at Heritage Square. It was still unable to terminate the existing lease, though, and it stayed in periodic contact with Gumwood as to the possibility of opening the store at Heritage Square.

Simon's portfolio negotiations with Ann Taylor also continued for a considerable length of time, and a lease for Ann Taylor Loft at University Park was among the leases included in those negotiations. Simon in particular sought to include it in the deal, though Ann Taylor generally expressed indifference to opening at University Park, and indicated that it might not open a store in Mishawaka at all. By the end of 2007, the portfolio negotiations were approaching their conclusion, though the parties had not executed any leases yet. In January 2008, though, **[*11]** in response to the economic recession, Ann Taylor announced that it would be closing over 100 stores and that it was cutting back on opening new stores. This threw its pending negotiations with Simon into turmoil, as the closures included a number of Simon properties and stores that had been subject to their portfolio negotiations. On February 11, 2008, Simon's CEO sent a letter to Ann Taylor's CEO, stating in part, "[N]ot going forward with committed deals puts us in an untenable situation. You can't expect us to renew leases at Woodbury Commons, Dadeland Mall and Burlington Mall (just to name a few) while you are closing stores and reneging on recent commitments to us." [DE 129-49]. The CEOs spoke the following week and arrived at a deal by which Ann Taylor agreed to open a store at University Park and delay its closures of certain other stores. In return, Simon agreed to execute lease renewals at other of its properties that were important to Ann Taylor. The parties then began executing the leases in batches, and Ann Taylor's lease for University Park was fully executed on July 11, 2008. Ann Taylor thereafter opened a Loft store at University Park in March 2009.

Despite losing Ann Taylor **[*12]** as a tenant, Heritage Square still had some success in attracting high-end retailers. Coldwater Creek, White House/Black Market, and Aveda each signed leases with and opened at Heritage Square. Eddie Bauer also closed its store at University Park and relocated to Heritage Square. However, Gumwood asserts that Ann Taylor's absence at Heritage Square not only cost it the rent it would have received from Ann Taylor, but also triggered a snowball effect that caused it to lose other retailers and to receive less rental income from its existing tenants. When its revenues eventually became insufficient to cover its interest expenses and it was unable to restructure its debt, Gumwood defaulted on its loan. The loan, which then had a balance of about $33 million, was sold in November 2010 for $12.5 million. In January 2011, Gumwood transferred ownership of Heritage Square to its lender through a deed in lieu of foreclosure, at which time it was relieved of any further obligation to repay the loan. Gumwood then initiated this action by filing its complaint on June 29, 2011.

II. STANDARD OF REVIEW

HN1[] On summary judgment, the moving party bears the burden of demonstrating that there "is no genuine **[*13]** dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*. A "material" fact is one identified by the substantive law as affecting the outcome of the suit. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. A "genuine issue" exists with respect to any material fact when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* Where a factual record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial, and summary judgment should be granted. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)* (citing *First Nat'l Bank v. Cities Service Co., 391 U.S. 253, 289, 88 S. Ct. 1575, 20 L. Ed. 2d 569 (1968))*.

HN2[] In determining whether a genuine issue of material fact exists, this Court must construe all facts in the light most favorable to the non-moving party and draw all reasonable and justifiable inferences in that party's favor. *Jackson v. Kotter, 541 F.3d 688, 697 (7th Cir. 2008)*; *King v. Preferred Tech. Grp., 166 F.3d 887, 890 (7th Cir. 1999)*. However, the non-moving party cannot simply rest on the allegations or denials contained in its pleadings, but must present sufficient evidence to show the existence of each element of its case on which it will bear the burden at trial. *Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*; *Robin v. Espo Eng'g Corp., 200 F.3d 1081, 1088 (7th Cir. 2000)*.

III. DISCUSSION

Gumwood asserts antitrust claims against Simon under *Sections 1* and *2* of the Sherman Act, *15 U.S.C. §§ 1*, *2*. ***HN3***[] *Section 1* of the Sherman Act prohibits combinations or conspiracies in restraint of trade, **[*14]** while *Section 2* prohibits the use of anticompetitive means to create or maintain a monopoly. Both of Gumwood's claims rely on the same theory, which is that Simon engaged in anticompetitive conduct through an unlawful tying arrangement. Specifically, Gumwood alleges that Simon threatened retailers that if they opened stores at Gumwood's Heritage Square or did not open at Simon's University Park Mall, Simon would refuse to renew those retailers' leases in other of its properties.

Both parties have moved for summary judgment. Simon asks that Gumwood's claims be dismissed in their entirety, arguing that Gumwood is unable to establish certain elements of its claims, and also that the claims are barred by the statute of limitations. Gumwood seeks summary judgment in its favor on the merits of its claims, leaving only the measure of damages to be determined. It also seeks a ruling that the collateral source doctrine prevents its damages from being reduced by other sources that have offset its losses. The Court first considers whether summary judgment is warranted in either party's favor on the merits of the claims. The Court then turns to the statute of limitations and collateral source issues.

A. [*15] Merits of the Antitrust Claims

As noted, both of Gumwood's claims arise out of a tying arrangement allegedly imposed by Simon. ***HN4***[] In a typical tying arrangement, a seller agrees to sell a product over which the seller has a monopoly (the tying product) only if the buyer also purchases a separate product (the tied product) from the seller, or agrees not to purchase that product from a competing seller. *N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5-6, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958)*; *Carl Sandburg Vill. Condo Ass'n No. 1 v. First Condo. Dev. Co., 758 F.2d 203, 207 (7th Cir. 1985)*. "The traditional antitrust concern with such an agreement is that if the seller of the tying product is a monopolist, the tie-in will force anyone who wants the monopolized product to buy the tied product from him as well, and the result will be a second monopoly." *Sheridan v. Marathon Petroleum Co. LLC, 530 F.3d 590, 592 (7th Cir. 2008)*; *see also* *It's My Party, Inc. v. Live Nation, Inc., 811 F.3d 676, 2016 WL 426085, at *5 (4th Cir. 2016)* ("Tying suppresses competition in two ways: First, the buyer is prevented from seeking alternative sources of supply for the tied product; second, competing suppliers of the tied product are foreclosed from that part of the market which is subject to the tying arrangement." (internal quotation omitted)). In the Seventh Circuit, to demonstrate that a tying arrangement is unlawful *per se*, a plaintiff must prove the following four elements: (1) two separate products have been tied together; (2) the tying seller has **[*16]** sufficient economic power in the market for the tying product to restrain free competition in the tied product market; (3) the tie affects a not-insubstantial amount of interstate commerce in the tied product; and (4) the tying seller has some economic interest in the sales of the tied product. *Reifert v. S. Cent. Wisc. MLS Corp., 450 F.3d 312, 317 (7th Cir. 2006)* (citing *Carl Sandburg, 758 F.2d at 207*).

In its motion for summary judgment, Simon focuses on the first element, arguing that there is insufficient evidence to show that it actually imposed a tie between any properties. It also argues that an additional element should be required—harm to competition—and that Gumwood is unable to satisfy that element. The Court considers those issues in turn. Meanwhile, as a plaintiff seeking summary judgment in its favor, Gumwood's motion must address every element of its claims, and it must establish that the evidence indisputably proves every one of those elements. The Court thus need not dwell on Gumwood's motion, as the record reflects deep factual disputes on multiple issues, including in particular the definition of the relevant markets, whether Simon has market power in those markets, and whether Simon actually imposed a tie. Because the dispute over the existence of a tie, which **[*17]** is central to Simon's motion, is sufficient to deny Gumwood's motion for summary judgment, the Court does not reach the remaining issues raised in Gumwood's motion.

1. The Existence of an Unlawful Tying Arrangement

Both parties argue that the record indisputably supports their positions as to whether Simon tied two products (or in this case, properties) together. The existence of a tie requires more than just a package deal or a request to purchase two products together. As the Supreme Court has stated,***HN5***[] "the essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer . . . might have preferred to purchase elsewhere on different terms."

Jefferson Parish, 466 U.S. at 12. Thus, an unlawful tie depends on some sort of coercion by the seller to cause the buyer to accept a condition—either purchasing the tied product from the seller or refraining from purchasing that product from a competitor—on the sale of the tying product. "[S]trong persuasion, encouragement, or cajolery to the point of obnoxiousness" to induce a buyer to accept a package deal do not suffice. *Bob Maxfield, Inc. v. Am. Motors Corp., 637 F.2d 1033, 1037 (5th Cir. 1981)*; *Unijax, Inc. v. Champion Int'l, Inc., 683 F.2d 678, 685-86 (2d Cir. 1982)* (holding that "aggressive salesmanship" **[*18]** is insufficient to establish a tie). Rather, the seller must somehow convey to the buyer that the buyer *must* accept the condition in order to receive the tying product. *Paladin Assocs., Inc. v. Mont. Power Co., 328 F.3d 1145, 1159 (9th Cir. 2003)* ("A plaintiff must present evidence that the defendant went beyond persuasion and coerced or forced its customer to buy the tied product in order to obtain the tying product."); Areeda & Hovenkamp, ***Antitrust Law*** ¶ 1752b (3d ed. 2011) ("There is no tie for any antitrust purpose unless the defendant improperly imposes conditions that explicitly or practically require buyers to take the second product if they want the first one.").

Simon argues that to meet this element, a plaintiff must establish two distinct requirements: first, that the defendant imposed a condition by *refusing or threatening to refuse* to sell the tying product without the tied product; and second, that the defendant *coerced* the buyer into accepting that condition. However, the Court agrees with Gumwood that those requirements are not completely distinct. Instead, a threat to refuse to sell the tying product unless the buyer purchases the tied product is one method of effecting the coercion that this element requires.[2] *Collins, 781 F.3d at 272* (defining "coercion" as "requiring **[*19]** the customer to buy product B when buying product A"); *Unijax, 683 F.2d at 685* ***HN6***[] ("Actual coercion supporting a finding of a tying violation is present only if the manufacturer goes beyond persuasion and conditions its retailer's purchase of one product on the purchase of another product."); *Bob Maxfield, 637 F.2d at 1037* (finding that coercion had not been proven in the absence of evidence that the defendant required the buyer to take the tied product in order to receive the tying product); Areeda ¶ 1752e ("[G]eneral threats inducing purchase of [a tied product] do not prove tying unless the threats took the form of refusing to sell the tying product to those who would not take the defendant's tied product.").

In other words, ***HN7***[] if a defendant threatens to withhold the tying product unless a buyer accepts the condition, and the defendant has the market power to make that threat meaningful, then the buyer is coerced to accept the condition. *Datagate, Inc. v. Hewlett-Packard Co., 60 F.3d 1421, 1423 (9th Cir. 1995)* ("To accomplish [a tying arrangement], the competitor agrees to sell the tying product . . . only on the condition that its customers also purchase the tied product . . . . The competitor thus uses its market power in the tying product to coerce the customer into purchasing the tied product."). Thus, the pertinent question is whether the evidence shows that Simon refused or threatened to refuse to renew leases in the tying markets unless Ann Taylor signed a lease at University Park or agreed to stay out of Heritage Square. If so, then Simon's market power in the tying markets—the second element of a *per se* tying claim, **[*21]** which Simon has not challenged for the purposes of its motion—supplies the requisite force to coerce Ann Taylor to acquiesce to that threat.

The Court finds that there is a genuine dispute of fact on that question. To begin with, Simon's negotiators denied adopting such a strategy or making such a threat to Ann Taylor, and Ann Taylor's negotiators denied that they received or were influenced by any such a threat, so summary judgment cannot be granted in Gumwood's favor on this issue. To create a factual dispute against that evidence, Gumwood relies primarily on a number of internal Simon documents and communications that reference plans to impose a tie and suggest that threats consistent with those plans had in fact been communicated to Ann Taylor. First, a document entitled "Ann Taylor Meeting

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[2] There are other methods, too, such as using differential pricing, *e.g.*, *Collins Inkjet Corp. v. Eastman Kodak Co., 781 F.3d 264, 270-73 (6th Cir. 2015)*, or adopting policies or designing a product such that the tied product is the only viable economic option to use in concert with the tying product, *e.g.*, *Smith v. eBay Corp., No. C 10-03825, 2012 U.S. Dist. LEXIS 1211, 2012 WL 27718, at *6 (N.D. Cal. Jan. 5, 2012)*, though those are not at issue here. *See also* Herbert Hovenkamp, Federal Antitrust Policy: The Law of Competition and its Practice § 10.4, p. 550 (5th ed. 2016) ("Clearly, if a seller freely permits the buyer to take or decline a second product there is not tie. The buyer must somehow be forced, or coerced, **[*20]** into accepting the tied product. This coercion could result from (1) an absolute refusal to sell the tying product without the tied product; (2) a discount, rebate or other financial incentive given to buyers who also take the tied product; (3) technological design that makes it impossible to sell the tying product without the tied product.").

Summary" dated August 15, 2006, outlines the following strategy: "Create leverage with renewals on more mature accounts . . . . We need a positive decision on University Park before we will move forward with any key renewals. Woodbury and Lenox would be prime centers to kill if the negotiations go south." [DE 129-8]. A similar document dated the following month contains the same language. [DE **[*22]** 128-25].

Other communications in that timeframe tend to corroborate Simon's adoption of that strategy and imply that such threats had been communicated to Ann Taylor. In internal emails in August and September 2006, one of Simon's negotiators wrote the following:

- "[T]hey [Ann Taylor] do have an executed lease, with [H]eritage, however, the developer has yet to satisfy the co tenancy. (expires in Dec of this year). We are putting the full court pressure on all others who are interested in the market[.] *I was very clear that their decision can and will jeopardize our willingness to proceed on new deals and renewals*." [DE 129-33 (emphasis added)].
- "Scotti [Ann Taylor's lead negotiator] may be gone by year end. I do not know what he has or has not communicated to her [Kay Krill, Ann Taylor's CEO] about losing high producing stores (Lenox, Stanford, Woodbury ...) [i]f Mishawaka is not resolved to our satisfaction." [DE 129-32].

- "On the Ann Taylor front. Scotti has his ass in hot water and knows it. We have been very aggressive with him on cleaning up some existing problems prior to us addressing any key renewals so please hold off on woodbury. If he does not rectify his actions we are considering canceling[] **[*23]** 2 deals so his actions are not repeated." [DE 129-35]
- "I will still help where needed but in essence DS [David Simon] is trying to meet with Kay Krill. I don't believe John [Scotti] has told Kay the severity of the situation. If they go ahead with Heritage we're going to cancel Woodbury and Dadeland. Lose a pinky - take an arm!" [DE 129-34 (punctuation and capitalization modified for clarity)].

While these emails may fall short of a smoking gun, they at least permit an inference that Simon threatened to withhold leases in other properties if Ann Taylor proceeded with its store at Heritage Square or did not sign a lease at University Park. Notably, the first email notes that Simon "was *very clear* that [Ann Taylor's] decision can *and will* jeopardize [Simon's] willingness to proceed on new deals and renewals." [DE 129-33 (emphasis added)]. A subsequent email notes, "If they go ahead with Heritage we're going to cancel Woodbury and Dadeland." [DE 129-34]. The emails also imply that these threats had been communicated at least to Mr. Scotti, Ann Taylor's lead negotiator at the time, as they only express uncertainty as to how far he had communicated them within Ann Taylor. There is also **[*24]** evidence that these threats affected Ann Taylor's actions. Within days of these communications, Ann Taylor abruptly stopped construction of its store at Heritage Square, where it had a long-term lease, had already spent over one hundred thousand dollars in construction costs, and had previously planned to open by Christmas. *See* *Datagate, 60 F.3d at 1426* (finding sufficient evidence of coercion where there was evidence that the defendant threatened to cease providing the tying product if the buyer purchased the tied product from a third party, and there was evidence that this threat impacted the buyer's decision).

In arguing that these statements do not constitute threats for these purposes, Simon cites to *Davis v. Marathon Oil, 528 F.2d 395 (6th Cir. 1975)*. There, the defendant allegedly told the plaintiff, a gas station operator, that if he did not buy more of the tied product, "his lease might be cancelled." *Id. at 401*. The court found that this did not suffice to establish coercion because this statement was consistent with the defendant merely expressing its displeasure with the plaintiff's performance as a distributor, and because "no express threats to cancel the lease were made." *Id. at 401-02*. But stating that Ann Taylor's decision can "and will" jeopardize the other leases, **[*25]** and that "[i]f they go ahead with Heritage we're going to cancel Woodbury and Dadeland," goes beyond the vague and tentative statement at issue in *Davis*. [DE 129-33, -34]. The statements also suggest that Simon intended for Ann Taylor to come away with the understanding that there would be consequences with its other leases if it stayed at Heritage Square. [DE 129-35 ("Scotti has his ass in hot water and knows it. We have been very aggressive with him on cleaning up some existing problems prior to us addressing any key renewals . . . .")]. Though there is room for a contrary interpretation, and a jury could find that those statements were never communicated to Ann Taylor in the first place, the Court finds that this evidence is sufficient to create a dispute of fact over whether Simon threatened to withhold the tying properties unless Ann Taylor agreed to its conditions in the tied market.

Simon also argues that the fact that Ann Taylor's representatives deny having been coerced is itself sufficient to grant summary judgment. The Court cannot agree. In support of this argument, Simon cites to *It's My Party, 811 F.3d 676, 2016 WL 426085*, and *Paladin, 328 F.3d 1145*. In both cases, the courts affirmed summary judgment on tying claims based on an absence **[*26]** of coercion, and noted during their discussions that even the alleged targets of the coercion denied being coerced. *It's My Party, 811 F.3d 676, 2016 WL 426085, at *6*; *Paladin, 328 F.3d at 1161*. However, neither court suggested that an admission of coercion is required, or that a denial of coercion is sufficient to negate a dispute of fact. Rather, the plaintiffs in both cases failed to provide evidence of any threats having been communicated, and the courts referenced the denials of coercion as an illustration of the absence of a dispute of fact. Here, there is evidence that threats were communicated and that they impacted Ann Taylor's decisions, so the fact that Ann Taylor's representatives (whose credibility Gumwood also contests) deny the coercion only creates (or deepens) a dispute of fact. Accordingly, the Court finds that there is a genuine dispute as to the existence of a tie.

2. Harm to Competition

Simon next argues that Gumwood's claim fails because it has failed to present evidence of any harm to competition, such as evidence that Simon is charging above-market prices as a result of the tying. However, it is debatable whether harm to competition is a distinct element of a *per se* tying claim.***HN8***[] The Supreme Court has never stated that proof of harm to **[*27]** competition is required. Likewise, the Seventh Circuit has on multiple occasions articulated the elements of a *per se* tying claim, and it has not included harm to competition among them. *Reifert, 450 F.3d at 316*; *Carl Sandburg, 758 F.2d at 207*. And in *Carl Sandburg*, the Seventh Circuit contrasted the *per se* framework against the rule of reason approach by noting that the latter "requires an inquiry into the actual effects of the agreement on competition." *758 F.2d at 210 n.5*; *see also* *Datagate, 60 F.3d at 1425* ("The foundational principle of *per se* antitrust liability is that some acts are considered so inherently anticompetitive that no examination of their impact on the market as a whole is required."); Herbert Hovenkamp, Federal Antitrust Policy: The Law of Competition and Its Practice § 10.1 p. 535 (5th ed. 2016) ("If a tying arrangement is really a *per se* violation of the antitrust laws, as the Supreme Court has often stated, then a separate analysis of anticompetitive effects is peculiar. The whole point of *per se* analysis is to avoid expensive individualized inquiries concerning competitive effects of particular arrangements."). Further, at least one district court in this circuit has stated that***HN9***[] "[u]nder a *per se* rule analysis, a plaintiff is not required to prove any anti-competitive **[*28]** consequences of a defendant's activity . . . ." *KFC Corp. v. Marion-Kay Co., Inc., 620 F. Supp. 1160, 1169 (S.D. Ind. 1985)*.

As Simon notes in its reply brief,***HN10***[] some circuits have required plaintiffs to prove harm to competition as an element of a *per se* tying claim. The Second Circuit first included that requirement in *Yentsch v. Texaco, Inc., 630 F.2d 46, 57 (2d Cir. 1980)*. However, the court's analysis of that element looked to whether there was any proof of "foreclosure of competition in the tied product market," meaning whether the tying affected any buyers' decisions as to whether to buy the tied products from a competitor instead of the defendant. *Id. at 57-58* ("As to anticompetitive effects in the tied product markets, the question is whether . . . competitors were foreclosed from selling to [buyers] because of [the defendant's] policies."). The Seventh Circuit essentially incorporates that factor into the third element of its test—whether a not-insubstantial amount of commerce is affected. As the Seventh Circuit stated in *Reifert*, "The third element of the [*per se* tying] test states that a tying arrangement violates ***antitrust law*** only if 'a substantial volume of commerce is foreclosed' because of the tie." *450 F.3d at 317* (quoting *Jefferson Parish, 466 U.S. 2, 104 S. Ct. 1551, 80 L. Ed. 2d 2*)).

Fox Motors, Inc. v. Mazda Distribs. (Gulf), Inc., which Simon also cites on this point, likewise **[*29]** focused on whether the practice in question ever caused buyers not to purchase the tied products from competitors. *806 F.2d 953, 958 (10th Cir. 1986)* ("The record contains no indication that the alleged tying arrangement . . . influenced the level of dealer purchases from different manufacturers."); *see also* *Driskill v. Dallas Cowboys Football Club, Inc.,* 498 F.2d 321, 323 (5th Cir. 1974) (also cited by Simon, and holding that the effect-on-competition element was not met where there were no other competitors in the tied market). Thus, even in circuits that include harm to competition as an element of a *per se* tying claim, the substance of the analysis is still largely on par with the Seventh Circuit's analysis, and looks more generally to whether buyers might have purchased the tied products from a competitor absent the tying, not to whether there is evidence of actual economic effects such as above-market prices in the tied markets, as Simon suggests is required here. *See* Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc., 585 F.2d 821, 835 (7th Cir. 1978) (stating that in a *per se* tying analysis, "we are not free to inquire whether such tying in any given case injures market competition," but that there must be at least some "potential to foreclose access to the tied product market").

Therefore, the Court proceeds under the analysis set forth by the Seventh Circuit for a *per* ***[*30]*** *se* tying claim. In that framework, ***HN11***[] the existence of harm to competition is encompassed in the element of whether the tie affects a not-insubstantial amount of commerce in the tied product. *Reifert, 450 F.3d at 317*. The Seventh Circuit has further stated that "[t]his element can be broken into two sub-questions: (1) Is there at least one competitor in the tied product market other than the [defendant]; and (2) Is the quantity of interstate commerce affected not-insubstantial?" *Id. at 318*. As to the first sub-question, Heritage Square could qualify as a competitor to University Park in the tied market of Mishawaka. And as to the second sub-question, Simon concedes that there is at least a dispute of fact as to whether a not-insubstantial amount of commerce has been affected. [DE 148 p. 19 ("There is a genuine dispute about whether a substantial volume of commerce was foreclosed.")]. Accordingly, Gumwood has satisfied its burden on this element at this stage.

Finally, Simon argues that the Court should not extend the *per se* tying analysis to the context of portfolio negotiations, where parties negotiate large numbers of leases as a package. The tying theory there would apparently be that if the parties agree that nothing is **[*31]** final until everything is final, then every item in the negotiation is conditioned on every other item. Simon argues that there are pro-competitive justifications for engaging in portfolio negotiations, and that this arrangement is dissimilar from other arrangements that have been subjected to *per se* illegality, so the *per se* analysis should not apply. However, this argument appears to have been raised in anticipation of an argument that Gumwood never actually made. Gumwood does not argue that the portfolio negotiation itself constitutes a tying arrangement (though Dr. Frech, Gumwood's expert, did at his deposition), and the Court agrees that it does not. Portfolio negotiations may facilitate a tying arrangement, but negotiating a package deal does not create a tie until a party conveys that the tied product *must* be a part of the package or they will withhold the tying product. Thus, as discussed above, Gumwood must show that Simon threatened to refuse to lease other properties depending on Ann Taylor's decision on University Park and Heritage Square, not simply that the parties negotiated multiple properties together or that Ann Taylor's decision on one might have affected the terms **[*32]** of others.

To the extent that Simon argues that the *per se* analysis should not apply even where such a threat is present, though, the Court disagrees. That type of coercion is within the heartland of cases that examine tying claims under the *per se* analysis. *E.g., It's My Party, 811 F.3d 676, 2016 WL 426085*; *Paladin, 328 F.3d 1145*; *Datagate, 60 F.3d 1421*; *Unijax, 683 F.2d 687*; *Bob Maxfield, 637 F.2d 1033*. Moreover, though the Court agrees that portfolio negotiations in general are likely to have many desirable effects, Simon has not articulated any competitive justification for threatening a customer to prevent them from doing business with a competitor, and the Court sees no reason why the *per se* analysis should not apply in that context. *Sheridan, 530 F.3d at 593* ("The Court has not discarded the tying rule, and we have no authority to do so.").

B. Statute of Limitations

Simon next argues that Gumwood's claims are barred by the statute of limitations. ***HN12***[] A civil antitrust action is barred by the statute of limitations unless it is "commenced within four years after the cause of action accrued." *15 U.S.C. § 15b*; *Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 91 S. Ct. 795, 28 L. Ed. 2d 77 (1971)*. Gumwood filed its complaint in this action on June 29, 2011, so any claim that accrued prior to June 29, 2007 is barred. "Generally, a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's **[*33]** business." *Zenith, 401 U.S. at 336*. Gumwood alleges that Simon's tying activity began in 2006 and began harming Heritage Square well before June 29, 2007, including by causing Ann Taylor to discontinue its construction at Heritage Square in August 2006 and to decline to sign an otherwise fully-negotiated lease amendment in April 2007 that would have required it to open its store at Heritage Square. The statute of limitations could thus pose a significant obstacle to Gumwood's claims.

To avoid that result, Gumwood invokes the continuing violation doctrine. ***HN13***[] "***Antitrust law*** provides that, in the case of a 'continuing violation,' say, a price-fixing conspiracy that brings about a series of unlawfully high priced sales over a period of years, 'each overt act that is part of the violation and that injures the plaintiff,' *e.g.*, each sale to the plaintiff, 'starts the statutory period running again, regardless of the plaintiff's knowledge of the alleged illegality at much earlier times.'" *Klehr v. A.O. Smith Corp., 521 U.S. 179, 189, 117 S. Ct. 1984, 138 L. Ed. 2d 373 (1997)* (quoting 2 P. Areeda & H. Hovenkamp, ***Antitrust Law*** ¶ 338b (rev. ed. 1995)); *see also* *Zenith, 401 U.S. at 338* ("In the context of a continuing conspiracy to violate the antitrust laws, . . . each time a plaintiff is injured by an act of the defendants **[*34]** a cause of action accrues to him to recover the damages caused by that act and that, as to those damages, the statute of limitations runs from the commission of the act."). "An overt act that restarts the statute of limitations is characterized by two elements: (1) it must 'be a new and independent act that is not merely a reaffirmation of a previous act'; and (2) it must 'inflict new and accumulating injury on the plaintiff.'" *DXS, Inc. v. Siemens Medical Systems, Inc., 100 F.3d 462, 467 (6th Cir. 1996)* (quoting *Pace Indus., Inc. v. Three Phoenix Co., 813 F.2d 234, 238 (9th Cir. 1987))*; *accord* *Lehman v. Lucom, 727 F.3d 1326, 1331 (11th Cir. 2013)*; *Champagne Metals v. Ken-Mac Metals, Inc., 458 F.3d 1073, 1088 (10th Cir. 2006)*; *Xechem, Inc. v. Bristol-Myers Squibb Co., 372 F.3d 899, 902 (7th Cir. 2004)*; *Varner v. Peterson Farms, 371 F.3d 1011, 1019 (8th Cir. 2004)*.

In its brief, Gumwood does not acknowledge this analytical framework for continuing violations. Instead, it cites primarily to *Taylor v. Meirick, 712 F.2d 1112 (7th Cir. 1983)*, which addressed a different conception of the continuing violation doctrine in the context of a copyright claim. There, the Seventh Circuit held that "the statute of limitations does not begin to run on a continuing wrong till the wrong is over and done with." *Id. at 1118*. As a result, the plaintiff's claim for a series of copyright violations was timely where the defendant's conduct continued into the limitations period, even though it began outside the limitations period. *Id.* And perhaps more importantly, the court permitted the plaintiff to reach back and recover damages that occurred prior to the limitations period **[*35]** because those damages were part of the same continuing violation. *Id. at 1119*.

To the extent Gumwood attempts to rely on *Taylor* to argue that it need not prove new acts and injuries within the limitations period, *Taylor* does not support that proposition.[3] The court there found that the defendant was accountable for continued sales of the infringing product within the limitations period, *id.*, so it did not suggest that a plaintiff could recover even when a continuing wrong extends into the limitations period but inflicts no new injuries in that span. Moreover, in the antitrust context, courts have widely and quite uniformly held that in order for continuing violations to trigger new limitations periods, there must be a new and independent overt act that inflicts new and accumulating injury on the plaintiff. *Klehr, 521 U.S. at 189*; *Lehman, 727 F.3d at 1331*; *Champagne Metals, 458 F.3d at 1088*; *Xechem, 372 F.3d at 902*; *Varner, 371 F.3d at 1019*; *DXS, 100 F.3d at 467*; *Pace Industries, 813 F.2d at 238*; *see also* Areeda & Hovenkamp, ***Antitrust Law*** ¶ 320c6 (4th ed. 2014) ("Of course, if the damages all occurred more than four years earlier, the plaintiff is time-barred notwithstanding continuation of the defendant's violation."). To the extent *Taylor* says otherwise, it does not apply in this context.

Taylor's effect in this case, if any, would thus not be on whether Gumwood's claims are barred, but on whether Gumwood can recover damages caused by acts that occurred prior to the limitations period, in that *Taylor* permitted

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[3] For what it's worth, *Taylor* has arguably been narrowed by the Seventh Circuit, *e.g., **[*36]*** *Limestone Dev. Corp. v. Village of Lemont, Ill., 520 F.3d 797, 800-802 (7th Cir. 2008)*; *CSC Holdings, Inc. v. Redisi, 309 F.3d 988, 992-93 (7th Cir. 2002)*, and has been criticized by other district courts in this circuit to the extent that at least one district court has refused to follow it even in the copyright context, finding itself "powerfully convinced" that the Seventh Circuit would reverse *Taylor* once given the chance, *Leventhal v. Schenberg, 917 F. Supp. 2d 837, 845-46 (N.D. Ill. 2013)*. *See also* *Champion Labs., Inc. v. Cent. Ill. Mfg. Co., No. 14 C 9754, 2016 U.S. Dist. LEXIS 4641, 2016 WL 164364, at *4 (N.D. Ill. Jan. 14, 2016)* (describing the limitations and criticisms of *Taylor*, but nonetheless following its holding in a copyright case).

the plaintiff to recover damages for the entire course of conduct. But there again, Gumwood runs into the problem that this proposition is contrary to the great weight of authority in antitrust cases. *E.g., Klehr, 521 U.S. at 189* ("But the commission of a separate new overt act generally does not permit the plaintiff to recover for the injury caused by old overt acts outside the limitations period."); *Xechem, 372 F.3d at 902*; *Stolow v. Greg Manning Auctions Inc., 80 F. App'x 722, 725 (2d Cir. 2003)* ("Stolow cannot recover for the loss of [his company] or other injuries he allegedly suffered before April 4, 1998 (four years before he filed this lawsuit) because his claim that the **[*37]** continuing nature of the alleged illegal conduct tolled the statute of limitations is without merit. . . . Although Stolow refers to *Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002)*, which treated a 'hostile work environment' claim as a single 'unlawful employment practice' under Title VII for statute of limitations purposes, nothing suggests that the Supreme Court intended that decision to displace these well-established antitrust and RICO principles."); Areeda ¶ 320c6 ("Even in the case of the continuing conspiracy or violation, . . . plaintiffs are ordinarily limited to damages for the four years immediately preceding the filing of their lawsuit.").

As Simon notes, this is illustrated by the very cases Gumwood cites that apply the continuing violation doctrine in the antitrust context, which hold that ***HN14***[] the plaintiff may only recover damages that accrued within the limitations period, not damages that were caused by the same course of conduct but that predated the limitations period. *Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 88 S. Ct. 2224, 20 L. Ed. 2d 1231 (1968)* (allowing the plaintiff to bring an antitrust claim in 1955 for conduct that began in 1912, but permitting recovery of only the damages that accrued within the limitations period); *Smith, 2012 U.S. Dist. LEXIS 1211, 2012 WL: 27718, at *3 n.2* (denying a motion to dismiss since the continuing violation extended **[*38]** into the limitations period, but noting that "[a]ny harm that accrues after the tolling of the statute of limitations periods but that is associated with an overt act that occurred prior to the limitations period is not remediable"). The Seventh Circuit has also expressly rejected extending *Taylor's* damages theory into the RICO context, *McCool v. Strata Oil Co., 972 F.2d 1452, 1466 (7th Cir. 1992)*, which employs the same limitations principles as ***antitrust law***, *Klehr, 521 U.S. at 190* (citing this holding from *McCool* as applying in both the RICO and antitrust contexts); *see also Limestone Dev. Corp., 520 F.3d at 800-802*. Thus, to decide whether Gumwood's claims are barred in their entirety, as would be required to justify summary judgment, the Court considers, first, whether Simon engaged in any new and independent overt acts within the limitations period, and second, whether those acts inflicted any new and accumulating injury on Gumwood.

1. New and Independent Act

First,***HN15***[] to start a new limitations period, an overt act must "be a new and independent act that is not merely a reaffirmation of a previous act." *DXS, 100 F.3d at 467* ("Even when a plaintiff alleges a continuing violation, an overt act by the defendant is required to restart the statute of limitations and the statute runs from the last overt act."). As some circuits have **[*39]** articulated this rule, overt acts must be more than the "abatable but unabated inertial consequences of some pre-limitations action" in order to trigger a new limitations period. *Z Techs. Corp. v. Lubrizol Corp., 753 F.3d 594, 600 (6th Cir. 2014)*; *Poster Exch., Inc. v. Nat'l Screen Serv. Corp., 517 F.2d 117, 128 (5th Cir. 1975)*. Thus, where a party makes an "'irrevocable, immutable, permanent and final'" decision prior to the limitations period, subsequent acts within the limitations period that simply reflect that prior decision will not restart the clock. *Champagne Metals, 458 F.3d at 1090* (quoting *Hennegan v. Pacifico Creative Serv., Inc., 787 F.2d 1299, 1301 (9th Cir. 1986))*.

Conversely, when a party decides to embark on an unlawful course of conduct prior to the limitations period, but that initial decision "require[s] further action" to implement, or a party's actions within the limitations period "manifest[] a commitment to renewing and enforcing" a prior decision or agreement, those subsequent actions will restart the limitations period. *Id. at 1089*; *see also DXS, 100 F.3d at 468* (finding that subsequent acts to implement a previously-announced but unenforced policy restarted the limitations clock where they were not "compelled by" the policy announcement and were not "merely reaffirmations of" the policy); *Midwestern Mach. Co., Inc. v. Nw. Airlines, Inc., 392 F.3d 265 (8th Cir. 2004)* ("[A] continuing violation theory is based on an initial action that violates the antitrust laws followed by injuries caused by illegal actions *designed to implement* ***[*40]*** *and effectuate* the initial violation."). In the context of a tying arrangement, this typically means that a plaintiff must show that the defendant "'had the ability to and actually did enforce the tie' during the limitations period." *Eichman v. Fotomat Corp. 880 F.2d 149, 160 (9th Cir. 1989)* (quoting *Airweld, Inc. v. Airco, Inc., 742 F.2d 1184, 1190 (9th Cir. 1984))*; *Smith, 2012 U.S. Dist. LEXIS 1211, 2012 WL 27718, at *3* (same).

Here, as Simon argues, the alleged tying activity began prior to June 2007, which suggests that Simon had decided prior to that point (if at all) to require Ann Taylor to sign a lease at University Park or to stay out of Heritage Square in order to retain its leases at the other Simon properties. But there was nothing final or irrevocable about any of Simon's actions prior to the limitations period. As Simon's continued interactions with Ann Taylor revealed, any tying arrangement was tenuous at best, and it took considerable maneuvering and prodding over the ensuing period for Simon to keep Ann Taylor from proceeding at Heritage Square and to cause it to sign a lease at University Park. Nor did Ann Taylor take any action that irrevocably committed it to the tying arrangement prior to the limitations period. It neither terminated its lease with Heritage Square nor signed a lease at University Park until well within the limitations period. **[*41]** Thus, Simon could not simply sit idly while the inertial consequences of its previous threats played out. To the contrary, the parties' negotiations proceeded in fits and starts, and Simon had to consistently apply pressure to Ann Taylor and maintain the tie to ensure that Ann Taylor would comply.

The nature of the relationship between Ann Taylor and Simon relative to Gumwood makes this clear. This was not a case where two parties with mutually aligned interests agreed not to do business with a plaintiff, such that the initial agreement between those parties can be considered final and the subsequent acts within the limitations period merely reflect that prior decision. *E.g., Kaw Valley Elec. Coop. Co., Inc. v. Kan. Elec. Power Coop., Inc., 872 F.2d 931, 933 (10th Cir. 1989)* (finding an action time-barred where a cooperative decided prior to the limitations period not to do business with non-members); *AMF, Inc. v. Gen. Motors Corp., 591 F.2d 68 (9th Cir. 1979)* (similar). The tying arrangement here would have been adverse to Ann Taylor's interests, as it constrained Ann Taylor's ability to freely consider and choose among competing centers. Thus, in the absence of a formalized agreement that Simon could enforce against Ann Taylor, the tying arrangement required continuing action by Simon to keep Ann Taylor aligned.

The Tenth Circuit's decision **[*42]** in *Champagne Metals* involved a similar scenario. There, a group of the plaintiff's competitors conspired to harm the plaintiff by pressuring the plaintiff's suppliers not to do business with it. *458 F.3d at 1089*. But like Simon's initial decision to impose a tying arrangement, the initial decision among the competitors in *Champagne Metals* did not itself have any effect on the plaintiff. *Id.* Rather, the competitors had to take further action to implement that decision by coercing third parties, the suppliers, not to do business with the plaintiff. *Id.* Thus, the acts that the competitors took within the limitations period to keep the suppliers from doing business with the plaintiff were sufficiently new and independent to restart the statute of limitations. *Id. at 1089-90* (noting also that the plaintiff could seek to recover damages "for those acts" that occurred "within the limitations period"); *see also Hennegan, 787 F.2d at 1300-01* (finding a continuing violation where a souvenir shop's competitors coerced third parties, tour operators, to steer their tours away from the plaintiff's shop, and actions in furtherance of that arrangement continued into and caused harm within the limitations period).

Likewise here, Simon could not unilaterally **[*43]** deprive Heritage Square of its tenants. Rather, it could only impact Heritage Square by influencing the actions of those third parties, including Ann Taylor. *See Champagne Metals, 458 F.3d at 1089* (distinguishing *Kaw Valley*, where the defendants' refusals to deal with the plaintiff did not restart the limitations period, on the basis that "the agreeing parties [in *Kaw Valley*] had exclusive control over the input they sought to deny to the plaintiff; a decision not to supply that input required no further action"). And though Simon allegedly began pressuring Ann Taylor in 2006, it was not until mid-2008 that Ann Taylor finally signed a lease at University Park. That lease itself would constitute a new, independent overt act in furtherance of the tying arrangement, as it was the culmination of the alleged tying and was not an inevitable consequence of any previous acts. It also took concerted and renewed effort by Simon into 2008 to secure the University Park lease, and those various acts could also qualify as new overt acts. [*E.g.*, DE 128-36; 129-43].

There were other potential overt acts within the limitations period, too. For example, there is evidence that around August 2007, Ann Taylor and Simon entered an agreement **[*44]** by which Ann Taylor agreed not to open any stores in centers that competed with Simon properties. Multiple emails reference such an agreement and note that the parties were working on how to document it. [*E.g.*, DE 129-43 "Yes, we agreed not to go into the other project . . . "); 129-44 ("As the 'new kid on the block', Buck [Sappenfield of Ann Taylor] has said all the right things — ie. no more AT's [Ann Taylors] opening in our backyard."); 128-33 (noting among the "open items" to be addressed between Ann Taylor and Simon: "Discussion and understanding as to how we should document AT's agreement not to go into the markets where they've turned down opportunities with us."). That agreement is a plausible result of Simon's tying threats and could encompass Heritage Square, and could thus be another new and independent overt act as part of the tying arrangement.

Moreover, throughout this period, Simon continued to insist on engaging in a single, global negotiation rather than agreeing on individual properties. [*E.g.*, DE 128-27 ("As it relates to AT, . . . we agreed only to hold up renewals . . . ."); 128-32; 129-36 ("In a meeting yesterday with David and Rick, they reiterated their direction **[*45]** not to sign any leases (new or renewal) with . . . Ann Taylor unless and until we finish our packages with them."); 129-38 ("We were holding all the deals until they were all complete."); 129-39 (noting that Simon had been holding off on renewing certain leases for about a year as of February 2008); 129-41 ("until things are settled with AT, we should not be pursuing the signing of this lease.")]. As Simon argues, there is nothing inherently improper about that practice, and it is not sufficient to establish a tie. However, it was still a necessary step to maintain a tying arrangement under these circumstances, since Simon could not tie properties together if it negotiated and executed each lease individually. Each of those refusals to renew leases on the tying properties or to negotiate them apart from the tied properties could thus constitute new overt acts, as they continued to implement the tying arrangement. Therefore, the Court finds that there is evidence from which a jury could find that Simon took overt acts within the limitations period that could have triggered a new statute of limitations.

2. New and Accumulating Injury

The more difficult question on this record comes on **[*46]** the second element, which is whether Gumwood was actually harmed by any overt acts that took place within the limitations period.***HN16***[] For overt acts to restart the limitations period, they must inflict "new and accumulating injury on the plaintiff." *DXS, 100 F.3d at 467* (quoting *Pace Indus., 813 F.2d at 238*); Areeda ¶ 320c6 ("Of course, if the damages all occurred more than four years earlier, the plaintiff is time-barred notwithstanding continuation of the defendant's violation."). However, after the negotiations between Gumwood and Ann Taylor for the lease amendment fell through in April 2007, there were never any further concrete plans to open the store at Heritage Square that could have been interrupted by any tying arrangement; the store essentially remained in limbo until Ann Taylor signed a lease and later opened its store at University Park. And as a matter of ***antitrust law***, "when a purchaser is 'forced' to buy a product he would not have otherwise bought even from another seller in the tied product market, there can be no adverse impact on competition because no portion of the market which would otherwise have been available to other sellers has been foreclosed." *Jefferson Parish, 466 U.S. at 16*; *Reifert, 450 F.3d at 318* ("Forcing a buyer to purchase a product he otherwise would **[*47]** not have purchased is insufficient to establish the foreclosure of competition."). Thus, if Ann Taylor had decided prior to the limitations period that it was not going to open a store at Heritage Square, as Simon argues, and Simon then "forced" Ann Taylor to open at University Park when it would not have otherwise opened with any other competitors in the market, the subsequent forcing will be of no antitrust concern and will not revive Gumwood's claim.

However, the Court finds that there is sufficient evidence from which a jury could find that Ann Taylor had not conclusively decided prior to the limitations period not to open at Heritage Square, and that it may have opened its store there if not for Simon's continued tying. To begin with, Ann Taylor still had a binding ten-year lease at Heritage Square that it was unable to terminate. It had also spent over one hundred thousand dollars in construction costs building its store at Heritage Square, so it had an investment in that location. Further, because the cotenancy provision in its lease had not been (and could not be) met, Ann Taylor would have been able to pay significantly reduced rent at Heritage Square, saving it twenty percent **[*48]** or more on rent each year.[4] Under those

[4] Other stores at Heritage Square whose co-tenancy provisions were not met opened anyway, possibly for that reason.

circumstances, Ann Taylor would have had the ability to return to Heritage Square rather easily had Simon not continued to persist in the tying arrangement, and it would have had incentives to do so, too.

There is also evidence that Ann Taylor believed that Heritage Square was the best location for it even after Simon's tying activity began. In a March 17, 2007 email, one of Ann Taylor's representatives stated: "I'm having problems at heritage. . . . .feeling the pre[]ssure. The sad thing is we all believe that is where we should be." [DE 128-24]. He also explained at his deposition, "We knew this was the right site and market for us to be in or I felt that was the right market to be in . . . ." [DE 129-1 p. 13]. Though that was still prior to the limitations period, it is notable in that it shows that even after Simon's initial salvo, which included the threats noted above and even a meeting between Simon's and Ann Taylor's CEOs, Ann Taylor was still interested in opening a store at Heritage Square and may have preferred that location **[*49]** to University Park. A jury could infer that Ann Taylor's preference remained the same three months later when the limitations period began.

Simon also notes that Mr. Sappenfield of Ann Taylor testified that as of March 2007, Ann Taylor was putting together an action plan to terminate the lease at Heritage Square because "[t]he division was not wanting to go forward with a store in the shopping center." [DE 132-19 (stating also, "The only caveat is that we already had spent $100,000 on the store and the easiest thing would have been to go forward but we didn't think that the store would be successful.")]. Yet, the following month, Ann Taylor began negotiating with Gumwood over a *second amendment* to its lease under which it would have immediately resumed construction and opened its store at Heritage Square. Though Ann Taylor did not go forward with that plan, either, this illustrates the back-and-forth nature of Ann Taylor's intentions at Heritage Square.

In addition, though there were never any new concrete plans for Ann Taylor to open at Heritage Square after April 2007, there was no formal or irrevocable decision to terminate Ann Taylor's relationship with Heritage Square at that time. In May 2007, an Ann **[*50]** Taylor representative told a Heritage Square representative "that with reference to Ann Taylor Loft, that they [Ann Taylor] still had many issues to overcome with Simon before they could determine if they will move forward with us." [DE 151-7]. Internal Ann Taylor communications in July 2007 also suggest that Ann Taylor had no present intention to open a store at Heritage Square, but they were equivocal as to whether Ann Taylor had made any final decision not to ever open at Heritage Square. [DE 151-10 (stating that the deal is "on hold" and that they "will determine if the deal should be killed shortly")]. *See* *Xechem, 372 F.3d at 901-02* (finding that an action was not time-barred even though the project in question had been placed "on permanent hold" prior to the limitations period, since that could be interpreted as merely a decision not to act at that particular time, not a final decision to never do so, and noting that "'on hold' itself implies the possibility of change"). And in February 2008, Ann Taylor inquired as to the status of Heritage Square and indicated to a Gumwood representative that they "still didn't know if [they] could open with" Heritage Square, but that they were "looking for an opportunity **[*51]** to do that." [DE 132-62 p. 7].

Gumwood's corporate representative also testified that her discussions with Ann Taylor about opening at Heritage Square continued throughout this period, and even continued after Ann Taylor signed a lease at University Park. [DE 151-11 ("They continued to talk with us, that there could be an opening -- or that they could potentially open. So that's why we kept the conversations alive.")]. Ann Taylor never communicated to Gumwood during that period that the deal was dead. [*Id.*] In fact, an Ann Taylor representative told her in December 2008 that they still were not sure whether Ann Taylor was going to enter the market, and that he would be back in touch with her in January 2009. [*Id.*] This indicates that even after Ann Taylor signed a lease with University Park in July 2008, it was trying to keep its options open as much as possible, which is inconsistent with Ann Taylor having made a final decision prior to June 29, 2007, when the limitations period began.

Granted, there is other evidence that by the time Ann Taylor finally signed a lease at University Park, it had already decided not to open at Heritage Square and was deciding only between opening at University **[*52]** Park or not opening in Mishawaka at all. [*E.g.*, DE 129-43 ("Yes, we agreed not to go into the other project, but the division does not want to go to the [University Park] mall either. They will just not have a store in the market.")]. But Ann Taylor's position at that time could be viewed as a product of Simon's continued maintenance of the tying arrangement, too, or of the agreement around August 2007 for Ann Taylor not to open any stores "in [Simon's] backyard." [DE 129-44; 128-33]. Ann Taylor may have preferred not being in the market to opening a store at

University Park, but it may have also preferred opening a store at Heritage Square to both of those options. [*See* DE 128-24; 129-1 p. 13]. The tying arrangement took that option off the table at the time, but that does not mean that if Simon did not continue to maintain its tying requirement, Ann Taylor would not have returned to Heritage Square. And given the other evidence noted above that Ann Taylor may have still considered opening a store at Heritage Square within the limitations period, the Court finds that there is a genuine dispute of fact on this question. Accordingly, the Court cannot grant summary judgment on the basis **[*53]** that the claims are barred in whole by the statute of limitations.

3. Collateral Estoppel

Finally, Simon argues that Gumwood should be collaterally estopped from contesting that it knew by April 2007 that it had suffered an injury as a result of Simon's conduct. Simon bases this argument on the dismissal of a tortious interference claim Gumwood brought against Simon in state court. However, as Simon notes in its reply brief, Gumwood does not contest that it was aware of that injury by April 2007, so the Court need not address the collateral estoppel argument. Moreover, that fact has no impact on the continuing-violations analysis above as to these antitrust claims[5]—that Gumwood cannot recover any damages for injuries it suffered prior to the limitations period does not mean it cannot recover for injuries caused by conduct within the limitations period that caused new and accumulating harm, if it can make that showing.

C. Collateral Source Doctrine

Finally, Gumwood has moved for summary judgment to preclude Simon from offering evidence to reduce Gumwood's damages under **[*54]** the collateral source doctrine, under which benefits conferred on a plaintiff by third parties cannot be used to reduce the damages owed by a defendant. Broadly speaking, Gumwood's expert calculated damages by determining the total loss in value to Heritage Square attributable to Simon's conduct. He first determined that Heritage Square was worth either $34.3 or $41.0 million prior to the events at issue here. He then determined that it was worth $11.0 million as of November 2010. After controlling for a substantial drop in value due to the recession, which accounted for about half of the losses, the expert concluded that the loss in value of Heritage Square attributable to Simon's conduct was either $11.0 or $16.7 million.

Meanwhile, Simon's expert contends that if damages are measured based on a change in value at all,[6] they should be measured by the change in the value of Gumwood's interest in Heritage Square, not the change of value of Heritage Square itself. Simon's expert notes that Heritage Square was pledged as security for a $33.5 million non-recourse loan for its construction. She then calculates Gumwood's interest in Heritage Square as the difference between Heritage Square's **[*55]** value prior to these events and the amount of the loan, which she places at either $4.5 or $12.8 million based on Gumwood's expert's calculations. She thus contends that those amounts were the most that Gumwood stood to lose (much or all of which may have been lost due to the recession and other factors), and that any additional loss in value would have been sustained by the lender when it took ownership of Heritage Square through a deed in lieu of foreclosure and Gumwood's obligation to repay the loan was released. Gumwood objects to this calculation, arguing that it is a backdoor way of introducing evidence of loan forgiveness, which Gumwood argues would be barred by the collateral source doctrine.

HN17[] Typically, the collateral source doctrine applies where a plaintiff receives insurance payments or some other benefits that are triggered by or compensate the plaintiff for the injury **[*56]** in question. *E.g., ADM Investor Servs., Inc. v. Collins, 515 F.3d 753, 755 (7th Cir. 2008)*; *Perry v. Larson, 794 F.2d 279, 285-86 (7th Cir. 1986)*; *see* *Restatement (Second) of Torts § 920A* ("Payments made to or benefits conferred on the injured party from other

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[5] In fact, the same state court denied Simon's motion to dismiss Gumwood's state antitrust claims as untimely. [DE 151-2, -3].

[6] She contends that the proper method is actually to calculate the amount of reduced rent that Heritage Square collected as a result of the loss of Ann Taylor as a tenant. After subtracting certain costs and expenses, she arrives at a net difference of $28,739 in loss to Gumwood based on Ann Taylor's absence.

sources are not credited against the tortfeasor's liability, although they cover all or a part of the harm for which the tortfeasor is liable."). In those circumstances, the collateral benefits received by the plaintiff cannot be used to reduce the damages owed by the defendant. Collins, 515 F.3d at 755; Perry, 794 F.2d at 285-86. For example, the defendant in *Collins* incurred a debt by making trades on margin, and that debt was guaranteed by a third-party broker. Collins, 515 F.3d at 755. When the plaintiff made a margin call that the defendant could not satisfy, the guarantor paid the plaintiff a portion of the defendant's outstanding debt pursuant to its guarantee. *Id.* The court held that the payment did not reduce the damages that the defendant owed to the plaintiff, stating, "That a third party reimburses part of a loss does not disable the injured person from recovering under tort or contract law." *Id.* Similarly, in Molzof v. United States, 6 F.3d 461 (7th Cir. 1993), the Seventh Circuit considered an award of future medical expenses in a tort action. There, even though the plaintiff was entitled to free medical care for life because of his prior military service, the court held that the plaintiff **[*57]** was still entitled to receive over $1 million in damages for the value of his future medical care. Id. at 464-65. While the injury left the plaintiff no worse off financially relative to his future medical expenses—both before and after the injury, he was entitled to free medical care—the collateral source rule prevented his recovery from being reduced on that basis. *Id.*

The circumstances here fit rather oddly, if at all, into the framework of the collateral source doctrine, though. As Simon argues, its expert did not invoke loan forgiveness as such as the basis for her opinion. However, her opinion relies on the premise that Gumwood had no further obligation to repay the loan once the lender took ownership of Heritage Square. If Gumwood remained obligated for the full amount of the loan, it would certainly be damaged in the full amount of the loss of value of Heritage Square, as that would have directly reduced its ability to satisfy the loan and the lender could still pursue Gumwood for the remaining balance. Having instead negotiated a non-recourse loan, Gumwood essentially transferred some of the risk of loss of value of Heritage Square to its lender (for which the lender was presumably compensated), **[*58]** much as a homeowner might purchase home insurance to transfer some of the risk of damage to its home to an insurer, in which case the insurance payments would not reduce the plaintiff's recovery. By that comparison, the collateral source doctrine might mean that the contractual forgiveness of the outstanding loan balance at the time the lender accepted the deed in lieu of foreclosure will not impact the damages to which Gumwood is entitled. However, neither party has cited any case applying the collateral source doctrine in this unique factual circumstance or suggesting that a non-recourse loan can provide a form of collateral benefit.[7] And for that matter, Simon has cited no authority that the existence of a loan on a property or the terms of that loan should affect a plaintiff's ability to recover damages for harm to that property in the first place, so resort to the collateral source doctrine may be unnecessary.

Moreover, the thrust of Simon's argument is essentially that much of the claim for the loss of value of Heritage Square belongs to the lender because the lender bore much of the risk and realized the loss when it took ownership of the property. Yet Gumwood also represents that when the lender accepted the deed in lieu of foreclosure, the lender permitted Gumwood to retain any claim against Simon relative to Heritage Square. Thus, if the damages in question are recoverable by either Gumwood or the lender, and the lender has relinquished its claim to Gumwood, Gumwood might be entitled to recover those damages either way. Finally, Gumwood argues that the loan was not fully non-recourse, as some of its principals had to make certain personal guarantees. However, Gumwood does not indicate how the personal obligations of the partners should affect the damages recoverable by the partnership, if at all, or how that would be a collateral benefit to Gumwood.

Given the uncertainties of these various moving parts, and because neither party has presented any authority applying the collateral source doctrine in these unique circumstances, the Court cannot **[*60]** conclude at this time that Gumwood is entitled to summary judgment as to the application of the collateral source doctrine. However, these issues bear further consideration, and the parties may renew or present additional arguments on these issues as appropriate in advance of trial.

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[7] States also take various approaches as to whether plaintiffs' recoveries should be reduced where they are able to negotiate discounts on expenses incurred as a result of the injury in question. Those cases seem inapplicable here, though, where both the loan and its non-recourse **[*59]** terms were in effect prior to the injury.

IV. CONCLUSION

For the foregoing reasons, the parties' cross motions for summary judgment [DE 127, 130] are each DENIED. Simon's motions to strike [DE 156, 159] are also DENIED as moot. Finally, Simon's motion for oral argument [DE 135] is DENIED as unnecessary at this time in light of the depth and quality of the parties' briefs.

SO ORDERED.

ENTERED: March 18, 2016

/s/ JON E. DEGUILIO

Judge

United States District Court

United States v. Tribune Publ'g Co.

United States District Court for the Central District of California

March 18, 2016, Decided; March 18, 2016, Filed

Case No. CV 16-01822-AB (PJWx)

Reporter

2016 U.S. Dist. LEXIS 54494 *; 2016-1 Trade Reg. Rep. (CCH) P79,544

UNITED STATES OF AMERICA, Plaintiff, v. TRIBUNE PUBLISHING COMPANY, Defendant.

Core Terms

public interest, irreparable harm, newspapers, acquisition, injunction, advertising, effects, merits, temporary restraining order, preliminary injunction, relevant market, local news, anticompetitive, percent, merger, local newspaper, anti trust law, interchangeable, geographic, antitrust, consumers, hardships

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Judges: HONORABLE ANDRÉ BIROTTE JR., UNITED STATES DISTRICT JUDGE.

Opinion by: ANDRÉ BIROTTE JR.

Opinion

ORDER GRANTING APPLICATION FOR A TEMPORARY RESTRAINING ORDER

Before the Court is the United States of America's ("government") Ex Parte Application for a Temporary Restraining Order ("TRO") (Dkt. No. 5.), filed, along with the Complaint (Dkt. No. 1), on March 17, 2016. Defendant Tribune Publishing Company ("Tribune") filed an Opposition, and the government filed a Reply on March 18, 2016. (Dkt. Nos. 12, 16.)[1] Upon consideration of the papers, the Court **GRANTS** the application.

I. BACKGROUND

The papers set forth the relevant background in detail. The Court will provide only a summary. Tribune owns the *Los Angeles Times*. The government seeks an order enjoining Tribune from finalizing its acquisition of Freedom Communications, Inc. ("Freedom") and its publications, the Orange County *Register* and the Riverside County

[1] At 6:30 p.m. on March 18, 2016, Tribune filed an Ex Parte Application **[*2]** to File a Sur-Reply. (Dkt. No. 17.) The Court GRANTS that application. However, the court has reviewed Tribune's sur-reply and it does not change the analysis herein.

Press-Enterprise. Tribune was the winning bidder — out of two or three bidders — for Freedom's assets in a bankruptcy auction held March 16, 2016 and is scheduled to seek bankruptcy court approval of its acquisition on March 21, 2016. The government argues that the acquisition would immediately end competition between Tribune and Freedom for readers and advertisers in Orange and Riverside counties, leaving Tribune with a monopoly in the market for English-language daily local newspapers in these counties. The government contends that this is prohibited by *Section 7* of the Clayton Act, *15 U.S.C. § 18*, and seeks to enjoin the acquisition to preserve the status quo pending a motion for preliminary injunction. **[*3]**

II. APPLICABLE LEGAL STANDARDS

A. Standard for a Temporary Restraining Order

A temporary restraining order is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. NRDC, Inc., 555 U.S. 7, 22, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008)*. The purpose of a preliminary injunction is to preserve the status quo and the rights of the parties until a final judgment on the merits can be rendered. *See* *U.S. Philips Corp. v. KBC Bank N.V., 590 F.3d 1091, 1094 (9th Cir. 2010)*. The purpose of a temporary restraining order is to preserve the status quo before a preliminary injunction hearing may be held. *Granny Goose Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers Granny Goose Foods, Inc., 415 U.S. 423, 439, 94 S. Ct. 1113, 39 L. Ed. 2d 435 (1974)*; *Johnson v. Macy, No. CV 15-7165 FMO (ASX), 145 F. Supp. 3d 907, 2015 U.S. Dist. LEXIS 158054, 2015 WL 7351538, at *3 (C.D. Cal. Nov. 16, 2015)*. The standard for a temporary restraining order is identical to the standard for a preliminary injunction. *Frontline Med. Assocs., Inc. v. Coventry Healthcare Workers Comp., Inc., 620 F. Supp. 2d 1109, 1110 (C.D. Cal. 2009)*. Specifically, a party seeking preliminary injunctive relief must establish that he is (1) likely to succeed on the merits, (2) that he is likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in his favor, and (4) that an injunction is in the public interest. *Am. Trucking Ass'ns v. City of Los Angeles, 559 F.3d 1046, 1052 (9th Cir. 2009)*.

Alternatively, "'serious questions going to the merits' and a hardship balance that tips sharply toward the plaintiff can support the issuance of an injunction," **[*4]** provided that the plaintiff also shows irreparable harm and that the injunction is in the public interest. *Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1132 (9th Cir. 2011)*; *SATA GmbH & Co. KG v. Wenzhou New Century Int'l, Ltd., No. CV 15-08157-BRO (Ex), 2015 U.S. Dist. LEXIS 147637, 2015 WL 6680807, *3 (C.D. Cal. Oct. 19, 2015)*. A "serious question" is one on which the movant "has a fair chance of success on the merits." *Sierra On-Line, Inc. v. Phoenix Software, Inc., 739 F.2d 1415, 1421 (9th Cir. 1984)*.

The elements of this test are "balanced, so that a stronger showing of one element may offset a weaker showing of another." *Alliance for the Wild Rockies, 622 F.3d 1045, 1049-50 (9th Cir. 2010)*, *rev'd on other grounds*, *632 F.3d 1127 (9th Cir. 2011)*. However, the applicant must *demonstrate* that immediate or imminent irreparable harm is likely: "Speculative injury does not constitute irreparable injury sufficient to warrant granting a preliminary injunction. A plaintiff must do more than merely allege imminent harm sufficient to establish standing; a plaintiff must *demonstrate* immediate threatened injury as a prerequisite to preliminary injunctive relief." *Caribbean Marine Svcs. Co., Inc. v. Baldrige, 844 F.2d 668, 674 (9th Cir. 1988)* (emphasis in original) (internal citations omitted); *see also* *Fin. & Sec. Prods. Ass'n v. Diebold, Inc., Case No. C 04-04347 WHA, 2005 U.S. Dist. LEXIS 45409, 2005 WL 1629813, * 6 (N.D. Cal. Jul. 8, 2005)* ("Irreparable harm must not be speculative or merely alleged to be imminent . . . ."). In the antitrust context, "[r]easonable apprehension of threatened injury" can constitute irreparable harm. *Am. Passage Media Corp. v. Cass Commc'ns, Inc., 750 F.2d 1470, 1473 (9th Cir. 1985)*; *accord* *15 U.S.C. § 26*. Nevertheless, the party seeking injunctive **[*5]** relief still "must demonstrate irreparable harm," *id.*, by showing "a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur." *Los Angeles Memorial Coliseum Comm'n v. Nat'l Football League, 634 F.2d 1197,1201 (9th Cir. 1980)* (citation and internal quotations omitted). Unsupported allegations without "factual basis" do not suffice. *Id.*

B. Elements of a *Clayton Act* Violation

The government challenges the transaction under *Section 7* of the Clayton Act. To prove a violation of *Section 7*, a plaintiff must demonstrate that the challenged transaction is likely to "substantially . . . lessen competition or tend to create a "monopoly" in a properly defined "market for a particular product in a particular geographic area." *United States v. Baker Hughes, Inc., 908 F.2d 981, 982-83 n.1, 285 U.S. App. D.C. 222 (D.C. Cir. 1990)*. The government must prove that there is a "reasonable probability" of substantial competitive harm; a mere possibility of harm is insufficient to prove a *Section 7* violation. *United States v. Marine Bancorporation, Inc., 418 U.S. 602, 616-17, 622-23, 94 S. Ct. 2856, 41 L. Ed. 2d 978 (1974)* ("*[Section] 7* deals in 'probabilities,' not 'ephemeral possibilities.'") (citing *Brown Shoe Co. v. United States, 370 U.S. 294, 323, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962))*; *United States v. SunGard Data Sys., Inc., 172 F. Supp. 2d 172, 180 (D.D.C. 2001)*. If, on balance, the transaction is not likely to substantially lessen competition, the government cannot carry its burden. *Baker Hughes, 908 F.2d at 982-83*.

Courts evaluate mergers under a "burden-shifting" framework by which the government must (1) establish a cognizable relevant product market, (2) **[*6]** demonstrate market shares that give rise to anticompetitive effects, and (3) show probable adverse effects on customers in the market as a whole. *Id. at 981*. If the government establishes these elements, there arises a presumption that the merger will substantially lessen competition. *California v. Am. Stores Co., 872 F.2d 837, 841-42 (9th Cir. 1989)*, *rev'd on other grounds*, *495 U.S. 271, 110 S. Ct. 1853, 109 L. Ed. 2d 240 (1990)*.

If the government establishes a prima facie case, the burden then shifts to the defendant to produce evidence rebutting the presumption. *Baker Hughes, 908 F.2d at 982-83*. If the defendant successfully rebuts the presumption, the burden of producing additional evidence of anticompetitive effect shifts to the government and merges with the ultimate burden of persuasion, which remains with the government at all times. *Id.*

III. DISCUSSION

A. The Government Has Established a Likelihood of Success on the Merits of Its Claim.

Having reviewed the parties' submissions, the Court finds that the Government has shown a likelihood of success on the merits of its claim.

1. The Government Is Likely to Establish Its Proposed Relevant Market.

To prove anticompetitive effect, the government must establish the relevant market, which consists of two components: a product market and a geographic market. *FTC v. Freeman Hosp., 69 F.3d 260, 268 (8th Cir. 1995)*. The relevant product market establishes **[*7]** the boundaries within which competition meaningfully exists. Those "commodities reasonably interchangeable by consumers for the same purposes" constitute a product market for antitrust purposes. *United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 395, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)*. The relevant market "must be drawn narrowly to exclude any other product to which, within reasonable variations in price, only a limited number of buyers will turn." *Times-Picayune Publ'g Co. v. United States, 345 U.S. 594, 612 n.31, 73 S. Ct. 872, 97 L. Ed. 1277 (1953)*; *see also* *Brown Shoe, 370 U.S. at 325* (product markets are delineated "by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it"). A relevant geographic market is an "area in which the seller operates[] and to which the purchaser can practicably turn for supplies." *United States v. Phila. Nat'l Bank, 374 U.S. 321, 359, 83 S. Ct. 1715, 10 L. Ed. 2d 915 (1963)* (internal quotation marks and emphasis omitted).

Here, the government defines the relevant *product* market as "the sale of Daily English-language local daily newspapers to subscribers and the sale of local advertising in those newspapers." *See* TRO 10:14-16, *and* Exh. B

(Decl. of Robin Allen). In particular, the government notes that readers and advertisers are not likely to find local newspapers in *other languages* to be reasonably interchangeable with local English-language newspapers.

The government defines the relevant *geographic* ***[*8]*** market as Orange County and Riverside County. The government argues that English-language newspapers *from elsewhere* are not likely to be interchangeable with English-language newspapers in Orange and Riverside counties because the former "do not regularly provide local news specific to that county, nor do they have any significant circulation or sales inside Orange County." *See* TRO 13:8-11. And, although the *Los Angeles Times* provides news about and has circulation in these Counties, this fact does not ameliorate but instead exacerbates the potential anticompetitive effects of the acquisition because Tribune also owns the *Los Angeles Times*. In its Reply, the government claims that over 200,000 residents of Orange and Riverside Counties buy daily newspapers.

Tribune does not contest that local newspapers provide local content and local advertising. Instead, it argues that the government's market definition fails to account for internet-based sources of local news and advertising as potential competition in the relevant product market and that therefore the government's market definition is too narrow. *See, e.g., Reilly v. Hearst Corp., 107 F. Supp. 2d 1192, 1201 (N.D. Cal. 2000)* (noting that the internet "has opened a staggering array of news sources" **[*9]** and that "[w]hile a merger of the two dominant San Francisco dailies in 1965 might well have posed an unquestionable threat of undue concentration of market power under the old paradigm, that threat today is far from clear."). If the government's relevant market definition is not sound, then its prima facie case collapses.

The Court is not convinced of Tribune's position that the internet renders geography and distinctions between kinds of news sources obsolete. In *Reilly*, Judge Walker questioned whether the geographic scope of the market for San Francisco newspapers was in fact broader than San Francisco. But Judge Walker's discussion cited, in addition to the influence of the internet, the presence of other nearby local papers, the region's recent population explosion, and the availability of other free-distribution newspapers as factors suggesting a broader market. *See Reilly, 107 F. Supp. 2d at 1200-01*. In addition, Judge Walker issued his order after a court trial with a fully-developed record. Thus, *Reilly* is of little assistance to Tribune.

Meanwhile, Tribune has not meaningfully rebutted the government's market definition. Tribune states in conclusory fashion that "[f]or local news in Orange County, [readers] can turn to **[*10]** numerous on-line local sources," *see* Opp'n 16:17-20, without identifying any such sources. Tribune also states that readers can turn to Google News, Apple News, "numerous search engines, or various media," *id.*, for news on any particular topic, but to the Court's knowledge neither Google News, Apple News, nor "search engines" themselves *generate* local content. Rather, news aggregator sites primarily post links to stories on the websites of other content generators — including local newspapers like the *Register* or the *Press-Enterprise*. That other websites post links to local sites only demonstrates that local newspapers continue to serve a unique function in the marketplace: they are the creators of local content. It further stands to reason that local advertisers in search of print advertising would choose to advertise with local news providers. To be sure, there are other "sources" of local news such as bloggers and the like, but Tribune neither argues nor demonstrates that consumers consider the content or advertising they provide as "reasonably interchangeable" with what the local English-language newspapers provide.

The Court is therefore satisfied that the government is likely **[*11]** to establish its proposed relevant product market.

2. The Government Is Likely to Demonstrate That the Acquisition Would Have Anti-Competitive Effects and Adverse Effects on the Consumers in the Market.

"[A] merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market[,] is so inherently likely to lessen competition substantially[,] that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects." *Philadelphia National Bank, 374 U.S. at 363*; *see also id. at 364* ("Without attempting to specify the smallest market share which would still be considered to threaten undue concentration, we are clear that 30% presents that threat."); *United States v. Bazaarvoice, Inc., No. 13-cv-00133-WHO, 2014 U.S.*

Dist. LEXIS 3284, 2014 WL 203966, at *68-70 (N.D. Cal. Jan. 8, 2014) (finding that "the government established that the combined market shares of [the merging parties] far exceeds 30 percent, and is in excess of 50 percent," which "easily made a prima facie showing of a Section 7 violation").

Here, the government has shown that, based on the above relevant market definition, Tribune's acquisition of the *Register* will increase its control of local daily newspaper **[*12]** circulation from 41 percent to 98 percent in Orange County, and Tribune's acquisition of the *Press-Enterprise* and *Register* would increase its share of local daily newspapers from 12 percent to over 81 percent in Riverside County. Tribune only contests the government's relevant market definition, but does not meaningfully dispute these figures. Under the cases cited above, such a concentration clearly constitutes a threat to competition and would likely have adverse effects on consumers in the market as whole. The government will therefore likely establish these elements.

The government has therefore shown a likelihood of success on the merits of its Clayton Act claim.

B. The Government Has Established a Likelihood of Irreparable Harm, That an Injunction is in the Public Interest, and That the Balance of Hardships and Equities Tips in Its Favor.

"In a Government case the proof of the violation of law may itself establish sufficient public injury to warrant relief." California v. Am. Stores Co., 495 U.S. 271, 295, 110 S. Ct. 1853, 109 L. Ed. 2d 240 (1990); *see also* United States v. Siemens Corp., 621 F.2d 499, 506 (2d Cir. 1980) ("[O]nce the United States demonstrates a reasonable probability that § 7 has been violated, irreparable harm to the public should be presumed."); United States v. Ingersoll-Rand Co., 218 F. Supp. 530, 544 (W.D. Pa. 1963) ("The Congressional pronouncement in § 7 embodies the irreparable injury of **[*13]** violations of its provisions.").

Even absent a presumption, the government has established a likelihood of irreparable harm. Should an injunction not issue, Tribune would acquire the *Register* and *Press-Enterprise* and undertake all of the business actions — consolidating operations, taking ownership of business-sensitive information, terminating employees, etc. — that normally accompany mergers. It would be very difficult — if not impossible — to unwind these actions, so the court could not grant an effective remedy in should the government ultimately prevail. *See* Consol. Gold Fields PLC v. Minorco, S.A., 871 F.2d 252, 261 (2d Cir. 1989) (irreparable harm established where merged firm would "dominate" the market and the acquired firms "would cease to be viable competitors in the market"); F&M Schaefer Corp. v. C. Schmidt & Sons, Inc., 597 F.2d 814, 818 (2d Cir. 1979) (finding irreparable harm because acquisition would allow defendant immediately to "have access to the confidential trade information of one of its leading competitors" and lead to the "risk of decreased organizational morale" of the acquired firm); United States v. Ivaco, Inc., 704 F. Supp. 1409, 1429 (W.D. Mich. 1989) ("If an injunction is denied and the transaction is later found to violate the Act, then the remedy would be a divestiture of acquired assets," but "[t]hat remedy is typically rejected by the courts as ineffective" as it "would not **[*14]** effectively remedy the injury to competition threatened by this transaction."). The Court is simply not convinced by Tribune's attempt to downplay the significance of this potential harm.

The public interest and the balance of hardships inquiries are interrelated and both weigh in favor of an injunction. "By enacting Section 7, Congress declared that the preservation of competition is always in the public interest." Ivaco, 704 F. Supp. at 1430; *see also* F.T.C. v. Swedish Match, 131 F. Supp. 2d 151, 173 (D.D.C. 2000) ("There is a strong public interest in effective enforcement of the antitrust laws . . . ."). The Court finds this especially applicable here where the consumer access to local news is at stake. Newspapers — indeed, local ones — are important to a healthy democracy. Tribune claims that it would be harmed because it would not be able to consummate its purchase before Freedom runs out of financing on March 31, 2016 and the second place bidder would make the purchase instead. It may be that Tribune will lose the opportunity to acquire the *Register* and *Press-Enterprise* in favor of the second place bidder. However, this private harm does not outweigh the public interest in the preservation of competition, especially given the government's likelihood of success on the merits. **[*15]** *See, e.g.,* Ivaco, 704 F. Supp. at 1430 ("This private, financial harm must, however, yield to the public interest in maintaining effective competition."); United States v. Columbia Pictures Indus., Inc., 507 F. Supp. 412, 434 (S.D.N.Y. 1980) ("Far more important than the interests of either the defendants or the existing industry. . . is the public's interest in enforcement of the antitrust laws and in the preservation of competition. The public interest is not easily outweighed by private interests."); *Siemens Corp., 621 F.2d at 506* (in *Section 7* cases brought by the Government, "private interests must be subordinated to public ones"). That the government enforces ***antitrust law*** on behalf of the public interest necessarily weighs heavily in the balance-of-hardships calculus. Furthermore, Tribune could have avoided the risk of harm altogether by vetting the acquisition with the government ahead of time. Finally, the government seeks to preserve the status quo pending a resolution of its case on the merits, thereby avoiding harm to the marketplace that otherwise appears likely.

Some cases discuss the "balance" analysis as the balance of equities. Insofar as the balance of equities is distinct from the balance of hardships, it also tips in the government's favor. Tribune faults the government for not interjecting itself into the allegedly **[*16]** well-publicized potential acquisition earlier, while the government faults Tribune for not notifying it of its intentions. Perhaps both sides could have anticipated antitrust problems sooner and dealt with them on some basis other than on an application for a TRO resolved in a matter of hours. Indeed, Tribune evidently anticipated potential antitrust issues long ago because it secured antitrust counsel, yet it appears that it failed to vet its intentions with the government voluntarily. The Court finds that the government's alleged eleventh-hour enforcement of the ***antitrust law*** and the arguable prejudice this causes Tribune does not influence the equities or outbalance the paramount importance of the public interest. The balance of the equities therefore strongly favors the government.

The likelihood of irreparable harm, the public interest, and the balance of hardships and equities weigh in favor of an injunction.

IV. CONCLUSION

For the foregoing reasons, the Court **GRANTS** the Government's Ex Parte Application for a Temporary Restraining Order.

IT IS HEREBY ORDERED that, pending a hearing for determination of an Order to Show Cause Why a Preliminary Injunction Should Not Issue, Defendant **[*17]** Tribune Publishing Co., and all of its respective agents, employees, or attorneys, shall be and hereby are **RESTRAINED AND ENJOINED** from acquiring any portion of the assets of Freedom Communications, Inc., or in any way taking control of or gaining access to the assets of Freedom Communications, Inc.

Under *Fed. R. Civ. Proc. 65(b)(2)*, a TRO must expire no later than 14 days after the time it is issued unless the court extends it for good cause. Therefore, the Court hereby **SETS** a hearing on the government's request for an Order to Show Cause Why a Preliminary Injunction Should Not Issue for **Monday, March 28, 2016, at 10:00 a.m.**

Dated: March 18, 2016

/s/ André Birotte Jr.

HONORABLE ANDRÉ BIROTTE JR.

UNITED STATES DISTRICT COURT JUDGE

Arapahoe Surgery Ctr., LLC v. Cigna Healthcare, Inc.

United States District Court for the District of Colorado

March 21, 2016, Decided; March 21, 2016, Filed

Civil Action No. 13-cv-3422-WJM-CBS

Reporter

171 F. Supp. 3d 1092 *; 2016 U.S. Dist. LEXIS 36103 **; 2016-1 Trade Reg. Rep. (CCH) P79,546

ARAPAHOE SURGERY CENTER, LLC, CHERRY CREEK SURGERY CENTER, LLC, HAMPDEN SURGERY CENTER, LLC, KISSING CAMELS SURGERY CENTER, SURGCENTER OF BEL AIR, LLC, and WESTMINSTER SURGERY CENTER, LLC, Plaintiffs / Counterclaim Defendants, v. CIGNA HEALTHCARE, INC., CONNECTICUT GENERAL LIFE INSURANCE COMPANY, CIGNA HEALTHCARE — MID-ATLANTIC, INC., and CIGNA HEALTHCARE OF COLORADO, INC., Defendants / Counterclaim Plaintiffs.

Prior History: *Arapahoe Surgery Ctr., LLC v. CIGNA Healthcare, Inc., 80 F. Supp. 3d 1257, 2015 U.S. Dist. LEXIS 20488 (D. Colo., 2015)*

Core Terms

patients, plans, Counterclaim, benefits, unjust enrichment, antitrust, tortious interference, summary judgment, protocol, insured, reimbursement, fee-forgiving, out-of-network, argues, damages, billed, misrepresentations, charges, fails, declaratory relief, in-network, providers, factual dispute, preemption, deductible, coverage, agrees, costs, declaration, restitution

Counsel: **[**1]** For Arapahoe Surgery Center LLC, Cherry Creek Surgery Center LLC, Hampden Surgery Center LLC, Kissing Camels Surgery Center LLC, SurgCenter of Bel Air LLC, Westminster Surgery Center LLC, Plaintiffs, Counter Defendants: Joe Ramon Whatley, Jr., LEAD ATTORNEY, Whatley Kallas, LLP-Aspen, Aspen, CO; Deborah Jane Winegard, Whatley Kallas, LLC-Atlanta, Atlanta, GA; Edith M. Kallas, Whatley Kallas, LLC-New York, New York, NY; Henry C. Quillen, Whatley Kallas, LLC-Portsmouth, Portsmouth, NH; William Tucker Brown, Whatley Kallas, LLC-Birmingham, Birmingham, AL.

For CIGNA Healthcare Inc, Connecticut General Life Insurance Company, CIGNA Healthcare - Mid-Atlantic Inc, CIGNA Healthcare of Colorado Inc, Defendants, Counter Claimants: Edwin Packard Aro, LEAD ATTORNEY, Timothy Robert Macdonald, Arnold & Porter LLP-Denver, Denver, CO; Joshua Simon, Ryan Daniel McEnroe, Warren Haskel, Kirkland & Ellis, LLP-New York, New York, NY.

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For Surgical Center **[**2]** Development Inc, doing business as SurgCenter Development, Counter Defendant: Joe Ramon Whatley, Jr., LEAD ATTORNEY, Whatley Kallas, LLP-Aspen, Aspen, CO; Deborah Jane Winegard, Whatley Kallas, LLC-Atlanta, Atlanta, GA; Henry C. Quillen, Whatley Kallas, LLC-Portsmouth, Portsmouth, NH; William Tucker Brown, Whatley Kallas, LLC-Birmingham, Birmingham, AL.

Judges: William J. Martínez, United States District Judge.

Opinion by: William J. Martínez

Opinion

[*1101] ORDER GRANTING IN PART AND DENYING IN PART MOTIONS FOR SUMMARY JUDGMENT

Plaintiffs and Counterclaim Defendants Arapahoe Surgery Center, LLC, Cherry Creek Surgery Center, LLC, Hampden Surgery Center, LLC, Kissing Camels Surgery Center, LLC, SurgCenter of Bel Air, LLC ("SurgCenter"), and Westminster Surgery Center, LLC ("Westminster") (collectively "Plaintiffs" or the "ASCs") are ambulatory surgery centers bringing this action against Defendants Cigna Healthcare, Inc., Connecticut General Life Insurance Co., Cigna Healthcare — Mid-Atlantic, Inc., and Cigna Healthcare of Colorado, Inc. (collectively "Cigna"). (ECF No. 60 at 56-64.) The ASCs bring claims under the Employee Retirement Income Security Act ("ERISA") § 502(a), *29 U.S.C. §§ 1132(a)* and *1133*; the Sherm an Act, *15 U.S.C. §§ 1 et seq.*, and the Colorado Antitrust Act, **[**3]** *Colo. Rev. Stat. §§ 6-4-101 et seq.*; and state law claims for breach of contract and breach of the implied covenant of good faith and fair dealing. (*Id.*) Cigna has asserted Counterclaims under ERISA for injunctive relief; a related claim for declaratory relief; a claim under a Colorado criminal statute prohibiting abuse of health insurance, *Colo. Rev. Stat. § 18-13-119*; and state law claims[1] for unjust enrichment and tortious interference with contract.[2] (ECF No. 17.) Before the Court **[*1102]** are the parties' respective Motions for Summary Judgment ("Motions"). (ECF Nos. 105, 106.) For the reasons set forth below, the Motions are each granted in part and denied in part: Cigna's Motion is granted in full as to the ASCs' antitrust claims and in part as to the ERISA claims; the ASCs' Motion is granted in full as to Cigna's abuse of health insurance counterclaim and in part as to the unjust enrichment and tortious interference claims; and the Motions are otherwise denied.

I. LEGAL STANDARD

Summary judgment is warranted under *Federal Rule of Civil Procedure 56* "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*; *see also* *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-50, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. A fact is "material" if, under the relevant substantive law, it is essential to proper disposition of the claim. *Wright v. Abbott Labs., Inc., 259 F.3d 1226, 1231-32 (10th Cir. 2001)*. An issue is "genuine" if the evidence is such that it might lead a reasonable trier of fact to return a verdict for the nonmoving party. *Allen v. Muskogee, 119 F.3d 837, 839 (10th Cir. 1997)*. In analyzing a motion for summary judgment, a court must view the evidence and all reasonable inferences therefrom in the light most favorable to the nonmoving party. *Adler v. Wal-Mart Stores, Inc., 144 F.3d 664, 670 (10th Cir. 1998)* (citing *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986))*. In addition, the Court must resolve factual ambiguities against the moving party, thus favoring the right to a trial. *See* *Houston v. Nat'l Gen. Ins. Co., 817 F.2d 83, 85 (10th Cir. 1987)*.

II. BACKGROUND

The following relevant **[**5]** facts are undisputed, unless otherwise noted.

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[1] Cigna's state law claims against SurgCenter and Westminster are brought under Maryland law, as both are Maryland limited liability companies operating in Maryland, while its state law claims against the remaining ASCs are brought under Colorado law, as they are all Colorado entities. (ECF No. **[**4]** 17 ¶¶ 16-21, 218, 225, 233, 240, 248, 254.) Each of Cigna's state law claims asserts that the ASCs' conduct gives rise to a claim under both Maryland and Colorado law. (*Id.* ¶¶ 218, 225, 233, 240, 248, 254.)

[2] Cigna also brought additional counterclaims under ERISA, *Colorado Criminal Code § 18-4-405*, RICO, and COCCA, as well as state law claims alleging fraud and negligent misrepresentation, all of which were previously dismissed. (ECF No. 80.)

Cigna is a managed care company offering health insurance benefit plans, some of which it funds itself, and most of which are funded by the employers or entities that sponsor them, while Cigna serves as claims administrator. (Cigna's Statement of Material Facts ("Cigna's SMF") (ECF No. 90 at 3-27) ¶¶ 1-2.) Cigna maintains a network of medical providers who agree in their network contracts to accept discounted rates for their services. (*Id.* ¶¶ 5-6.) The ASCs are ambulatory surgery centers providing medical services, and are all considered out-of-network facilities under Cigna's insurance plans. (*Id.* ¶¶ 23, 26.) Cigna's plans all contain a clause delegating to Cigna "the discretionary authority to interpret and apply plan terms and to make factual determinations in connection with its review of claims under the plan." (*Id.* ¶ 22.)

Under Cigna's plans, if a patient receives services from an out-of-network medical provider, the patient pays any applicable co-payment, coinsurance, or deductible (collectively referred to as the patient's "cost share"), as specified in the plan. (*Id.* ¶ 14.) As compared to in-network services, the plans generally **[**6]** require patients to pay a higher cost share for out-of-network services. (*Id.* ¶ 15.) The plans contain a section entitled "Exclusions, Expenses Not Covered and General Limitations," which reads in relevant part: "Covered Expenses will not include, and no payment will be made . . . [for] charges which you are not obligated to pay or for **[*1103]** which you are not billed or for which you would not have been billed except that they were covered under this plan." (*Id.* ¶ 18.) Cigna interprets this exclusion provision to mean that the plan is not responsible for a charge that the provider does not require a member to pay, including any cost share obligation under the member's plan. (*Id.* ¶ 19.)

Cigna also limits its plans' reimbursement to out-of-network providers to a specified "Maximum Reimbursable Charge," and will not reimburse any charge that is greater than the provider's "normal charge" for that service. (*Id.* ¶¶ 20-21.) Patients using out-of-network providers are also generally subject to a deductible for those providers, one which is separate from their in-network deductible. (*Id.* ¶ 17.)

As out-of-network providers, the ASCs adopted a billing policy under which they would charge patients no **[**7]** more than those patients' in-network cost share responsibility, rather than the higher out-of-network cost share provided under Cigna's plans. (*Id.* ¶ 33.) In discussing these costs with patients, the ASCs sometimes referred to the out-of-network cost share obligations as "penalties." (*Id.* ¶ 38.) As the ASCs did not have all of Cigna's plan documents, they estimated the patient's in-network cost share, calculating this estimate in many cases by using 150% of the Medicare rate for the relevant procedure. (*Id.* ¶¶ 39-40.) When the patient had no in-network responsibility, the ASC would collect no cost share from the patient. (*Id.* ¶ 41; *see also* ECF No. 116 at 7.) When the ASCs submitted benefits claims to Cigna requesting reimbursement for their services, they charged rates as out-of-network facilities. (Cigna's SMF ¶ 52.)

Cigna contends that, in practice, the ASCs often accepted payments from it and other insurers as payment in full without charging the patients anything at all, and without holding the patient responsible for any difference between the insurer's payment and the amount in the ASCs' claims. (*Id.* ¶¶ 42-43.) The ASCs dispute this, contending that they only charged a patient **[**8]** nothing when that patient had no in-network responsibility, and that patients for whom Cigna did not pay benefits have since received a bill reflecting the balance due. (ECF No. 116 at 7.) The ASCs required all their patients to sign "Assignment of Benefits" forms, which contain an acknowledgement that the patient understands that he or she is "financially responsible for all charges regardless of any applicable insurance or benefits payments," or on some versions of the form, the patient agrees "to pay all sums due the facility at the usual and customary charge of the facility." (ASCs' Statement of Material Facts ("ASCs' SMF") (ECF No. 97 at 4-19) ¶ 7.) Pursuant to these forms, the ASCs contend that they have billed patients when Cigna denied their claims. (*Id.* ¶ 8.) Cigna does not dispute that such forms were signed, but it does dispute that patients were billed for outstanding balances, or that the ASCs ever intended to hold patients responsible for more than the calculated in-network cost share. (ECF No. 112 at 2-3.)

Cigna began investigating the ASCs' billing practices, and based on Cigna's belief that the ASCs were forgiving fees, Cigna began sending notices to physicians who **[**9]** had referred patients to the ASCs, reminding them to refer patients to in-network providers and threatening to terminate them from Cigna's network if they did not desist. (Cigna's SMF ¶¶ 62-63.) Cigna also sent surveys to their members who had received services from the ASCs, which revealed that the patients paid lower cost shares than the amounts specified in their plans for out-of-network providers. (*Id.* ¶ 73.)

[*1104] Based on this information, Cigna implemented a "fee-forgiving protocol" for processing claims from the ASCs, under which it reduced reimbursement to the ASCs based on the amount the patient paid in cost share. (*Id.* ¶ 79.) Cigna "flagged" the ASCs' claims pursuant to its determination that they were forgiving fees, which routed claim processing to Cigna's Special Investigation Unit. (ASCs' SMF ¶¶ 68.) The ASCs do not dispute that Cigna's fee-forgiving protocol led to reduced reimbursement payments, but also note that on the majority of the ASCs' claims, Cigna denied the claim in full and paid nothing. (ECF No. 116 at 13.) Cigna asserts that, under the protocol, its Special Investigation Unit withheld payment for claims for which the ASCs refused to provide Cigna with information **[**10]** about the amount the patient had paid in cost share. (Cigna's SMF ¶ 68.) However, it is undisputed that, in the fall of 2014, Cigna changed its fee-forgiving protocol for paying the ASCs' claims from "full denial" to processing the claim at 150% of Medicare. (*Id.* ¶ 75.)

The ASCs had a general policy of appealing claims through Cigna's administrative process when Cigna reimbursed less than 60% of the billed charges. (*Id.* ¶ 59; ASCs' SMF ¶ 17.) However, one of the ASCs, Westminster, did not appeal any of Cigna's denials of claims until March 14, 2013. (Cigna's SMF ¶ 60.)

The ASCs filed this action on December 18, 2013. (ECF No. 1.) Cigna filed an Answer and Counterclaims on February 10, 2014. (ECF Nos. 16, 17.) On March 6, 2015, the Court entered an Order Granting in Part and Denying in Part the ASCs' Motion to Dismiss Cigna's Counterclaims. (ECF No. 80.) The Court dismissed counterclaims under the Racketeer Influenced and Corrupt Organizations Act ("RICO") and its state analogue, some of Cigna's counterclaims under ERISA, and several state law claims. (*Id.* at 21.)

On April 23, 2015, Cigna and the ASCs each filed their respective Motions. (ECF Nos. 90, 97.) The parties each filed Responses (ECF **[**11]** Nos. 112, 116) and Replies (ECF Nos. 123, 124).

III. ANALYSIS

Cigna's Motion seeks summary judgment on each of the ASCs' claims against it, as well as on its counterclaims against the ASCs. (ECF No. 90.) The ASCs' Motion seeks summary judgment in their favor on each of Cigna's counterclaims, as well as on all of the ASCs' own claims except for their antitrust claims. (ECF No. 97.) The Court will therefore discuss the parties' respective arguments as to each set of claims in turn.

A. Antitrust: ASCs' Claims VI & VII

Cigna challenges the ASCs' Claims VI and VII, which allege antitrust violations under the Sherman Act and the Colorado Antitrust Act, respectively.[3] (ECF No. 90 at 27-36.) Cigna raises three arguments: (1) the ASCs have failed to present any evidence of a conspiracy, either direct or circumstantial; (2) there is no evidence of an unlawful restraint of trade; and (3) there is no evidence of an antitrust injury. (*Id.*) Because the Court finds the third argument dispositive, its analysis begins there.

[*1105] "An antitrust injury is defined as an injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Sports Racing Servs., Inc. v. Sports Car Club of Am., Inc., 131 F.3d 874, 882 (10th Cir. 1997)*. "Antitrust injury" is not enumerated as an element of any of the Sherman Act claims discussed above, yet it is a necessary element of any antitrust claim. *See* *NYNEX Corp. v. Discon, 525 U.S. 128, 135, 119 S. Ct. 493, 142 L. Ed. 2d 510 (1998)* (a plaintiff in a § 1 claim must show harm to the competitive process); *Full Draw Prods. v. Easton Sports, Inc., 182 F.3d 745, 750 (10th Cir. 1999)* (claim under the Clayton Act

[3] The Colorado Antitrust Act is the state law analogue to the Sherman Act. *See* *Colo. Rev. Stat. § 6-4-119* ("the courts shall use as a guide interpretations given by the federal courts to comparable federal antitrust **[**12]** laws"). Because federal ***antitrust law*** principles apply to both the federal and state antitrust claims, the Court will analyze both claims together. *See* *Four Corners Nephrology Assocs., P.C. v. Mercy Med. Ctr. of Durango, 582 F.3d 1216, 1220 n.1 (10th Cir. 2009)*.

requires that the plaintiff show an antitrust injury); *Rural Tel. Service Co. v. Feist Publications, Inc., 957 F.2d 765, 768 (10th Cir. 1992)* (holding that an antitrust injury is a necessary element of a § 2 claim).

Cigna here argues that the ASCs' antitrust claims must fail for lack of antitrust injury because they allege only injury to themselves as competitors, not injury to competition itself. (ECF No. 90 at 35-37.) Cigna argues that the ASCs remain open for business, demonstrating that they have not been pushed out of the market by Cigna's alleged anticompetitive acts, and that economic losses to the ASCs cannot alone constitute an injury to competition. (*Id.*)

In response, the ASCs argue that the **[**13]** antitrust injury resulting from Cigna's acts is supported by the expert report of Dr. R. Forrest McCluer, Ph.D. (ECF No. 120-16 at 22-25, 35-37.) The paragraphs the ASCs cite in support of their argument fall under two separate headings in Dr. McCluer's report: "The High Cost of [Hospital Outpatient Departments] Relative to ASC" (which falls under the broader heading "The Rise of Outpatient Surgeries"), and "Demonstrating the Fact of Antitrust Injury." Under the first of these two headings, Dr. McCluer opines that costs for procedures performed at ASCs are typically significantly lower—sometimes by two to three times—than the same procedure performed at a hospital, and that consequently, "the out of pocket costs to [patients] as well as the total cost of health care can rise as a result of excluding Plaintiffs from the market . . . ." (*Id.* at 22-25.)

Under the second heading, Dr. McCluer explains that antitrust injury exists when an anticompetitive act restricts consumer choices, or results in increased costs to consumers. (*Id.* at 35.) He opines that "the alleged joint-boycott and conspiracy had the effect of diverting cases away from Plaintiff ASCs and redirected them, at least to some degree, to [hospital **[**14]** outpatient departments]." (*Id.* at 36.) Finally, Dr. McCluer cites specific examples of physicians that moved the site of planned surgeries from the ASCs to hospitals in Cigna's network, in response to Cigna's warning and termination letters. (*Id.*)

The ASCs argue that *Full Draw Products* supports a finding that "a loss resulting from an attempt to cripple or eliminate a competitor is precisely the type of loss to be expected as the result of an illegal boycott," and is therefore an antitrust injury. (ECF No. 116 at 45.) The Court rejects the implication in this argument that any injury caused by a *per se* illegal boycott is necessarily an antitrust injury, as the Supreme Court has spoken definitively on that issue. *Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 341-42, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)* ("We also reject respondent's suggestion that no antitrust injury need be shown where a *per se* violation is involved. The *per se* rule is a method of determining whether *§ 1 of the Sherman Act* has been violated, but it does not indicate whether a private plaintiff has suffered antitrust injury and thus whether he may recover damages . . . .").

[*1106] However, the Court agrees that *Full Draw Products* encourages a case-specific analysis of whether the alleged injury stems from the anticompetitive **[**15]** effects of the challenged conduct. Indeed, in a related case alleging the same underlying conspiracy, this Court previously cited *Full Draw Products'* holding that a plaintiff's injury alone can constitute antitrust injury under certain circumstances. *Kissing Camels Surgery Ctr., LLC v. Centura Health Corp., 2015 U.S. Dist. LEXIS 114600, 2015 WL 5081608, at *7* (citing *Full Draw Prods., 182 F.3d at 754* ("We have no doubt that alleging the loss of one of two competitors in this case alleges injury to competition. . . . Because defendants' alleged boycott reduced a competitive market of two producers to a market of one monopolist, Full Draw quite clearly alleged substantial injury to competition from defendants' group boycott.")). In *Kissing Camels*, the Court found that the plaintiffs—which included many of the same Plaintiff ASCs in the instant case—had sufficiently presented evidence of antitrust injury despite a failure to discuss anticompetitive impacts on any competitor other than the plaintiffs themselves. *Id.* The Court noted that the plaintiffs' antitrust expert analyzed the relevant market and found that, "because it is highly concentrated, elimination of any of the Plaintiffs as competitors would have a substantial negative impact on competition." *Id.* The Court concluded that, in the concentrated Colorado Springs market **[**16]** at issue in *Kissing Camels*, the plaintiffs had presented sufficient evidence that the evidence of harm to themselves established harm to competition. *Id.*

In the instant case, however, the ASCs point to no such market analysis or any similar evidence. Rather, the evidence the ASCs cite from Dr. McCluer's report consists of generalized opinions regarding the lower cost of procedures at ASCs as compared to hospitals, and specific examples of business the ASCs lost as a result of Cigna's actions. Even viewed in the light most favorable to the ASCs, the Court finds this evidence insufficient to defeat summary judgment on the issue of antitrust injury. Notably, there is no evidence that any of the Plaintiff ASCs in this case have actually been excluded from the market; rather, the evidence shows only that they suffered some amount of lost business as a result of Cigna's acts.[4] (*See* ECF No. 120-16 at 36-37.) The ASCs have not pointed to any part of Dr. McCluer's expert report that analyzes the competitiveness of the relevant markets to indicate that such lost business substantiates an antitrust injury. They have not even directed the Court to evidence showing, for example, that their businesses **[**17]** are likely to fail if such losses continue. Instead, they point to Dr. McCluer's opinions on increased costs to patients, apparently arguing that increased costs demonstrate competitive harm. However, Dr. McCluer does not reference any concrete instances of increases in costs to patients on which a jury could rely to find that such harm occurred, nor does he opine that costs necessarily, or **[*1107]** even probably, increased in this case. (*See id.* at 22-25, 35-37.) Without more, it would be unreasonable for a jury to take the large inferential step from Dr. McCluer's generalized opinions to find that patient costs increased as a result of anticompetitive activity in the instant case.

The Court has no obligation to sift through Dr. McCluer's report, or the record as a whole, to determine whether there is any other evidence of an antitrust injury. *Mitchell v. City of Moore, 218 F.3d 1190, 1199 (10th Cir. 2000)* (holding that the Court is "not obligated to comb the record in order to make [the plaintiff's] arguments for [it]"). "[O]n a motion for summary judgment, 'it is the responding party's burden to ensure that the factual dispute is portrayed with particularity, without depending on the trial court to conduct its own search of the record." *Cross v. The Home Depot, 390 F.3d 1283, 1290 (10th Cir. 2004)*. Given the lack of evidence of an antitrust injury, the Court holds that no reasonable jury could find in the ASCs' favor on its antitrust claims. Accordingly, Cigna's Motion is granted as to the ASCs' Claims VI and VII under the Sherman Act and the Colorado Antitrust Act.

B. ERISA: ASCs' Claims I, II, & III and Cigna's Counterclaim I

The ASCs' Claims **[**19]** I, II, and III are all brought under various provisions of ERISA, arguing that Cigna violated the statute by failing to pay benefits (Claim I), breaching its fiduciary duty as an insurer and third-party administrator (Claim II), and failing to provide a full and fair review of the ASCs' claims (Claim III). (ECF No. 60 at 56-60.) Cigna raises four general arguments that summary judgment is warranted on these claims: (1) under the "abuse of discretion" standard of review, Cigna correctly interpreted its plans, and its actions to deny or reduce benefits payments were supported by substantial evidence; (2) the ASCs failed to exhaust administrative remedies for at least some of their claims; (3) the ASCs' Claim II for restitution fails because purely monetary compensation is unavailable under *ERISA § 502(a)(3)* and there is no evidence Cigna gained from its acts; and (4) the ASCs' Claim III fails because Cigna reviewed every appeal after the fee-forgiving protocol was implemented. (ECF No. 90 at 37-43.) The ASCs, too, seek summary judgment on these claims, arguing that Cigna's interpretation of its plans was erroneous as a matter of law. (ECF No. 97 at 20-28.)

Cigna's Counterclaim I is also brought under **[**20]** *§ 502(a)(3)*, and the sole remaining relief sought is an injunction requiring the ASCs to submit to Cigna only the amounts that the ASCs actually charge the patients and to exclude any additional amount from their future claims.[5] (ECF No. 17 at 41.) Both parties seek summary judgment on that claim as well.

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[4] While there is no requirement that a competitor be eliminated to establish an antitrust injury, the ASCs' citation to *Full Draw Products* is inapposite where no such elimination has occurred. (*See* ECF No. 116 at 46 (quoting *Full Draw Prods., 182 F.3d at 755* ("The mere fact that the number of competitors after the boycott matches the number before . . . does not cure the anticompetitive effect of the boycott, which is the elimination of a competitor by means other than 'the economic freedom of participants in the relevant market.'")).) The cited passage from *Full Draw* ***[**18]*** *Products* explained that an antitrust injury occurred when a competitor was eliminated, even though from a consumer's perspective, it had only one choice in the market both before and after the challenged boycott—not, as the ASCs appear to suggest, that the fact of a competitor's survival after a boycott has no impact on the antitrust injury analysis.

[5] Cigna originally sought declaratory relief under Counterclaim I as well, but that request was dismissed in a prior order. (ECF No. 80 at 8.)

1. Standard of Review

ERISA § 502(a) authorizes a civil action "by a participant or beneficiary . . . (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan . . . ." 29 U.S.C. § 1132(a)(1). However, "ERISA does not set out the appropriate standard of review for actions under § 1132(a)(1)(B) challenging benefit eligibility determinations." Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 109, 109 S. Ct. 948, 103 L. Ed. 2d 80 (1989). In *Firestone*, the Supreme Court established the proper standard of review for such claims, holding that "a denial of **[*1108]** benefits challenged under § 1132(a)(1)(B) is to be reviewed under a *de novo* standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." **[**21]** Id. at 115. "If the plan provides for such discretion, then the proper standard of review is abuse of discretion." McClenahan v. Metro. Life Ins. Co., 621 F. Supp. 2d 1135, 1139 (D. Colo. 2009) *aff'd*, 416 F. App'x 693 (10th Cir. 2011). The parties here do not dispute that all of the plans at issue in this case contain a provision granting Cigna discretionary authority to interpret and apply plan terms, and to make benefits determinations. (Cigna's SMF ¶ 22.) Thus, it would appear that under Firestone, the abuse of discretion standard applies.

In Colorado, however, the analysis does not end there. On August 6, 2008, Colorado Revised Statutes § 10-3-1116(2) became effective, which reads:

> An insurance policy, insurance contract, or plan that is issued in this state that offers health or disability benefits shall not contain a provision purporting to reserve discretion to the insurer, plan administrator, or claim administrator to interpret the terms of the policy, contract, or plan or to determine eligibility for benefits.

Colo. Rev. Stat. § 10-3-1116(2). On its face, this statute would seem to render void the discretionary clauses for those Colorado plans that Cigna insures, such that the applicable standard of review for those plans would revert to the default *de novo*. However, despite the fact that Cigna does not raise the issue in its own Motion or in its response to the ASCs' **[**22]** Motion (*see* ECF No. 90 at 37-38; ECF No. 112 at 17-19), when faced with a potential conflict between state and federal laws, the Court must consider the question of preemption.

"ERISA includes expansive pre-emption provisions . . . to ensure that employee benefit plan regulation would be exclusively a federal concern." Aetna Health Inc. v. Davila, 542 U.S. 200, 208, 124 S. Ct. 2488, 159 L. Ed. 2d 312 (2004) (citing 29 U.S.C. § 1144) (internal quotation marks omitted). "There are two aspects of ERISA preemption: (1) 'conflict preemption' and (2) remedial or 'complete preemption.'" David P. Coldesina, D.D.S. v. Estate of Simper, 407 F.3d 1126, 1135-36 (10th Cir. 2005) (citing 29 U.S.C. § 1144(a)).

The Tenth Circuit has not reached the preemption question with respect to § 10-3-1116(2), but other judges in this District have thoroughly discussed the issue. *See* McClenahan, 621 F. Supp. 2d at 1140-1142; *see also* Kohut v. Hartford Life & Acc. Ins. Co., 710 F. Supp. 2d 1139, 1147-49 (D. Colo. 2008). The Court is persuaded by the reasoning in McClenahan, which found that: (1) § 10-3-1116(2) was not expressly preempted by ERISA because it fell within the savings clause for a state regulation of insurance pursuant to the prescribed analysis in Kentucky Association of Health Plans, Inc. v. Miller, 538 U.S. 329, 342, 123 S. Ct. 1471, 155 L. Ed. 2d 468 (2003); and (2) § 10-3-1116(2) was not preempted by ERISA due to a conflict because the abuse of discretion standard of review arises from contractual drafting, not from any ERISA provision, and therefore the state statute does not affect ERISA's statutory enforcement scheme.[6] **[*1109]** McClenahan, 621 F. Supp. 2d at 1140-42. The Court agrees with and adopts the preemption analysis **[**23]** in *McClenahan*, and concludes, for the same reasons articulated therein, that § 10-3-1116(2) is not preempted by ERISA. Therefore, for those plans subject to this Colorado statute,

[6] Ultimately, *McClenahan* found that § 10-3-1116(2) did not require *de novo* review under the facts of that case, because the relevant events giving rise to McClenahan's claims occurred before the effective date of the Colorado statute and the statute could not be applied retroactively under Colorado law. Because the facts in this case occurred well after August 2008, no issue of retroactivity is raised by the facts of the instant case.

namely, any Colorado plans that Cigna insures, the discretionary clause is void and the Court must apply *de novo* review.[7]

The parties do not dispute that Maryland lacks a parallel statute. The ASCs also agree that Cigna's self-funded plans—those in which, for example, an employer acts as insurer and Cigna as mere administrator—are not subject to *§ 10-3-1116(2)*. (*See* ECF No. 97 at 22.) These plans, all of which contain **[**24]** a discretionary clause, must therefore be reviewed under an abuse of discretion standard of review. *See* *Firestone, 489 U.S. at 115*. Under the abuse of discretion standard, the court "will uphold the decision of the plan administrator so long as it is predicated on a reasoned basis, and there is no requirement that the basis relied upon be the only logical one or even the superlative one." *Eugene S. v. Horizon Blue Cross Blue Shield of N.J., 663 F.3d 1124, 1134 (10th Cir. 2011)* (internal quotation marks omitted) (referring to "arbitrary and capricious" standard); *see also* *Loughray v. Hartford Grp. Life Ins. Co., 366 F. App'x 913, 923 (10th Cir. 2010)* ("In the ERISA context, we treat the abuse of discretion and the arbitrary and capricious standards of review as interchangeable."). In determining whether the plan administrator's interpretation was within its discretion, the Court must "look for 'substantial evidence' in the record to support the administrator's conclusion, meaning 'more than a scintilla' of evidence 'that a reasonable mind could accept as sufficient to support a conclusion.'" *Eugene S., 663 F.3d at 1134* (quoting *Adamson v. UNUM Life Ins. Co. Of Am., 455 F.3d 1209, 1212 (10th Cir. 2006))*.

The ASCs raise an additional issue affecting the standard of review: the effect of a potential conflict of interest. The ASCs argue that, for those plans in the abuse of discretion category which Cigna insures itself (limited, of course, to some number of the Maryland plans **[**25]** at issue, since the insured Colorado plans are in the *de novo* category), Cigna saved money by denying its members' claims, and therefore had an inherent conflict of interest from its dual role as evaluator and payer of benefits claims. (ECF No. 116 at 28.) The ASCs argue that this conflict of interest must be considered as a factor when determining whether Cigna abused its discretion. (*Id.* (citing *Metro. Life Ins. Co. v. Glenn, 554 U.S. 105, 108, 128 S. Ct. 2343, 171 L. Ed. 2d 299 (2008))*.) Cigna argues that a dual role conflict does not alter the standard of review (ECF No. 124 at 16), and the Court does not disagree. But Cigna has not cited any authority contradicting the ASCs' argument that this conflict of interest is a factor that may be considered when reviewing Cigna's exercise of discretion for possible abuse. The Court therefore agrees that conflict of interest is a factor in evaluating a potential abuse of discretion for any plans that Cigna insures.

The ASCs argue that the conflict of interest should also be considered for plans that Cigna merely administered, even though it did not benefit monetarily from denial of claims, because Cigna applied a uniform policy when it denied claims and its decisions were therefore uniformly "tainted by self-interest." (ECF **[*1110]** No. **[**26]** 116 at 28.) While this argument is logical, it is unsupported; the sole authority the ASCs cite for this proposition deals with a completely unrelated issue. (*Id.* (citing *Phelan v. Wyo. Associated Builders, 574 F.3d 1250, 1255 (10th Cir. 2009)* (affirming a district court's remedy reversing member's termination from insurance plan because it was a permissible equitable remedy under *ERISA § 502(a)(3)*)).) The Court therefore declines to apply the conflict of interest factor outside the plans where Cigna has a dual role.

2. Exhaustion of Administrative Remedies

Cigna seeks summary judgment on the ASCs' ERISA claims as to some of the applicable plans for failure to exhaust administrative remedies, based on the argument that the ASCs conceded that they did not appeal some of the benefits claims that were denied or reduced. (ECF No. 90 at 41-42.) Specifically, Cigna states that the ASCs admitted that they do not appeal benefits claims where Cigna paid 60% or more of the amount that was billed, and one ASC—Westminster—admitted that it did not appeal any Cigna benefits claims until March 14, 2013. (*Id.*; Cigna's SMF ¶ 60.) The ASCs do not dispute these admissions, but they argue that appeals were futile under Cigna's fee-forgiving protocol. (ECF No. 116 at 11, 33-34.)

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[7] The same would be true for any plans at issue here that are not subject to ERISA, but as the parties have not enumerated the specific plans, the Court cannot determine at this stage whether any such plans exist.

In an unpublished **[**27]** decision on which Cigna relies, the Tenth Circuit states, "We agree with the Seventh Circuit's approach to evaluating a claim of futility and hold that in order to satisfy the futility exception to the exhaustion requirement, plaintiff must establish that 'it is certain that his claim will be denied on appeal, not merely that he doubts that an appeal will result in a different decision.'" *Rando v. Standard Ins. Co., 182 F.3d 933 (10th Cir. 1999)* (table) (quoting *Lindemann v. Mobil Oil Corp., 79 F.3d 647, 650 (7th Cir. 1996))* (brackets omitted). While this decision is not binding, the Court is persuaded that the bar for showing futility is high.

Nevertheless, the Court concludes that the ASCs have shown futility here for those claims that were not appealed after the imposition of Cigna's fee-forgiving protocol. Once Cigna imposed a blanket policy of how to handle the ASCs' claims, the ASCs could be certain that Cigna would reject their appeals pursuant to that policy. However, the ASCs have presented no evidence that their appeals would have been futile *before* the imposition of the fee-forgiving protocol. As such, the Court finds that the ASCs' ERISA claims are barred for failure to exhaust administrative remedies as to any claim for benefits that was not appealed through both administrative levels provided **[**28]** under the plans, if those claims were denied before the dates that the fee-forgiving protocol was applied.[8] Cigna's Motion is therefore granted in this limited respect.

3. Interpretation of Plans and Denial of Benefits

Both parties move for summary judgment on the question of whether Cigna was entitled to deny the ASCs' claims for benefits, in whole or in part, pursuant to the terms of their plans. (ECF No. 90 at 38-41; ECF No. 97 at 20-28.) "In interpreting an ERISA plan, [the Court] examine[s] the plan documents as a whole and, if unambiguous, construe[s] them as a matter of law." *Foster v. PPG Indus., Inc., 693 F.3d 1226, 1237 (10th Cir. 2012)* (internal quotation marks omitted).

[*1111] Cigna's Motion cites three provisions of the plans that it believes supported its actions on the ASCs' claims: (1) an exclusion from the definition of "Covered Expenses" for "charges which you[, the plan member,] are not obligated to pay or for which you are not billed or for which you would not have been billed except that they were covered under this plan" (Cigna's SMF ¶ 18); (2) the requirement to pay an out-of-network deductible amount **[**29]** before receiving any reimbursement for out-of-network services (*id.* ¶ 16); and (3) the "Maximum Reimbursable Charge," which can be no more than the "provider's normal charge for a similar service" (*id.* ¶ 20). (ECF No. 90.) Cigna interpreted the Covered Expenses exclusion language as permitting it to refuse requests for reimbursement for more than "the charge that [the ASCs] used to calculate the members' in-network cost-sharing responsibility." (ECF No. 90 at 39.) Cigna further argues that, because of the out-of-network deductible requirement, many members who had not satisfied that requirement would not have received any coverage anyway. (*Id.*)

As to the Covered Expenses exclusion, the ASCs' Motion argues that it does not support denying the claims because the plan member was never "not obligated to pay or . . . not billed" for the ASCs' services. (ECF No. 97 at 22-23.) Instead, the ASCs argue, their patients sign forms acknowledging that the patient is "financially responsible for all charges regardless of any applicable insurance or benefits payments." (ASCs' SMF ¶ 7.) Cigna disputes whether all patients signed such forms, and also disputes whether the ASCs ever actually intended **[**30]** to make their patients financially responsible for more than the cost-share amount the ASCs calculated. (*See* ECF No. 112 at 2-3.)

As to the Maximum Reimbursable Charge and deductible requirements, the ASCs argue that these cannot serve as bases for Cigna's decision to deny claims either. (ECF No. 97 at 24-25.) The ASCs contend that neither of these provisions establishes a basis for exclusion from coverage; they merely define terms that might limit payments on covered claims. (*Id.*) The ASCs also note that Cigna's denial letters issued after it implemented the fee-forgiving protocol all cited only the Covered Expenses exclusion. (ASCs' SMF ¶ 18.) Those letters stated that the denial was based on information that the particular ASC facility "did not obligate its patients to pay their full cost share

[8] These dates are listed in the Affidavit of Mary Ellen Cisar. (ECF No. 104.) They vary by facility as well as by which claims submission system was used. (*Id.*)

obligation . . . or did not bill its patients for the same." (*Id.*) Cigna does not contest the ASCs' assertion that its cited basis for denial was only the Covered Expenses exclusion.

Both parties cite out-of-circuit decisions to support their arguments, but neither cited decision is precisely on point. The ASCs cite *North Cypress Medical Center Operating Co. v. Cigna Healthcare, 781 F.3d 182, 196 (5th Cir. 2015)*, which discussed Cigna's denial of claims by an out-of-network medical provider **[**31]** who did not charge its patients for the coinsurance provided for in their plans. Evaluating the claim denials under abuse of discretion review, the Fifth Circuit noted that the first step is to determine whether Cigna's interpretation of the plans is "legally correct," viewing the plan language from the perspective of an average plan participant. *Id. at 195-96*. From that perspective, the Fifth Circuit stated that "[t]here are strong arguments that Cigna's plan interpretation is not 'legally correct,'" because it questioned whether patients reading the Covered Expenses exclusion "would understand that they *have no insurance coverage* if they are not charged for coinsurance. That is, would a plan member understand the language to *condition* coverage on the collection of coinsurance, rather than simply describing the fact **[*1112]** that the insurance does not cover all of a patient's costs." *Id. at 196* (emphasis in original). While this case offers a persuasive analysis, it fails to resolve the instant case; the Fifth Circuit's analysis raised questions but did not offer definitive answers, and was arguably dicta, since the issue of legal correctness was not decided but was remanded to the district court. Furthermore, the instant **[**32]** case is distinguishable, at least as to the claims for which Cigna did not completely deny coverage but reduced the amount it paid.

Cigna relies on *Kennedy v. Connecticut General Life Insurance Co., 924 F.2d 698 (7th Cir. 1991)*, which evaluated a similar decision by Cigna to deny claims by the plaintiff medical provider because he had waived his patients' co-payments and had agreed to accept as payment "whatever the insurer would pay." *Id. at 699*. The Seventh Circuit found that the Covered Expenses exclusion applied to relieve Cigna of its coverage obligation under the applicable plan, because "[b]y promising that he would look exclusively to CIGNA for payment, Kennedy relieved [the patient] of any legal obligation to pay. So Kennedy's charge *to the patient* was zero, and 80% of nothing is nothing." *Id. at 701* (emphasis in original). Viewing the facts in the light most favorable to the ASCs, however, *Kennedy* is distinguishable from the instant case. Here, there is a factual dispute as to whether the ASCs did, in fact, charge their patients some cost share and hold them financially responsible for the entire claimed amount if Cigna refused to pay. If the ASCs' patients were billed for the charges and obligated to pay them, then the Covered Expenses exclusion does not apply.

Given the factual **[**33]** dispute in the record regarding whether the ASCs' patients were or were not held financially responsible for the charges here, the Court cannot determine whether the Covered Expenses exclusion applied as a matter of law. Consequently, with respect to this issue, the ASCs' Motion must be denied, and Cigna's Motion must also be denied, at least as to the plans subject to *de novo* review.

As to the plans subject to abuse of discretion review, however, further analysis is required. A legally incorrect reading of the plans may still be enforced if it was reasonable, within Cigna's discretion, to interpret its plans in this manner. On this point, Cigna argues that it had substantial evidence to support its decision, because it surveyed its plan members and determined that the ASCs charged patients less than their full cost share responsibility under the plans, and sometimes charged them nothing. (ECF No. 90 at 40-41.) Relying on *North Cypress*, the ASCs respond that Cigna's decisions were unreasonable because the plans' language does not condition coverage on full cost share payments. (ECF No. 116 at 30-33; ECF No. 97 at 23-25.) However, the ASCs' arguments are aimed at those circumstances **[**34]** where Cigna's ultimate decision was to deny the claim in its entirety and pay nothing at all. It is undisputed that, at least after the fall of 2014, Cigna changed its fee-forgiving protocol from "full denial" to paying some percentage of the claim based on its calculation of 150% of Medicare reimbursements. (ASCs' SMF ¶ 75.) Thus, there were some circumstances where Cigna appeared to decide that the Covered Expenses exclusion applied to bar coverage completely, and other circumstances where it determined that the charge was covered but calculated a lower reimbursable amount.

Whether Cigna's decision was within its discretion depends on which of these two circumstances applied to a particular claim. When Cigna determined that the expense was covered, its decision to reduce **[*1113]** payment on the claim was based on its interpretation of the Covered Expenses exclusion in the context of the amount the patient was charged. For example, where Cigna had performed patient surveys and investigations and understood that the ASCs calculated a patient's cost share as 150% of Medicare, Cigna's decision to cover only 150% of Medicare was based on substantial evidence because the information it had at the **[**35]** time suggested that the patient was being billed only for 150% of Medicare. *See* *Adamson, 455 F.3d at 1212, 1214* ("The substantiality of the evidence is evaluated against the backdrop of the administrative record as a whole. . . . In applying this standard of review, we consider the evidence before the plan administrator at the time he made the decision to deny benefits.").

Even viewing these facts in the light most favorable to the ASCs, and considering Cigna's conflict of interest for those plans that it insures, the Court finds that Cigna's decision to reduce these payments was not unreasonable and was within its discretion. As such, Cigna's decision to reduce payments on the ASCs' claims must be upheld for those plans that are subject to abuse of discretion review. Cigna's Motion is therefore granted as to those plans.

However, the patient surveys and cost share calculations do not provide substantial evidence for Cigna to completely decline coverage. For those claims on which Cigna chose to pay nothing, Cigna's decision was reasonable only if it was supported by substantial evidence that the patients were "not obligated to pay or . . . not billed" for *anything at all*. Because this rests on the same disputed evidence **[**36]** discussed above regarding whether the ASCs held patients responsible for the charges, the Court must deny summary judgment for both parties on these claims.

In summary, the Court grants Cigna's Motion on Claim I with respect to those plans that are subject to abuse of discretion review (the Maryland plans and the self-funded plans) where Cigna paid on the claim but reduced the amount to 150% of Medicare, and denies the ASCs' Motion with respect to those plans. As to those same plans where Cigna denied the claim completely, and as to all other plans, both parties' motions are denied on Claim I.

4. Breach of Fiduciary Duty: Claim II

Cigna argues that Claim II fails because it is duplicative of Claim I, and that insofar as it seeks restitution, such purely monetary compensation is unavailable under *ERISA § 502(a)(3)*. (ECF No. 90 at 42.) Cigna further argues that the claim fails on the merits because there is no evidence Cigna gained any benefit from its acts. (*Id.*)

As to the first argument, the ASCs state that Cigna has merely misread the Second Amended Complaint. (ECF No. 116 at 34.) While Claim I seeks restitution of unpaid benefits, Claim II seeks "equitable, injunctive and declaratory relief." (ECF No. **[**37]** 60 at 57-59.) Given this clarification, and in reliance on the ASCs' representation that they do not seek restitution under Claim II, the Court rejects Cigna's first argument.

As to Cigna's argument that the breach of fiduciary duty claim fails on the merits, the ASCs respond that Cigna's decisions to deny the ASCs' claims benefited Cigna, and/or the sponsors for which it administered the plan, at the expense of subscribers, which is the behavior prohibited under *29 U.S.C. § 1106*. (ECF No. 116 at 35.) Because the fee-forgiving protocol undisputedly reduced or eliminated claim payments, the ASCs argue that Cigna saved money for whichever entity funded the plan by implementing the protocol, and the subscriber was left to pay out of pocket. (*Id.*) This characterization supports a **[*1114]** finding that Cigna did, in fact, gain from denying or reducing claim payments.

Since the Court has found a material factual dispute as to whether Cigna's fee-forgiving protocol was permissible under ERISA, the same dispute prevents the Court from determining as a matter of law whether the use of the protocol constituted a breach of Cigna's fiduciary duty. As such, both parties' Motions are denied as to Claim II.

5. Full and Fair **[**38]** Review: Claim III

The ASCs' Claim III challenges Cigna's acts in denying the ASCs' claims for benefits on the basis that Cigna failed to provide a "full and fair review" of the claims. (ECF No. 60 at 59-60.)

Pursuant to *29 U.S.C. § 1133(2)*, an employee benefit plan must "afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim." This full and fair review must include "knowing what evidence the decision-maker relied upon, having an opportunity to address the accuracy and reliability of the evidence, and having the decision-maker consider the evidence presented by both parties prior to reaching and rendering his decision." *Sage v. Automation, Inc. Pension Plan & Trust, 845 F.2d 885, 893-94 (10th Cir. 1988)* (internal quotation marks omitted).

Cigna's sole argument in its Motion is that it fully reviewed every one of the ASCs' appeals after the fee-forgiving protocol was implemented. (ECF No. 90 at 43.) But, as the ASCs point out, the fee-forgiving protocol itself was a blanket policy that did not provide them with an opportunity to challenge the evidence Cigna relied upon in issuing its denials. (ECF No. 116 at 35.) As there is a factual dispute preventing summary **[**39]** judgment on whether the fee-forgiving protocol was permissible under ERISA, the Court cannot grant summary judgment as to whether its use deprived the ASCs of a full and fair review. Accordingly, both parties' Motions are denied as to Claim III.

6. Counterclaim I

Cigna's Counterclaim I seeks injunctive relief requiring the ASCs to limit their future claims to only the amounts that the ASCs actually charge the patients. (ECF No. 17 at 41.) Cigna argues that it merits summary judgment because the ASCs' policy of discounting patients' cost share "violated the terms of Cigna's ERISA-governed plans." (ECF No. 90 at 45.) However, the Court's finding that Cigna's decision to reduce payment on some of its claims was within its discretion does not equate to a finding that the ASCs violated the terms of the plans. Cigna's Motion fails to articulate a genuine argument for summary judgment on this counterclaim, and it is therefore denied.

Similarly, because the Court found above that there are material factual disputes such that it cannot determine as a matter of law whether Cigna's interpretation of its plans was permissible, the ASCs' Motion on this counterclaim is also denied.

C. Contract: ASCs' [40] Claims IV & V**

The ASCs bring claims for breach of contract and breach of the implied covenant of good faith and fair dealing with regard to any plans at issue in this case that are not covered by ERISA. (ECF No. 60 at 60, 62.) The ASCs seek damages resulting from the alleged breaches as assignees of the plan subscribers. (*Id.*) Cigna contends that summary judgment should be granted on these claims, arguing that (1) no breach occurred; (2) the ASCs cannot recover damages; and (3) Claim V, the implied covenant claim, is duplicative and fails on the merits. (ECF No. 90 at 43-44.) **[*1115]** On these claims as well, the ASCs argue that Cigna's legally incorrect interpretation of its plans mandates judgment in the ASCs' favor as to those plans not covered by ERISA. (ECF No. 97 at 27-28.)

As to the argument that no breach occurred because the Covered Expenses exclusion permitted denial of the claims, the same factual dispute identified above prevents the Court from granting summary judgment on this issue. Cigna's argument that it merely "enforc[ed] this contractual term" has not been established as a matter of law at this stage of the case.

The same factual dispute precludes summary judgment on Cigna's damages argument. **[**41]** Cigna argues that no damages are recoverable by the ASCs because they bring these claims solely as assignees of their patients, and their patients were never obligated to pay more than a fraction of what their plans required. (ECF No. 90 at 43-44.) Because this factual assertion is in dispute, the question of what damages were suffered remains in dispute.

Finally, as to the implied covenant claim, Cigna argues that it should be dismissed as duplicative of the breach of contract claim, and that it cannot be used to contradict the express terms of the contract. (*Id.* at 44.) Cigna cites only one unpublished case for its argument that an implied covenant claim should not proceed alongside a contract claim arising from the same facts, and in that case, the plaintiff stipulated to dismiss the claim without prejudice. *See Aurora Commercial Corp. v. PMAC Lending Servs., Inc., 2014 U.S. Dist. LEXIS 28064, 2014 WL 859253, at *5 (D. Colo. Mar. 5, 2014)*. The Court therefore rejects this argument as completely unsupported. Cigna's other argument on this claim relies on its position that its interpretation of the plans was permissible, which is the subject of a factual dispute and cannot support summary judgment.

Accordingly, Cigna's Motion is denied as to the ASCs' Claims IV and V. Given the factual disputes on which these claims **[**42]** rely, the ASCs' Motion is also denied as to these claims.

D. Abuse of Health Insurance: Cigna's Counterclaim IX

Cigna's Counterclaim IX seeks declaratory relief under Colorado Criminal Code *§ 18-13-119*, which states in relevant part as follows:

> Health care providers - abuse of health insurance
> (1) The general assembly hereby finds, determines, and declares that:
> (a) Business practices that have the effect of eliminating the need for actual payment by the recipient of health care of required copayments and deductibles in health benefit plans interfere with contractual obligations entered into between the insured and the insurer relating to such payments;
> * * *
> (2) Therefore, the general assembly declares that such business practices are illegal and that violation thereof or the advertising thereof shall be grounds for disciplinary actions. . . .
> (3) Except as otherwise provided in subsections (5), (6), and (8) of this section, if the effect is to eliminate the need for payment by the patient of any required deductible or copayment applicable in the patient's health benefit plan, a person who provides health care commits abuse of health insurance if the person knowingly:
>
> (a) Accepts from any third-party payor, as payment in **[**43]** full for services rendered, the amount the third-party payor covers; or
>
> (b) Submits a fee to a third-party payor which is higher than the fee he has **[*1116]** agreed to accept from the insured patient with the understanding of waiving the required deductible or copayment.
> (4) Abuse of health insurance is a class 1 petty offense.

Cigna requests a declaration that the Colorado ASCs' billing practices violated *§ 18-13-119*, and that therefore Cigna is entitled to recover any amounts illegally obtained through such violation. (ECF No. 17 at 53-55.)

The ASCs argue that Cigna lacks standing to enforce a criminal statute against the ASCs, and that no private right of action exists for a violation of *§ 18-13-119*. (ECF No. 97 at 29-30.) The ASCs also argue that they have not violated the statute on the merits. (*Id.* at 30-31.) The Court agrees that this claim fails because there is no civil cause of action for a violation of *§ 18-13-119*, and therefore it need not discuss the ASCs' other arguments.

Cigna contends that the fact that *§ 18-13-119* is a criminal statute providing for no explicit civil remedy does not bar its claim, because the Court should imply a private civil cause of action. (ECF No. 112 at 30.) Cigna urges the Court to apply the analysis of whether **[**44]** to imply a private right of action set forth in *Allstate Insurance Co. v. Parfrey, 830 P.2d 905 (Colo. 1992)*. However, *Allstate* dealt not with a criminal statute, but with a civil statute providing for certain disclosures in sales of automobile insurance, which was "totally silent on the matter of remedy." *Id. at 910*. The court was therefore required to determine whether a private cause of action existed "[b]ecause the statutory scheme does not expressly provide a method for enforcing a violation" of the statute. *Id. at 911* (setting forth three factors for consideration).

The instant case is distinguishable, as *§ 18-13-119* provides explicitly for criminal sanctions, treating violations as "a class 1 petty offense." Cigna responds to this argument in a footnote, citing an unpublished case from this District and quoting from it as follows: "provision of a criminal penalty does not necessarily preclude implication of a private cause of action." (ECF No. 112 at 31 n.5 (citing *Chafin v. Stasi, 2015 U.S. Dist. LEXIS 42173, 2015 WL 1525542, at *16 (D. Colo. Mar. 31, 2015)*.) This is a serious misstatement of the cited case, which reads in context as follows:

> Though a provision of a criminal penalty does not necessarily preclude implication of a private cause of action, a 'bare criminal statute,' which contains absolutely no indication that a civil remedy is available, does not provide **[**45]** a basis from which to infer a private cause of action. Indeed, congressional intent to create such a remedy, the most important factor to consider when determining if an implied private remedy exists, cannot

> be found on the face of this statute. Instead, the purpose of the statute is to provide protection against interference with the legislative process. Accordingly, not only does this statute fail to provide a private cause of action to support Plaintiff's claims, but there is no legislative intent to support an implied private remedy.

*Chafin, 2015 U.S. Dist. LEXIS 42173, 2015 WL 1525542, at *16* (citations omitted).

Read in context, the Court finds *Chafin* persuasive and concludes that a similar analysis applies here. Cigna notes that the statutory purpose of *§ 18-13-119* is to protect insurers' contractual relationships with their insureds, but the statute also explicitly states that its violation "shall be grounds for disciplinary actions," not for a civil cause of action. *Colo. Rev. Stat. § 18-13-119(2)*. Cigna has pointed to nothing that suggests a congressional intent to create a private right of action on which an insurer may sue to protect its contracts **[*1117]** with its insureds; indeed, such action would likely be duplicative of a tort claim for interference with contract, since the statute **[**46]** provides that the prohibited business practices "interfere with contractual obligations entered into between the insured and the insurer." *Id.* *§ 18-13-119(1)(a)*.

The Court concludes that no private right of action is implied in *§ 18-13-119*. Accordingly, the Court finds that Cigna may not bring a claim for declaratory relief as to *§ 18-13-119*, and the ASCs' Motion is granted as to Counterclaim IX.

E. State Law Claims: Cigna's Counterclaims VII & VIII

Cigna brings state law claims for unjust enrichment and tortious interference with contract. (ECF No. 17 at 44-53.) The ASCs' Motion raises the following arguments against these claims: (1) both the unjust enrichment claim and the tortious interference with contract claim fail because the Court already found that Cigna failed to allege misrepresentation; (2) the unjust enrichment claim is preempted by ERISA; (3) the statute of limitations bars at least some of these claims; (4) the unjust enrichment claim fails because the ASCs did not receive any benefit to Cigna's detriment; (5) the tortious interference claim fails because Cigna has not shown that the ASCs intentionally induced the patients to breach their contracts, that the ASCs acted wrongfully, or that Cigna suffered damages; **[**47]** and (6) Cigna lacks standing to bring these claims on behalf of employer-funded plans because Cigna suffered no damages. (ECF No. 97 at 31-40.) The Court will discuss each argument in turn.

1. <u>Misrepresentation</u>

The ASCs' Motion argues that the Court's rulings with respect to Cigna's allegations of fraud and misrepresentation in its order on the ASCs' Motion to Dismiss Cigna's Counterclaims mandate summary judgment on both the unjust enrichment and tortious interference claims. (ECF No. 97 at 31-32, 35.) The ASCs argue that both claims are based on alleged misrepresentations or fraud, and that the Court rejected Cigna's allegations that the ASCs misrepresented their billing practices. (*Id.*)

In its ruling on the ASCs' Motion to Dismiss Cigna's Counterclaims, the Court found that Cigna failed to plausibly plead that the ASCs misrepresented their billing practices because Cigna admitted that the ASCs disclosed on their claim forms that they reduced the patient's portion of the bill and made the patient responsible for only an approximate in-network deductible and co-pay amount. (ECF No. 80 at 11-12.) The Court concluded that Cigna had not plausibly pled misrepresentations constituting predicate **[**48]** acts under RICO, and dismissed that counterclaim and its parallel state claim. (*Id.*) The Court found that the same alleged misrepresentations were the basis for Cigna's counterclaims for fraud, aiding and abetting fraud, negligent misrepresentation, and aiding and abetting negligent misrepresentation, and dismissed those claims as well. (*Id.* at 16.) However, the Court found that Cigna had sufficiently stated a claim for unjust enrichment and tortious interference with contract, and denied the Motion to Dismiss as to those claims. (*Id.* at 16-18.)

The ASCs' argument in the instant Motion is based on Cigna's allegations in its Counterclaims, which reference alleged misrepresentations of charges for the ASCs' services on both of the remaining claims. (ECF No. 17 at 50-53.) While the Court's findings as to misrepresentations impact the factual narrative on which both claims are predicated, neither of these claims necessarily fails without proof of these misrepresentations or fraud. The essence of Cigna's unjust enrichment claim is **[*1118]** that Cigna overpaid benefits claims in amounts that exceeded the value of the reimbursed service, and that it would be unjust for the ASCs to retain these additional amounts. (*Id.* at 50-51.) The **[**49]** tortious interference claim alleges that the ASCs induced patients not to pay the amounts they were contractually obligated to pay and misrepresented the terms of their insurance plans, causing the patients to breach their contracts and causing Cigna to overpay claims. (*Id.* at 51-53.) Notably, the alleged misrepresentation of the terms of the patients' insurance plans was not within the scope of the Court's findings in its prior order. (ECF No. 80 at 11 ("While Cigna also alleges that the ASCs misrepresented to patients that they could use in-network benefits at the ASCs' facilities, Cigna does not allege that its RICO and COCCA claims are based on such misrepresentations. Instead, it alleges that the ASCs used such tactics to conceal the nature of the inflated charges.").)

Accordingly, the Court rejects the ASCs' argument that the Court's prior order requires granting summary judgment on the unjust enrichment and tortious interference claims.

2. Preemption

The Court previously found, in the context of the ASCs' Motion to Dismiss, that Cigna's state law counterclaims were not subject to either express preemption or conflict preemption. (ECF No. 80 at 13-16.) The ASCs' Motion now argues that the unjust **[**50]** enrichment claim is preempted because it requires interpretation of Cigna's benefit plans to determine whether the claims were overpaid. (ECF No. 97 at 33-34.) In response, Cigna argues that the unjust enrichment claim does not require such interpretation, because it is based on a determination that the amounts Cigna paid the ASCs exceeded the value of the services the ASCs provided. (ECF No. 112 at 33.) The Court agrees with Cigna that, read properly, the unjust enrichment claim is based on a finding that Cigna made overpayments relative to the actual value of the services rather than relative to what Cigna was contractually permitted to pay under the plans. Therefore, this claim is not preempted, and the Court denies the ASCs' Motion in that respect.

3. Statute of Limitations

The ASCs argue that both the unjust enrichment claim and the tortious interference claim are barred in part by the applicable statute of limitations. (ECF No. 97 at 32-33, 36.) As to the unjust enrichment claim, the ASCs argue that the Maryland statute of limitations for an unjust enrichment claim seeking monetary restitution is three years, and that Cigna was aware of Westminster's billing practices more than **[**51]** three years before it filed its counterclaim against Westminster. (*Id.* at 32-33.) As to the tortious interference claim, the ASCs argue that Cigna was aware of and began investigating the ASCs' claim practices more than two years before it brought its counterclaim against Kissing Camels (in Colorado), and more than three years before it brought its counterclaim against Westminster (in Maryland). (*Id.* at 36.)

Cigna opposes on three bases: (1) the unjust enrichment and tortious interference claims were compulsory counterclaims that relate back to the date the ASCs filed their initial complaint (December 18, 2013), not the date the counterclaims were filed (February 10, 2014); (2) these claims did not accrue when Cigna began investigating the ASCs' billing practices, but rather when Cigna knew that it was overpaying claims or that its plan members had been induced to breach; and (3) separate claims accrued as to each patient whose benefits were overpaid or who breached the contract, such that at least those claim s based on later transactions are not barred. (ECF No. 112 at 37-39.) **[*1119]** Cigna does not dispute the applicable statutory limitation periods. (*See id.*)

As to the question of relation back, the ASCs argue **[**52]** that these are not compulsory counterclaims, under the test articulated in *Pipeliners Local Union No. 798 v. Ellerd, 503 F.2d 1193, 1198 (10th Cir. 1974)*. The Court disagrees. Cigna's counterclaims for unjust enrichment and tortious interference are based on largely the same issues of fact as the ASCs' principal claims, much of the same evidence supports or refutes both sets of claims, and the two sets of claims are logically related in the sense that they arose from the same business practices by each party that are challenged by the opposing party. *See* *Pipeliners Local, 503 F.2d at 1198*. Therefore, the relevant date for measuring whether these claims are timely is December 18, 2013.

As to accrual, the Court agrees with Cigna that separate claims accrued as to each overpaid claim or each patient who was induced to breach the contract, rather than a generalized accrual for the entire category of unjust enrichment or tortious interference claims when Cigna began investigating each ASC's practices. Each benefits claim gives rise to separate damages based on the particular facts of that patient's services. As such, the Court holds that the following claims are time-barred: (1) any claims for tortious interference by Colorado ASCs that accrued before December 18, 2011, and (2) any claims for unjust **[**53]** enrichment, or for tortious interference by Westminster, that accrued before December 18, 2010. The ASCs' Motion as to these claims is granted in part in that limited respect.

4. Unjust Enrichment: Counterclaim VII

The ASCs argue that Cigna's claim for unjust enrichment fails because the ASCs provided services to the patients for which they sought reimbursement and thus were not unjustly enriched, and because Cigna did not suffer a detriment from paying the claims. (ECF No. 97 at 34-35.) In response, Cigna contends that there is evidence the ASCs were overpaid based on the value of the service provided, because the ASCs charged their patients based on lower rates than that submitted to Cigna, and because the fee schedule was set to achieve an average reimbursement of 20-30% of the billed charges. (ECF No. 112 at 33.) Cigna further argues that it has necessarily suffered a detriment because it has paid the difference between the charges the ASCs submitted and the true value of their services. (*Id.* at 33-34.)

The Court finds that Cigna has presented sufficient evidence of unjust enrichment, when viewing the facts in the light most favorable to Cigna. An unjust enrichment claim requires evidence that **[**54]** the defendant knowingly received a benefit at the plaintiff's expense that it would be unjust for the defendant to retain. *See* *Lewis v. Lewis, 189 P.3d 1134, 1141 (Colo. 2008)*; *Hill v. Cross Country Settlements, LLC, 402 Md. 281, 936 A.2d 343, 351 (Md. 2007)*. Cigna has presented evidence on which a reasonable jury could rely that the actual value of the services the ASCs provided was lower than the amount of the claims it submitted. If the jury finds as much, then Cigna paid claims at rates higher than the value of the services provided, which constitutes a detriment. Therefore, Cigna has stated a claim for unjust enrichment, and the ASCs' Motion is denied as to Counterclaim VII.

5. Tortious Interference with Contract: Counterclaim VIII

Cigna's tortious interference claim alleges that the ASCs' billing practices interfered with the contracts between Cigna and the patients whom it insured through its plans. (ECF No. 17 at 51-53.) The ASCs argue that Cigna has failed to present **[*1120]** evidence supporting all the elements of a claim for tortious interference. (ECF No. 97 at 36-40.)

A tortious interference claim has five elements under both Colorado and Maryland law: (1) existence of a contract between the plaintiff and a third party; (2) knowledge of that contract by the defendant; (3) the defendant's intentional, improper **[**55]** interference with that contract; (4) breach of that contract by the third party; and (5) resulting damages to the plaintiff. *Fowler v. Printers II, Inc., 89 Md. App. 448, 598 A.2d 794, 802 (Md. Ct. Spec. App. 1991)*; *Colo. Nat'l Bank of Denver v. Friedman, 846 P.2d 159, 170 (Colo. 1993)*. The ASCs challenge the latter three elements of this claim.

As to breach, the ASCs argue that the plans do not require a member to pay his or her full cost share as a condition of coverage. (ECF No. 97 at 37-38.) But Cigna explains that the cost share provisions of its plans require payment of specified portions of out-of-network services, and to the extent that the ASCs' patients did not do so, they breached their contracts. (ECF No. 112 at 34-35.) The Court agrees with Cigna that a reasonable jury could find that cost share payments were required under the contracts and that a patient's failure to pay under this provision in full was a breach. This finding is not made unreasonable by a Cigna employee's statement that a patient's choice to obtain treatment at the ASCs' facilities did not breach the contract, as the ASCs suggest. (ECF No. 97 at 38; *see also* ECF No. 112 at 35 n.7.)

As to intent and improper interference, the ASCs contend that there is no evidence they intended to induce a breach. (ECF No. 97 at 38-39.) Again, the Court finds that Cigna has presented **[**56]** sufficient evidence to satisfy this element. A reasonable jury could infer intent from the ASCs' admitted practices of offering to provide out-of-network services at in-network rates, and of accepting much lower cost share payments from patients than provided for in their plans. Such an inference could support a jury's conclusion that the ASCs therefore intended to obtain these patients' business by discounting their cost share rates below what their plans called for, which caused resulting interference with the contracts under Cigna's theory of the case.

Finally, the ASCs challenge Cigna's evidence of damages, arguing that Cigna paid no more than its plans required it to pay. (ECF No. 97 at 40.) However, this depends on whether Cigna's plans in fact permitted it to discount or deny claims under its fee-forgiving protocol, as it later did. As discussed above, there are factual disputes as to whether the fee-forgiving protocol was appropriate under the plans. If the protocol was permissible, then Cigna's acts to pay claims in full (before the protocol was implemented) resulted in overpayments that caused it damages. Consequently, there is a factual dispute preventing summary judgment. **[**57]**

The Court finds that Cigna has provided sufficient evidence to satisfy all elements of its tortious interference with contract claim, and therefore the ASCs' Motion is denied as to that claim.

6. Standing

The ASCs argue that, as to the self-funded plans, Cigna lacks standing to seek money damages for its unjust enrichment and tortious interference claims because any damages were suffered by the plan sponsor, not Cigna. (ECF No. 97 at 41.) Cigna points out that its agreements with clients for self-funded plans explicitly authorize it to "take all reasonable steps to recover . . . overpayment[s]" on behalf of the plan sponsor. (ECF No. 112 at 40.) The ASCs respond that these claims do not seek "overpayments," and even assuming **[*1121]** they do, such overpayments can only be determined with reference to plan interpretation such that the claims are preempted by ERISA. (ECF No. 123 at 22-23.) The Court rejects this revived preemption argument, for the same reasons discussed above.

As to whether the restitution and damages sought in the unjust enrichment and tortious interference claims are "overpayments," the Court's above analysis of each of these claims at Parts III.E.4-5 clarifies that the relief sought by both **[**58]** claims may be characterized as overpayments. The unjust enrichment claim seeks restitution of the amount it paid above the actual value of the ASCs' services, while the tortious interference claim seeks damages for the difference between what Cigna paid and what it could have paid for the ASCs' services in the absence of interference. As such, the Court finds that the relief sought in these claims is covered by the agreement between Cigna and its plan sponsors for it to seek overpayments on their behalf, and therefore Cigna has standing to pursue these claims.

F. Declaratory Relief: Cigna's Counterclaim XII

Lastly, the ASCs argue that Cigna's Counterclaim XII for declaratory relief should have been dismissed in the Court's prior Order on the ASCs' Motion to Dismiss, because it seeks "a declaration that the claims for reimbursement submitted by the ASCs are not for covered services, and are not payable under employee health and welfare benefit plans that are insured or administered by Cigna . . . [and] that the ASCs must return all sums received from Cigna." (ECF No. 17 at 61.) The ASCs point to the Court's analysis of Cigna's request for declaratory relief encompassed in its Counterclaim **[**59]** I, which held that "it merely couche[d] the restitution claim in the form of a declaration" and that such relief was not cognizable under *ERISA § 502(a)*. (ECF No. 80 at 8.) The ASCs also argue that this claim is redundant because the issues contained therein will be resolved by resolution of the ASCs' own claims. (ECF No. 97 at 41.)

Cigna agrees that the first part of its declaratory relief claim—seeking a declaration that the ASCs' claims are not for covered services—was dismissed by the Court's prior order. (ECF No. 112 at 39.) As to the second part of the claim, which seeks a declaration that the claims are not payable, Cigna argues that this request for relief is like the injunctive relief sought in Counterclaim I under ERISA that the Court permitted to proceed. (*Id.* at 39-40.)

The Court agrees with Cigna on this issue, and now clarifies its prior order. Cigna's counterclaims for declaratory relief that only seek restitution of payments fall outside the scope of *§ 502(a)* and were therefore dismissed, whether they occurred in Counterclaim I or Counterclaim XII. (*See* ECF No. 80 at 8-9.) That ruling included Cigna's request for declarations that "any payments the ASCs received under such claims should be returned to Cigna," **[**60]** and that "the claims for reimbursement submitted by the ASCs are not for covered services . . . ." (ECF No. 17 at 60-61.) While the remaining request for declaratory relief, which seeks a declaration that the ASCs' claims "are not payable under employee health and welfare benefit plans that are insured or administered by Cigna," may ultimately reveal itself to be redundant, the Court cannot find as much at this stage given the factual disputes in the remaining claims.

Accordingly, summary judgment is not appropriate on Cigna's remaining request for declaratory relief, and the ASCs' Motion is denied as to Counterclaim XII.

IV. CONCLUSION

For the reasons set forth above, the Court ORDERS as follows:

> **[*1122]** 1. Cigna's Motion for Summary Judgment (ECF No. 105) is GRANTED IN PART as to Plaintiffs' Claims VI and VII under the Sherman Act, as to Plaintiffs' Claim I solely on certain theories of liability specified at Part III.B.3, above, and as to certain unexhausted ERISA benefits claims as described at Part III.B.2, above, and DENIED IN PART in all other respects;
>
> 2. Plaintiffs' and Counterclaim Defendants' Motion for Summary Judgment (ECF No. 106) is GRANTED IN PART as to Cigna's Counterclaim IX for **[**61]** declaratory relief under Colorado Criminal Code *§ 18-13-119*, and as to certain portions of Cigna's Counterclaims VII and VIII that are time-barred as described at Part III.E.3, above, and DENIED IN PART in all other respects; and
>
> 3. This case remains set for a jury trial to commence on October 17, 2016. Given the reduction in the number of claims remaining for trial, the length of trial shall be shortened to ten days, and will conclude on Friday, October 28, 2016.

Dated this 21st day of March, 2016.

BY THE COURT:

/s/ William J. Martínez

William J. Martínez

United States District Judge

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Medical Ctr. at Elizabeth Place, LLC v. Atrium Health Sys.

United States Court of Appeals for the Sixth Circuit

October 8, 2015, Argued; March 22, 2016, Decided; March 22, 2016, Filed

File Name: 16a0068p.06

No. 14-4166

Reporter
817 F.3d 934 *; 2016 U.S. App. LEXIS 5214 **; 2016 FED App. 0068P (6th Cir.) ***; 2016-1 Trade Reg. Rep. (CCH) P79,543; 99 Fed. R. Evid. Serv. (Callaghan) 1388; 2016 WL 1105023

THE MEDICAL CENTER AT ELIZABETH PLACE, LLC, Plaintiff-Appellant, v. ATRIUM HEALTH SYSTEM, et al., Defendants-Appellees.

Subsequent History: Rehearing denied by, Rehearing, en banc, denied by *Medical Ctr. at Elizabeth Place, LLC v. Atrium Health Sys., 2016 U.S. App. LEXIS 9979 (6th Cir., May 4, 2016)*

Summary judgment granted by, Summary judgment denied by *Med. Ctr. at Elizabeth Place v. Premier Health Partners, 2016 U.S. Dist. LEXIS 192269 (S.D. Ohio, Oct. 6, 2016)*

On remand at, Motion granted by, Motion denied by, As moot, Dismissed by, in part, Judgment entered by *Medical Ctr. at Elizabeth Place, LLC v. Premier Health Partners, 2017 U.S. Dist. LEXIS 126499 (S.D. Ohio, Aug. 9, 2017)*

Prior History: [1]** Appeal from the United States District Court for the Southern District of Ohio at Dayton. No. 3:12-cv-00026—Timothy S. Black, District Judge.

Med. Ctr. at Elizabeth Place v. Premier Health Partners, 2014 U.S. Dist. LEXIS 169186 (S.D. Ohio, Oct. 20, 2014)

Core Terms

teams, joint venture, competitors, single entity, decisions, operating agreement, entities, defendants', decisionmaking, antitrust, contracts, patients, insurers, parties, network, concerted action, anticompetitive, economic interest, insurance company, restraint of trade, district court, licensing, pursuing, centers, integration, compete, profits, conspiring, functions, intellectual property

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > Scope

HN1[] **Antitrust & Trade Law, Sherman Act**

15 U.S.C.S. § 1 of the Sherman Antitrust Act prohibits any contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations.

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

HN2[] **Conspiracy to Monopolize, Sherman Act**

The question cannot be answered in the abstract as to whether a joint venture constitutes a single entity incapable of conspiring with itself in an anticompetitive manner, or whether, instead, it becomes a vehicle to facilitate separate entities to conspire illegally to restrain trade. To determine whether a joint venture constitutes a combination under *15 U.S.C.S. § 1*, the true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint is imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

Antitrust & Trade Law > Sherman Act > Scope

HN3[] **Antitrust & Trade Law, Sherman Act**

The Sherman Antitrust Act is based on an often-difficult distinction between concerted and independent, unilateral action. Concerted activity is scrutinized more closely than unilateral behavior because concerted activity inherently is fraught with anticompetitive risk insofar as it deprives the marketplace of independent centers of decisionmaking that competition assumes and demands. Specifically, *15 U.S.C.S. § 1* regulates concerted activity between two or more entities, outlawing every contract, combination, or conspiracy in restraint of trade, a provision that has subsequently been limited to target only unreasonable restraints of trade.

Antitrust & Trade Law > Sherman Act > Claims

HN4[] **Sherman Act, Claims**

To prevail on a claim under *15 U.S.C.S. § 1*, a plaintiff must prove: (1) a contract, combination, or conspiracy; (2) producing adverse, anticompetitive effects in the relevant market; and (3) resulting in injury.

Antitrust & Trade Law > Sherman Act > Claims

HN5[] **Sherman Act, Claims**

The American Needle test sets out the standard to apply in distinguishing concerted from unilateral action under *15 U.S.C.S. § 1*.

Antitrust & Trade Law > Sherman Act > Claims

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

HN6[] **Sherman Act, Claims**

Concerted action under *15 U.S.C.S. § 1* does not turn simply on whether the parties involved are legally distinct entities. Rather, substance, not form, should determine whether an entity is capable of conspiring under *§ 1*. It is not dispositive that defendants organize themselves under a single umbrella or into a structured joint venture. The key is whether the contract, combination, or conspiracy joins together independent centers of decisionmaking. If it does, the entities are capable of conspiring under *§ 1*, and the court must decide whether the restraint of trade is an unreasonable and therefore illegal one.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Sherman Act > Scope

HN7[] **Sherman Act, Claims**

Judicial precedent looks beyond labels to recognize underlying collusion among competitors as violations of the Sherman Antitrust Act.

Antitrust & Trade Law > Sherman Act > Claims

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

HN8[] **Sherman Act, Claims**

The American Needle test directs courts to look at a number of factors when determining whether multiple parties joined together in a joint venture are functioning as a single entity for purposes of *15 U.S.C.S. § 1* of the Sherman Antitrust Act. Courts first look to the actual conduct of the parties to the joint venture: concerted activity does not turn simply on whether the parties involved are legally distinct entities. Instead, judicial precedent has eschewed formalistic distinctions in favor of a functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate. In looking at how the parties actually operate, judicial precedent repeatedly finds instances in which members of a legally single entity violated *§ 1* when the entity was controlled by a group of competitors and served, in essence, as a vehicle for ongoing concerted activity.

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

HN9[] **Cartels & Horizontal Restraints, Sherman Act**

For purposes of *15 U.S.C.S. § 1*, the American Needle standard looks to other factors in addition to actual conduct, examining the nature of the business relationship among defendants, focusing on whether that relationship remains that of separate, competing entities or whether there is a single center of decisionmaking.

Antitrust & Trade Law > Sherman Act > Claims

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

HN10[] **Sherman Act, Claims**

The American Needle test emphasizes that it is not dispositive that the parties to the joint venture have organized and created a legally separate entity that centralizes certain management functions. An ongoing *15 U.S.C.S. § 1* violation cannot evade *§ 1* scrutiny simply by giving the ongoing violation a name and label. Perhaps every agreement and combination in restraint of trade could be so labeled.

Antitrust & Trade Law > Sherman Act > Claims

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

HN11[] **Sherman Act, Claims**

Competitors cannot simply get around antitrust liability by acting through a third-party intermediary or joint venture.

Antitrust & Trade Law > Sherman Act > Claims

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

HN12[] **Sherman Act, Claims**

Any joint venture involves multiple sources of economic power cooperating to produce a product or provide a service. The benefits of cooperation do not transform concerted action into unilateral action that puts the joint venture beyond the reach of *15 U.S.C.S. § 1*.

Evidence > ... > Hearsay > Exemptions > Statements by Party Opponents

HN13[] **Exemptions, Statements by Party Opponents**

An anonymous statement may be admissible under *Fed. R. Evid. 801(d)(2)* in certain circumstances that demonstrate sufficient indicia of reliability as to the authenticity of the statement.

Evidence > ... > Hearsay > Exemptions > Statements by Party Opponents

HN14[] **Exemptions, Statements by Party Opponents**

See *Fed. R. Evid. 801(d)(2)*.

Evidence > ... > Hearsay > Exemptions > Statements by Party Opponents

HN15[] **Exemptions, Statements by Party Opponents**

For purposes of admitting anonymous statements under *Fed. R. Evid. 801(d)(2)*, the crucial question is whether there is evidence that the unidentified declarants were speaking on a matter within the scope of their employment, not their identity.

Counsel: ARGUED: Richard A. Ripley, HAYNES AND BOONE, LLP, Washington, D.C., for Appellant.

Charles J. Faruki, FARUKI IRELAND & COX P.L.L., Dayton, Ohio, for Appellees.

ON BRIEF: Richard A. Ripley, HAYNES AND BOONE, LLP, Washington, D.C., James Alan Dyer, SEBALY, SHILLITO & DYER, Dayton, Ohio, Anne M. Johnson, Ryan Paulsen, Sally Dahlstrom, HAYNES AND BOONE, LLP, Dallas, Texas, for Appellant.

Charles J. Faruki, Laura A. Sanom, FARUKI IRELAND & COX P.L.L., Dayton, Ohio, Thomas Demitrack, JONES DAY, Cleveland, Ohio, for Appellees.

Judges: Before: MERRITT, DAUGHTREY, and GRIFFIN, Circuit Judges. MERRITT, J., delivered the opinion of the court in which DAUGHTREY, J., joined. GRIFFIN, J., delivered a separate dissenting opinion.

Opinion by: MERRITT

Opinion

[*2] [*936]** MERRITT, Circuit Judge. *Section 1 of the Sherman Act* broadly prohibits "combinations in restraint of trade."[1] Plaintiff claims that defendants conspired to deny it access to managed care contracts that plaintiff needed to compete in the hospital market in Dayton, Ohio. The question in this case is whether defendants, four previously independent hospitals now operating **[**2]** as a hospital "network" under the name "Premier Health Partners," is a "combination" subject to liability under *§ 1* of the Sherman Act, or whether it should be characterized as a single entity competing in the marketplace for hospital services in the Dayton area. The four hospitals entered into a joint operating agreement that merged[2] some of their healthcare functions, but retained control of others, and they continued to compete with each other. The district court held that the Premier group was a single entity and dismissed this antitrust case on summary judgment without adjudicating the question of whether the behavior of the Premier group of hospitals constitutes impermissible anticompetitive conduct. We disagree and reverse and remand for further proceedings under the *Sherman Act*.

I. Background

Plaintiff, The Medical Center at Elizabeth Place, opened in **[**3]** 2006 and operates a 26-bed, for-profit, physician-owned hospital in Dayton, Ohio.[3] Plaintiff specializes in acute-care surgical services. Its competitors for surgical patients in the Dayton market include the defendant hospitals. Defendant Premier Health Partners was formed in 1995 when two Dayton-area hospitals entered into a joint operating agreement. Over the next 13 years, several additional **[***3]** hospital corporations in the area entered into Premier's joint operating agreement.[4] Premier

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[1] ***HN1***[] *Section 1* of the Sherman Act prohibits any "contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." *15 U.S.C. § 1*.

[2] A merger was not possible because one of the hospitals, Catholic Health Initiatives, Inc., was prohibited from joining a non-Catholic entity.

[3] In 2009, after struggling financially for three years, which plaintiff claims resulted from defendants' illegal boycott, plaintiff sold a 49% ownership interest to Kettering Health Network, a major competitor of defendant Premier Health Partners in the Dayton market. The sale allowed plaintiff to gain access to Kettering's managed-care contracts with local insurance companies and thereby increase its patient volume.

Health Partners, **[*937]** through the joint operating agreement, operates four hospitals: Good Samaritan Hospital, Miami Valley Hospital, Atrium Medical Center, and Upper Valley Medical Center. See Second Amended and Restated Joint Operating Agreement of Premier Health Partners (executed Feb. 2008). Premier is not a hospital, does not provide any health care itself, and has no assets of its own. Instead, Premier handles much of the financial business of the hospitals through the joint operating agreement, including negotiating managed-care contracts with insurance carriers. The defendant hospitals share revenues and losses through an agreed-upon formula set forth in the joint operating agreement, but each defendant **[**4]** maintains separate ownership of its assets. Defendant hospitals file separate tax returns and other corporate forms and documents filed with the government.

Plaintiff claims that the hospital defendants are not a single entity, but instead a group of hospitals capable of concerted action to keep plaintiff from competing in the market. Plaintiff offers proof that the group engaged in concerted action in three principal ways: (1) to coerce commercial health insurers that collectively represent at least 70% of the insured consumers in Dayton to refuse to negotiate contracts for managed **[**5]** care with plaintiff and to otherwise deny it access to their networks, thereby depriving plaintiff of the ability to serve a large segment of the Dayton consumer market; (2) by threatening punitive financial consequences to physicians who affiliated with plaintiff, including terminating leases that physicians had with defendant hospitals for office space or terminating or evicting physicians already leasing from defendant facilities, and threatening to withhold referrals; and (3) by compelling physicians, either through threats of punitive measures or through financial incentives, to refuse to admit their patients to plaintiff hospital.

HN2[] The question cannot be answered in the abstract as to whether a joint venture like the one here constitutes a single entity incapable of conspiring with itself in an anticompetitive manner, or whether, instead, it becomes a vehicle to facilitate separate entities to conspire illegally to restrain trade. In *American Needle, Inc. v. National Football League, 560 U.S. 183, 203 n.10, 130 S. Ct. 2201, 176 L. Ed. 2d 947* **[***4]** (2010), the Supreme Court relied on Justice Brandeis's multi-factored test in *Board of Trade of Chicago v. United States, 246 U.S. 231, 238, 38 S. Ct. 242, 62 L. Ed. 683 (1918)*, to determine whether a joint venture constitutes a "combination" under *Section 1*:

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps **[**6]** thereby promotes competition or whether it is such as may suppress or even destroy competition. *To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint is imposed; the nature of the restraint and its effect, actual or probable*. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; *but because knowledge of intent may help the court to interpret facts and to predict consequences*.

(Emphasis added.)[5] The summary judgment record leaves little doubt on the **[*938]** question of the intent of the network to prevent plaintiff hospital from entering the Dayton healthcare market. The deposition of the eventual

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[4] The corporate defendants, in addition to Premier Health Partners, are Atrium Health System, Catholic Health Initiatives, MedAmerica Health Systems Corporation, Samaritan Health Partners, and UVMC.

[5] Our dissenting colleague does not agree that this statement from Justice Brandeis in *American Needle* is relevant because it discusses facts relating to defendants' **[**8]** intent, history and coercive behavior. The objection is strange because Justice Brandeis's admonition is quoted at length in a case where the issue was whether the defendant was a single entity. Surely if the Supreme Court had thought that Justice Brandeis's factors concerning conduct and intent were irrelevant, it would not have said they were relevant and directed lower courts to consider them. We understand that, at least on paper, the joint venture agreement, written by defendants themselves, aims to legitimate the cartel. But further factual determination is required to resolve whether the neutral words of the agreement belie the true aim of defendants' association. We are tasked with looking at the evidence before us, which includes evidence of defendants' unveiled threats to plaintiff and the words of defendants' employees and agents concerning their views on the nature of the relationship among defendants. *See Freeman v. San Diego Ass'n of Realtors, 322 F.3d 1133, 1150 (9th Cir. 2003)* ("Defendants sabotage their theory by their own admissions. . . . Rarely do antitrust defendants serve up their own heads on so shiny a silver platter."). Our colleague's refusal to consider anything

head of plaintiff hospital contains the following testimony about a phone conversation he had with Thomas Arquilla, Executive Vice President of the Premier group of hospitals, one afternoon before the plaintiff hospital opened:

> The conversation started with him asking **[**7]** me the question, John, I understand that you are an investor in this new Regent Hospital [plaintiff hospital]. And I said yes, Tom, that's true. I also understand that you are the chairman of the board of the hospital. Is that true? I said yes, it's true. He said I want you to know that you are the enemy and that this is war, and you are not going to open this hospital. I replied to him are you going to kick me off of staff at Miami Valley Hospital? And he said John, I'm not going to tell you what we are going to do to you, but **[***5]** there are many things that we can do to you, and we are going to do them. I said Tom, are you going to blow the facility up? And he laughed, and he said I already told you, John, there's lots of things that we can do to you, and we are going to do them. You are not going to open this hospital. He then went on to say that our facility would suck off good paying patients, that we were going to be cherry pickers, and that we would suck off good patients.

Fleishman Dep. at 118:12-119:10 (Oct. 22, 2013).

American Needle sets out the framework we are to follow in deciding the "single entity" versus "concerted activity" question at issue in this appeal. Based on defendants' stated intent to keep plaintiff out of the Dayton market, the evidence of coercive conduct threatening both physicians and insurance companies with financial loss if they did business with plaintiff, evidence of continued actual and self-proclaimed competition among the defendant hospitals, and evidence that the defendant hospitals' business operations are not entirely unitary, we conclude that there is a genuine issue of material fact as to whether the defendant hospitals' network constitutes a single entity or concerted action among competitors for purposes of *Section 1* of the Sherman Act.

II. Analysis

HN3[] The Sherman Antitrust Act is based on an often-difficult distinction between concerted and independent, unilateral action. Concerted activity is scrutinized **[*939]** more closely than unilateral behavior because "?[c]oncerted activity inherently is fraught with anticompetitive risk' insofar as it 'deprives the marketplace of independent centers **[**10]** of decisionmaking that competition assumes and demands.'" *Am. Needle, 560 U.S. at 190* (quoting *Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 768-69, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984))*. Specifically, *Section 1* regulates concerted activity between two or more entities, outlawing "[e]very contract, combination . . . or conspiracy, in restraint of trade," *15 U.S.C. § 1*, a provision that has subsequently been limited to target only "unreasonable" restraints of trade. ***HN4***[] To prevail on a claim under *§ 1*, a plaintiff must prove: (1) a contract, combination, or conspiracy; (2) producing adverse, anticompetitive effects in the relevant market; and (3) resulting in injury. *See* **[***6]** *Expert Masonry, Inc. v. Boone Cty., Ky., 440 F.3d 336, 342 (6th Cir. 2006)*. This appeal looks only at the element addressed by the district court, which is the first element: whether defendants' conduct is the result of two or more entities acting in concert or whether defendants, based on their participation in the joint operating agreement, function as a single entity in the market place. Our analysis is guided by ***HN5***[] *American Needle*, which sets out the standard to apply in distinguishing concerted from unilateral action.

In *American Needle*, the Court looked at the conduct of members of an incorporated joint venture that organized the 32 NFL teams for purposes of marketing the NFL trademark for apparel. **[**11]** *American Needle* explained that ***HN6***[] "concerted action under *§ 1* does not turn simply on whether the parties involved are legally distinct entities." *560 U.S. at 191*. Rather, "substance, not form, should determine whether a[n] . . . entity is capable of conspiring under *§ 1*." *Id. at 195* (quoting *Copperweld, 467 U.S. at 773 n.21*). It is not dispositive that defendants organize themselves "under a single umbrella or into a structured joint venture," *id. at 196*, as defendant hospitals did here. The "key," according to the Court, is whether the "contract, combination . . ., or conspiracy" joins together "independent centers of decisionmaking . . . . If it does, the entities are capable of conspiring under *§ 1*, and the

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other than the joint venture agreement is tantamount to repealing *Section 1* **[**9]** of the Sherman Act by allowing the cartel members themselves to write up the only facts to be considered.

court must decide whether the restraint of trade is an unreasonable and therefore illegal one." *Id.* (citation omitted). The Court went on to hold that the 32 teams "remain separately controlled, potential competitors with economic interests that are distinct from [National Football League Properties'] financial well-being." *Id. at 201* (citing Herbert Hovenkamp, *Exclusive Joint Ventures and Antitrust Policy*, *1995 Colum. Bus. L.R. 1, 52-61 (1995)*). Given this explanation, the Court in *American Needle* concluded that the joint venture formed by 32 NFL teams, "at least" with regard to their decision collectively **[**12]** to license the teams' independently owned intellectual property, was engaged in concerted rather than single-entity action and thus potentially violated *Section 1*. The Court reasoned that apart from the teams' agreement to cooperate in exploiting these assets, they would be competitors in the market to produce and sell team-logo apparel and headgear by licensing their intellectual property and dealing with suppliers.

Applying *American Needle* to examine the relationship among the defendant hospitals pursuant to the joint operating agreement, we come to the same conclusion. Like the joint **[***7]** venture in *American Needle*, the joint operating agreement brings together "independent centers of decisionmaking" that "remain separately controlled, potential competitors with economic **[*940]** interests that are distinct" and thus are capable of concerted action. *See* Nathaniel Grow, *American Needle and the Future of the Single Entity Defense under Section One of the Sherman Act*, *48 Am. Bus. L.J. 449, 484 (Fall 2011)* ("[W]henever the entity is controlled by, or itself controls, competing economic actors, it is engaged in concerted activity rendering single entity status improper."); *see also* Areeda & Hovenkamp, ***Antitrust Law*** P 1478a (2010) (The "most significant **[**13]** competitive threats arise when joint venture participants are actual or potential competitors.").

HN7[] The Supreme Court looks beyond labels to recognize underlying collusion among competitors as violations of the *Sherman Act*. *See* *Am. Needle, 560 U.S. at 191* ("[W]e have repeatedly found instances in which members of a legally single entity violated *§ 1* when the entity was controlled by a group of competitors and served, in essence, as a vehicle for ongoing concerted activity."); *accord* *Timken Roller Bearing Co. v. United States, 341 U.S. 593, 594-95, 71 S. Ct. 971, 95 L. Ed. 1199 (1951)* (failing to "find any support in reason or authority for the proposition that agreements between legally separate persons and companies to suppress competition among themselves and others can be justified by labeling the project a 'joint venture'"), *overruled on other grounds by* *Copperweld, 467 U.S. at 764-65*; *United States v. Am. Tobacco Co., 221 U.S. 106, 187, 31 S. Ct. 632, 55 L. Ed. 663 (1911)* (where the trust or holding company device brought together previously independent firms to lessen competition and achieve monopoly power, "the combination was in and of itself" is a restraint of trade); *see also* Federal Trade Comm'n & U.S. Dep't of Justice, Antitrust Guidelines for Collaborations Among Competitors 9 (2000) ("[L]abeling an arrangement a 'joint venture' will not protect what is merely a device to raise price or restrict output . . . .").

HN8[] *American Needle* directs **[**14]** us to look at a number of factors when determining whether multiple parties joined together in a joint venture are functioning as a single entity for purposes of *Section 1* of the Sherman Act. We first look to the actual conduct of the parties to the joint venture: "We have long held that concerted activity does not turn simply on whether the parties involved are legally distinct entities. Instead, we have eschewed formalistic distinctions in favor of a functional consideration of how the parties involved in the alleged anticompetitive conduct **[***8]** *actually operate*." *560 U.S. at 191* (emphasis added). The Court went on to say that in looking at how the parties actually operate, "we have repeatedly found instances in which members of a legally single entity violated *§ 1* when the entity was controlled by a group of competitors and served, in essence, as a vehicle for ongoing concerted activity." *Id.* (citing *United States v. Sealy, Inc., 388 U.S. 350, 87 S. Ct. 1847, 18 L. Ed. 2d 1238 (1967)* (holding that Sealy was not a single entity, but instead an "instrumentality of the individual" parties)).

The stated intent on the part of the defendants to engage in coercive behavior, as well as conduct providing evidence of that intent, is demonstrated by the conversation recited above between the CEO of plaintiff **[**15]** and the Executive Vice President of Premier, in which the Premier official stated his intention to keep plaintiff from entering the Dayton healthcare market. The record also contains evidence, through letters and emails, that physicians who collaborated with plaintiff in any way lost their leases for office space in properties owned by defendants and were threatened with loss of treating privileges at defendant hospitals.

[*941] Boycott by Health Insurance Companies

Another example of alleged conduct indicating possible anticompetitive intent on the part of defendants arises from evidence that insurance companies were refusing to deal with plaintiff at the behest of defendant hospitals. Defendant hospitals each executed separate managed-care contracts with each insurance company. Plaintiff offered evidence that defendant hospitals each individually executed managed-care contracts with the insurance companies that contained language prohibiting the insurer from also contracting with plaintiff by including an explicit restriction on the insurer's ability to add a new hospital to its network. *See, e.g.*, Email dated Aug. 10, 2009, from Mark Shaw of Premier to Renee Johnson of Premier with subject **[**16]** line referencing "Medical Center at Elizabeth Place" and requesting that Ms. Johnson investigate whether certain insurance companies were violating their contracts with Premier by adding new hospitals to their networks. Access to managed-care contracts offered by insurers is crucial to a hospital's financial success. The managed-care contracts with insurers provide the hospital with the volume (patients who are covered by the insurers) that is necessary to survive. If a hospital cannot contract with a number of insurers, or at least several insurers with large numbers of insureds, it is unlikely to admit enough patients, and it is only through patients that the hospital **[***9]** generates revenue. Hospitals generally seek to become "in-network" or "preferred" providers for a number of insurers, often accepting lower rates from the insurance companies in exchange for a higher volume of patients. In this case, the forming of the joint venture, bringing the defendant hospitals under the umbrella of Premier Health Partners, facilitated negotiation with insurers for managed-care contracts. The Federal Trade Commission and the Antitrust Division of the Justice Department recognize that "collaboration **[**17]** that eliminates or reduces price competition or allows providers to gain increased bargaining leverage with [insurers] raises significant antitrust concerns." Deborah L. Feinstein, Director, Bureau of Competition, Federal Trade Commission, *Antitrust Enforcement in Health Care: Proscription, not Prescription*, at 2, Address at the Fifth National Accountable Care Organization Summit (June 19, 2014). In this address, Director Feinstein also noted that "management contracts whereby one hospital manages another hospital with which it also competes may raise concerns similar to horizontal acquisitions." *Id. at 9*.

Negotiating contracts that explicitly exclude the insurers' ability to contract with other parties is anticompetitive on its face and normally serves no proper business function, a fact recognized by the district court in its first order denying the motion to dismiss. *The Med. Ctr. at Elizabeth Place v. Premier Health Partners, 2012 U.S. Dist. LEXIS 123408, 2012 WL 3776444, at *5 (S.D. Ohio Aug. 30, 2012)* ("Organizing a group boycott of [plaintiff] does not promote any legitimate objective of the [joint operating agreement] or achieve any procompetitive benefits."). Plaintiff has submitted evidence that each insurer knew that the other insurers had included this limitation in their contracts, as demonstrated by the excerpt below from a Dayton **[**18]** industry publication:

> Premier has threatened to revoke privileges for physicians participating in [plaintiff hospital] and contracts with health plans such as Anthem and UnitedHealth are known to be contingent on excluding [plaintiff hospital] from the network.

HealthLeaders InterStudy, Dayton Market Overview at 7-8 (Apr. 2008). In addition to this published account, plaintiff also **[*942]** offered evidence from insurance company emails and defendant hospitals' Board of Directors meetings that, in addition to demonstrating knowledge among the insurers of the restriction on adding new hospitals to their networks in their managed-care contracts with defendant hospitals, the insurance companies regularly monitored each other to **[***10]** ensure that the other insurance companies were complying with the contract restriction on dealing with a new hospital.

The Joint Operating Agreement

HN9[] *American Needle* also looked to other factors in addition to actual conduct, examining the nature of the business relationship among defendants, focusing on whether that relationship remains that of separate, competing entities or whether there is a single center of decisionmaking. As noted above, Premier owns no assets and it does not provide any healthcare services. Like the joint venture under **[**19]** scrutiny in *American Needle*, Premier is a separate corporate entity with its own management structure, including a CEO and a Board of Directors, some of whom are employees of the individual defendant hospitals. The joint operating agreement provides for certain management functions to be carried out by Premier on behalf of the defendant hospitals. Premier's duties under the joint operating agreement are an attempt to achieve efficiencies in billing and collecting payments, managing physicians and physician groups, property management and other similar duties. **HN10**[] *American Needle* emphasized that it is not dispositive that the parties to the joint venture have organized and created a legally separate entity that centralizes certain management functions. The Court stated that an "ongoing *§ 1* violation cannot evade *§ 1* scrutiny simply by giving the ongoing violation a name and label. 'Perhaps every agreement and combination in restraint of trade could be so labeled.'" *Am. Needle, 560 U.S. at 197* (quoting *Timken Roller Bearing, 341 U.S. at 598*). The joint operating agreement provides for some degree of unitary management, but questions remain as to whether "their general corporate actions are guided or determined by separate corporate consciousnesses." *Id. at 196* (quotation **[**20]** marks and citations omitted).

The Premier joint operating agreement also provides for sharing revenue pursuant to an agreed upon formula. But, if the fact that potential competitors shared in profits or losses from a venture meant that the venture was immune from *§ 1*, then any cartel "could evade the antitrust laws simply by creating a 'joint venture' to serve as the exclusive seller of their competing products." *Major League Baseball Props., Inc. v. Salvino, Inc., 542 F.3d 290, 335 (2d Cir. 2008)* (Sotomayor, J., concurring in judgment). Indeed, a joint venture with a single management structure is generally a better way to operate a cartel because it decreases the risk that a party to **[***11]** an illegal agreement will defect from that agreement. But, **HN11**[] competitors "cannot simply get around" antitrust liability by acting "through a third-party intermediary or joint venture." *Am Needle, 560 U.S. at 201* (internal quotations omitted).

Although joining together to carry out certain functions, defendant hospitals remain separate legal entities, each with their own assets, filing their own tax returns and maintaining a separate corporate identity with its own CEO and Board of Directors. The record also demonstrates that defendant hospitals compete with each other for physicians and patients, with each defendant **[**21]** hospital continuing to market certain hospital services to the public. Each of the defendant hospitals **[*943]** makes material independent decisions concerning their respective medical operations that are not managed by Premier, including staffing decisions and medical strategies concerning patient care.

Like the NFL teams in *American Needle*, each defendant hospital holds its own assets. Thus, the defendant hospitals only "partially" unite their economic interests, and they continue to have distinct, potentially competing interests. *See Am. Needle, 560 U.S. at 198*. **HN12**[] Any joint venture involves multiple sources of economic power cooperating to produce a product or provide a service. The benefits of cooperation do not transform concerted action into unilateral action that puts the joint venture beyond the reach of *§ 1*. As the Court noted, "Apart from their agreement to cooperate in exploiting those assets, . . . there would be nothing to prevent each of those teams from making its own market decisions . . . ." *Id. at 200*. Here, the defendant hospitals clearly did not completely align their interests, economic or otherwise. The defendant hospitals continue to function more or less as independent and competing hospitals that entered into **[**22]** the joint operating agreement largely to derive the benefit of conforming certain business practices to a uniform standard. The evidence shows that the joint venture under Premier's management is composed of individual hospitals that are separately incorporated, hold their assets separately, and compete with each other for patients. Like the NFL teams, each defendant hospital "is a substantial, independently owned" business that is "guided [by a] 'separate corporate consciousness[ ].'" *Id. at 196* (quoting *Copperweld, 467 U.S. at 771*).

[*12] Defendant Hospitals Continue to Compete**

The record also provides evidence that defendant hospitals continue to view themselves not as a single entity, but as competitors in the market. Defendants made statements to the public, among themselves and to a consultant hired by Premier, that demonstrate that they view themselves as separate entities. In 2010, Premier retained H*Works Consulting to help it devise a strategic five-year plan (2010-2015). One aspect of the study was to analyze the role of Premier and its relationship to its constituent elements, the defendant hospitals. As part of the process, 44 of defendants' "executives and key stakeholders" were interviewed by H*Works on a number **[**23]** of topics, including the integration of defendant hospitals. Pearce Fleming of H*Works conducted all of the interviews of defendants' executives, including Premier's Board of Trustees, the top level executives at Premier, and senior management from all the defendant hospitals. Fleming took contemporaneous notes of each interview, generating 11 sets of handwritten notes.

Based on these statements by defendants' top administrators, H*Works made a number of findings, including the following: "[Premier] partners do not collaborate or act as a system today, more often [Premier] partners find themselves competing with each other;" "[Premier] does not have an identity as a collaborative group, rather act as a confederacy that collaborates in a few areas (i.e., supplies, financing/access to capital, electronic medical records);" "[Premier] does not think of itself as integrated organization;" and "[Premier] Partners compete with each other for market share." H*Works Consulting, Key Interview Findings, at 8 (Apr. 2010). Specific statements from the interviews include: Premier is a "confederation of autonomous organizations" that cooperate in certain areas; "[t]he brand is the hospital, not [Premier];" defendant hospitals **[*944]** "do their own thing and act in their **[**24]** own self interest above that of [Premier];" and the joint venture structure was "designed to keep everyone separate." H*Works Consulting Interview Statements at 2-5 (Apr. 2010). The H*Works findings and interview statements set forth in its reports to Premier provide evidence that defendant hospitals uniformly agree that the they are driven to pursue individual hospital goals even after entering into the joint venture.

The district court refused to consider most of this compelling evidence, labeling it inadmissible hearsay. In refusing to consider the findings from H*Works, the district court **[***13]** found the statements "incomplete, anonymous personal opinions . . . . lack[ing] any context," ruling them "inadmissible, anonymous hearsay and speculation . . . ." *The Med. Ctr. at Elizabeth Place v. Premier Health Partners, 2014 U.S. Dist. LEXIS 169186, 2014 WL 7739356, at *4 (S.D. Ohio Oct. 20, 2014)*. To the contrary, many of the statements were attributable to a particular person. But, whether a specific identity is given or not, it was error to exclude these statements as they are admissions of a partyopponent, admissible under the hearsay exception in *Federal Rule of Evidence 801(d)(2)*.[6] ***HN13***[] An anonymous statement may be admissible under *Rule 801(d)(2)* in certain circumstances that demonstrate sufficient indicia of reliability as to the authenticity of the statement. *Davis v. Mobil Oil Expl. & Prod. Se., Inc., 864 F.2d 1171, 1174 (5th Cir. 1989)* (holding that anonymous **[**25]** statement was admissible as a statement by a party's agent under *Rule 801(d)(2)(D)*, and noting that "a district court should be presented with sufficient evidence to conclude that the person who is alleged to have made the damaging statement is in fact a party or an agent of that party . . . .").

The statements fall within the hearsay exception for admissions of party opponents under *Rule 801(d)(2)(D)* because the district court was presented with "sufficient evidence" to conclude that the person who made the statement is in fact "a party or an agent" of defendants. It is **[**26]** undisputed that the speakers, though some are unidentified by name or specific title, were all executives or "key" stakeholders of defendant hospitals. The statements were made in the scope of their employment relationship and during the existence of the joint venture. They acted within the scope of their employment in stating their views on the state of their operations and

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[6] The Rule states in relevant part:

(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

. . .

HN14[] (2) An Opposing Party's Statement. The statement is offered against an opposing party and:

(A) was made by the party in an individual or representative capacity;

(B) is one the party manifested that it adopted or believed to be true;

(C) was made by a person whom the party authorized to make a

statement on the subject;

(D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or

(E) was made by the party's coconspirator during and in furtherance of the conspiracy integration of those operations at the request of Premier's CEO. Thus, the sources of the **[***14]** statements are identified sufficiently to establish that they were made by agents of defendants acting within the scope of and during the existence of their employment relationship. *See* *Ryder v. Westinghouse Elec. Corp., 128 F.3d 128, 134 (3d Cir. 1997)* (holding in a similar situation that statements from unidentified executives **[*945]** were admissible because evidence established that though their precise identity was unknown, they were all "Westinghouse executives who had authority to make personnel decisions [and thus were] act[ing] within the scope of their employment in stating their views on the state of their workforce . . . ."). ***HN15***[] The crucial question is whether there is evidence that the unidentified declarants were speaking on a matter within the scope of their employment, not their identity. *Back v. Nestlé USA, Inc., 694 F.3d 571, 578 (6th Cir. 2012)*.

[27] III. Conclusion**

The gravamen of plaintiff's complaint is that in creating a joint venture, defendants colluded to keep plaintiff from competing in the Dayton hospital market through a number of avenues. The evidence of emails, letters, and the statements elicited by the consultant, together with the lack of shared assets by the defendants, raises a genuine issue of material fact as to whether defendant hospitals have "separate" corporate consciences or whether they should be considered a single entity for purposes of the antitrust laws. All of these facts suggest that defendant hospitals are actually competitors attempting to eliminate another competitor through concerted action. When viewing the record in the light most favorable to plaintiff, a reasonable juror might conclude that, aside from a business relationship pursuant to the joint operating agreement, defendant hospitals maintained separate identities and acted more like competitors than one unit. *Expert Masonry, Inc. v. Boone Cty., Ky., 440 F.3d 336, 341 (6th Cir. 2006)* ("In this circuit, courts are generally reluctant to use summary judgment dispositions in antitrust actions due to the critical 'role that intent and motive have in antitrust claims and the difficulty of proving conspiracy by means **[**28]** other than factual inference.'")(quoting *Smith v. Northern Mich. Hosps., 703 F.2d 942, 947 (6th Cir. 1983))*.

Because plaintiff presented evidence of conduct and business operations that raise the possibility of concerted action among defendant hospitals, the question remains upon remand **[***15]** whether hospitals that had previously pursued their own interests separately, and that continue to seem to compete, combined unlawfully to restrain competition.

For the foregoing reasons, the judgment of the district court is reversed, and the case is remanded for further proceedings consistent with this opinion.

Dissent by: GRIFFIN

Dissent

[*16]** GRIFFIN, Circuit Judge, dissenting. To succeed on a *§ 1* claim under the Sherman Antitrust Act, a plaintiff must establish that the defendants: "(1) participated in an agreement that (2) unreasonably restrained trade in the relevant market." *Worldwide Basketball and Sport Tours, Inc. v. NCAA, 388 F.3d 955, 959 (6th Cir. 2004)*. Because *§ 1* "does not reach conduct that is wholly unilateral," *Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 768, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)* (internal quotation marks omitted), proving the first element involves a threshold showing that the defendants are separate entities capable of concerted action. That is the only question before us: "whether defendants . . . should be characterized as a single entity." (Majority opinion.)

The test we apply to determine single-entity status is from *American* ***[**29]*** *Needle* and *Copperweld*: whether the defendants are "separate economic actors pursuing separate economic interests," such that their agreement "'deprives the marketplace of independent centers of decisionmaking,' . . . and thus of actual or potential competition." *Am. Needle, Inc. v. Nat'l Football* ***[*946]*** *League, 560 U.S. 183, 195, 130 S. Ct. 2201, 176 L. Ed. 2d 947 (2010)* (quoting *Copperweld, 467 U.S. at 769*).

My colleagues begin not with *American Needle* and *Copperweld*, but with the "rule of reason" as articulated in Board of Trade v. United States, 246 U.S. 231, 38 S. Ct. 242, 62 L. Ed. 683 (1918)—a test that may come into play only for the second part of the inquiry—i.e., in determining whether the agreement itself constitutes an "unreasonable restraint" on trade. *See* Am. Needle, 560 U.S. at 203 ("[T]he restraint must be judged according to the flexible Rule of Reason.") (footnote omitted); *see also* Worldwide Basketball, 388 F.3d at 959 ("Whether an agreement *unreasonably* restrains trade is determined under one of two approaches: the *per se* rule and the rule of reason.").[1] Reaching this issue is premature. Because of its ruling that defendants are a single entity for § 1 purposes, the district court never considered whether defendants "participated in [any] agreement," much less an agreement to restrain trade unreasonably.

[*17]** The majority's misapplication of *American Needle* is problematic. Invoking the rule of reason steers focus to defendants' intent to avoid competition with plaintiff and away from the relevant question: whether, under the terms of their Joint Operating Agreement (JOA), defendant hospitals and their joint operating company, Premier Health Partners (Premier), share "a complete unity of interest," Copperweld, 467 U.S. at 771, and represent a single center of decisionmaking. I conclude they do. Thus, I would affirm summary judgment in favor of defendants and respectfully dissent.

I.

"The Sherman Act contains a 'basic distinction between concerted and independent action.'" Id. at 767 (quoting Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)). Section 2 of the Act governs conduct by a single firm that "threatens actual monopolization," while § 1 reaches "unreasonable restraints of trade effected by a 'contract, combination or . . . conspiracy' between separate entities." Id. at 767-68 (quoting 15 U.S.C. § 1). Concerted activity between two parties is "inherently . . . fraught with anticompetitive risk." Id. at 768-69. "In any conspiracy, two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit." Id. at 769. As a result, **[**31]** the conspirators profit from increased economic power, while depriving the market "of the independent centers of decisionmaking that competition assumes and demands." *Id.*

That concern does not apply, however, when the actors share "a complete unity of interest," such as when the coordinated conduct occurs between officers and employees of the same company, or a corporation and one of its unincorporated divisions. Id. at 769-71. "[O]fficers of a single firm are not separate economic actors pursuing separate economic interests, so agreements among them do not suddenly bring together economic power that was previously pursuing divergent goals." Id. at 769. Following this reasoning in *Copperweld*, the Supreme Court held that the coordinated activity of a parent corporation **[*947]** and its wholly owned subsidiary "must be viewed as that of a single enterprise for purposes of § 1 of the Sherman Act." Id. at 771.

[*18]** Although *Copperweld* limited its inquiry to the context of parent and wholly owned subsidiary corporations, *see* id. at 767, the Court emphasized "the broader principle that substance, not form, should determine whether a separately incorporated entity is capable of conspiring under § 1." Id. at 773 n.21. Whether two legally separate entities constitute a single actor **[**32]** depends upon commonality of interest, not corporate formality. Thus, "although a parent corporation and its wholly owned subsidiary are 'separate' for the purposes of incorporation or formal title, they are controlled by a single center of decisionmaking and they control a single aggregation of economic power. Joint conduct by two such entities does not 'depriv[e] the marketplace of independent centers of decisionmaking.'" Am. Needle, 560 U.S. at 194 (quoting Copperweld, 467 U.S. at 769).

The Supreme Court reiterated the substance-over-form analysis in *American Needle*, which involved an antitrust claim against National Football League Properties (NFLP), an organization formed by the 32 teams in the National Football League (NFL), "to develop, license, and market [each team's] intellectual property." 560 U.S. at 187. Traditionally, NFLP granted nonexclusive licenses to vendors, including American Needle, to manufacture and sell

[1] Citing the rule of reason seems all the more misplaced here, where plaintiff alleges that defendants' conduct constitutes a *per se* violation of § 1, not **[**30]** a violation under the "flexible Rule of Reason." Am. Needle, 560 U.S. at 203.

clothing bearing NFL team insignias. *Id.* In 2000, however, NFLP granted Reebok an exclusive license to sell trademarked headwear for all 32 teams. *Id.* American Needle sued, claiming the NFL, its teams, the NFLP, and Reebok violated *§§ 1* and *2* of the Sherman Act. *Id. at 187-88*. Defendants NFL and NFLP asserted they were incapable of conspiring with each other **[**33]** "because they are a single economic enterprise, at least with respect to the conduct challenged." *Id. at 188*. The district court agreed and granted defendants' motion for summary judgment. The Seventh Circuit affirmed, noting the teams "can function only as one source of economic power when collectively producing NFL football." *Id.*

The Supreme Court reversed. Explaining the single-entity inquiry, the Court stated:

> [T]he question is not whether the defendant is a legally single entity or has a single name; nor is the question whether the parties involved "seem" like one firm or multiple firms in any metaphysical sense. The key is whether the alleged "contract, combination . . . or conspiracy" is concerted action—that is, whether it joins together separate decisionmakers. The relevant inquiry, therefore, is whether there is a "contract, combination . . . or conspiracy" amongst "separate economic actors pursuing separate economic interests" . . . such that the **[***19]** agreement "deprives the marketplace of independent centers of decisionmaking," and therefore of "diversity of entrepreneurial interests," and thus of actual or potential competition.

Id. at 195 (citations omitted).

Applying this test, the Court ruled the independently **[**34]** owned NFL teams were capable of conspiring with one another. Though "*partially* unite[d]" by the fact that they all benefit from the success of the NFL brand, each team "still ha[d] distinct, potentially competing interests." *Id. at 198*. Teams compete with one another on the field for fans, for contracts with managerial and player personnel, **[*948]** and "in the market for intellectual property." *Id. at 196-97*. A team licensing its intellectual property "is not pursuing the common interests of the whole league but is instead pursuing interests of [the] 'corporation itself,'. . . teams are acting as 'separate economic actors pursuing separate economic interests,' and each team therefore is a potential 'independent cente[r] of decisionmaking.'" *Id. at 197* (quoting *Copperweld, 467 U.S. at 770*) (citation omitted). The fact that the teams had formed the NFLP to market their brands through a single outlet was not dispositive. "An ongoing *§ 1* violation cannot evade *§ 1* simply by giving the ongoing violation a name and a label." *Id.*

Whether the NFLP's decisions constituted concerted action was a closer question. "This is so both because NFLP is a separate corporation with its own management and because the record indicates that most of the revenues generated by NFLP are shared by the teams **[**35]** on an equal basis." *Id. at 200*. Nevertheless, because each team acted for its own separate interest in making NFLP decisions, the Court held that those decisions fell within the reach of *§ 1*. *Id.* "Thirty-two teams operating independently through the vehicle of the NFLP are not like the components of a single firm that act to maximize the firm's profits." *Id. at 201*. Instead, each team garnered economic benefits "separate and apart from NFLP profits as a result of the decisions they make for the NFLP." *Id.* Accordingly, because each team was acting for its own interest, and not simply the interest of the NFLP as a whole, "decisions by the NFLP regarding the teams' separately owned intellectual property constitute[d] concerted action." *Id.*

[*20]** II.

As the majority states, *American Needle* "eschewed formalistic distinctions in favor of a functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate." *Am. Needle, 560 U.S. at 191*. Guided by the rule of reason, my colleagues interpret this directive to mean that we should ask how defendants "actually operate" with regard to plaintiff—specifically, their intent to keep plaintiff out of the market as expressed through apparent threats by Premier's executives and **[**36]** the boycott defendants allegedly arranged among the insurance companies. This view is flawed. Defendants' intent to exclude others from the market is irrelevant to determining whether defendants themselves constitute a single entity. To resolve that question, we should consider how defendants "actually operate" amongst each other.

American Needle asks if "the [anticompetitive] agreement joins together independent centers of decisionmaking" between the defendant entities. *560 U.S. at 196* (internal quotation marks omitted). Defendant hospitals were independent centers of decisionmaking before forming Premier as their joint operating company, but the question here is whether that independence survived the creation of the joint venture; whether, when acting through Premier, defendants are "pursuing the common interests of the whole," or whether each defendant has a remaining, independent economic interest, such that it could be "pursuing the interests of [the] corporation itself," even in the course of taking joint action. *Id. at 197* (internal quotation marks omitted). What matters then is whether defendants remain in competition *with each other*, not whether they intend to ward off competition with a third party. **[**37]** The Supreme Court's reasoning makes this point plain:

> **[*949]** Agreements made within a firm can constitute concerted action covered by *§ 1* when the parties to the agreement act on interests separate from those of the firm itself . . . .
>
> For that reason, decisions by the NFLP regarding the teams' separately owned intellectual property constitute concerted action. Thirty-two teams operating independently through the vehicle of the NFLP are not like components of a single firm that act to maximize the firm's profits. The teams remain separately controlled, potential competitors with economic interests that are distinct from NFLP's financial well-being. Unlike typical decisions by corporate shareholders, NFLP licensing decisions effectively require the assent of more than a mere **[***21]** majority of shareholders. And each team's decision reflects not only an interest in NFLP's profits but also an interest in the team's individual profits.

Id. at 200-01 (citations and footnotes omitted). Defendants' wish to avoid competing with plaintiff tells us nothing about whether defendant hospitals are themselves "potential competitors with economic interests that are distinct from [Premier's] financial well-being" as a whole.

III.

[38]** The best evidence of how Premier and the defendant hospitals "actually operate" is the parties' JOA. The majority concedes that the JOA vests Premier with control over the hospitals' "management functions," but insists—without discussion of the agreement's terms—that "questions remain" as to whether defendants are guided by a single corporate consciousness. Review of the JOA should resolve those questions. From the outset, the JOA identifies corporate unification as an overarching goal: "The vision of the Parties is to create and operate the JOC [joint operating company] Network as a multi-entity, integrated health care delivery system for the Miami Valley Region that is positioned for the future and not simply a continuation of the large JOC Hospitals."

Executing on that vision, the agreement creates a "unity of interest" among defendant hospitals by establishing a system of shared income:

- The JOA provides that its financial arrangements are intended to promote the functioning of Premier and defendant hospitals as an "integrated health system."
- Defendants' net incomes are totaled each year into a single "network net income," to be allocated to the parties based on predetermined percentages **[**39]** in the JOA.
- Defendants also share losses according to the same predetermined percentages.

Most importantly, the allocation of network net income is not linked to any individual hospital's revenue or profitability. For example, defendant MedAmerica Health Systems is entitled to 55.35% of the network net income under the JOA. Because defendants' revenues are combined in totaling the network net income, MedAmerica receives 55.35% of the profit earned from a patient regardless of whether that patient is treated at Atrium Health System, Samaritan Health **[***22]** Partners, Catholic Health Initiatives, UVMC, or MedAmerica's own facility. Unlike the NFL teams in *American Needle*, who maintained "economic interests . . . distinct from NFLP's financial well-being," *560 U.S. at 201*, no single hospital has any incentive to become more profitable by attracting more patients than the **[*950]** other.[2] The majority is therefore incorrect to say "defendant hospitals compete with each other for . . . patients." They do not.

To be sure, revenue sharing is not dispositive of single-entity status. Competitors cannot side-step antitrust liability merely by sharing revenue through a joint venture. "If the fact that potential competitors shared in profits or losses from a venture meant that the venture was immune from *§ 1*, then any cartel 'could evade the ***antitrust law*** simply by creating a "joint venture" to serve as the exclusive seller of their competing products.'" *Am. Needle, 560 U.S. at 201* (quoting *Major League Baseball Props., Inc. v. Salvino, Inc., 542 F.3d 290, 335 (2d Cir. 2008)* (Sotomayor, J., concurring in judgment)).

But defendants' integration is not limited to profits and losses on a balance sheet. The JOA grants Premier significant operational authority over each defendant hospital. In particular:

- It designates Premier as the "operator" for all health system activities and requires Premier to coordinate and have authority over all of those activities. Premier has general authority to operate and manage the operations of the health system activities of all defendants.
- Defendant hospitals' CEOs report to Premier's COO.
- Each defendant's management reports to Premier's executives, and Premier's system vice presidents and senior vice presidents serve at the top of each department throughout the system.
- Premier **[**41]** has integrated a number of system management functions among defendant hospitals, such as managed care and legal functions, into single departments for the entire system.
- The JOA grants Premier authority and control over defendants' strategic plans, budgets, and business plans.
- The JOA requires Premier to develop and oversee the implementation of a strategic plan for all system activities, and each defendant must comply with and implement the strategic plan.
- **[***23]** It also requires Premier to develop annual capital expenditure and operating budgets for the system, and each defendant must adopt and implement the budget approved for it by Premier.
- Premier's CEO has the power to remove each defendant hospital's CEO.
- Premier controls defendant hospitals' material debt incurrence and negotiates and manages their relationships with insurance companies.

Although each defendant hospital retains its separate corporate existence, along with the right to amend or repeal their corporate governing documents, the JOA requires them to "take all corporate action . . . as required to implement" Premier's authority. Defendants are also prohibited from modifying corporate documents in a manner inconsistent **[**42]** with the JOA without prior approval. To the extent defendant hospitals' corporate documents conflict with the JOA, the JOA controls.

The majority's reply that "defendant hospitals remain separate legal entities . . . [each] filing their own tax returns and maintaining a separate corporate identity with its own CEO and Board of Directors" is beside the point. Finding an issue of fact on these grounds elevates form over substance. "[T]he question is not whether **[*951]** the defendant is a legally single entity or has a single name"; rather, the question is one of functional reality. *Am. Needle, 560 U.S. at 195*. And the functional reality is that the JOA unifies defendant hospitals under Premier's flagship.

That reality is not changed by the fact that the hospitals maintain individually-owned assets. Neither *American Needle*, nor *Copperweld*, discusses the role of asset ownership as part of the single-entity inquiry. Yet the majority makes a point of quoting the single mention of "assets" in *American Needle*: "NFLP's licensing decisions are made by the 32 potential competitors, and each of them actually owns its share of the jointly managed assets. Apart from their agreement to cooperate in exploiting those assets, including their **[**43]** decisions as the NFLP, there would be nothing to prevent each of the teams from making its own market decisions relating to purchases of apparel and

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[2] Additionally, defendants' counsel represented at oral argument that Premier sets prices for all hospital services performed by physician-employees, ensuring that each hospital charges the same price for the same service. **[**40]**

headwear, to the sale of such items, and to the granting of licenses to use its trademarks." *Id. at 200* (citation omitted).

This language does not establish that asset ownership is important to the single-entity inquiry. Viewed in context, the Court's mention of assets is merely a reiteration of its primary **[***24]** holding; "there would be nothing to prevent each of the [NFL] teams from making its own market decisions" because they remained independent centers of decisionmaking capable of acting on separate economic interests—even while making joint decisions through the NFLP:

> The 32 teams capture individual economic benefits separate and apart from NFLP profits as a result of the decisions they make for the NFLP. NFLP's decisions thus affect each team's profits from licensing its own intellectual property. "Although the business interests of" the teams "will *often* coincide with those of the" NFLP "as an entity in itself, that commonality of interest exists in every cartel." In making the relevant licensing decisions, NFLP is therefore "an instrumentality" **[**44]** of the teams.

Am. Needle, 560 U.S. at 201 (citations omitted). Here, by contrast, defendant hospitals are not capable of acting on separate economic interests. All of their profits are shared as part of the network net income. They do not "capture individual economic benefits separate and apart from" that income. *Id.* Individual ownership of assets carries little weight when all the economic benefit of those assets is mutually shared. Defendant hospitals are also distinguishable from the teams in *American Needle* by virtue of their decision to cede substantial operational control over to Premier. Consequently, there is something to prevent them from making "[their] own market decisions" wholly "[a]part from their agreement to cooperate in exploiting [their individually-owned] assets." *Id. at 200*.

To the extent that asset ownership matters, it must be evaluated as part of *American Needle's* "functional analysis," *id. at 192*, which in this case directs us back to the JOA. The JOA grants Premier substantial control over the defendant hospitals' individually-owned assets—a fact the majority does not address. Defendant hospitals are prohibited from "sell[ing], convey[ing], transfer[ring], or otherwise dispos[ing] of any material asset used in JOC Activities" to any entity other than a fellow **[**45]** defendant hospital without Premier's prior approval. Further:

- It gives Premier authority to use any of defendant hospitals' resources, facilities, or supplies for the system's activities.

- **[*952]** Plaintiff cited no evidence to dispute defendants' claim that Premier has, in fact, consolidated programs, moved equipment between facilities, and limited procedures occurring in certain facilities.

- **[***25]** The JOA also authorizes Premier to assess costs to the hospitals for implementation of new technologies and programs—including building, equipment acquisition, and training costs—and Premier exercises that authority.

Functionally, defendant hospitals own their assets in name only, without deriving any individual benefit from those assets. Defendants' inability to manage their own assets should therefore serve as another marker of Premier's centralized control—not a fact that brings their corporate unification into question.

IV.

In addition to defendants' anticompetitive intent, and individually-owned assets, the majority finds that the anonymous H*Works statements are evidence "that defendant hospitals continue to view themselves . . . as competitors in the market." I disagree.

Setting aside the question **[**46]** of admissibility, this evidence does not create a genuine issue of material fact. "When the moving party has carried its burden . . . , its opponent must do more than simply show there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)* (footnote and citation omitted). While we may reasonably infer that the issue of economic integration was within the scope of employment for some of the 44 "executives and key stakeholders" involved in the H*Works project, the circumstances surrounding the statements do not prove that the statements are related to that issue.

The purpose of the H*Works project was to help Premier "devise a strategic five-year plan," and "analyze the role of Premier and its relationship to . . . defendant hospitals." (Majority opinion.) According to plaintiff, defendants "hoped to . . . improve strategic integration, coordination, systems thinking and market leverage"—goals that involve more than just economic integration. The variety of topics addressed in the H*Works statements confirms as much; they include thoughts on creating a more "patient centered approach," Premier's need to "expand to other communities," and complaints from doctors that Premier "must answer **[**47]** the 'what's in it for me' question for physicians and prove it to them."

[*26]** The JOA establishes "control[] by a single center of decisionmaking [i.e., Premier]," as well as "a single aggregation of economic power." *Am. Needle, 560 U.S. at 194*. Defendants have therefore carried their burden to establish an overall unity of interest. Plaintiff has not rebutted the factual basis for defendants' motion. Considered in context, the H*Works statements cast no more than a "metaphysical doubt" upon that unity. Thus, "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party," and "there is no genuine issue for trial." *Matsushita, 475 U.S. at 587* (internal quotation marks omitted).

V.

Defendants' alleged conduct in this case, if proven at trial, is indeed anticompetitive. But the *Sherman Act* does not proscribe unreasonable restraints on trade by a single entity; "it leaves untouched a single firm's anticompetitive conduct (short of threatened monopolization) that may be indistinguishable in economic effect from the conduct of two firms subject to *§ 1* **[*953]** liability." *Copperweld, 467 U.S. at 775*. "Congress left this 'gap'" purposefully, "for eminently sound reasons." *Id.* A prohibition against independent action "that merely restrains trade . **[**48]** . . could deter perfectly competitive conduct by firms that are fearful of litigation costs and judicial error." *Am. Needle, 560 U.S. at 190 n.2*. Regardless of their intent to keep plaintiff out of the market, defendants have demonstrated a complete unity of interest and a single center of decisionmaking. "Unless we second-guess the judgment of Congress to limit *§ 1* to concerted conduct," *Copperweld, 467 U.S. at 776*, we are without authority to check them.

For these reasons, I respectfully dissent. I would affirm the judgment of the district court.

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United States Postal Serv. v. Postal Regulatory Comm'n

United States Court of Appeals for the District of Columbia Circuit

November 20, 2015, Argued; March 22, 2016, Decided

No. 15-1018

Reporter

816 F.3d 883 *; 421 U.S. App. D.C. 486 **; 2016 U.S. App. LEXIS 5187 ***; 2016 WL 1104748

UNITED STATES POSTAL SERVICE, PETITIONER v. POSTAL REGULATORY COMMISSION, RESPONDENT, GAMEFLY, INC. AND NETFLIX, INC., INTERVENORS

Prior History: [*1]** On Petition for Review of an Order of the Postal Regulatory Commission.

Core Terms

streaming, market power, mailer, round-trip, products, downstream, customers, upstream, market-dominant, consumers, substitution, antitrust, percent, offers, prices

LexisNexis® Headnotes

Governments > Federal Government > US Postal Service

HN1[] **Federal Government, US Postal Service**

By statute, the U.S. Postal Service's products are divided into "competitive" products, which are subject to a statutory price floor, and "market-dominant" products, which are subject to a statutory price ceiling.

Governments > Federal Government > US Postal Service

HN2[] **Federal Government, US Postal Service**

Market-dominant products obviously include those that are an actual monopoly, but the governing statute describes market-dominant products more broadly as those in the sale of which the U.S. Postal Service exercises sufficient market power. *39 U.S.C.S. §§ 3621-3634*.

Governments > Federal Government > US Postal Service

HN3[] **Federal Government, US Postal Service**

39 U.S.C.S. § 3642(b)(1), the governing statute's definition of a market-dominant product, includes all products meeting the following description: Each product in the sale of which the U.S. Postal Service exercises sufficient market power that it can effectively set the price of such product substantially above costs, raise prices significantly, decrease quality, or decrease output, without risk of losing significant levels of business to other firms offering similar products.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization

Governments > Federal Government > US Postal Service

HN4[] **Regulated Practices, Monopolies & Monopolization**

A statutory price cap, indexed to inflation, is meant to assure that the U.S. Postal Service does not abuse a dominant position. This is not unlike rate regulation for other state-granted monopolies. The language of *39 U.S.C.S. § 3642* has been consistently taken to reflect basic antitrust concerns with market power.

Administrative Law > Judicial Review > Standards of Review

HN5[] **Judicial Review, Standards of Review**

When an appellate court is reviewing an administrative agency decision under the Administrative Procedure Act, it means the agency is entitled to deference.

Governments > Federal Government > US Postal Service

HN6[] **Federal Government, US Postal Service**

In the context of *39 U.S.C.S. § 3642(b)(1)*, market power analysis need account for only potential substitutes that constrain pricing in the reasonably foreseeable future.

Counsel: David C. Belt, Attorney, U.S. Postal Service, argued the cause and filed the briefs for petitioner. Stephan J. Boardman, Chief Counsel, entered an appearance.

Henry C. Whitaker, Attorney, U.S. Department of Justice, argued the cause for respondent. With him on the brief were Benjamin C. Mizer, Principal Deputy Assistant Attorney General, Michael S. Raab, Attorney, David A. Trissell, General Counsel, Postal Regulatory Commission, Christopher J. Laver and Anne J. Siarnacki, Deputy General Counsels, and Richard A. Oliver, Attorney.

Joy M. Leong, David M. Levy, and John F. Cooney were on the brief for intervenors GameFly, Inc. and Netflix, Inc. in support of respondent. Matthew D. Field entered an appearance.

Judges: Before: PILLARD, Circuit Judge, SILBERMAN and SENTELLE, Senior Circuit Judges. Opinion for the Court filed by Senior Circuit Judge SILBERMAN.

Opinion by: SILBERMAN

Opinion

[*884] **[**487]** SILBERMAN, *Senior Circuit Judge*: The Postal Service offers a host of different products for consumers and businesses. ***HN1***[] By statute, the Postal Service's products are divided into "competitive" products, which are subject to a statutory price floor, and "market-dominant" **[***2]** products, which are subject to a statutory price ceiling. In this case, the Postal Service applied to the Postal Regulatory Commission to have one of the Service's products, the "round-trip mailer," used in the DVD-by-mail industry, classified as competitive rather than market-dominant. The Commission denied the request, and the Postal Service petitioned for review. We deny the petition.

I.

The round-trip mailer is a product used by intervenors Netflix and GameFly whereby customers receive a DVD disc by mail that they can return with an enclosed envelope. Netflix, a provider of movies, is the dominant purchaser of this product, with nearly 97 percent of purchases.[1] It is provided only by the Postal Service; Fed Ex and UPS do not offer anything similar. Customers, to be sure, can also rent DVDs at various physical locations, such as storefronts and kiosks, but these alternatives are declining. Movies can also be delivered to customers through streaming directly to televisions or computers, and that is a booming market in which Netflix, which also offers streaming, meets a number of direct competitors.

Netflix customers are, in huge numbers, leaving the **[***3]** DVD-by-mail service. After peaking in 2010, DVD-by-mail declined 14 percent, and then another 41, 21, and 22 percent, year over year. Meanwhile, streaming service continues to expand, growing 26, 25, and 19 percent, year over year, from 2012 to 2014. Nevertheless, a significant core continues to use the round-trip mailer service, in part because the content available through the round-trip mailer is more extensive than that available through streaming and, in part, for difficulties in reception with streaming. Indeed, nearly two-thirds of all DVD-by-mail customers also subscribe to streaming. Importantly, although the round-trip mailer is a declining product, it remains quite profitable to Netflix, with a profit margin of nearly 50 percent. That makes it considerably more profitable than streaming.

In 2013, the Postal Service formally requested that the Commission remove the round-trip mailer from the market-dominant list, where it is subject to a statutory price ceiling, and place it on the competitive product list, where it would be subject to only a statutory price floor. The request was opposed by intervenors Netflix and GameFly, as well as by a Commission-appointed public representative. **[***4]** ***HN2***[] Market-dominant products obviously include those that are an actual monopoly, but the governing statute describes market-dominant products more broadly as those "in the sale of which the Postal Service exercises sufficient market power." *See* *39 U.S.C. §3621-3634*.

As noted, the Commission denied the request. Applying antitrust concepts, it defined the relevant market as the physical delivery of DVDs by mail, and ruled that the Postal Service, as the only entity producing the round-trip mailer, exercised sufficient power within that market to justify a market-dominant classification.

II.

HN3[] Section *39 U.S.C. § 3642(b)(1)*, the governing statute's definition of a market-dominant **[*885]** **[**488]** product, includes all products meeting the following description:

> [E]ach product in the sale of which the Postal Service exercises sufficient market power that it can effectively set the price of such product substantially above costs, raise prices significantly, decrease quality, or decrease output, without risk of losing significant levels of business to other firms *offering similar products*. (emphasis added)

It would seem that a permissible reading of the statute would foreclose the Postal Service's position because arguably there really are no products in the marketplace **[***5]** "similar" to the round-trip mailer. But the Commission does not rely on that interpretation of the language. Instead, the Commission and all parties agree that the statute should be read as incorporating general concepts of federal ***antitrust law***.[2]

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[1] GameFly provides video games on disc.

[2] ***HN4***[] A statutory price cap, indexed to inflation, is meant to assure that the Postal Service does not abuse a dominant position, *see* *U.S. Postal Serv. v. Postal Regulatory Comm'n, 785 F.3d 740, 744, 415 U.S. App. D.C. 141 (D.C. Cir. 2015)*. This

In that regard, the Postal Service contends that the Commission erred in its definition of the market. First, it made too much of the difference between DVD-by-mail and streaming services, whereas ***antitrust law*** has traditionally recognized that even differentiated products, provided they are reasonable substitutes for one another, may be included in the same market. In this case, the precipitous drop in DVD-by-mail customers, which has attended the concurrent rise in streaming services, strongly suggests, argues the Postal Service, that a substantial substitution is taking place, at the consumer level, between the two forms of delivery. That substitution **[***6]** is an indication that whatever the differences between DVD-by-mail and streaming, customers see them as similar enough that they ought be considered in the same market. And as DVD-by-mail service is in the same market as streaming services downstream, the Service argues that streaming services have the effect of disciplining the price the Postal Service can charge for DVD-by-mail service upstream, thus mitigating any market power.

Secondly, the Postal Service argues that the Commission relied too heavily on the "core" group of DVD-by-mail consumers who do not use streaming services. While any product will have core consumers who refuse to switch products even in the face of price increases, the Commission, we are told, overemphasized their numbers or loyalty. This misconception led to an unduly narrow definition of the downstream market, failing to take account of the constraints faced by the Postal Service upstream in setting its price for the round-trip mailer.

In the alternative, the Postal Service offers two arguments apart from market definition. Even if the definition of the relevant market was not unreasonable, the Commission still failed to consider that Netflix, as a near-monopsonist **[***7]** in purchasing the round-trip mailer upstream, can exercise strong countervailing buyer power. As such, it would limit the Postal Service's pricing discretion. And the Commission did not consider that the market, defined as *either* DVD-by-mail or distribution of content generally, is in a constant state of technological evolution. Such change provides an intrinsic limitation on the exercise of market power.

The Commission's arguments dovetail with its considerations set forth in its order. In defending its definition of the relevant market as limited to DVD-by-mail, **[*886]** **[**489]** the Commission emphasizes evidence that DVD-by-mail provides a different range of material, and services a different base of consumers, than streaming and other distribution channels. Regarding substitutability, it is noteworthy that many customers subscribe to *both* DVD-by-mail and streaming services. It further disputes the Postal Service's assertion that the simultaneous decline in DVD-by-mail subscriptions and increase in streaming subscriptions suggests a high enough substitutability to justify a unified market, because the shift toward streaming may have nothing to do with price sensitivity of DVD-by-mail customers; it **[***8]** may just as well result from broader market trends unrelated to price-based substitution.

The Commission stresses that the Postal Service bore the burden in the present case. It was obliged to present evidence demonstrating that, despite the fact that the Postal Service is the only entity providing the round-trip mailer for DVD-by-mail services, it nevertheless lacked market power. That evidence, particularly in the form of price elasticity data, was lacking. Thus, the Commission argues it was reasonable to conclude that the Postal Service did not meet its burden.

Finally, the Commission contends that even if there is downstream competition between delivery by mail and delivery by other means (such as streaming and kiosks), the Postal Service still failed to show that it would not be in a position to simply capture more of Neflix and GameFly's profits upstream. Even if increased prices resulting from a new classification could not be passed on by Netflix and GameFly because of rugged downstream competition, the removal of a price ceiling would allow the Postal Service to use its position as the sole provider of the round-trip mailer to capture a larger portion of the intervenors' profits. **[***9]**

* * *

Petitioner's case essentially rests on the proposition that the proliferation of competitors in the downstream market (direct sales to consumers) restricts the capacity of the Postal Service to raise prices to Netflix and GameFly. Therefore, the Postal Service contends, streaming services and DVD-by-mail services compete with each other

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is not unlike rate regulation for other state-granted monopolies. The language of 39 U.S.C. § 3642 has been consistently taken to reflect basic antitrust concerns with market power.

and, under ***antitrust law***, should be treated as a single market. We should note at the outset of our analysis that we do not sit as an appellate court reviewing an antitrust case from the district court. Rather ***HN5***[] we are reviewing an administrative agency decision under the APA — which means the agency is entitled to deference. Even if we were to disagree with the Commission's economic analysis, we are obliged to affirm if the agency was at least reasonable.[3] *See* *City of Los Angeles v. Dept. of Transp., 165 F.3d 972, 977, 334 U.S. App. D.C. 185 (D.C. Cir. 1999)* ("[W]e do not sit as a panel of referees on a professional economics journal, but as a panel of generalist judges obliged to defer to a reasonable judgment by an agency acting pursuant to congressionally delegated authority.").

But we think the Commission was more than just reasonable; its decision seems rather compelling. As the Commission found, **[***10]** the petitioner produced no evidence to establish that a significant increase in the price of DVD-by-mail — the cost to Netflix and GameFly in the upstream market — would result in a significant shift by Netflix or GameFly away from purchasing DVD-by-mail services upstream. In other words, there was no evidence presented to **[*887]** **[**490]** establish at what point an increase in the price the Service charged would cause Netflix and Gamefly to look elsewhere for distribution.

There is a fundamental logical flaw in the Service's argument. The Service enjoys market power in the (upstream) distribution market regardless of conditions in the (downstream) content market because it does not face any competition in the distribution market. Whether because of economic or legal hurdles, no other business offers or seems reasonably poised to offer a competing distribution channel that Netflix could readily take advantage of. If the Postal Service were to raise the price of its round trip mailer to Netflix and GameFly, there are only two possibilities. First, it may be the downstream market is not sufficiently competitive, and thus Netflix and GameFly could pass on the price increase to consumers without consequence. **[***11]** Second, alternatively, it may be the downstream market is competitive, and thus Netflix and GameFly could not pass on the price increase to consumers without losing them. In the first instance, the Postal Service's market power upstream coexists with Netflix and Gamefly's market power downstream. They would share in the supracompetitive price. In the second instance, although Netflix and Gamefly lack power downstream, the Service's power upstream remains, and puts it in a position to extract more of the profit margin of its captive suppliers. In either case, the Postal Service employs market power.[4]

There remain petitioner's two other arguments, even assuming it can be thought to have market power. First, that Netflix — after all, a market behemoth — has sufficient economic clout to counter petitioner's market power. But that theory simply doesn't apply in this case because Netflix and GameFly have no alternative means to transport DVDs by mail, so there is no way that Netflix could exercise any bargaining leverage *vis-a-vis* the Postal Service. It should be obvious that as long as the DVD-by-mail business is quite profitable, Netflix has no rational economic course but to pay the market-dominant piper. As to the second alternative argument, regarding the speed of technological change, we have said that ***HN6***[] market power analysis need account for only potential "substitutes that constrain pricing in the reasonably foreseeable future." *United States v. Microsoft Corp., 253 F.3d 34, 53-54, 346 U.S. App. D.C. 330 (D.C. Cir. 2001)*. The Commission was not, therefore, unreasonable to hold that the potential technological evolution suggested by the Service was too speculative to condition its market power analysis here.

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[3] In other words, not arbitrary and capricious, *see* *Gundersen Lutheran Med. Ctr., Inc. v. Sebelius, 666 F.3d 1335, 1337, 399 U.S. App. D.C. 68 (D.C. Cir. 2011)*; *Blumenthal v. FERC, 613 F.3d 1142, 1146-47, 392 U.S. App. D.C. 175 (D.C. Cir. 2010)*.

[4] Court precedent, and antitrust doctrine generally, recognize that market power may be exercised upstream, even where there is a competitive market downstream. *See* *Coal Exporters Association v. United States, 745 F.2d 76, 84-85, 240 U.S. App. D.C. 256 (D.C. Cir. 1984)*; 2B AREEDA ET. AL., ***ANTITRUST LAW*** ¶ 564 (4th ed. 2014). This effect is recognized in several other antitrust inquiries that involve market power, *see* *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc., 549 U.S. 312, 127 S. Ct. 1069, 166 L. Ed. 2d 911 (2007)* (finding buyer power in upstream market for inputs, despite lack of seller power in national downstream market for outputs); *Mandeville Island Farms v. American Crystal Sugar Co., 334 U.S. 219, 68 S. Ct. 996, 92 L. Ed. 1328 (1948)* (finding market power upstream, despite lack of power downstream); EINER ELHAUGE, UNITED STATES ***ANTITRUST LAW*** AND ECONOMICS, 172, 263 (2d ed. 2011); HERBERT **[***12]** HOVENKAMP, FEDERAL ANTITRUST POLICY, § 8.10 (4th ed. 2011).

For the foregoing reasons, we deny the petition for review.

So ordered.

Alaska Elec. Pension Fund v. Bank of Am. Corp.

United States District Court for the Southern District of New York

March 28, 2016, Decided; March 28, 2016, Filed

14-CV-7126 (JMF)

Reporter

175 F. Supp. 3d 44 *; 2016 U.S. Dist. LEXIS 39953 **; 2016-1 Trade Reg. Rep. (CCH) P79,551; 2016 WL 1241533

ALASKA ELECTRICAL PENSION FUND, et al., Plaintiffs, -v- BANK OF AMERICA CORPORATION, et al., Defendants.

Subsequent History: Motion denied by *Alaska Elec. Pension Fund v. Bank of Am. Corp., 2016 U.S. Dist. LEXIS 158455, 2016 WL 6779901 (S.D.N.Y., Nov. 16, 2016)*

Motion granted by *Alaska Elec. Pension Fund v. Bank of Am. Corp., 2017 U.S. Dist. LEXIS 8141 (S.D.N.Y., Jan. 20, 2017)*

Motion denied by *Alaska Elec. Pension Fund v. Bank of Am. Corp., 2017 U.S. Dist. LEXIS 11757 (S.D.N.Y., Jan. 26, 2017)*

Motion granted by *Alaska Elec. Pension Fund v. Bank of Am. Corp., 2017 U.S. Dist. LEXIS 13896 (S.D.N.Y., Jan. 26, 2017)*

Later proceeding at *Alaska Elec. Pension Fund v. Bank of Am.,, 2017 U.S. Dist. LEXIS 146034 (S.D.N.Y., July 11, 2017)*

Settled by, Class certification granted by, Stay granted by *Alaska Elec. Pension Fund v. Bank of Am., 2017 U.S. Dist. LEXIS 146033 (S.D.N.Y., July 12, 2017)*

Motion denied by, Dismissed by, in part, Motion granted by, in part, Motion denied by, in part *Alaska Elec. Pension Fund v. Bank of Am. Corp., 306 F. Supp. 3d 610, 2018 U.S. Dist. LEXIS 17621 (S.D.N.Y., Feb. 2, 2018)*

Settled by, in part, Dismissed by, in part *Alaska Elec. Pension Fund v. Bank of America, N.A., 2018 U.S. Dist. LEXIS 232224 (S.D.N.Y., Nov. 13, 2018)*

Costs and fees proceeding at, Motion granted by *Alaska Elec. Pension Fund v. Bank of Am. Corp., 2018 U.S. Dist. LEXIS 202526 (S.D.N.Y., Nov. 29, 2018)*

Motion granted by, Objection overruled by *Alaska Elec. Pension Fund v. Bank of Am., Corp., 2020 U.S. Dist. LEXIS 33258, 2020 WL 916853 (S.D.N.Y., Feb. 26, 2020)*

Core Terms

Plaintiffs', Banks, interest rate, manipulation, antitrust, Defendants', conspiracy, benchmark, derivatives, swap, allegations, anti trust law, swaption, unjust enrichment, transactions, quotation, marks, cooperative, rates, motion to dismiss, contracts, cases, parties, prices, tortious interference, breach-of-contract, inter-dealer, statute of limitations, good faith, damages

LexisNexis® Headnotes

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

HN1[] Defenses, Demurrers & Objections, Motions to Dismiss

A Fed. R. Civ. P. 12(b)(1) motion challenges the court's subject matter jurisdiction to hear the case. A case is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it. In reviewing a motion to dismiss under Rule 12(b)(1), a court must take all facts alleged in the complaint as true and draw all reasonable inferences in favor of the plaintiff, but jurisdiction must be shown affirmatively, and that showing is not made by drawing from the pleadings inferences favorable to the party asserting it. Moreover, a court may consider affidavits and other materials beyond the pleadings to resolve the jurisdictional issue, but the court may not rely on conclusory or hearsay statements contained in the affidavits. The plaintiff bears the burden of proving subject matter jurisdiction by a preponderance of the evidence.

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

HN2[] Motions to Dismiss, Failure to State Claim

A *Fed. R. Civ. P. 12(b)(6)* motion tests the legal sufficiency of a complaint and requires a court to determine whether the facts alleged in the complaint are sufficient to show that the plaintiff has a plausible claim for relief. When ruling on a *Rule 12(b)(6)* motion, a court must accept the factual allegations set forth in the complaint as true and draw all reasonable inferences in favor of the plaintiff. To survive such a motion, however, the plaintiff must plead sufficient facts to state a claim to relief that is plausible on its face. A claim is facially plausible when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.

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

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

HN3[] Standing, Injury in Fact

To ensure that federal courts resolve only those disputes in which the parties have a concrete stake, U.S. Const. art. III requires a plaintiff seeking relief in federal court to show an injury-in-fact, that is, the invasion of a legally protected interest in a manner that is concrete and particularized, not conjectural or hypothetical. Injury in fact, however, is a low threshold, which the Second Circuit has held need not be capable of sustaining a valid cause of action. A "paid too much" or "received too little" harm is classic economic injury-in-fact. Discovery may well show that, for some plaintiffs on some days, the alleged wrongdoing actually resulted in a benefit. But the mere fact that an injury may be outweighed by other benefits, while often sufficient to defeat a claim for damages, does not negate standing. At the motion to dismiss stage, the appropriate question is whether the alleged wrongdoing plausibly caused each plaintiff to suffer some loss at some point during the time period at issue.

Antitrust & Trade Law > Sherman Act > Scope

HN4[] Antitrust & Trade Law, Sherman Act

Sherman Act § 1 (15 U.S.C.S. § 1) declares illegal every contract, combination, or conspiracy, in restraint of trade or commerce.

Antitrust & Trade Law > Clayton Act > Remedies > Damages

HN5[] Remedies, Damages

Clayton Act § 4 (15 U.S.C.S. § 15) provides a private right of action, with recovery of treble damages, to any person who has been injured in his business or property by reason of anything forbidden in the antitrust laws. § 15(a).

Antitrust & Trade Law > Sherman Act > Claims

HN6[] Sherman Act, Claims

To survive a motion to dismiss, a Sherman Act, 15 U.S.C.S. § 1 et seq., claim must (1) define the relevant geographic market, (2) allege an antitrust injury, and (3) allege conduct in violation of antitrust laws.

Antitrust & Trade Law > Sherman Act > Claims

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

HN7[] Sherman Act, Claims

Sherman Act § 1 (15 U.S.C.S. § 1) prohibits only restraints of trade effected by a contract, combination, or conspiracy, so plaintiffs must allege that defendants entered into an agreement or conspiracy— be it tacit or express — to state a claim. Direct evidence is not required, as concrete, smoking gun proof of an illegal conspiracy between sophisticated actors can be hard to come by, especially at the pleadings stage. Instead, circumstantial facts supporting the inference that a conspiracy existed are sufficient. More specifically, a horizontal agreement or conspiracy may be inferred on the basis of conscious parallelism when such interdependent conduct is accompanied by circumstantial evidence and plus factors. Such plus factors may include a common motive to conspire, evidence that shows the parallel acts were against the apparent individual economic self-interest of the alleged conspirators, and evidence of a high level of interfirm communications. That list, however, is neither exhaustive nor exclusive, but rather illustrative of the type of circumstances which, when combined with parallel behavior, might permit a jury to infer the existence of an agreement. The ultimate question is whether allegations of parallel conduct are placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action.

Antitrust & Trade Law > Sherman Act > Claims

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

HN8[] Sherman Act, Claims

The mere existence of ongoing government investigations is a circumstance that, when combined with parallel behavior, may permit a jury to infer the existence of an agreement prohibited by Sherman Act § 1 (15 U.S.C.S. § 1).

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

HN9[] Motions to Dismiss, Failure to State Claim

The choice between two plausible inferences that may be drawn from factual allegations is not a choice to be made by the court on a *Fed. R. Civ. P. 12(b)(6)* motion. Instead, the sole question for the court is whether the plaintiffs put forward enough fact to raise a reasonable expectation that discovery will reveal sufficient evidence.

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

Constitutional Law > ... > Case or Controversy > Standing > Particular Parties

HN10[] Standing, Requirements

Antitrust standing is a concept that is distinct from standing under U.S. Const. art. III. To establish antitrust standing, a plaintiff must plausibly allege two things: (a) that it suffered a special kind of antitrust injury; and (b) that it is a suitable plaintiff to pursue the alleged antitrust violations and thus is an efficient enforcer of the antitrust laws. With respect to the former, it is not enough for the actual injury to be causally linked to the alleged violation; instead, in order to establish antitrust injury, the plaintiff must demonstrate that its injury is of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful. That requirement helps ensure that the harm claimed by the plaintiff corresponds to the rationale for finding a violation of the antitrust laws in the first place.

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

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

HN11[] Cartels & Horizontal Restraints, Price Fixing

Restricting supply may be a hallmark of much anticompetitive behavior, but it is not a prerequisite to showing antitrust injury. Conspiring to artificially flood the market with manipulative transactions is the sort of coordinated action in a supposedly competitive market that is precisely the sort of anticompetitive behavior the antitrust laws were intended to prevent. More broadly, engaging in a cooperative endeavor to manipulate prices (or components thereof) does not insulate otherwise-competing entities from antitrust liability to parties harmed by that manipulation. The machinery employed by a combination for price-fixing is immaterial to the antitrust laws. Cooperative organization is rife with opportunities for anticompetitive activity. If anything, therefore, the fact that otherwise-competing entities acted together as part of a cooperative endeavor is reason for more scrutiny, not less — and certainly not a basis for immunity from antitrust liability altogether.

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

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

HN12[] Cartels & Horizontal Restraints, Price Fixing

Requiring buyers to pay supra-competitive prices as a result of a horizontal price-fixing conspiracy is the quintessential antitrust injury.

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

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

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

HN13[] **Cartels & Horizontal Restraints, Price Fixing**

Collusion in the setting of a benchmark rate (or its functional equivalent) that is then used as a component of price results in antitrust injury. Such collusion gives rise to a claim under the *Sherman Act*, *15 U.S.C.S. § 1 et seq.*, by purchasers of the affected products. The fact that the alleged conspiracy involved misrepresentations about the rate-setting process does not mean that the plaintiffs' injuries sound in tort rather than antitrust. It is the rare price fixer indeed who truthfully discloses his or her illegal conduct to consumers. Instead, it should go without saying that most antitrust conspiracies involve misrepresentations, if not outright falsehoods. It would be perverse to grant such wrongdoers immunity from liability under the antitrust laws to those harmed by their anticompetitive conduct merely because, in addition to engaging in that misconduct, they took steps to conceal it through misrepresentations.

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

HN14[] **Standing, Requirements**

Antitrust injury is necessary, but not always sufficient, to establish standing. Plaintiffs must also show that they are efficient enforcers of the antitrust laws. To determine whether a putative antitrust plaintiff is an efficient enforcer of the antitrust laws, courts in the Second Circuit consider: (1) the directness or indirectness of the asserted injury; (2) the existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement; (3) the speculativeness of the alleged injury; and (4) the difficulty of identifying damages and apportioning them among direct and indirect victims so as to avoid duplicative recoveries. One factor that raises particular standing concerns is the presence of other efficient antitrust enforcers whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Choice of Law

HN15[] **Federal & State Interrelationships, Choice of Law**

Where a court has determined that the result would be the same under either jurisdiction's law, it need not decide which to apply.

Business & Corporate Compliance > ... > Breach > Breach of Contract Actions > Elements of Contract Claims

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

HN16[] **Breach of Contract Actions, Elements of Contract Claims**

An essential element of contractual and quasi-contractual claims is the existence of some relationship between the plaintiff and the defendant.

Civil Procedure > ... > Class Actions > Class Members > Named Members

Constitutional Law > ... > Case or Controversy > Standing > Particular Parties

HN17[] Class Members, Named Members

To establish U.S. Const. art. III standing in a class action, for every named defendant there must be at least one named plaintiff who can assert a claim directly against that defendant. Each claim must be analyzed separately, and a claim cannot be asserted on behalf of a class unless at least one named plaintiff has suffered the injury that gives rise to that claim. Although some circuits have allowed such claims to proceed pursuant to the juridical link doctrine, in no case in the Second Circuit has that doctrine been applied. The Second Circuit has expressly disavowed at least one version of the juridical link doctrine.

Business & Corporate Compliance > ... > Breach > Breach of Contract Actions > Elements of Contract Claims

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

HN18[] Breach of Contract Actions, Elements of Contract Claims

To state a claim for breach of contract, a plaintiff must allege (1) an agreement, (2) breach by the defendant, and (3) damages. A list of the precise contracts the defendants allegedly breached is not required to survive a motion to dismiss. Allegations that provide the defendants with sufficient information to permit them to have a fair understanding of what the plaintiffs are complaining about, and to know whether there is a legal basis for recovery, is all that is required at this stage of the litigation.

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

Contracts Law > Contract Interpretation > Good Faith & Fair Dealing

HN19[] Motions to Dismiss, Failure to State Claim

An implied-covenant claim can survive a motion to dismiss only if it is based on allegations different than those underlying the accompanying breach of contract claim and the relief sought is not intrinsically tied to the damages allegedly resulting from the breach of contract. An implied-covenant claim is not a valid alternative theory of recovery when it is based on the exact same allegations as a breach-of-contract claim.

Business & Corporate Compliance > ... > Contracts Law > Breach > Breach of Contract Actions

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

HN20[] Breach, Breach of Contract Actions

Under the laws of Connecticut, Pennsylvania, and Michigan, plaintiffs are routinely allowed to bring alternative claims for unjust enrichment and breach of contract. By contrast, New York law provides that a party can pursue alternative claims for unjust enrichment and breach of contract only where there is a bona fide dispute as to whether an express contract governs the subject matter of the disagreement.

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

HN21[] **Intentional Interference, Elements**

A claim for tortious interference with contract generally requires the plaintiffs to plead (1) each defendant's knowledge of the contract, (2) each defendant's intentional and improper procurement of a breach of that contract, and (3) damages proximately caused by the defendant's conduct. The plaintiffs must plead a specific intent to injure a known contractual relationship with another.

Antitrust & Trade Law > Sherman Act > Defenses

HN22[] **Sherman Act, Defenses**

A *Sherman Act*, *15 U.S.C.S. § 1 et seq.*, claim is subject to a four-year statute of limitations. *15 U.S.C.S. § 15b*.

Civil Procedure > ... > Affirmative Defenses > Statute of Limitations > Borrowing Statutes

Governments > Legislation > Statute of Limitations > Time Limitations

HN23[] **Statute of Limitations, Borrowing Statutes**

Under New York law, when a nonresident plaintiff sues upon a cause of action that arose outside of New York, the court must apply the shorter limitations period, including all relevant tolling provisions, of either: (1) New York; or (2) the state where the cause of actions accrued.

Contracts Law > Defenses > Affirmative Defenses > Statute of Limitations

Governments > Legislation > Statute of Limitations > Time Limitations

HN24[] **Affirmative Defenses, Statute of Limitations**

Breach-of-contract and unjust enrichment claims are subject to a six-year statute of limitations in New York. *N.Y. C.P.L.R. § 213(2)*. The statutes of limitations in some other states are the same or shorter: three years in Alaska under *Alaska Stat. § 09.10.053*; four years in Pennsylvania under *42 Pa. Cons. Stat. § 5525(a)* and Connecticut under *Conn. Gen. Stat. § 52-576(a)*; and six years in Michigan under *Mich. Comp. Laws § 600.5807(8)*.

Governments > Legislation > Statute of Limitations > Equitable Estoppel

HN25[] **Statute of Limitations, Equitable Estoppel**

The statute of limitations is tolled where a plaintiff shows that a defendant committed fraudulent acts intended to conceal its misconduct and that the plaintiff's ignorance of the concealed misconduct was not a product of its own lack of reasonable diligence.

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

Governments > Legislation > Statute of Limitations > Equitable Estoppel

HN26[] **Motions to Dismiss, Failure to State Claim**

Requiring plaintiffs, at the motion to dismiss stage, to make a showing of reasonable diligence to avail themselves of the fraudulent concealment doctrine would be premature.

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

HN27[] **Amendment of Pleadings, Leave of Court**

Under *Fed. R. Civ. P. 15*, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires. *Rule 15(a)(2)*. The Second Circuit has held that a *Rule 15(a)* motion should be denied only for such reasons as undue delay, bad faith, futility of the amendment, and perhaps most important, the resulting prejudice to the opposing party. Nevertheless, the grant or denial of an opportunity to amend is within the discretion of the district court.

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Judges: JESSE M. FURMAN, United States District Judge.

Opinion by: JESSE M. FURMAN

Opinion

[*49] OPINION AND ORDER

JESSE M. FURMAN, United States District Judge:

These consolidated putative class actions are the latest in a series of cases in recent years to allege a longstanding conspiracy by some of the world's largest banks to manipulate a benchmark interest rate. In the other cases, plaintiffs allege efforts to fix the London InterBank Offered Rate ("LIBOR"), *see, e.g.,* *In re LIBOR-Based Fin. Instr. Antitrust Litig., 935 F. Supp. 2d 666 (S.D.N.Y. 2013)* ("*LIBOR I*"), and the leading benchmark interest rate for the foreign exchange market, *see* *In re Foreign Ex. Benchmark Rates Antitrust Litig., 74 F. Supp. 3d 581 (S.D.N.Y. 2015)* ("*FX*"). In these cases, Plaintiffs allege a scheme to manipulate U.S. Dollar ISDAfix ("ISDAfix"), which is a benchmark interest rate incorporated into a broad range of financial derivatives. Defendants are (1) fourteen banks that **[**6]** dominate the market for interest rate derivatives and set ISDAfix (collectively, "the Banks" or "Defendant

Banks"); and (2) ICAP Capital Markets LLC ("ICAP"), an inter-dealer broker that served as the administrator in charge of setting the ISDAfix rates until January 26, 2014. Plaintiffs, several institutional investors, allege that Defendants abused their respective roles in the rate-setting process to manipulate ISDAfix in order to extract higher profits from outstanding interest rate swaps and "swaptions" (essentially, options on interest rate swaps). Plaintiffs' Amended Complaint raises an antitrust claim under the *Sherman Act* as well as various state-law claims.

Defendants now move, pursuant to *Rule 12(b) of the Federal Rules of Civil Procedure*, to dismiss all of Plaintiffs' claims. Defendants' motion raises several questions, one of which — whether manipulation of a benchmark interest rate by defendants who are supposed to cooperate (albeit at arms' length) in setting that rate causes "antitrust injury" to those harmed by investments tied to the benchmark — has divided courts in this District and is currently under consideration by the Second Circuit. For the reasons stated below, the Court holds that such collusion in manipulating **[**7]** a benchmark rate that is then incorporated into the price of financial instruments can indeed result in antitrust injury. For that reason and others discussed below, Defendants' motion to dismiss Plaintiffs' *Sherman Act* claim is DENIED; their motion to dismiss Plaintiffs' state-law claims is GRANTED in part and DENIED in part.

BACKGROUND

The following facts — taken from the Amended Complaint, documents referenced **[*50]** therein, and matters of which the Court can take judicial notice — are assumed to be true for purposes of this motion and viewed in the light most favorable to Plaintiffs as the non-moving parties. *See, e.g., Kleinman v. Elan Corp., 706 F.3d 145, 152 (2d Cir. 2013)*; *Chambers v. Time Warner, Inc., 282 F.3d 147, 153 (2d Cir. 2002)*.

A. Interest Rate Derivatives

Derivatives are financial instruments, "the value of which depends on the value of another underlying asset." (Consolidated Am. Class Action Compl. (Docket No. 164) ("AC") ¶ 47). Derivatives "permit market participants to manage and transfer risk by allowing parties to separate out and trade individual risk components, such as interest rate risk." (*Id.*). The largest derivatives market is the interest rate derivatives market; the most common type of interest rate derivative is the interest rate "swap." (*Id. ¶ 48*). An interest rate swap is an **[**8]** agreement between two counterparties to exchange interest rate payments on an agreed notional amount over a set period of time. (*Id.*). "Typically, one party will pay based on a 'fixed' interest rate on the notional amount that does not vary from one payment to the next, while the other party will pay based on a variable 'floating' interest rate that is tied to an independent benchmark such as LIBOR." (*Id.*). Such a "fixed-for-floating rate swap allows parties with floating rate debt to hedge their interest rate exposure by receiving a variable rate on the notional amount in exchange for paying a fixed rate on that same notional amount." (*Id. ¶ 49*).

Another (related) interest rate derivative instrument is a "swaption," which is a contract pursuant to which a buyer pays a seller a premium for the option to enter into an interest rate swap at a specified rate on some set future date. (*Id. ¶¶ 55-56*). When entering a swaption, "the parties may choose whether the swaption is to be *physically settled*," which means the parties actually enter into the swap if exercised, "or *cash settled*," which means the seller pays the buyer the value of the swap on the exercise date. (*Id. ¶¶ 56-57*). In most **[**9]** cases, ISDAfix is used to determine the settlement value of a cash-settled swaption on its exercise date. (*Id. ¶¶ 58-59, 61*). If the fixed rate specified in the swaption is more favorable than the ISDAfix rate, the option is "in the money," meaning the swaption has value and the buyer can claim a cash payment from the seller. (*Id. ¶¶ 57, 61*). If the ISDAfix rate is less favorable than the fixed swaption rate, the option is "out of the money" and will simply expire without being exercised. (*Id.*). In that instance, the seller of the swaption profits by retaining the premium paid up front when the buyer purchased the swaption. (*See id.* ¶¶ 55, 57). "[A]ccurate calculation and reporting of the ISDAfix rate is critical to the fair settlement of swaptions, and even the smallest movement of ISDAfix can drastically affect the value of a cash-settled swaption." (*Id. ¶ 61*).

Over the past thirty years, the market for interest rate derivatives in general (and interest rate swaps in particular) has grown dramatically. (*Id. ¶ 51*). According sources cited in the Amended Complaint, the collective nominal amounts on outstanding interest rate swaps has grown from about $2.3 trillion in 1990 to about $342 trillion **[**10]** as of June 2012, including $164 trillion of U.S. dollar swaps alone. (*Id.*). The value of swaption contracts outstanding as of July 2013 was $29.5 trillion as measured by notional amount. (*Id. ¶ 55*). The Defendant Banks collectively dominate the market for interest rate derivatives. (*Id. ¶ 53*). Indeed, over the course of the putative class period — from January 1, 2006, to June 30, 2013 (*see id.* ¶ 235) — the collective interest rate holdings of the Defendant Banks represented over ninety percent of the total reported notional **[*51]** amounts of interest rate derivatives held by U.S. dealers. (*Id. ¶ 53*).

B. The ISDAfix Benchmark Interest Rate

ISDAfix is the most common interest rate benchmark used to determine the value upon expiration of cash-settled interest rate swaptions. (*Id. ¶ 58*). The ISDAfix rate purports to "represent the average fixed interest rate that an over-the-counter derivatives market dealer would bid or offer for a swap of a certain tenor and currency in exchange for a specified floating LIBOR rate." (*Id. ¶ 71*). Different ISDAfix rates are calculated each day for transactions of varying tenors (that is, lengths) in different currencies. (*Id. ¶ 68*). During the class period, ICAP **[**11]** was responsible for compiling ISDAfix benchmark rates. Every morning at 11:02 a.m., ICAP would circulate to the Defendant Banks a set of reference points generated using (1) the rates offered in completed inter-dealer trades and executable inter-dealer bids at 11:00 a.m. and (2) information "reflecting executed trades and executable bids and offers at 11 a.m. for US Treasury securities from ICAP's" inter-dealer electronic trading platform. (*Id. ¶ 72*). ICAP then asked each Defendant Bank to submit, for each maturity, the midpoint of where "that dealer would itself offer and bid a swap" in that maturity for a set notional amount "to an acknowledged dealer of good credit in the swap market." (*Id. ¶¶ 71, 224*). Banks could accept the reference rate provided at 11:02 a.m., submit a different value, or take no action. (*Id. ¶ 72*). Thomson Reuters would then compile the day's ISDAfix rates by eliminating a set number of the highest and lowest rates submitted through ICAP and then averaging the remainder. (*Id.*).

C. Plaintiffs' Allegations of Wrongdoing

Plaintiffs allege that Defendants took advantage of their respective roles in the ISDAfix rate-setting process to manipulate the daily ISDAfix **[**12]** benchmarks for their own financial gain. In particular, they contend that the Defendant Banks manipulated daily ISDAfix rates to benefit their own trading positions and that ICAP assisted in that manipulation in order to earn brokerage commissions. (*Id. ¶¶ 137-139*). The Amended Complaint identifies a number of practices that Defendants used to perpetrate their manipulation. First, Plaintiffs allege that Defendants agreed to rubberstamp the reference rate posted by ICAP each day in contravention of ICAP's publicly disseminated submissions rules, which indicated that the Defendant Banks should not submit a rate "where the dealer sees the mid-market away from itself, but should be a function of its own bid/offer spread." (*Id. ¶¶ 8-9, 71*). Second, Plaintiffs allege that the Defendant Banks manipulated the reference rate itself by flooding the inter-dealer swap market just before 11 a.m. with transactions designed to move ICAP's reference rate to whatever point the Defendant Banks desired — a process known as "banging the close." (*Id. ¶¶ 134*, 136-37). To facilitate this strategy, Defendants allegedly shared information with one another in order to coordinate their trading activities. (***[**13]*** *Id. ¶¶ 6, 130*). Finally, Plaintiffs contend that, when "banging the close" failed to move the reference rate to the desired level, "ICAP could and would also simply set the reference rate at the predetermined level" irrespective of the state of the market. (*Id. ¶ 130 n.45*). According to Plaintiffs, this manipulation of ISDAfix took place on nearly every trading day during the class period — and abruptly came to an end only when government agencies began investigating the ISDAfix benchmark process in the wake of well-publicized revelations that banks were conspiring to fix LIBOR. (*Id. ¶¶ 7*, 80-81). In or about November 2012, the Commodity Futures Trading Commission ("CFTC") **[*52]** issued a first round of subpoenas relating to ISDAfix. (*Id. ¶ 81-83*). In September 2014, the CFTC reportedly told the U.S. Department of Justice that it had "found evidence of criminal behavior following" its investigation of "banks' alleged manipulation of ISDAfix." (*Id. ¶ 82-83*).

Plaintiffs are various institutions that "transacted in interest rate derivatives expressly tied to ISDAfix or directly impacted by Defendants' manipulation of ISDAfix" with one or more Defendant Banks on "days that have been identified **[**14]** as being subject to manipulation." (*Id. ¶¶ 23-27*). More specifically, the Amended Complaint alleges that "Plaintiffs' swaptions and other interest rate derivatives that settled by reference, or otherwise had cash flows tied to ISDAfix rates were made less profitable" for Plaintiffs (and more profitable to the Defendant Banks) "than they would have been in the absence of manipulation." (*Id. ¶ 262*; *see id.* ¶¶ 192-209). In the Amended Complaint, they bring antitrust claims under the *Sherman Act*, *15 U.S.C. § 1, et seq.*, as well as state-law claims for breach of contract, breach of the implied covenant of good faith and fair dealing, unjust enrichment, and tortious interference with contract.

LEGAL STANDARDS

Defendants' motion is brought pursuant to *Rules 12(b)(1)* and *12(b)(6)*. ***HN1***[] A *Rule 12(b)(1)* motion challenges the court's subject matter jurisdiction to hear the case. "A case is properly dismissed for lack of subject matter jurisdiction under *Rule 12(b)(1)* when the district court lacks the statutory or constitutional power to adjudicate it." *Makarova v. United States, 201 F.3d 110, 113 (2d Cir. 2000)*. In reviewing a motion to dismiss under *Rule 12(b)(1)*, a court "must take all facts alleged in the complaint as true and draw all reasonable inferences in favor of plaintiff, but jurisdiction must be shown affirmatively, and that showing **[**15]** is not made by drawing from the pleadings inferences favorable to the party asserting it." *Morrison v. Nat'l Austl. Bank Ltd., 547 F.3d 167, 170 (2d Cir. 2008)* (internal quotation marks and citation omitted), *aff'd*, *561 U.S. 247, 130 S. Ct. 2869, 177 L. Ed. 2d 535 (2010)*. Moreover, a court "may consider affidavits and other materials beyond the pleadings to resolve the jurisdictional issue, but [the Court] may not rely on conclusory or hearsay statements contained in the affidavits." *J.S. ex rel. N.S. v. Attica Cent. Schs., 386 F.3d 107, 110 (2d Cir. 2004)*. "The plaintiff bears the burden of proving subject matter jurisdiction by a preponderance of the evidence." *Aurecchione v. Schoolman Transp. Sys., Inc., 426 F.3d 635, 638 (2d Cir. 2005)*.

By contrast, ***HN2***[] a *Rule 12(b)(6)* motion tests the legal sufficiency of a complaint and requires a court to determine whether the facts alleged in the complaint are sufficient to show that the plaintiff has a plausible claim for relief. *Ashcroft v. Iqbal, 556 U.S. 662, 679, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. When ruling on a *Rule 12(b)(6)* motion, a court must accept the factual allegations set forth in the complaint as true and draw all reasonable inferences in favor of the plaintiff. *See, e.g., Holmes v. Grubman, 568 F.3d 329, 335 (2d Cir. 2009)*. To survive such a motion, however, the plaintiff must plead sufficient facts "to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." **[**16]** *Iqbal, 556 U.S. at 678* (citing *Twombly, 550 U.S. at 556*).

DISCUSSION

Defendants move to dismiss Plaintiffs' claims on various grounds. First, they contend **[*53]** that all of Plaintiffs' claims should be dismissed for lack of subject-matter jurisdiction because Plaintiffs do not have standing under Article III of the Constitution. Second, they seek to dismiss Plaintiffs' antitrust claims on the grounds that the Amended Complaint fails to plausibly allege a conspiracy to restrain trade and that Plaintiffs lack "antitrust standing." Third, they claim that each of Plaintiffs' state-law claims fails as a matter of law. And finally, they assert that many of Plaintiffs' claims are time barred. The Court considers the challenge to Plaintiffs' constitutional standing first, *see, e.g., Ross v. Bank of Am. N.A., 524 F.3d 217, 222 (2d Cir. 2008)* ("Standing is the threshold question in every federal case, determining the power of the court to entertain the suit." (internal quotation marks omitted)), and then turns to Defendants' other arguments.

A. Constitutional Standing

Defendants' argument that Plaintiffs lack standing under Article III can be swiftly rejected. HN3[] To ensure that federal courts resolve only "those disputes in which the parties have a concrete stake," Article III requires a plaintiff seeking relief in federal court to show **[**17]** an "injury-in-fact, that is, the invasion of a 'legally protected interest' in a manner that is 'concrete and particularized' . . . not 'conjectural or hypothetical.'" *Bhatia v. Piedrahita, 756 F.3d 211, 218 (2d Cir. 2014)* (quoting *Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992))*. "Injury in fact," however, "is a low threshold," which the Second Circuit has held "'need not be capable of sustaining a valid cause of action.'" *Ross, 524 F.3d at 222* (quoting *Denney v. Deutsche Bank AG, 443 F.3d 253, 263 (2d Cir. 2006))*. Plaintiffs cross that "low threshold" here. As discussed more fully below, Plaintiffs plausibly allege that each Defendant participated in a conspiracy to manipulate ISDAfix rates. Plaintiffs also allege that they "transacted in interest rate derivatives expressly tied to ISDAfix or directly impacted" by that alleged manipulation. (AC ¶¶ 23-27). Defendants do not seriously contest that a plaintiff could establish injury-in-fact if it were to demonstrate that, because of an artificially induced shift in ISDAfix on a given day, it paid more than it should have (or was paid less than it should have been) under the terms of a particular transaction. That sort of "paid too much" or "received too little" harm is classic economic injury-in-fact. Of course, discovery may well show that, for some Plaintiffs on some days, the alleged ISDAfix manipulation actually **[**18]** resulted in a benefit. But the mere fact "that an injury may be outweighed by other benefits, while often sufficient to defeat a claim for damages, does not negate standing." *Ross, 524 F.3d at 222* (internal quotation marks omitted). At this stage, the appropriate question is whether the alleged manipulation of ISDAfix plausibly caused each Plaintiff to suffer *some* loss under the terms of *some* derivative at *some* point during the years the conspiracy allegedly took place. *See* *FX, 74 F. Supp. 3d at 595* ("[A]ny particular transaction that a particular Plaintiff entered into with a particular Defendant on a day that the Fix was manipulated to that Plaintiff's detriment would sufficiently demonstrate injury in fact as to that Plaintiff."). Given the sheer volume of transactions identified by Plaintiffs in the Amended Complaint (*see* AC, App. A), it is not hard to conclude that the answer to that question is yes.

B. The Antitrust Claims

Plaintiff's principal claim is brought under HN4[] *Section One of the Sherman Act*, which declares illegal "[e]very contract, combination . . ., or conspiracy, in restraint of trade or commerce." *15 U.S.C. § 1*. HN5[] *Section Four of the Clayton Act*, in **[*54]** turn, provides a private right of action, with recovery of treble damages, to "any person **[**19]** who [has been] injured in his business or property by reason of anything forbidden in the antitrust laws." *15 U.S.C. § 15(a)*. HN6[] "To survive a motion to dismiss, a *Sherman Act* claim must (1) define the relevant geographic market, (2) allege an antitrust injury, and (3) allege conduct in violation of antitrust laws." *Concord Assocs., L.P. v. Entm't Props. Trust, 817 F.3d 46, 2016 U.S. App. LEXIS 4946, 2016 WL 1075947, at *3 (2d Cir. Mar. 18, 2016)* (internal quotation marks omitted). Here, Defendants argue that Plaintiffs' *Sherman Act* claim must be dismissed for either of two reasons. First, they contend that Plaintiffs fail to allege conduct in violation of the antitrust laws because the Amended Complaint does not plausibly allege a conspiracy to restrain trade. Second, relying almost exclusively on *LIBOR I*, Defendants assert that Plaintiffs lack "antitrust standing." The Court will address each argument in turn.

1. Conspiracy To Restrain Trade

HN7[] *Section One of the Sherman Act* prohibits only restraints of trade "effected by a contract, combination, or conspiracy," so Plaintiffs must allege that Defendants entered into an agreement or conspiracy— be it "tacit or express" — to state a claim. *Twombly, 550 U.S. at 553* (internal quotation marks omitted). Significantly, direct evidence is not required, as concrete, "smoking gun" proof of an illegal conspiracy between **[**20]** sophisticated actors "can be hard to come by, especially at the pleadings stage." *Mayor & City Council of Baltimore v. Citigroup, Inc., 709 F.3d 129, 136 (2d Cir. 2013)*. Instead, "circumstantial facts supporting the *inference* that a conspiracy existed" are sufficient. *Id.; see also* *United States v. Snow, 462 F.3d 55, 68 (2d Cir. 2006)* ("[C]onspiracy by its very nature is a secretive operation, and it is a rare case where all aspects of a conspiracy can be laid bare in court with . . . precision."); *In re Elec. Books Antitrust Litig., 859 F. Supp. 2d 671, 681 (S.D.N.Y. 2012)* ("[C]onspiracies nearly always must be proven through inferences that may fairly be drawn from the behavior of the alleged conspirators.").

More specifically, a horizontal agreement or conspiracy, the sort of pact alleged here, "may be inferred on the basis of conscious parallelism when such interdependent conduct is accompanied by circumstantial evidence and plus factors." *Todd v. Exxon Corp., 275 F.3d 191, 198 (2d Cir. 2001)*. Such "'plus factors' may include: a common motive to conspire, evidence that shows the parallel acts were against the apparent individual economic self-interest of the alleged conspirators, and evidence of a high level of interfirm communications." *Mayor of Baltimore, 709 F.3d at 136* (internal quotation marks omitted). That list, however, is "neither exhaustive nor exclusive, but rather illustrative of the type of circumstances which, when combined with parallel behavior, might permit a jury to infer the existence **[**21]** of an agreement." *Id. at n.6*. The ultimate question is whether allegations of parallel conduct are "placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action." *Twombly, 550 U.S. at 557*.

Applying those standards here, and drawing all reasonable inferences in Plaintiffs' favor, the Court concludes that the Amended Complaint plausibly alleges that a conspiracy among Defendants existed. For starters, the Amended Complaint contains extensive allegations of parallel conduct. According to the Amended Complaint, the Defendant Banks "claimed to have the exact same bid/ask spread" for "nearly every day for multiple years" (AC ¶¶ 9, 102) and coordinated open-market trades before 11 a.m. to "bang the close" (*see, e.g., id.* ¶¶ 133-34). Additionally, the **[*55]** Amended Complaint includes several "plus factors" that "raise[] a suggestion" of illegal agreement rather than mere independent action. First, Plaintiffs allege that Defendants had a common motive to conspire — namely that Defendants were major players in the market for interest rate derivatives who were jointly motivated by a desire to maximize profits by manipulating the ISDAfix benchmark **[**22]** rates. (*See, e.g.*, AC ¶¶ 2, 10, 74, 80, 122, 138, 156). The plausibility of that motive is reinforced by other allegations in the Amended Complaint. For example, the very nature of ISDAfix suggests that any attempt to unilaterally control ISDAfix would be risky and likely futile, as any individual bank's submission to ICAP would be drowned out in the polling process by which ISDAfix was set each day. Defendants counter that a conspiracy to move ISDAfix "makes no economic or logical sense" unless the Defendant Banks' positions "were aligned throughout the putative class period." (Defs.' Mem. Law Supp. Joint Mot. To Dismiss Consolidated Class Action Compl. (Docket No. 173) ("Defs.' Mem.") 11). But that is not the case. The Amended Complaint plausibly alleges that "[t]here were more profits to be earned for Defendants in maintaining the shared ability to manipulate ISDAfix over the long term than there were to be lost due to a divergence of interest on any particular day." (AC ¶ 10). And contrary to Defendants' suggestion (Defs.' Mem 11-12), it appears that that sort of rate manipulation can be economically sensible and feasible given that many banks (including some Defendants) have admitted **[**23]** that, in approximately the same period of time, they conspired to rig similar benchmark rates — namely, LIBOR and the leading benchmark interest rate for the foreign exchange market — in order to maximize profits. (*See, e.g.*, AC ¶ 91).

Additionally, Plaintiffs allege that Defendants' parallel conduct required them to act against their own economic self-interest. For example, the Amended Complaint alleges that, in order to facilitate their parallel submissions, Defendants shared commercially sensitive information with one other. (AC ¶ 6). It also alleges that the Defendant Banks' process of rubberstamping the ISDAfix reference rate violated ISDA's rules, exposing them to scrutiny and penalties (both civil and criminal) if their behavior became public. (*See, e.g., id.* ¶¶ 71-73). And as Defendants themselves point out, rubberstamping the reference rate and "banging the close" every day almost certainly harmed some banks on some days given that Defendants' swap and swaption positions could not have been perfectly aligned throughout the putative class period. (*See* Defs.' Mem. 11-12). Finally, the Amended Complaint alleges ongoing government investigations into manipulation of ISDAfix. ***HN8***[] The **[**24]** mere existence of such investigations is a circumstance that, "when combined with parallel behavior, might permit a jury to infer the existence of an agreement." *Mayor of Baltimore, 709 F.3d at 136 n.6*; *see also* *Starr v. Sony BMG Music Entm't, 592 F.3d 314, 324-25 (2d Cir. 2010)*. Moreover, Plaintiffs here allege not only that government investigations are pending, but also that those investigations have actually turned up "evidence of criminal behavior" relating to the Defendant Banks' manipulation of ISDAfix. (AC ¶¶ 14, 83). Significantly, Plaintiffs also allege that Defendants abruptly and simultaneously ceased engaging in parallel conduct when they were served with subpoenas in connection with government investigations (*see, e.g., id.* ¶¶ 112, 115, 117, 140-41), strengthening substantially the inference that a conspiracy existed.

To be sure, Defendants offer plausible non-collusive explanations for many of the facts alleged in the Amended Complaint. But ***HN9***[] "[t]he choice between two plausible inferences that may be drawn from factual allegations is not a choice to be made by **[*56]** the court on a *Rule 12(b)(6)* motion." *Anderson News, L.L.C. v. Am. Media, Inc., 680 F.3d 162, 185 (2d Cir. 2012)*. Instead, the sole question for the Court is whether Plaintiffs put forward "enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Twombly, 550 U.S. at 556*. Taking all of **[**25]** Plaintiffs' allegations together, as the Court must, *see, e.g., Cont'l Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699, 82 S. Ct. 1404, 8 L. Ed. 2d 777 (1962)*, and drawing all reasonable inferences in their favor, the Court concludes that they have.

2. Antitrust Standing

Next, Defendants contend that Plaintiffs' *Sherman Act* claim must be dismissed because Plaintiffs lack ***HN10***[] "antitrust standing" — a concept that is distinct from standing under Article III. *See, e.g., Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 339 n.8, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)* ("*ARCO*"). To establish antitrust standing, a plaintiff must plausibly allege two things: "(a) that it suffered 'a special kind of antitrust injury,' and (b) that it is a suitable plaintiff to pursue the alleged antitrust violations and thus is an 'efficient enforcer' of the antitrust laws." *Gatt Comm., Inc. v. PMC Assocs., LLC, 711 F.3d 68, 75 (2d Cir. 2013)* (quoting *Port Dock & Stone Corp. v. Oldcastle Ne., Inc., 507 F.3d 117, 121-22 (2d Cir. 2007))*. With respect to the former, "[i]t is not enough for the actual injury to be causally linked" to the alleged violation; instead, "in order to establish antitrust injury, the plaintiff must demonstrate that its injury is of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Id.* (internal quotation marks and alteration omitted). That requirement helps ensure "that the harm claimed by the plaintiff corresponds to the rationale for finding a violation of the antitrust **[**26]** laws in the first place." *ARCO, 495 U.S. at 342*; *see, e.g., Assoc. Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 534, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)* ("Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation."); *Blue Shield of Va., Inc. v. McCready, 457 U.S. 465, 477, 102 S. Ct. 2540, 73 L. Ed. 2d 149 (1982)* ("It is reasonable to assume that Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damage for the injury to his business or property.").

a. Antitrust Injury

Relying primarily on *LIBOR I*, Defendants argue first that Plaintiffs cannot establish antitrust injury because the setting of ISDAfix "is based on a cooperative process" rather than "the product of competition to win Plaintiffs' business." (Defs.' Mem. 21).[1] The facts in *LIBOR I* and the facts in these cases are indeed similar. In *LIBOR I*, as here, the plaintiffs alleged that banks participating in a process to set a benchmark interest rate under the auspices of a trade association manipulated that rate in ways that negatively affected financial instruments in which the plaintiffs had invested. Concluding that the plaintiffs failed to allege antitrust injury, the Court dismissed the plaintiffs' *Sherman Act* claims. "[T]he process of setting LIBOR," the Court **[**27]** reasoned, "was never intended to be competitive. Rather, it was **[*57]** a cooperative endeavor wherein otherwise-competing banks agreed to submit estimates of their borrowing costs to the [trade association] each day to facilitate the [trade association's] calculation of an interest rate index." *935 F. Supp. 2d at 688* (citation omitted). Even if the defendants "subverted this process by conspiring to submit artificial estimates instead of estimates made in good faith," the Court continued, "it would not follow that plaintiffs have suffered antitrust injury. Plaintiffs' injury would have resulted from defendants' misrepresentation, not from harm to competition." *Id.*

Much like the Court in *FX, 74 F. Supp. 3d at 596-98*, this Court declines to follow *LIBOR I* here for two independent reasons. First, these cases are factually distinguishable from *LIBOR I* in one critical respect: The Amended

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[1] *LIBOR I* is on appeal to the Second Circuit, which held oral argument on November 13, 2015. *See In re: LIBOR-Based Financial Instruments Antitrust Litig.*, No. 13-3565 (Docket No. 567) (2d Cir. Nov. 13, 2015).

Complaint here alleges not only that Defendants manipulated ISDAfix through the ICAP reference-rate process — a process that was arguably intended to be a **[**28]** "cooperative endeavor" akin to the LIBOR-setting process — but also that Defendants conspired to move prices for swaps in the inter-dealer market by acting as a trading bloc (specifically, by "banging the close"). (*See* AC ¶¶ 134, 136-137). That is, whereas "the LIBOR-setting process was a 'cooperative endeavor wherein otherwise-competing banks agreed to submit estimates of their borrowing costs . . . to facilitate the . . . calculation of an interest rate index,'" ISDAfix was set, at least in part, "by actual transactions in a market where Defendants [were] supposed to be perpetually competing by offering independently determined bid-ask spreads." *FX, 74 F. Supp. 3d at 596* (quoting *LIBOR I, 935 F. Supp. 2d at 688*).

Notably, Defendants do not (and could not) dispute that the inter-dealer market for swaps is itself competitive or that the Defendant Banks were horizontal competitors in that market. Instead, they argue that, although coordinating behavior to "bang the close" involves market activity, it cannot give rise to antitrust injury because it is not competition-reducing behavior. To reach that surprising conclusion, Defendants emphasize the fact that Plaintiffs allege that the Defendant Banks "introduce[ed] more — not fewer — transactions into the **[**29]** inter-dealer interest rate swap market around 11 a.m." (Defs.' Mem. 26). Arguing that "[a] hallmark of price fixing is an agreement to elevate price by restricting supply," they contend that "banging the close" can never be anticompetitive because it involves increasing, rather than restricting, supply. (*See id.*). The Court disagrees. ***HN11***[] Restricting supply may be "a hallmark" of much anticompetitive behavior, but Defendants cite no authority for the proposition that it is a prerequisite to showing antitrust injury. Plaintiffs allege that, instead of competing in the inter-dealer market, the Defendant Banks conspired and agreed to artificially flood the market with transactions to manipulate ISDAfix. That sort of coordinated action in a supposedly competitive market is precisely the sort of anticompetitive behavior the antitrust laws "were intended to prevent." *In re DDVAP Direct Purchaser Antitrust Litig., 585 F.3d 677, 688 (2d Cir. 2009)* (internal quotation marks omitted).

Second, and more broadly, the Court respectfully disagrees with the *LIBOR I* Court's legal conclusion that engaging in a "cooperative endeavor" to manipulate prices (or components thereof) insulates "otherwise-competing" entities from antitrust liability to parties harmed by that manipulation. **[**30]** As an initial matter, the Supreme Court has long held that "the machinery employed by a combination for price-fixing is immaterial" to the antitrust laws. *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223, 60 S. Ct. 811, 84 **[*58]** L. Ed. 1129 (1940)*. And far from viewing cooperative endeavors with favor, the Court has expressly cautioned that cooperative organization is "rife with opportunities for anticompetitive activity." *Am. Soc. of Mech. Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 571, 102 S. Ct. 1935, 72 L. Ed. 2d 330 (1982)*; *see also, e.g., MCI Telecommc'ns. Corp. v. AT&T Co., 512 U.S. 218, 233, 114 S. Ct. 2223, 129 L. Ed. 2d 182 (1994)* ("The Court itself has policed trade associations and rate bureaus under the antitrust laws precisely because the sharing of pricing information can facilitate price fixing . . . ."); *Arizona v. Maricopa Cty. Med. Soc., 457 U.S. 332, 339-40, 102 S. Ct. 2466, 73 L. Ed. 2d 48 (1982)* (applying the *Sherman Act* to a non-profit "association" of doctors "organized for the purpose of promoting fee-for-service medicine and to provide the community with a competitive alternative to existing health insurance plans"); *cf. Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 506-09, 108 S. Ct. 1931, 100 L. Ed. 2d 497 (1988)* ("[P]rivate standard-setting by associations comprising firms with horizontal and vertical business relations is permitted at all under the antitrust laws only on the understanding that it will be conducted in a nonpartisan manner offering procompetitive benefits. . . . [T]he hope of procompetitive benefits depends upon the existence of safeguards sufficient to prevent the standard-setting process from being biased by members with economic **[**31]** interests in restraining competition."). If anything, therefore, the fact that "otherwise-competing" entities acted together as part of a "cooperative endeavor" is reason for more scrutiny, not less — and certainly not a basis for immunity from antitrust liability altogether.

More fundamentally, Defendants' argument ignores the gravamen of Plaintiffs' antitrust claim. According to the Amended Complaint, Defendants were not engaged in a "cooperative endeavor" in any meaningful sense of that phrase. To be sure, the Defendant Banks "cooperated" with one another by providing rate information to ICAP, which then used the information to calculate the benchmark. But that benchmark was intended "to represent the going rate in a fully competitive market." (AC ¶ 248; *see also id.* ¶ 4 ("From start to finish, ISDAfix was supposed to be set based on real transactions and prices drawn from a competitive market.")). To that end, the Defendant Banks were "required . . . to make submissions to ICAP based on their *own*, personal bid/offer spreads" in a competitive market. (AC ¶ 72 (emphasis added)). Viewed in that way, Defendants' "cooperation" was merely an efficient conduit for their competition in **[**32]** the interest rate market. Put differently, Plaintiffs do not argue that the antitrust laws barred Defendants from cooperating in any respect to arrive at a benchmark rate. If each of the Defendant Banks had actually shared with ICAP the average of where it "would itself [have] offered and bid a swap" in a competitive market, as it was supposed to do, Plaintiffs would presumably have no claim. (AC ¶ 71). Instead, Plaintiffs contend that Defendants' cooperation extended beyond that relatively minimal level to actual collusion on the rate — and that, by doing so, Defendants earned (at Plaintiffs' expense) *supra*-competitive profits from financial instruments that incorporated that rate as a component of price. (*See* Pls.' Mem. Law Opp'n Defs.' Joint Mot. To Dismiss Am. Consol. Class Action Compl. (Docket No. 194) ("Pls.' Mem.") 31 ("Plaintiffs here allege that Defendants agreed to hijack the process, whatever it was in the abstract, so they could earn *supra*-competitive profits (off of interest rate derivatives) in a market where they competed (the market for interest rate derivatives)."). In other words, Plaintiffs contend that they had "to pay *supra*-competitive prices as a result of a **[*59]** **[**33]** horizontal price-fixing conspiracy" to fix a component of the price of financial instruments that they purchased in an otherwise competitive market. *FX, 74 F. Supp. 3d at 598*. ***HN12***[] That is "the *quintessential* antitrust injury." *Id.* (emphasis added).

Notably, this Court and the *FX* Court are not alone in concluding that ***HN13***[] collusion in the setting of a benchmark rate (or its functional equivalent) that is then used as a component of price results in antitrust injury. *LIBOR I*— and two cases that adopted its reasoning, *7 West 57th Street Realty Co. v. Citigroup, Inc., No. 13-CV-981 (PGG), 2015 U.S. Dist. LEXIS 44031, 2015 WL 1514539, at *15-20 (S.D.N.Y. Mar. 31, 2015)*, and *Laydon v. Mizuho Bank, Ltd., No. 12-CV-3419 (GBD), 2014 U.S. Dist. LEXIS 46368, 2014 WL 1280464, at *7-8 (S.D.N.Y. Mar. 28, 2014)* — aside, courts have long held that such collusion gives rise to a claim under the *Sherman Act* by purchasers of the affected products. *See, e.g., Knevelbaard Dairies v. Kraft Foods, Inc., 232 F.3d 979, 987-89 (9th Cir. 2000)* (holding that a conspiracy to manipulate the benchmark for bulk cheese auction prices, which were then used to determine the government-mandated minimum price for milk, caused antitrust injury to milk buyers); *In re Aluminum Warehousing Antitrust Litig., 95 F. Supp. 3d 419, 443 (S.D.N.Y. 2015)* (holding that a conspiracy to raise the "Platts Midwest Premium" benchmark, which was commonly used as a component of price in contracts for the purchase of aluminum, caused antitrust injury to aluminum buyers); *Ice Cream Liquidation, Inc. v. Land O'Lakes, Inc., 253 F. Supp. 2d 262, 272-74 (D. Conn. 2003)* (holding that a conspiracy to inflate the price of butter, which was used as a component of minimum milk prices, caused antitrust injury **[**34]** to milk buyers); *see also, e.g., In re High Fructose Corn Syrup Antitrust Litig., 295 F.3d 651, 656 (7th Cir. 2002)* (holding that fixing a "list price" would constitute a *per se* antitrust violation even if the list price was only a "guide to likely transaction purchases"); *Plymouth Dealers' Ass'n of N. Cal. v. United States, 279 F.2d 128, 132 (9th Cir. 1960)* (holding that a trade association's circulation of list prices for cars was *per se* illegal even though dealers used the list prices "only as a starting point"); 12 Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** ¶ 2022a (3d ed. 2010) ("The per se rule generally governs not only explicit price fixing but also agreements to fix a 'price element.'").

Contrary to Defendants' contentions (Defs.' Mem. 21), and the conclusions of the *LIBOR I* Court, *see 935 F. Supp. 2d at 688*, the fact that conspiracy alleged in these cases involved misrepresentations about the ISDAfix rate-setting process does not mean that Plaintiffs' injuries sound in tort rather than antitrust. It is the rare price fixer indeed who truthfully discloses his or her illegal conduct to consumers. Instead, it should go without saying that most antitrust conspiracies involve misrepresentations, if not outright falsehoods. *See, e.g., National Ass'n. of Pharm. Mfrs., Inc. v. Ayerst Labs., 850 F.2d 904, 916-17 (2d Cir. 1988)* (discussing the publication of a false and misleading letter as part of an antitrust claim); *In re Monosodium Glutamate Antitrust Litig., No. 00-MD-1328 (PAM), 2003 U.S. Dist. LEXIS 23237, 2003 WL 23022001, at *1 (D. Minn. Dec. 23, 2003)* **[**35]** (discussing an antitrust conspiracy in which the co-conspirators provided customers "with false or misleading explanations" for pricing); *see also, e.g., Knevelbaard Dairies, 232 F.3d at 990* ("The result for purposes of antitrust injury analysis should be no different than if the cheese makers had conspired to report a fictitious NCE price in order to depress the milk price, *which clearly would cause direct injury to the milk producers*." (emphasis added)). It would be perverse to grant such wrongdoers immunity from liability under the antitrust laws to those harmed by their anticompetitive conduct merely because, in addition to engaging in **[*60]** that misconduct, they took steps to conceal it through misrepresentations.

In short, the Amended Complaint in these cases alleges that Plaintiffs "are purchasers" of Defendants' products "who allege being forced to pay *supra*-competitive prices as a result of [Defendants'] anticompetitive conduct. Such an injury plainly is 'of the type the antitrust laws were intended to prevent.'" *DDAVP Direct Purchaser Antitrust Litig., 585 F.3d at 688* (quoting *Brunswick Corp., 429 U.S. at 489*).[2]

b. Efficient Enforcers

As noted above, ***HN14***[] "antitrust injury is necessary, but not always sufficient, **[**37]** to establish standing." *Daniel v. Am. Bd. of Emergency Med., 428 F.3d 408, 443 (2d Cir. 2005)* (internal quotation marks omitted). Plaintiffs must also show that they are "efficient enforcer[s] of the antitrust laws." *Balaklaw v. Lovell, 14 F.3d 793, 798 n.9 (2d Cir. 1994)*. To determine whether a putative antitrust plaintiff is an "efficient enforcer" of the antitrust laws, courts in this Circuit consider: "(1) the directness or indirectness of the asserted injury; (2) the existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement; (3) the speculativeness of the alleged injury; and (4) the difficulty of identifying damages and apportioning them among direct and indirect victims so as to avoid duplicative recoveries." *Gatt Comm., 711 F.3d at 78* (quoting *Paycom Billing Servs., Inc. v. Mastercard Int'l, Inc., 467 F.3d 283, 290-91 (2d Cir. 2006))*. One factor that "raises particular standing concerns" is "the presence of other efficient antitrust enforcers 'whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement.'" *Daniel, 428 F.3d at 443-44* (quoting *Assoc. Gen. Contractors, 459 U.S. at 542*). In these cases, Defendants focus their argument on that factor, arguing that there is another class of antitrust plaintiffs that would be more "efficient enforcers" — namely, non-defendant banks that participated in the inter-dealer market. (Defs.' Mem. 27-28). But based **[**38]** on the allegations contained in the Amended Complaint, the Court has no reason to believe that the non-defendant banks suffered any financial injury at all from Defendants' manipulation of that market, and therefore cannot conclude that those banks could serve as a more "efficient enforcers" than Plaintiffs. In any event, the other three factors all favor the **[*61]** conclusion that Plaintiffs are "efficient enforcers": Plaintiffs have alleged that they were directly harmed by Defendants' anticompetitive conduct by having to pay higher prices (or earning lower profits) from instruments tied to ISDAfix, there is nothing particularly speculative about the injury alleged, and the damages at issue are tied to particular transactions and contracts, obviating the danger of duplicative recovery. Given those factors, the Court has no basis to doubt that Plaintiffs are "efficient enforcers" whose financial injury will adequately "motivate them to vindicate the public interest in antitrust enforcement." *See* *Daniel, 428 F.3d at 443-44*. It follows that they have "antitrust standing" to pursue the claim under the *Sherman Act*.

C. The State-Law Claims

In addition to their antitrust claim, Plaintiffs allege state-law claims (against **[**39]** all Defendants other than ICAP) for breach of contract, breach of the implied covenant of good faith and fair dealing, unjust enrichment, and tortious interference with contract. The Court considers each of those claims in turn.[3]

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[2] The Supreme Court's decisions in *ARCO* and *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977), 97 S. Ct. 690, 50 L. Ed. 2d 701* — the principal authorities upon which the *LIBOR I* Court relied, *see* *935 F. Supp. 2d at 689-92*, and upon which Defendants rely (although not as heavily) here (Defs.' Br. **[**36]** 26) — do not call for a different conclusion. As the *FX* Court explained, those cases "were brought by competitors against their rivals, not by consumers alleging the per se wrong of horizontal price-fixing against colluding competitors." *74 F. Supp. 3d at 598*. The cases thus stand for the uncontroversial proposition that a competitor cannot use the antitrust laws to recover lost profits as a result of being confronted with an *increase* in competition. They do not stand for the proposition that a plaintiff fails to show antitrust injury if it "could have suffered the same harm under normal circumstances of free competition." *LIBOR I, 935 F. Supp. 2d at 689*; *see* *In re Cardizem CD Antitrust Litig., 332 F.3d 896, 912 (6th Cir. 2003)* (rejecting an argument that where a "defendant could have in theory caused the same injury without engaging in an antitrust violation, the plaintiff has not suffered an 'antitrust injury,' even if in fact it was the antitrust violation that caused the actual injury in a particular case"); *see also, e.g.,* *Irvin Indus., Inc. v. Goodyear Aerospace Corp., 974 F.2d 241, 245-46 (2d Cir. 1992)* ("The possibility that [the defendant] might have submitted a lawful bid, and, if so, the same damage might have resulted, cannot in and of itself negate causation as a matter of law.").

1. The Contract and Quasi-Contract Claims Against Nomura Securities

Before turning to Plaintiffs' claims generally, however, the Court addresses their claims against Defendant Nomura Securities ("Nomura") in particular. In supplemental memoranda, Defendant **[**40]** Nomura argues that all contract and quasi-contractual claims against it — namely, the claims for breach of contract, breach of the implied covenant of good faith and fair dealing, and unjust enrichment — should be dismissed because Plaintiffs fail to allege "any transaction, contract, or relationship between *any* plaintiff and Nomura." (Supp. Mem. Def. Nomura Securities International, Inc. Supp. Mot. To Dismiss (Docket No. 175) 1). The Court agrees. ***HN16***[] An essential element of each contractual and quasi-contractual claim Plaintiffs raise is the existence of some relationship between the plaintiff and the defendant. *See, e.g., In re LIBOR-Based Fin. Instruments Antitrust Litig., 27 F. Supp. 3d 447, 479 (S.D.N.Y. 2014)* ("*LIBOR III*") ("While parties need not be in privity with one another to sustain an unjust enrichment claim, a plaintiff must still plead that it had *some* relationship with a defendant."); *id. at 478* ("[I]t is clear that the law requires an agreement between the parties for a defendant to be liable for a breach of contract."). Here, although Appendix A to the Amended Complaint lists almost 2,000 transactions between Plaintiffs and the Defendant Banks, *none* of those transactions is with Nomura.

Notably, Plaintiffs point to no authority (and indeed make no argument) suggesting that **[**41]** their claims against Nomura should survive despite their failure to allege any relationship, contractual or otherwise, with the bank. The fact that members of the putative class may have engaged in transactions with Nomura (*see* AC ¶ 38) is plainly not enough to keep **[*62]** the claims alive. *See NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co., 693 F.3d 145, 159 (2d Cir. 2012)* ("***HN17***[] [T]o establish Article III standing in a class action . . . for every named defendant there must be at least one named plaintiff who can assert a claim *directly* against that defendant . . . ." (emphasis added)); *Griffin v. Dugger, 823 F.2d 1476, 1483 (11th Cir. 1987)* ("[E]ach claim must be analyzed separately, and a claim cannot be asserted on behalf of a class unless at least one named plaintiff has suffered the injury that gives rise to that claim."). And although some Circuits have allowed such claims to proceed pursuant to the "juridical link" doctrine, *see Payton v. Cty. of Kane, 308 F.3d 673, 678-82 (7th Cir. 2002)*, Plaintiffs point to no case in this Circuit where that doctrine has been applied, *see McCall v. Chesapeake Energy Corp., 817 F. Supp. 2d 307, 315 (S.D.N.Y. 2011)* ("[The plaintiff] does not cite to any case where the juridical link doctrine was found to cure a named plaintiff's lack of Article III standing, and other courts in the Second Circuit have dismissed this same argument."). In fact, as Plaintiffs concede (Pls.' Mem. Law Opp'n Def. Nomura Securities International, Inc.'s **[**42]** Suppl. Mem. Law (Docket No. 195) 1 n.1), the Second Circuit has expressly disavowed at least one version of the juridical link doctrine. *See, e.g., Mahon v. Ticor Title Ins. Co., 683 F.3d 59, 64 (2d Cir. 2012)*. The Court therefore concludes that the juridical link doctrine does not save Plaintiffs' contractual and quasicontractual claims against Nomura and that those claims must be dismissed.

2. Breach of Contract

HN18[] To state a claim for breach of contract, a plaintiff must allege (1) an agreement, (2) breach by the defendant, and (3) damages. *See, e.g., Fischer & Mandell, LLP v. Citibank, N.A., 632 F.3d 793, 799 (2d Cir. 2011)*.[4] Defendants challenge all three elements of Plaintiffs' contract claim here. First, Defendants complain that,

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[3] Applying New York choice-of-law rules, *see Follman v. World Fin. Network Nat'l Bank, 721 F. Supp. 2d 158, 161 (E.D.N.Y. 2010)*, Plaintiffs' state-law claims may be governed by the law of New York, Alaska, Pennsylvania, Connecticut, or Michigan (the last four of which are where Plaintiffs are domiciled (*see* AC ¶¶ 23-27)). The parties do not brief choice of law; instead, they appear to agree (if not explicitly, *see* Defs.' Br. 34 n.39, then implicitly), that the Court need not reach choice-of-law questions at this stage because the results would be the same under any applicable law. *See Fin. One Pub. Co. Ltd. v. Lehman Bros. Special Fin., Inc., 414 F.3d 325, 331 (2d Cir. 2005)* ***HN15***[] ("[W]here the court has determined that the result would be the same under either jurisdiction's law, it need not decide which to apply." (emphasis omitted)). In light of that, the Court leaves choice of law to another day.

although Plaintiffs list a series of almost 2,000 contracts in Appendix A to the Amended Complaint, "they fail to allege sufficient facts about each of those transactions to allow Defendants to determine which of them will be a basis for Plaintiffs' claim." (Defs.' Mem. 35). Plaintiffs could certainly have done a better job of identifying the precise contracts Defendants allegedly breached. But Defendants provide no authority to suggest that such a list is required to survive a motion to dismiss. The only cases Defendants cite in support of their argument are *Langreich v. Gruenbaum, No. 06-CV-4931 (BSJ) (MHD), 2009 U.S. Dist. LEXIS 40296, 2009 WL 321253, at *4 (S.D.N.Y. Jan. 30, 2009)* **[**43]** , where the Court dismissed a "muddled" breach-of-contract claim under *Rule 8(a) of the Federal Rules of Civil Procedure* because it could not even discern whether the plaintiff was alleging breaches of oral contracts, written contracts, or both, and *Sedona Corp. v. Ladenburg Thalmann & Co., Inc., No. 03-CV-3120 (LTS) (THK), 2005 U.S. Dist. LEXIS 16382, 2005 WL 1902780, at *20 (S.D.N.Y. Aug. 9, 2005)*, where the Court was similarly unable to identify what specific provisions of the "myriad alleged oral and written agreements" defendants had allegedly breached. In these cases, by contrast, the Amended Complaint explains that (1) Plaintiffs' breach-of-contract claims are based only on contracts with the Defendant Banks "whose cash flows were expressly tied to USD ISDAfix" (AC ¶ 254); (2) that those contracts were each "governed by ISDA Master Agreements" (*id. ¶¶ 210, 256*); and (3) **[*63]** that each contract expressly required the Defendant Banks to act "in good faith" and in accordance with the law (*id. ¶¶ 213-14, 216*). Those allegations provide Defendants with "sufficient information to permit [them] to have a fair understanding of what [Plaintiffs are] complaining about and to know whether there is a legal basis for recovery," which is all that is required at this stage of the litigation. *Kittay v. Kornstein, 230 F.3d 531, 541 (2d Cir. 2000)* (internal quotation marks **[**44]** omitted).

Defendants' other contentions — that the Amended Complaint fails to allege that they breached the contracts and fails to allege that Plaintiffs "were harmed or even affected by the alleged breach" (Defs.' Mem. 35-36) — are similarly unpersuasive. First, as discussed above, Plaintiffs allege that each Defendant engaged in a conspiracy to artificially manipulate ISDAfix throughout the class period in violation of antitrust laws. (*See, e.g.*, AC ¶¶ 6, 8, 115-17, 141, 145, 163, 171-76). Plaintiffs also allege that Defendants knowingly misrepresented the nature of ISDAfix, affirming that ISDAfix was an objective, market-based rate even though all Defendants knew ISDAfix to be artificially manipulated throughout the putative class period. Those allegations are plainly sufficient to state a claim that Defendants breached their commitment to make calculations and payments in good faith and in accordance with the law. Second, Plaintiffs plausibly allege that the whole point of Defendants' conspiracy to manipulate ISDAfix was to maximize profits for the Defendant Banks on certain **[**45]** instruments by decreasing revenues or increasing prices for the counterparties to those instruments. And, at least according to the Amended Complaint, which the Court must treat as true, Defendants were ultimately successful in that endeavor: "Plaintiffs' swaptions and other interest rate derivatives that settled by reference, or otherwise had cash flows tied to ISDAfix rates were made less profitable" for Plaintiffs (*i.e.*, more profitable to the Banks) "than they would have been in the absence of manipulation." (AC ¶ 262). Given the nature of the alleged conspiracy between Defendants, that allegation is entirely plausible. The fact that some Plaintiffs on some days may have benefitted from the manipulation of the ISDAfix rates under their contracts does not alter the fact that Plaintiffs plausibly allege that they were harmed by Defendants' agreement to manipulate ISDAfix in a way that would favor the Banks (and, by implication, harm Plaintiffs). The Amended Complaint therefore adequately makes out a claim for breach of contract.

3. Breach of the Implied Covenant of Good Faith and Fair Dealing

In addition to their breach-of-contract claim, Plaintiffs raise a claim for breach of the **[**46]** implied covenant of good faith and fair dealing. ***HN19***[] "An implied-covenant claim can survive a motion to dismiss only if it is based on allegations different than those underlying the accompanying breach of contract claim and the relief sought is not intrinsically tied to the damages allegedly resulting from the breach of contract." *Grant & Eisenhofer, P.A. v. Bernstein Liebhard LLP, No. 14-CV-9839 (JMF), 2015 U.S. Dist. LEXIS 51685, 2015 WL 1809001, at *4 (S.D.N.Y. Apr. 20, 2015)* (internal quotation marks omitted). Here, Plaintiffs' implied-covenant claim is based on precisely the

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[4] A plaintiff must also prove "adequate performance by the plaintiff." *Fischer & Mandell, LLP, 632 F.3d at 799*. That element is not at issue here.

same allegations as their breach-of-contract claim — namely, that Plaintiffs and certain of the Defendant Banks entered into ISDA Master Agreements, which required the Banks to act in good faith and in accordance with the law, and that the Banks breached that duty when they calculated cash settlement amounts with reference to an ISDAfix rate they knew to be manipulated. (*Compare* AC ¶¶ 260-61, *with id.* ¶¶ 266-67). Plaintiffs only response is that they permissibly plead two theories of recovery in the alternative, **[*64]** which "makes sense" here because the Court or a jury might ultimately reject the breach-of-contract claim. (Pls.' Mem. 47). But an implied-covenant claim is not a valid alternative theory of recovery "when [it is] based on the exact same allegations" **[**47]** as a breach-of-contract claim, as it is here. *Grant & Eisenhofer, 2015 U.S. Dist. LEXIS 51685, 2015 WL 1809001, at *4* (internal quotation marks omitted). Plaintiffs' implied-covenant claim must therefore be dismissed.[5]

4. Unjust Enrichment

Next, Plaintiffs raise an unjust enrichment claim against all the Defendant Banks. For this claim, the choice of law does appear to be relevant. ***HN20***[] Under the laws of Connecticut, Pennsylvania, and Michigan, plaintiffs are routinely allowed to bring alternative claims for unjust enrichment and breach contract. *See* *Stein v. Horton, 99 Conn. App. 477, 914 A.2d 606, 613 (Conn. App. Ct. 2007)* ("Parties routinely plead alternative counts alleging breach of contract and unjust enrichment, although in doing so, they are entitled only to a single measure of damages arising out of these alternative claims."); *Lugo v. Farmers Pride, Inc., 2009 PA Super 5, 967 A.2d 963, 970 (Pa. Super. Ct. 2009)* (holding that plaintiffs may "plead . . . breach of contract in the alternative with a cause of action under a theory of unjust enrichment"); *H.J. Tucker & Assocs., Inc. v. Allied Chucker & Eng'g Co., 234 Mich. App. 550, 595 N.W.2d. 176, 182 (Mich. Ct. App. 1999)* (holding that "plaintiff was entitled to plead alternative" claims of contract and quasi-contract).[6] By contrast, New York law provides that a party can pursue alternative claims for unjust enrichment and breach of contract only "[w]here there is a bona fide dispute as to whether" an express contract governs the subject matter of the disagreement, which — given **[**49]** the Court's conclusions with respect to Plaintiffs' implied-covenant claim — may not be the case here. *Marshall v. Hyundai Motor Am., 51 F. Supp. 3d 451, 471 (S.D.N.Y. 2014)*; *see also* *LIBOR III, 27 F. Supp. 3d at 483* ("[T]he predicate for dismissing quasi-contract claims is that the contract at issue clearly covers the dispute between the parties."). But because the parties did not brief the issue of choice of law, *see supra* note 3, and at least some Plaintiffs' unjust enrichment claims would likely survive **[*65]** based on the more permissive law in their domiciles, the Court sees little reason at this point to parse the question of whether there is a "bona fide dispute as to whether" an express contract governs the subject matter of the parties' disagreement. Instead, Defendants' motion to dismiss Plaintiffs' unjust enrichment claim is therefore denied without prejudice to renewal on summary judgment.

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[5] The Court would reach that conclusion regardless of what state's law is to be applied. The law of every relevant state either does not recognize breach of the implied covenant of good faith and fair dealing as a separate cause of action, *see* *Casper v. Combustion Eng'g, Inc., No. CV 97-0570516S, 1998 Conn. Super. LEXIS 1883, 1998 WL 389215, at *8 (Conn. Super. Ct. June 23, 1998)* ("Notwithstanding that our Supreme Court has recognized the covenant of good faith and fair dealing as a rule of contract construction, the covenant is widely misused and pled as a separate cause of action which generally does nothing more than restate a breach of contract claim."); ***McCann v. U.S. Bank, N.A., 873 F. Supp. 2d 823, 848 (E.D. Mich. 2012)*** ("Michigan law does not recognize a cause of action for breach of the implied covenant of good faith and fair dealing." (internal quotation marks omitted)); *King of Prussia Equip. Corp. v. Power Curbers, Inc., 158 F. Supp. 2d 463, 466-67 (E.D. Pa. 2001)* (concluding that "the courts of Pennsylvania would not entertain [plaintiff's] good faith and fair dealing claim as a separate cause of action" where based on the same allegations as a breach of contract claim), or appears to recognize it as an independent cause of action only in limited circumstances not present **[**48]** here, *see* *Reed v. Mun. of Anchorage., 782 P.2d 1155, 1158 (Ala. 1989)* (explaining that the implied duty of good faith and fair dealing creates an enforceable cause of action in the context of employment contracts).

[6] The state of Alaska law on this question is less clear, but it appears that Alaska also allows separate claims for unjust enrichment and breach of contract to be brought in the alternative. *See* ***Reeves v. Alyeska Pipeline Serv. Co., 56 P.3d 660, 664 (Alaska 2002)*** (reviewing a special jury verdict involving alternative claims of express contract and unjust enrichment claims without suggesting the claims cannot be pursued in the alternative).

5. Tortious Interference [50]**

Finally, the Court turns to Plaintiffs' claims for tortious interference with contract. Under any potentially applicable state law, ***HN21***[] such a claim generally requires Plaintiffs to plead (1) each Defendant's knowledge of the contract, (2) each Defendant's intentional and improper procurement of a breach of that contract, and (3) damages proximately caused by the Defendant's conduct. *See, e.g., RAN Corp. v. Hudesman, 823 P.2d 646, 648 (Alaska 1991)*; *Smith v. Brown, No. CV91288536S, 1992 Conn. Super. LEXIS 2599, 1992 WL 219300, at *1 (Conn. Super. Ct. Aug. 28, 1992)*; *CMI Int'l, Inc. v. Intermet Int'l Corp., 251 Mich. App. 125, 649 N.W.2d 808, 812 (Mich. Ct. App. 2002)*; *Ullmannglass v. Oneida, Ltd., 86 A.D.3d 827, 927 N.Y.S.2d 702, 705 (N.Y. App. Div. 2011)*; *Walnut St. Assocs., Inc. v. Brokerage Concepts, Inc., 2009 PA Super 191, 982 A.2d 94, 97-98 (Pa. Super. Ct. 2009)*, *aff'd*, *610 Pa. 371, 20 A.3d 468 (2011)*. Here, Plaintiffs fail to plead actual intent to interfere with known contracts, so their tortious-interference claim must be dismissed. Plaintiffs attempt to muddy the water on this point by arguing that "[i]mpacting ISDAfix contracts was . . . not an unintended side-effect, but the focus of Defendants' behavior." (Pls.' Mem. 51). Although that is undoubtedly true on one level — according to the Amended Complaint, Defendants hoped to impact ISDAfix contracts to which *they themselves were party*—it is not enough. Instead, Plaintiffs must plead a specific intent to injure a known contractual relationship *with another. See, e.g., RAN Corp., 823 P.2d at 648* (holding that a plaintiff in Alaska must show that "the defendant . . . knew of the contract and intended to induce a breach"); *Smith, 1992 Conn. Super. LEXIS 2599, 1992 WL 219300, at *1* (noting **[**51]** that a claim for tortious interference under Connecticut law requires a plaintiff to establish, *inter alia*, "the existence of a contractual relationship," "a third party's knowledge of this relationship" and "a third party's intent to interfere with that contract" (citing *Solomon v. Aberman, 196 Conn. 359, 364, 493 A.2d 193 (1985))*); *CMI Int'l, 649 N.W.2d at 812* (holding that, under Michigan law, tortious interference with a contract requires a plaintiff to allege that the defendant acted "for the purpose of invading the contractual rights" of another); *Ullmannglass, 927 N.Y.S.2d at 705* (holding that to "sustain a claim for tortious interference with a contract" under New York law "it must be established that a valid contract existed which a third party knew about, the third party intentionally and improperly procured the breach of the contract and the breach resulted in damage to the plaintiff" (internal quotation marks omitted)); *Walnut St. Assocs., 982 A.2d at 98* (observing that the "necessary elements" of a claim for intentional interference in Pennsylvania include "(1) the existence of a contractual relationship between the complainant and a third party" and "(2) an intent on the part of the defendant to harm the plaintiff by interfering with that contractual relationship"). As Plaintiffs do not do so, they fail to state a claim **[**52]** for tortious interference.

D. Timeliness

Finally, Defendants contend that many of the claims in Plaintiffs' Amended Complaint — which relates back, in most if not all respects, to Plaintiffs' original complaint, which was filed on September 4, 2014 (*see* Complaint (Docket No. 1); *see also* Defs.' Br. 42 & n.52)— are time-barred. ***HN22***[] **[*66]** Plaintiffs' *Sherman Act* claim is subject to a four-year statute of limitations. *See 15 U.S.C. § 15b*. To determine the statute of limitations for Plaintiffs' breach-of-contract and unjust enrichment claims — the only state-law claims that survive in light of the Court's rulings above — the Court would have to apply New York's choice-of-law rules. *See, e.g., Carroll v. LeBoeuf, Lamb, Greene & MacRae, L.L.P., 392 F. Supp. 2d 621, 628 (S.D.N.Y. 2005)*. ***HN23***[] Under New York law, "when a nonresident plaintiff sues upon a cause of action that arose outside of New York, the court must apply the shorter limitations period, including all relevant tolling provisions, of either: (1) New York; or (2) the state where the cause of actions accrued." *Stuart v. Am Cyanamid Co., 158 F.3d 622, 627 (2d Cir. 1998)*; *see N.Y. C.P.L.R. § 202*. ***HN24***[] Breach-of-contract and unjust enrichment claims are subject to a six-year statute of limitations in New York. *See N.Y. C.P.L.R. § 213(2)*. But the statutes of limitations in the states where Plaintiffs' claims accrued are the same or shorter: three years in **[**53]** Alaska, *see Alaska Stat. § 09.10.053*; four years in Pennsylvania, *see 42 Pa. Cons. Stat. § 5525(a)*, and Connecticut, *see Conn. Gen. Stat. § 52-576(a)*; and six years in Michigan, *see Mich. Comp. Laws § 600.5807(8)*.

The Court need not decide which statute of limitations applies at this stage, however, because Plaintiffs plausibly allege that Defendants fraudulently concealed their conspiracy. In every relevant jurisdiction, ***HN25***[] the statute of limitations is tolled where a plaintiff shows that a defendant committed fraudulent acts intended to conceal its misconduct and that the plaintiff's ignorance of the concealed misconduct was not a product of its own lack of reasonable diligence. *See, e.g.,* *Koch v. Christie's Int'l PLC, 699 F.3d 141, 157 (2d Cir. 2012)* (federal law); *Williams v. Williams, 129 P.3d 428, 432 (Alaska 2006)*; *BellSouth Telecomms., Inc. v. W.R. Grace & Co.-Conn., 77 F.3d 603, 615 (2d Cir. 1996)* (Connecticut law); *Doe v. Roman Catholic Archbishop of Archdiocese of Detroit, 264 Mich. App. 632, 692 N.W.2d 398, 404-05 (Mich. Ct. App. 2004)*; *Simcuski v. Saeli, 44 N.Y.2d 442, 448-50, 377 N.E.2d 713, 406 N.Y.S.2d 259 (1978)*; *Sarpolis v. Tereshko, 26 F. Supp. 3d 407, 420 (E.D. Pa. 2014)*. Applying those doctrines here, Plaintiffs plausibly allege that the running of the potentially applicable statutes of limitations was tolled at least through September 4, 2011 — three years prior to the filing of their initial complaint — which is all they need to do to for all remaining claims to survive Defendants' motion to dismiss. *See* *Santos v. Dist. Council of N.Y. City & Vicinity of United Bhd. of Carpenters & Joiners of Am., AFL-CIO, 619 F.2d 963, 967 n.4 (2d Cir. 1980)* (providing that a statute of limitations defense "may be raised in a pre-answer motion pursuant to *Fed. R. Civ. P. 12(b)(6)*" only "if it appears on the face of the complaint that the cause of action has not been brought within the statute of limitations"). **[**54]**

First, the alleged conspiracy in these cases was secretive and covert by its very nature — it was an agreement that was "designed to endure over a period of time" and, "[i]n order to endure, it [had to] remain concealed" from the market. *State of N.Y. v. Hendrickson Bros., Inc., 840 F.2d 1065, 1084 (2d Cir. 1988)*. Additionally, Plaintiffs explicitly allege that Defendants committed affirmative acts of concealment. For example, Plaintiffs contend that, throughout the putative class period, Defendants falsely maintained that ISDAfix was an accurate, market-based rate through public statements describing the process by which ISDAfix was set. *Cf.* *Palmer v. Borg-Warner Corp., 838 P.2d 1243, 1249 (Alaska 1992)* (discussing and relying on prior Alaska case law that held there was "no reason for a reasonable **[*67]** person to doubt the truth of the representations made" by a defendant where evidence calling those representations into doubt would only have been available through "extensive testing"). Indeed, the Amended Complaint identifies several statements made during the putative class period by ISDA — a trade association with which all Defendants were involved — that allegedly amounted to affirmative misrepresentations regarding how ISDAfix was calculated. (AC ¶¶ 222-28).

Defendants contend that Plaintiffs cannot avail themselves of the **[**55]** fraudulent concealment doctrine because they failed to exercise reasonable diligence in investigating their claims. (Defs.' Mem. 45-46). But ***HN26***[] requiring Plaintiffs, "at the motion to dismiss stage, to make a showing of reasonable diligence" would be "premature." *BPP Ill., LLC v. Royal Bank of Scotland Grp., PLC, 603 F. App'x 57, 59 (2d Cir. 2015)* (summary order) (internal quotation marks omitted). In any event, Plaintiffs plausibly allege that they did not know about Defendants' conduct until after September 4, 2011, and that their failure to uncover the conspiracy earlier was not due to a lack of diligence on their part. Among other things, the trends identified in the Amended Complaint are subtle and required the aggregation of massive quantities of data. (*See* Pls.' Mem. 57). And perhaps the most important data — the Defendant Banks' individual submissions to ICAP — were (at least according to the Amended Complaint, which must be taken as true) not publicly available at all. (AC ¶ 232; *see id.* ¶ 69 ("While the final ISDAfix rates are published, the Defendant Banks' individual submissions are not.")). Contrary to Defendants' contentions (Defs.' Mem. 45-46), the fact that there was a single article published in 2010 that raised "suspicion[s]" about the ISDAfix rate-setting process **[**56]** does not call for a different result at this stage of the litigation. *See* Michael Mackenzie & Gillian Tett, *Markets: Frozen in Time*, Fin. Times (June 16, 2010). Nothing in that article made clear that the Defendant Banks were making false submissions to ICAP or that ICAP and the Defendant Banks had in any way agreed to manipulate ISDAfix. *Id.* In fact, if anything, the article only underscores that the rate-setting process was opaque and difficult to meaningfully evaluate without substantial investments of time, money, and energy. *See id.* (describing the ISDAfix rate-setting process as "opaque" and quoting then-CFTC Chairman Gary Gensler as stating that many of the transactions in the swap market were "internali[zed]" and "not made publicly available"). In any event, a single article raising suspicions about the rate-setting process is not enough to establish, on a motion to dismiss, that Plaintiffs failed to exercise reasonable diligence. *See* *BPP Ill., LLC, 603 F. App'x at 59* (holding that the district court had "acted too hastily" in dismissing claims relating to the fixing of LIBOR as time-barred despite multiple articles detailing the alleged rate fixing).

In short, Plaintiffs plausibly allege that Defendants fraudulently concealed **[**57]** their conspiracy until after September 4, 2011. It follows that, whether the applicable statute of limitations is three years or longer, Plaintiffs' remaining claims cannot be dismissed as untimely.

CONCLUSION

For the reasons stated above, Defendants' motion to dismiss is GRANTED in part and DENIED in part. Specifically, Plaintiffs' tortious interference and breach-of-implied-faith claims are dismissed in their entirety, as are Plaintiffs' breach-of-contract **[*68]** and unjust enrichment claims against Nomura. Plaintiffs' remaining claims — namely, their antitrust claim against all Defendants and their breach-of-contract and unjust enrichment claims against all Defendants other than Nomura (and ICAP, against whom they were not brought) — survive.

One issue remains: In the final line of their opposition, Plaintiffs ask for leave to amend their complaint for a second time in the event that the Court grants Defendants' motion in any part. (Pls.' Mem. 60). ***HN27***[] Under *Rule 15 of the Federal Rules of Civil Procedure*, "a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." *Fed. R. Civ. P. 15(a)(2)*. The Second Circuit has held that a *Rule 15(a)* motion — as the Court construes Plaintiff **[**58]** passing request — "should be denied only for such reasons as undue delay, bad faith, futility of the amendment, and perhaps most important, the resulting prejudice to the opposing party." *Aetna Cas. & Sur. Co. v. Aniero Concrete Co., 404 F.3d 566, 603 (2d Cir. 2005)* (internal quotation marks omitted); *see also* *Loreley Fin. (Jersey) No. 3 Ltd. v. Wells Fargo Sec., LLC, 797 F.3d 160, 190 (2d Cir. 2015)* ("leav[ing] unaltered" prior case law on denial of leave to amend, including the rule that "leave may be denied where amendment would be futile"). Nevertheless, "the grant or denial of an opportunity to amend is within the discretion of the District Court." *Williams v. Citigroup Inc., 659 F.3d 208, 214 (2d Cir. 2011)* (internal quotation marks omitted).

Applying those principles here, the Court concludes that leave to amend is not warranted here because further amendment would be futile. First, the problems with Plaintiffs' impliedcovenant and tortious interference claims are "substantive" and "better pleading will not cure" them. *Cuoco v. Moritsugu, 222 F.3d 99, 112 (2d Cir. 2000)*. Second, although Plaintiffs could cure the defects in their contract and quasi-contract claims against Nomura simply by naming transactions involving Nomura, it is safe to assume that they would have done so if they could have done so. That is, with respect to the claims against Nomura that are dismissed, Plaintiffs fail to give "any indication that [they are] in possession of facts that would **[**59]** cure the problems identified in this opinion." *Clark v. Kitt, No. 12-CV-8061 (CS), 2014 U.S. Dist. LEXIS 113494, 2014 WL 4054284, at *15 (S.D.N.Y. Aug. 15, 2014)*. The fact that Plaintiffs already amended their complaint once in an attempt to cure the deficiencies raised in Defendants' initial motion to dismiss — a motion that, notably, raised many of the same arguments as the motion addressed in this Opinion and Order (*see* Docket No. 151) — and that they were expressly cautioned that they would "not be given another opportunity to amend their complaint to address the alleged deficiencies identified in" Defendants' earlier motion (Docket No. 154), underscores the futility of further amendment. *See, e.g.,* *Ruotolo v. City of N.Y., 514 F.3d 184, 191 (2d Cir. 2008)* (affirming the district court's denial of leave to amend in part because of the previous opportunities that the plaintiff had received to amend the complaint). Plaintiffs' request for leave to amend is therefore denied.

The Clerk of Court is directed to terminate Docket No. 172.

SO ORDERED.

Date: March 28, 2016

New York, New York

/s/ Jesse M. Furman

JESSE M. FURMAN

United States District Judge

Lippincott v DirecTV, Inc. (In re NFLs Sunday Ticket Antitrust Litig.)

United States District Court for the Central District of California

March 28, 2016, Decided; March 28, 2016, Filed

ML 15-02668-BRO (JEMx); CV 15-09996-BRO (JEMx)

Reporter
2016 U.S. Dist. LEXIS 41639 *; 2016-1 Trade Reg. Rep. (CCH) P79,557; 2016 WL 1192642

IN RE: NATIONAL FOOTBALL LEAGUES SUNDAY TICKET ANTITRUST LITIGATION, THIS DOCUMENT RELATES TO: ROBERT GARY LIPPINCOTT, JR. v. DIRECTV, INC. ET AL

Subsequent History: Request granted, in part, Request denied by, in part *In re NFLs Sunday Ticket Antitrust Litig., 2016 U.S. Dist. LEXIS 195070 (C.D. Cal., May 23, 2016)*

Dismissed by, Motion denied by, As moot *In re NFL Sunday Ticket Antitrust Litig., 2017 U.S. Dist. LEXIS 121354 (C.D. Cal., June 30, 2017)*

Prior History: *In re NFL's "Sunday Ticket" Antitrust Litig., 148 F. Supp. 3d 1358, 2015 U.S. Dist. LEXIS 166043 (J.P.M.L., Dec. 8, 2015)*

Core Terms

antitrust, unconscionability, allegations, federal law, monopoly, removal, federal question, cause of action, federal court, prices, Sherman Act, supra-competitive, pleaded, federal jurisdiction, plaintiff's claim, federal issue, state law, monopolistic, cases, unjust enrichment, state law claim, district court, well-pleaded, consumers, artfully, disputed, Reply

Counsel: **[*1]** Attorneys for Plaintiffs: None.

Attorneys for Defendants: None.

Judges: BEVERLY REID O'CONNELL, United States District Judge.

Opinion by: BEVERLY REID O'CONNELL

Opinion

CIVIL MINUTES — GENERAL

Proceedings: (IN CHAMBERS)

ORDER DENYING PLAINTIFF LIPPINCOTT'S MOTION TO REMAND [24]

I. INTRODUCTION

Pending before the Court is Plaintiff Robert Gary Lippincott, Jr.'s Motion to Remand. (Dkt. No. 24.) After consideration of the papers filed in support of and in opposition to the instant Motion, the Court deems this matter appropriate for decision without oral argument of counsel. *See Fed. R. Civ. P. 78*; *C.D. Cal. L.R. 7-15*. As discussed further below, because the Court finds that Plaintiff's artfully pleaded Complaint necessarily states a substantial federal question under the Sherman Act, the Court **DENIES** Plaintiff's Motion to Remand.

II. FACTUAL & PROCEDURAL BACKGROUND

On October 6, 2015, Plaintiff Robert Gary Lippincott, Jr. ("Plaintiff") filed a Class Action Complaint in the Superior Court of the State of California, County of Sonoma. (*See Robert Gary Lippincott, Jr. v. DIRECTV, Inc. et al.*, No. 2:15-cv-09996 (hereinafter, "*Lippincott*"), Dkt. No. 1-1 (hereinafter, "Compl.").) Plaintiff's Complaint alleges that Defendants DirecTV, Inc.[1] and DirecTV Holdings **[*2]** LLC (collectively, "DirecTV" or "Defendants") engaged and continue to engage in conduct that violates: (1) California's Consumers Legal Remedies Act ("CLRA"), *Cal. Civ. Code § 1770*; (2) California's Unfair Competition Law ("UCL"), *Cal. Bus. & Prof. Code § 17200 et seq.*; and, (3) quasi-contract/unjust enrichment common law. (Compl. ¶¶ 51-79.)

According to Plaintiff, Defendants' "NFL Sunday Ticket product is [an] exclusive product that allows viewers to watch Sunday afternoon NFL out-of-market live game video telecasts—telecasts of games played on Sundays and not within the subscriber's home television market." (Compl. ¶ 4.) Plaintiff alleges that DirecTV is "the exclusive marketer of out of market Sunday afternoon NFL games," and claims that "DirecTV's monopoly over the broadcast of out of market Sunday afternoon NFL games allows [Defendants] to charge consumers unreasonably high, supra-competitive prices for its NFL Sunday Ticket programming within" California. (Compl. ¶¶ 5, 7.) Plaintiff's CLRA and UCL claims are based on Plaintiff's allegations that Defendants' contracts **[*3]** with Plaintiff and other similarly-situated California consumers contain unfair and unconscionable price provisions. (Compl. ¶ 14.)

Defendants removed Plaintiff's case to the Northern District of California on November 6, 2015, claiming that federal question jurisdiction exists over this case because "Plaintiff's claims are based on alleged 'monopolistic' conduct by DIRECTV, are necessarily federal in character, and Plaintiff's right to relief depends on the resolution of substantial, disputed questions of federal ***antitrust law***." (*Lippincott*, Dkt. No. 1 at 3.) That same day, Defendants filed a Notice of Related Action with the Judicial Panel on Multidistrict Litigation ("JPML"), providing the JPML with information regarding Plaintiff's case. (*In re Nat'l Football League's "Sunday Ticket" Antitrust Litig.*, MDL No. 2668 (hereinafter "JPML MDL"), Dkt. No. 66.)[2] Plaintiff filed his initial motion to remand in the Northern District of California on November 13, 2015.

On December 14, 2015, before the district court in the Northern District of California had ruled on Plaintiff's then-pending motion to remand, the JPML issued a Conditional Transfer Order transferring Plaintiff's Complaint to this Court. (JPML MDL, Dkt. No. 114.) Plaintiff did not oppose the JPML's Conditional Transfer Order, (*see id.* at 1 (providing that any party may file "a notice of opposition" to the Conditional Transfer Order within seven days)), and the JPML finalized the Transfer Order on December 22, 2015. (JPML MDL, Dkt. No. 117.)

Plaintiff filed the instant Motion to Remand with this Court on January 29, 2016. (*In re Nat'l Football Leagues Sunday Ticket Antitrust Litigation*, No. 2:15-ml-02668-BRO-JEM (hereinafter, "MDL"), Dkt. No. 24; *see* MDL, Dkt. No. 25 (hereinafter, "Mot.").) This Court's Order Setting Case Management Conference and Briefing Schedule terminated Plaintiff's Motion to Remand, (MDL, Dkt. Nos. 27, 28), however, the Court subsequently reinstated Plaintiff's Motion and set a briefing schedule, (MDL, Dkt. No. 96). According to that schedule, Defendants **[*5]**

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[1] According to Defendants, DirecTV, Inc. "no longer exists," as it "merged into DIRECTV, LLC, with DIRECTV, LLC as the surviving entity." (*Lippincott*, Dkt. No. 1 at 2 n.1.)

[2] On August 27, 2015, Movant Ninth Inning Inc. dba The Mucky Duck requested that the JPML centralize related actions alleging violations concerning the exclusive distribution of the NFL's Sunday Ticket product, "as well as any tag-along **[*4]** actions or other cases such as may be subsequently filed asserting related or similar claims." (JPML MDL, Dkt. No. 1.)

timely opposed Plaintiff's Motion to Remand on March 15, 2016, (MDL, Dkt. No. 107 (hereinafter, "Opp'n")), and Plaintiff timely replied on March 22, 2016, (MDL, Dkt. No. 113 (hereinafter, "Reply")).

III. LEGAL STANDARD

Pursuant to 28 U.S.C. § 1441, a civil action may be removed to the district court only if that court has original jurisdiction over the issues alleged in the state court complaint. *See* 28 U.S.C. § 1441(a). Under 28 U.S.C. § 1331, federal courts have jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. A case "arises under" federal law if a plaintiff's "well-pleaded complaint establishes either that federal law creates the cause of action" or that the plaintiff's "right to relief under state law requires resolution of a substantial question of federal law in dispute between the parties." *Franchise Tax Bd. v. Constr. Laborers Vacation Tr. for S. Cal., 463 U.S. 1, 13, 27, 103 S. Ct. 2841, 77 L. Ed. 2d 420 (1983)*.

In determining whether removal in a given case is proper, a court should "strictly construe the removal statute against removal jurisdiction." *Gaus v. Miles, Inc., 980 F.2d 564, 566 (9th Cir. 1992)*. "Federal jurisdiction must be rejected if there is any doubt as to the right of removal in the first instance." *Id.* The removing party therefore bears a heavy burden to rebut the presumption against removal. *See id.*

IV. DISCUSSION

Plaintiff **[*6]** claims "there is no basis for federal subject matter-jurisdiction" because Plaintiff's Complaint alleges "exclusively California state law causes of action against Defendants." (Mot. at 1-2.) Defendants argue, on the other hand, that "[t]he artful pleading doctrine . . . forecloses Plaintiff's attempt to avoid federal jurisdiction" where Plaintiff's Complaint "raises substantial, disputed federal questions that can only be resolved with reference to the federal Sherman Act." (Opp'n at 1.)

As discussed above, whether removal jurisdiction exists must be determined by reference to a plaintiff's "well-pleaded complaint." *Merrell Dow Pharm. Inc. v. Thompson, 478 U.S. 804, 808, 106 S. Ct. 3229, 92 L. Ed. 2d 650 (1986)*. The well-pleaded complaint rule makes plaintiff the "master of the claim." *Caterpillar Inc. v. Williams, 482 U.S. 386, 392, 107 S. Ct. 2425, 96 L. Ed. 2d 318 (1987)*. Thus, where a plaintiff can bring claims under both federal and state law, the plaintiff can prevent removal by ignoring the federal claim and alleging only state law claims. *Rains v. Criterion Sys., Inc., 80 F.3d 339, 344 (9th Cir. 1996)*. Plaintiff's Complaint in this case explicitly references only state causes of action under California's CLRA, UCL, and common law. (Compl. ¶¶ 51-79.)

An exception to the well pleaded complaint rule exists, however. *Vasserman v. Henry Mayo Newhall Mem'l Hosp., 65 F. Supp. 3d 932, 950 (C.D. Cal. 2014)*. Under the "artful pleading" doctrine, a court may recharacterize a plaintiff's claims as federal if the plaintiff **[*7]** has attempted to defeat removal by omitting to plead necessary federal questions. *Franchise Tax, 463 U.S. at 22*; *Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 398 n.2, 101 S. Ct. 2424, 69 L. Ed. 2d 103 (1981)* (concluding that the district court properly found that respondents "had attempted to avoid removal jurisdiction by 'artful[ly]' casting their 'essentially federal law claims' as state-law claims"); *Lippitt v. Raymond James Fin. Servs., Inc., 340 F.3d 1033, 1041 (9th Cir. 2003)* (describing the artful pleading doctrine as a "corollary" to the well-pleaded complaint rule that "allows courts to delve beyond the face of the state court complaint and find federal question jurisdiction by recharacterizing a plaintiff's state-law claim as a federal claim"); *Sparta Surgical Corp. v. Nat'l Ass'n of Sec. Dealers, Inc., 159 F.3d 1209, 1212-13 (9th Cir. 1998)* ("The rule that state law claims cannot be alchemized into federal causes of action by incidental reference . . . has no application when relief is particularly predicated on a subject matter committed exclusively to federal jurisdiction."); *Brennan v. Sw. Airlines Co., 134 F.3d 1405, 1409 (9th Cir. 1998)* (explaining that "the artful pleading doctrine creates an exception to [the] general rule" that "district courts have federal-question jurisdiction only if a federal question appears on the *face* of a plaintiff's complaint"), *amended sub nom.* *Brennan v. Sw. Airlines, 140 F.3d 849 (9th Cir. 1998)*.

"[T]he mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction." Lippitt, 340 F.3d at 1040 (quoting Merrell Dow, 478 U.S. at 808). "Federal question jurisdiction **[*8]** extends only in those cases in which a well-pleaded complaint establishes 'either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on a resolution of a substantial question of federal law.'" Easton v. Crossland Mortg. Corp., 114 F.3d 979, 982 (9th Cir. 1997) (quoting Franchise Tax Bd. v. Constr. Laborers Vacation Tr., 463 U.S. 1, 27-28, 103 S. Ct. 2841, 77 L. Ed. 2d 420 (1983)).

The Supreme Court clarified the standard for finding "substantial federal question" jurisdiction in *Gunn v. Minton*, which is required for this Court to possess subject matter jurisdiction over this case:

> [F]ederal jurisdiction over a state law claim will lie if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress. Where all four of these requirements are met, . . . jurisdiction is proper because there is a "serious federal interest in claiming the advantages thought to be inherent in a federal forum," which can be vindicated without disrupting Congress's intended division of labor between state and federal courts.

Gunn v. Minton, 133 S. Ct. 1059, 1065, 185 L. Ed. 2d 72 (2013) (quoting Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 313-14, 125 S. Ct. 2363, 162 L. Ed. 2d 257 (2005)).

A. Plaintiff's Complaint Necessarily Raises a Federal Issue

As an initial matter, Plaintiff argues that his claims make no reference to federal statutes. (Mot. at 8.) But under **[*9]** the artful pleading doctrine described above, the Court is not limited to Plaintiff's characterization of his claims as state causes of action. "In addition to examining the literal language selected by the plaintiff, the district court must analyze whether federal jurisdiction would exist under a properly pleaded complaint." Sparta, 159 F.3d at 1212 (citing Easton, 114 F.3d at 982). The Ninth Circuit has explained that a "plaintiff may not avoid federal jurisdiction by omitting from the complaint federal law essential to his or her claim or by casting in state law terms a claim that can be made only under federal law." *Id.* (citing Easton, 114 F.3d at 982; Rains, 80 F.3d at 344). Thus, if the Court concludes that Plaintiff "has 'artfully pleaded' claims in this fashion, it may uphold removal even though no federal question appears on the face of the plaintiff's complaint." Rivet v. Regions Bank of La., 522 U.S. 470, 475, 118 S. Ct. 921, 139 L. Ed. 2d 912 (1998).

Plaintiff also maintains that "[o]n its face, Plaintiff's complaint does not state a claim that 'arises under' federal law" because "[t]he factual allegations of the complaint are narrowly tailored to support Plaintiff's primary theory of liability—unconscionability of the consumer contracts under California state law." (Mot. at 2.) Plaintiff explains that his "intent in using . . . descriptive words [that Plaintiff **[*10]** admits are sometimes associated with federal antitrust claims] was not to assert federal claims, but rather to establish the procedural and substantive elements of unconscionability under California law." (Mot. at 8.) "When a claim can be supported by alternative and independent theories—one of which is a state law theory and one of which is a federal law theory—federal question jurisdiction does not attach because federal law is not a necessary element of the claim." Rains, 80 F.3d at 346.

Plaintiff states that "[a]ll three of Plaintiff's claims are premised on an unconscionability theory." (Reply at 4; *see* Mot. at 2-3.) In order to establish the procedural and substantive elements for Plaintiff's underlying unconscionability theory, Plaintiff alleges that "Defendants abused their monopoly position, leaving Plaintiff . . . with no available market alternatives," (Compl. ¶ 55), and that Defendants "maliciously and oppressively abuse[d] that position by imposing unreasonably high prices," (Compl. ¶ 58). Plaintiff also asserts that "[t]he price charged by DirecTV for its NFL Sunday Ticket service is disproportionately and unreasonably high . . . compared to the prices a competitive market would produce," (Compl. ¶ 59), and **[*11]** that Defendants "extract[ed] monopoly profits by charging . . . supra-competitive prices," (Compl. ¶ 60). Plaintiff argues that the substantive element for unconscionability is satisfied by Plaintiff's allegation that Defendants' unequal bargaining position causes consumers to pay unfair and unreasonable prices. (Reply at 4.) "[A] contractual term is substantively suspect," however, if the term "reallocates the risks of the bargain in an objectively unreasonable or unexpected manner." *Appalachian Ins. Co. v. McDonnell Douglas Corp., 214 Cal. App. 3d 1, 23, 262 Cal. Rptr. 716 (Cal. Ct. App. 1989)*.

If the Court were to disregard the allegations regarding Defendants' alleged "monopoly position" and "supra-competitive prices," no alternative and independent unconscionability theory would remain. Plaintiff's allegations would amount to the conclusion that Defendants' contracts contained "unconscionable provisions—the price of DirecTV's NFL Sunday Ticket service." (Compl. ¶ 54.) Pleading unconscionability requires something more than merely alleging that the price of a product was unfairly high. *See* *Walter v. Hughes Commc'ns, Inc., 682 F. Supp. 2d 1031, 1046-47 (N.D. Cal. 2010)* (finding that plaintiffs did not plead sufficient facts to support a claim for unconscionability in violation of the CLRA because plaintiffs "simply state[d] that the imposition of the fee was unconscionable, without explaining **[*12]** how it 'shocked the conscience' or was 'harsh or oppressive'" and that "[t]he 'shock the conscience' standard is a high one"); *Perdue v. Crocker Nat'l Bank, 38 Cal.3d 913, 926, 216 Cal. Rptr. 345, 702 P.2d 503 (Cal. 1985)* (en banc) (explaining that "[a]llegations that the price exceeds cost or fair value, standing alone, do not state a cause of action," but require "further allegations and proof setting forth the circumstances of the transaction"). As such, without Plaintiff's allegations regarding Defendants' allegedly monopolistic conduct, all three of Plaintiff's claims—each based on Plaintiff's unconscionability theory—would fail as a matter of law. Although Plaintiff argues that Defendants' alleged CLRA violation "can succeed on a theory of unconscionability as alleged in the complaint," (Mot. at 9), the Court does not find Plaintiff's unconscionability theory adequately provides for an independent state law theory for Plaintiff's CLRA claim.

Rather, Defendants' monopolistic conduct, as alleged by Plaintiff in his Complaint, is only actionable under *Section 2* of the Sherman Act, particularly where "[n]o California statute deals expressly with monopolization." *Dimidowich v. Bell & Howell, 803 F.2d 1473, 1478 (9th Cir. 1986)* (explaining that California's Cartwright Act, *Cal. Bus. & Prof. Code § 16720*, "does not address *unilateral* conduct"), *modified on denial of reh'g*, *810 F.2d 1517 (9th Cir. 1987)*; *see also* *Flagship Theatres of Palm Desert, LLC v. Century Theatres, Inc., 198 Cal. App. 4th 1366, 1386, 131 Cal. Rptr. 3d 519 (Cal. Ct. App. 2011)* ("[T]he Cartwright **[*13]** Act contains no provision parallel to the Sherman Act's prohibition against monopolization (*15 U.S.C. § 2*), and the Cartwright Act applies only to a 'combination' involving 'two or more persons' (*§ 16720*), not to *unilateral* conduct."). Moreover, it is clear that "[t]he federal courts have exclusive jurisdiction over federal antitrust claims." *Turf Paradise, Inc. v. Arizona Downs, 670 F.2d 813, 821 (9th Cir. 1982)*; *see also* *Marrese v. Am. Acad. of Orthopaedic Surgeons, 470 U.S. 373, 379-380, 105 S. Ct. 1327, 84 L. Ed. 2d 274 (1985)* (citing *Gen. Inv. Co. v. Lake Shore & Mich. S. Ry. Co., 260 U.S. 261, 286-88, 43 S. Ct. 106, 67 L. Ed. 244, 1 Ohio Law Abs. 162 (1922))*.

Although federal jurisdiction over the entire case is proper even when only one asserted state law claim turns on a substantial federal question, the Court also finds that Plaintiff's UCL and common law claims necessarily raise federal issues. *See* *Cty. of Santa Clara v. Astra USA, Inc., 401 F. Supp. 2d 1022, 1025 (N.D. Cal. 2005)* ("If only one of several state claims satisfies the requirements for removal on federal-question grounds, then any other purely state claims in the same complaint may also be determined by the federal court under its supplemental jurisdiction.").

Plaintiff similarly argues that his UCL claim "can succeed on a theory that Defendants' conduct and pricing was unfair, even if not rising to the level of being unlawful, or alternatively, on a theory that Defendants' conduct was unlawful for violating the CLRA." (Mot. at 9.) As discussed above, however, Plaintiff's CLRA claim would fail as a matter of law if the **[*14]** Court disregarded Plaintiff's allegations regarding Defendants' monopolistic conduct. Although the Court agrees that "a violation of the unfair prong of the UCL does *not* necessarily require establishing a violation of the Sherman Act," *PeopleBrowsr, Inc. v. Twitter, Inc., No. C-12-6120 EMC, 2013 U.S. Dist. LEXIS 31786, 2013 WL 843032, at *4 (N.D. Cal. Mar. 6, 2013)*, Plaintiff's UCL cause of action relies on Defendants' alleged "abuse of its monopoly position" and charging "supra-competitive prices," (Compl. ¶¶ 67, 68). Unlike in *PeopleBrowsr*, Plaintiff's Complaint does not allege conduct that "'significantly threatens or harms competition,' *regardless of* whether it represents an actual or incipient violation of an ***antitrust law***." *PeopleBrowsr, 2013 U.S. Dist. LEXIS 31786, 2013 WL 843032, at *4* (quoting *Cel—Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 20 Cal. 4th 163, 187 (Cal. 1999))* (emphasis added). Instead, Plaintiff's claim depends on Defendants' actual or incipient violation of a federal ***antitrust law***; Plaintiff's unconscionability theory is not "independent" of a federal antitrust theory. *See Rains, 80 F.3d at 346*.

Finally, Plaintiff contends that his quasi-contract and unjust enrichment cause of action "can succeed on a theory that Plaintiff's contract with Defendants is void as an illegal contract based on the CLRA and UCL violations and that Defendants have been **[*15]** unjustly enriched, a purely state law issue." (Mot. at 9.) For the same reasons that Plaintiff's CLRA and UCL claims fail to state an alternative and independent state law theory, Plaintiff's quasi-contract and unjust enrichment cause of action does not establish an independent state law claim.

For Plaintiff to prevail on his unconscionability theory that underlies his CLRA, UCL, and quasi-contract/unjust enrichment claims, Plaintiff must show that Defendants obtained a monopoly, and that Defendants charged supra-competitive prices. In fact, Plaintiff's class action allegations explicitly indicate that a "common legal and factual question[]" as to all class members is "[w]hether Defendants have obtained a monopoly with respect to Sunday afternoon out-of-market NFL game video presentations." (Compl. ¶ 47(a).) "That will necessarily require application of [federal ***antitrust] law*** to the facts of [Plaintiff's] case." *See Gunn, 133 S. Ct. at 1065*. A federal issue—namely, a federal antitrust issue under *Section 2* of the Sherman Act—is necessarily raised in Plaintiff's artfully pleaded Complaint.

B. Defendants Dispute the Federal Antitrust Issue Raised by Plaintiff's Complaint

Defendants "vigorously den[y] all of the allegations in Plaintiff's **[*16]** Complaint," which include Plaintiff's assertions regarding Defendants' monopoly power and supra-competitive prices—allegations relevant to the federal antitrust issue. (Opp'n at 19.) Plaintiff's papers do not reference whether the federal antitrust issue is disputed in this case. (*See generally* Mot.; *see* Reply at 10; *see also* Opp'n at 19 ("[T]his factor is easily satisfied, and Plaintiff has not argued otherwise.").) Plaintiff alleges that DirecTV is a monopoly, that it abuses its monopoly position to charge supra-competitive prices and extract monopoly profits, (Compl. ¶¶ 35, 36); Defendants deny these assertions, (Opp'n at 19). This case thus involves a "dispute or controversy respecting the . . . effect of [federal] law." *Grable, 545 U.S. at 313*. The Court accordingly finds that the federal antitrust issue is "actually disputed" here. *See Gunn, 133 S. Ct. at 1065-66*.

C. The Federal Antitrust Issue is Substantial

The Supreme Court has explained that the third *Gunn* factor, the substantiality requirement, "looks . . . to the importance of the issue to the federal system as a whole." *Gunn, 133 S. Ct. at 1066*; *see also id. at 1068* (explaining that "something more [than the vital importance of the resolution of a federal issue to the particular parties in the case], demonstrating **[*17]** that the question is significant to the federal system as a whole, is needed"). Plaintiff states, in conclusory fashion, that "any potential application of federal case law in this case will have limited effect on the federal system as a whole" because a "state court's consideration of the definitions of 'monopoly' or 'supra-competitive' in the context of the CLRA or UCL [has] little, if any, precedential effect." (Mot. at 11.)

As discussed above, Plaintiff's claims necessarily arise under the Sherman Act. The Supreme Court has expressly highlighted that "[t]he federal interest embodied in the Sherman Act is well-recognized and substantial." *Miller v. Hedlund, 813 F.2d 1344, 1352 (9th Cir. 1986)*; *see Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 111, 100 S. Ct. 937, 63 L. Ed. 2d 233 (1980)* ("The federal interest in enforcing the national policy in favor of competition is both familiar and substantial. . . . We must acknowledge the importance of the [Sherman] Act's procompetition policy."). The Ninth Circuit has also acknowledged the "federal interest in promoting competition under the Sherman Act." *Costco Wholesale Corp. v. Maleng, 522 F.3d 874, 903 (9th Cir. 2008)*.

In *Grable*, the Supreme Court explained that removal is permitted in substantial federal question cases because such cases "justify resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues." **[*18]** *545 U.S. at 312*. Similarly, here, the JPML found that "centralization [of the various related cases concerning DirecTV's Sunday Ticket product] will . . . promote the just and efficient conduct of this litigation" and will "prevent inconsistent pretrial rulings." (JPML MDL, Dkt. No. 112 at 1-2.) Based on the express guidance of the Supreme Court and the Ninth Circuit, as well as the MDL context in which this case arises, the Court finds that the federal antitrust issue raised in Plaintiff's Complaint is substantial because of its importance to the federal system as a whole.

D. The Federal Antitrust Issue is Capable of Resolution in Federal Court Without Disrupting the Federal-State Balance Approved by Congress

The artful pleading doctrine is invoked "only in exceptional circumstances" because the doctrine "raises difficult issues of state and federal relationships and often yields unsatisfactory results." *Salveson v. W. States Bankcard Ass'n, 731 F.2d 1423, 1427 (9th Cir. 1984)*. Plaintiff acknowledges that "the Federal courts have exclusive jurisdiction of all cases arising under *Section 2* of the Sherman Act," but claims that because federal courts do not have jurisdiction over "all questions in which monopolistic conduct may be the subject-matter of the controversy," the fourth **[*19]** *Gunn* factor is not met. The Court agrees that federal courts do not have jurisdiction over all cases alleging any type of monopolistic conduct. But, as discussed above, Plaintiff's Complaint artfully pleaded conduct that is exclusively within the jurisdiction of the federal court, namely under *Section 2* of the Sherman Act. Plaintiff otherwise makes the same inapposite arguments discussed and dismissed by this Court above. (*See* Mot. at 12 ("Defendants have attempted to deprive Plaintiff of his rights as the master of his complaint. Where the same conduct is prohibited by both federal and state law, Plaintiff has every right to choose to enforce state law claims instead of federal law claims.").) The Court finds that the federal antitrust issue is capable of resolution by this Court without the risk of disrupting the federal-state balance.

Because the Court finds that Defendants have satisfied all four *Gunn* factors, the Court concludes that it may exert federal subject matter jurisdiction over Plaintiff's artfully pleaded Complaint.

V. CONCLUSION

For the foregoing reasons, the Court **DENIES** Plaintiff's Motion to Remand. The Court hereby **VACATES** the hearing scheduled for March 29, 2016.

IT IS SO ORDERED [*20] .

End of Document

BHL Boresight, Inc. v. Geo-Steering Solutions, Inc.

United States District Court for the Southern District of Texas, Houston Division

March 29, 2016, Decided; March 29, 2016, Filed

CIVIL ACTION NO. 4:15-CV-00627

Reporter
2016 U.S. Dist. LEXIS 44729 *; 2016 WL 8648927

BHL BORESIGHT, INC., et al, Plaintiffs, VS. GEO-STEERING SOLUTIONS, INC., et al, Defendants.

Subsequent History: Modified by, Motion denied by, On reconsideration by *BHL Boresight, Inc. v. Geo-Steering Solutions, Inc., 2017 U.S. Dist. LEXIS 47196, 2017 WL 1177966 (S.D. Tex., Mar. 29, 2017)*

Partial summary judgment denied by, Without prejudice, Motion granted by *BHL Boresight, Inc. v. Geo-Steering Solutions, Inc., 2017 U.S. Dist. LEXIS 48056, 2017 WL 1180446 (S.D. Tex., Mar. 30, 2017)*

Motion granted by, in part, Motion denied by, in part *BHLBoresight, Inc. v. Geo-Steering Solutions, Inc., 2017 U.S. Dist. LEXIS 60217 (S.D. Tex., Apr. 19, 2017)*

Stay granted by *Bhl Boresight v. Geo-Steering Solutions, 2017 U.S. Dist. LEXIS 233209 (S.D. Tex., May 26, 2017)*

Motion granted by, in part, Motion denied by, in part, Dismissed by, in part, Dismissed without prejudice by, in part *BHL Boresight, Inc. v. Geo-Steering Sols. Inc., 2017 U.S. Dist. LEXIS 98057 (S.D. Tex., June 26, 2017)*

Partial summary judgment denied by, Objection overruled by *BHL Boresight, Inc. v. Geo-Steering Sols., Inc., 2017 U.S. Dist. LEXIS 136227, 2017 WL 3634215 (S.D. Tex., Aug. 24, 2017)*

Motion denied by *Bhl Boresight v. Geo-Steering Solutions, 2018 U.S. Dist. LEXIS 239319 (S.D. Tex., Mar. 5, 2018)*

Objection overruled by *BHL Boresight, Inc. v. Geo-Steering Sols., Inc., 2018 U.S. Dist. LEXIS 108682 (S.D. Tex., June 27, 2018)*

Dismissed by, in part, Motion denied by, Stay granted by, Stay denied by, in part, Motion denied by, Without prejudice *BHL Boresight, Inc. v. Geo-Steering Sol., Inc., 2019 U.S. Dist. LEXIS 10425, 2019 WL 280904 (S.D. Tex., Jan. 22, 2019)*

Core Terms

software, alleges, electronic communication, authorization, bitlocks, storage, tortious interference, motion to dismiss, courts, counterclaim, accessed, declaratory judgment, electronic, argues, business relationship, user, license agreement, exceeded, geosteering, monopolize, antitrust, cases, marks, terms, non-infringement, parties, rights, fails, prospective business relationship, unjust enrichment

LexisNexis® Headnotes

Civil Procedure > Preliminary Considerations > Jurisdiction

Governments > Courts > Authority to Adjudicate

Constitutional Law > The Judiciary > Jurisdiction

Governments > Courts > Creation & Organization

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

HN1[] **Preliminary Considerations, Jurisdiction**

Federal courts are of limited jurisdiction, possessing only those powers conferred by the Constitution and Congress. Consequently, if the court lacks either the constitutional or statutory authority to adjudicate a claim, then the claim shall be dismissed. The requirement that jurisdiction be established as a threshold matter springs from the nature and limits of the judicial power of the United States and is inflexible and without exception. Motions filed under Fed. R. Civ. P. 12(b)(1) allow a party to challenge the subject matter jurisdiction of the district court to hear a case. Because ensuring that a federal court has proper jurisdiction is fundamental and necessary before touching the substantive claims of a lawsuit, when a Rule 12(b)(1) motion is filed in conjunction with other *Rule 12* motions, the court should consider the Rule 12(b)(1) jurisdictional attack before addressing any attack on the merits.

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

Civil Procedure > Preliminary Considerations > Jurisdiction > Subject Matter Jurisdiction

HN2[] **Defenses, Demurrers & Objections, Motions to Dismiss**

In examining a Fed. R. Civ. P. 12(b)(1) motion, the district court may consider matters of fact which may be in dispute. Lack of subject matter jurisdiction may be found in any one of three instances: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. The burden of proof lies with the party asserting jurisdiction. A Rule 12(b)(1) motion should only be granted if it appears certain that the plaintiff cannot prove any set of facts in support of his claim that would entitle plaintiff to relief.

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

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

HN3[] **Motions to Dismiss, Failure to State Claim**

Motions to dismiss for failure to state a claim are appropriate when a defendant attacks the complaint because it fails to state a legally cognizable claim. *Fed. R. Civ. P. 12(b)(6)*. Under the Federal Rules, a pleading must contain a short and plain statement of the claim showing that the pleader is entitled to relief. *Fed. R. Civ. P. 8(a)(2)*. This requirement exists in order to give the defendant fair notice of what the claim is and the grounds upon which it rests. Although Rule 8's pleading standard does not require detailed factual allegations, it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.

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

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

HN4[] Motions to Dismiss, Failure to State Claim

To survive a motion to dismiss for failure to state a claim, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim has facial plausibility when a court can draw the reasonable inference that the defendant is liable for the misconduct alleged based on the factual content pled. In determining plausibility, courts first disregard formulaic recitations of the elements of the legal claim as conclusory. The court then assumes the truth of all factual allegations and determines whether those factual allegations allege a plausible claim. Determining whether a complaint states a plausible claim for relief will be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. Where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not shown—that the pleader is entitled to relief. If the facts fail to nudge the claims across the line from conceivable to plausible, then the complaint must be dismissed. On a *Fed. R. Civ. P. 12(b)(6)* review, the court may consider documents attached to or incorporated in the complaint and matters of which judicial notice may be taken.

Civil Procedure > Preliminary Considerations > Jurisdiction > Subject Matter Jurisdiction

Governments > Courts > Authority to Adjudicate

HN5[] Jurisdiction, Subject Matter Jurisdiction

The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trademarks. *28 U.S.C.S. § 1338*.

Civil Procedure > ... > Justiciability > Case & Controversy Requirements > Actual Controversy

Constitutional Law > The Judiciary > Case or Controversy

Civil Procedure > Judgments > Declaratory Judgments > Federal Declaratory Judgments

Civil Procedure > ... > Declaratory Judgments > Federal Declaratory Judgments > Scope of Declaratory Judgments

HN6[] Case & Controversy Requirements, Actual Controversy

The *Declaratory Judgment Act*, *28 U.S.C.S. § 2201*, authorizes courts to adjudicate controversies between parties before a conflict blossoms into a larger and costlier claim. The Act provides that in a case of actual controversy within its jurisdiction any court of the United States may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. *28 U.S.C.S. § 2201(a)*. The U.S. Supreme Court has stated that the phrase "case of actual controversy" in the Act refers to the type of cases and controversies that are justiciable under Article III. Accordingly, the *federal Declaratory Judgment Act* does not create a substantive cause of action it is merely a vehicle that allows a party to obtain an early adjudication of an actual controversy arising under other substantive law. Because the availability of such relief presupposes the existence of a judicially remediable right, a plaintiff cannot use the *Declaratory Judgment Act* to create a private right of action where none exists.

Civil Procedure > ... > Declaratory Judgments > Federal Declaratory Judgments > Discretionary Jurisdiction

Civil Procedure > Judgments > Declaratory Judgments > Federal Declaratory Judgments

HN7[] **Federal Declaratory Judgments, Discretionary Jurisdiction**

When analyzing whether to decide or dismiss a declaratory judgment suit, district courts engage in the three-step inquiry set out in Orix Credit Alliance, Inc. v. Wolfe. The court must consider: (1) whether the declaratory action is justiciable; (2) whether the court has the authority to grant declaratory relief; and (3) whether the court should exercise its discretion to decide or dismiss the action.

Civil Procedure > Judgments > Declaratory Judgments > Federal Declaratory Judgments

Copyright Law > ... > Civil Infringement Actions > Jurisdiction > Federal Court Jurisdiction

Copyright Law > Copyright Infringement Actions > Civil Infringement Actions > Registration Requirement

HN8[] **Declaratory Judgments, Federal Declaratory Judgments**

The Copyright Act requires that certain conditions be fulfilled before infringement actions may be brought. *17 U.S.C.S. §§ 401-412*. Copyright registration is one such jurisdictional prerequisite to asserting a copyright infringement action. As the opposite side of the same coin, a number of courts to address the issue have held that this jurisdictional prerequisite applies with equal force to declaratory judgment actions of copyright noninfringement. Accordingly, to bring a declaratory judgment action for copyright noninfringement, the declaratory judgment defendant's original complaint should include a copy of the registration certificate, indicate compliance with the registration provisions of the Copyright Act, and include a description of the specific works allegedly copyrighted.

Civil Procedure > ... > Justiciability > Case & Controversy Requirements > Actual Controversy

Civil Procedure > Judgments > Declaratory Judgments > Federal Declaratory Judgments

Civil Procedure > ... > Justiciability > Ripeness > Tests for Ripeness

HN9[] **Case & Controversy Requirements, Actual Controversy**

A declaratory judgment action is ripe for adjudication only where an actual controversy exists. In order to meet the "actual controversy" requirement, a dispute must be definite and concrete, real and substantial, and admit of specific relief through a decree of a conclusive character. While declaratory judgment actions cannot be used to seek an opinion advising what the law would be on a hypothetical set of facts, declaratory judgment plaintiffs need not actually expose themselves to liability before bringing suit.

Business & Corporate Compliance > ... > Causes of Action Involving Trademarks > Trademark Law > Causes of Action Involving Trademarks

Civil Procedure > ... > Justiciability > Case & Controversy Requirements > Actual Controversy

Patent Law > Remedies > Declaratory Judgments

Copyright Law > ... > Civil Infringement Actions > Remedies > Declaratory Judgments

Civil Procedure > Judgments > Declaratory Judgments > Federal Declaratory Judgments

HN10[] Trademark, Causes of Action Involving Trademarks

The new question in each patent, copyright, and trademark declaratory judgment suit is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interest, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. Although threats of legal action are no longer dispositive in this analysis, they can help establish an actual controversy if they are sufficiently specific and concrete. Likewise, actual manufacture, use, or sale of a potentially infringing product can indicate the presence of an actual controversy.

Civil Procedure > Judgments > Declaratory Judgments > Federal Declaratory Judgments

HN11[] Declaratory Judgments, Federal Declaratory Judgments

The difference between an abstract question and a controversy contemplated by the *Declaratory Judgment Act* is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy.

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

Governments > Legislation > Interpretation

Antitrust & Trade Law > Clayton Act

Antitrust & Trade Law > Sherman Act

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

HN12[] State Regulation, Claims

Texas ***antitrust law*** is founded on federal law. The current Texas Antitrust Act is modeled on both the Sherman Antitrust Act and the *Clayton Act* and provides that it is to be interpreted in harmony with federal judicial interpretations of federal laws.

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

Governments > Legislation > Interpretation

Evidence > Burdens of Proof > Allocation

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

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

HN13[] State Regulation, Claims

Tex. Bus. & Com. Code Ann. § 15.05(b) states: It is unlawful for any person to monopolize, attempt to monopolize, or conspire to monopolize any part of trade or commerce. This provision mirrors *§ 2* of the Sherman Antitrust Act. Accordingly, courts look to federal law interpreting *§ 2 of the Sherman Act* for guidance in interpreting *§ 15.05(b)* of the Texas Antitrust Act. To prevail on an attempted monopolization claim under *§ 2 of the Sherman Act*, a plaintiff must prove: (1) that the defendant engaged in predatory or exclusionary conduct with (2) a specific intent to monopolize the relevant market, and (3) a dangerous probability of achieving monopoly power. Predatory or exclusionary conduct under the first prong is behavior that tends to impair the opportunities of rivals and either does not further competition on the merits or does so in an unnecessarily restrictive way.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom to Petition

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

HN14[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

The *First Amendment* right to petition the government protects the right to bring suit in state and federal courts. As a corollary to this right, the U.S. Supreme Court created the Noerr-Pennington doctrine, which immunizes defendants from antitrust liability for engaging in conduct (including litigation) aimed at influencing decision-making by the government. Courts recognize only one exception to Noerr-Pennington. Under the "sham exception" to this doctrine, activity ostensibly directed toward influencing governmental action does not qualify for Noerr immunity if it is a mere sham to cover an attempt to interfere directly with the business relationships of a competitor. In order to constitute sham litigation, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits, and such baseless lawsuit must conceal an attempt to interfere directly with the business relationships of a competitor.

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

Evidence > Burdens of Proof > Allocation

HN15[] **Attempts to Monopolize, Elements**

A "dangerous probability" is analyzed by considering the relevant market and the defendant's ability to lessen or destroy competition in that market. The relevant market must have both product and geographic dimensions. Moreover, in order to demonstrate that defendants have the capacity to achieve, let alone a dangerous probability of achieving, monopoly power, a plaintiff must provide evidence that defendants possess some legally significant share of the market.

Evidence > Burdens of Proof > Allocation

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

HN16[] **Burdens of Proof, Allocation**

A plaintiff must establish the following elements to succeed on a tortious interference with contract claim: (1) the existence of a contract subject to interference; (2) willful and intentional interference; (3) that proximately causes damage; and (4) actual damage or loss. To establish intent, the plaintiff must show either that the interfering party had actual knowledge of the existence of the contract and of the plaintiff's interest in it or that the interfering party had knowledge of such facts and circumstances that would lead a reasonable person to believe in the existence of the contract and the plaintiff's interest in it. To show proximate cause, a plaintiff must allege that the defendant took an active part in persuading a party to a contract to breach it. In order for liability to arise, there must be some act of interference or of persuading a party to breach, for example by offering better terms or other incentive.

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

HN17[] **Intentional Interference, Elements**

Texas law protects prospective contracts and business relations from tortious interference. In order to prevail on a tortious interference with prospective business relationships claim, the plaintiff must establish: (1) there was a reasonable probability that the plaintiff would have entered into a business relationship with a third party; (2) the defendant either acted with a conscious desire to prevent the relationship from occurring or knew the interference was certain or substantially certain to occur as a result of the conduct; (3) the defendant's conduct was independently tortious or unlawful; (4) the interference proximately caused the plaintiff injury; and (5) the plaintiff suffered actual damage or loss as a result.

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

Torts > ... > Commercial Interference > Prospective Advantage > Intentional Interference

HN18[] **Intentional Interference, Elements**

Intentional interference does not require intent to injure, only that the actor desires to cause the consequences of his act, or that he believes that the consequences are substantially certain to result from it. Absent actual knowledge of the prospective contract or business relation, interference cannot be intentional. Moreover, interference is not improper if the defendant had no desire to effectuate the interference by his action but knew that it would be a mere incidental result of conduct he was engaging in for another purpose.

Evidence > Burdens of Proof > Allocation

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

HN19[] **Burdens of Proof, Allocation**

The Supreme Court of Texas has made it clear that to establish liability for interference with a prospective contractual or business relation the plaintiff must prove that it was harmed by the defendant's conduct that was either independently tortious or unlawful. "Independently tortious" means that the conduct objected to would violate some other recognized tort duty. Conduct that is merely sharp or unfair is not actionable and cannot be the basis for an action for tortious interference with prospective relations. Wrongful litigation may be used as the basis for a tortious interference claim. However, litigation is not "wrongful" if instituted (1) in a bona fide exercise of the defendant's own rights or (2) pursuant to a good faith assertion of colorable legal rights.

Evidence > Burdens of Proof > Allocation

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

HN20[] **Burdens of Proof, Allocation**

In a tortious interference with prospective relationship claim, a plaintiff must be able to show that the act of interference was the proximate cause of the damages suffered by it. The components of proximate cause are cause in fact and foreseeability. The test for cause in fact, or "but for causation," is whether the act or omission was a substantial factor in causing the injury without which the harm would not have occurred. "Foreseeability" means that the actor, as a person of ordinary intelligence, should have anticipated the dangers that his act created for others. In other words, proximate cause is that cause, unbroken by any new and independent cause, that produces injury and without which the injury would not have occurred.

Business & Corporate Compliance > ... > Civil Actions > Computer & Internet Law > Civil Actions

Computer & Internet Law > Criminal Offenses > Computer Fraud & Abuse Act

HN21[] **Computer & Internet, Civil Actions**

The *Computer Fraud and Abuse Act (CFAA)*, *18 U.S.C.S. § 1030*, punishes various fraudulent and damaging activities related to the use of computers. Although primarily a criminal statute, under *§ 1030(g)* civil actions are authorized for some violations of its substantive provisions. In order to maintain a civil action, a party must suffer damage or loss by reason of a violation of *§ 1030*. *18 U.S.C.S. § 1030(g)*.

Business & Corporate Compliance > ... > Civil Actions > Computer & Internet Law > Civil Actions

Computer & Internet Law > Criminal Offenses > Computer Fraud & Abuse Act

HN22[] **Computer & Internet, Civil Actions**

18 U.S.C.S. § 1030(a)(2)(C) prohibits intentionally accessing a computer without authorization or exceeding authorized access, thereby obtaining information from any protected computer. *Section 1030(a)(4)* prohibits the knowing access of a protected computer without authorization, and with intent to defraud, if such conduct furthers the intended fraud and the violator obtains anything of value. *18 U.S.C. § 1030(a)(4)*. And a section of *§ 1030(a)(6)* proscribes trafficking knowingly and with intent to defraud in any password or similar information through which a computer may be accessed without authorization when such trafficking affects interstate or foreign commerce.

Business & Corporate Compliance > ... > Civil Actions > Computer & Internet Law > Civil Actions

Computer & Internet Law > Criminal Offenses > Computer Fraud & Abuse Act

HN23[] **Computer & Internet, Civil Actions**

The *Computer Fraud and Abuse Act (CFAA)*, *18 U.S.C.S. § 1030*, defines a "computer" as an electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such device, but does not include an automated typewriter or typesetter, a portable hand held calculator, or other similar device. *18 U.S.C.S. § 1030(e)(1)*. A "protected computer" is one which is used in or affecting interstate or foreign commerce or communication. *18 U.S.C.S. § 1030(e)(2)(B)*. However, the term "facility" as used in the phrase "data storage facility or communications facility" within the definition of "computer" is not defined. *18 U.S.C.S. § 1030*.

Business & Corporate Compliance > ... > Civil Actions > Computer & Internet Law > Civil Actions

Computer & Internet Law > Criminal Offenses > Computer Fraud & Abuse Act

HN24[] Computer & Internet, Civil Actions

The Computer Fraud and Abuse Act (CFAA), 18 U.S.C.S. § 1030, does not define "authorization" or "authorized access." However, it clearly differentiates between unauthorized users and those who exceed authorized access. The term "exceeds authorized access" is defined in § 1030(e)(6): the term "exceeds authorized access" means to access a computer with authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled so to obtain or alter. In conditioning the nature of the intrusion in part on the level of authorization a computer user possesses, Congress distinguished between insiders, who are authorized to access a computer, and outside hackers who break into a computer. Accordingly, courts typically analyze the scope of a user's authorization to access a protected computer on the basis of the expected norms of intended use or the nature of the relationship established between the computer owner and the user.

Business & Corporate Compliance > ... > Civil Actions > Computer & Internet Law > Civil Actions

Computer & Internet Law > Criminal Offenses > Computer Fraud & Abuse Act

HN25[] Computer & Internet, Civil Actions

In light of the plain language of the Computer Fraud and Abuse Act (CFAA), 18 U.S.C.S. § 1030, several courts have determined that there is no ownership requirement of the protected computer at issue to state a viable CFAA claim. The United States District Court for the Southern District of Texas agrees with these authorities' reading of the statute.

Business & Corporate Compliance > ... > Civil Actions > Computer & Internet Law > Civil Actions

Computer & Internet Law > Criminal Offenses > Computer Fraud & Abuse Act

HN26[] Computer & Internet, Civil Actions

In the context of the Computer Fraud and Abuse Act (CFAA), 18 U.S.C.S. § 1030, access to a computer and data that can be obtained from that access may be exceeded if the purposes for which access has been given are exceeded. The only potential concern the Fifth Circuit has expressed about finding CFAA liability when the access terms of an employment policy or license/confidentiality agreement have been exceeded is in the criminal context.

Business & Corporate Compliance > ... > Civil Actions > Computer & Internet Law > Civil Actions

Computer & Internet Law > Criminal Offenses > Computer Fraud & Abuse Act

HN27[] Computer & Internet, Civil Actions

The civil-claims provision of the Computer Fraud and Abuse Act (CFAA), 18 U.S.C.S. § 1030, states that any person who suffers damage or loss by reason of a § 1030 violation may maintain a civil action against the violator to obtain compensatory damages and injunctive relief or other equitable relief. 18 U.S.C.S. § 1030(g). However, the provision goes on to limit civil actions to only those situations involving one of the factors set forth in subclauses (I), (II), (III), (IV), or (V) of subsection (c)(4)(A)(i). Subclause (I) covers loss to 1 or more persons during any 1-year period aggregating at least $5,000 in value. 18 U.S.C.S. § 1030(c)(4)(A)(i)(I). The CFAA defines "loss" as "any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other consequential damages incurred because of interruption of service. 18 U.S.C.S. §

1030(e)(11). Based on this language, courts have concluded that the term "loss" encompasses only two types of harm: costs to investigate and respond to an offense, and costs incurred because of a service interruption. "Damage" is defined as any impairment to the integrity or availability of data, a program, a system, or information. 18 U.S.C.S. § 1030(e)(8).

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

HN28[] Motions to Dismiss, Failure to State Claim

In considering a motion to dismiss for failure to state a claim, a district court must limit itself to the contents of the pleadings, including attachments thereto.

Business & Corporate Compliance > ... > Privacy & Security > Computer & Internet Law > Privacy & Security

Computer & Internet Law > Privacy & Security > Electronic Communications Privacy Act

HN29[] Computer & Internet, Privacy & Security

The *Electronic Communications Privacy Act* provides a cause of action against anyone who intentionally accesses without authorization a facility through which an electronic communication service is provided; or intentionally exceeds an authorization to access that facility; and thereby obtains, alters, or prevents authorized access to a wire or electronic communication while it is in electronic storage in such system. 18 U.S.C.S. §§ 2701(a)(1), 2707(a). Accordingly, for defendants to be liable under the Stored Communications Act, they must have gained unauthorized access to a facility through which electronic communication services are provided (or the access must have exceeded the scope of authority given) and must thereby have accessed electronic communications while in storage.

Business & Corporate Compliance > ... > Privacy & Security > Computer & Internet Law > Privacy & Security

Computer & Internet Law > Privacy & Security > Electronic Communications Privacy Act

HN30[] Computer & Internet, Privacy & Security

While the Stored Communications Act does not define the term "facility," it does define the terms "electronic communication," "electronic communication service" and "electronic storage." 18 U.S.C.S. § 2510. Electronic communication means any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce. 18 U.S.C.S. § 2510(12). The statute defines an "electronic communication service" (ECS) as any service which provides to users thereof the ability to send or receive wire or electronic communications. § 2510(15). "Electronic storage" is defined as (A) any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof; and (B) any storage of such communication by an electronic communication service for purposes of backup protection of such communication. § 2510(17).

Computer & Internet Law > Privacy & Security > Electronic Communications Privacy Act

Evidence > Burdens of Proof > Allocation

HN31[] **Privacy & Security, Electronic Communications Privacy Act**

To state a claim under the Stored Communications Act (SCA), a plaintiff must show not only that defendants accessed a facility through which an electronic communication service is provided, but furthermore, that defendants obtained, altered, or prevented authorized access to a wire or electronic communication while it was in electronic storage in such system. *18 U.S.C.S. § 2701(a)*. The SCA defines "electronic storage" as (A) any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof; and (B) any storage of such communication by an electronic communication service for purposes of backup protection of such communication. *18 U.S.C.S. § 2510(17)*. A number of courts have read subsection (A) of the definition of "electronic storage" narrowly, concluding that data residing on an individual's hard drive or cell phone is not in electronic storage because, unlike emails waiting on the server to be delivered to the recipient, it is not in "temporary, intermediate storage" as required by the Act. Nevertheless, subsection (B) provides an alternative avenue to qualification as electronic storage. By its plain terms, subsection (B) applies to backup storage regardless of whether it is intermediate or post-transmission.

Computer & Internet Law > Privacy & Security > Electronic Communications Privacy Act

HN32[] **Privacy & Security, Electronic Communications Privacy Act**

Authorized users cannot be held liable under *§ 2701 of the Electronic Communications Privacy Act*. Under *18 U.S.C.S. § 2701(c)(1)*, a party is excepted from liability if the conduct is authorized by the provider of the electronic communications service.

Computer & Internet Law > Privacy & Security > Electronic Communications Privacy Act

Governments > Legislation > Interpretation

HN33[] **Privacy & Security, Electronic Communications Privacy Act**

Section 2701(c) of the Electronic Communications Privacy Act allows those who are "authorized by a user" (i.e., third-party users) of the electronic communication service to access a communication "of or intended for that user." *18 U.S.C.S. § 2701(c)(2)*. The plain language of *§ 2701(c)(2)* indicates that only a "user" of the service can authorize third-party access to the communication. The statute defines "user" as one who "1) uses the electronic communication service; and 2) is duly authorized by the provider of such service to engage in such use." *18 U.S.C.S. § 2510(13)*. Because the statutory language is unambiguous, it must control the construction of the statute, notwithstanding the legislative history.

Business & Corporate Compliance > ... > Contracts Law > Breach > Breach of Contract Actions

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN34[] **Breach, Breach of Contract Actions**

In Texas, when one person has obtained a benefit from another by fraud, duress, or the taking of an undue advantage, he may recover under a theory of unjust enrichment. However, unjust enrichment is not a proper remedy merely because it might appear expedient or generally fair that some recompense be afforded for an unfortunate loss to the claimant, or because the benefits to the person sought to be charged amount to a windfall. Texas courts have also made it clear that unjust enrichment is based on quasi-contract and is unavailable when a valid, express contract governing the subject matter of the dispute exists.

Copyright Law > Constitutional Copyright Protections > Federal & State Law Interrelationships > Federal Preemption

HN35[] **Federal & State Law Interrelationships, Federal Preemption**

Section 301(a) of the Copyright Act, *17 U.S.C.S. § 301(a)*, accomplishes the general federal policy of creating a uniform method for protecting and enforcing certain rights in intellectual property by preempting other claims. The United States Court of Appeals for the Fifth Circuit follows a two-step approach to determine whether a state-law claim is preempted by *§ 301*. At the first step, the cause of action is examined to determine if it falls within the subject matter of copyright. Second, the cause of action is examined to determine if it protects rights that are equivalent to any of the exclusive rights of a federal copyright, as provided in *17 U.S.C.S. § 106*. In applying this test to cases involving software, the Fifth Circuit has made it clear that software falls within the ambit of *§ 301*. However, claims not wholly limited to software are broader than the scope of copyright protection.

Copyright Law > ... > Civil Infringement Actions > Elements > Copying by Defendants

Torts > ... > Concerted Action > Civil Conspiracy > Elements

HN36[] **Elements, Copying by Defendants**

The United States Court of Appeals for the Fifth Circuit evaluates the equivalency of rights under what is commonly referred to as the "extra element" test. For example, § 106 of the Copyright Act, *17 U.S.C.S. § 106*, grants the holder of a copyright the exclusive right to reproduce, distribute, perform, and display the copyrighted work. Thus, a state law claim protects rights equivalent to a federal copyright claim where the core of the state law theory of recovery speaks to wrongful copying. Conspiracy is considered a derivative tort because liability is presumed on participation in some underlying tort. The elements of civil conspiracy in Texas are: (1) a combination of two or more persons; (2) an object to be accomplished (an unlawful purpose or a lawful purpose by unlawful means); (3) a meeting of the minds on the object or course of action; (4) one or more unlawful, overt acts; and (5) damages as the proximate result. Specific intent is required. In evaluating the elements of civil conspiracy in the context of the extra-element test, the court has concluded that the intent element of the conspiracy claim does not constitute qualitatively different conduct where the element of intent only goes to an intent to form an agreement to copy and use copyrightable trade secrets and confidential information.

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Judges: MELINDA HARMON, UNITED STATES DISTRICT JUDGE.

Opinion by: MELINDA HARMON

Opinion

OPINION & ORDER

Pending in the above-referenced cause and addressed in this Order are Defendant Geo-Steering Solutions, Inc. and Geo-Steering Solutions USA, Inc's (collectively, "GSSI") Motion to Dismiss for Failure to State a Claim Pursuant to *Fed. R. Civ. P. 12(b)(6)* (Doc. 18), Plaintiff BHL Boresight, Inc.'s ("BHL") Motion to Dismiss GSSI Defendants' Counterclaim Counts I-III and VI-VIII for Lack of Subject Matter Jurisdiction and/or Failure to State a Claim (Doc. 27), Defendant Statoil Gulf Services LLC's ("Statoil") Motion to Dismiss for Failure to State a Claim Pursuant to *Fed. R. Civ. P. 12(b)(6)* and Memorandum in Support Thereof (Doc. 28), Defendant Statoil's Motion for Leave of Court to File a Reply Memorandum to Plaintiff BHL's Opposition of Motion to Dismiss (Doc. 48) and Plaintiff's Opposition and Alternative Motion for Leave to File Surreply (Doc. 56).[1] Having considered the parties' motions, responses, replies, and the relevant law, the Court concludes that BHL's Motion to Dismiss (Doc. 27), Statoil's Motion **[*3]** for Leave of Court to File a Reply Memorandum (Doc. 48), and BHL's Motion for Leave to File Surreply (Doc. 56) should be **GRANTED**. GSSI's Motion to Dismiss (Doc. 27) and Statoil's Motion to Dismiss (Doc. 28) are **GRANTED** in part and **DENIED** in part.

I. Background

This case arises from a soured business relationship and subsequent claims of license-agreement violations in the highly competitive oil and gas exploration industry. As the leading provider of geosteering software to oil and gas companies, Plaintiff BHL and Defendant Statoil's predecessor-in-interest, Brigham Oil & Gas, L.P. ("Brigham"), enjoyed a mutually beneficial working relationship for many years. (Doc. 1 at ¶ 12.) Pursuant to a 2009 licensing agreement between Brigham and BHL (the "Brigham License Agreement"), BHL provided Brigham access to its proprietary **[*4]** software. (*Id.*)

Under the terms of the Brigham License Agreement, BHL's software was loaded onto Brigham's computers. (*See id.* at ¶¶ 9, 12.) Because BHL's software is encrypted, however, Brigham and other licensees are provided with USB "bitlock" hardware devices as an additional security feature. (*Id.* at ¶ 9.) These bitlocks connect to a single computer, allowing access to the encrypted software on that particular device. (*Id.*) Since each computer running the software requires a bitlock in order to open the software, the licensee's needs determine the number of bitlocks provided. (*Id.*)

A number of years into the Brigham-BHL relationship, Statoil acquired Brigham and became a licensee of BHL's software by virtue of the acquisition. (*Id.* at ¶ 12.) On November 5, 2012, BHL and Statoil amended the Brigham License Agreement to reflect that Statoil would be subject to all terms and conditions of the original agreement between Brigham and BHL. (*Id.* at ¶ 13.) These terms and conditions included provisions stating that Statoil's rights were limited, third-party consultants could only use BHL's software and bitlocks after executing a separate usage

[1] The Court is aware that Plaintiff's Opposed Motion for Leave to File First Amended Complaint and Add Additional Parties (Doc. 75) remains pending. However, the Court defers a ruling on that motion at this time. Should Plaintiff wish to update Exhibit 1 to this motion, Plaintiff's First Amended Complaint (Doc. 75-1), in light of the Court's rulings herein, it is advised to do so.

agreement with BHL, and any use beyond the express **[*5]** terms and conditions of any sublicense agreement was automatically void and without authority. (*Id.* at ¶¶ 15-18.)

Although BHL permits its licensees to use BHL's software with third-party consulting entities, it only does so "[i]n limited cases, and with advanced notice and prior written agreement." (*Id.* at ¶ 10.) If the consulting entity is a direct competitor in the geosteering software market, the entity is subject to "extensive use restrictions and conditions," including "acknowledgement and protection of BHL's intellectual property." (*Id.*) In this case, BHL only authorized one consultant, Neset Consulting Services, to use its software with Statoil. (*Id.* at ¶ 14.) However, in the fall of 2014, BHL discovered that Statoil had provided BHL's software and bitlocks to GSSI—a new geosteering software provider and direct competitor of BHL. (*Id.* at ¶¶ 21, 23, 25.) When BHL confronted Statoil, it was informed that GSSI was indeed in possession of BHL's bitlocks. (*Id.* at ¶ 25.)

Believing that GSSI used this unrestricted and unauthorized access to develop its own geosteering software program (*Id.* at ¶ 24), BHL initiated this action. BHL brings claims against Statoil and GSSI for violations of **[*6]** the *Computer Fraud and Abuse Act ("CFAA")* and *Electronic Communications Privacy Act* ("ECPA") (Counts I-III), unjust enrichment (Count V), and civil conspiracy (Count VIII). (*Id.* at ¶¶ 28-51, 60-64, 77-80.) BHL also alleges misappropriation of trade secrets (Count IV) and civil theft (Count VII) against GSSI and breach of contract (Count VI) against Statoil. (*Id.* at ¶¶ 52-59, 65-76.) GSSI has asserted counterclaims against BHL for: request for declaratory judgment of independent creation of the GSSI software (Count I), request for declaratory judgment that the GSSI software is an original work (Count II), request for declaratory judgment that GSSI did not copy BHL's software in creating GSSI's software (Count III), *Lanham Act* violation (Count IV), common law unfair competition (Count V), state antitrust violation (Count VI), tortious interference with existing contract (Count VII), and tortious interference with prospective business relationships (Count VIII). (Doc. 19 at ¶¶ 10-56.) All parties have filed motions to dismiss under either *Rule 12(b)(1)* or *12(b)(6)*, which are now ripe for adjudication. (Docs. 18, 27, 28.)

II. Legal Standard

A. 12(b)(1)

HN1[] Federal courts are of limited jurisdiction, possessing only **[*7]** those powers conferred by the Constitution and Congress. *Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 377, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994)*; *Halmekangas v. State Farm Fire & Cas. Co., 603 F.3d 290, 292 (5th Cir. 2010)*. Consequently, if the court lacks either the constitutional or statutory authority to adjudicate a claim, then the claim shall be dismissed. *Krim v. pcOrder.com, Inc., 402 F.3d 489, 494 (5th Cir. 2005)* (citations omitted). The requirement that jurisdiction be established as a threshold matter "spring[s] from the nature and limits of the judicial power of the United States" and is "inflexible and without exception." *Mansfield, C. & L.M.R. Co. v. Swan, 111 U.S. 379, 382, 4 S. Ct. 510, 28 L. Ed. 462 (1884)*.

Motions filed under *Rule 12(b)(1) of the Federal Rules of Civil Procedure* allow a party to challenge the subject matter jurisdiction of the district court to hear a case. *Fed. R. Civ. P. 12(b)(1)*. Because ensuring that a federal court has proper jurisdiction "is fundamental and necessary before touching the substantive claims of a lawsuit," *Arena v. Graybar Elec. Co., Inc., 669 F.3d 214, 223 (5th Cir. 2012)*, "[w]hen a *Rule 12(b)(1)* motion is filed in conjunction with other *Rule 12* motions, the court should consider the *Rule 12(b)(1)* jurisdictional attack before addressing any attack on the merits." *Ramming v. United States, 281 F.3d 158, 161 (5th Cir. 2001)* (per curiam) (citing *Hitt v. City of Pasadena, 561 F.2d 606, 608 (5th Cir. 1977))*.

HN2[] In examining a *Rule 12(b)(1)* motion, the district court may consider matters of fact which may be in dispute. *Id.* (citing *Williamson v. Tucker, 645 F.2d 404, 413 (5th Cir. 1981))*. Lack of subject matter jurisdiction may be found in any one of three instances: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented **[*8]** by undisputed facts plus the court's resolution of disputed facts. *Id.* (citing *Barrera—Montenegro v. United States, 74 F.3d 657, 659 (5th Cir. 1996))*. The burden of proof lies with the party asserting jurisdiction. *Choice Inc. of Tex. v. Greenstein, 691 F.3d 710, 714 (5th Cir. 2012)* (citations omitted). A 12(b)(1) motion should only be granted "if it appears certain that the plaintiff cannot prove any set of facts in support of his claim that would entitle plaintiff to relief." *Ramming, 281 F.3d at 161* (citing *Home Builders Ass'n of Miss., Inc. v. City of Madison, 143 F.3d 1006, 1010 (5th Cir. 1998))*.

B. 12(b)(6)

HN3[] Motions to dismiss for failure to state a claim are appropriate when a defendant attacks the complaint because it fails to state a legally cognizable claim. *Fed. R. Civ. P. 12(b)(6)*. Under the Federal Rules, a pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." *Fed. R. Civ. P. 8(a)(2)*. This requirement exists in order to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests," *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (quoting *Conley v. Gibson, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957))* (internal citation marks omitted). Although *Rule 8*'s pleading standard "does not require 'detailed factual allegations,' it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Twombly, 550 U.S. at 555*).

HN4[] "To survive a motion to dismiss [for failure to state a claim], a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief **[*9]** that is plausible on its face.'" *Id. at 678* (quoting *Twombly, 550 U.S. at 570*). "A claim has facial plausibility when a court can draw the reasonable inference that the defendant is liable for the misconduct alleged based on the factual content pled." *Id. at 678* (citing *Twombly, 550 U.S. at 556*). In determining plausibility, courts first disregard "formulaic recitation[s] of the elements" of the legal claim as conclusory. *Id. at 678*. The court then assumes the truth of all factual allegations and determines whether those factual allegations allege a plausible claim. *See id.* "Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id. at 679* (citation omitted).

"[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" *Id.* (quoting *Fed. R. Civ. P. 8(a)(2)*). If the facts fail to "nudge[] the[] claims across the line from conceivable to plausible, [then] the[] complaint must be dismissed." *Twombly, 550 U.S. at 570*. On a *Rule 12(b)(6)* review, "the court may consider documents attached to or incorporated in the complaint and matters of which judicial notice may be taken." *U.S. ex rel. Willard v. Humana Health Plan of Tex. Inc., 336 F.3d 375, 379 (5th Cir. 2003)* (citing **[*10]** *Lovelace v. Software Spectrum Inc., 78 F.3d 1015, 1017-18 (5th Cir. 1996))*.

III. Analysis

A. BHL's Motion to Dismiss GSSI's Counterclaims

BHL seeks to have this Court dismiss six of GSSI's eight counterclaims against Plaintiff for lack of subject matter jurisdiction and/or failure to state a claim. (Doc. 27.) Specifically, BHL requests dismissal of the following claims: (1) request for declaratory judgment of independent creation of the GSSI software (Count I); (2) request for declaratory judgment that the GSSI software is an original work (Count II); (3) request for declaratory judgment that GSSI did not copy BHL's software in creating GSSI's software (Count III); (4) state antitrust claim (Count VI); (5) tortious interference with existing contract (Count VII); and (6) tortious interference with prospective business relationships (Count VIII). GSSI opposes this motion, arguing that it has pleaded its claims sufficiently to withstand BHL's attack. (Doc. 37.) Should the Court disagree, however, GSSI requests leave to amend. (*Id.*)

a. *Declaratory Judgment Claims of Copyright Non-Infringement (Counts I-III)*

BHL contends that this Court lacks subject matter jurisdiction over GSSI's three counterclaims seeking declarations of copyright non-infringement. (Doc. 27 at **[*11]** 12.) Specifically, BHL argues that because it did not assert a copyright claim in its complaint there is no "substantial controversy of sufficient immediacy and reality between Boresight and the GSSI Defendants to warrant the Court's jurisdiction over these three counterclaims." (*Id.*) GSSI responds that "it cannot be argued that there is not an actual [copyright] case or controversy" for several reasons: (1) BHL's counsel sent a letter threating legal action for alleged violations of BHL's "copyrights;" (2) BHL's complaint states that this Court has jurisdiction under *28 U.S.C. § 1338*;[2] (3) BHL's complaint notes that its software devices provide an electronic reminder to the licensed user that "Boresight's Software is subject to copyright protection;" (4) BHL claims sole ownership of the software in its complaint; and (4) BHL seeks remedies exclusive to copyright. (Doc. 37 at 11-13.) Moreover, GSSI asserts that this Court his subject matter jurisdiction over its declaratory judgment counterclaims because "Plaintiff's state law trade secret claims (Count IV) are pre-empted by the Copyright Act."[3] (*Id.* at 16).

HN6[] The *Declaratory Judgment Act*, *28 U.S.C. § 2201*, authorizes courts to adjudicate **[*13]** controversies between parties before a conflict blossoms into a larger and costlier claim. The Act provides that "[i]n a case of actual controversy within its jurisdiction . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." *28 U.S.C. § 2201(a)*. The Supreme Court has stated that "the phrase 'case of actual controversy' in the Act refers to the type of 'Cases' and 'Controversies' that are justiciable under Article III." *MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 127, 127 S. Ct. 764, 166 L. Ed. 2d 604 (2007)* (quoting *Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240, 57 S. Ct. 461, 81 L. Ed. 617 (1937))*.

Accordingly, "[t]he *federal Declaratory Judgment Act* . . . does not create a substantive cause of action . . . [it] is merely a vehicle that allows a party to obtain an early adjudication of an actual controversy arising under other substantive law." *Perez v. Ocwen Loan Servicing, LLC, 4:15-CV-1751, 2015 U.S. Dist. LEXIS 156895, 2015 WL 7430920, at *5 (S.D. Tex. Nov. 20, 2015)* (alteration in original) (citation and internal citation marks omitted). Because "the availability of such relief presupposes the existence of a judicially remediable right," *Schilling v. Rogers, 363 U.S. 666, 677, 80 S. Ct. 1288, 4 L. Ed. 2d 1478 (1960)*, "a plaintiff cannot use the *Declaratory Judgment Act* to create a private right of action where none exists." *Reid v. Aransas Cnty., 805 F. Supp. 2d 322, 339 (S.D. Tex. 2011)* (citation omitted).

HN7[] When analyzing whether to decide or dismiss a declaratory **[*14]** judgment suit, district courts engage in the three-step inquiry set out in *Orix Credit Alliance, Inc. v. Wolfe, 212 F.3d 891, 895 (5th Cir. 2000)*. The Court must consider: (1) whether the declaratory action is justiciable; (2) whether the court has the authority to grant declaratory relief; and (3) whether the court should exercise its discretion to decide or dismiss the action. *Id.* Because the Court decides this case on the first step, it need not discuss the second or third.

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[2] ***HN5***[] "The district courts shall have original jurisdiction of any civil action arising under any Act of Congress **[*12]** relating to patents, plant variety protection, copyrights and trademarks." *28 U.S.C. § 1338*.

[3] The Court can easily dispose of this argument. Count IV of Plaintiff's complaint is a claim for misappropriation of trade secrets under the Texas Uniform Trade Secrets Act ("TUTSA"). (*See* Doc. 1 at ¶¶ 52-59.) It is well established that a misappropriation of trade secrets claim under TUTSA is not preempted by the Copyright Act because it contains an "extra element" of breach of confidentiality or improper methods, which is not equivalent to any of the exclusive rights of copyright. *Beardmore v. Jacobson, 4:13-CV-361, 131 F. Supp. 3d 656, 2015 U.S. Dist. LEXIS 123365, 2015 WL 5530398, at *11 (S.D. Tex. Sept. 18, 2015)*; *M-I LLC v. Stelly, 733 F. Supp. 2d 759, 786 (S.D. Tex. 2010)*; *GlobeRanger Corp. v. Software AG USA, Inc., 3:11-CV-0403-B, 2015 U.S. Dist. LEXIS 76059, 2015 WL 3648577, at *4-5 (N.D. Tex. June 11, 2015)*. This stands in stark contrast to trade secret claims under TUTSA's predecessor, the Texas Theft Liability Act ("TTLA"), which courts in this district uniformly held was preempted by copyright law. *Beardmore, 2015 U.S. Dist. LEXIS 123365, 2015 WL 5530398, at *10* (citing *Spear Mktg., Inc. v. BancorpSouth Bank, 791 F.3d 586, 598 (5th Cir. 2015))* ("The Fifth Circuit has held theft of trade secrets under *§ 31.05* as applied to software is preempted by the Copyright Act."). Accordingly, GSSI cannot rely on preemption of Count IV for subject matter jurisdiction of their declaratory judgment claims of copyright non-infringement.

i. *Justiciability: Substantive Cause of Action*

GSSI contends that this Court has subject matter jurisdiction under *28 U.S.C. § 1338(a)*, which gives a federal court original jurisdiction over any civil action arising under federal copyright law. In its counter complaint, GSSI seeks copyright noninfringement declarations from this Court affirming that: (1) GSSI software was independently created; (2) GSSI software is an original work; and (3) GSSI did not copy BHL software in creating GSSI software. (Doc. 19 at ¶¶ 24, 30, 36.)

HN8[] The Copyright Act requires that certain conditions be fulfilled before infringement actions may be brought. *See 17 U.S.C. §§ 401-412*. Copyright registration is one such jurisdictional prerequisite to asserting a copyright infringement action. *FedEx Ground Package Sys., Inc. v. Applications Intern. Corp., CIV.A. 03-1512, 2008 U.S. Dist. LEXIS 107896, 2008 WL 4279751, at *7 (W.D. Pa. Sept. 12, 2008)*; *see also Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361, 111 S. Ct. 1282, 113 L. Ed. 2d 358 (1991)* (stating that to prove copyright infringement, **[*15]** a plaintiff must show (1) ownership of a valid copyright and (2) actionable copying); *Galiano v. Harrah's Operating Co., Inc., 416 F.3d 411, 414 (5th Cir. 2005)* (same). As the opposite side of the same coin, a number of courts to address the issue have held that this jurisdictional prerequisite applies with equal force to declaratory judgment actions of copyright noninfringement. *See, e.g., Audio Sys. of Florida, Inc. v. SimplexGrinnell LP, 603CV404ORL22DAB, 2003 U.S. Dist. LEXIS 23344, 2003 WL 25571401, at *3 (M.D. Fla. Sept. 11, 2003)* ("[W]here, as here, the Counter-defendant has not made any application for registration, Counter-claimant's declaratory judgment action for copyright non-infringement is barred"); *Prospect Planet, LLC v. Paychecks for Life.com, A3-02-91, 2003 U.S. Dist. LEXIS 835, 2003 WL 751023, at *2 (D.N.D. Jan. 16, 2003)* ("Plaintiff's declaratory judgment action for copyright non-infringement is barred because of Defendant's failure to register its copyright"); *Burns v. Rockwood Distrib. Co., 481 F. Supp. 841, 849 n.14 (N.D. Ill. 1979)* ("defendants cannot rely on *28 U.S.C. § 1338(a)* as a basis for federal jurisdiction" of their counterclaim for a declaration of copyright noninfringement because "satisfaction of the jurisdictional prerequisites of copyright registration and recordation . . . is not shown . . . ."). Accordingly, to bring a declaratory judgment action for copyright noninfringement, the declaratory judgment defendant's original complaint should include a copy of the registration **[*16]** certificate, indicate compliance with the registration provisions of the Copyright Act, and include a description of the specific works allegedly copyrighted. *See Burns, 481 F. Supp. at 845, 845 n.3, n. 14 (N.D. Ill. 1979)* (declaratory judgment plaintiff barred from bringing action for noninfringement because declaratory judgment defendant had not indicated compliance with copyright-action prerequisites in her original complaint).

Here, BHL's complaint makes no reference to copyright aside from one brief statement that "Boresight's Software is subject to copyright protection." (Doc. 1 at ¶ 20.) BHL's complaint does not include a registration certificate, indicate compliance with the registration provisions of the Copyright Act, or describe specific works. As a result, it could not assert a copyright infringement claim against Defendants. GSSI's declaratory judgment claims for copyright non-infringement are, therefore, likewise barred.

ii. *Justiciability: Actual Controversy*

There is another ground for this Court's conclusion that it lacks subject matter jurisdiction over GSSI's copyright non-infringement claims. Like any other action, declaratory judgment actions must be ripe in order to be justiciable. *Orix, 212 F.3d at 896 (5th Cir. 2000)* (citation omitted). ***HN9***[] "A declaratory judgment **[*17]** action is ripe for adjudication only where an 'actual controversy' exists." *Id.* (citing *28 U.S.C. § 2201(a)*). In order to meet the "actual controversy" requirement, a dispute must be "definite and concrete, real and substantial, and admit of specific relief through a decree of a conclusive character." *Vantage Trailers, Inc. v. Beall Corp., 567 F.3d 745, 748 (5th Cir. 2009)* (citing *MedImmune, 549 U.S. at 127*). While declaratory judgment actions "cannot be used to seek an opinion advising what the law would be on a hypothetical set of facts," declaratory judgment plaintiffs "need not actually expose themselves to liability before bringing suit." *Id.* (citing *MedImmune, 549 U.S. at 127, 129-30)*.

Courts apply a common framework to the justiciability analysis in all patent, copyright, and trademark declaratory judgment suits. *Id.* (citation omitted). Prior to the Supreme Court's decision in *MedImmune*, this was a two-part test, which required the declaratory plaintiff to show: (1) an explicit threat or other action by the [holder of a patent, trademark, or copyright], which creates a reasonable apprehension on the part of the declaratory plaintiff that it will face an infringement suit, and (2) present activity which could constitute infringement or concrete steps taken with the intent to conduct such activity. *See, e.g., Texas v. West Pub. Co., 882 F.2d 171, 175 (5th Cir. 1989)* (adopting the Federal **[*18]** Circuit's two-part test). *MedImmune* invalidated the first prong of this test. *SanDisk Corp. v. STMicroelectronics, Inc., 480 F.3d 1372, 1380 (Fed. Cir. 2007)*. Consequently, ***HN10***[] the new "question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interest, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *MedImmune, 549 U.S. at 127* (quoting *Md. Cas. Co. v. Pac. Coal & Oil Co., 312 U.S. 270, 273, 61 S. Ct. 510, 85 L. Ed. 826 (1941))*.

Although threats of legal action are no longer dispositive in this analysis, they can help establish an actual controversy if they are sufficiently specific and concrete. *Young v. Vannerson, 612 F. Supp. 2d 829, 840 (S.D. Tex. 2009)* (citing *Prasco, LLC v. Medicis Pharm. Corp., 537 F.3d 1329, 1336 (Fed. Cir. 2008))* ("[F]ollowing *MedImmune*, proving a reasonable apprehension of suit is one of multiple ways that a declaratory judgment plaintiff can satisfy the more general all-the-circumstances test to establish that an action presents a justiciable Article III controversy."). Likewise, actual manufacture, use, or sale of a potentially infringing product can indicate the presence of an actual controversy. *Id.* (citing *Int'l Harvester Co. v. Deere & Co., 623 F.2d 1207, 1215 (7th Cir. 1980))*. Here, the parties are already involved in litigation and GSSI is using contested software.[4] (Doc. 37 at 13.) However, the analysis does not end here.

Both parties cite the same cases, *Vantage Trailers* and *Spindletop Films*, highlighting language and facts relevant to their respective positions. (*Compare* Doc. 27 at 13-14 *with* Doc. 37 at 14-15.) The Court concedes that the applicability of these and other justiciability cases to the facts at hand depends on how the dispute is framed. As the Supreme Court itself has admitted, ***HN11***[] "[t]he difference between an abstract question and a 'controversy' contemplated by the *Declaratory Judgment Act* is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy." *Md. Cas. Co., 312 U.S. at 273*.

Nevertheless, even were the Court to conclude that the current litigation and the issue of contested software indicates there is some copyright controversy between the parties, it "is less clear . . . whether the controversy is sufficiently immediate and real to render it an 'actual controversy' under the *Declaratory Judgment Act*." *Wright v. Spindletop Films, 830 F. Supp. 2d 280, 285* (citing *Vantage Trailers, 567 F.3d at 750-51*). Plaintiff did not bring a copyright infringement claim in this case and very likely may never do so (depending on the resolution of **[*20]** the other claims currently pending before the Court and whether it has a valid copyright registration in the first place).[5] As a result, the Court concludes GSSI is essentially requesting an "opinion advising what the law would be upon a hypothetical state of [copyright] facts."[6] *MedImmune, 549 U.S. at 127* (citation and internal citation marks omitted). Accordingly, there is no dispute that is "definite and concrete, real and substantial . . . and admit[s] of specific relief through a decree of a conclusive character." *Vantage Trailers, 567 F.3d at 748* (citation and internal citation marks omitted). GSSI's declaratory judgment claims for copyright non-infringement must be dismissed for lack of subject matter jurisdiction.

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[4] It is important to note that BHL alleges the software was created using misappropriated trade secrets, **[*19]** not that the software is infringing a copyright that BHL owns.

[5] Moreover, as mentioned in the previous section, based on the pleadings it is questionable whether Plaintiff could bring a copyright claim against Defendants in the first place.

[6] *I.e.*, there was a valid, registered copyright, it can be compared to the software that GSSI has developed for purposes of copyright infringement analysis, it was copied, etc.

b. *State Antitrust Claim (Count VI)*

Count VI of GSSI's counterclaims asserts a state antitrust claim against BHL. (Doc. 19 at ¶¶ 47-49.) GSSI alleges that "[t]hrough the assertion of their claims and **[*21]** this litigation against the GSSI Counter-Plaintiffs, BHL has attempted to stifle competition in an effort to monopolize the geosteering software market in contravention of *§ 15.01 et seq. of the Texas Business and Commerce Code*." (Doc. 19 at ¶ 48.) GSSI Defendants also allege that "[t]hrough the assertion of their claims and this litigation against the GSSI Counter-Plaintiffs, BHL has attempted to stifle competition in an effort to monopolize the geosteering consultancy market in contravention of *§ 15.01 et seq. of the Texas Business and Commerce Code*." (Doc. 19 at ¶ 49.)

BHL seeks dismissal of the antitrust claim under *Rule 12(b)(6)*. (Doc. 27 at 18-23). BHL claims that GSSI failed to plead the required elements for an antitrust claim. (*Id.*) Specifically, BHL alleges that GSSI failed to plead anticompetitive conduct, allege damages or injury, and define the relevant market. (*Id.*) BHL also argues that its lawsuit against GSSI is immunized under *Noerr-Pennington* as "protected petitioning" and GSSI cannot plead sham litigation so as to discredit this immunity. (*Id.* at 19-21.) In response, GSSI admonishes the Court to "read the Complaint in its entirety, [because] dismissal of an antitrust claim at the motion to dismiss stage for failure to plead the **[*22]** relevant market adequately should not be done lightly." GSSI goes on:

> In this case, Boresight has alleged that it is the market leader in the U.S. oil and gas exploration industry, which indicates that Boresight exercises substantial market power in the geosteering market, and may in fact be attempting to exercise monopoly power in that market. In view of that fact, GSSI's complaint alleges that Boresight is attempting to use that market power in an effort to stifle competition and monopolize the geosteering software market in contravention of Texas ***Antitrust law***. (Dkt. 19 at ¶¶ 48-49). These allegations, if proved, would largely substantiate GSSI's antitrust claims.

(Doc. 37 at 20.)

HN12[] Texas ***antitrust law*** is founded on federal law. The current Texas Antitrust Act is modeled on both the Sherman Antitrust Act and the *Clayton Act* and provides that it is to be interpreted in harmony with federal judicial interpretations of federal laws. *Caller-Times Pub. Co., Inc. v. Triad Commc'ns, Inc., 826 S.W.2d 576, 580 (Tex. 1992)*; *see also* *Tex. Bus. & Com. Code § 15.04* ("The provisions of this Act . . . shall be construed in harmony with federal judicial interpretations of comparable federal antitrust statutes to the extent consistent with this purpose.").

GSSI's antitrust counterclaim is best characterized as an **[*23]** attempted monopolization claim premised on the "anticompetitive conduct" of BHL's "assertion of their claims and this litigation against the GSSI Counter-Plaintiffs." (Doc. 19 at ¶¶ 48-49.) The provision of the Texas Antitrust Act implicated by this counterclaim is *§ 15.05(b)*, ***HN13***[] which states: "It is unlawful for any person to monopolize, attempt to monopolize, or conspire to monopolize any part of trade or commerce." *Tex. Bus. & Com. Code § 15.05(b)*. This provision mirrors *§ 2* of the Sherman Antitrust Act.[7] Accordingly, courts look to federal law interpreting *§ 2* of the Sherman Act for guidance in interpreting *section 15.05(b)* of the Texas Antitrust Act. *Caller-Times, 826 S.W.2d at 580*.

To prevail on an attempted monopolization claim under *§ 2*, a plaintiff must prove: (1) that the defendant engaged in predatory or exclusionary conduct with (2) a specific intent to monopolize the relevant market, and (3) a dangerous probability of achieving monopoly power. *Surgical Care Ctr. of Hammond, L.C. v. Hosp. Serv. Dist. No. 1 of Tangipahoa Parish, 309 F.3d 836, 839 (5th Cir. 2002)* (citing **[*24]** *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993))*. Predatory or exclusionary conduct under the first prong is "behavior that tends to impair the opportunities of rivals and either does not further competition on the merits or does so in an unnecessarily restrictive way." *Cascade Health Sols. v. PeaceHealth, 515 F.3d 883, 894 (9th Cir.*

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[7] *Section 2* provides: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . ." *15 U.S.C. § 2*.

2008) (citing Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 605 n.32, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985)). One type of exclusionary conduct that may form the basis of an antitrust claim is known as "sham litigation."[8] *See* Rockbit Indus. U.S.A., Inc. v. Baker Hughes, Inc., 802 F. Supp. 1544, 1552 (S.D. Tex. 1991) ("The remaining exclusionary conduct alleged by Rockbit is sham litigation."); RPC, Inc. v. Rick Prudhomme, 2007 U.S. Dist. LEXIS 3946, at *9 (E.D. Tex. Jan. 19, 2007) ("Defendants contend that by initiating litigation against them, Plaintiffs engaged in anti-competitive conduct in violation of § 2 of the Sherman Act and Texas Business and Commerce Code § 15.05 as the litigation 'is a mere sham . . . .'").

i. *Predatory or Exclusionary Conduct: Sham Litigation & Noerr-Pennington*

HN14[] The First Amendment right to petition the government protects the right to bring suit in state and federal courts. Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972). As a corollary to this right, the Supreme Court created the *Noerr-Pennington* doctrine,[9] which immunizes defendants from antitrust liability for **[*25]** engaging in conduct (including litigation) aimed at influencing decision-making by the government. Octane Fitness, LLC v. ICON Health & Fitness, Inc., 134 S. Ct. 1749, 1757, 188 L. Ed. 2d 816 (2014) (citing Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 56, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993)). Courts recognize only one exception to *Noerr-Pennington*. Under the "sham exception" to this doctrine, "activity 'ostensibly directed toward influencing governmental action' does not qualify for *Noerr* immunity if it 'is a mere sham to cover . . . an attempt to interfere directly with the business relationships of a competitor.'" *Id.* (quoting Prof'l Real Estate Investors, 508 U.S. at 51). In order to constitute sham litigation, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits, and such baseless lawsuit must conceal an attempt to interfere directly with the business relationships of a competitor. Prof'l Real Estate Investors, 508 U.S. at 60-61.

Here, BHL filed suit against Defendants alleging violations of the Computer Fraud and Abuse and Electronic Communications Privacy Acts, misappropriation of trade secrets, unjust enrichment, breach of contract, civil theft, and civil conspiracy. (Doc. 1.) Given the allegations as they are laid out in the Original Complaint, the Court cannot say that BHL's claims are baseless. Nor did GSSI allege **[*26]** facts to show otherwise in its antitrust counterclaim. Accordingly, the Court finds that the instant lawsuit is protected activity under the Noerr-Pennington doctrine.

i. *Dangerous Probability: Defining the Relevant Market*

Although the Court may stop here, there are additional grounds for this Court's conclusion that GSSI's counterclaims are deficient. The Court also concludes that GSSI's claim should be dismissed under 12(b)(6) because GSSI fails to define the relevant market. ***HN15***[] "A 'dangerous probability' is analyzed by considering the relevant market and the defendant's ability to lessen or destroy competition in that market." Rio Grande Royalty Co., Inc. v. Energy Transfer Partners, L.P., 786 F. Supp. 2d 1190, 1194-95 (S.D. Tex. 2009) (citing Spectrum Sports, 506 U.S. at 456, 459). The relevant market must have both product and geographic dimensions. Domed Stadium Hotel, Inc. v. Holiday Inns, Inc., 732 F.2d 480, 487 (5th Cir. 1984) (citing Fort Worth Nat'l Corp. v. Fed. Sav. and Loan Ins. Corp., 469 F.2d 47, 59 (5th Cir. 1972); Hornsby Oil Co. v. Champion Spark Plug Co., 714 F.2d 1384, 1393 (5th Cir. 1983)). Moreover, "[i]n order to demonstrate that defendants have the capacity to achieve, let alone a dangerous probability of achieving, monopoly power, a plaintiff must provide evidence that defendants possess some legally significant share of the market." Benson v. St. Joseph Reg'l Health Ctr., CIV.A.H-04-4323,

[8] Although GSSI is not explicit in calling the litigation a "sham," since there are no other allegations of "predatory or exclusionary conduct," the Court treats GSSI's counterclaim, for the purpose of this analysis, as resting on the sham litigation doctrine.

[9] The *Noerr-Pennington* doctrine was established in Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961), and United Mine Workers v. Pennington, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965).

2007 U.S. Dist. LEXIS 99255, 2007 WL 7120757, at *12 (S.D. Tex. Mar. 22, 2007), *aff'd*, 575 F.3d 542 (5th Cir. 2009) (citing Domed Stadium, 732 F.2d at 490).

GSSI half-heartedly attempts to delineate the relevant market by referencing the "geosteering software" and "geosteering consultancy" markets. (*See* Doc. 19 at ¶¶ 48-49.) Unfortunately, these allegations standing **[*27]** alone are inadequate. GSSI does not define the geographic boundaries of the market, and "does not provide allegations about market conditions [or BHL's market power] to assist the Court in determining whether [BHL] might have possessed sustained monopoly power sufficient to support a claim for attempted monopolization." Rio Grande Royalty, 786 F. Supp. 2d at 1213. This failure is fatal to GSSI's counterclaim. *See, e.g.,* Star Tobacco Inc. v. Darilek, 298 F. Supp. 2d 436, 448 (E.D. Tex. 2003) (dismissing attempted monopolization counterclaim for failure to "include key factual allegations regarding the composition of the relevant geographic and product markets."); Rockbit, 802 F. Supp. at 1553 (dismissing attempted monopolization claim because "Rockbit's bare allegation that there is a dangerous probability that Baker Hughes will be successful in its attempt to monopolize is insufficient to support its claim. . . . without any allegation of supporting facts").

c. *Tortious Interference with Contractual Relationship (Count VII)*

HN16[] A plaintiff must establish the following elements to succeed on a tortious interference with contract claim: (1) the existence of a contract subject to interference; (2) willful and intentional interference; (3) that proximately causes damage; and (4) actual damage or loss. Butnaru v. Ford Motor Co., 84 S.W.3d 198, 207 (Tex. 2002) (citations omitted); Specialties of Mex. Inc. v. Masterfoods USA, 2010 U.S. Dist. LEXIS 58782, 2010 WL 2488031, at *9 (S.D. Tex. June 14, 2010) (citation **[*28]** omitted). To establish intent, "the plaintiff must show either that the interfering party had actual knowledge of the existence of the contract and of the plaintiff's interest in it or that the interfering party had knowledge of such facts and circumstances that would lead a reasonable person to believe in the existence of the contract and the plaintiff's interest in it." Exxon Corp. v. Allsup, 808 S.W.2d 648, 656 (Tex. App.—Corpus Christi 1991, writ denied) (citations omitted). To show proximate cause, "a plaintiff must allege that 'the defendant took an active part in persuading a party to a contract to breach it.'" Hambric Sports Mgmt., LLC v. Team AK, Inc., 2010 U.S. Dist. LEXIS 65491, 2010 WL 2605243, at *9 (N.D. Tex. June 29, 2010) (citing Amigo Broad., LP v. Spanish Broad. Sys., Inc., 521 F.3d 472, 493 (5th Cir. 2008)). In order for liability to arise, "there must be some act of interference or of persuading a party to breach, for example by offering better terms or other incentives . . . ." M-I LLC v. Stelly, 733 F. Supp. 2d 759, 775 (S.D. Tex. 2010) (citation omitted).

Pointing to Wal-Mart Stores, Inc. v. Sturges, 52 S.W.3d 711, 726 (Tex. 2001), BHL argues that a plaintiff must plead factual allegations that would be actionable under a recognized tort to state a claim for tortious interference with an existing contract. (Doc. 27 at 24) Because GSSI failed to plead independently tortious conduct, BHL insists that GSSI's tortious interference with existing contract claim must be dismissed.[10] (*Id.* at 24-26.) BHL misreads *Sturges. Sturges* involved claims for tortious interference with *prospective* ***[*29]*** business relations, not with an existing contract. *See* Sturges, 52 S.W.3d at 726 ("We therefore hold that to recover for *tortious interference with a prospective business relation* a plaintiff must prove that the defendant's conduct was independently tortious or wrongful.") (emphasis added). Indeed, as another district court bound to Texas law and addressing an argument identical to BHL's concluded:

> Texas law—perhaps reflecting a desire to afford *existing* contracts more protection than prospective ones, as well as to distinguish between actionable interference and desirable competition during that period before a contract is formed—appears to require only that the alleged interference with an existing contract be "willful and intentional."

U.S. Enercorp, Ltd. v. SDC Montana Bakken Expl., LLC, 966 F. Supp. 2d 690, 705 (W.D. Tex. 2013) (collecting cases).

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[10] More particularly, BHL argues that GSSI's failure to present facts that indicate BHL's conduct in filing the lawsuit would be actionable under a recognized tort dooms both tortious interference claims. (Doc. 27 at 25.)

Here, GSSI alleges that it had an existing service agreement with Statoil and "[t]hrough the assertion of its wanton, specious, baseless, and malicious claims, BHL willfully and intentionally interfered with the service agreement, affecting and interrupting **[*30]** the scope of the service agreement and the relationship between the parties moving forward." (Doc. 19 at ¶¶ 51-52.) Although it need not allege independently wrongful conduct and it has adequately alleged the existence of a contract subject to interference, GSSI must plead the remaining elements of tortious interference with existing contract in order to state a claim. However, nowhere does GSSI set forth facts that allege how BHL interfered with the existing GSSI-Statoil contract, or that it persuaded Statoil to breach the contract. Nor does GSSI allege damages. GSSI has therefore failed to allege all of the required elements of its claim—but not for the reason that BHL asserts. The Court will afford GSSI an opportunity to remedy these deficiencies by amending its pleading.

d. *Tortious Interference with Prospective Business Relationships (Count VIII)*

As already alluded to, ***HN17***[] Texas law also protects prospective contracts and business relations from tortious interference, albeit with different rules. *Sturges, 52 S.W.3d at 713*. In order to prevail on a tortious interference with prospective business relationships claim, the plaintiff must establish: (1) there was a reasonable probability that the plaintiff would **[*31]** have entered into a business relationship with a third party; (2) the defendant either acted with a conscious desire to prevent the relationship from occurring or knew the interference was certain or substantially certain to occur as a result of the conduct; (3) the defendant's conduct was independently tortious or unlawful; (4) the interference proximately caused the plaintiff injury; and (5) the plaintiff suffered actual damage or loss as a result. *Coinmach Corp. v. Aspenwood Apartment Corp., 417 S.W.3d 909, 923 (Tex. 2013)* (citations omitted); *Stelly, 733 F. Supp. 2d at 775*.

BHL argues that GSSI's pleading is "devoid of any facts giving rise to tortious interference." (Doc. 27 at 24-27.) Specifically, BHL points to GSSI's failure to point out how BHL's actions were "independently wrongful," offer any factual support or allegations of damages other than a conclusory statement that it was "harmed", or plead proximate cause. (*Id.*) GSSI responds by announcing that it "has likewise pleaded a claim . . . for tortious interference with prospective business relationships," reciting the elements of a tortious interference with prospective business relationships claim and concluding with a nearly verbatim repetition of the allegations from its complaint.[11] (Doc. 37 at 20-21.) The Court agrees with **[*32]** BHL that these allegations are insufficient to state a claim for tortious interference with prospective business relationships for a number of reasons.

i. *Prevention of Business Relationship*

In this case, GSSI acknowledges that it had a contract with Statoil and uses that contract as the basis for its tortious interference with existing contractual relationship counterclaim. Consequently, as a basis for its tortious interference with prospective business relationships claim, it must plead facts indicating that BHL's "wanton, specious, baseless, and malicious claims" prevented the formation of another contract. *See Enercorp, 966 F. Supp. 2d at 702-03* ("[B]ecause Enercorp acknowledges that it did consummate a contract with SEPCO, it must, at a minimum, plead **[*33]** facts that would indicate that Defendants prevented the formation of *another* contract—one that was separate and distinct from the one eventually consummated.") GSSI has not done so.

GSSI includes no factual allegations of any prospective business relationship aside from the conclusory statement that "[t]he GSSI Counter-Plaintiffs had a reasonable probability of entering into a business relationship with a third party." (Doc. 19 at ¶ 54.) Courts in this district have found that far more detailed allegations are insufficient. For example, in concluding that plaintiff's allegations were insufficient in *M-I LLC v. Stelly*, the court stated:

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[11] "The GSSI Counter-Plaintiffs had a reasonable probability of entering into a business relationship with a third party. BHL asserted its wanton, specious, baseless and malicious claims against the GSSI Counter-Plaintiffs with the intent of harming their ["GSSI's"] business and the market for their geosteering services and the GSSI Software . . . . The GSSI Counter-Plaintiffs have been harmed, resulting in actual damages and the loss of prospective contracts." (Doc. 37 at 21.)

> M—I fails to set forth any allegations establishing a reasonable probability that it would have entered into a business relationship. The closest it comes is its averment that it "has provided [w]ellbore cleanout tools and services to BP for other ThunderHorse wells, and expected to provide the same for 778 # 2," but instead lost the project to WES. (Doc. No. 355, ¶ 29.) This statement, however, does not plead a reasonable probability that M-I and BP would have entered into a contractual relationship for the ThunderHorse project. Furthermore, M—I fails to plead any other **[*34]** business relationships that are the subject of this claim.

733 F. Supp. 2d at 776.

GSSI's claim is even less complete than the one in *Stelly*. GSSI does not name what third parties or contracts it refers to, preventing the Court from inferring that there was a reasonable probability that GSSI would have entered into a business relationship with a third party. Its claim is subject to dismissal on this ground.

ii. *Conscious Desire*

HN18[] "Intentional interference does not require intent to injure, only that the actor desires to cause the consequences of his act, or that he believes that the consequences are substantially certain to result from it." *Sw. Bell Tel. Co. v. John Carlo Texas, Inc., 843 S.W.2d 470, 472 (Tex. 1992)* (citations and internal citation marks omitted). Absent actual knowledge of the prospective contract or business relation, interference cannot be intentional. *Texas Oil Co. v. Tenneco Inc., 917 S.W.2d 826, 834 (Tex. App.—Houston [14th Dist.] 1994)*, *rev'd on other grounds sub nom. Morgan Stanley & Co., Inc. v. Texas Oil Co., 958 S.W.2d 178 (Tex. 1997)*. Moreover, interference is not improper if the defendant "had no desire to effectuate the interference by his action but knew that it would be a mere incidental result of conduct he was engaging in for another purpose . . . ." *Bradford v. Vento, 48 S.W.3d 749, 757 (Tex. 2001)* (quoting *Restatement (Second) of Torts § 766B cmt. d* (1979)) (internal citation marks omitted).

Here, GSSI summarily alleges intent by stating "BHL asserted its wanton, specious, baseless, and malicious **[*35]** claims against the GSSI Counter-Plaintiffs with the intent of harming their business and the market for geosteering services and the GSSI software." (Doc. 19 at ¶ 55.) Without more, this claim cannot survive. It is utterly devoid of any factual allegation that BHL had actual knowledge of a prospective business relation and its desire to interfere in that relation was its primary purpose in doing so. *See Stelly, 733 F. Supp. 2d at 776* (dismissing claim because "M-I has not pled that Defendants committed misappropriation and/or breach of fiduciary duty with a conscious desire to cause, or with the certain knowledge that, it was preventing MI's specific business relationship from forming."). GSSI's claim may be dismissed for this deficiency as well.

iii. *Independently Tortious Conduct*

HN19[] The Supreme Court of Texas has made it clear that to establish liability for interference with a prospective contractual or business relation the plaintiff must prove that it was harmed by the defendant's conduct that was either independently tortious or unlawful. *Sturges, 52 S.W.3d at 726*. "'Independently tortious' means that the conduct objected to would violate 'some other recognized tort duty.'" *Star Tobacco, 298 F. Supp. 2d at 448* (citing *Sturges, 52 S.W.3d at 713*). "Conduct that is merely 'sharp' or unfair is not **[*36]** actionable and cannot be the basis for an action for tortious interference with prospective relations . . . ." *Sturges, 52 S.W.3d at 726*.

Wrongful litigation may be used as the basis for a tortious interference claim. *Strategic Capital Corp. v. New Strong Grp. Ltd., 4:08-CV-1651, 2012 U.S. Dist. LEXIS 175939, 2012 WL 6202182, at *10 (S.D. Tex. Dec. 12, 2012)* ("Litigation is a powerful weapon, and when instituted in bad faith for the purpose of causing damage or loss, it is a wrongful method of interference.") (quoting *Hughes v. Hous. Nw. Med. Ctr., Inc., 680 S.W.2d 838, 842 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.))*; *McCall v. Tana Oil & Gas Corp., 82 S.W.3d 337, 347 (Tex. App.—Austin 2001)*, *rev'd in part on other grounds*, *104 S.W.3d 80 (Tex. 2003)* (same). Malice may not. *Sturges, 52 S.W.3d at 724*. However, litigation is not "wrongful" if instituted (1) in a bona fide exercise of the defendant's own rights or (2) pursuant to a good faith assertion of colorable legal rights. *Pers. Preference Video, Inc. v. Home Box Office, Inc., 986 F.2d 110, 111-12 (5th Cir. 1993)* (citing *Victoria Bank & Trust Co. v. Brady, 811 S.W.2d 931, 939 (Tex. 1991)*; *Int'l Shortstop, Inc. v. Rally's, Inc., 939 F.2d 1257, 1271 (5th Cir. 1991))*.

In this case, it is unclear from GSSI's pleading what BHL conduct was allegedly "independently tortious or unlawful." GSSI's claim is barred to the extent it argues malice as the basis for the claim. However, even assuming GSSI asserts wrongful litigation as the independently tortious act of interference, it fails to allege bad faith in instigating this lawsuit. Accordingly, its claim may be dismissed on this ground as well.

iv. ***Proximate Cause***

HN20[] In a tortious interference claim, "a plaintiff must be able to show that the act of interference **[*37]** was the proximate cause of the damages suffered by it." *Tex. Campaign for the Env't v. Partners Dewatering Int'l, LLC, 13-14-00656-CV, 485 S.W.3d 184, 2016 Tex. App. LEXIS 537, 2016 WL 300233, at *10 (Tex. App.—Corpus Christi Jan. 21, 2016, no pet.)* (citation and internal citation marks omitted). The components of proximate cause are cause in fact and foreseeability. *W. Invs., Inc. v. Urena, 162 S.W.3d 547, 551 (Tex. 2005)* (citation omitted). The test for cause in fact, or "but for causation," is whether the act or omission "was a substantial factor in causing the injury without which the harm would not have occurred." *Doe v. Boys Clubs of Greater Dallas, Inc., 907 S.W.2d 472, 477 (Tex. 1995)* (citation and internal citation marks omitted). "Foreseeability" means that the actor, as a person of ordinary intelligence, should have anticipated the dangers that his act created for others. *Lunn v. Fragomen, Del Rey, Bensen & Loewy P.C., CIV.A. H-04-404, 2006 U.S. Dist. LEXIS 11160, 2006 WL 492098, at *7 (S.D. Tex. Feb. 28, 2006)* (citing *Doe 907 S.W.2d at 478*). "In other words, proximate cause is that cause, unbroken by any new and independent cause, that produces injury and without which the injury would not have occurred." *Tex. Campaign for the Env't, 2016 Tex. App. LEXIS 537, 2016 WL 300233, at *10* (citations omitted).

Without clear allegations of (1) the prospective relationship(s) interfered with; (2) the independently tortious or unlawful activity BHL employed to interfere with such relationships; and (3) damages sustained,[12] the Court cannot reasonably **[*38]** infer proximate causation. Accordingly, GSSI's claim may likewise be dismissed on this ground. *C.f. In re Burzynski, 989 F.2d 733, 739 (5th Cir. 1993)* (finding proximate cause sufficiently pled when other essential elements of tortious interference were sufficiently pled and connected).[13]

v. ***Damages***

Aside from its conclusory statement that "the GSSI Counter-Plaintiffs have been harmed, resulting in actual damages and the loss of prospective contracts" (Doc. 19 at ¶ 56), the Court concludes that GSSI "also fail[s] to allege facts or explain how or whether [GSSI] suffered any actual damage or loss." *Seeberger Bank of Am., N.A. Ventures Trust 2013 I.H.R. v. Seeberger, EP-14-CV-366-KC, 2015 U.S. Dist. LEXIS 168348, 2015 WL 9200878, at *22 (W.D. Tex. Dec. 16, 2015)*. This too is fatal to GSSI's counterclaim. However, the Court will afford GSSI an opportunity to replead in order to properly **[*39]** assert each element of its claim.

B. Defendants' Motions to Dismiss

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[12] See *infra*, Section III.A.d.v.

[13] At that time, the essential elements of tortious interference with existing contract under Texas law were the same as they are now: intentional act, contract existence, proximate cause, and damages. *In re Burzynski, 989 F.2d at 738*. Although *In re Burzynski* dealt with a tortious interference with existing contract claim, the Court believes the proximate-cause analysis is equally applicable to a tortious interference with prospective relationship claim.

In their motions to dismiss, GSSI and Statoil both argue that BHL fails to allege facts that adequately plead violations of the *Computer Fraud and Abuse Act*, *18 U.S.C. § 1030*, and *Electronic Communications Privacy Act*, *18 U.S.C. § 2701*, (Counts I-III). (Docs. 18 at 6-13, 36 at 7-16.) GSSI ends its offensive here, but Statoil additionally attacks the sufficiency of BHL's unjust enrichment and civil conspiracy claims (Counts V, VIII). (Doc. 28 at 16-23.) BHL responds that its claims are sufficient, however, if the Court disagrees, it seeks leave to amend. (Doc. 36 at 11-12.)

a. *CFAA* *(Counts I - GSSI & II - Statoil)*

HN21[] The *CFAA* punishes various fraudulent and damaging activities related to the use of computers. Although primarily a criminal statute, under *§ 1030(g)* civil actions are authorized for some violations of its substantive provisions. *Fiber Sys. Int'l, Inc. v. Roehrs, 470 F.3d 1150, 1156 (5th Cir. 2006)*; *see* *18 U.S.C. § 1030(g)*.[14] In order to maintain a civil action, a party must "suffer[] damage or loss by reason of a violation of . . . *section [1030*]." *18 U.S.C. § 1030(g)*.

Utilizing the civil liability provision, BHL alleges that both Statoil and GSSI violated *§§ 1030(a)(2)*, *1030(a)(4)*, and *1030(a)(6)*. (Doc. 1 at ¶¶ 34, 36, 45, 47.) The only provision of ***HN22***[] *§ 1030(a)(2)* that is implicated by the facts of this case prohibits "intentionally access[ing] a computer without authorization or exceed[ing] authorized access," thereby "obtain[ing] information from any protected computer."[15] *18 U.S.C. § 1030(a)(2)(C)*. *Section 1030(a)(4)* prohibits the "knowing[ ] . . . access[of] a protected computer without authorization," and "with intent to defraud," if "such conduct furthers the intended fraud and [the violator] obtains anything of value."[16] *18 U.S.C. § 1030(a)(4)*. And the relevant section of *1030(a)(6)* proscribes **[*41]** trafficking "knowingly and with intent to defraud . . . in any password or similar information through which a computer may be accessed without authorization" when "such trafficking affects interstate or foreign commerce."[17] *18 U.S.C. § 1030(a)(6)*.

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[14] The full text of *18 U.S.C. § 1030(g)* reads:

> Any person who suffers damage or loss by reason of a violation of this section may maintain a civil action against the violator to obtain compensatory damages and injunctive relief **[*40]** or other equitable relief. A civil action for a violation of this section may be brought only if the conduct involves 1 of the factors set forth in subclauses[4] (I), (II), (III), (IV), or (V) of subsection (c)(4)(A)(i). Damages for a violation involving only conduct described in subsection (c)(4)(A)(i)(I) are limited to economic damages. No action may be brought under this subsection unless such action is begun within 2 years of the date of the act complained of or the date of the discovery of the damage. No action may be brought under this subsection for the negligent design or manufacture of computer hardware, computer software, or firmware.

[15] The full text of *18 U.S.C. § 1030(a)(2)* reads:

> Whoever—intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains . . . (A) information contained in a financial record of a financial institution, or of a card issuer as defined in *section 1602(n)* of title 15, or contained in a file of a consumer reporting agency on a consumer, as such terms are defined in the *Fair Credit Reporting Act* (*15 U.S.C. 1681 et seq.*); (B) information from any department or agency of the United States; or (C) information from any protected computer . . . shall be punished as provided in subsection (c) of this section.

[16] The full text of *18 U.S.C. § 1030(a)(4)* reads:

> Whoever—knowingly and with intent to defraud, accesses a protected computer without authorization, or exceeds authorized access, and by means of such conduct furthers the intended fraud and obtains anything of value, unless the object of the fraud and the thing obtained consists only of the use of the computer and the value of such use is not more than $5,000 in any 1-year period **[*42]** . . . shall be punished as provided in subsection (c) of this section.

[17] The full text of *18 U.S.C. § 1030(a)(6)* reads:

With regard to the CFAA claims, GSSI argues that BHL fails to allege that GSSI accessed a protected computer or acted without or in excess of authorization. (Doc. 18 at 6-10.) Statoil joins GSSI in this assertion (Doc. 28 at 10-11), but it additionally argues that BHL fails to allege a cognizable loss under the CFAA (Doc. 28 at 7-10). BHL responds that it has sufficiently pleaded all elements of its CFAA claims, but seeks leave to amend if the Court decides otherwise. (Docs. 24 at 7-17, 36 at 9-18.) The Court will address each of the three elements that Defendants take issue with in turn: (1) "protected computer;" (2) "access . . . without authorization or exceed[ing] authorized access;" and (3) "loss."

i. *Protected Computer*

HN23[] The CFAA defines a "computer" **[*43]** as "an electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such device, but . . . does not include an automated typewriter or typesetter, a portable hand held calculator, or other similar device . . . ." *18 U.S.C. § 1030(e)(1)*. A "protected computer" is one "which is used in or affecting interstate or foreign commerce or communication." *18 U.S.C. § 1030(e)(2)(B)*. However, the term "facility" as used in the phrase "data storage facility or communications facility" within the definition of "computer" is not defined. *See* *18 U.S.C. § 1030*.

GSSI argues that BHL fails to allege the "protected computer" element of its claim because BHL's complaint states that GSSI's unauthorized access was to "Boresight's Software and bitlocks." (Doc. 18 at 7.) GSSI avers that bitlocks are simply USB storage devices, and because neither software nor bitlocks are high speed data processing devices, they are not covered by the plain language of the statute. (*Id.*) GSSI also argues that because BHL alleges that Statoil provided BHL's bitlocks to GSSI to access BHL's **[*44]** software without BHL's authorization, BHL "at best alleges that the GSSI Defendants received the Boresight Software using the bitlock storage devices, but does not allege access to a *computer*." (Doc. 18 at 8.) (emphasis added). GSSI goes on to cite a district court case from Maryland for the proposition that "[r]eceiving electronic information is . . . not the same as 'accessing' the computer from which the information is derived . . . ." (*Id.*) Finally, GSSI avers that BHL's complaint "clearly alleges that the *access to the software* was unauthorized," however, the CFAA only provides a cause of action "for *accessing a protected computer* without authorization or exceeding authorization." (Doc. 18 at 9.) (emphasis in original).

BHL responds by distinguishing the main case relied upon by GSSI and arguing that the legislative history of the CFAA confirms the broad scope of the meaning of "protected computer." (Doc. 24 at 10-11.) BHL further avers that, at this stage, it need only allege sufficient facts to allow the Court to reasonably infer that the computers Defendants used may meet the interstate or foreign commerce requirement for its software and bitlocks to fall within the plain language of "protected **[*45]** computer"—a requirement that it claims it has fulfilled. (*Id.* at 11-13.) In its response to Statoil, BHL also claims that "[t]he Complaint clearly alleges facts that indicate that Boresight's 'information' that Statoil accessed and obtained must function with an individual computer," thereby bringing it within the plain language of the statute. (Doc. 36 at 12-13.)

In light of the second phrase of the definition of "computer," courts regularly conclude that systems and devices that function with individual data processing devices are covered by the statute. *See, e.g.,* *Genesco Sports Enter., Inc. v. White, 3:11-CV-1345-N BF, 2011 U.S. Dist. LEXIS 147599, 2011 WL 6593415, at *5 (N.D. Tex. Oct. 27, 2011)*, *report and recommendation adopted*, *3:11-CV-1345-N BF, 2011 U.S. Dist. LEXIS 147063, 2011 WL 6433704 (N.D. Tex. Dec. 22, 2011)* (corporate server is protected computer); *Donahue v. Tokyo Electron Am., Inc., 42 F. Supp. 3d 829, 843 (W.D. Tex. 2014)* (computer network is protected computer). *See also* *NovelPoster v. Javitch Canfield Group, No. 13-cv-05186-WHO, 140 F. Supp. 3d 938, 2014 U.S. Dist. LEXIS 106804, at *13 n.4 (N.D. Cal. Aug. 4, 2014)* (online accounts are protected computer). Here, BHL's complaint alleges that the information Defendants

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Whoever—knowingly and with intent to defraud traffics (as defined in *section 1029*) in any password or similar information through which a computer may be accessed without authorization, if—(A) such trafficking affects interstate or foreign commerce; or (B) such computer is used by or for the Government of the United States . . . shall be punished as provided in subsection (c) of this section.

obtained resides on computers and the computer network and its bitlock devices and software function with these covered devices. (Doc. 1 at ¶ 30, 38, 40.) Moreover, by alleging the bitlocks are USB devices (Doc. 1 at ¶ 9), the Court can infer they provide data storage functions, potentially **[*46]** bringing them within the ambit of the definition of a computer ("computer . . . includes any data storage facility . . . directly related to or operating in conjunction with such [data processing] device."). Without further factual development on the interplay of the software, network, bitlocks, and individual computers to negate this inference, the Court can reasonably infer that BHL's software and bitlocks fall within the *CFAA's* definition of a "protected computer." BHL has sufficiently pled this element of its *CFAA* claim.

ii. ***Authorized Access***

HN24[↑] The *CFAA* does not define "authorization" or "authorized access." *United States v. Phillips, 477 F.3d 215, 219 (5th Cir. 2007)*. However, it clearly differentiates between unauthorized users and those who exceed authorized access. *Id.* (citing *18 U.S.C. §§ 1030(e)(6)*, *1030(a)(1)*, *(a)(2)*, *(a)(4)*) (internal citation marks omitted). The term "exceeds authorized access" is defined in *§ 1030(e)(6)*: "the term 'exceeds authorized access' means to access a computer with authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled so to obtain or alter . . . . " *United States v. John, 597 F.3d 263, 270-71 (5th Cir. 2010)* (quoting *18 U.S.C. § 1030(e)(6)*). As the Fifth Circuit has noted, "[i]n conditioning the nature of the intrusion in part on the level of authorization a computer user possesses, **[*47]** Congress distinguished between 'insiders, who are authorized to access a computer,' and 'outside hackers who break into a computer.'" *Phillips, 477 F.3d at 219* (citing S.Rep. No. 104-357, at 11 (1996); S.Rep. No. 99-432, at 10, *as reprinted in* 1986 U.S.C.C.A.N. 2479, at 2488 (1986)). Accordingly, "courts typically analyze[] the scope of a user's authorization to access a protected computer on the basis of the expected norms of intended use or the nature of the relationship established between the computer owner and the user." *Id.*

GSSI claims that it could not access a computer without authorization or by exceeding authorization because GSSI owned the computers on which the BHL software was accessed. (Doc. 18 at 9.) Building on this argument, GSSI cites a Northern District of California case to claim that "it is the owner of the protected computer that decides whether someone is authorized to access its computer's [sic] or not." (*Id.* at 9-10.) (alteration in original). GSSI then concludes that it cannot act without authorization because either GSSI or Statoil—as the owners of the computers on which the software was accessed—determine access. (*Id.* at 9-10.)

Statoil joins GSSI's offensive, citing the Ninth Circuit's decision in *United States v. Nosal, 676 F.3d 854, 858 (9th Cir. 2012)*, to **[*48]** argue that ownership of the protected computer is dispositive to access. (Doc. 28 at 10-11.) Because "Statoil accessed its own computers to use and view BHL's software as authorized by the licensing agreement between the parties," Statoil claims that "BHL has not alleged that Statoil acted in a manner which would run afoul of the *CFAA*." (*Id.* at 11.) At most, BHL alleges "unauthorized disclosure or use of information," which is not actionable under the statute. (*Id.*)

In its response to GSSI, BHL argues there is no ownership or control of the computer required for a *CFAA* claim, citing a number of non-binding cases in support. (Doc. 24 at 9-10, 14-17.) (citing *Theofel v. Farey-Jones, 359 F.3d 1066, 1078 (9th Cir. 2004)*; *State Analysis Inc. v. American Financial Servs. Assoc., 621 F. Supp. 2d 309, 316 (E.D. Va. 2009)*; *AtPac, Inc. v. Aptitude Solutions, Inc., 2010 U.S. Dist. LEXIS 42109, *14 (E.D. Cal. Apr. 28, 2010)*; *Secureinfo Corp. v. Telos Corp., 387 F. Supp.2d 593, 609 (E.D. Va. 2005))*. Instead, it argues, the central issue in third-party computer cases is the scope of the authorization to access the data. (*Id.* at 14-17.) BHL also cites several cases for the proposition that authorization is exceeded when defendants violate the terms of a prior grant of authorization, either by subterfuge or express breach of agreement. (*Id.* at 15-16.) (citing *EF Cultural Travel BV v. Explorica, Inc., 274 F.3d 577, 581-82 (1st Cir. 2001)*; *Shurgard Storage Centers, Inc. v. Safeguard Self Storage, Inc., 119 F. Supp. 2d 1121, 1125 (W.D. Wa. 2000)*; *State Analysis, 621 F. Supp. 2d at 316*; *AtPac, 2010 U.S. Dist. LEXIS 42109, at *12-13)*.

BHL renews a number of these arguments in its response to Statoil. (Doc. 36 at 13-18.) Specifically directed at Statoil, however, is BHL's argument that although Statoil may have had authorization **[*49]** to access BHL's software initially, it contractually agreed that it would forfeit all rights of access immediately upon breach of the license agreement. (*Id.* at 14-15.) When Statoil granted access to GSSI, Statoil's authorization was void from that point forward. (*Id.* at 14.) BHL also argues that Statoil's reliance on Ninth Circuit law is "neither instructive or binding" since the Fifth Circuit has held that the CFAA should be "broadly construed." (*Id.* at 15.)

Circling back to the argument regarding how access is determined, BHL cites *United States v. John* for the proposition that in the Fifth Circuit, "access to a computer or data that can be obtained from that access may be exceeded if the purposes for which access has been given are exceeded." (*Id.* at 16.) Citing to *John's* rejection of the Ninth Circuit's interpretation of the CFAA in *Brekka* as too narrow, BHL alleges that *Brekka* is easily distinguishable. (*Id.*) (citing *LVRC Holdings LLC v. Brekka, 581 F.3d 1127 (9th Cir. 2009))*. BHL points out that in rejecting the plaintiff's argument that defendant's authorized computer access was exceeded when he accessed and used stored information to further his own competing business, the *Brekka* court specifically noted that there was no written agreement governing access terms and no **[*50]** written guidelines prohibiting the employee from emailing documents to a personal computer. (*Id.* at n.8.) According to BHL, both *John* and *Brekka* actually support BHL's argument that a CFAA claim exists when there is an agreement delineating the parameters of authorized use, which is then exceeded. (*Id.* at 16-17.) Because BHL's complaint alleged that Statoil and BHL had such an agreement specifically prohibiting disclosure to or access by a third-party consultant such as GSSI, and providing for automatic, immediate revocation of authorized use as the penalty for such unauthorized conduct, BHL argues it has stated a claim for civil liability under the CFAA. (*Id.* at 18.)

Initially, the Court notes that to the extent Statoil argues that BHL's complaint should be dismissed because Statoil had authorization to the software and bitlocks, this type of argument is a merits argument that is irrelevant at this stage. *See Simmonds Equip., LLC v. GGR Int'l, Inc., CIV.A. H-15-0862, 126 F. Supp. 3d 855, 2015 U.S. Dist. LEXIS 113629, 2015 WL 5089169, at *5 (S.D. Tex. Aug. 27, 2015)* ("GGR's argument that Simmonds' CFAA claim should be dismissed because GGR had lawful access . . . is a merits argument not relevant for purposes of determining whether Simmonds has stated a claim for which relief may be granted."); *St. Jude Med. S.C., Inc. v. Janssen-Counotte, A-14-CA-877-SS, 2014 U.S. Dist. LEXIS 173835, 2014 WL 7237411, at *13 (W.D. Tex. Dec. 17, 2014)* **[*51]** ("Janssen argues the CFAA claim should be dismissed because she accessed the computer with authorization and for the purpose of doing her job. This is a merits argument and irrelevant at the Rule 12 stage.").

Moving on to the issue of pleading sufficiency, ***HN25***[] in light of the plain language of the statute, several courts—including one recently within our circuit—have determined that there is no ownership requirement of the protected computer at issue to state a viable CFAA claim. *See St. Jude, 2014 U.S. Dist. LEXIS 173835, 2014 WL 7237411, at *13* (citation omitted) ("The Court sees no support for Janssen's position there is an ownership requirement."); *Theofel, 359 F.3d at 1078* ("The district court erred by reading an ownership or control requirement into the Act. . . . Nothing in the provision's language supports the district court's restriction. Individuals other than the computer's owner may be proximately harmed by unauthorized access, particularly if they have rights to data stored on it."). The Court agrees with these authorities' reading of the statute. Accordingly, BHL's complaint need not be dismissed because it alleges that GSSI and Statoil accessed the software and bitlocks at issue using GSSI and Statoil computers and **[*52]** computer networks.

Defendants are correct to note that there has been some disagreement among the circuits as to how broadly or narrowly to interpret the CFAA. Pointing out that the CFAA was targeted at computer hackers, some authorities have argued that it only applies in situations where an outsider, or someone without authorization, accesses a computer. *State Analysis, 621 F. Supp. 2d at 315* (internal citations omitted). These courts have rejected attempts to apply the CFAA to cases where defendants did not break into a system, but simply abused the privileges of a license. *Id.* Other courts, however, including a majority in this circuit, have held that the CFAA does apply to authorized users who use programs in an unauthorized way, such as when users obtain and use proprietary information in violation of employer policies or confidentiality or licensing agreements.[18]

[18] *See, e.g., John, 597 F.3d at 272* (defendant exceeded access by knowingly violating terms of acceptable-use policy as part of illegal scheme); *Phillips, 477 F.3d at 221, 221 n.5* (noting that "authorized access typically arises only out of a contractual or

Defendants cite a number of cases in support of their contentions that (1) exceeding the terms of a licensing agreement or duty of loyalty is insufficient to demonstrate that an individual exceeds authorization; and (2) **[*55]** third-party defendants cannot be liable where their access was made possible by another party violating its license agreement with the plaintiff. *See* (Doc. 18 at 9-10; Doc. 28 at 10-11) (citing *Nosal, 676 F.3d at 862-63*; *NovelPoster, 140 F. Supp. 3d 938, 2014 U.S. Dist. LEXIS 106804, at *24-25)*. The Court is unswayed by these authorities. The Fifth Circuit has clearly stated, ***HN26***[] "[a]ccess to a computer and data that can be obtained from that access may be exceeded if the purposes for which access has been given are exceeded." *John, 597 F.3d at 272*. As illustrated by footnote 16, this pronouncement has been broadly applied within this circuit.

The only potential concern the Fifth Circuit has expressed about finding *CFAA* liability when the access terms of an employment policy or license/confidentiality agreement have been exceeded is in the criminal context. *See id. at 272-73*. In *John*, the Fifth Circuit examined the Ninth Circuit's *Brekka* decision in detail, noting that the Ninth Circuit declined to find civil liability in a case in which the defendant breached a state law duty of loyalty to his employer by accessing and using information he was entitled to access to further his own competing business. *Id. at 273*. As the court stated:

> The Ninth Circuit's reasoning in *Brekka* was influenced by its recognition that "[f]irst, and most important, *§ 1030* **[*56]** is primarily a criminal statute, and *§§ 1030(a)(2)* and *(4)* create criminal liability for violators of the statute." The court explained its view that, "[a]lthough this case arises in a civil context, our interpretation of [the statute] is equally applicable in the criminal context," and that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." The Ninth Circuit explained that "[i]f the employer has not rescinded the defendant's right to use the computer, the defendant would have no reason to know that making personal use of the company computer in breach of a state law fiduciary duty to an employer would constitute a criminal violation of the *CFAA*. It would be improper to interpret a criminal statute in such an unexpected manner.
>
> *There are no such concerns in the present case*.

Id. (quoting *Brekka, 581 F.3d at 1134-35*) (emphasis added).

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agency relationship" and finding defendant subject to *CFAA* because he violated acceptable computer use policy and accessed sites he had no authorization to access) **[*53]** (collecting cases); *Beta Tech., Inc. v. Meyers, CIV.A. H-13-1282, 2013 U.S. Dist. LEXIS 147095, 2013 WL 5602930, at *3 (S.D. Tex. Oct. 10, 2013)* (plaintiff stated a claim under *CFAA* when it alleged that defendant violated employment and computer-use policies); *Sw. Airlines Co. v. Farechase, Inc., 318 F. Supp. 2d 435, 439 (N.D. Tex. 2004)* (alleging access contrary to use-agreement policies and in spite of express warnings sufficient to allege unauthorized access for *CFAA* claim); *Frisco Med. Ctr., L.L.P. v. Bledsoe, 4:12-CV-37/4:15CV105, 147 F. Supp. 3d 646, 2015 U.S. Dist. LEXIS 159915, 2015 WL 7734108, at *9 (E.D. Tex. Nov. 30, 2015)* (access violating terms of confidentiality and security agreements signed by defendants constitutes access in excess of authorization for *CFAA* liability); *Donahue, 42 F. Supp. 3d at 843* (allegation that plaintiff's access was in violation of "Confidentiality Agreement, Certification, and Defendants' Software Policy and Code of Ethics" was sufficient to state unauthorized access or exceeding authorized access under *CFAA*); *Meats by Linz, Inc. v. Dear, 3:10-CV-1511-D, 2011 U.S. Dist. LEXIS 42800, 2011 WL 1515028, at *3 (N.D. Tex. Apr. 20, 2011)* (plaintiff stated *CFAA* claim when it alleged facts that allowed the court to draw the reasonable inference that defendant accessed plaintiff's computer system and used information on it in violation of a restrictive covenant agreement and without plaintiff's consent); *Genesco, 2011 U.S. Dist. LEXIS 147599, 2011 WL 6593415, at *5* (allegation that defendant "ha[d] no right accessing" plaintiff's computer sufficient to state a claim under the **[*54]** *CFAA*). *See also, Associated Pump & Supply Co., LLC v. Dupre, CIV.A. 14-9, 2014 U.S. Dist. LEXIS 46259, 2014 WL 1330196, at *6 (E.D. La. Apr. 3, 2014)* (concluding that the *John* decision indicates that the Fifth Circuit would likely recognize a *CFAA* claim for civil liability when defendant is alleged to have accessed and misused information in contravention of a broad confidentiality delineating the scope of authorized access); *Total Safety v. Rowland, CIV.A. 13-6109, 2014 U.S. Dist. LEXIS 161964, 2014 WL 6485641, at *21 (E.D. La. Nov. 18, 2014)* (citing favorably *Dupre*'s discussion of the Fifth Circuit's likelihood to recognize liability when a defendant accesses and misuses information in contravention of a confidentiality agreement). *Cf. Bridal Expo, Inc. v. van Florestein, CIV.A. 4:08-CV-03777, 2009 U.S. Dist. LEXIS 7388, 2009 WL 255862, at *11 (S.D. Tex. Feb. 3, 2009)* (finding that plaintiffs were unlikely to succeed on their *CFAA* claim because defendants "had signed no confidentiality agreement with Bridal Expo or any other agreement restricting their access to the files they had been working with at their jobs at Bridal Expo" and, therefore, did not act in excess of their authorization).

As in John, there are no such concerns in this case. There are no criminal ramifications for Defendants here. There is, therefore, no need to reinterpret Fifth Circuit precedent—particularly since Judge Kozinski's invitation to do so was not addressed to this Court.[19] Moreover, in *Brekka*, the Ninth Circuit was faced with a situation in which the defendant and employer "did not have a written employment agreement, nor did LVRC promulgate employee guidelines that would prohibit employees from emailing LVRC documents to personal computers." *Brekka, 581 F.3d at 1129*. In contrast, BHL's complaint clearly alleges that (1) BHL never granted access to GSSI; (2) BHL never granted Statoil permission to share access to BHL's software and bitlocks with GSSI; **[*57]** (3) BHL and Statoil had an express license agreement delineating the terms of Statoil's access and providing for automatic forfeiture of access privileges in case of breach; (4) GSSI accessed the software and bitlocks through Statoil; and (5) Statoil continued to access the software and bitlocks after it breached the license agreement. (Doc. 1 at ¶¶ 11, 15-19, 21-22, 25-26, 30, 32, 40.) The Court finds these allegations are more than sufficient to allow the Court to draw the inference that GSSI and Statoil acted without authorization and/or exceeded authorization.

iii. *Cognizable Loss*

HN27[] The civil-claims provision of the CFAA states that "any person who suffers damage or loss by reason of a [§ 1030] violation . . . may maintain a civil action against the violator to obtain compensatory damages and injunctive relief or other equitable relief." *18 U.S.C. § 1030(g)*. However, the provision goes on to limit civil actions to only those situations involving one of the factors set forth in *subclauses (I)*, *(II)*, *(III)*, *(IV)*, or *(V)* of *subsection (c)(4)(A)(i)*. *Id.* The only subclause potentially applicable here is *subclause (I)*, which covers "loss to 1 or more persons during any 1-year period . . . aggregating at least $5,000 in value." *18 U.S.C. § 1030(c)(4)(A)(i)(I)*.

The CFAA defines "loss" as "any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, **[*59]** cost incurred, or other consequential damages incurred because of interruption of service." *18 U.S.C. § 1030(e)(11)*. Based on this language, courts have concluded that the term "loss" encompasses only two types of harm: costs to investigate and respond to an offense, and costs incurred because of a service interruption. *Alliantgroup, L.P. v. Feingold, 803 F. Supp. 2d 610, 630 (S.D. Tex. 2011)* (citations omitted). "Damage" is defined as "any impairment to the integrity or availability of data, a program, a system, or information." *18 U.S.C. § 1030(e)(8)*.

Although BHL's complaint avers that it sustained damage "exceeding $5,000 in a single calendar year," it goes on to list its losses as "reduced business, harm to its goodwill, and loss of licensing fees associated with the use of Boresight's Software." (Doc. 1 at ¶¶ 32, 34.) Statoil argues that this is insufficient because BHL fails to allege that Statoil's conduct involves either of the type of costs recognized by this Court and the CFAA—costs to investigate and respond to an offense or costs incurred because of a service interruption. (Doc. 28 at 9.) The Court agrees.

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[19] As Judge Kozinski noted in *Nosal*, a case on which Defendants heavily rely, the Fifth Circuit has not yet been faced with an opportunity to differentiate between the licensee and third-party in defining the parameters of exceeding or lacking authorization:

> We remain unpersuaded by the decisions of our sister circuits that interpret the CFAA broadly to cover violations of corporate computer use restrictions or violations of a duty of loyalty. *See United States v. Rodriguez, 628 F.3d 1258 (11th Cir. 2010)*; *United States v. John, 597 F.3d 263 (5th Cir. 2010)*; *Int'l Airport Ctrs., LLC v. Citrin, 440 F.3d 418 (7th Cir. 2006)*. These courts looked only at the culpable behavior of the defendants before them, and failed to consider the effect on millions of ordinary citizens caused by the statute's unitary **[*58]** definition of "exceeds authorized access." They therefore failed to apply the long-standing principle that we must construe ambiguous criminal statutes narrowly so as to avoid "making criminal law in Congress's stead." *United States v. Santos, 553 U.S. 507, 514, 128 S.Ct. 2020, 170 L.Ed.2d 912 (2008)*.
>
> We therefore respectfully decline to follow our sister circuits and urge them to reconsider instead.

Nosal, 676 F.3d at 862-63.

In its response, BHL appears to attempt to remedy this defect by stating that BHL "incurred in-house labor costs when investigating, assessing, and quantifying the extent/reach of Statoil's **[*60]** infractions" and then listing the man hours a number of its employees spent on the investigation. (Doc. 36 at 11.) However, as Statoil correctly notes in its Motion for Leave to File Reply Memorandum (Doc. 48), BHL's averments are too little, too late. Without converting the parties' motions to ones for summary judgment, the Court is bound to the pleadings. *Fed. R. Civ. P. 12(b)(6)*. *See, e.g., Clark v. Tarrant Cnty., 798 F.2d 736, 745 (5th Cir. 1986)* ("The district court considered matters outside the pleadings in ruling on the *Rule 12(b)(6)* motion to dismiss for failure to state a claim, so that, as expressly provided in *Rule 12(b)(6)*, the motion to dismiss was converted into a motion for summary judgment under *Fed. R. Civ. P. 56*."); *Collins v. Morgan Stanley Dean Witter, 224 F.3d 496, 498 (5th Cir. 2000)* (citing *Fed. R. Civ. P. 12(b)(6)*) (***HN28***[] "In considering a motion to dismiss for failure to state a claim, a district court must limit itself to the contents of the pleadings, including attachments thereto."). Without allegations that allow the Court to infer that Defendants are liable for cognizable losses under the *CFAA*, the Court must conclude that BHL's complaint runs afoul of *Rule 12(b)(6)* requirements. *See Stelly, 733 F. Supp. 2d at 780* ("M—I's . . . claim fails because M-I does not allege any facts showing at least $5,000 of loss, or any loss as a result of investigation or interruption of computer service.") BHL may replead its *CFAA* claim **[*61]** to allege cognizable loss.

b. *ECPA (Count III)*

In 1986, Congress passed the *Electronic Communications Privacy Act, Pub.L. No. 99-508, 100 Stat. 1848*, which was intended to afford privacy protection to electronic communications. Title I of the ECPA amended the federal Wiretap Act, which previously had addressed only interception of wire and oral communications, to also address interception of electronic communications. *See Pub.L. No. 99-508, 100 Stat. 1848*; S.Rep. No. 99-541, at 3 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3557; *18 U.S.C. §§ 2510(12)*; 2511(1)(a); *Konop v. Hawaiian Airlines, Inc., 302 F.3d 868, 874 (9th Cir. 2002)*; *United States v. Steiger, 318 F.3d 1039, 1046-47 (11th Cir. 2003)*. At the same time, Title II of the ECPA created the Stored Communications Act ("SCA") to cover access to stored communications and records. *See Pub.L. No. 99-508, 100 Stat. 1848*; S.Rep. No. 99-541, at 3 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3557; *18 U.S.C. § 2701(a)*; *Konop, 302 F.3d at 874*; *Steiger, 318 F.3d at 1047*.

The potential breadth of these statutes and the date of last amendment make them notoriously difficult for modern courts to grapple with. As the Ninth Circuit has noted:

> [T]he intersection of these . . . statutes is a complex, often convoluted, area of the law. [T]he difficulty is compounded by the fact that the ECPA was written prior to the advent of the Internet and the World Wide Web. As a result, the existing statutory framework is ill-suited to address modern forms of communication . . . . Courts **[*62]** have struggled to analyze problems involving modern technology within the confines of this statutory framework, often with unsatisfying results. [U]ntil Congress brings the laws in line with modern technology, protection of the Internet . . . will remain a confusing and uncertain area of the law.

Konop, 302 F.3d at 874 (citations and internal citation marks omitted) (collecting law review articles criticizing judicial interpretations of the ECPA). Part of the confusion arising from the ECPA comes from the courts' application of the statutory definitions to a vast and ever growing list of electronic systems and devices that interface with "electronic communications."

HN29[] The ECPA provides a cause of action against anyone who "intentionally accesses without authorization a facility through which an electronic communication service is provided; or intentionally exceeds an authorization to access that facility; and thereby obtains, alters, or prevents authorized access to a wire or electronic communication while it is in electronic storage in such system." *18 U.S.C. §§ 2701(a)(1)*, *2707(a)*. "Accordingly, for Defendants to be liable under the SCA, they must have gained unauthorized access to a facility through which electronic communication services are **[*63]** provided (or the access must have exceeded the scope of authority given) and must thereby have accessed electronic communications while in storage." *Garcia v. City of Laredo, 702 F.3d 788, 791 (5th Cir. 2012)*.

In attacking the sufficiency of BHL's ECPA claims, GSSI argues that BHL fails to allege that GSSI "accessed a facility through which an electronic communication service is provided" or "obtained, altered, or prevented authorized access to a wire or electronic communication while it is in electronic storage." (Doc. 18 at 11-13.) Statoil joins GSSI in arguing that BHL fails to allege that Defendants accessed a "facility" recognized by the ECPA. (Doc. 28 at 12-14). Statoil also argues that BHL admits Statoil's access was authorized and, therefore, fails to state a claim that access was unauthorized or exceeded. (*Id.* at 14-15). Finally, Statoil alleges that BHL's position is counter to the purpose of the SCA.[20] (*Id.* at 15-16.)

Essentially, the parties here dispute whether the terms "facility," "electronic storage," and "access" are applicable to the facts alleged in BHL's complaint. ***HN30***[] While the SCA does not define the term "facility," it does define **[*64]** the terms "electronic communication," "electronic communication service" and "electronic storage." *See* *18 U.S.C. § 2510*. "'Electronic communication' means any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce . . . ." *Id.* *§ 2510(12)*. The statute defines an "electronic communication service" ("ECS") as "any service which provides to users thereof the ability to send or receive wire or electronic communications." *Id.* *§ 2510(15)*. "Electronic storage" is defined as "(A) any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof; and (B) any storage of such communication by an electronic communication service for purposes of backup protection of such communication." *Id.* *§ 2510(17)*.

i. *Facility*

Courts have had no trouble concluding that the terms "electronic communication service" and "facility" comfortably fit providers of communication services—such as telephone companies, Internet or email service providers, and bulletin board services—and the facilities they use to operate these services. **[*65]** *Steve Jackson Games, Inc. v. United States Secret Service, 36 F.3d 457, 462 (5th Cir. 1994)* (electronic bulletin board system allowing for email communication is electronic communication service); *United States v. Councilman, 418 F.3d 67, 81-82 (1st Cir. 2005)* (email service is electronic communication service); *In re DoubleClick, Inc. Privacy Litig., 154 F. Supp. 2d 497, 508 (S.D.N.Y. 2001)* (Internet access is electronic communications service); *Fraser v. Nationwide Mut. Ins. Co., 352 F.3d 107, 114 (3d Cir. 2003)*, *as amended* (Jan. 20, 2004) (company email service is electronic communication service); *Theofel, 359 F.3d at 1075* (ISP is electronic communication service). Importantly to the case at bar, however, the term has not been constrained to these obvious entities. Several courts have determined that the term also encompasses protected websites and databases. *State Analysis, 621 F. Supp. 2d at 313* (searchable, proprietary online database available only by subscription sufficiently alleges electronic communication service for ECPA claim); *Konop, 302 F.3d at 879* (password-protected website is electronic communication service).

Notably, a majority of the opinions interpreting "electronic communication service" do not explicitly state what the "facility" is that functions with the service. As a result, it is difficult to determine what characteristics define the relationship between a facility and an electronic communications service. However, a careful reading of these cases indicates that the services at issue all depend on or interact with a network or server. **[*66]** This conclusion is bolstered by a number of recent district court decisions.

The majority of federal courts to address the facility question have done so in the context of personal devices, such as desktop computers, laptops, and mobile phones. The courts have held, nearly universally, that such devices are not "facilities" under the Act.[21] In reaching this conclusion, these courts "have consistently concluded that an

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[20] Since we are only dealing with Title II of the ECPA, *i.e.*, the SCA, the Court uses the terms ECPA and SCA interchangeably.

[21] *See, e.g.,* *Garcia, 702 F.3d at 792-93* (noting that courts agree that a home computer is not protected by the SCA and finding that defendant's argument that her cell phone was a facility under the statute was unsupported by legislative history or other courts' decisions); *Cousineau v. Microsoft Corp., 6 F. Supp. 3d 1167, 1174-75 (W.D. Wash. 2014)* (discussing similar cases and

individual's personal computer does not 'provide [] an electronic communication service' simply by virtue of enabling use of electronic communication services." *In re iPhone Application Litig., 844 F. Supp. 2d 1040, 1058 (N.D. Cal. 2012)* (citing *Crowley v. CyberSource Corp., 166 F. Supp. 2d 1263, 1270-71 (N.D. Cal. 2001))*.

Accordingly, courts attempting to define what makes a "facility" distinct have recently begun to coalesce around the idea that server-like functions are a necessary attribute of a "facility." As one district court has observed: "Notably, cases after *iPhone* have determined that for a device to be a "facility" under the SCA, "it must perform server-like functions." *Vaquero Energy, Inc. v. Herda, 1:15-CV-0967-JLT, 2015 U.S. Dist. LEXIS 115717, 2015 WL 5173535, at *11 (E.D. Cal. Sept. 3, 2015)*; **[*68]** *see also* *In re Pharmatrak, Inc. Privacy Litig., 220 F. Supp. 2d 4, 13 (D. Mass. 2002)*, *rev'd on other grounds sub nom.* *In re Pharmatrak, 329 F.3d 9 (1st Cir. 2003)* ("While it is possible for modern computers to perform server-like functions, there is no evidence that any of the Plaintiffs used their computers in this way."); *Cousineau v. Microsoft Corp., 6 F. Supp. 3d 1167, 1175 (W.D. Wash. 2014)* (concluding that plaintiff's phone not a "facility" because it "did not provide location services to other users in a server-like fashion . . . .").

BHL's complaint alleges that by accessing the software and using the bitlocks, GSSI and Statoil obtained access to electronic communications that "were in electronic storage in that database." (Doc. 1 at ¶ 49.) Elsewhere in the complaint BHL states that the unauthorized use of the bitlocks granted GSSI and Statoil access to BHL's software, which was accessed through either Statoil or GSSI's computer network. (*Id. at 40*.) Finally, BHL avers that its software and trade secrets, reside on "computers and the computer network." (*Id. at 29, 38*.)

Although BHL's allegations are not a model of clarity in apprising this Court how the software, bitlocks, individual computers, and the computer networks function, at this stage, Plaintiff's averments still allow the Court to draw a reasonable inference that its software and bitlocks come within **[*69]** the ambit of the ECPA. The Court notes, however, that upon further factual development regarding the functions performed by BHL's software and bitlocks, it may become apparent that BHL was overly optimistic in asserting an ECPA claim.

ii. ***Electronic Storage***

HN31[] To state a claim under the SCA, BHL must show not only that Defendants accessed a "facility through which an electronic communication service is provided," but furthermore, that Defendants "obtain[ed], alter[ed], or prevent[ed] authorized access to a wire or electronic communication while it [was] in electronic storage in such system . . . ." *18 U.S.C. § 2701(a)*. The SCA defines "electronic storage" as "(A) any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof; and (B) any storage of such communication by an electronic communication service for purposes of backup protection of such communication." *18 U.S.C. § 2510(17)*.

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concluding that mobile device is not "facility" under SCA); *In re iPhone Application Litigation, 844 F. Supp. 2d 1040, 1057-58 (N.D. Cal. 2012)* (analyzing a number of cases and concluding that those that have concluded an individual's computer, laptop, or mobile device are not "facilities" subject to ECPA have the better reasoning); *Hilderman v. Enea TekSci, Inc., 551 F. Supp. 2d 1183, 1204 (S.D. Cal. 2008)* ("It is questionable whether the laptop computer qualifies **[*67]** as a 'facility through which an electronic communication service is provided.'"); *Freedom Banc Mortg. Servs., Inc. v. O'Harra, 2:11-CV-01073, 2012 U.S. Dist. LEXIS 125734, 2012 WL 3862209, at *9 (S.D. Ohio Sept. 5, 2012)* (stating that computers are not relevant facilities that SCA is designed to protect); *Steiger, 318 F.3d at 1049* (holding that computer hard drive is beyond the reach of the SCA); *Crowley v. CyberSource Corp., 166 F. Supp. 2d 1263, 1271 (N.D. Cal. 2001)* (argument that computer is "facility" subject to SCA is "destined to failure"); *In re Pharmatrak, Inc. Privacy Litig., 220 F. Supp. 2d 4, 13 (D. Mass. 2002)*, *rev'd on other grounds sub nom.* *In re Pharmatrak, Inc., 329 F.3d 9 (1st Cir. 2003)* (stating that personal computer is not facility under SCA); *Roadlink Workforce Solutions L.L.C. v. Malpass, No. 13-5459-RBL, 2013 U.S. Dist. LEXIS 133786, 2013 WL 5274812, at *3 (W.D. Wash. Sep. 18, 2013)* (following reasoning in *iPhone* that personal computing devices are not "facilities" under SCA); *Morgan v. Preston, No. 13-0403, 2013 U.S. Dist. LEXIS 159641, 2013 WL 5963563, at *5 n.3 (M.D. Tenn. Nov. 7, 2013)* (citing numerous cases to demonstrate that "overwhelming body of law" supports conclusion that personal computer is not a facility); *Lazette v. Kulmatycki, 949 F. Supp. 2d 748, 755-56 (N.D. Ohio June 5, 2013)* (explaining why reasoning in *iPhone* is persuasive).

A number of courts have read subsection (A) of the definition of "electronic storage" narrowly, concluding that data residing on an individual's hard drive or cell phone is not in electronic storage because, unlike emails waiting on the server to be delivered to the recipient, it is not in "temporary, intermediate storage" as required **[*70]** by the Act. *See, e.g.,* Garcia, 702 F.3d at 793 (citations omitted); In re DoubleClick, 154 F. Supp. 2d at 512; In re iPhone, 844 F. Supp. 2d at 1059. Nevertheless, subsection (B) provides an alternative avenue to qualification as electronic storage. *See Theofel, 359 F.3d at 1076* ("By its plain terms, subsection (B) applies to backup storage regardless of whether it is intermediate or post-transmission.").

Here, BHL simply alleges that the software and data therein was accessed using the bitlocks and "[t]hrough these actions, Defendants . . . violated Title II of the ECPA." (Doc. 1 at ¶¶ 49-50.) These conclusory allegations are insufficient to give rise to an inference that the data resides in "temporary, intermediate" storage or is stored "for purposes of backup protection" as required to demonstrate "electronic storage" under the SCA. BHL may attempt to rectify this inadequacy in an amended pleading.

iii. *Access*

Statoil is correct to note that ***HN32***[] authorized users cannot be held liable under § 2701 of the ECPA. *See* In re Am. Airlines, Inc., Privacy Litig., 370 F. Supp. 2d 552, 558-59 (N.D. Tex. 2005) (plaintiffs fail to state a § 2701 claim because "their amended complaints each assert that American authorized AAI to disclose the PNRs to TSA."). Under § 2701(c)(1), a party is excepted from liability if the conduct is authorized by the provider of the electronic communications service, which in this case would be BHL. However, unlike the plaintiffs' complaints **[*71]** in In re American Airlines, BHL's complaint clearly alleges that (1) BHL and Statoil had an express license agreement delineating the terms of Statoil's access and providing for automatic forfeiture of access privileges in case of breach, and (2) Statoil continued to access the software and bitlocks after it breached the license agreement. (Doc. 1 at ¶¶ 15-19, 21-22, 25-26, 30, 49.) This is sufficient to allege unauthorized access under the ECPA.

Moreover, it is worth mentioning that BHL likewise sufficiently alleges unauthorized access by GSSI. ***HN33***[] Section 2701(c) also allows those who are "authorized by a user" (i.e., third-party users) of the electronic communication service to access a communication "of or intended for that user." 18 U.S.C. § 2701(c)(2). The plain language of § 2701(c)(2) indicates that only a "user" of the service can authorize third-party access to the communication. The statute defines "user" as one who "1) uses the electronic communication service; and 2) *is duly authorized by the provider of such service to engage in such use."* 18 U.S.C. § 2510(13) (emphasis added).

Because the statutory language is unambiguous, it must control the construction of the statute, notwithstanding the legislative history. United States v. Turkette, 452 U.S. 576, 580, 101 S. Ct. 2524, 69 L. Ed. 2d 246 (1981). Accordingly, GSSI would be authorized **[*72]** only if Statoil was "duly authorized" at the time access was granted. As already discussed, however, BHL has clearly alleged that Statoil's license agreement provided for immediate revocation of access privileges if access was granted to a third party without BHL's consent. Accordingly, Statoil was no longer a "duly authorized" user capable of providing third-party authorization at the time it did in fact provide access to GSSI. BHL has sufficiently pleaded unauthorized access for both Statoil and GSSI.

c. *Unjust Enrichment (Count V - Statoil Only)*

Count Five of BHL's complaint asserts a claim for unjust enrichment against GSSI and Statoil. (Doc. 1 at ¶¶ 60-64.) Statoil asks this Court to dismiss this claim, arguing that because the parties had a contractual relationship outlining the terms of Statoil's use of BHL's software, and BHL failed to plead that the contract was invalid for any reason, BHL is precluded from asserting this claim under Texas law. (Doc. 28 at 16-17.)[22]

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[22] Statoil also argues that Plaintiff's unjust enrichment claim is preempted by the Copyright Act. (Doc. 28 at 22-23.) Because the Court agrees with Statoil's primary argument, the Court need not address this secondary **[*73]** attack.

HN34[] In Texas, when one person has obtained a benefit from another by fraud, duress, or the taking of an undue advantage, he may recover under a theory of unjust enrichment. Heldenfels Bros., Inc. v. City of Corpus Christi, 832 S.W.2d 39, 41 (Tex. 1992). However, "[u]njust enrichment is not a proper remedy merely because it might appear expedient or generally fair that some recompense be afforded for an unfortunate loss to the claimant, or because the benefits to the person sought to be charged amount to a windfall." Heldenfels, 832 S.W.2d at 42 (citation and internal citation marks omitted). Texas courts have also made it clear that "unjust enrichment is based on quasi-contract and is unavailable when a valid, express contract governing the subject matter of the dispute exists." Coghlan v. Wellcraft Marine Corp., 240 F.3d 449, 454 (5th Cir. 2001) (citations omitted); Casa Orlando Apartments, Ltd. v. Fed. Nat'l Mortg. Ass'n, 624 F.3d 185, 196 n.32 (5th Cir. 2010) (citation omitted); McGowan & Co., Inc. v. Bogan, 93 F. Supp. 3d 624, 652 (S.D. Tex. 2015) (citations omitted).

The dispute in this case arises from Statoil's use of BHL's software and bitlocks in breach of its agreement with BHL. BHL's complaint clearly alleges that Statoil and BHL had a license agreement that expressly governed both Statoil's use of the software and bitlocks and its right to share them with third-party consultants. (Doc. 1 at ¶¶ 13-15.) This averment dooms Plaintiff's claim. Because a valid, express contract governs the terms of Statoil's use of **[*74]** BHL's software and outlines remedies for breach, Plaintiff's claim for unjust enrichment against Statoil must be dismissed.

d. *Civil Conspiracy (Count VIII)*

Statoil seeks dismissal of Plaintiff's civil conspiracy claim on the ground that it is completely preempted by the Copyright Act. (Doc. 28 at 17-22.) Statoil relies heavily on *Stelly* to make this argument. (Id. at 21-22.) Plaintiff responds that Statoil erroneously characterizes the underlying tort in its civil conspiracy claim as unauthorized copying and use of BHL's software rather than as the breach of the confidential relationship with BHL, and therefore, misreads *Stelly*. (Doc. 36 at 27-29.)

HN35[] Section 301(a) of the Copyright Act "accomplishes the general federal policy of creating a uniform method for protecting and enforcing certain rights in intellectual property by preempting other claims." Daboub v. Gibbons, 42 F.3d 285, 288 (5th Cir. 1995). The Fifth Circuit follows a two-step approach to determine whether a state-law claim is preempted by § 301. Id. at 288-89. At the first step, "the cause of action is examined to determine if it falls within the subject matter of copyright." Id. at 289 (citation and internal citation marks omitted). "Second, the cause of action is examined to determine if it protects rights that are equivalent **[*75]** to any of the exclusive rights of a federal copyright, as provided in 17 U.S.C. § 106." *Id.* (citation omitted).

i. *Step One: Subject Matter of Copyright*

In applying this test to cases involving software, the Fifth Circuit has made it clear that software falls within the ambit of § 301. *See, e.g.,* Alcatel USA, Inc. v. DGI Techs., Inc., 166 F.3d 772, 786 (5th Cir. 1999) (concluding that operating system software is tangible media falling within the subject matter of copyright); Spear Mktg., Inc. v. BancorpSouth Bank, 791 F.3d 586, 597 (5th Cir. 2015) ("computer software is a tangible medium protected by the Copyright Act."). However, "claims not wholly limited to software" are broader than the scope of copyright protection. GlobeRanger Corp. v. Software AG, 691 F.3d 702, 709 (5th Cir. 2012).

Here, BHL alleges that Statoil misappropriated BHL's proprietary software in breach of the parties' confidential relationship. However, the extent of the allegedly misappropriated trade secrets—and whether software is solely at issue—is not clearly described in the complaint. (Doc. 1 at ¶¶ 77-80.) If more than software is at issue, then BHL would survive the first step of the analysis. On the other hand, if software is solely at issue, the dispositive question is whether BHL's civil conspiracy claim protects rights that are "equivalent" to any of the exclusive rights protected by copyright. Regardless of whether software is **[*76]** solely at issue, however, the Court concludes that BHL's claim survives. This is because BHL's claim is premised on an underlying tort that does not "protect[] rights that are 'equivalent' to any of the exclusive rights of a federal copyright as provided in 17 U.S.C. § 106." Daboub, 42 F.3d at 289 (citations omitted).

i. ***Step Two: Equivalency***

HN36[] The Fifth Circuit "evaluate[s] the equivalency of rights under what is commonly referred to as the 'extra element' test." Alcatel, 166 F.3d at 787. For example, "[s]ection 106 [of the Act] grants the holder of a copyright the exclusive right to reproduce, distribute, perform, and display the copyrighted work." Kane v. Nace Intern., 117 F. Supp. 2d 592, 597 (S.D. Tex. 2000) (alteration in original) (quoting Daboub, 42 F.3d at 289) (internal citation marks omitted). Thus, "[a] state law claim protects rights equivalent to [a] federal copyright claim where the core of the state law theory of recovery speaks to wrongful copying." Stelly, 733 F. Supp. 2d at 783 (citing Daboub, 42 F.3d at 289.

Conspiracy is considered a derivative tort because liability is presumed on participation in some underlying tort. Tilton v. Marshall, 925 S.W.2d 672, 681 (Tex. 1996) (citation omitted). The elements of civil conspiracy in Texas are: (1) a combination of two or more persons; (2) an object to be accomplished (an unlawful purpose or a lawful purpose by unlawful means); (3) a meeting of the minds on the object or course of action; **[*77]** (4) one or more unlawful, overt acts; and (5) damages as the proximate result. Ultraflo Corp. v. Pelican Tank Parts, Inc., 823 F. Supp. 2d 578, 588 (S.D. Tex. 2011) (citations omitted); Ins. Co. of N. Am. v. Morris, 981 S.W.2d 667, 675 (Tex. 1998). Specific intent is required. Triplex Commc'ns Inc. v. Riley, 900 S.W.2d 716, 719 (Tex. 1995).

In evaluating the elements of civil conspiracy in the context of the extra-element test, this Court has concluded that "'the intent element of the conspiracy claim does not constitute qualitatively different conduct where the element of intent only goes to an intent to form an agreement to copy and use' copyrightable trade secrets and confidential information." Ultraflo, 823 F. Supp. 2d at 588 (quoting Stelly, 733 F. Supp. 2d at 791). In this case, however, the underlying tort that the intent element attaches to is misappropriation of trade secrets—a claim that courts have concluded is not preempted by the Copyright Act, because it includes an "extra element" of breach of confidentiality or improper methods, which is not equivalent to any of the exclusive rights of copyright. Id. at 587 (citing Stelly, 733 F. Supp. 2d at 786); GlobeRanger, 2015 U.S. Dist. LEXIS 76059, 2015 WL 3648577, at *4-5; Emerald City Mgmt., LLC v. Kahn, 4:14-CV-358, 2016 U.S. Dist. LEXIS 2143, 2016 WL 98751, at *18 (E.D. Tex. Jan. 8, 2016) (citations omitted); *see also* Stromback v. New Line Cinema, 384 F.3d 283, 303-304 (6th Cir. 2004) (collecting cases). Because the underlying tort alleged in this case (trade-secret misappropriation) survives the extra-element test and conspiracy is a derivative tort, this Court concludes that Plaintiff's civil conspiracy claim is likewise not preempted **[*78]** by § 301.

C. Defendant Statoil's Motion for Leave to File a Reply Memorandum

Statoil filed its Motion for Leave to File a Reply Memorandum to Plaintiff's Opposition of Motion to Dismiss on August 6, 2015. (Doc. 48.) In its preliminary statement, Statoil states that its purpose in filing the brief is to "make this [C]ourt aware of new, controlling precedent," and to "identify for the [C]ourt, numerous allegations contained" in BHL's brief "that are not set forth in the complaint and therefore, must not be considered on a motion to dismiss." (Doc. 48-2 at 2.) In this motion, Statoil argues that *Spear Marketing*—a case that Statoil alleges has numerous "similar, if not identical" claims as those in the case at bar—dictates a favorable outcome for Statoil's motion to dismiss. (Doc. 48 at 2 n.1.) BHL opposes Statoil's motion, arguing that *Spear Marketing* has no bearing on the arguments in Statoil's Motion to Dismiss" because it "does not address or change the existing law regarding preemption of conspiracy and unjust enrichment claims by the Copyright Act." (Doc. 56 at 1.) BHL also argues that "[i]n its proposed Reply, Statoil . . . proposes for the first time that all of Boresight's trade secrets are embodied completely **[*79]** in its software, thus implying that that [sic] copyright preemption of Boresight's state-law claims may be appropriate in this case." (*Id.* at 2.) Because this is a new argument not raised in Statoil's original motion to dismiss, BHL asks this Court to deny Statoil's motion. (Id. at 4.) In the alternative, BHL requests leave to file a surreply if the Court grants Statoil's motion because "no injustice would exist where Boresight is given a fair opportunity to respond." (*Id. at 3-4*.)

The Court initially notes that BHL is correct in pointing out that *Spear Marketing* has little to no bearing on Statoil's motion to dismiss[23] and that Statoil raises a new argument in its proposed reply. Moreover, while it appreciates Statoil's eagerness to assist, the Court is capable of determining what "must not be considered on a motion to dismiss" on its own. However, in the interest of having full briefing on all issues raised in the pending motions, the Court grants Statoil leave to file its reply memorandum. However, for the same reason—and in fairness to BHL—the Court likewise grants BHL leave to file its surreply.

IV. Conclusion

As discussed, the Court finds that it lacks subject matter jurisdiction of GSSI's declaratory judgment claims. This is an incurable defect. Accordingly, these claims must be dismissed with prejudice.

The Court also finds that a number of the parties' claims fail to meet the 12(b)(6) standard. However, the Court will grant the parties' requests for leave to amend these claims rather than dismissing them outright. *See* *Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co., 313 F.3d 305, 329 (5th Cir. 2002)* ("[D]istrict courts often afford plaintiffs at least one opportunity to cure pleading deficiencies before dismissing a case, unless it is clear that the defects are incurable or the plaintiffs advise the court that they are unwilling or unable to amend in a manner that will avoid dismissal.") The Court believes that additional allegations could cure the existing deficiencies. For the forgoing reasons, the Court hereby

ORDERS that Plaintiff BHL's Motion to Dismiss (Doc. 27) is **GRANTED**, Defendant Statoil's Motion to Dismiss (Doc. 28) is **GRANTED** in part and **DENIED** in part, and Defendant GSSI's Motion to Dismiss (Doc. 27) is **GRANTED** in part and **DENIED** in part. Accordingly, GSSI's **[*81]** declaratory judgment counterclaims (Counts I-III) are dismissed for lack of subject matter jurisdiction and the following claims are dismissed, without prejudice, for failure to state a claim:

- BHL's ECPA claim (Count III)
- BHL's unjust enrichment claim against Statoil (Count V)
- GSSI's state antitrust counterclaim (Count VI)
- GSSI's tortious interference with existing contract counterclaim (Count VII)
- GSSI's tortious interference with prospective business relationships counterclaim (Count VIII)

The parties shall have 21 days to amend their pleadings to conform with the Court's rulings. It is further

ORDERED that Defendant's Motion for Leave to File a Reply Memorandum to Plaintiff's Opposition of Motion to Dismiss (Doc. 48) is **GRANTED**. BHL's Motion for Leave to File Surreply (Doc. 56-1) is likewise **GRANTED**.

SIGNED at Houston, Texas, this 29th day of March, 2016.

/s/ Melinda Harmon

MELINDA HARMON

UNITED STATES DISTRICT JUDGE

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[23] The Court agrees with BHL because *Spear Marketing* deals with the TTLA rather than the TUTSA, and as explained in **[*80]** *supra* note 3, the two statutes dictate a different result in the copyright preemption analysis.

Dana v. Hershey Co.

United States District Court for the Northern District of California

March 29, 2016, Decided; March 29, 2016, Filed

Case No. 15-cv-04453-JCS

Reporter

180 F. Supp. 3d 652 *; 2016 U.S. Dist. LEXIS 41594 **; 2016 WL 1213915

LAURA DANA, Plaintiff, v. THE HERSHEY COMPANY, et al., Defendants.

Subsequent History: Affirmed by *Dana v. Hershey Co., 2018 U.S. App. LEXIS 18723 (9th Cir. Cal., July 10, 2018)*

Prior History: *Barber v. Nestlé USA, Inc., 154 F. Supp. 3d 954, 2015 U.S. Dist. LEXIS 170608 (C.D. Cal., Dec. 9, 2015)*

Core Terms

chain, omissions, chocolate, consumers, products, abuses, disclosure, cases, disclose, courts, child labor, fraudulent, unfair, duty to disclose, misrepresentations, misleading, prong, labor practice, slave labor, advertising, argues, cocoa, product label, failure to disclose, safe harbor, allegations, customers, labeling, manufacturer, packaging

LexisNexis® Headnotes

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

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

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

A complaint may be dismissed for failure to state a claim on which relief can be granted under *Fed. R. Civ. P. 12(b)(6)*. The purpose of a motion to dismiss under *Rule 12(b)(6)* is to test the legal sufficiency of the complaint. Generally, a plaintiff's burden at the pleading stage is relatively light. *Fed. R. Civ. P. 8(a)* states that a pleading which sets forth a claim for relief shall contain a short and plain statement of the claim showing that the pleader is entitled to relief. *Fed. R. Civ. P. 8(a)*. A complaint may be dismissed for failure to state a claim on which relief can be granted under *Fed. R. Civ. P. 12(b)(6)*. The purpose of a motion to dismiss under *Rule 12(b)(6)* is to test the legal sufficiency of the complaint. Generally, a plaintiff's burden at the pleading stage is relatively light. *Fed. R. Civ. P. 8(a)* states that a pleading which sets forth a claim for relief shall contain a short and plain statement of the claim showing that the pleader is entitled to relief. *Fed. R. Civ. P. 8(a)*.

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

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

HN2[] Motions to Dismiss, Failure to State Claim

In ruling on a motion to dismiss under *Fed. R. Civ. P. 12(b)(6)*, the court analyzes the complaint and takes all allegations of material fact as true and construes them in the light most favorable to the non-moving party. Dismissal may be based on a lack of a cognizable legal theory or on the absence of facts that would support a valid theory. A complaint must contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory. A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. Nor does a complaint suffice if it tenders naked assertions devoid of further factual enhancement. Rather, the claim must be plausible on its face, meaning that the plaintiff must plead sufficient factual allegations to allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.

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

HN3[] Heightened Pleading Requirements, Fraud Claims

Fed. R. Civ. P. 9(b) sets a heightened pleading standard for claims based on fraud. In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. *Fed. R. Civ. P. 9(b)*. In order to meet this standard, a complaint must specify such facts as the times, dates, places, benefits received, and other details of the alleged fraudulent activity. The heightened standard does not apply to malice, intent, knowledge, and other conditions of a person's mind. *Fed. R. Civ. P. 9(b)*.

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

Civil Procedure > Preliminary Considerations > Jurisdiction > Subject Matter Jurisdiction

HN4[] Defenses, Demurrers & Objections, Motions to Dismiss

Where a jurisdictional challenge is based on the allegations of a plaintiff's complaint rather than on extrinsic evidence, courts assume the plaintiff's allegations to be true and draw all reasonable inferences in his favor. The inquiry is therefore much like a *Fed. R. Civ. P. 12(b)(6)* analysis.

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

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

HN5[] Standing, Injury in Fact

When plaintiffs contend that class members paid more for a product than they otherwise would have paid, or bought it when they otherwise would not have done so they have suffered an Article III injury in fact.

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

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

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

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

HN6[] False Advertising, State Regulation

The Unfair Competition Law (UCL), *Cal. Bus. & Prof. Code §§ 17200-17210* and the False Advertising Law (FAL), *Cal. Bus. & Prof. Code §§ 17500-17509*, require that private plaintiffs have suffered injury in fact and have lost money or property as a result of the unfair competition or false advertising. A consumer who relies on a product label and challenges a misrepresentation contained therein can satisfy the standing requirement of the UCL and the FAL by alleging that he or she would not have bought the product but for the misrepresentation, and that such allegations are sufficient to establish economic injury within the meaning of those statutes.

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

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

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

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

HN7[] False Advertising, State Regulation

The Consumers Legal Remedies Act (CLRA), *Cal. Civ. Code §§ 1750-1784*, allows a consumer who has suffered "any damage" to sue, and any plaintiff who has standing under the Unfair Competition Law's, *Cal. Bus. & Prof. Code §§ 17200-17210*, and the False Advertising Law's, *Cal. Bus. & Prof. Code §§ 17500-17509*, lost money or property requirement will, a fortiori, have suffered any damage for purposes of establishing CLRA standing.

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

HN8[] Deceptive & Unfair Trade Practices, State Regulation

The Consumers Legal Remedies Act, *Cal. Civ. Code §§ 1750-1784*, prohibits certain enumerated unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer. *Cal. Civ. Code § 1770(a)*.

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

HN9[] Deceptive & Unfair Trade Practices, State Regulation

Although a claim may be stated under the Consumers Legal Remedies Act, *Cal. Civ. Code §§ 1750-1784*, in terms constituting fraudulent omissions, to be actionable the omission must be contrary to a representation actually made by the defendant, or an omission of a fact the defendant was obliged to disclose. California courts have generally rejected a broad obligation to disclose. Absent affirmative misrepresentations, an obligation to disclose under California law extends only to matters of product safety.

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

HN10[] Deceptive & Unfair Trade Practices, State Regulation

The weight of authority limits a duty to disclose under the Consumers Legal Remedies Act, *Cal. Civ. Code §§ 1750-1784*, to issues of product safety, unless disclosure is necessary to counter an affirmative misrepresentation.

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

HN11[] **Deceptive & Unfair Trade Practices, State Regulation**

A duty to disclose under California law does not extend to all information that may persuade a consumer to make different purchasing decisions.

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

HN12[] **Deceptive & Unfair Trade Practices, State Regulation**

While the Consumers Legal Remedies Act, *Cal. Civ. Code §§ 1750-1784*, provides that it shall be liberally construed and applied to promote its underlying purposes of consumer protection, *Cal. Civ. Code § 1760*, it does not explicitly discuss representations regarding labor practices, *Cal. Civ. Code § 1770(a)*.

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

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

California's Unfair Competition Law, *Cal. Bus. & Prof. Code §§ 17200-17210*, prohibits unfair competition, defined as any unlawful, unfair, or fraudulent business act or practice. Cal. Bus. & Prof. Code § 17200.

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

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

Absent a duty to disclose, the failure to do so does not support a claim under the fraudulent prong of the Unfair Competition Law, *Cal. Bus. & Prof. Code §§ 17200-17210*.

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

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

When a plaintiff who claims to have suffered injury from a direct competitor's "unfair" act or practice invokes Cal. Bus. & Prof. Code § 17200, the word "unfair" in that section means conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.

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

HN16[] **False Advertising, State Regulation**

The False Advertising Law (FAL), *Cal. Bus. & Prof. Code §§ 17500-17509*, makes it unlawful for any person to make or disseminate or cause to be made or disseminated before the public any statement which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading. Cal. Bus. & Prof. Code § 17500. The plain language of the statute—which prohibits making, disseminating, or causing the dissemination of false or misleading statements—does not encompass omissions. There can be no FAL claim where there is no statement at all—or in other words that an omission, even of material facts, does not violate the FAL.

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

HN17[] **False Advertising, State Regulation**

There must be at least some affirmative misrepresentation to support a claim under the False Advertising Law, *Cal. Bus. & Prof. Code §§ 17500-17509*.

Counsel: [1]** For Laura Dana, on behalf of herself and all others similarly situated, Plaintiff: Elaine T. Byszewski, LEAD ATTORNEY, Hagens Berman Sobol Shaprio LLP, Pasadena, CA; Ashley A Bede, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Seattle, WA; Christopher Robert Pitoun, Hagens Berman Sobol Shapiro LLP, Pasadena, CA; Kevin Kamuf Green, Hagens Berman Sobol Shapiro, San Diego, CA; Steve W. Berman, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Seattle, WA.

For The Hershey Company, a Delaware Corporation, Hershey Chocolate & Confectionery Corporation, a Delaware Corporation, Defendant: Gary T. Lafayette, LEAD ATTORNEY, Brian H. Chun, Lafayette & Kumagai LLP, San Francisco, CA; Jonah M Knobler, Steven A. Zalesin, Travis J. Tu, PRO HAC VICE, Patterson Belknap Webb and Tyler LLP, New York, NY.

Judges: JOSEPH C. SPERO, Chief Magistrate Judge.

Opinion by: JOSEPH C. SPERO

Opinion

[*654] ORDER GRANTING MOTION TO DISMISS

Re: Dkt. No. 22

I. INTRODUCTION

"The use of child slave labor in the Ivory Coast is a humanitarian tragedy." *Doe I v. Nestle USA, Inc., 766 F.3d 1013, 1016 (9th Cir. 2014)*. The fact that major international corporations source ingredients for their products from supply chains involving slavery and the worst forms of child labor raises significant ethical questions. The issue before **[**2]** this Court, however, is whether California law requires corporations to inform customers of that fact on their product packaging and point of sale advertising. Every court to consider the issue has held that it does not. This Court agrees.

This is a putative class action in which Plaintiff Laura Dana claims that Defendants The Hershey Company and Hershey Chocolate & Confectionary Corporation (collectively, "Hershey") violated California's Unfair Competition Law ("UCL," *Cal. Bus. & Prof. Code §§ 17200-17210*), Consumers Legal Remedies Act ("CLRA," *Cal. Civ. Code §§ 1750-1784*), and False Advertising Law ("FAL," *Cal. Bus. & Prof. Code §§ 17500-17509*) by failing to disclose on the packaging of Hershey's chocolate products that some of the cocoa used therein originated at farms in Côte d'Ivoire (also known as the Ivory Coast) that use slave labor and the worst forms of **[*655]** child labor. Hershey moves to dismiss all claims. The Court held a hearing on March 18, 2016.[1] For the reasons stated below, Hershey's Motion is GRANTED, and this action is dismissed with prejudice.[2]

II. BACKGROUND

A. Allegations of the Complaint[3]

Côte d'Ivoire is the world's largest producer of cocoa beans, the raw ingredient for chocolate, and supplies 40% of global cocoa production and 47% of total imports to the United States. Compl. (dkt. 1) ¶¶ 19, 46. Slave labor and the worst forms of child labor are common in Ivorian cocoa production, as is well documented by United States government agencies, academic studies, nonprofit organizations, investigative journalists, and former laborers. *Id.* ¶¶ 5-8, 23-25, 32-42. Children are frequently injured in the course of dangerous work involving machetes, chemicals, and heavy loads, and workers (both children and adults) may be beaten, whipped, and locked in to prevent escape. *Id.* ¶¶ 23-25. The Ninth Circuit has also acknowledged the existence of such conditions. *Id.* ¶ 26; *Doe I, 766 F.3d at 1016*.

Hershey is one of the largest chocolate companies in the United States and sells a number of popular chocolate products. *Id.* ¶ 3. In 2001, members if the United States chocolate **[**4]** industry including Hershey signed a voluntary protocol, negotiated by Representative Eliot Engel and Senator Tom Harkin, to develop standards for certifying chocolate produced without labor abuses. *Id.* ¶ 27. After failing to meet the initial 2005 deadline, the industry extended the self-imposed deadline to 2008, then to 2010, and then to 2020. *Id.* ¶¶ 29-31.

Despite adopting a "supplier code" that prohibits child labor and forced labor, and a "Corporate Social Responsibility Report" stating that "Hershey has zero tolerance for the worst forms of child labor in its supply chain," Hershey sources much of its chocolate from Côte d'Ivoire through a multi-level supply chain of independent growers, cooperatives, distributors, and other intermediaries. *Id.* ¶¶ 4, 11, 20, 45, 47 51, 52. "Hershey acknowledges . . . the child and slave labor in its Ivorian supply chain,"[4] but does not disclose the existence of those labor abuses on its product labels. *Id.* ¶¶ 21, 22, 48, 50.

Dana "has purchased Hershey Chocolate Products at various retail stores including Target and Walmart in Brentwood and Antioch, California from 2011 through 2014." *Id.* ¶ 13. Citing studies showing that consumers will pay a premium for ethically produced coffee, clothing, and seafood, *id.* ¶¶ 55-59, Dana alleges that she and other customers "would not have purchased Hershey Chocolate Products or paid as much for them" if Hershey had disclosed labor violations on the product labels. *Id.* ¶ 10, *see also id.* ¶¶ 60, 95, 106.

The Complaint includes three claims, under the UCL, the CLRA, and the FAL, respectively. The UCL claim is based on three separate theories arising from Hershey's failure to disclose labor abuses in its **[*656]** supply chain on the packaging of its chocolate products: (1) the omission is "unlawful," because it violates the CLRA, *id.* ¶ 74; (2) the omission is "unfair," because the abusive labor practices themselves are immoral and the failure to disclose them

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[1] The Court also heard argument in *McCoy v. Nestle USA, Inc.*, No. 15-cv-4451, which involves different parties but substantially similar claims and arguments. A separate order has been published concurrently in that **[**3]** case.

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

[3] Dana's allegations are taken as true in the context of a motion to dismiss.

[4] Certain Hershey products, sold under the brand names Bliss, Dagoba, and Scharffen Berger, are certified by the Rainforest Alliance (a nongovernmental organization) as using ethically produced cocoa and are not at issue in this **[**5]** case. Compl. ¶ 49.

impairs competition and prevents consumers from making informed decisions, *id.* ¶ 75; and (3) the omission is "fraudulent" because it is likely to deceive a reasonable consumer and the true facts would be material **[**6]** to reasonable consumer, *id.* ¶ 76. The CLRA claim asserts that Hershey's failure to disclose labor abuses in its supply chain constitutes a misrepresentation of the "source, characteristics, and standard" of the products. *Id.* ¶ 91, *see also id.* ¶¶ 88-90 (citing *Cal. Civ. Code § 1770(a)(2)*, *(5)*, *(7)*). The FAL claim asserts that Hershey had a duty to disclose the labor abuses in its supply chain because it had superior knowledge as compared to customers, and because it made "partial representations and/or misrepresentations to the contrary." *Id.* ¶ 102. In her Opposition, Dana disclaims any theory of an obligation to disclose arising from partial misrepresentations. Opp'n (dkt. 25) at 13 n.58.

B. Procedural History

Dana filed this action on September 28, 2015, seeking to represent herself and other similarly situated consumers who purchased Hershey chocolate products in the last four years. *See generally* Compl. Dana's counsel also represents plaintiffs who filed similar actions against two other large chocolate manufacturers, Mars and Nestlé. *See Hodsdon v. Mars, Inc.*, No. 3:15-cv-04450-RS (N.D. Cal.); *McCoy v. Nestlé USA, Inc.*, No. 3:15-cv-04451 (N.D. Cal.). Defendants moved to dismiss in all three cases. Judge Seeborg **[**7]** granted the motion to dismiss in *Hodsdon*, as discussed in detail below. The undersigned heard argument on the motion in *McCoy* concurrently with Hershey's motion in the present case.[5]

C. Parties' Arguments

Hershey argues that the case must be dismissed for several reasons, starting with the safe harbor doctrine, which provides that plaintiffs cannot use California's consumer protection laws to pursue relief that **[**8]** is foreclosed by other, more specific statutes. Mot. (dkt. 22) at 6-9. According to Hershey, the California Transparency in Supply Chains Act of 2010 (the "Supply Chains Act") bars Dana's claims because it regulates disclosures related to labor abuses in supply chains and does not require the disclosures Dana seeks. *Id.* Dana responds that the Supply Chains Act does not specifically permit Hershey's omissions or bar Dana's claims, and that the labor violations addressed by that statute (slavery and human trafficking) do not encompass all of the violations at issue here (which also include dangerous but non-slave child labor). Opp'n at 5-10.

[*657] Next, Hershey argues that it has no duty to disclose labor conditions in its supply chain because the information at issue does not relate to product safety, and because Hershey did not have exclusive knowledge, actively conceal the information, make misleading partial representations, or have a fiduciary relationship with Dana. Mot. at 9-17. Dana contends that the limitation of the duty to disclose to safety issues only applies in post-warranty product defect cases, which this is not, and that a duty arises from Hershey's superior (albeit not actually **[**9]** exclusive) knowledge of labor abuses in its supply chain. Opp'n at 11-15. She "does not here contend that Hershey's partial disclosures give rise to its duty to disclose." *Id.* at 13 n.58.

Turning to Dana's specific claims, Hershey argues that Dana cannot proceed on a UCL claim for "unlawful" conduct because her CLRA claim is deficient, nor for "fraudulent" conduct because such a claim does not encompass

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[5] Four other cases based on nondisclosure of supply chain labor violations, brought by plaintiffs who also share counsel with Dana, have been dismissed for failure to state a claim in the Central District of California. *Wirth v. Mars Inc., No. SA CV 15-1470-DOC (KESx), 2016 U.S. Dist. LEXIS 14552, 2016 WL 471234 (C.D. Cal. Feb. 5, 2016)*; *Barber v. Nestlé USA, Inc., 154 F. Supp. 3d 954, 2015 WL 9309553 (C.D. Cal. 2015)*; *De Rosa v. Tri-Union Seafoods, LLC, No. CV 15-7540-CJC (AGRx), 2016 U.S. Dist. LEXIS 5497, 2016 WL 524059 (C.D. Cal. Jan. 15, 2016)* (summarily dismissing for the reasons stated in *Barber*); *Hughes v. Big Heart Pet Brands, No. CV 15-8007-CJC (AGRx), 2016 U.S. Dist. LEXIS 5508, 2016 WL 524057 (C.D. Cal. Jan. 15, 2016)* (same). Those cases, all of which concern seafood (or pet food that includes seafood products) rather than chocolate, were decided at least in part based on the safe harbor doctrine, which *Hodsdon, McCoy*, and this Order decline to reach. The four Central District cases are presently pending on appeal before the Ninth Circuit.

omissions absent a duty to disclose. Mot. at 17-18. Dana responds that her CLRA claim is sufficient to support an "unlawful conduct" UCL claim, and the "fraudulent conduct" claim should survive because she contends that Hershey did have a duty to disclose. Opp'n at 17-18. As for "unfair" conduct, Hershey contends that Dana cannot succeed under any of the tests that courts have used, because she has not identified a legislative policy against Hershey's non-disclosure, the non-disclosure at issue is not inherently immoral or oppressive, and there is no substantial injury to consumers. Mot. at 18-21. Dana argues that the labor abuses in Hershey's supply chain contravene legislatively declared policies in the form of United Nations prohibitions of forced labor and the worst forms of child labor that the **[**10]** United States has ratified, and that those abuses are immoral and unethical. Opp'n at 18-19. She also contends that the harm of deceiving consumers outweighs the cost to Hershey of changings its product labeling. *Id.* at 19-20. Hershey notes in reply that the United Nations sources that Dana cites relate only to labor practices, not product labeling. Reply (dkt. 30) at 10.

Hershey argues that Dana's CLRA claim fails because Hershey had no duty to disclose, and also because the omissions regarding labor abuses do not relate to the specific provisions of the statute Dana cites, which govern representations regarding attributes including the "source," "characteristics," and "standard" of goods. Mot. at 21-22. Dana contends that "Hershey's failure to disclose that its supply chain is not child and slave free is likely to deceive a reasonable consumer regarding the chocolate's source (from plantations using child and slave labor) and characteristics/standard (produced by child and slave labor)." Opp'n at 20. Hershey responds that the provisions at issue are intended "to target misrepresentations regarding the identity of the seller, . . . a product's physical features or capabilities, . . . or its inherent **[**11]** level of quality or performance," not the labor standards used to produce the product. Reply at 12.

Hershey does not address Dana's FAL claim separately in detail, but contends in a footnote that the FAL only governs affirmative misrepresentations, not omissions. Mot. at 17 n.18. Dana disputes that proposition and argues that some cases have allowed FAL claims to proceed based on omissions. Opp'n at 17.

According to Hershey, Dana lacks both Article III and statutory standing to bring any of her claims because she cannot trace the cocoa used in the specific chocolate products she bought back to a specific plantation, and thus cannot know whether the products she bought were produced with slave or child labor. Mot. at 22-23. Hershey contends that without that knowledge, **[*658]** whether the products Dana bought were misrepresented (even under Dana's theory of misrepresentation by omission) is uncertain, and if they were not, Dana has not suffered any cognizable injury. *Id.* Dana responds that her injury and standing arise from misrepresentation of the supply chain for the chocolate, and if Hershey had better disclosed the labor abuses in the supply chain, she would not have bought the products regardless **[**12]** of whether she knew the origin of the cocoa in a specific item. Opp'n at 22. Dana relies on case law holding that a consumer who purchased or paid more for a product based on misrepresentations has both constitutional and statutory standing to bring claims under California's consumer protection laws. Opp'n at 21-22 (citing *Hinojos v. Kohl's Corp., 718 F.3d 1098 (9th Cir. 2013)*; *Kwikset Corp. v. Superior Court, 51 Cal. 4th 310, 330, 120 Cal. Rptr. 3d 741, 246 P.3d 877 (2011))*.

Finally, Hershey argues that requiring the labeling Dana seeks would compel speech in violation of the *First Amendment*. Mot. at 23-25. Dana contends that laws against misleading advertising are constitutional, and that a mere rational basis is required to support laws compelling affirmative factual product labeling to avoid misleading consumers. Opp'n at 23-25 (citing, *e.g., Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 105 S. Ct. 2265, 85 L. Ed. 2d 652, 17 Ohio B. 315 (1985))*. Hershey responds that Dana has not alleged any misleading affirmative representations that require labeling to redress consumer confusion, and that the disclosure Dana seeks is not '"purely factual and uncontroversial."' Reply at 14-15 (quoting *Zauderer, 471 U.S. at 651*).

D. *Hodsdon v. Mars, Inc.*

In *Hodsdon*, Judge Seeborg granted a motion by chocolate manufacturer Mars, Inc. to dismiss claims very similar those in the case at hand. *Hodsdon v. Mars, Inc., 162 F. Supp. 3d 1016, No. 15-CV-04450-RS, 2016 U.S. Dist. LEXIS 19268, 2016 WL 627383 (N.D. Cal. Feb. 17, 2016)*. As a preliminary matter, the court held that the plaintiff had standing because: (1) "California **[**13]** law permits litigants to pursue claims under the UCL, CLRA, and FAL if they show . . . that 'the consumer paid more than he or she actually valued the product'"; (2) the plaintiff adequately alleged that the use of forced labor in the supply chain caused him to devalue the product even if he could not prove that forced labor was used to produce the specific chocolate products that he purchased; and (3) the plaintiff adequately alleged that he saw the product labels before he purchased the products. *2016 U.S. Dist. LEXIS 19268, [WL] at *3* (quoting *Hinojos, 718 F.3d at 1104*). Turning to the merits, however, the court held that the plaintiff failed to state a claim under California law.

With respect to the FAL claim, the court reconciled cases holding that omissions were not actionable with others that allowed FAL claims based on omissions to proceed, ultimately determining that omissions accompanying misleading incomplete statements are actionable, but omissions with no corresponding statements are not. *2016 U.S. Dist. LEXIS 19268, [WL] at *4*. *Compare* *Norcia v. Samsung Telecomms. Am., LLC, No. 14-CV-00582-JD, 2015 U.S. Dist. LEXIS 110454, 2015 WL 4967247, at *8 (N.D. Cal. Aug. 20, 2015)* ("There can be no FAL claim where there is no 'statement' at all."), *and Stanwood v. Mary Kay, Inc., 941 F. Supp. 2d 1212, 1222 (C.D. Cal. 2012)* (same), *with* *In re Sony Gaming Networks & Customer Data Sec. Breach Litig., 996 F. Supp. 2d 942, 991 (S.D. Cal. 2014)* (denying motion to dismiss where defendant claimed to have taken steps to secure information but **[**14]** failed to disclose security deficiencies), and *Tait v. BSH Home Appliances Corp., No. SACV 10-00711 DOC (ANx), 2011 U.S. Dist. LEXIS 103584, 2011 WL 3941387, at *2 (C.D. Cal. Aug. 31, 2011)* (denying a motion to dismiss where the **[*659]** defendant marketed a washing machine as "sanitary" but failed to disclose its tendency to accumulate mold). Because the plaintiff in *Hodsdon* "asserted the former type of claim, i.e., that Mars violated the FAL by failing to issue any statement at all," the court dismissed the claim. *Hodsdon, 2016 U.S. Dist. LEXIS 19268, 2016 WL 627383 at *4*.

Next, the court turned to the plaintiff's CLRA claim and his claim under the "unlawful" prong of the UCL, which was based on the purported CLRA violation. *2016 U.S. Dist. LEXIS 19268, [WL] at *5-6*. Noting the Ninth Circuit's holding that "California courts have generally rejected a broad obligation to disclose," the court looked to whether Mars had any such obligation. *2016 U.S. Dist. LEXIS 19268, [WL] at *5*. The court held that despite one case to the contrary, "the overwhelming majority of courts to consider the issue" have held that omissions are only actionable under the CLRA if they relate to product safety or defects. *2016 U.S. Dist. LEXIS 19268, [WL] at *5-6*. Because the omissions at issue related instead to "admittedly horrific labor practices" in the supply chain, the court dismissed the plaintiff's CLRA claim and the "unlawful conduct" aspect of the UCL claim that derived from it. **[**15]** *2016 U.S. Dist. LEXIS 19268, [WL] at *6*.

The plaintiff also brought UCL claims based on the "fraudulent" and "unfair" prongs of the statute. The court followed two California appellate decisions holding that omissions cannot satisfy the "fraudulent" prong unless there was a duty to disclose, and therefore dismissed that claim. *2016 U.S. Dist. LEXIS 19268, [WL] at *6* (citing *Berryman v. Merit Prop. Mgmt., Inc., 152 Cal. App. 4th 1544, 1557, 62 Cal. Rptr. 3d 177 (2007)*; *Daugherty v. Am. Honda Co., 144 Cal. App. 4th 824, 838, 51 Cal. Rptr. 3d 118 (2006))*. As for the "unfair" prong, the court held that the plaintiff's complaint did not satisfy any of the tests used by California courts to assess such claims: (1) unlike the underlying labor conditions themselves, the lack of disclosure could not be said to be "'immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers,'" because the harm was merely the purchase of a chocolate bar and the information that was absent from the packaging was readily available elsewhere; and (2) again unlike the underlying labor conditions, the harm from lack of disclosure was not tied to any established public policy expressed in "'specific constitutional, statutory, or regulatory provisions.'" *2016 U.S. Dist. LEXIS 19268, [WL] at *7* (quoting *S. Bay Chevrolet v. Gen. Motors Acceptance Corp., 72 Cal. App. 4th 861, 887, 85 Cal. Rptr. 2d 301 (1999)*; *McVicar v. Goodman Glob., Inc., 1 F. Supp. 3d 1044, 1054 (C.D. Cal. 2014))*. The court therefore dismissed the UCL claim in its entirety.

Because the plaintiff failed to state a claim for the reasons summarized above, the court did not reach Mars's argument **[**16]** that the Supply Chains Act creates a safe harbor, but expressed doubt that any such harbor is as broad as Mars contended. *2016 U.S. Dist. LEXIS 19268, [WL] at *8-9*. The court found that amendment would be futile and denied leave to amend. *2016 U.S. Dist. LEXIS 19268, [WL] at *9*. Hodsdon's appeal of Judge Seeborg's decision is currently pending before the Ninth Circuit.

III. ANALYSIS

A. Legal Standard

HN1[] A complaint may be dismissed for failure to state a claim on which relief can be granted under *Rule 12(b)(6) of the Federal Rules of Civil Procedure*. "The purpose of a motion to dismiss under *Rule 12(b)(6)* is to test the legal sufficiency of the complaint." *N. Star Int'l v. Ariz. Corp. Comm'n, 720 F.2d 578, 581 (9th Cir. 1983)*. Generally, a plaintiff's burden at the pleading stage is relatively light. *Rule 8(a) of the Federal Rules of Civil Procedure* states that "[a] pleading which sets forth a claim for relief . . . shall contain . . . a short **[*660]** and plain statement of the claim showing that the pleader is entitled to relief." *Fed. R. Civ. P. 8(a)*.

HN2[] In ruling on a motion to dismiss under *Rule 12(b)(6)*, the court analyzes the complaint and takes "all allegations of material fact as true and construe[s] them in the light most favorable to the non-moving party." *Parks Sch. of Bus. v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995)*. Dismissal may be based on a lack of a cognizable legal theory or on the absence of facts that would support a valid theory. *Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990)*. A complaint must "contain either direct or inferential allegations respecting all the material elements necessary **[**17]** to sustain recovery under some viable legal theory." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 562, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (citing *Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (7th Cir. 1984))*. "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Twombly, 550 U.S. at 555*). "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id.* (quoting *Twombly, 550 U.S. at 557*). Rather, the claim must be "'plausible on its face,'" meaning that the plaintiff must plead sufficient factual allegations to "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (quoting *Twombly, 550 U.S. at 570*).

HN3[] *Rule 9(b) of the Federal Rules of Civil Procedure* sets a heightened pleading standard for claims based on fraud. "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." *Fed. R. Civ. P. 9(b)*. The Ninth Circuit has held that in order to meet this standard, a "complaint must specify such facts as the times, dates, places, benefits received, and other details of the alleged fraudulent activity." *Neubronner v. Milken, 6 F.3d 666, 672 (9th Cir. 1993)*; *see also McMaster v. United States, 731 F.3d 881, 897 (9th Cir. 2013)*. The heightened standard does not apply to "[m]alice, intent, knowledge, and other conditions of a person's mind." *Fed. R. Civ. P. 9(b)*.

Hershey also moves to dismiss under *Rule 12(b)(1)*, apparently on the basis that the Court lacks jurisdiction because Dana lacks Article III **[**18]** standing. *See* Mot. at ECF p. 2 (Notice of Motion identifying *Rule 12(b)(1)* as a basis for dismissal); *id.* at 22-23 (arguing that Dana lacks standing). *HN4*[] Where, as here, a jurisdictional challenge is based on the allegations of a plaintiff's complaint rather than on extrinsic evidence, courts "assume [the plaintiff's] allegations to be true and draw all reasonable inferences in his favor." *Wolfe v. Strankman, 392 F.3d 358, 362 (9th Cir. 2004)*. "[T]he inquiry is therefore much like a *Rule 12(b)(6)* analysis." *Animal Legal Def. Fund v. HVFG LLC, 939 F. Supp. 2d 992, 997 (N.D. Cal. 2013)*.

B. Standing

Hershey argues that Dana lacks Article III and statutory standing to pursue these claims because she does not and cannot allege that the specific products she purchased were made from cocoa produced with the labor abuses at issue in this case—slave labor or the worst forms of child labor—and therefore fails to allege an actual, particularized injury. Mot. at 22-23; Reply at 12-14. The parties agree that Hershey currently cannot trace the cocoa used in a particular Hershey chocolate product to a specific plantation, and there is thus no way to know what labor **[*661]** practices were used in its production. *See* Compl. ¶ 10; Mot. at 22; Reply at 13. Dana argues that she has standing because she would have either not purchased or paid less for Hershey's products if she had known **[**19]** that the *supply chain* involved the labor abuses at issue, regardless of where the cocoa in a particular chocolate bar originated. Opp'n at 22. Judge Seeborg held that the plaintiff in *Hodsdon* had standing under similar circumstances, and the Court agrees that Dana has standing here. *See* Hodsdon, 2016 U.S. Dist. LEXIS 19268, 2016 WL 627383 at *3.

The issue of Article III standing is straightforward. "**HN5**[] [W]hen, as here, 'Plaintiffs contend that class members paid more for [a product] than they otherwise would have paid, or bought it when they otherwise would not have done so' they have suffered an Article III injury in fact." Hinojos v. Kohl's Corp., 718 F.3d 1098, 1104 (9th Cir. 2013) (quoting Mazza v. Am. Honda Motor Co., 666 F.3d 581, 595 (9th Cir. 2012)) (second alteration in original).

Dana also has standing under the California statutes at issue. **HN6**[] The UCL and FAL require that private plaintiffs "ha[ve] suffered injury in fact and ha[ve] lost money or property as a result of the unfair competition" or false advertising. Hinojos, 718 F.3d at 1103 (quoting Cal. Bus. & Prof. Code § 17204 (UCL); citing *id.* § 17535 (FAL)) (alterations in original).[6] In *Hinojos*, the Ninth Circuit examined the California Supreme Court's decision in *Kwikset Corp. v. Superior Court*, which held that a "'consumer who relies on a product label and challenges a misrepresentation contained therein can satisfy the standing requirement of [the UCL and the FAL] by alleging . . . that he **[**20]** or she would not have bought the product but for the misrepresentation,'" and that "such allegations are sufficient to establish economic injury within the meaning of [those statutes]." Id. at 1105 (quoting Kwikset, 51 Cal. 4th 310, 330, 120 Cal. Rptr. 3d 741, 246 P.3d 877 (2011)) (ellipsis in original).

In both *Kwikset*, where the defendant marketed locks as "Made in U.S.A." despite some foreign components and assembly work, and *Hinojos*, where the defendant allegedly advertised its normal prices as "reduced," plaintiffs who relied on those representation had standing to sue under the UCL and FAL. Id. at 1107; Kwikset, 51 Cal. 4th at 330. Those courts also listed a number of other scenarios where a plaintiff's reliance on false advertising could give rise to standing: "meat falsely labeled as kosher or halal, wine labeled with the wrong region or year, blood diamonds mislabeled as conflict-free, and goods falsely suggesting they were produced by union labor." Hinojos, 718 F.3d at 1105 (citing Kwikset, 51 Cal. 4th at 328-29). Dana's claim that she would have paid less for (or declined to purchase) Hershey's products **[**21]** but for Hershey's misrepresentations of the labor practices in its supply chain fits well within these examples.

The Ninth Circuit's decision in Birdsong v. Apple, Inc., 590 F.3d 955 (9th Cir. 2009), does not deprive Dana of standing. *See* Mot. at 22; Reply at 13 (citing *Birdsong* for the argument that Dana lacks standing unless the specific product she purchased was produced by slave labor or child labor). In that case, the plaintiffs alleged that Apple violated the UCL by selling iPods that were capable of producing dangerous volume levels and thus causing **[*662]** hearing loss. Id. at 957. The Ninth Circuit affirmed the district court's holding that the plaintiffs failed to show a particularized and actual injury sufficient for standing under the UCL—despite the plaintiffs' argument that the risk of hearing loss diminished the value of the iPods—in part because "the alleged loss in value . . . rests on a hypothetical risk of hearing loss to other consumers who may or may not choose to use their iPods in a risky manner," and the plaintiffs did "not claim that they, or anyone else, have suffered or [were] substantially certain to suffer hearing loss from using an iPod." Id. at 959-62. Here, in contrast, Dana alleges that the value of the chocolate products was diminished **[**22]** because consumers did not wish to support a supply chain that included severe labor abuses. The alleged damage was therefore done *by the purchase itself*, not by any contingency that might happen after the purchase.[7]

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[6] **HN7**[] The CLRA allows a consumer who has suffered "any damage" to sue, and "any plaintiff who has standing under the UCL's and FAL's 'lost money or property' requirement will, *a fortiori*, have suffered 'any damage' for purposes of establishing CLRA standing." Hinojos, 718 F.3d at 1107-08.

[7] Hershey also cites a number of district court cases finding that plaintiff purchasers did not have standing merely because products were defective as to *other* purchasers. Mot. at 23 & n.21 (citing In re McNeil Consumer Healthcare, Mktg. & Sales Practices Litig., No. MDL 2190, 2011 U.S. Dist. LEXIS 76800, 2011 WL 2802854 (E.D. Pa. July 15, 2011); Meaunrit v. The Pinnacle Foods Grp., LLC, No. C 09-04555 CW, 2010 U.S. Dist. LEXIS 43858, 2010 WL 1838715 (N.D. Cal. May 5, 2010); Myers-Armstrong v. Actavis Totowa, LLC, No. C 08-04741 WHA, 2009 U.S. Dist. LEXIS 38112, 2009 WL 1082026, (N.D. Cal.

Hershey argues, essentially, that a UCL claim based on misrepresentation of labor practices can only succeed where a plaintiff is *certain* that the objectionable practice was used to produce the specific item that the plaintiff purchased. *See* Reply at 12-13. Stepping back from **[**23]** the fact pattern of this case, that argument would dictate that even if Hershey had—hypothetically—concealed Ivorian labor conditions from its customers, falsely labeled all of its chocolate as certified to be free of child labor, and run a fraudulent national ad campaign touting its child-labor-free chocolate, a customer who relied on that false promotion would lack standing to sue for fraudulent business practices and false advertising so long as some fraction of Hershey's cocoa met those descriptions and the customer was unable to tell what labor conditions produced the cocoa in the actual product he or she purchased. Such a result would undermine the holding of *Hinojos* and *Kwikset*.[8] The difference between that hypothetical scenario and Dana's allegation of mere omission is critical to the outcome of the present motion, as discussed in the **[*663]** sections below, but it is a difference relevant to the merits of the claims, not to standing.

"'For a significant segment of the buying public, labor practices do matter in making consumer choices.'" *Kwikset, 51 Cal. 4th at 329* (quoting *Kasky v. Nike, Inc., 27 Cal. 4th 939, 969, 119 Cal. Rptr. 2d 296, 45 P.3d 243 (2002))*. It is plausible that a consumer would place less value on a product produced from a supply chain involving severe labor abuses. Dana alleges that she purchased products or paid a higher price for them because she was deceived regarding the labor practices in the supply chain. That actual, particularized injury is **[**25]** sufficient to establish standing.

C. CLRA Claim

HN8[] The CLRA prohibits certain enumerated "unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer." *Cal. Civ. Code § 1770(a)*. Dana argues that Hershey's failure to disclose labor abuses on its packaging violates *subsection (a)(2)* by "[m]isrepresenting the source" of the chocolate, *subsection (a)(5)* by "[r]epresenting that goods . . . have . . . characteristics . . . which they do not have," and *subsection (a)(7)* by "[r]epresenting that goods . . . are of a particular standard." *Id. § 1770(a)(2)*, *(5)*, *(7)*; *see* Compl. ¶¶ 88-91; Opp'n at 20. In her Opposition, Dana makes clear that these theories are based on "Hershey's omission of known child and slave labor in its supply chain," and that she "does not here contend that Hershey's partial misrepresentations give rise to its duty to disclose." Opp'n at 13 n.58.

HN9[] "[A]lthough a claim may be stated under the CLRA in terms constituting fraudulent omissions, to be actionable the omission must be contrary to a representation actually made by the defendant, or an omission of a fact the defendant was obliged to disclose." *Daugherty v. Am. Honda Motor Co., 144 Cal. App. 4th 824, 835, 51 Cal. Rptr. 3d 118 (2006)*. "California courts have generally rejected a broad obligation to disclose . **[**26]** . . ." *Wilson v. Hewlett-Packard Co., 668 F.3d 1136, 1141 (9th Cir. 2012)*. In *Wilson*, the Ninth Circuit held that, absent affirmative misrepresentations, an obligation to disclose under California law extends only to matters of product

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Apr. 22, 2009), *aff'd*, *382 F. App'x 545 (9th Cir. 2010)*; *Whitson v. Bumbo, No. C 07-05597 MHP, 2009 U.S. Dist. LEXIS 32282, 2009 WL 1515597 (N.D. Cal. Apr. 16, 2009)*). To the extent those cases are consistent with the more recent Ninth Circuit decisions in *Hinojos* and *Mazza*, all of them—like *Birdsong*—involved at most an unrealized risk of future harm, and are not analogous to the case at hand where Dana alleges that failure to disclose ethical practices in the supply chain affected her willingness to purchase and pay for the products.

[8] Similarly, to use some of the examples given in those cases, it would be a bizarre result if sellers advertising food as halal or kosher, diamonds as conflict-free, or products as union-made could knowingly mix compliant and non-compliant products with **[**24]** impunity so long as there was no way for a buyer to trace the specific item he or she purchased back to the source. The Eighth Circuit has nevertheless adopted that rule. *See* *Wallace v. ConAgra Foods, Inc., 747 F.3d 1025, 1030-31 (8th Cir. 2014)* (holding that customers lacked Article III standing to bring a claim based on allegedly false advertising of a product as using 100% kosher beef, where the plaintiffs could not show that the specific products they purchased contained non-kosher beef). This Court respectfully disagrees with that result. In this Court's view, if a customer has paid a premium for an assurance that a product meets certain standards, and the assurance turns out to be meaningless, the premium that the customer has paid is an actual, personal, particularized injury that is cognizable under Article III. *See* *Hinojos, 718 F.3d at 1104*.

safety. *Id. at 1141-43* (examining *Daugherty, 144 Cal. App. 4th at 836*, and subsequent decisions); *see also* *Oestreicher v. Alienware Corp., 322 F. App'x 489, 493 (9th Cir. 2009)* (unpublished and non-precedential) ("A manufacturer's duty [of disclosure] to consumers is limited to its warranty obligations absent either an affirmative misrepresentation or a safety issue.").

At least one district court decision has limited *Wilson* to cases where a product was covered by a warranty that expired before the defect became apparent. *Stanwood v. Mary Kay, Inc., 941 F. Supp. 2d 1212, 1221 (C.D. Cal. 2012)*. Central to the Central District's holding was its determination that "[t]he Ninth Circuit acknowledged that its requirement of a safety issue does not necessarily apply outside the products defect context where warranty protections are not available," and that *Wilson* "list[ed] cases where a safety issue was not required to trigger a duty to disclose." *Id.* (citing *Wilson, 668 F.3d at 1142*). The Court respectfully disagrees with *Stanwood's* reading of *Wilson*. The cases listed at the page cited in *Wilson* by *Stanwood* do not support *Stanwood*'s holding: four cases explicitly based the materiality of an omission at least in part on **[*664]** whether it related to safety, **[**27]** [9] and the Ninth Circuit characterized the remaining two[10] as having "arguably concerned safety issues." *Wilson, 668 F.3d at 1142* & n.2. Accordingly, the Court does not agree that *Wilson* is limited to cases where a warranty once existed but has since expired. There are cases holding that a manufacturer has a greater duty to disclose defects that arise *during* a product's express warranty period. *E.g., Collins v. eMachines, Inc., 202 Cal. App. 4th 249, 257-58 (2011)*; *see also* *Wilson, 668 F.3d at 1142 n.1* (discussing *Tietsworth v. Sears, Roebuck & Co., 720 F. Supp. 2d 1123 (N.D. Cal. 2010))*. But there is no allegation that Hershey made any warranty of its chocolate products that would be relevant in this case.[11]

The Court agrees with Judge Seeborg's **[**28]** conclusion that ***HN10***[] the weight of authority limits a duty to disclose under the CLRA to issues of product safety, unless disclosure is necessary to counter an affirmative misrepresentation. *See* *Hodsdon, 2016 U.S. Dist. LEXIS 19268, 2016 WL 627383 at *6* (declining to follow *Stanwood* in light of "overwhelming authority to the contrary," and collecting cases). The Court also concludes that a plain reading of *Wilson* governs this case, and this "Court is not free to deviate from the Ninth Circuit's construction of California law in *Wilson* absent a subsequent interpretation from California's courts that the interpretation was incorrect." *Rasmussen v. Apple, Inc., 27 F. Supp. 3d 1027, 1036 (N.D. Cal. 2014)* (following *Wilson* despite concluding that its basis in California law is "subject to reasonable debate") (citing *Kona Enters., Inc. v. Estate of Bishop, 229 F.3d 877, 885 n.7 (9th Cir. 2000))*. Further, the Court agrees with Judge Seeborg and Hershey that some bright-line limitation on a manufacturer's duty to disclose is sound policy, given the difficulty of anticipating exactly what information some customers might find material to their purchasing decisions and wish to see on product labels. *See* *Hodsdon, 2016 U.S. Dist. LEXIS 19268, 2016 WL 627383 at *6* ("[*Stanwood*'s and Dana's] definition of a material omission has stunning breadth, and could leave manufacturers (chocolate or otherwise) little guidance about what information, if any, it must disclose **[**29]** to avoid CLRA or UCL liability."); Mot. at 12-13 (discussing examples of consumers making purchasing decisions based on "businesses' positions on social issues; their support for or opposition to legislation; their political donations; their environmental record; their

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[9] *O'Shea v. Epson Am., Inc., No. CV 09-8063 PSG (CWx), 2011 U.S. Dist. LEXIS 85273, 2011 WL 3299936, at *7-9 (C.D.Cal. July 29, 2011)*; *Smith v. Ford Motor Co., 749 F. Supp. 2d 980, 987 (N.D. Cal. 2010)* ("[F]or the omission to be material, the failure must pose 'safety concerns' . . . ."), *aff'd*, *462 F. App'x 660 (9th Cir. 2011)*; *In re Sony Grand Wega KDF—E A10/A20 Series Rear Projection HDTV Television Litig., 758 F. Supp. 2d 1077, 1095 (S.D. Cal. 2010)*; *Oestreicher v. Alienware Corp., 544 F. Supp. 2d 964, 971 (N.D. Cal. 2008)*, *aff'd*, *322 F. App'x 489 (9th Cir. 2009)*; *Falk v. Gen. Motors Corp., 496 F. Supp. 2d 1088, 1096* n.*. (N.D. Cal. 2007) ("Moreover, plaintiffs successfully allege that the potential for failed speedometers constitutes a safety hazard.").

[10] *Cirulli v. Hyundai Motor Co., No. SACV 08-0854 AG (MLGx), 2009 U.S. Dist. LEXIS 125139, 2009 WL 5788762 (C.D.Cal. June 12, 2009)*; *Bristow v. Lycoming Engines, No. CIV. S-06-1947 LKK GGH, 2007 U.S. Dist. LEXIS 31350, 2007 WL 1106098 (E.D.Cal. Apr. 10, 2007)*.

[11] *Wilson* also acknowledges cases recognizing a broader duty of disclosure in the sale of services, rather than products. *Wilson, 668 F.3d at 1143* (citing, *e.g.,* *In re Mediscan Research, Ltd., 940 F.2d 558 (9th Cir. 1991))*. The chocolate products at issue in the present case are products, not services.

employment practices; and their ties to certain nations or regimes" (footnotes omitted)). There are **[*665]** countless issues that may be legitimately important to many customers, and the courts are not suited to determine which should occupy the limited surface area of a chocolate wrapper.

HN11[] A duty to disclose under California law does not extend to all "information [that] may persuade a consumer to make different purchasing decisions." *Hodsdon, 2016 U.S. Dist. LEXIS 19268, 2016 WL 627383 at *6* (citing *Wirth, 2016 U.S. Dist. LEXIS 14552, 2016 WL 471234 at *5-6)*. Because Dana does not allege any omission of known dangers to the safety of customers, there is no duty to disclose applicable to this case, and Dana's CLRA claim is therefore DISMISSED. A contrary result would create "a broad obligation to disclose," which "California courts have generally rejected." *Wilson, 668 F.3d at 1141*.

Even if that were not so, the parties agree Dana would still need to show one of the following to support a duty to disclose: (1) a fiduciary relationship between Hershey and Dana; (2) **[**30]** that Hershey had "exclusive knowledge of material facts not known or reasonably accessible to" its customers; (3) that Hershey actively concealed a material fact; or (4) that Hershey had made misleading partial representations. Opp'n at 12 (quoting *Doe v. SuccessfulMatch.com, 70 F. Supp. 3d 1066, 1076 (N.D. Cal. 2014))*; Mot. at 9-10. Dana relies solely on the "exclusive knowledge" test. Opp'n at 13-15. But even if "courts do not apply 'exclusivity' with . . . rigidity," *see* *Johnson v. Harley-Davidson Motor Co. Grp., 285 F.R.D. 573, 583 (E.D. Cal. 2012)*, it is difficult to see how *any* definition of "exclusive knowledge" could include a case where, by Dana's own allegations: "Hershey acknowledges as it must, the child and slave labor in its Ivorian supply chain" in its Corporate Social Responsibility Report, Compl. ¶ 21; the industry acknowledged the issue in the Harkin-Engel Protocol in 2001—more than *ten years* before the statute of limitations period for Dana's CLRA claim—and has repeatedly admitted its failure to even develop a comprehensive certification system in the years since, *id. ¶¶ 27-31*; and in 2006 the United States Department of Labor commissioned Tulane University to publish reports detailing labor abuses in the chocolate industry supply chain, *id. ¶¶ 32-36*; among other public disclosures detailed in the Complaint.

Further, **[**31]** even if Dana could adequately plead that Hershey had a duty to disclose the labor abuses in its supply chain on its product labels, it is far from clear that such information falls within the categories of representations governed by the CLRA. Dana invokes provisions barring misrepresentation of the "source," "characteristics," and "standard" of a product. Opp'n at 20 (citing *Cal. Civ. Code § 1770(a)(2)*, *(5)*, *(7)*). **HN12**[] While the CLRA provides that it "shall be liberally construed and applied to promote its underlying purposes" of consumer protection, *Cal. Civ. Code § 1760*, it does not explicitly discuss representations regarding labor practices, *see id. § 1770(a)*, and Dana cites no authority holding that any of the enumerated categories she relies on are so broad as to encompass labor abuses. Because the Court holds that Hershey did not have a duty to disclose labor abuses in its supply chain on its product labels, the Court declines to resolve whether misrepresentations regarding labor practices can fall within the scope of the CLRA.

D. UCL Claim

HN13[] California's UCL prohibits unfair competition, defined as "any unlawful, unfair, or fraudulent business act or practice." *Cal. Bus. & Prof. Code § 17200*. Dana brings her claim under each of these prongs, and Hershey argues that each must **[**32]** be dismissed.

[*666] The "unlawful" prong of Dana's Complaint is based solely on Hershey's purported violation of the CLRA. Compl. ¶ 74. As discussed above, the Court holds that Dana fails to state a CLRA claim. Hershey's Motion is therefore GRANTED as to this prong of Dana's UCL claim.

The "fraudulent" prong fails for similar reasons. As Judge Seeborg noted in *Hodsdon*, California courts have held that "'**HN14**[] [a]bsent a duty to disclose, the failure to do so does not support a claim under the fraudulent prong of the UCL.'" *Hodsdon, 2016 U.S. Dist. LEXIS 19268, 2016 WL 627383 at *6* (quoting *Berryman v. Merit Prop. Mgmt., Inc., 152 Cal. App. 4th 1544, 1557, 62 Cal. Rptr. 3d 177 (2007))*; *see also* *Daugherty, 144 Cal. App. 4th at 838* ("We cannot agree that a failure to disclose a fact one has no affirmative duty to disclose is 'likely to deceive' anyone within the meaning of the UCL."). Because, as discussed above, the Court holds that Hershey had no affirmative duty to disclose severe labor abuses in its supply chain on its product labels, Hershey's Motion is GRANTED as to the "fraudulent" prong of Dana's UCL claim.

That leaves the "unfair" prong, the test for which remains somewhat unsettled in the California courts. Courts previously held a practice to be "'unfair' . . . when it offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially **[**33]** injurious to consumers." *S. Bay Chevrolet v. Gen. Motors Acceptance Corp., 72 Cal. App. 4th 861, 886-87, 85 Cal. Rptr. 2d 301 (1999)* (citation and internal quotation marks omitted). "This test involves balancing the harm to the consumer against the utility of the defendant's practice." *Lozano v. AT & T Wireless Servs., Inc., 504 F.3d 718, 735 (9th Cir. 2007)* (citing *S. Bay, 72 Cal. App. 4th at 886*). The California Supreme Court, however, found that the *South Bay* test was "too amorphous and provide[d] too little guidance to courts and businesses" in a UCL case between competitors, and held instead that:

> ***HN15***[] When a plaintiff who claims to have suffered injury from a direct competitor's "unfair" act or practice invokes *section 17200*, the word "unfair" in that section means conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.

Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 20 Cal. 4th 163, 185, 187, 83 Cal. Rptr. 2d 548, 973 P.2d 527. The *Cel-Tech* court explicitly declined to decide what test applied to actions brought by consumers, as opposed to by competitors. *Id. at 197 n.12*.

In the years since *Cel-Tech*, some courts have continued to use the *South Bay* test for cases brought by consumers, while others have followed *Cel-Tech*'s lead and "require[d] that the unfairness be tied to a 'legislatively declared' policy," *Lozanoa v. AT & T Wireless Servs., Inc., 504 F.3d 718, 736 (9th Cir. 2007)*, or in other words, "'that the UCL claim **[**34]** be tethered to specific constitutional, statutory, or regulatory provisions,'" *Hodsdon, 2016 U.S. Dist. LEXIS 19268, 2016 WL 627383, at *7* (quoting *McVicar v. Goodman Global, Inc., 1 F. Supp. 3d 1044, 1054 (C.D. Cal. 2014))*. "Absent guidance from the California courts about the proper definition of an 'unfair' business practice, federal courts have applied both tests." *Id.* (citing *Lozano, 504 F.3d at 736*).

The "legislative policies" on which Dana relies are the United Nations' International Labor Convention No. 182 and the United **[*667]** Nations' Universal Declaration of Human Rights—the former forbidding the worst forms of child labor, the latter forbidding slavery, and both having been ratified by the United States. Opp'n at 18-19. The crux of Dana's claim, however, is not that Hershey utilized slave labor or the worst forms of child labor, but rather that Hershey does not disclose the existence of those labor abuses in its supply chain on the packaging of its products. Dana has not identified any legislatively declared policy requiring such disclosure,[12] nor does she cite any authority for the proposition that where some of a manufacturer's suppliers contravene a legislatively established policy, it is "unfair" within the meaning of the UCL for the manufacturer to fail to disclose those violations on its product packaging. The Court declines to **[**35]** make that leap.

At the hearing, Dana's counsel suggested for the first time that Dana could amend her UCL claim to tether the "unfair" prong to the Department of Labor's listing of goods produced with child labor and forced labor, *see 22 U.S.C. § 7112(b)*, and to California's Supply Chains Act, which is discussed in more detail below in the context of Hershey's safe harbor doctrine argument, *see Cal. Civ. Code § 1714.43*. Although both statutes call for certain disclosures related to labor conditions, neither expresses any policy of disclosure on product labels. Amending Dana's Complaint to reference those statutes would not remedy the defects of her UCL claim.

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[12] While Dana does not argue in the context of the "unfair" prong that either the CLRA or the FAL constitutes such a policy, her arguments that those statutes compel the disclosure she seeks could perhaps be transposed to this claim. For the reasons discussed above and below in the context of Dana's CLRA and FAL claims, the Court holds that neither statute represents a policy requiring the disclosure of labor abuses in a supply chain on product labels.

Turning to the *South Bay* balancing test, the distinction between the underlying labor practices and the failure to disclose **[**36]** once again undermines Dana's claim. The slave labor and child labor alleged in the Complaint would certainly qualify as "immoral, unethical, oppressive, [and] unscrupulous." *See* S. Bay, 72 Cal. App. 4th at 887. But can the same be said about the failure to disclose Hershey's suppliers' labor abuses on Hershey's product packaging? Considering this issue in *Hodsdon*, Judge Seeborg held as follows:

> The harm at issue here is that Hodsdon may not have purchased Mars's chocolate products at all, or would have paid less for them, had he been aware of the prospect for child labor in Mars's supply chain. Such information is, in fact, readily available to consumers on Mars's website. Given that Hodsdon, like any other consumer, has access to information about the source of Mars's cocoa beans, the absence of such information on the packaging is not "substantially injurious to consumers" or necessarily immoral. Granting that the labor practices at issue are immoral, there remains an important distinction between them and the actual harm for which Hodsdon seeks to recover, namely his purchase of Mars's chocolate products absent any disclosure. Mars's failure to disclose information it had no duty to disclose in the first place **[**37]** is not substantially injurious, immoral, or unethical, and Hodsdon's UCL claim may therefore not advance.

Hodsdon, 2016 U.S. Dist. LEXIS 19268, 2016 WL 627383, at *7. This Court agrees. Because Dana has not adequately alleged a violation of either test for the "unfair" **[*668]** prong, or a violation of the "unlawful" or "fraudulent" prongs, her UCL claim is DISMISSED.

E. FAL Claim

HN16[] The FAL makes it unlawful for any person "to make or disseminate or cause to be made or disseminated before the public . . . any statement . . . which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading." Cal. Bus. & Prof. Code § 17500. The plain language of the statute—which prohibits *making, disseminating*, or *causing* the dissemination of false or misleading statements—does not encompass omissions. Several cases have therefore held that "[t]here can be no FAL claim where there is no 'statement' at all"—or in other words that an omission, even of material facts, does not violate the FAL. Norcia v. Samsung Telecomms. Am., LLC, No. 14-CV-00582-JD, 2015 U.S. Dist. LEXIS 110454, 2015 WL 4967247, at *8 (N.D. Cal. Aug. 20, 2015); *see also* Hodsdon, 2016 U.S. Dist. LEXIS 19268, 2016 WL 627383, at *4; *Stanwood, 941 F. Supp. 2d at 1222*.

Dana cites four federal district court cases and two California appellate cases that purportedly held to the contrary, allowing FAL claims to proceed based on omissions. Opp'n at **[**38]** 17 nn.89 & 91. One of those cases actually dismissed the plaintiff's FAL claim to the extent that it was based on affirmative misrepresentations, and did not address the FAL claim at all in its discussion of the plaintiff's fraudulent omission theory. Elias v. Hewlett-Packard Co., 950 F. Supp. 2d 1123, 1135-36, 1140 (N.D. Cal. 2013) (discussing only the CLRA, UCL, and common law in the context of fraudulent omissions, and granting leave to amend only as to those claims). Both of the California cases were based on claims that print, television, and/or telephone advertising campaigns—which inherently consist of affirmative statements—were misleading for failure to disclose fees associated with financial products or limitations on the use of coupons. People v. JTH Tax, Inc., 212 Cal. App. 4th 1219, 1224, 151 Cal. Rptr. 3d 728 (2013) ("The lawsuit claimed there were misleading or deceptive statements in print and television advertising . . . ."); People v. Toomey, 157 Cal. App. 3d 1, 17, 203 Cal. Rptr. 642 (1984) ("We encounter little difficulty concluding that Holiday's telephone solicitations and newspaper advertisements were likely to deceive consumers."). Two of the other cases, which Judge Seeborg considered in *Hodsdon*, both also involved some degree of affirmative misrepresentation. *See* Hodsdon, 2016 U.S. Dist. LEXIS 19268, 2016 WL 627383, at *4. In one, the defendant allegedly "misrepresented that it would take 'reasonable steps' to secure Plaintiffs' Personal Information **[**39]** [stored on or transmitted via the defendant's network], and that [it] use[d] industry-standard encryption to prevent unauthorized access to sensitive financial information," but failed to disclose that its safeguards were inadequate and network intrusions occurred. In re Sony Gaming Networks & Customer Data Sec. Breach Litig., 996 F. Supp. 2d 942, 990-91 (S.D. Cal. 2014) (quoting the plaintiffs' complaint; final alteration in original). In the other case, the defendants advertised their washing machines as "Xxtra Sanitary" and "high efficiency," but allegedly concealed that the machines developed mold and were not efficient. Tait v. BSH Home Appliances Corp., No. SACV 10-00711 DOC (ANx), 2011 U.S. Dist. LEXIS 103584, 2011 WL 3941387, at *1-3 (C.D. Cal. Aug. 31, 2011). That leaves only a decision by the Southern District of California, which held without analysis that the FAL's prohibition of untrue or misleading statements also "requires a duty to disclose" in at least certain circumstances. Cortina v. **[*669]** Goya Foods, Inc., 94 F. Supp. 3d 1174, 1192 (S.D. Cal. 2015) (holding that the plaintiffs plausibly stated a claim under the FAL where the defendant failed to disclose a "potentially dangerous substance" in the beverages it sold).

Although neither *Sony* nor *Tait* cited the alleged misrepresentations as the reason for allowing the plaintiffs' omissions claims to proceed, the Court agrees with Judge Seeborg's conclusion that the outcome in both cases is consistent **[**40]** with a requirement that ***HN17***[] there be at least *some* affirmative misrepresentation to support a claim under the FAL. *See* Hodsdon, 2016 U.S. Dist. LEXIS 19268, 2016 WL 627383, at *4. As for Cortina, and also to the extent that any of the other cases discussed above are not consistent with that rule, the Court respectfully disagrees with their interpretation of the FAL's statutory language. Because Dana bases her claims on pure omissions, Opp'n at 13 n.58, she fails to allege that Hershey "ma[d]e or disseminate[d] or cause[d] to be made or disseminated" any false or misleading statement, and thus fails to state a claim under the FAL.[13]

F. Additional Defenses

In light of the holdings above that each of Dana's claims must be dismissed, the Court need not reach the parties' arguments regarding Hershey's two additional defenses: that the California legislature has created a "safe harbor" against Dana's claims by enacting the Supply Chains Act, *see* Mot. at 6-9; and that the relief Dana seeks would compel Hershey's speech in violation of the First Amendment, id. at 23-25. Although this Order need not and does not resolve either of **[**41]** those issues, the Court briefly addresses the safe harbor argument.

"[T]he reach of the UCL is broad, but it is not without limit and may not be used to invade 'safe harbors' provided by other statutes." Loeffler v. Target Corp., 58 Cal. 4th 1081, 1125, 171 Cal. Rptr. 3d 189, 324 P.3d 50 (2014) (citing Cel-Tech, 20 Cal. 4th at 182). "If the Legislature has permitted certain conduct or considered a situation and concluded no action should lie, courts may not override that determination." *Id.* The California Supreme Court has described the scope of the doctrine as follows:

> A plaintiff may thus not "plead around" an "absolute bar to relief" simply "by recasting the cause of action as one for unfair competition." (Manufacturers Life Ins. Co. v. Superior Court (1995) 10 Cal. 4th 257, 283, 41 Cal. Rptr. 2d 220, 895 P.2d 56.) The rule does not, however, prohibit an action under the unfair competition law merely because some other statute on the subject does not, itself, provide for the action or prohibit the challenged conduct. To forestall an action under the unfair competition law, another provision must actually "bar" the action or clearly permit the conduct.

Cel-Tech, 20 Cal. 4th at 182-83; *see also* Loeffler, 58 Cal. 4th at 1125 (emphasizing the requirement that another statute "*clearly permit*" the challenged conduct).

The Supply Chains Act requires certain large corporations to disclose on their websites their "efforts to eradicate slavery and human trafficking from [their] **[**42]** direct supply chain[s] for tangible goods offered for **[*670]** sale." Cal. Civ. Code § 1714.43(a)(1). The statute does not "actually 'bar'" any action. *See* Cel-Tech, 20 Cal. 4th at 183. Nor does it "clearly permit" any conduct except disclosure of efforts to eradicate slavery and human trafficking. *See id.*; Loeffler, 58 Cal. 4th at 1125. There are also discrepancies between the subject matter of the Supply Chains Act and the disclosure Dana seeks in this case. As Judge Seeborg noted in *Hodsdon*, the statute "concerns slavery and human trafficking, not [other forms of abusive] child labor," and "the legislative history is silent about whether the legislature contemplated disclosure on labels." Hodsdon, 2016 U.S. Dist. LEXIS 19268, 2016 WL 627383, at *9. Moreover, there is a difference between, on one hand, advertising the steps a company has taken to reduce slavery

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[13] Moreover, even if the FAL allowed claims based on omissions, Dana has not established any duty to disclose the information at issue, as discussed above in the context of her CLRA claim.

in its supply chain (as the statute requires), and on the other, disclosing that such slavery persists (as Dana seeks here). That the legislature mandated the former in certain instances does not necessarily indicate a conclusion that the latter could never be required under existing consumer protection laws.

The Ninth Circuit very recently addressed the safe harbor doctrine in *Ebner v. Fresh, Inc.*, a case alleging deception where a cosmetic product label disclosed the net weight of **[**43]** the product contained in a tube but failed to disclose that "only 75% of that product is reasonably accessible." *Ebner, 818 F.3d at 804, 2016 WL 1056088, at *3 (9th Cir. 2016)*. The panel held that the disclosure of the actual net weight fell within the safe harbor because "[b]oth federal and California law affirmatively require cosmetic manufacturers to include an accurate statement of the net weight of included cosmetic product." *Id.* The plaintiff also brought an omission claim, however, arguing that failure to explain how much of the product was accessible rendered the accurate weight disclosure "deceptive and misleading." *Id.* The panel held that "[u]nlike a claim seeking to alter the net weight declaration itself, this [omission] claim does not fall within the safe harbor because there is no law expressly permitting the omission of supplemental statements." *Id.* Similarly, here, Hershey has not identified any law "expressly permitting the omission of" disclosures on product labels regarding slave labor and the worst forms of child labor in a product's supply chain. *See id.*

The Court recognizes that recent district court decisions have held that the Supply Chains Act creates a safe harbor against claims based on non-disclosure **[**44]** of labor abuses in a supply chain. *Wirth, 2016 U.S. Dist. LEXIS 14552, 2016 WL 471234 at *6-9*; *Barber, 154 F. Supp. 3d 954, 2015 WL 9309553, at *2-5*; *De Rosa, 2016 U.S. Dist. LEXIS 5497, 2016 WL 524059* (summarily dismissing for the reasons stated in *Barber*); *Hughes, 2016 U.S. Dist. LEXIS 5508, 2016 WL 524057* (same).[14] Because this Court holds for the reasons stated above that California's consumer protection laws do not create any obligation to make the disclosures Dana seeks, the question of whether the Supply Chains Act would shield against such a duty is ultimately moot, and the Court need not and does not resolve whether *Wirth* and *Barber* are correct or applicable to the case at hand. The Court nevertheless echoes Judge Seeborg's skepticism that the safe harbor doctrine is as broad as Hershey contends.

IV. CONCLUSION

For the reasons stated above, Dana's claims under the CLRA, the UCL, and the FAL fail to state a claim on which relief may be granted, and are therefore DISMISSED. Dana has made clear that she **[*671]** does not intend to pursue a claim based on affirmative misrepresentations. *See* Opp'n at 13 n.58. The Court therefore finds that leave to amend would be futile, and dismisses this action with prejudice.

IT IS SO ORDERED.

Dated: March 29, 2016

/s/ Joseph C. Spero

JOSEPH C. SPERO

Chief Magistrate Judge

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[14] Appeals of all of these cases are currently pending before the Ninth Circuit.

McCoy v. Nestle United States, Inc.

United States District Court for the Northern District of California

March 29, 2016, Decided; March 29, 2016, Filed

Case No. 15-cv-04451-JCS

Reporter
173 F. Supp. 3d 954 *; 2016 U.S. Dist. LEXIS 41601 **; 2016 WL 1213904

ELAINE MCCOY, Plaintiff, v. NESTLE USA, INC, Defendant.

Subsequent History: Affirmed by McCoy v. Nestle United States, 2018 U.S. App. LEXIS 18731 (9th Cir. Cal., July 10, 2018)

Core Terms

chain, omission, products, consumers, chocolate, abuses, disclosure, courts, cases, child labor, disclose, argues, unfair, misrepresentation, fraudulent, misleading, duty to disclose, prong, customers, cocoa, labor practice, slave labor, packaging, labeling, product label, allegations, failure to disclose, safe harbor, worst, affirmative misrepresentation

LexisNexis® Headnotes

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

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

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

A complaint may be dismissed for failure to state a claim on which relief can be granted under Fed. R. Civ. P. 12(b)(6). The purpose of a motion to dismiss under Rule 12(b)(6) is to test the legal sufficiency of the complaint. Generally, a plaintiff's burden at the pleading stage is relatively light. Fed. R. Civ. P. 8(a) states that a pleading which sets forth a claim for relief shall contain a short and plain statement of the claim showing that the pleader is entitled to relief. Fed. R. Civ. P. 8(a).

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

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

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

In ruling on a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the court analyzes the complaint and takes all allegations of material fact as true and construes them in the light most favorable to the non-moving party.

Dismissal may be based on a lack of a cognizable legal theory or on the absence of facts that would support a valid theory. A complaint must contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory. A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. Nor does a complaint suffice if it tenders naked assertions devoid of further factual enhancement. Rather, the claim must be plausible on its face, meaning that the plaintiff must plead sufficient factual allegations to allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.

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

HN3[] **Heightened Pleading Requirements, Fraud Claims**

Fed. R. Civ. P. 9(b) sets a heightened pleading standard for claims based on fraud. In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. *Fed. R. Civ. P. 9(b)*. In order to meet this standard, a complaint must specify such facts as the times, dates, places, benefits received, and other details of the alleged fraudulent activity. The heightened standard does not apply to malice, intent, knowledge, and other conditions of a person's mind. *Fed. R. Civ. P. 9(b)*.

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

Civil Procedure > Preliminary Considerations > Jurisdiction > Subject Matter Jurisdiction

HN4[] **Defenses, Demurrers & Objections, Motions to Dismiss**

Where a jurisdictional challenge is based on the allegations of a plaintiff's complaint rather than on extrinsic evidence, courts assume the plaintiff's allegations to be true and draw all reasonable inferences in his favor. The inquiry is therefore much like a *Fed. R. Civ. P. 12(b)(6)* analysis.

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

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

HN5[] **Standing, Injury in Fact**

When plaintiffs contend that class members paid more for a product than they otherwise would have paid, or bought it when they otherwise would not have done so they have suffered an Article III injury in fact.

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

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

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

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

HN6[] **False Advertising, State Regulation**

The Unfair Competition Law (UCL), *Cal. Bus. & Prof. Code §§ 17200-17210* and the False Advertising Law (FAL), *Cal. Bus. & Prof. Code §§ 17500-17509*, require that private plaintiffs have suffered injury in fact and have lost money or property as a result of the unfair competition or false advertising. A consumer who relies on a product label and challenges a misrepresentation contained therein can satisfy the standing requirement of the UCL and the FAL by alleging that he or she would not have bought the product but for the misrepresentation, and that such allegations are sufficient to establish economic injury within the meaning of those statutes.

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

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

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

HN7[] **Deceptive & Unfair Trade Practices, State Regulation**

The Consumers Legal Remedies Act (CLRA), *Cal. Civ. Code §§ 1750-1784*, allows a consumer who has suffered "any damage" to sue, and any plaintiff who has standing under the Unfair Competition Law's, *Cal. Bus. & Prof. Code §§ 17200-17210*, and the False Advertising Law's, *Cal. Bus. & Prof. Code §§ 17500-17509*, lost money or property requirement will, a fortiori, have suffered any damage for purposes of establishing CLRA standing.

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

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

The Consumers Legal Remedies Act, *Cal. Civ. Code §§ 1750-1784*, prohibits certain enumerated unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer. *Cal. Civ. Code § 1770(a)*.

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

HN9[] **Deceptive & Unfair Trade Practices, State Regulation**

Although a claim may be stated under the Consumers Legal Remedies Act, *Cal. Civ. Code §§ 1750-1784*, in terms constituting fraudulent omissions, to be actionable the omission must be contrary to a representation actually made by the defendant, or an omission of a fact the defendant was obliged to disclose. California courts have generally rejected a broad obligation to disclose. Absent affirmative misrepresentations, an obligation to disclose under California law extends only to matters of product safety.

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

HN10[] **Deceptive & Unfair Trade Practices, State Regulation**

The weight of authority limits a duty to disclose under the Consumers Legal Remedies Act, *Cal. Civ. Code §§ 1750-1784*, to issues of product safety, unless disclosure is necessary to counter an affirmative misrepresentation.

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

HN11[] **Deceptive & Unfair Trade Practices, State Regulation**

A duty to disclose under California law does not extend to all information that may persuade a consumer to make different purchasing decisions.

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

HN12[] **Deceptive & Unfair Trade Practices, State Regulation**

While the Consumers Legal Remedies Act, *Cal. Civ. Code §§ 1750-1784*, provides that it shall be liberally construed and applied to promote its underlying purposes of consumer protection, *Cal. Civ. Code § 1760*, it does not explicitly discuss representations regarding labor practices, *Cal. Civ. Code § 1770(a)*.

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

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

California's Unfair Competition Law, *Cal. Bus. & Prof. Code §§ 17200-17210*, prohibits unfair competition, defined as any unlawful, unfair, or fraudulent business act or practice. Cal. Bus. & Prof. Code § 17200.

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

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

Absent a duty to disclose, the failure to do so does not support a claim under the fraudulent prong of the Unfair Competition Law, *Cal. Bus. & Prof. Code §§ 17200-17210*.

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

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

When a plaintiff who claims to have suffered injury from a direct competitor's "unfair" act or practice invokes Cal. Bus. & Prof. Code § 17200, the word "unfair" in that section means conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.

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

HN16[] **False Advertising, State Regulation**

The False Advertising Law (FAL), *Cal. Bus. & Prof. Code §§ 17500-17509*, makes it unlawful for any person to make or disseminate or cause to be made or disseminated before the public any statement which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading. Cal. Bus. & Prof. Code § 17500. The plain language of the statute—which prohibits making, disseminating, or causing the dissemination of false or misleading statements—does not encompass omissions.

There can be no FAL claim where there is no statement at all—or in other words that an omission, even of material facts, does not violate the FAL.

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

HN17[] False Advertising, State Regulation

There must be at least some affirmative misrepresentation to support a claim under the False Advertising Law, *Cal. Bus. & Prof. Code §§ 17500-17509*.

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Judges: JOSEPH C. SPERO, Chief Magistrate Judge.

Opinion by: JOSEPH C. SPERO

Opinion

[*956] ORDER GRANTING MOTION TO DISMISS

Re: Dkt. No. 16

I. INTRODUCTION

"The use of child slave labor in the Ivory Coast is a humanitarian tragedy." *Doe I v. Nestle USA, Inc., 766 F.3d 1013, 1016 (9th Cir. 2014)*. The fact that major international corporations source ingredients for their products from supply chains involving slavery and the worst forms of child labor raises significant ethical questions. The issue before this Court, however, is whether California law requires corporations to inform customers of that fact on their product packaging and point of sale advertising. Every court to consider the issue has held that it does not. This Court agrees.

This is a putative **[**2]** class action in which Plaintiff Elaine McCoy claims that Defendant Nestlé USA, Inc. ("Nestlé") violated California's Unfair Competition Law ("UCL," *Cal. Bus. & Prof. Code §§ 17200-17210*), Consumers Legal Remedies Act ("CLRA," *Cal. Civ. Code §§ 1750-1784*), and False Advertising Law ("FAL," *Cal. Bus. & Prof. Code §§ 17500-17509*) by failing to disclose on the packaging of Nestlé's chocolate products that some of the cocoa used therein originated at farms in Côte d'Ivoire (also known as the Ivory Coast) that use slave labor and the worst forms of child labor. Nestlé moves to dismiss all claims. The Court held a hearing on March 18, 2016.[1] For the reasons stated below, Nestlé's Motion is GRANTED, and this action is dismissed with prejudice.[2]

[1] The Court also heard argument in *Dana v. The Hershey Company*, No. 15-cv-4453, which involves different parties but substantially similar claims and arguments. A separate order has been published concurrently in that case.

II. BACKGROUND

A. Allegations of the Complaint[3]

Côte d'Ivoire is the world's largest producer of cocoa beans, the raw ingredient for **[**3]** chocolate, and supplies 40% of global cocoa production and 47% of total imports to the United States. Compl. (dkt. 1) ¶¶ 20, 51. Slave labor and the worst forms of child labor are common in Ivorian cocoa production, as is well documented by United States government agencies, academic studies, nonprofit organizations, investigative journalists, and former laborers. *Id. ¶¶ 5-9*, 24-26, 33-47. Children are frequently injured in the course of dangerous work involving machetes, chemicals, and heavy loads, and workers (both children and adults) may be beaten, whipped, and locked in to prevent escape. *Id. ¶¶ 24-26*. The Ninth Circuit has also acknowledged the existence of such conditions. *Id. ¶ 27*; *Doe I, 766 F.3d at 1016*.

Nestlé is one of the largest food companies in the United States and sells a number of popular chocolate products. *Id. ¶ 3*. In 2001, members if the United States chocolate industry including Nestlé signed a voluntary protocol, negotiated by Representative Eliot Engel and Senator Tom Harkin, to develop standards for certifying chocolate produced without labor abuses. *Id. ¶ 28*. After failing to meet the initial 2005 deadline, the industry extended the self-imposed deadline to 2008, then to 2010, and **[**4]** then to 2020. *Id. ¶¶ 30-32*.

Despite adopting "Corporate Business Principles" that require ethical business **[*957]** practices in its supply chain and a "Supplier Code" that "strictly prohibit[s]" child labor and forced labor, Nestlé sources much of its chocolate from Côte d'Ivoire through a multi-level supply chain of independent growers, cooperatives, distributors, and other intermediaries. *Id. ¶¶ 4, 11, 21, 50, 52*, 60-66, 52. Nestlé acknowledges child and slave labor in its Ivorian supply chain, including children engaged in unsafe work, but does not disclose the existence of those labor abuses on its product labels. *Id. ¶¶ 21, 53*. Certain Nestlé products also advertise that Nestlé "works with [a certification program that does not permit child labor] to help improve the lives of cocoa farmers." *Id. ¶¶ 54-55*. Although McCoy disputes the accuracy of that certification, her claims here are based only on Nestlé's omissions, not on any affirmative misrepresentations. *Id. ¶ 57*; Opp'n (dkt. 18) at 12 n.64.

McCoy "has purchased Nestlé Chocolate Products at various retail stores including Sam's Club and Safeway in and around Vacaville, and Fairfield, California from 2011 through present." *Id. ¶ 14*. Citing studies **[**5]** showing that consumers will pay a premium for ethically produced coffee, clothing, and seafood, *id. ¶¶ 67-71*, McCoy alleges that she and other customers "would not have purchased Nestlé's Chocolate Products or paid as much for them" if Nestlé had disclosed labor violations on the product labels. *Id. ¶ 11*, *see also id.* ¶¶ 14, 49, 78, 93, 107, 118.

The Complaint includes three claims, under the UCL, the CLRA, and the FAL, respectively. The UCL claim is based on three separate theories arising from Nestlé's failure to disclose labor abuses in its supply chain on the packaging of its chocolate products: (1) the omission is "unlawful," because it violates the CLRA, *id.* ¶ 86; (2) the omission is "unfair," because the abusive labor practices themselves are immoral and the failure to disclose them impairs competition and prevents consumers from making informed decisions, *id. ¶ 87*; and (3) the omission is "fraudulent" because it is likely to deceive a reasonable consumer and the true facts would be material to reasonable consumer, *id. ¶ 88*. The CLRA claim asserts that Nestlé's failure to disclose labor abuses in its supply chain constitutes a misrepresentation of the "source, characteristics, **[**6]** and standard" of the products. *Id. ¶ 103*, *see also id.* ¶¶ 100-02 (citing *Cal. Civ. Code § 1770(a)(2)*, *(5)*, *(7)*). The FAL claim asserts that Nestlé had a duty to disclose the labor abuses in its supply chain because it had superior knowledge as compared to customers, and because it made

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

[3] McCoy's allegations are taken as true in the context of a motion to dismiss.

"partial representations and/or misrepresentations to the contrary." *Id. ¶ 114*. In her Opposition, McCoy disclaims any theory of an obligation to disclose arising from partial misrepresentations. Opp'n at 12 n.64.

B. Procedural History

McCoy filed this action on September 28, 2015, seeking to represent herself and other similarly situated consumers who purchased Nestlé chocolate products in the last four years. *See generally* Compl. McCoy's counsel also represents plaintiffs who filed similar actions against two other large chocolate manufacturers, Mars and Hershey. *See Hodsdon v. Mars, Inc.*, No. 3:15-cv-04450-RS (N.D. Cal.); *Dana v. The Hershey Company*, No. 3:15-cv-04453 (N.D. Cal.). Defendants moved to dismiss in all three cases. Judge Seeborg granted the motion to dismiss in *Hodsdon*, as discussed in detail below. The undersigned heard argument on Hershey's motion in *Dana* concurrently with Nestlé's motion in the present case.[4]

[*958] C. Parties' Arguments

Nestlé argues that the case must be dismissed for several reasons, starting with the safe harbor doctrine, which provides that plaintiffs cannot use California's consumer protection laws to pursue relief that is foreclosed by other, more specific statutes. Mot. (dkt. 16) at 8-11. According to Nestlé, the California Transparency in Supply Chains Act of 2010 (the "Supply Chains Act") bars McCoy's claims **[**8]** because it regulates disclosures related to labor abuses in supply chains and does not require the disclosures McCoy seeks. *Id.* McCoy responds that the Supply Chains Act does not specifically permit Nestlé's omissions or bar McCoy's claims, and that the labor violations addressed by that statute (slavery and human trafficking) do not encompass all of the violations at issue here (which also include dangerous but non-slave child labor). Opp'n at 3-8.

Nestlé also argues that the Court should dismiss the case based on the doctrine of equitable abstention, because: (1) the economic policies at issue are better suited for resolution by legislative bodies or administrative agencies; (2) enforcement of injunctive relief would be unduly burdensome for the Court due to the need to monitor foreign labor conditions; and (3) the foreign relations issues implicated by McCoy's claims require a uniform federal policy and should be entrusted to the legislative or executive branch. Mot. at 11-13. McCoy argues that the subject matter of the case falls within the experience and competence of the Court, and that overseeing an injunction requiring Nestlé to change its labeling would not be unduly burdensome. **[**9]** Opp'n at 8-10.

Next, Nestlé argues that it has no duty to disclose labor conditions in its supply chain because the information at issue does not relate to product safety, and because Nestlé did not have exclusive knowledge, actively conceal the information, make misleading partial representations, or have a fiduciary relationship with McCoy. Mot. at 14-18. Nestlé contends that all of McCoy's claims fail because, as a matter of law, reasonable consumers are not likely to be deceived by the omission of something that Nestlé had no duty to disclose—and even if it were legally possible, McCoy has not adequately alleged that consumers expect supply chains to be entirely free of labor abuses. *Id.* at 18-19. McCoy responds that the limitation of the duty to disclose to safety issues only applies in post-warranty product defect cases, which this is not, and that a duty arises from Nestlé's superior (albeit not actually exclusive) knowledge of labor abuses in its supply chain. Opp'n at 10-14. She "does not here contend that Nestlé's partial

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[4] Four other **[**7]** cases based on nondisclosure of supply chain labor violations, brought by plaintiffs who also share counsel with McCoy, have been dismissed for failure to state a claim in the Central District of California. *Wirth v. Mars Inc., No. SA CV 15-1470-DOC (KESx), 2016 U.S. Dist. LEXIS 14552, 2016 WL 471234 (C.D. Cal. Feb. 5, 2016)*; *Barber v. Nestle USA, Inc., 154 F. Supp. 3d 954, 2015 U.S. Dist. LEXIS 170608, 2015 WL 9309553 (C.D. Cal. 2015)*; *De Rosa v. Tri-Union Seafoods, LLC, No. CV 15-7540-CJC (AGRx), 2016 U.S. Dist. LEXIS 5497, 2016 WL 524059 (C.D. Cal. Jan. 15, 2016)* (summarily dismissing for the reasons stated in *Barber*); *Hughes v. Big Heart Pet Brands, No. CV 15-8007-CJC (AGRx), 2016 U.S. Dist. LEXIS 5508, 2016 WL 524057 (C.D. Cal. Jan. 15, 2016)* (same). Those cases, all of which concern seafood (or pet food that includes seafood products) rather than chocolate, were decided at least in part based on the safe harbor doctrine, which *Hodsdon, Dana*, and this Order decline to reach. The four Central District cases are presently pending on appeal before the Ninth Circuit.

disclosures give rise to its duty to disclose." *Id.* at 12 n.64. McCoy also argues that she has adequately pled that, absent disclosure to the contrary, consumers would expect that **[**10]** chocolate is not produced using slave labor or the worst forms of child labor, and that reliance is at least a question of fact. *Id.* at 14-16.

[*959] Turning to McCoy's specific claims, Nestlé contends that the FAL only governs affirmative misrepresentations, not omissions. Mot. at 19. McCoy disputes that proposition and argues that some cases have allowed FAL claims to proceed based on omissions. Opp'n at 16.

Nestlé argues that McCoy's CLRA claim fails because omissions regarding labor abuses do not fall within the statutory provisions she invokes—which govern representations regarding the "source, characteristics, and standard" of the chocolate, *see* Compl. ¶ 103—and that she therefore also cannot proceed on a UCL claim for "unlawful" conduct based on her CLRA claim. Mot. at 17-18. McCoy contends that "Nestlé's failure to disclose that its supply chain is not child and slave free is likely to deceive a reasonable consumer regarding the chocolate's source (from plantations using child and slave labor) and characteristics/standard (produced by child and slave labor)." Opp'n at 17.

As for "unfair" conduct under the UCL, Nestlé contends that McCoy cannot succeed under any of the tests that courts have used, **[**11]** because she has not identified a legislative policy against Nestlé's non-disclosure, nor has she plausibly alleged that the harm caused was "substantial" or that it outweighed the utility of Nestlé's conduct. Mot. at 19-21. McCoy argues that the labor abuses in Nestlé's supply chain contravene legislatively declared policies in the form of United Nations prohibitions of forced labor and the worst forms of child labor that the United States has ratified, and that those abuses are immoral and unethical. Opp'n at 18-19. She also contends that the harm of deceiving consumers outweighs the cost to Nestlé of changings its product labeling. *Id.* at 19. Nestlé notes in reply that the United Nations sources that McCoy cites relate only to labor practices, not product labeling. Reply (dkt. 27) at 12.

According to Nestlé, McCoy lacks both Article III and statutory standing to bring any of her claims because she cannot trace the cocoa used in the specific chocolate products she bought back to a specific plantation, and thus cannot know whether the products she bought were produced with slave or child labor. Mot. at 21-22. Nestlé contends that without that knowledge, whether the products McCoy bought were **[**12]** misrepresented (even under McCoy's theory of misrepresentation by omission) is uncertain, and if they were not, McCoy has not suffered any cognizable injury. *Id.* McCoy responds that her injury and standing arise from misrepresentation of the supply chain for the chocolate, and if Nestlé had better disclosed the labor abuses in the supply chain, she would not have bought the products regardless of whether she knew the origin of the cocoa in a specific item. Opp'n at 19-21. McCoy relies on case law holding that a consumer who purchased or paid more for a product based on misrepresentations has both constitutional and statutory standing to bring claims under California's consumer protection laws. *Id.* at 20-21. (citing *Hinojos v. Kohl's Corp., 718 F.3d 1098 (9th Cir. 2013)*; *Kwikset Corp. v. Superior Court, 51 Cal. 4th 310, 330, 120 Cal. Rptr. 3d 741, 246 P.3d 877 (2011))*.

Nestlé also argues that McCoy lacks standing because she has not adequately alleged reliance on any misrepresentation. Mot. at 22. According to Nestlé, McCoy has not alleged that she saw or relied on any misleading affirmative representations, nor that she would have read the disclosure she seeks on Nestlé's product packaging. *Id.* McCoy contends that her claim is based only on omission of material facts and that her Complaint adequately alleges that she would not have bought Nestlé **[**13]** products if the packaging had disclosed severe labor abuses in Nestlé's supply chain. Opp'n at 20-21.

[*960] Next, Nestlé argues that McCoy's Complaint does not satisfy the heightened pleading standard of *Rule 9(b) of the Federal Rules of Civil Procedure* because it does not identify the specific products McCoy purchased, provide a complete list of the products she is suing over, include copies of packaging for all of the products at issue. Mot. at 23. McCoy argues that her Complaint meets the pleading standard that courts have applied in fraudulent omission cases, and that she need not list the specific products she purchased because "the omission is identical" across Nestlé's product line. Opp'n at 21-23.

Finally, Nestlé argues that requiring the labeling McCoy seeks would compel speech in violation of the *First Amendment*. Mot. at 23-25. McCoy contends that laws against misleading advertising are constitutional, and that a mere rational basis is required to support laws compelling affirmative factual product labeling to avoid misleading consumers. Opp'n at 23-25 (citing, *e.g.*, *Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 105 S. Ct. 2265, 85 L. Ed. 2d 652, 17 Ohio B. 315 (1985))*. Nestlé responds that McCoy has not alleged any misleading affirmative representations that require labeling to redress consumer confusion, and that the disclosure McCoy seeks is **[**14]** not "'purely factual and uncontroversial.'" Reply at 13-15 (quoting *Zauderer, 471 U.S. at 651*).

D. *Hodsdon v. Mars, Inc.*

In *Hodsdon*, Judge Seeborg granted a motion by chocolate manufacturer Mars, Inc. to dismiss claims very similar those in the case at hand. *Hodsdon v. Mars, Inc., 162 F. Supp. 3d 1016, No. 15-CV-04450-RS, 2016 U.S. Dist. LEXIS 19268, 2016 WL 627383 (N.D. Cal. Feb. 17, 2016)*. As a preliminary matter, the court held that the plaintiff had standing because: (1) "California law permits litigants to pursue claims under the UCL, CLRA, and FAL if they show . . . that 'the consumer paid more than he or she actually valued the product'"; (2) the plaintiff adequately alleged that the use of forced labor in the supply chain caused him to devalue the product even if he could not prove that forced labor was used to produce the specific chocolate products that he purchased; and (3) the plaintiff adequately alleged that he saw the product labels before he purchased the products. *2016 U.S. Dist. LEXIS 19268, [WL] at *3* (quoting *Hinojos, 718 F.3d at 1104*). Turning to the merits, however, the court held that the plaintiff failed to state a claim under California law.

With respect to the FAL claim, the court reconciled cases holding that omissions were not actionable with others that allowed FAL claims based on omissions to proceed, ultimately determining that omissions accompanying misleading incomplete **[**15]** statements are actionable, but omissions with no corresponding statements are not. *2016 U.S. Dist. LEXIS 19268, [WL] at *4*. *Compare Norcia v. Samsung Telecomms. Am., LLC, No. 14-CV-00582-JD, 2015 U.S. Dist. LEXIS 110454, 2015 WL 4967247, at *8 (N.D. Cal. Aug. 20, 2015)* ("There can be no FAL claim where there is no 'statement' at all."), *and Stanwood v. Mary Kay, Inc., 941 F. Supp. 2d 1212, 1222 (C.D. Cal. 2012)* (same), *with In re Sony Gaming Networks & Customer Data Sec. Breach Litig., 996 F. Supp. 2d 942, 991 (S.D. Cal. 2014)* (denying motion to dismiss where defendant claimed to have taken steps to secure information but failed to disclose security deficiencies), *and Tait v. BSH Home Appliances Corp., No. SACV 10-00711 DOC (ANx), 2011 WL 3941387, at *2 (C.D. Cal. Aug. 31, 2011)* (denying a motion to dismiss where the defendant marketed a washing machine as "sanitary" but failed to disclose its tendency to accumulate mold). Because the plaintiff in *Hodsdon* "asserted the former type of claim, i.e., that Mars violated the FAL by failing to issue any statement at all," the court dismissed the claim. *Hodsdon,* ***[*961]*** *2016 U.S. Dist. LEXIS 19268, 2016 WL 627383, at *4*.

Next, the court turned to the plaintiff's CLRA claim and his claim under the "unlawful" prong of the UCL, which was based on the purported CLRA violation. *2016 U.S. Dist. LEXIS 19268, [WL] at *5-6*. Noting the Ninth Circuit's holding that "California courts have generally rejected a broad obligation to disclose," the court looked to whether Mars had any such obligation. *2016 U.S. Dist. LEXIS 19268, [WL] at *5*. The court held that despite one case to the contrary, "the overwhelming majority of courts to consider the issue" **[**16]** have held that omissions are only actionable under the CLRA if they relate to product safety or defects. *2016 U.S. Dist. LEXIS 19268, [WL] at *5-6*. Because the omissions at issue related instead to "admittedly horrific labor practices" in the supply chain, the court dismissed the plaintiff's CLRA claim and the "unlawful conduct" aspect of the UCL claim that derived from it. *2016 U.S. Dist. LEXIS 19268, [WL] at *6*.

The plaintiff also brought UCL claims based on the "fraudulent" and "unfair" prongs of the statute. The court followed two California appellate decisions holding that omissions cannot satisfy the "fraudulent" prong unless there was a duty to disclose, and therefore dismissed that claim. *2016 U.S. Dist. LEXIS 19268, [WL] at *6* (citing *Berryman v. Merit Prop. Mgmt., Inc., 152 Cal. App. 4th 1544, 1557, 62 Cal. Rptr. 3d 177 (2007)*; *Daugherty v. Am. Honda Co., 144 Cal. App. 4th 824, 838, 51 Cal. Rptr. 3d 118 (2006))*. As for the "unfair" prong, the court held that the plaintiff's complaint did not satisfy any of the tests used by California courts to assess such claims: (1) unlike the underlying labor conditions themselves, the lack of disclosure could not be said to be "'immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers,'" because the harm was merely the purchase of a chocolate bar and the information that was absent from the packaging was readily available elsewhere; and (2) again unlike the underlying labor conditions, the harm from **[**17]** lack of disclosure was not tied to any established public policy expressed in "'specific constitutional, statutory, or regulatory provisions.'" *2016 U.S. Dist. LEXIS 19268, [WL] at *7* (quoting *S. Bay Chevrolet v. Gen. Motors Acceptance Corp., 72 Cal. App. 4th 861, 887, 85 Cal. Rptr. 2d 301 (1999)*; *McVicar v. Goodman Glob., Inc., 1 F. Supp. 3d 1044, 1054 (C.D. Cal. 2014))*. The court therefore dismissed the UCL claim in its entirety.

Because the plaintiff failed to state a claim for the reasons summarized above, the court did not reach Mars's argument that the Supply Chains Act creates a safe harbor, but expressed doubt that any such harbor is as broad as Mars contended. *2016 U.S. Dist. LEXIS 19268, [WL] at *8-9*. The court found that amendment would be futile and denied leave to amend. *2016 U.S. Dist. LEXIS 19268, [WL] at *9*. Hodsdon's appeal of Judge Seeborg's decision is currently pending before the Ninth Circuit.

III. ANALYSIS

A. Legal Standard

HN1[] A complaint may be dismissed for failure to state a claim on which relief can be granted under *Rule 12(b)(6) of the Federal Rules of Civil Procedure*. "The purpose of a motion to dismiss under *Rule 12(b)(6)* is to test the legal sufficiency of the complaint." *N. Star Int'l v. Ariz. Corp. Comm'n, 720 F.2d 578, 581 (9th Cir. 1983)*. Generally, a plaintiff's burden at the pleading stage is relatively light. *Rule 8(a) of the Federal Rules of Civil Procedure* states that "[a] pleading which sets forth a claim for relief . . . shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief." *Fed. R. Civ. P. 8(a)*.

HN2[] In ruling on a motion to dismiss under *Rule 12(b)(6)*, the court analyzes the complaint and takes "all allegations **[**18]** of material **[*962]** fact as true and construe[s] them in the light most favorable to the non-moving party." *Parks Sch. of Bus. v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995)*. Dismissal may be based on a lack of a cognizable legal theory or on the absence of facts that would support a valid theory. *Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990)*. A complaint must "contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 562, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (citing *Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (7th Cir. 1984))*. "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Twombly, 550 U.S. at 555*). "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id.* (quoting *Twombly, 550 U.S. at 557*). Rather, the claim must be "'plausible on its face,'" meaning that the plaintiff must plead sufficient factual allegations to "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (quoting *Twombly, 550 U.S. at 570*).

HN3[] *Rule 9(b) of the Federal Rules of Civil Procedure* sets a heightened pleading standard for claims based on fraud. "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." *Fed. R. Civ. P. 9(b)*. The Ninth Circuit has held that in order to meet this standard, a "complaint must specify such facts as the times, dates, **[**19]** places, benefits received, and other details of the alleged fraudulent activity." *Neubronner v. Milken, 6 F.3d 666, 672 (9th Cir. 1993)*; *see also* *McMaster v. United States, 731 F.3d 881, 897 (9th Cir. 2013)*. The heightened standard does not apply to "[m]alice, intent, knowledge, and other conditions of a person's mind." *Fed. R. Civ. P. 9(b)*.

Nestlé also moves to dismiss under *Rule 12(b)(1)* on the basis that the Court lacks jurisdiction because McCoy lacks Article III standing. *See* Mot. at 8. ***HN4***[] Where, as here, a jurisdictional challenge is based on the allegations of a plaintiff's complaint rather than on extrinsic evidence, courts "assume [the plaintiff's] allegations to be true and draw all reasonable inferences in his favor." *Wolfe v. Strankman, 392 F.3d 358, 362 (9th Cir. 2004)*.

"[T]he inquiry is therefore much like a *Rule 12(b)(6)* analysis." *Animal Legal Def. Fund v. HVFG LLC, 939 F. Supp. 2d 992, 997 (N.D. Cal. 2013)*.

B. Standing

Nestlé argues that McCoy lacks Article III and statutory standing to pursue these claims because she does not and cannot allege that the specific products she purchased were made from cocoa produced with the labor abuses at issue in this case—slave labor or the worst forms of child labor—and therefore fails to allege an actual, particularized injury. Mot. at 21-22. The parties agree that Nestlé currently cannot trace the cocoa used in a particular Nestlé chocolate product to a specific plantation, and there is thus no way to know what labor practices were **[**20]** used in its production. *See* Compl. ¶ 11; Mot. at 22. McCoy argues that she has standing because she would have either not purchased or paid less for Nestlé's products if she had known that the *supply chain* involved the labor abuses at issue, regardless of where the cocoa in a particular chocolate bar originated. Opp'n at 20-21. Judge Seeborg held that the plaintiff in *Hodsdon* had standing under similar circumstances, and the Court agrees that McCoy has standing here. *See Hodsdon,* ***[*963]*** *2016 U.S. Dist. LEXIS 19268, 2016 WL 627383, at *3*.

The issue of Article III standing is straightforward. "***HN5***[] [W]hen, as here, 'Plaintiffs contend that class members paid more for [a product] than they otherwise would have paid, or bought it when they otherwise would not have done so' they have suffered an Article III injury in fact." *Hinojos v. Kohl's Corp., 718 F.3d 1098, 1104 (9th Cir. 2013)* (quoting *Mazza v. Am. Honda Motor Co., 666 F.3d 581, 595 (9th Cir. 2012))* (second alteration in original).

McCoy also has standing under the California statutes at issue. ***HN6***[] The UCL and FAL require that private plaintiffs "ha[ve] suffered injury in fact and ha[ve] lost money or property as a result of the unfair competition" or false advertising. *Hinojos, 718 F.3d at 1103* (quoting *Cal. Bus. & Prof. Code § 17204 (UCL)*; citing *id. § 17535 (FAL)*) (alterations in original).[5] In *Hinojos*, the Ninth Circuit examined the California Supreme Court's decision in *Kwikset Corp. v. Superior Court*, which held **[**21]** that a "'consumer who relies on a product label and challenges a misrepresentation contained therein can satisfy the standing requirement of [the UCL and the FAL] by alleging . . . that he or she would not have bought the product but for the misrepresentation,'" and that "such allegations are sufficient to establish economic injury within the meaning of [those statutes]." *Id. at 1105* (quoting *Kwikset, 51 Cal. 4th 310, 330, 120 Cal. Rptr. 3d 741, 246 P.3d 877 (2011))* (ellipsis in original).

In both *Kwikset*, where the defendant marketed locks as "Made in U.S.A." despite some foreign components and assembly work, and *Hinojos*, where the defendant allegedly advertised its normal prices as "reduced," plaintiffs who relied on those representation had standing to sue under the UCL and FAL. *Id. at 1107*; *Kwikset, 51 Cal. 4th at 330*. Those courts also listed a number of other scenarios where a plaintiff's reliance on false advertising could give rise to standing: "meat falsely labeled as kosher or halal, wine labeled with the wrong region or year, blood diamonds mislabeled **[**22]** as conflict-free, and goods falsely suggesting they were produced by union labor." *Hinojos, 718 F.3d at 1105* (citing *Kwikset, 51 Cal. 4th at 328-29*). McCoy's claim that she would have paid less for (or declined to purchase) Nestlé's products but for Nestlé's misrepresentations of the labor practices in its supply chain fits well within these examples.

The Ninth Circuit's decision in *Birdsong v. Apple, Inc., 590 F.3d 955 (9th Cir. 2009)*—which Nestlé does not discuss in its briefs but which Hershey relies on to make a similar argument in *Dana*—does not deprive McCoy of standing. In that case, the plaintiffs alleged that Apple violated the UCL by selling iPods that were capable of producing dangerous volume levels and thus causing hearing loss. *Id. at 957*. The Ninth Circuit affirmed the district court's holding that the plaintiffs failed to show a particularized and actual injury sufficient for standing under the UCL—despite the plaintiffs' argument that the risk of hearing loss diminished the value of the iPods—in part because "the

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[5] ***HN7***[] The CLRA allows a consumer who has suffered "any damage" to sue, and "any plaintiff who has standing under the UCL's and FAL's 'lost money or property' requirement will, *a fortiori*, have suffered 'any damage' for purposes of establishing CLRA standing." *Hinojos, 718 F.3d at 1107-08*.

alleged loss in value . . . rests on a hypothetical risk of hearing loss to other consumers who may or may not choose to use their iPods in a risky manner," and the plaintiffs did "not claim that they, or anyone else, have suffered or [were] substantially certain to suffer hearing **[**23]** loss from using an iPod." *Id. at* ***[*964]*** *959-62*. Here, in contrast, McCoy alleges that the value of the chocolate products was diminished because consumers did not wish to support a supply chain that included severe labor abuses. The alleged damage was therefore done *by the purchase itself*, not by any contingency that might happen after the purchase.

Nestlé argues, essentially, that a UCL claim based on misrepresentation of labor practices can only succeed where a plaintiff is *certain* that the objectionable practice was used to produce the specific item that the plaintiff purchased. *See* Mot. at 21-22. Stepping back from the fact pattern of this case, that argument would dictate that even if Nestlé had—hypothetically—concealed Ivorian labor conditions from its customers, falsely labeled all of its chocolate as certified to be free of child labor, and run a fraudulent national ad campaign touting its child-labor-free chocolate, a customer who relied on that false promotion would lack standing to sue for fraudulent business practices and false advertising so long as some fraction of Nestlé's cocoa met those descriptions and the customer was unable to tell what labor conditions produced the cocoa in the actual **[**24]** product he or she purchased. Such a result would undermine the holding of *Hinojos* and *Kwikset*. The difference between that hypothetical scenario and McCoy's allegation of mere omission is critical to the outcome of the present motion, as discussed in the sections below, but it is a difference relevant to the merits of the claims, not to standing.

Similarly, to use some of the examples given in *Hinojos* and *Kwikset*, it would be a bizarre result if sellers advertising food as halal or kosher, diamonds as conflict-free, or products as union-made could knowingly mix compliant and non-compliant products with impunity so long as there was no way for a buyer to trace the specific item he or she purchased back to the source. The Eighth Circuit has nevertheless adopted that rule. *See* *Wallace v. ConAgra Foods, Inc., 747 F.3d 1025, 1030-31 (8th Cir. 2014)* (holding that customers lacked Article III standing to bring a claim based on allegedly false advertising of a product as using 100% kosher beef, where the plaintiffs could not show that the specific products they purchased contained non-kosher beef). This Court respectfully disagrees with that result. In this Court's view, if a customer has paid a premium for an assurance that a product meets certain standards, **[**25]** and the assurance turns out to be meaningless, the premium that the customer has paid is an actual, personal, particularized injury that is cognizable under Article III. *See* *Hinojos, 718 F.3d at 1104*.

"'For a significant segment of the buying public, labor practices do matter in making consumer choices.'" *Kwikset, 51 Cal. 4th at 329* (quoting *Kasky v. Nike, Inc., 27 Cal. 4th 939, 969, 119 Cal. Rptr. 2d 296, 45 P.3d 243 (2002))*. It is plausible that a consumer would place less value on a product produced from a supply chain involving severe labor abuses. McCoy alleges that she purchased products or paid a higher price for them because she was deceived regarding the labor practices in the supply chain. That actual, particularized injury is sufficient to establish standing.

Nestlé also argues that McCoy lacks standing because she has not sufficiently alleged reliance. Mot. at 22. The Court agrees with McCoy that, at least for the purpose of Article III standing, McCoy adequately pleads reliance by alleging that she saw the product labeling and would not have purchased the products if labor abuses in the supply chain had been disclosed. *See* Compl. ¶ 14. Whether Nestlé had a duty to disclose those conditions, *see* Mot. at 22, is relevant to whether the Complaint states a claim on which relief can be granted, but is not an issue **[**26]** of standing.

[*965] C. CLRA Claim

HN8[] The CLRA prohibits certain enumerated "unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer." *Cal. Civ. Code § 1770(a)*. McCoy argues that Nestlé's failure to disclose labor abuses on its packaging violates *subsection (a)(2)* by "[m]isrepresenting the source" of the chocolate, *subsection (a)(5)* by "[r]epresenting that goods . . . have . . . characteristics . . . which they do not have," and *subsection (a)(7)* by "[r]epresenting that goods . . . are of a particular standard." *Id. § 1770(a)(2)*, *(5)*, *(7)*; *see* Compl. ¶¶ 100-03; Opp'n at 17. In her Opposition, McCoy makes clear that these theories are based on "Nestlé's omission of known child and slave labor in its supply chain," and that she "does not here contend that Nestlé's partial misrepresentations give rise to its duty to disclose." Opp'n at 12 n.64.

"*HN9*[] [A]lthough a claim may be stated under the CLRA in terms constituting fraudulent omissions, to be actionable the omission must be contrary to a representation actually made by the defendant, or an omission of a fact the defendant was obliged to disclose." *Daugherty v. Am. Honda Motor Co., 144 Cal. App. 4th 824, 835, 51 Cal. Rptr. 3d 118 (2006)*. "California courts have generally rejected a broad obligation to disclose . . . ." *Wilson v. Hewlett-Packard Co., 668 F.3d 1136, 1141 (9th Cir. 2012)*. In *Wilson*, the **[**27]** Ninth Circuit held that, absent affirmative misrepresentations, an obligation to disclose under California law extends only to matters of product safety. *Id. at 1141-43* (examining *Daugherty, 144 Cal. App. 4th at 836*, and subsequent decisions); *see also* *Oestreicher v. Alienware Corp., 322 F. App'x 489, 493 (9th Cir. 2009)* (unpublished and non-precedential) ("A manufacturer's duty [of disclosure] to consumers is limited to its warranty obligations absent either an affirmative misrepresentation or a safety issue.").

At least one district court decision has limited *Wilson* to cases where a product was covered by a warranty that expired before the defect became apparent. *Stanwood v. Mary Kay, Inc., 941 F. Supp. 2d 1212, 1221 (C.D. Cal. 2012)*. Central to the Central District's holding was its determination that "[t]he Ninth Circuit acknowledged that its requirement of a safety issue does not necessarily apply outside the products defect context where warranty protections are not available," and that *Wilson* "list[ed] cases where a safety issue was not required to trigger a duty to disclose." *Id.* (citing *Wilson, 668 F.3d at 1142*). The Court respectfully disagrees with *Stanwood*'s reading of *Wilson*. The cases listed at the page cited in *Wilson* by *Stanwood* do not support *Stanwood*'s holding: four cases explicitly based the materiality of an omission at least in part on whether it related to safety,[6] and the Ninth Circuit **[**28]** characterized the remaining two[7] as having "arguably concerned safety **[*966]** issues." *Wilson, 668 F.3d at 1142 & n.2*. Accordingly, the Court does not agree that *Wilson* is limited to cases where a warranty once existed but has since expired. There are cases holding that a manufacturer has a greater duty to disclose defects that arise *during* a product's express warranty period. *E.g., Collins v. eMachines, Inc., 202 Cal. App. 4th 249, 257-58, 134 Cal. Rptr. 3d 588 (2011)*; *see also* *Wilson, 668 F.3d at 1142 n.1* (discussing *Tietsworth v. Sears, Roebuck & Co., 720 F. Supp. 2d 1123 (N.D. Cal. 2010))*. But there is no allegation that Nestlé made any warranty of its chocolate products that would be relevant in this case.[8]

The Court agrees with Judge Seeborg's conclusion that ***HN10***[] the **[**29]** weight of authority limits a duty to disclose under the CLRA to issues of product safety, unless disclosure is necessary to counter an affirmative misrepresentation. *See* *Hodsdon, 2016 U.S. Dist. LEXIS 19268, 2016 WL 627383, at *6* (declining to follow *Stanwood* in light of "overwhelming authority to the contrary," and collecting cases). The Court also concludes that a plain reading of *Wilson* governs this case, and this "Court is not free to deviate from the Ninth Circuit's construction of California law in *Wilson* absent a subsequent interpretation from California's courts that the

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[6] *O'Shea v. Epson Am., Inc., No. CV 09-8063 PSG (CWx), 2011 U.S. Dist. LEXIS 85273, 2011 WL 3299936, at *7-9 (C.D.Cal. July 29, 2011)*; *Smith v. Ford Motor Co., 749 F. Supp. 2d 980, 987 (N.D. Cal. 2010)* ("[F]or the omission to be material, the failure must pose 'safety concerns' . . . ."), *aff'd*, *462 F. App'x 660 (9th Cir. 2011)*; *In re Sony Grand Wega KDF—E A10/A20 Series Rear Projection HDTV Television Litig., 758 F. Supp. 2d 1077, 1095 (S.D. Cal. 2010)*; *Oestreicher v. Alienware Corp., 544 F. Supp. 2d 964, 971 (N.D. Cal. 2008)*, *aff'd*, *322 F. App'x 489 (9th Cir. 2009)*; *Falk v. Gen. Motors Corp., 496 F. Supp. 2d 1088, 1096 n.*. (N.D. Cal. 2007)* ("Moreover, plaintiffs successfully allege that the potential for failed speedometers constitutes a safety hazard.").

[7] *Cirulli v. Hyundai Motor Co., No. SACV 08-0854 AG (MLGx), 2009 U.S. Dist. LEXIS 125139, 2009 WL 5788762 (C.D.Cal. June 12, 2009)*; *Bristow v. Lycoming Engines, No. CIV. S-06-1947 LKK GGH, 2007 U.S. Dist. LEXIS 31350, 2007 WL 1106098 (E.D.Cal. Apr. 10, 2007)*.

[8] *Wilson* also acknowledges cases recognizing a broader duty of disclosure in the sale of services, rather than products. *Wilson, 668 F.3d at 1143* (citing, *e.g.,* *In re Mediscan Research, Ltd., 940 F.2d 558 (9th Cir. 1991))*. The chocolate products at issue in the present case are products, not services.

interpretation was incorrect." *Rasmussen v. Apple, Inc., 27 F. Supp. 3d 1027, 1036 (N.D. Cal. 2014)* (following *Wilson* despite concluding that its basis in California law is "subject to reasonable debate") (citing *Kona Enters., Inc. v. Estate of Bishop, 229 F.3d 877, 884 n.7 (9th Cir. 2000))*. Further, the Court agrees with Judge Seeborg and Nestlé that some bright-line limitation on a manufacturer's duty to disclose is sound policy, given the difficulty of anticipating exactly what information some customers might find material to their purchasing decisions and wish to see on product labels. *See Hodsdon, 2016 U.S. Dist. LEXIS 19268, 2016 WL 627383, at *6* ("[*Stanwood*'s and McCoy's] definition of a material omission has stunning breadth, and could leave manufacturers (chocolate or otherwise) little guidance about what information, if any, it must disclose to avoid CLRA **[**30]** or UCL liability."); Reply at 8. There are countless issues that may be legitimately important to many customers, and the courts are not suited to determine which should occupy the limited surface area of a chocolate wrapper.

HN11[] A duty to disclose under California law does not extend to all "information [that] may persuade a consumer to make different purchasing decisions." *Hodsdon, 2016 U.S. Dist. LEXIS 19268, 2016 WL 627383, at *6* (citing *Wirth, 2016 U.S. Dist. LEXIS 14552, 2016 WL 471234, at *5-6)*. Because McCoy does not allege any omission of known dangers to the safety of customers, there is no duty to disclose applicable to this case, and McCoy's CLRA claim is therefore DISMISSED. A contrary result would create "a broad obligation to disclose," which "California courts have generally rejected." *Wilson, 668 F.3d at 1141*.

Even if that were not so, the parties agree McCoy would still need to show one of the following to support a duty to disclose: (1) a fiduciary relationship between Nestlé and McCoy; (2) that Nestlé had "exclusive knowledge of material facts not known or reasonably accessible to" its customers; (3) that Nestlé actively concealed a material fact; or (4) that Nestlé had made misleading partial representations. Opp'n **[*967]** at 11 (quoting *Doe v. SuccessfulMatch.com, 70 F. Supp. 3d 1066, 1076 (N.D. Cal. 2014))*; Mot. at 15. McCoy relies solely on the "exclusive knowledge" test. Opp'n at **[**31]** 12-14. But even if "courts do not apply 'exclusivity' with . . . rigidity," *see Johnson v. Harley-Davidson Motor Co. Grp., 285 F.R.D. 573, 583 (E.D. Cal. 2012)*, it is difficult to see how *any* definition of "exclusive knowledge" could include a case where, by McCoy's own allegations: Nestlé acknowledges on a public website its suppliers' use of slave labor and the worst forms of child labor, Compl. ¶ 21; the industry acknowledged the issue in the Harkin-Engel Protocol in 2001—more than *ten years* before the statute of limitations period for McCoy's CLRA claim—and has repeatedly admitted its failure to even develop a comprehensive certification system in the years since, *id. ¶¶ 28-32*; and in 2006 the United States Department of Labor commissioned Tulane University to publish reports detailing labor abuses in the chocolate industry supply chain, *id. ¶¶ 33-37*; among other public disclosures detailed in the Complaint.

Further, even if McCoy could adequately plead that Nestlé had a duty to disclose the labor abuses in its supply chain on its product labels, it is far from clear that such information falls within the categories of representations governed by the CLRA. McCoy invokes provisions barring misrepresentation of the "source," "characteristics," and "standard" **[**32]** of a product. Opp'n at 17 (citing *Cal. Civ. Code § 1770(a)(2)*, *(5)*, *(7)*). ***HN12***[] While the CLRA provides that it "shall be liberally construed and applied to promote its underlying purposes" of consumer protection, *Cal. Civ. Code § 1760*, it does not explicitly discuss representations regarding labor practices, *see id. § 1770(a)*, and McCoy cites no authority holding that any of the enumerated categories she relies on are so broad as to encompass labor abuses. Because the Court holds that Nestlé did not have a duty to disclose labor abuses in its supply chain on its product labels, the Court declines to resolve whether misrepresentations regarding labor practices can fall within the scope of the CLRA.

D. UCL Claim

HN13[] California's UCL prohibits unfair competition, defined as "any unlawful, unfair, or fraudulent business act or practice." *Cal. Bus. & Prof. Code § 17200*. McCoy brings her claim under each of these prongs, and Nestlé argues that each must be dismissed.

The "unlawful" prong of McCoy's Complaint is based solely on Nestlé's purported violation of the CLRA. Compl. ¶ 86. As discussed above, the Court holds that McCoy fails to state a CLRA claim. Nestlé's Motion is therefore GRANTED as to this prong of McCoy's UCL claim.

The "fraudulent" prong fails for similar reasons. As Judge Seeborg **[**33]** noted in *Hodsdon*, California courts have held that "***HN14***[] '[a]bsent a duty to disclose, the failure to do so does not support a claim under the fraudulent prong of the UCL.'" *Hodsdon, 2016 U.S. Dist. LEXIS 19268, 2016 WL 627383, at *6* (quoting *Berryman v. Merit Prop. Mgmt., Inc., 152 Cal. App. 4th 1544, 1557, 62 Cal. Rptr. 3d 177 (2007))*; *see also* *Daugherty, 144 Cal. App. 4th at 838* ("We cannot agree that a failure to disclose a fact one has no affirmative duty to disclose is 'likely to deceive' anyone within the meaning of the UCL."). Because, as discussed above, the Court holds that Nestlé had no affirmative duty to disclose severe labor abuses in its supply chain on its product labels, Nestlé's Motion is GRANTED as to the "fraudulent" prong of McCoy's UCL claim.

That leaves the "unfair" prong, the test for which remains somewhat unsettled in the California courts. Courts previously held a practice to be "'unfair' . . . when it **[*968]** offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." *S. Bay Chevrolet v. Gen. Motors Acceptance Corp., 72 Cal. App. 4th 861, 886-87, 85 Cal. Rptr. 2d 301 (1999)* (citation and internal quotation marks omitted). "This test involves balancing the harm to the consumer against the utility of the defendant's practice." *Lozano v. AT & T Wireless Servs., Inc., 504 F.3d 718, 735 (9th Cir. 2007)* (citing *S. Bay, 72 Cal. App. 4th at 886*). The California Supreme Court, however, found that the *South Bay* test was "too amorphous and provide[d] too little guidance to courts and businesses" in a UCL **[**34]** case between competitors, and held instead that:

> ***HN15***[] When a plaintiff who claims to have suffered injury from a direct competitor's "unfair" act or practice invokes *section 17200*, the word "unfair" in that section means conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.

Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 20 Cal. 4th 163, 185, 187, 83 Cal. Rptr. 2d 548, 973 P.2d 527. The *Cel-Tech* court explicitly declined to decide what test applied to actions brought by consumers, as opposed to by competitors. *Id. at 197 n.12*.

In the years since *Cel-Tech*, some courts have continued to use the *South Bay* test for cases brought by consumers, while others have followed *Cel-Tech*'s lead and "require[d] that the unfairness be tied to a 'legislatively declared' policy," *Lozano v. AT & T Wireless Servs., Inc., 504 F.3d 718, 736 (9th Cir. 2007)*, or in other words, "'that the UCL claim be tethered to specific constitutional, statutory, or regulatory provisions,'" *Hodsdon, 2016 U.S. Dist. LEXIS 19268, 2016 WL 627383, at *7* (quoting *McVicar v. Goodman Global, Inc., 1 F. Supp. 3d 1044, 1054 (C.D. Cal. 2014))*. "Absent guidance from the California courts about the proper definition of an 'unfair' business practice, federal courts have applied both tests." *Id.* (citing *Lozano, 504 F.3d at 736*).

The "legislative policies" on which McCoy relies are the United Nations' International **[**35]** Labor Convention No. 182 and the United Nations' Universal Declaration of Human Rights—the former forbidding the worst forms of child labor, the latter forbidding slavery, and both having been ratified by the United States. Opp'n at 18-19. The crux of McCoy's claim, however, is not that Nestlé utilized slave labor or the worst forms of child labor, but rather that Nestlé does not disclose the existence of those labor abuses in its supply chain on the packaging of its products. McCoy has not identified any legislatively declared policy requiring such disclosure,[9] nor does she cite any authority for the proposition that where some of a manufacturer's suppliers contravene a legislatively established policy, it is

[9] While McCoy does not argue in the context of the "unfair" prong that either the CLRA or the FAL constitutes such a policy, her arguments that those statutes compel the disclosure she seeks could perhaps be transposed to this claim. For the reasons discussed above and below in the context of McCoy's CLRA and FAL claims, **[**36]** the Court holds that neither statute represents a policy requiring the disclosure of labor abuses in a supply chain on product labels.

"unfair" within the meaning of the UCL for the manufacturer to fail to disclose those violations on its product packaging. The Court declines to make that leap.

[*969] At the hearing, McCoy's counsel suggested for the first time that McCoy could amend her UCL claim to tether the "unfair" prong to the Department of Labor's listing of goods produced with child labor and forced labor, *see* 22 U.S.C. § 7112(b), and to California's Supply Chains Act, which is discussed in more detail below in the context of Nestlé's safe harbor doctrine argument, *see* Cal. Civ. Code § 1714.43. Although both statutes call for certain disclosures related to labor conditions, neither expresses any policy of disclosure on product labels. Amending McCoy's Complaint to reference those statutes would not remedy the defects of her UCL claim.

Turning to the *South Bay* balancing test, the distinction between the underlying labor practices and the failure to disclose once again undermines McCoy's claim. The slave labor and child labor alleged in the Complaint would certainly qualify as "immoral, unethical, oppressive, [and] unscrupulous." *See* S. Bay, 72 Cal. App. 4th at 887. But can the same be said about the failure to disclose Nestlé's suppliers' labor abuses on Nestlé's product packaging? Considering this issue in *Hodsdon* ***[**37]*** , Judge Seeborg held as follows:

> The harm at issue here is that Hodsdon may not have purchased Mars's chocolate products at all, or would have paid less for them, had he been aware of the prospect for child labor in Mars's supply chain. Such information is, in fact, readily available to consumers on Mars's website. Given that Hodsdon, like any other consumer, has access to information about the source of Mars's cocoa beans, the absence of such information on the packaging is not "substantially injurious to consumers" or necessarily immoral. Granting that the labor practices at issue are immoral, there remains an important distinction between them and the actual harm for which Hodsdon seeks to recover, namely his purchase of Mars's chocolate products absent any disclosure. Mars's failure to disclose information it had no duty to disclose in the first place is not substantially injurious, immoral, or unethical, and Hodsdon's UCL claim may therefore not advance.

*Hodsdon, 2016 U.S. Dist. LEXIS 19268, 2016 WL 627383, at *7*. This Court agrees. Because McCoy has not adequately alleged a violation of either test for the "unfair" prong, or a violation of the "unlawful" or "fraudulent" prongs, her UCL claim is DISMISSED.

E. FAL Claim

HN16[] The FAL makes it unlawful **[**38]** for any person "to make or disseminate or cause to be made or disseminated before the public . . . any statement . . . which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading." *Cal. Bus. & Prof. Code § 17500*. The plain language of the statute—which prohibits *making, disseminating*, or *causing* the dissemination of false or misleading statements—does not encompass omissions. Several cases have therefore held that "[t]here can be no FAL claim where there is no 'statement' at all"—or in other words that an omission, even of material facts, does not violate the FAL. *Norcia v. Samsung Telecomms. Am., LLC, No. 14-CV-00582-JD, 2015 U.S. Dist. LEXIS 110454, 2015 WL 4967247, at *8 (N.D. Cal. Aug. 20, 2015)*; *see also* *Hodsdon, 2016 U.S. Dist. LEXIS 19268, 2016 WL 627383, at *4*; *Stanwood, 941 F. Supp. 2d at 1222*.

McCoy cites three federal district court cases and two California appellate cases that purportedly held to the contrary, allowing FAL claims to proceed based on omissions. Opp'n at 16 nn.92 & 95. One of those cases actually dismissed the plaintiff's FAL claim to the extent that it was **[*970]** based on affirmative misrepresentations, and did not address the FAL claim at all in its discussion of the plaintiff's fraudulent omission theory. *Elias v. Hewlett-Packard Co., 950 F. Supp. 2d 1123, 1135-36, 1140 (N.D. Cal. 2013)* (discussing only the CLRA, UCL, and common law in the context of fraudulent omissions, **[**39]** and granting leave to amend only as to those claims). Both of the California cases were based on claims that print, television, and/or telephone advertising campaigns—which inherently consist of affirmative statements—were misleading for failure to disclose fees associated with financial products or limitations on the use of coupons. *People v. JTH Tax, Inc., 212 Cal. App. 4th 1219, 1224, 151 Cal. Rptr. 3d 728 (2013)* ("The lawsuit claimed there were misleading or deceptive statements in print and television advertising . . . ."); *People v. Toomey, 157 Cal. App. 3d 1, 17, 203 Cal. Rptr. 642 (1984)* ("We encounter little difficulty concluding that Holiday's telephone solicitations and newspaper advertisements were likely to deceive consumers."). One of the other cases, which Judge Seeborg considered in *Hodsdon*, also involved some degree of affirmative misrepresentation. *See* Hodsdon, 2016 WL 627383, at *4. There, the defendant allegedly "misrepresented that it would take 'reasonable steps' to secure Plaintiffs' Personal Information [stored on or transmitted via the defendant's network], and that [it] use[d] industry-standard encryption to prevent unauthorized access to sensitive financial information," but failed to disclose that its safeguards were inadequate and network intrusions occurred. *In re Sony Gaming Networks & Customer Data Sec. Breach Litig., 996 F. Supp. 2d 942, 990-91 (S.D. Cal. 2014)* (quoting the plaintiffs' complaint; final alteration in original).[10] That leaves **[**40]** only a decision by the Southern District of California, which held without analysis that the FAL's prohibition of untrue or misleading statements also "requires a duty to disclose" in at least certain circumstances. *Cortina v. Goya Foods, Inc., 94 F. Supp. 3d 1174, 1192 (S.D. Cal. 2015)* (holding that the plaintiffs plausibly stated a claim under the FAL where the defendant failed to disclose a "potentially dangerous substance" in the beverages it sold).

Although the *Sony* decision did not cite the alleged misrepresentations as the reason for allowing the plaintiffs' omissions claim to proceed, the Court agrees with Judge Seeborg's conclusion that the outcome is consistent with a requirement that***HN17***[] there be at least *some* affirmative misrepresentation to support a claim under the FAL. *See* Hodsdon, 2016 U.S. Dist. LEXIS 19268, 2016 WL 627383, at *4. As for *Cortina*, and also to the extent that any of the other cases discussed above are not consistent with that rule, the Court **[**41]** respectfully disagrees with their interpretation of the FAL's statutory language. Because McCoy bases her claims on pure omissions, Opp'n at 12 n.64, she fails to allege that Nestlé "ma[d]e or disseminate[d] or cause[d] to be made or disseminated" any false or misleading statement, and thus fails to state a claim under the FAL.[11]

[*971] F. Additional Defenses

In light of the holdings above that each of McCoy's claims must be dismissed, the Court need not reach the parties' arguments regarding Nestlé's remaining defenses: that the California legislature has created a "safe harbor" against McCoy's claims by enacting the Supply Chains Act, *see* Mot. at 8-11; that the equitable abstention doctrine requires dismissal, *id. at 11-13*; that the Complaint falls short of the Rule 9(b) pleading standard, *id. at 23*; and that the relief McCoy seeks would compel Nestlé's speech in violation of the *First Amendment*, *id. at 23-25*. Although this Order need not and does not resolve any of those issues, the Court briefly addresses the safe harbor argument.

"[T]he reach of the UCL is broad, but it is not without limit and **[**42]** may not be used to invade 'safe harbors' provided by other statutes." *Loeffler v. Target Corp., 58 Cal. 4th 1081, 1125, 171 Cal. Rptr. 3d 189, 324 P.3d 50 (2014)* (citing *Cel-Tech, 20 Cal. 4th at 182*). "If the Legislature has permitted certain conduct or considered a situation and concluded no action should lie, courts may not override that determination." *Id.* The California Supreme Court has described the scope of the doctrine as follows:

> A plaintiff may thus not "plead around" an "absolute bar to relief" simply "by recasting the cause of action as one for unfair competition." (*Manufacturers Life Ins. Co. v. Superior Court (1995) 10 Cal. 4th 257, 283, 41 Cal. Rptr. 2d 220, 895 P.2d 56*.) The rule does not, however, prohibit an action under the unfair competition law merely because some other statute on the subject does not, itself, provide for the action or prohibit the challenged conduct. To forestall an action under the unfair competition law, another provision must actually "bar" the action or clearly permit the conduct.

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[10] Judge Seeborg similarly distinguished a Central District decision allowing a claim to proceed under the FAL where the defendants advertised their washing machines as "Xxtra Sanitary" and "high efficiency," but allegedly concealed that the machines developed mold and were not efficient. *Hodsdon, 2016 U.S. Dist. LEXIS 19268, 2016 WL 627383, at *4* (discussing *Tait v. BSH Home Appliances Corp., No. SACV 10-00711 DOC (ANx), 2011 U.S. Dist. LEXIS 103584, 2011 WL 3941387, at *1-3 (C.D. Cal. Aug. 31, 2011))*.

[11] Moreover, even if the FAL allowed claims based on omissions, McCoy has not established any duty to disclose the information at issue, as discussed above in the context of her CLRA claim.

Cel-Tech, 20 Cal. 4th at 182-83; *see also* *Loeffler, 58 Cal. 4th at 1125* (emphasizing the requirement that another statute "*clearly permit*" the challenged conduct).

The Supply Chains Act requires certain large corporations to disclose on their websites their "efforts to eradicate slavery and human trafficking from [their] direct supply chain[s] for tangible goods offered for sale." *Cal. Civ. Code § 1714.43(a)(1)*. The statute does not "actually 'bar'" any action. *See* *Cel-Tech, 20 Cal. 4th at 183*. Nor does it "clearly **[**43]** permit" any conduct except disclosure of efforts to eradicate slavery and human trafficking. *See id.*; *Loeffler, 58 Cal. 4th at 1125*. There are also discrepancies between the subject matter of the Supply Chains Act and the disclosure McCoy seeks in this case. As Judge Seeborg noted in *Hodsdon*, the statute "concerns slavery and human trafficking, not [other forms of abusive] child labor," and "the legislative history is silent about whether the legislature contemplated disclosure on labels." *Hodsdon, 2016 U.S. Dist. LEXIS 19268, 2016 WL 627383, at *9*. Moreover, there is a difference between, on one hand, advertising the steps a company has taken to reduce slavery in its supply chain (as the statute requires), and on the other, disclosing that such slavery persists (as McCoy seeks here). That the legislature mandated the former in certain instances does not necessarily indicate a conclusion that the latter could never be required under existing consumer protection laws.

The Ninth Circuit very recently addressed the safe harbor doctrine in *Ebner v. Fresh, Inc.*, a case alleging deception where a cosmetic product label disclosed the net weight of the product contained in a tube but failed to disclose that "only 75% **[*972]** of that product is reasonably accessible." *Ebner, __ F.3d __, No. 13-56644, Slip **[**44]** Op. at 8, 818 F.3d 799, 2016 U.S. App. LEXIS 4875, 2016 WL 1056088, at *3 (9th Cir. Mar. 17, 2016)*. The panel held that the disclosure of the actual net weight fell within the safe harbor because "[b]oth federal and California law affirmatively require cosmetic manufacturers to include an accurate statement of the net weight of included cosmetic product." *Id.* The plaintiff also brought an omission claim, however, arguing that failure to explain how much of the product was accessible rendered the accurate weight disclosure "deceptive and misleading." *Id.* The panel held that "[u]nlike a claim seeking to alter the net weight declaration itself, this [omission] claim does not fall within the safe harbor because there is no law expressly permitting the omission of supplemental statements." *Id.* Similarly, here, Nestlé has not identified any law "expressly permitting the omission of" disclosures on product labels regarding slave labor and the worst forms of child labor in a product's supply chain. *See id.*

The Court recognizes that recent district court decisions have held that the Supply Chains Act creates a safe harbor against claims based on non-disclosure of labor abuses in a supply chain. *Wirth, 2016 U.S. Dist. LEXIS 14552, 2016 WL 471234, at *6-9*; *Barber, 2015 U.S. Dist. LEXIS 170608, 2015 WL 9309553, at *2-5*; *De Rosa, 2016 U.S. Dist. LEXIS 5497, 2016 WL 524059* (summarily dismissing for the reasons stated in *Barber*); *Hughes, 2016 U.S. Dist. LEXIS 5508, 2016 WL 524057* (same).[12] Because this Court holds for **[**45]** the reasons stated above that California's consumer protection laws do not create any obligation to make the disclosures McCoy seeks, the question of whether the Supply Chains Act would shield against such a duty is ultimately moot, and the Court need not and does not resolve whether *Wirth* and *Barber* are correct or applicable to the case at hand. The Court nevertheless echoes Judge Seeborg's skepticism that the safe harbor doctrine is as broad as Nestlé contends.

IV. CONCLUSION

For the reasons stated above, McCoy's claims under the CLRA, the UCL, and the FAL fail to state a claim on which relief may be granted, and are therefore DISMISSED. McCoy has made clear that she does not intend to pursue a claim based on affirmative misrepresentations. *See* Opp'n at 12 n.64. The Court therefore finds that leave to amend would be futile, and dismisses this action with prejudice.

IT IS SO ORDERED.

Dated: March 29, 2016

/s/ Joseph C. Spero

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[12] Appeals of all of these cases are currently pending before the Ninth Circuit.

JOSEPH C. SPERO

Chief Magistrate Judge

Buena Vista Estates, Inc. v. Santa Fe Solid Waste Mgmt. Agency

United States District Court for the District of New Mexico

March 30, 2016, Filed

Civ. No. 15-cv-217 JCH

Reporter
2016 U.S. Dist. LEXIS 191812 *

BUENA VISTA ESTATES, INC., a New Mexico Corporation, Plaintiff, vs. SANTA FE SOLID WASTE MANAGEMENT AGENCY and SANTA FE COUNTY, Defendants.

Core Terms

immunity, market participant, Landfill, zoning, Moratorium, Antitrust, regulation, state action, anticompetitive, basalt, zoning authority, billboards, sand and gravel, anti trust law, anticompetitive conduct, aggregate, solid waste, allegations, municipal, blasting, disposal, factual allegations, ordinance, argues, government entity, zoning power, conspiracy, Electric, monopoly, asserts

Counsel: **[*1]** For Buena Vista Estates, Inc, a New Mexico Corporation, Plaintiff: Pete Domenici, Jr., LEAD ATTORNEY, Jeanne C. Washburn, Domenici Law Firm PC, Albuquerque, NM.

For Santa Fe Solid Waste Management Agency, Defendant: Frank D. Weissbarth, James P Sullivan, LEAD ATTORNEYS, Brennan & Sullivan, P.A., Santa Fe, NM.

For Santa Fe County, Defendant: Carolyn A. Wolf, LEAD ATTORNEY, Montgomery & Andrews, PA, Santa Fe, NM.

Judges: Judith C. Herrera, UNITED STATES DISTRICT JUDGE.

Opinion by: Judith C. Herrera

Opinion

MEMORANDUM OPINION AND ORDER

This matter is before the Court on *Defendants' Motion To Dismiss and Supporting Authority*. [Doc. 5] Defendants move to dismiss the Complaint under *Federal Rule of Civil Procedure 12(b)(6)* for failure to state a claim. Defendants filed a Response [Doc. 17], and Plaintiff filed a Reply [Doc. 18].

Having reviewed the motion, briefs, and relevant law, the Court concludes that the motion should be granted. The case will therefore be dismissed.

FACTUAL BACKGROUND

The following summary of statements and factual allegations,[1] taken from the Complaint, views the facts in the light most favorable to Plaintiff. [Doc. 1, pp. 1-12] *See* Archuleta v. Wagner, 523 F.3d 1278, 1283 (10th Cir. 2008).

The Santa Fe Solid Waste Management Agency ("SFSWMA") was created in 1995 as a joint authority of the City **[*2]** of Santa Fe and Santa Fe County ("SFC"). The purpose of SFSWMA was to create, maintain, and operate a landfill for use by residents of the City of Santa Fe and Santa Fe County.

SFSWMA began operations at the Caja del Rio Landfill in 1997. Caja del Rio has a solid waste landfill permit. The original plan called for soil cover from each disposal cell to be removed and stored until used for final covers of compacted solid waste. The basalt bedrock was to be blasted into lumps and transported to a storage waste (tailings) pile located next to the landfill disposal area. For many years, the basalt was considered a waste product.

Randall Kippenbrock, director of SFSWMA, later determined that the basalt could be crushed and sold as aggregate. SFSWMA and SFC entered into an eight-year contract with Del Hur Industries to crush and sell aggregate materials from the Caja del Rio Landfill. Kippenbrock's July 23, 2014 letter to the Board of County Commissioners states that it is estimated there is a stockpile of 1.6 million tons of unprocessed basalt at the landfill, which is anticipated to take eight to sixteen years to sell. [Doc. 1, pp. 16-17] The letter expresses the opinion that another basalt **[*3]** rock quarry is not needed in Santa Fe County.

The Complaint asserts: "In the operating agreement between SFSWMA, SFC and Del Hur Industries, rather than indicate they will operate under an appropriate County special use permit and County conditions, they attempt to contract for typical and required special use provision in lieu of obtaining appropriate zoning and special use permits." [Doc. 1, p. 6, ¶ 2] The Complaint further asserts: "SFSWMA and SFC knowingly formed the mining operation of Caja del Rio Landfill without proper permitting and zoning for the operation." [Doc. 1, p. 6, ¶ 3] There has been no public notice by SFSWMA of Caja del Rio's aggregate production blasting and sale of aggregate.

On November 8, 2013, Plaintiff Buena Vista Estates submitted an application to SFC for approval to create a mining zone to allow the extraction of aggregate for use as a construction material. After various reviews and hearings, the second public hearing before the Board of County Commissioners ended on August 12, 2014, without Plaintiff's application having yet been approved.

On September 16, 2014, the Board of County Commissioners of Santa Fe County adopted Ordinance No. 2014-8: "An Emergency **[*4]** Interim Development Ordinance Imposing a Twelve Month Moratorium on Development Approvals or the Issuance of Development Permits for Specified Developments of Countywide Impact" (the "Moratorium"). [Doc. 1 (Exhibit B), pp. 18-22] The Moratorium only applies to: (1) landfills, (2) junkyards, and (3) "sand and gravel extraction activity requiring blasting." [Doc. 1, p. 20, Sec. 4] The Moratorium does not apply to "sand and gravel extraction that does not require blasting." [Doc. 1, p. 20, Sec. 5.5]

The Moratorium recites that: the Board of County Commissioners previously found that Developments of Countywide Impact ("DCIs") have potential for far reaching effects on the community; DCIs are "developments that would place major demands on public facilities, the County's capital improvement plan and budget, and/or have the potential to affect the environment and public health, safety, and welfare beyond the impacts on immediately neighboring properties"; DCIs have the potential to create serious adverse noise, light, odor and vibration, explosive hazards, traffic congestion, and burdens on county emergency response services. [Doc. 1, p. 19, Sec. 3.1] The Board therefore found that special regulation of DCIs was **[*5]** necessary for the following purposes:

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[1] The Court notes that the Complaint mixes factual allegations and legal assertions and conclusions in sections entitled "Background" and "Introduction." This summary, taken from those sections of the Complaint, includes some conclusions of law. The Court accepts as true all well pleaded facts, but does not accept as true legal conclusions or legal conclusions couched as factual allegations. *See* Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). Where necessary to the Court's decision, any allegations not accepted as true will be specifically discussed below; where not necessary to the decision, however, the Court will not separate legal conclusions from factual allegations.

3.1.1. to protect the health, safety and welfare of the citizens, residents, and businesses of the County from the potentially harmful or hazardous impacts of DCIs;

3.1.2. to ensure short and long-term compatibility (both on-site and offsite) of DCIs and the County at large;

3.1.3. to preserve the quality and sustainability of life, the economy, infrastructure, environment, natural and cultural resources, and natural landscapes; and

3.1.4. to protect the degradation of air, surface water and groundwater, soils, environmentally sensitive lands and visual and scenic qualities.

[Doc. 1, p. 19] The Board found that existing regulations of the specified DCIs[2] were non-existent or inadequate to meet the special regulatory needs identified in Sections 3.1.1 to 3.1.4, and that a twelve-month moratorium on new applications and approvals was necessary to allow development of regulations for these DCIs. [Doc. 1, p. 19, Secs. 3.3, 3.4, 3.6]

The Moratorium states that it is based on the County's "express and implied zoning authority and police power," under *NMSA 1978, § 3-21-1* (2007) (granting counties zoning authority, including the power to regulate and restrict the "location and use of buildings, structures, and land **[*6]** for trade, industry, residence or other purposes"), and *NMSA 1978, § 4-37-1* (1975) (granting counties "those powers necessary and proper to provide for the safety, preserve the health, promote the prosperity and improve the morals, order, comfort and convenience of any county or its inhabitants").

PROCEDURAL BACKGROUND

Plaintiff filed the Complaint on March 13, 2015. [Doc. 1] Count I asserts a claim under the *Sherman Antitrust Act, 15 U.S.C. § 1*. Count II asserts a claim under the *New Mexico Antitrust Act, NMSA 1978, §§ 57-1-1 to -19* (1995).

This Court has jurisdiction over this case. *See* *28 U.S.C. § 1337*; *15 U.S.C. §§ 15*, *26*. The Court has jurisdiction over the claim under the New Mexico Antitrust Act. *See* *28 U.S.C. § 1367*.

LEGAL STANDARDS

I. *Rule 12(b)(6)*

On a motion to dismiss, the court assesses the legal sufficiency of the allegations contained within the four corners of the complaint. *Archuleta v. Wagner, 523 F.3d 1278, 1281 (10th Cir. 2008)*. *Rule 8* requires the complaint to contain "a short and plain statement of the claim showing that the pleader is entitled to relief." *Fed. R. Civ. P. 8(a)(2)*. The court accepts as true all well-pleaded facts, viewing them in the light most favorable to the plaintiff and allowing all reasonable inferences in favor of the plaintiff. *Archuleta, 523 F.3d at 1283*. This deference is inapplicable to legal conclusions in the complaint. *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. The court "should disregard all conclusory **[*7]** statements of law and consider whether the remaining specific factual allegations, if assumed to be true, plausibly suggest the defendant is liable." *Kansas Penn Gaming, LLC v. Collins, 656 F.3d 1210, 1214 (10th Cir. 2011)*; *see* *Iqbal, 556 U.S. at 678*. The court does not accept as true a legal conclusion couched as a factual allegation. *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*.

The complaint "does not need detailed factual allegations," but the factual allegations "must be enough to raise a right to relief above the speculative level." *Id.* The complaint must go beyond "an unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal, 556 U.S. at 678*. Conclusory statements unsupported by factual allegations are not sufficient. *Id.; Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991)*. "Threadbare recitals of the

[2] The reference is to the DCIs specified in Section 4 of the Moratorium: landfills, junkyards, and sand and gravel extraction activity requiring blasting.

elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal, 556 U.S. at 678*; *see* *Twombly, 550 U.S. at 555* (holding that mere "labels and conclusions" and "formulaic recitation of the elements of a cause of action" are insufficient); *Robbins v. Oklahoma, 519 F.3d 1242, 1247 (10th Cir. 2008)*.

The allegations of fact must "state a claim to relief that is plausible on its face." *Twombly, 550 U.S. at 570*; *see* *Archuleta, 523 F.3d at 1281, 1283*. "The allegations must be enough that, if assumed to be true, the plaintiff plausibly (not just speculatively) has a claim for relief." *Robbins, 519 F.3d at 1247*. The Tenth Circuit observed that "plausible" cannot mean "likely to be true," but "must refer to the scope of the allegations in a **[*8]** complaint: if they are so general that they encompass a wide swath of conduct, much of it innocent, then the plaintiffs 'have not nudged their claims across the line from conceivable to plausible.'" *Id.* (quoting *Twombly, 550 U.S. at 570*).

II. Antitrust Immunity

Section 1 of the Sherman Act makes unlawful "every contract, combination ... or conspiracy, in restraint of trade or commerce among the several States." *15 U.S.C. § 1*. In *Parker v. Brown*, the Supreme Court established "state action immunity." *Parker v. Brown, 317 U.S. 341, 350-51, 63 S. Ct. 307, 87 L. Ed. 315 (1943)*. *Parker* held that the *Sherman Act* was not intended "to restrain state action or official action directed by a state." *Id. at 351*. "States may regulate economic activity as they wish, pursuing even patently anticompetitive policies without having to look over their shoulders to see if Congress approves." *Kay Elec. Coop. v. City of Newkirk, 647 F.3d 1039, 1042 (10th Cir. 2011)*.

Because substate governmental entities—including municipalities and counties—are not sovereign, state action immunity under *Parker* does not apply to them directly, but they do receive immunity "when they act 'pursuant to state policy to displace competition with regulation or monopoly public service.'" *FTC v. Phoebe Putney Health Sys., Inc., 568 U.S. 216, 133 S. Ct. 1003, 1010, 185 L.Ed. 2d 43 (2013)* (quoting *City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 413, 98 S. Ct. 1123, 55 L. Ed. 2d 364 (1978)* (plurality opinion)). "[I]f a *state* expressly adopts an anticompetitive policy and chooses to use its municipal subdivisions as instruments **[*9]** to effect that policy, then the federal-state comity concerns undergirding the *Parker* state immunity doctrine *do* come into play." *Kay Elec. Coop., 647 F.3d at 1042*. A municipality or county "shares the state's 'immunity' when but only when it is implementing anticompetitive policies authorized by the state." *Id.*

DISCUSSION

I. Federal *Antitrust Law*

Citing the Sherman Antitrust Act, *15 U.S.C. § 1*, Count I of the Complaint asserts that SFC and SFSWMA "have unreasonably challenged restraint of trade in the relevant markets by knowingly joining together to operate an unpermitted and illegally zoned sand and gravel operation while opposing legal competition." [Doc. 1, p. 12] Defendants characterize the Complaint as alleging an antitrust violation based on the conjunction of two acts: (1) operating a sand and gravel operation at the Caja del Rio Landfill, including blasting; and (2) at the same time imposing a moratorium on granting new permits and approvals for sand and gravel extraction activities involving blasting. [Doc. 5, p. 2] Defendants argue that SFC is immune from federal and state antitrust laws.

As the Court understands the Complaint and Response, Plaintiff agrees with Defendants' characterization of the basis for its antitrust **[*10]** claims: anticompetitive conduct by engaging in its own sand and gravel business by marketing basalt, while SFC's Moratorium prevents the entry of new parties into that business. [Doc. 17, pp. 2-3] Plaintiff responds that SFC is deprived of immunity under the "market participant" exception:

> The Defendants are not immune from federal and state antitrust claims because they are market participants in the local and regional sand and gravel market, utilizing anti-competitive practices.
>
> . . . .

> Santa Fe County's antitrust liability arises first from its anticompetitive use of zoning powers. Though municipalities have been given wide latitude to engage in anticompetitive practice through the use of zoning ordinances following the Supreme Court's decision in *City of Columbia, 499 U.S. 365, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991)*, Santa Fe County's use of them exceeds the scope contemplated by *City of Columbia* because the County is also a market participant in the area it is regulating.

[Doc. 17, pp. 2, 10; *see id.* p. 7 ("The facts, accepted as true, show and support that the Defendants are market participants.")] Thus Plaintiff concedes that SFC would normally have state action immunity when utilizing its zoning powers. Plaintiff presents two arguments that SFC was deprived **[*11]** of immunity in this case: (A) Plaintiff relies squarely on the "market participant exception"; and (B) Plaintiff relies on the letter from Randall Kippenbrock, Executive Director of SFSWMA.

A. State Action Immunity

Defendants assert that the Moratorium is authorized by state law. As the Moratorium recites, its enactment is authorized under New Mexico statute, *Section 3-21-1*, granting counties zoning authority, including the power to regulate and restrict the "location and use of buildings, structures, and land for trade, industry, residence or other purposes." "Restrictions upon the use of one's property are imposed by state and local governments pursuant to police power." *Brazos Land, Inc. v. Board of County Comm'rs, 1993-NMCA-013, ¶ 29, 115 N.M. 168, 848 P.2d 1095, 1101*. "The United States Supreme Court has long held that governments may, pursuant to police power, adopt zoning ordinances that regulate the manner in which real property may be used." *Id.* When zoning is used to promote the public interest, it is upheld as a legitimate exercise of the police power. *Id.* Applying these principles, the New Mexico Court of Appeals upheld the county's enactment of a moratorium for the purpose of promulgating more stringent waste disposal requirements. *Id. ¶¶ 29-30, 848 P.2d at 1101*. As in *Brazos Land*, enactment of the **[*12]** Moratorium by SFC is an exercise of the zoning authority granted by the State of New Mexico under *Section 3-21-1*. Plaintiff does not dispute this argument or conclusion.

Defendants further argue that the exercise of zoning authority is inherently anticompetitive. Thus SFC's grant of zoning authority allowed suppression of competition.

In *Omni*, the Supreme Court held that the city's ordinance restricting the size, location, and spacing of billboards necessarily protected existing billboards against some competition from newcomers. *City of Columbia v. Omni Outdoor Advert., Inc., 499 U.S. 365, 373, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991)*. Thus, the Court held, the city was prima facie entitled to *Parker* immunity. Columbia Outdoor Advertising ("COA") controlled more than 95% of the relevant market by 1981. *Id. at 367*. The mayor and other city council members were personal friends of COA's majority owner; COA and its officers occasionally contributed funds and free billboard space to their campaigns. *Id.* Omni began erecting billboards in 1981. *Id. at 368*. COA met with City officials to seek enactment of zoning ordinances restricting billboard construction; ultimately, in 1982, the City passed a new ordinance restricting billboards, which obviously benefitted COA and severely hindered Omni's ability to compete. *Id.* Omni brought **[*13]** an antitrust suit, asserting a "secret anticompetitive agreement" in which the City and COA would each use its power and resources to protect COA's monopoly position. *Id. at 367-68*.

The Supreme Court recognized in *Omni* that the state statutes under which the City acted authorized municipalities to regulate the use of land and the construction of buildings and other structures, and that these statutes authorized the City to regulate billboards. *Id. at 370-71*. The Court rejected the argument that the City would lose *Parker* immunity if the City acted beyond its delegated authority—i.e., if the nature of its regulation were substantively or procedurally defective; to allow such a challenge under ***antitrust law*** would undermine *Parker* and the federalism interests it was designed to protect. *Id. at 372-73*. State action immunity requires that there be "'clear articulation of a state policy to authorize anticompetitive conduct,'" at least as the "foreseeable result." *Id.* (quoting *Town of Hallie v. City of Eau Claire, 471 U.S. 34, 40, 42, 105 S. Ct. 1713, 85 L. Ed. 2d 24 (1985))*. The Supreme Court held that the zoning authority granted to the City entailed authority to suppress competition: "The very purpose of zoning regulation is to displace unfettered business freedom in a manner that regularly has the effect of preventing normal **[*14]** acts of competition, particularly on the part of new entrants." *Id. at 373* (emphasis added). It was not required that suppression of competition was explicitly permitted; instead, the Court held that it is enough "if suppression of competition is the 'foreseeable result' of what the statute authorizes." *Id. at 372-73*. "A municipal ordinance restricting the size, location, and spacing of billboards (surely a common form of zoning) necessarily protects existing billboards against some competition from newcomers." *Id. at 374*. The Supreme Court concluded that the City's restriction of billboard construction was prima facie entitled to *Parker* immunity. *Id. at 374*.

As in *Omni*, SFC was given the authority to regulate by the state's grant of zoning power, and that zoning power may have the effect of suppressing competition. As in *Omni*, the Moratorium "necessarily protected existing [sand and gravel extraction businesses] against some competition from newcomers." As in *Omni*, the very purpose of SFC's Moratorium was "to displace unfettered business freedom in a manner that regularly has the effect of preventing normal acts of competition, particularly on the part of new entrants" like Plaintiff Buena Vista Estates. SFC determined that **[*15]** the Moratorium was necessary for the purposes set forth in Sections 3.1.1 to 3.1.4—purposes in accordance with those in *NMSA 1978, § 3-21-1* (2007).

Citing *Kay Electric*, Plaintiff argues that "the Tenth Circuit noted that a state hasn't authorized all forms of municipal anticompetitive conduct just because it has authorized some," and the county "must demonstrate that the state authorized the specific anticompetitive conduct at issue," this "particular monopolistic conduct." [Doc. 17, pp. 12-13] *See Kay Elec. Coop., 647 F.3d at 1044*. If Plaintiff means to say that the state must have specifically authorized SFC to restrict new sand and gravel extraction activity requiring blasting, Plaintiff misapprehends the relevant principles. The *Omni* Court rejected this degree of specificity. *See Omni, 499 U.S. at 373 n.4*. The anticompetitive conduct at issue specifically authorized by the state is zoning regulation, which is inherently anticompetitive and which "regularly has the effect of preventing normal acts of competition, particularly on the part of new entrants," as stated in *Omni, 499 U.S. at 373*. The state has specifically authorized SFC to exercise zoning authority, regulating and restricting the use of land. *See NMSA 1978, § 3-21-1*. The Moratorium regulating one use of land is an incident of this specific grant of general **[*16]** zoning authority.

Citing *Midcal*, Plaintiff mentions that in addition to a clearly articulated state policy, there must be active supervision by the state. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105, 100 S. Ct. 937, 63 L. Ed. 2d 233 (1980)*. [Doc. 17, p. 12] Plaintiff does not, however, argue that this requirement applies here and was not satisfied. And, as Defendants observe in their Reply, this case involves local governmental entities that "are not subject to the 'active state supervision requirement.'" *Phoebe Putney Health Sys, 133 S. Ct. at 1011* (stating that active state supervision requirement only applies to private parties). [Doc. 18, pp. 5-6] The reason is that local government entities "have less of an incentive to pursue their own self-interest under the guise of implementing state policies." *Id.* There is no need to require the state to actively supervise a local government entity's execution of a properly delegated function—here, zoning regulation. *See Town of Hallie v. City of Eau Claire, 471 U.S. 34, 46-47, 105 S. Ct. 1713, 85 L. Ed. 2d 24 (1985)*.

Defendants argue that their operation of the Landfill is authorized by state law. [Doc. 5, pp. 6-7] Both cities and counties are authorized to regulate collection and disposal of refuse, and to operate refuse disposal areas and facilities including landfills. *See NMSA 1978, § 3-48-2* (1965) (city); *NMSA 1978, § 4-56-3* (1971) (county). SFSWMA was created to jointly exercise this authority **[*17]** to operate a landfill. [Doc. 5, p. 7 & n.1 (citing *Joint Powers Agreement Act*, authorizing public agencies to create an administering agency to jointly exercise a common power, *NMSA 1978, §§ 11-1-3*, *11-1-5*)] As Plaintiff admits in the Complaint, "Caja del Rio operates under EPA and State standards for landfills, and has a solid waste landfill permit." [Doc. 1, p. 3] Defendants assert that their operation of the Landfill, including the basalt processing operations, is properly authorized.

The Court recognizes, however, that Plaintiff alleges that the Landfill is "unpermitted and illegally zoned." Although the Complaint "does not need detailed factual allegations," these overly general and conclusory allegations are not sufficient. *Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929*; *see Iqbal, 556 U.S. at 678*; *Hall, 935 F.2d at 1110*. The Court accepts only well pleaded facts, not conclusory allegations. *See Mitchell v. King, 537 F.2d 385, 386 (10th Cir. 1976)*. Moreover, these allegations appear to be legal conclusions couched as factual allegations—which the Court does not accept as true on a motion to dismiss. *See Twombly, 550 U.S. at 555*. The

Complaint would need more detailed factual allegations about the existing permit and zoning, together with citation of applicable laws or regulations regarding permitting and zoning; a determination that the Landfill's activities were "unpermitted" **[*18]** or "illegally zoned" would be a conclusion of law reached by application of those laws or regulations to the facts. The Court disregards conclusory statements of law in considering a *Rule 12(b)(6)* motion. *See Kansas Penn Gaming, LLC, 656 F.3d at 1214*.

The Court further observes that Plaintiff undercuts its argument of permit and zoning violations somewhat by admitting: "The landfill permit and the Solid Waste Act may contemplate and to a limited extent govern the blasting and excavation of basalt rock"; and: "even if a sold waste permit under the Solid Waste Act allows blasting and stockpiling of waste basalt material, it does not permit the processing, crushing, screening, stockpiling and transporting of the aggregate materials." [Doc. 17, pp. 3, 9] These admissions appear to show that Plaintiff's antitrust claims are based instead on the conjunction of the Moratorium with participation in the market.

Even if the Court were to take as true the allegations of an "unpermitted and illegally zoned" Landfill, however, that does not affect the antitrust analysis discussed above. As the Supreme Court observed in *Omni*, the "antitrust court" is not transformed into "the standard reviewer" whenever a plaintiff alleges "that the governmental body, **[*19]** though possessing the power to engage in the challenged conduct, has actually exercised its power in a manner not authorized by state law." *Omni, 499 U.S. at 371-72*. Once it has been established that SFC has zoning authority under state statute, and that both a city and county have authority to establish and operate a landfill, further review of exactly how that authority was exercised is not "a federal antitrust job," but instead a matter for state review upon a claim of state statutory violations. *Id. at 372*.

The Court concludes that Defendants are "prima facie entitled to *Parker* immunity," as in *Omni. 499 U.S. at 374*. Plaintiff makes two arguments that Defendants are deprived of this state action immunity. Plaintiff's primary argument is that the "market participant exception" precludes state action immunity. [Doc. 17, pp. 2, 7, 10-11] In addition, Plaintiff attached the Kippenbrock letter to the Complaint, and argues that this letter shows "Defendants' clear intention and efforts to maintain a monopoly."

B. Market Participant Exception

Plaintiff argues that "Defendants are not immune from federal and state antitrust claims because they are market participants in the local and regional sand and gravel market, utilizing anti-competitive **[*20]** practices." [Doc. 17, p. 2] But the Supreme Court has not established a "market participant exception." In *Omni*, the Supreme Court did not adopt such an exception—instead, merely recognizing in dicta a "possible" exception to the broad principle reaffirmed in that case: "We reiterate that, with the possible market participant exception, *any* action that qualifies as state action is '*ipso facto* ... exempt from the operation of the antitrust laws.'" *Omni, 499 U.S. at 379* (quoting *Hoover v. Ronwin, 466 U.S. 558, 568, 104 S. Ct. 1989, 80 L. Ed. 2d 590 (1984))*; *see id. at 374-75* (observing "this immunity does not necessarily obtain where the State acts not in a regulatory capacity but as a commercial participant in a given market"). In 2013, the Supreme Court recognized that it had not established a market participant exception, stating that *Omni* had left the question open and declining to "recognize and apply a 'market participant' exception to state-action immunity" because the argument was not raised by the parties or ruled on by the lower courts. *Phoebe Putney Health Sys., Inc., 133 S. Ct. at 1010 n.4*.

The only authority cited by Plaintiff in support of a market participant exception is the Tenth Circuit opinion in *Kay Electric Cooperative*. [Doc. 17, pp. 11-12] Plaintiff argues: "The State of New Mexico did not intend to establish a municipal aggregate **[*21]** materials monopoly through the conferral of zoning powers and the grant of a solid waste disposal permit"; and: "The state did not clearly articulate or affirmatively express a policy favoring Defendants' monopolization of aggregate reclamation and sale simply because Caja del Rio Landfill was given a solid waste disposal permit and engages in solid waste collection and disposal activities." [Doc. 17, p. 11] Plaintiff's argument concludes: "Therefore, the anticompetitive conduct Santa Fe County has engaged in by placing a moratorium on Plaintiff's permit application while concurrently favoring and participating in their own aggregate reclamation and sale operation could not have been contemplated by the legislature as a consequence of the *Solid*

Waste Act." [Doc. 17, pp. 11-12] Plaintiff's argument misapprehends the applicable principles, erring in focusing on the Landfill's solid waste permit. The point is that the zoning authority granted to SFC under *NMSA 1978, Section 3-21-1*, constitutes a "clear articulation of a state policy to authorize anticompetitive conduct," because the "very purpose of zoning regulation is to displace unfettered business freedom in a manner that regularly has the effect of preventing **[*22]** normal acts of competition, particularly on the part of new entrants." *Omni, 499 U.S. at 372-73* (internal quotation marks omitted). It is not required that the state be shown to have specifically intended that a "municipal aggregate materials monopoly" result. *See* *City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 415, 98 S. Ct. 1123, 55 L. Ed. 2d 364 (1978)* ("This does not mean, however, that a political subdivision necessarily must be able to point to a specific, detailed legislative authorization before it properly may assert a *Parker* defense to an antitrust suit."); *Paragould Cablevision, Inc. v. City of Paragould, 930 F.2d 1310, 1312 (8th Cir. 1991)* (stating *Louisiana Power & Light Co.* "has made clear that a specified, detailed legislative authorization of monopoly service need not exist to infer the necessary state intent" (internal quotation marks omitted)). What is required is that the state authorized SFC to regulate zoning, despite the fact that anticompetitive conduct of some kind may be the regular result. *See* *Omni, 499 U.S. at 373*; *Louisiana Power & Light Co., 435 U.S. at 415* (stating that an "adequate state mandate for anticompetitive activities of cities and other subordinate governmental units exists when it is found from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of" (internal quotation marks omitted; emphasis added)).

As the Reply argues, **[*23]** Plaintiff's description of the alleged anticompetitive behavior here is substantially similar to the circumstances of *Omni* (unless a "market participant exception" were applicable). In *Omni*, the City's use of its zoning power to restrict billboards favored an existing billboard business and was detrimental to a newer company's ability to compete. Here, SFC's use of its zoning power favored the existing operation, which marketed basalt, and was detrimental to a newcomer to the market, Plaintiff.

The distinction between *Omni* and this case is that SFC has a commercial interest in the existing operation. Plaintiff argues that this distinction is significant because of the market participant exception, which Plaintiff asserts was "articulated by the Tenth Circuit in *Kay Electric*." [Doc. 17, p. 11] As Defendants argue, however, *Kay Electric* did not adopt the market participant exception. [Doc. 18, pp. 3-4]

Instead, *Kay Electric* involved the issue of whether the state had authorized anticompetitive conduct. The Tenth Circuit concluded that the state "expressed a clear preference for, not against, competition" for electricity services in annexed areas, with statutes specifically sanctioning **[*24]** a "battle for electricity customers in annexed areas." *Kay Electric, 647 F.3d at 1044-45*. Contrasting the circumstances in *Hallie*, in which "the city's conduct was just the sort of thing the state legislature had authorized," the Tenth Circuit stated that "there's nothing on Oklahoma's statute books to suggest that the legislature authorized the species of antitrust violation alleged here—refusing to provide an end customer one service (sewage) unless he purchased something entirely different (electricity)." *Id. at 1046-47*. The fact that the city was a market participant was merely an incidental fact; the decision turned on the fact that the state had done the opposite of authorizing anticompetitive conduct. The Tenth Circuit did not use the term "market participant exception," or cite the dicta in *Omni* regarding a "market participant exception." Neither the language nor the analysis of *Kay Electric* supports Plaintiff's reliance on a market participant exception having been adopted in the Tenth Circuit.

Defendants further argue that they were not market participants, at any event, citing authority that a governmental entity does not become a market participant because of actions incidental to its primary activity. [Doc. 18, p. 5] **[*25]** *See* *Wooster Indus. Park, LLC v. City of Wooster, 55 F. Supp. 3d 990 (N.D. Ohio 2014)* (holding City not a market participant when it earned rental income from permitting company to collocate on a cell tower owned by City); *Wheeler v. Beard, No. Civ. A. 03-4826, 2005 U.S. Dist. LEXIS 9778, 2005 WL 1217191 (E.D. Pa. 2005)* (unpublished)[3] (holding that Department of Corrections' agreements with vendors to provide goods to inmates was "purely incidental" to the primary purpose of operating prisons). This analysis gains credence from the Supreme Court's citation in *Omni* of an example of what it would mean to be a "market participant": *Union Pacific R. Co. v. United States, 313 U.S. 450, 61 S. Ct. 1064, 85 L. Ed. 1453 (1941)*. In that case, Kansas City, Kansas, constructed,

[3] The Court cites this and other unpublished opinions for their persuasive value. *See* ***10th Cir. R. 32.1(A)***.

and was the owner and operator of, a wholesale produce market. The project was formulated in conjunction with the Union Pacific Railroad, and the City gave rebates and concessions to entice prospective tenants to move from an old market (in Kansas City, Missouri) to the new one. *Id. at 457-58*. The rebates and concessions were held unlawful under the *Elkins Act*, which prohibits concessions in respect to transportation. *Id. at 1072*. In citing *Union Pacific* as an example of a market participant, the Supreme Court in *Omni* stated that Kansas City, Kansas, was acting "not in a regulatory capacity but as a commercial participant in a given market." *Omni, 499 U.S. at 374-75*. In *Union Pacific*, no regulatory purpose was involved. In contrast, **[*26]** SFC and SFSWMA are acting primarily in their state-approved capacities to exercise zoning authority and to operate waste disposal facilities; sale of basalt is a mere byproduct of these primary roles. The Court concludes, however, that, in absence of persuasive authority for adoption of a market participant exception, it need not reach this further argument.

Plaintiff assumes that a market participant exception exists. Plaintiff provides no authoritative caselaw, and no reasoned or persuasive analysis, to support the adoption of a market participant exception. Plaintiff provides no analysis of the limits of such an exception when sale of basalt is merely a byproduct of Defendants' acting in their regulatory capacity, rather than Defendants' primary activity. Without authority from the Supreme Court or the Tenth Circuit, this Court declines to adopt a market participant exception.

The Court thus concludes that Defendants' sale of basalt does not deprive them of state action immunity under *Parker*.

C. Randall Kippenbrock letter

Plaintiff argues that the Kippenbrock letter shows "Defendants' clear intention and efforts to maintain a monopoly on a sand and gravel operation—not just landfill **[*27]** operations." [Doc. 17, p. 11] Defendants' Motion argues that this communication is protected by the *Noerr-Pennington* doctrine, which holds that: "The federal antitrust laws also do not regulate the conduct of private individuals in seeking anticompetitive action from the government." *Omni, 499 U.S. at 379-80*; *see* *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 141, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961)*; *United Mine Workers v. Pennington, 381 U.S. 657, 670, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965)*. [Doc. 5, p. 10] "That a private party's political motives are selfish is irrelevant: '*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose.'" *Omni, 499 U.S. at 380* (quoting *Mine Workers, 381 U.S. at 670*). Once a governmental entity "establishes it is entitled to state action immunity, the subjective motivation of the actors involved in the decisionmaking process should not come into play." *Allright Colorado, Inc. v. City of Denver, 937 F.2d 1502, 1511 (10th Cir. 1991)*; *see* *Omni, 499 U.S. at 377*.

Under the *Noerr-Pennington* doctrine, Kippenbrock's letter—even if it were by a private party—does not support an antitrust claim; the Court concludes that the doctrine applies to this letter from the director of a government agency. *See* *Manistee Town Ctr. v. City of Glendale, 227 F.3d 1090, 1093 (9th Cir. 2000)* (applying doctrine to lobbying by city); *Mariana v. Fisher, 338 F.3d 189, 200 (3d Cir. 2003)* (holding that the doctrine applies to government as well as private actors). Plaintiff's Response makes no response to this argument, set forth in Defendant's Motion.

If Plaintiff meant to suggest the Kippenbrock **[*28]** letter evidenced a conspiracy, that claim would also be unavailing. *Omni* held that there is no conspiracy exception to state action immunity. *Omni, 499 U.S. at 374*. It "is both inevitable and desirable that public officials often agree to do what one or another group of private citizens urges upon them"; if "'conspiracy' means nothing more than an agreement to impose the regulation in question, ... such an exception would virtually swallow up the *Parker* rule: All anticompetitive regulation would be vulnerable to a 'conspiracy' charge." *Id. at 375*. *Omni* rejected a conspiracy exception between a local government entity and a private company. On the same analysis, the Court concludes that there is no conspiracy exception to state action immunity in this case, involving two governmental entities.

D. Conclusion on Count I

The Court concludes that SFC and SFSWMA are entitled to state action immunity, and the Complaint should be dismissed for failure to state a claim.

II. New Mexico Antitrust Act

Count I under federal ***antitrust law*** and Count II under New Mexico ***antitrust law*** make the same claims. [Doc. 1, pp. 12-14] Plaintiff's Response confirms that the claims and the applicable analysis are the same. [Doc. 17, p. 10]

The **[*29]** language of the New Mexico Antitrust Act, *NMSA 1978, §§ 57-1-1 to -19* (1995), is virtually identical to that of the federal ***antitrust law***. *Section 57-1-16* provides:

Nothing contained in the Antitrust Act is intended to prohibit actions which are:

> A. clearly and expressly authorized by any state agency or regulatory body acting under a clearly articulated and affirmatively expressed state policy to displace competition with regulation; and
> B. actively supervised by the state agency or regulatory body which is constitutionally or statutorily granted the authority to supervise such actions when the agency or regulatory body does not have any proprietary interest in the actions.

The New Mexico Legislature explicitly provided that New Mexico's Antitrust Act should follow the same judicial interpretations as federal ***antitrust law***. *Section 57-1-15* states:

> Unless otherwise provided in the Antitrust Act, the Antitrust Act shall be construed in harmony with judicial interpretations of the federal antitrust laws. This construction shall be made to achieve uniform application of the state and federal laws prohibiting restraints of trade and monopolistic practices.

Plaintiff provides no claim or argument that the same result should not obtain under **[*30]** the New Mexico Act as under federal ***antitrust law***. The Court therefore concludes, on the same analysis discussed above, that the Complaint under New Mexico's Antitrust Act should be dismissed for failure to state a claim.

IT IS THEREFORE ORDERED that:

Defendants' Motion To Dismiss and Supporting Authority [Doc. 5] is **GRANTED**.

/s/ Judith C. Herrera

UNITED STATES DISTRICT JUDGE

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Beltran v. InterExchange, Inc.

United States District Court for the District of Colorado

March 31, 2016, Decided; March 31, 2016, Filed

Civil Action No. 14-cv-03074-CMA-KMT

Reporter

176 F. Supp. 3d 1066 *; 2016 U.S. Dist. LEXIS 43771 **; 2016-1 Trade Reg. Rep. (CCH) P79,569; 2016 WL 1253622

JOHANA PAOLA BELTRAN, LUSAPHO HLATSHANENI, BEAUDETTE DEETLEFS, DAYANNA PAOLA CARDENAS CAICEDO, and ALEXANDRA IVETTE GONZÁLEZ, on behalf of themselves and others similarly situated, Plaintiffs, v. INTEREXCHANGE, INC., USAUPAIR, INC., GREATAUPAIR, LLC, EXPERT GROUP INTERNATIONAL INC., d/b/a EXPERT AUPAIR, EURAUPAIR INTERCULTURAL CHILD CARE PROGRAMS, CULTURAL HOMESTAY INTERNATIONAL, CULTURAL CARE, INC., d/b/a CULTURAL CARE AU PAIR, AUPAIRCARE INC., AU PAIR INTERNATIONAL, INC., APF GLOBAL EXCHANGE, NFP, d/b/a AUPAIR FOUNDATION, AMERICAN INSTITUTE FOR FOREIGN STUDY, d/b/a AU PAIR IN AMERICA, AMERICAN CULTURAL EXCHANGE, LLC, d/b/a GOAUPAIR, AGENT AU PAIR, A.P.EX. AMERICAN PROFESSIONAL EXCHANGE, LLC, d/b/a PROAUPAIR, 20/20 CARE EXCHANGE, INC., d/b/a THE INTERNATIONAL AU PAIR EXCHANGE, and ASSOCIATES IN CULTURAL EXCHANGE, d/b/a GOAUPAIR, Defendants.

Prior History: *Beltran v. InterExchange, Inc., 2016 U.S. Dist. LEXIS 21065 (D. Colo., Feb. 22, 2016)*

Core Terms

pairs, Sponsors, Plaintiffs', host, Recommendation, allegations, minimum wage, stipend, distributor, wages, motion to dismiss, conspiracy, direct evidence, regulation, circumstantial evidence, room and board, Exemption, employees, Metals, agrees, weekly, magistrate judge, provisions, formula, direct agreement, wage law, customers, fiduciary, domestic, overtime

LexisNexis® Headnotes

Civil Procedure > Judicial Officers > Magistrates > Standards of Review

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

When a magistrate judge issues a recommendation on a dispositive matter, *Fed. R. Civ. P. 72(b)(3)* requires that the district judge determine de novo any part of the magistrate judge's recommended disposition that has been properly objected to. In conducting its review, the district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions.

Antitrust & Trade Law > Sherman Act > Claims

HN2[] **Sherman Act, Claims**

Because *Section 1 under the Sherman Act* does not prohibit all unreasonable restraints of trade, but only those restraints effected by a contract, combination, or conspiracy, the crucial question is whether the challenged anticompetitive conduct stems from independent decision or from an agreement. To survive a motion to dismiss, a complaint must present enough factual matter (taken as true) to suggest that an agreement was made and to raise a reasonable expectation that discovery will reveal evidence of illegal agreement. An agreement, however, need not be in writing or be explicit, and may be established by either direct or circumstantial evidence.

Antitrust & Trade Law > Sherman Act > Claims

HN3[] **Sherman Act, Claims**

Direct evidence of a *Section 1 Sherman Act* conspiracy must be evidence that is explicit and requires no inferences to establish the proposition or conclusion being asserted. However, because direct evidence of concerted action is so rare, the ***antitrust law*** has granted fact finders some latitude to find collusion or conspiracy from parallel conduct and inferences drawn from the circumstances. Specifically, if a complaint does not contain direct evidence of an agreement, but instead makes only allegations of so-called parallel conduct, e.g., allegations of similar pricing behavior, etc., such allegations must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action. That is, the complaint must contain allegations plausibly suggesting (not merely consistent with) agreement. In considering whether a plaintiff has alleged sufficient circumstantial evidence of conspiracy, the court considers the allegations as a whole.

Antitrust & Trade Law > Sherman Act > Claims

HN4[] **Sherman Act, Claims**

Allegations are deemed conclusory where they state a legal conclusion without supplying a factual narrative for that conclusion, such that they amount to nothing more than a formulaic recitation of the elements of a claim. For example, a conclusory allegation of a *Section 1 Sherman Act* claim would state little more than that the defendant joined a conspiracy to unreasonably restrain trade"

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

Evidence > Admissibility > Circumstantial & Direct Evidence

HN5[] **Burdens of Proof, Nonmovant Persuasion & Proof**

A plaintiff can survive summary judgment if he or she presents a combination of direct evidence and circumstantial evidence positing an economically rational theory of an agreement; by definition, then, such a plaintiff can withstand a *Fed. R. Civ. P. 12(b)(6)* motion.

Civil Procedure > Judgments > Summary Judgment > Burdens of Proof

Evidence > Admissibility > Circumstantial & Direct Evidence

HN6[] **Summary Judgment, Burdens of Proof**

When a plaintiff makes out a case based only on circumstantial evidence, the more economically rational a conspiracy is in a given situation, the broader the range of inferences that can be drawn from the evidence at summary judgment.

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

HN7[] Defenses, Demurrers & Objections, Motions to Dismiss

A court must take a plaintiff's factual allegations as true, consider them as a whole, and view them in the light most favorable to the plaintiff in evaluating a motion to dismiss.

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

HN8[] Jury Trials, Province of Court & Jury

A fact issue is for the jury.

Business & Corporate Compliance > ... > Labor & Employment Law > Wage & Hour Laws > Scope & Definitions

HN9[] Wage & Hour Laws, Scope & Coverage

Pursuant to *29 C.F.R. § 531.27(a)*, an employer may include the reasonable cost or fair value of furnishing an employee board, lodging or other facilities in the employee's wages. However, pursuant to *29 C.F.R. § 531.30*, an employer may not credit the cost of facilities toward an employee's wages if the employer is required by law to provide the same. 22 C.F.R. § 62.31(e)(6) provides that sponsors shall secure a host family placement for each participant. Sponsors shall not place the au pair with a family who cannot provide the au pair with a suitable private bedroom.

Business & Corporate Compliance > ... > Wage & Hour Laws > Scope & Definitions > Overtime & Work Periods

HN10[] Scope & Coverage, Overtime & Work Periods

Third party employers of employees engaged in live-in domestic service employment may not avail themselves of the overtime exemption provided by *29 U.S.C.S. § 213(b)(21)*, even if the employee is jointly employed by the individual or member of the family or household using the services. *29 C.F.R. § 552.109(c)*.

Business & Corporate Compliance > ... > Wage & Hour Laws > Scope & Definitions > Minimum Wage

HN11[] Scope & Coverage, Minimum Wage

If a state sets a higher minimum wage than that mandated by the *FLSA*, employees within that state are entitled to receive that higher wage. 22 C.F.R. § 62.31(j)(1); *29 U.S.C.S. § 218(a)*.

Torts > Intentional Torts > Breach of Fiduciary Duty

HN12[] **Intentional Torts, Breach of Fiduciary Duty**

A confidential relationship exists when one party justifiably reposes confidence in another such that the parties drop their guard and assume that each side is acting fairly. Colorado does not recognize a separate tort founded upon breach of a confidential relationship. However, a confidential relationship may serve as an indication of fiduciary status.

Civil Procedure > Judicial Officers > Magistrates > Objections

HN13[] **Magistrates, Objections**

Issues raised for the first time in objections to the magistrate judge's recommendation are deemed waived.

Counsel: **[**1]** For Johana Paola Beltran, Lusapho Hlatshaneni, Beaudette Deetlefs, Dayanna Paola Cardenas Caicedo, Alexandra Ivette Gonzalez and those similarly situated, Plaintiffs: Lauren Fleischer Louis, Sigrid Stone McCawley, Boies Schiller & Flexner, LLP-Ft. Lauderdale, Ft. Lauderdale, FL; Matthew Lane Schwartz, Peter Murray Skinner, Randall Wade Jackson, Boies Schiller & Flexner, LLP-New York, New York, NY; Alexander Neville Hood, Towards Justice-Denver, Denver, CO.

For InterExchange, Inc., Defendant: Brooke A. Colaizzi, Raymond Myles Deeny, LEAD ATTORNEYS, Erica Lynn Herrera, Heather Fox Vickles, Sherman & Howard, L.L.C.-Denver, Denver, CO.

For USAuPair, INC, Defendant: Chanda Marie Feldkamp, William James Kelly, III, Kelly & Walker, LLC, Denver, CO.

For GreatAuPair, LLC, Defendant: Martin Jose Estevao, LEAD ATTORNEY, Meshach Yustine Rhoades, Armstrong Teasdale, LLP-Denver, Denver, CO.

For Expert Group International, Inc doing business as Expert AuPair, Defendant: Bogdan Enica, Bogdan Enica, Attorney at Law, St Petersburg, FL.

For EuRaupair InterCultural Child Care Programs, Defendant: Kathryn Anne Barrett, Martha Louise Fitzgerald, Brownstein Hyatt Farber Schreck, LLP-Denver, Denver, CO.

For Cultural **[**2]** Homestay International, Defendant: James Edward Hartley, Holland & Hart, LLP-Denver, Denver, CO.

For Cultural Care, Inc. doing business as Cultural Care Au Pair, Defendant: Donald Joseph Gentile, Jeffrey Paul Allen, Lawson & Weitzen, LLP, Boston, MA; Walter Vernon Siebert, Sherman & Howard, L.L.C.-Denver, Denver, CO; William Leitzsey Monts, III, Hogan Lovells US LLP-DC, Washington, DC.

For AuPairCare, Inc., Defendant: John Roger Mann, Thomas Baker Quinn, Gordon & Rees, LLP-Denver, Denver, CO.

For Au Pair International, Inc., American Cultural Exchange, LLC doing business as GoAuPair, Defendant: Brian Alan Birenbach, Rietz Law Firm, LLC, Dillon, CO; Kathryn A. Reilly, Toren G. E. Mushovic, Wheeler Trigg O'Donnell, LLP, Denver, CO.

For APF Global Exchange, NFP doing business as Aupair Foundation, American Institute for Foreign Study doing business as Au Pair in America, Defendants: Daniel C. Perkins, Arapahoe County Attorney's Office-Littleton, Littleton, CO; Lawrence L. Lee, Susan M. Schaecher, Fisher & Phillips, LLP-Denver, Denver, CO.

For Agent Au Pair, Defendant: Kathryn A. Reilly, Toren G. E. Mushovic, Wheeler Trigg O'Donnell, LLP, Denver, CO.

For A.P.E.X. American Professional Exchange, **[**3]** LLC doing business as ProAuPair, 20/20 Care Exchange, Inc doing business as International Au Pair Exchange, The, Defendants: Christian Dow Hammond, Lawrence Daniel Stone, Dufford & Brown, P.C., Denver, CO.

Judges: CHRISTINE M. ARGUELLO, United States District Judge.

Opinion by: CHRISTINE M. ARGUELLO

Opinion

[*1070] ORDER ADOPTING AND AFFIRMING IN PART FEBRUARY 22, 2016 RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This matter is before the Court on the February 22, 2016 Recommendation of United States Magistrate Judge Kathleen M. Tafoya (Doc. # 240) on a handful of motions to dismiss in the instant case.

I. BACKGROUND

In her Recommendation, Magistrate Judge Tafoya analyzed five separate motions to dismiss brought by some combination of the fifteen Defendants named in this matter: Defendant Cultural Care, Inc.'s Motion to Dismiss All Claims in First Amended Complaint (Doc. # 127), Motion to Dismiss the First Amended Complaint by Defendant Interexchange, Inc. (Doc # 130), Defendant American Cultural Exchange, LLC, D/B/A Go Au Pair's Motion to Dismiss Counts I, III, IV, V, VI, VII, VIII, IX and X of the First Amended Complaint (Doc. # 131), Joint Motion by Certain Sponsor Defendants to Dismiss the First Amended Complaint (Doc. **[**4]** # 135), and Defendant American Institute for Foreign Study's Motion to Dismiss Amended Complaint (Doc. # 136). She recommended the Joint Motion by Certain Defendants to Dismiss the First Amended Complaint (Doc. # 135) be denied. (Doc. # 240 at 43.) Additionally, she recommended that the remaining motions (Doc. ## 127, 130, 131, and 136) should be granted in part and denied in part; specifically, that Plaintiffs' claim under the Utah Minimum Wage Act and Plaintiffs' claim for breach of contract should be dismissed,[1] but that Plaintiffs' remaining claims should proceed. (*Id.*)[2]

On March 14, 2016, Defendants filed two timely, consolidated objections to Judge Tafoya's **[**5]** Recommendation; one relates to her recommendation regarding Plaintiffs' antitrust claims (Doc. # 248), and the other relates to her recommendation regarding Plaintiffs' remaining claims (Doc. # 247). Plaintiffs also filed a Response to Defendants' Objections. (Doc. # 256.)

The Recommendation is incorporated herein by reference. *See* [*28 U.S.C. § 636(b)(1)(B)*]; [*Fed. R. Civ. P. 72(b)*]. As such, the Recommendation's thorough recitation of the factual background of this case will be reiterated only to the extent necessary to resolve Defendants' objections.

II. ANALYSIS

A. Legal Standard

HN1[] When a magistrate judge issues a recommendation on a dispositive matter, [*Fed. R. Civ. P. 72(b)(3)*] requires that the district judge "determine *de novo* any part of **[*1071]** the magistrate judge's [recommended]

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[1] Plaintiffs did not object to this aspect of the Recommendation. (*See* Doc. # 256 at 1 n.1.)

[2] Judge Tafoya also ordered that certain motions to strike relating to the motions to dismiss — specifically, Defendant Cultural Care, Inc.'s Motion to Strike Material in Plaintiffs' Consolidated Opposition to Defendants' Motions to Dismiss (Doc. # 206) and Plaintiffs' Cross-Motion to Strike Certain Exhibits Submitted by the Defendants" (Doc. # 221) — were denied as moot. The parties did not object to this ruling. (*See* Doc. ## 247, 248, 256.)

disposition that has been properly objected to." In conducting its review, "[t]he district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions." *Id.*

B. Application

1. Plaintiffs' Sherman Act Claims

Plaintiffs sue fifteen so-called "Sponsor" organizations (Sponsors), a mix of for-profit and non-profit organizations that are formally designated by the U.S. Department of State (DOS) as the exclusive **[**6]** entities permitted to recruit and place *au pairs*[3] with host families in the United States under the J-1 Visa program.[4] (Doc. # 110, ¶¶ 45-47, 72.) Judge Tafoya's Recommendation found that Plaintiffs' allegations were sufficient to state a claim for price fixing under *Section 1 of the Sherman Act* (Doc. # 240 at 13), which provides, in relevant part, that "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." *15 U.S.C. § 1* (*Section 1*).

Plaintiffs' Amended Complaint alleges that the Sponsors, who have "100% of the market power within the relevant market, including the power jointly to set *au pair* compensation below competitive and legal levels," have violated *Section 1* by engaging in a conspiracy not to compete with one another with respect to *au pair* wages. (Doc. # 110, ¶¶ 2, 72.) In other words, Plaintiffs allege that the Sponsors have agreed among themselves to create an artificially low, anticompetitive "wage floor" for *au pairs* — that is, to "fix" the price of *au pair* wages. Plaintiffs allege that such an agreement is to the Sponsors' economic advantage, as wages are one of several components of the overall "price" of providing an *au pair* to a host family, and the Sponsors must compete both for *au pairs* and for host families. In particular, they allege that this so-called "wage-fixing" agreement benefits the Sponsors in at least two ways: first, it allows them to effectively increase the portion of the overall costs to host families **[**8]** that are comprised of Sponsors' fees without increasing overall costs to host families for employing an *au pair*;[5] second, it allows the Sponsors to expand the number of potential host families they can attract (i.e., customers), by increasing the affordability of *au pair* child care child arrangements for host families vis-à-vis other kinds of child care arrangements. (*Id.*, ¶ 132.) "Both of these results increase Sponsors' profits, at the expense of *au pairs*." (*Id.*)

As a preliminary matter, Defendants' objection to the legal standard employed by Judge Tafoya is without merit. Defendants **[*1072]** assert that Judge Tafoya erred because her Recommendation

> failed to address the fact that Plaintiffs fail to allege facts in their Amended Complaint **sufficient to exclude the possibility of independent action**, even where parallel conduct is present, **as required by *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)*** (cited by the Court in *Twombly* for that **[**9]** proposition at *550 U.S. 544, 556, 127 S. Ct. 1955, 167 L. Ed. 2d 929)*.

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[3] Under the DOS' *au pair* program, young, foreign nationals (between the age of 18 and 26), with some secondary school education and English proficiency, are permitted to obtain a so-called "J-1" visa and stay in United States for one or two years. *Au pairs* live with an American host family, for whom they provide live-in child care services for 45 hours per week (as well as, in some cases, housekeeping and cooking). In exchange for these services, they are provided with, among other things, (1) a weekly stipend (which the Plaintiffs allege violates the *FLSA's* minimum wage and overtime regulations); and (2) up to $500 in an "education credit" to cover tuition **[**7]** (per year). (Doc. # 101, ¶¶ 44, 99, 108.)

[4] The J-1 visa *au pair* program is one of several official J-1 visa "cultural exchange" programs overseen and administered by the DOS. (Doc. # 101, ¶ 43.)

[5] Sponsors generate revenue at least in part from "placement" or "program" fees paid by host families in order to participate in the *au pair* program. For example, Au Pair in America's website indicates that it charges a host family an annual $8,245 "Program Fee" plus a $400 "Match Fee." (Doc. # 101, ¶ 99.)

(Doc. # 238 at 8) (emphasis added). In making this argument, Defendants conflate the summary judgment standard (i.e., the standard applicable in *Monsanto*) and the motion to dismiss standard (i.e., the standard applicable here). As Plaintiffs explained long ago in their Response brief to Defendants' Consolidated Motion to Dismiss (Doc. # 199 at 18), in *Monsanto*, the United States Supreme Court held that, in order to survive **a motion for a directed verdict** (which is analogous to the standard applied to a summary judgment motion), "there must be evidence that tends to exclude the possibility of independent action." *Id. at 769*. Obviously, Judge Tafoya's decision to apply the correct standard for the 12(b)(5) Motions before her, rather than the directed verdict/summary judgment standard, was not erroneous.[6]

In *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*, the seminal case outlining the pleading standard for *Section 1 under the Sherman Act*, plaintiffs brought **[**10]** a class action suit against several telephone companies, alleging that the companies had conspired to stay in their own markets and to keep other companies out of those markets in violation of *Section 1*. The United States Supreme Court explained that ***HN2***[] because *Section 1* does not prohibit all unreasonable restraints of trade, but only those restraints "effected by a contract, combination, or conspiracy, **the crucial question is whether the challenged anticompetitive conduct stems from independent decision or from an agreement**." *Id. at 553* (emphasis added). Accordingly, that Court held that, to survive a Motion to Dismiss, a complaint must present "enough factual matter (taken as true) to suggest that an agreement was made . . . [and] to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Id. at 556*. An agreement, however, need not be in writing or be explicit, and may be established by either direct or circumstantial evidence. *See id. at 553* (stating that the agreement may be "tacit or express"); *Cayman Expl. Corp. v. United Gas Pipe Line Co., 873 F.2d 1357, 1361 (10th Cir. 1989)* ("In the absence of an explicit agreement, conspiratorial conduct may be established by circumstantial evidence.").

HN3[] "Direct evidence [of] a *Section 1* conspiracy must be evidence that is explicit and requires no **[**11]** inferences to establish the proposition or conclusion being asserted." *Champagne Metals v. Ken-Mac Metals, Inc., 458 F.3d 1073, 1083 (10th Cir. 2006)* (citing *In re Baby Food Antitrust Litig., 166 F.3d 112, 118 (3d Cir. 1999))*. However, because direct evidence of concerted action is "so rare," the ***antitrust law*** has "granted fact finders some latitude to find collusion or conspiracy from parallel conduct and inferences drawn from the circumstances." *Oltz v. St. Peter's Cmty. Hosp., 861 F.2d 1440, 1450-51 (9th Cir. 1988)*. Specifically, if a complaint does not **[*1073]** contain direct evidence of an agreement, but instead makes only allegations of so-called "parallel conduct,"[7] e.g., allegations of similar pricing behavior, etc., such allegations "must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action." *Twombly, 550 U.S. at 557*. That is, the complaint must contain "allegations **plausibly suggesting** (not merely consistent with)

[6] Plaintiffs' assertion that *Monsanto* simply does not apply to this stage of the dispute is easily verifiable with a simple Westlaw or LexisNexis search. Thus, the Court is puzzled as to why this argument appeared **yet again** in Defendants' Objection to the Magistrate Judge's Recommendation.

[7] In *White v. R.M. Packer Co.*, the First Circuit Court of Appeals provided the following helpful explanation of the difference between a tacit agreement, which is prohibited under the *Sherman Act*, and parallel conduct (otherwise known as "conscious parallelism"), which is not:

> Conscious parallelism is a phenomenon of oligopolistic markets in which firms "might in effect share monopoly power, setting their prices at a profit-maximizing, supracompetitive level by recognizing their shared economic interests and their interdependence with respect to price and output decisions." Each producer may independently decide that it can maximize its profits by matching one or more other producers' price, on the hope that the market will be able to maintain high prices if the producers do not undercut one another.
>
> A tacit agreement—one in which only the conspirators' actions, and not any express communications, indicate the existence of an agreement—is distinguished from mere conscious parallelism by "uniform behavior among competitors, **[**13]** preceded by conversations implying that later uniformity might prove desirable or accompanied by other conduct that in context suggests that each competitor failed to make an independent decision."

635 F.3d 571, 575-76 (1st Cir. 2011) (citations omitted).

agreement." *Id.* (emphasis added); *see also* *Mitchael v. Intracorp, Inc., 179 F.3d 847, 859 (10th Cir.1999)* ("While consciously parallel behavior may contribute to a finding of antitrust conspiracy, it is insufficient, standing alone, to prove conspiracy"). In considering whether a Plaintiff has alleged sufficient circumstantial evidence of conspiracy, the Court considers the allegations as a whole. *Evergreen Partnering Group, Inc. v. Pactiv Corp., 720 F.3d 33, 47 (1st Cir. 2013)* ("While each of [the plaintiff's] allegations of circumstantial agreement standing **[**12]** alone may not be sufficient to imply agreement, taken together, they provide a sufficient basis to plausibly contextualize the agreement necessary for pleading a *[Section] 1* claim.")

At bottom, Defendants' Objection is rooted in the proposition that Judge Tafoya "stray[ed] from the law by **failing to recognize the impermissibility of inferring anticompetitive conspiracy from parallel conduct** where there is independent business rationale for the behavior." (Doc. # 248 at 2) (emphasis added). Defendants' argument, however, fails to properly consider Plaintiffs' allegations of a direct agreement, that is, the fact that Plaintiffs allege that there was **more than** mere parallel conduct indicative of an agreement among the Sponsors.

Although the Sponsors filed a Motion to Strike sections 90 through 94 of Plaintiffs' Complaint at an earlier juncture in this case — i.e., those sections of the Complaint in which Plaintiffs allege that several of the Sponsors' employees (the "Directors") **explicitly admitted** to Plaintiffs' investigator that the Sponsors had **expressly agreed among themselves** to keep *au pair* wages at the lowest possible level — Judge Tafoya denied their Motion and Defendants did **[**14]** not appeal her ruling. (Doc. # 235.) As such, in resolving Defendants' Motions to Dismiss, Judge Tafoya properly considered these allegations and took them to be true, and this Court must do the same. Although Judge Tafoya did not discuss these allegations in great detail, the Court finds it worth doing so here, as they amount to what Judge Richard Posner has termed **[*1074]** the "the smoking gun in a price-fixing case" — namely, "direct evidence, . . . [in] the form of an admission by an employee of one of the conspirators, that officials of the defendants had met and agreed explicitly on the terms of a conspiracy to raise prices." *See* *In re Text Messaging Antitrust Litig., 630 F.3d 622, 628 (7th Cir. 2010)* (Posner, J.); *see also* *Gen. Chemicals, Inc. v. Exxon Chem. Co., USA, 625 F.2d 1231, 1233 (5th Cir. 1980)* (quotation omitted) (noting that "Rarely, if ever, can a plaintiff point to a 'smoking gun'" of "direct evidence of a specific agreement between defendants" in a *Sherman Act* case).

Specifically, in the instant case, Plaintiffs allege as follows:

> • In a telephone conversation on November 20, 2014, a representative of one Sponsor Defendant, with the title of "Director," admitted that there was an understanding between all of the Sponsors to pay standard *au pairs* the same amount. **The sponsor explained that the government sets a minimum amount, [**15] but that all of the Sponsors then agreed among themselves to pay exactly that minimum amount**. This Sponsor thus characterized the "stipend paid to the *au pairs*" as a "fixed expense." The Sponsor explained that the stipend "is where pricing becomes standard across all agencies," and that "there is no difference in prices, as far as the stipend goes, between all of the agencies."
>
> • In a telephone conversation on November 21, 2014, a representative of another Sponsor, also with the title of "Director," admitted that all of the Sponsors agreed to set *au pair* wages at $195.75 per week. Specifically, **the Sponsor acknowledged that each and every Sponsor got together and agreed to pay *au pairs* a stipend of no more than $195.75 a week. As the representative added, the Sponsors "all agreed to pay that amount, no more."**
>
> • In yet another telephone conversation on November 21, 2014, a representative of yet another Sponsor, again with a "Director" title, explained why "the stipend is identical across all companies." The representative admitted that **the Sponsors all agreed to pay that exact same minimum rate**. As the Sponsor noted, "[e]verybody agrees" to pay *au pairs* no more than the minimum weekly wage.

(Doc. **[**16]** # 101, ¶¶ 92-94) (emphasis added).

Defendants argue that the statements quoted above are not sufficiently specific to infer that there was an agreement among the Sponsors, because Plaintiffs (1) did not identify the specific individuals involved in the alleged agreement or the time or place where the agreement was made, and (2) provide "no information to suggest the individuals actually had authority to speak for one, much less all, of sponsor Defendants." (Doc. # 248 at 14).[8] **[*1075]** In support of this proposition, they cite a footnote from *Twombly*, in which the Supreme Court stated

> Apart from identifying a 7-year span in which the [Section] 1 violations were supposed to have occurred . . . **the pleadings mentioned no specific time, place, or person involved in the alleged conspiracies** . . . . [A] defendant seeking to respond to plaintiffs' **conclusory allegations** in the § 1 context would have little idea where to begin.

550 U.S. at 565 n. 10 (emphasis added). There are a variety of reasons why *Twombly* offers very little guidance in this case. First, the above-quoted allegations of direct evidence in the form of admissions by the Sponsors are well-plead, not "conclusory," because they supply "a factual narrative" supporting their **[**17]** legal conclusions, in providing details like the specific dates of the admissions, that they were made by the Sponsor's employees, and exact quotes about the admissions themselves. *See* Arapahoe Surgery Ctr., LLC v. Cigna Healthcare, Inc., 80 F. Supp. 3d 1257, 1263-64 (D. Colo. 2015) (quoting Ashcroft v. Iqbal, 556 U.S. 662, 681, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (explaining that **HN4**[] "[a]llegations are deemed 'conclusory' where they state a legal conclusion without supplying a factual narrative for that conclusion, such that they 'amount to nothing more than a 'formulaic recitation of the elements of a . . . claim.' For example, a conclusory allegation [of] a [Section] 1 claim would state little more than that the defendant joined a conspiracy to unreasonably restrain trade")). Additionally, *Twombly* offers no guidance regarding the specificity required in a well-pleaded allegation of an **explicit/direct agreement**, because plaintiffs' complaint in that case was based solely on circumstantial evidence of an agreement. *See* Twombly, 550 U.S. at 564 (noting that "the complaint leaves no doubt that plaintiffs rest their [Section] 1 claim on descriptions of parallel conduct and **not on any independent allegation of actual agreement**"). However, a Tenth Circuit case — Champagne Metals v. Ken-Mac Metals, Inc., 458 F.3d 1073, 1084 (10th Cir. 2006) — is particularly instructive in analyzing the instant case, which, as described above, involves well-plead allegations of a direct agreement along with allegations **[**18]** of circumstantial evidence of such an agreement.

In Champagne Metals v. Ken-Mac Metals, Inc., 458 F.3d 1073, 1084 (10th Cir. 2006), a smaller, newer entrant to the aluminum distribution business **[**19]** brought suit under Section 1 against seven larger, more established aluminum distributors, alleging that those established distributors had agreed among themselves to exclude new competitors. The Tenth Circuit characterized the following statement as "weak" direct evidence in support of the plaintiff's Section 1 claim:

> [Wiley, an employee of an established aluminum distributor, said that he] felt . . . that **himself and other potential customers [distributors] within the industry** would find that Commonwealth [a mill] selling to Champagne [Metals] [a distributor], they — they would find that as, again, not in the best interest of the industry, **and would cause other distributors** in that area of the country **to source their metals from other mill sources**, and that by developing a relationship with Champagne Metals, we would be putting other business with potential customers [distributors] at risk.

Id. at 1083. The Tenth Circuit explained that this evidence was "direct" because it **[*1076]** was explicit — that is, the agent of the established distributor claimed that "'himself and other potential customers [distributors] . . . would cause other service centers [distributors] to remove their business from Commonwealth [a mill] if **[**20]** [that mill] continued selling to Champagne Metals [a distributor]." *Id.* The court also specifically held that "viewed in the light

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[8] Defendants also assert that the Directors' statements are analogous to the statements made by the former CEO of Qwest in *Twombly*, to the effect that encroaching on another defendant's territory "[m]ight be a good way to turn a quick dollar but that doesn't make it right." 550 U.S. at 568 n. 13. However, *Twombly*'s pleading standard offers little guidance as to the necessary level of specificity in the pleading of an **explicit agreement**, and in any case, this citation is in no way supportive of Defendants' argument. Although Defendants assert that the Supreme Court held in *Twombly* that "a comment by the chief executive of one of the seven defendant entities [was] insufficient to adequately plead a plausible conspiracy" (Doc. # 238 at 11), in fact, the Supreme Court noted that the district court (correctly) did not consider the CEO's statements because "[t]his was only part of what he reportedly said," and after it took "notice of the full contents of the published articles referenced in the complaint, from which the truncated quotations were drawn," the full context effectively neutralized the statements. *See* 550 U.S. at 568 n. 13.

most favorable to [the distributor], this statement indicates an agreement . . . to take collective action." *Id.* (emphasis added). However, it also explained that this evidence, **standing alone**, was too weak to allow the distributor to withstand summary judgment, because, "[f]or example, [the statement] does not indicate **which, if any, of the Established Distributors were among the 'other customers' which were part of the agreement**." *Id. at 1084* (emphasis added).

In the instant case, the statements of the Sponsors' Directors are, if anything, far **more** explicit about the existence of an agreement among "all" of the Sponsors than the statement involved in *Champagne Metals*. In *Champagne Metals*, the plaintiff sued his "day-to-day competitors," but did not sue not every distributor in the market (as such, there was some justifiable doubt about which, "if any" of the "customers" were included in the alleged agreement). *Id. at 1077, 1084*. In contrast, Plaintiffs have sued every single Sponsor in the relevant *au pair* market, and they also specifically allege that every single Sponsor was in agreement: **[**21]** one Director admitted that "**every Sponsor got together and agreed** to pay *au pairs* a stipend of no more than $195.75 a week," and another admitted that "**all [Sponsors] agreed** to pay that amount, no more." (Doc. # 101, ¶¶ 92, 93) (emphasis added). Particularly when such statements are viewed in the light most favorable to Plaintiffs, they are certainly sufficient to indicate there may have been a direct agreement to take collective action among Defendant-Sponsors. *See Champagne Metals, 458 F.3d at 1083*; *see also Rossi v. Standard Roofing, Inc., 156 F.3d 452, 468-72 (3d Cir. 1998)* (finding the plaintiff's testimony that he was told by one of his competitors that "if [he] went into business that [the competitor] and [another competitor] would do anything they could, stop supplies, cut the prices, whatever they had to do they were going to do to keep me out of business" to be direct evidence of concerted action).

At the same time, the Court **does** recognize that this evidence — at least as it is currently pled — is "weak" direct evidence, insofar as it does not provide critical details, such as the individuals with whom the investigator spoke, and whether such individuals (who allegedly identified themselves as "Directors") had the "authority to speak for one, much less all, of sponsor Defendants." **[**22]** (Doc. # 248 at 14). *Compare Champagne Metals, 458 F.3d at 1084* (emphasis added) (stating that statement of employee of a distributor constituted "weak" direct evidence of agreement because, "[f]or example, [the statement] does not indicate **which, if any, of the Established Distributors** were among the 'other customers' which were part of the agreement."); *Heartland Surgical Specialty Hosp., LLC v. Midwest Div., Inc., 527 F. Supp. 2d 1257, 1301 (D. Kan. 2007)* (emphasis added) (citing *Champagne Metals, 458 F.3d at 1084*, and characterizing testimony regarding an alleged agreement between managed care organizations as "weak" direct evidence because the testimony did not "identify **who was included** in the unwritten understanding amongst the 'managed care organizations'"). However, the relative weakness of Plaintiffs' allegation of direct evidence is not the end of the analysis; per *Champagne Metals, 458 F.3d at 1085*, ***HN5***[] a plaintiff can survive **summary judgment** if he or she presents a combination of direct evidence and circumstantial evidence positing an economically rational theory of an agreement; by **[*1077]** definition, then, such a plaintiff can withstand a 12(b)(6) Motion.[9] *See Champagne Metals, 458 F.3d at 1085*.[10]

In the instant case, in addition to providing evidence of a direct agreement among Sponsors, for purposes of withstanding a motion to dismiss, Plaintiffs also provide circumstantial evidence of an agreement that is at least as strong as that which was presented in *Champagne Metals*.[11] Specifically, in *Champagne Metals*, the Tenth Circuit

[9] This is because a plaintiff must withstand a relatively higher burden to survive a defendant's summary judgment motion than a motion to dismiss, especially in the antitrust context, which limits the range of permissible inferences **[**23]** from ambiguous evidence. Specifically, "a plaintiff seeking damages for a violation of *[Section] 1* must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently. . . . [I]n other words, [a plaintiff] must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed [plaintiff]." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*; *accord Abraham v. Intermountain Health Care Inc., 461 F.3d 1249, 1262 (10th Cir. 2006)*.

[10] In *Champagne Metals*, the Tenth Circuit specifically reserved what it called the "more difficult question" of whether, on summary judgment, "when **direct** evidence has been introduced, we must still evaluate the economic rationality of the alleged conspiracy when considering the accompanying **circumstantial** evidence." *458 F.3d at 1085*.

first noted that *HN6*[] "when a plaintiff makes out a case **based only on circumstantial evidence**," then "the more economically rational **[**24]** a conspiracy is in a given situation, the broader the range of inferences that can be drawn from the evidence" at summary judgment. *Id. at 1084* (emphasis added). The court then found that the plaintiff's theory that established distributors "acted together to attempt to keep a new, aggressive entrant out of the market" was economically rational based on fears of new competitors eroding profit margins or fears of losing market share. *Id. at 1084-86*. Similarly, here, Judge Tafoya determined that Plaintiffs' circumstantial evidence presented sufficient circumstantial evidence of a viable economic theory of collusion,[12] citing the following allegations:

(1) At least one Sponsor, Cultural Care, has informed prospective *au pairs*, in writing, that the weekly stipend arranged by Cultural Care would be "the same regardless of which *au pair* agency you use." (Am. Comp. at 20; Resp. at 14);

(2) Sponsors informed *au pairs* and host families that $195.75/week plus room and board is the **only** permitted compensation for *au pairs* (Am. Comp. at 73-74, 76-77);

(3) As the exclusive entities authorized to recruit, provide training, place and supervise *au pairs* with host families in the United States, Defendants control *au pair* opportunities within the United States (Am. Comp. at 10-11, Resp. at 14);

(4) The **[**25]** Sponsors' industry structure facilitates collusion as they are a relatively small group, 15 agencies, with 100% market share (Am. Comp. at 32);

[*1078] (5) In addition to industry structure, many Sponsors are members of the Alliance for International Education and Cultural Exchange and the International *Au Pair* Association ("IAPA"), individuals from certain Sponsors sit on IAPA's Board, and the featured speaker at a recent IAPA conference published an article arguing for strict maintenance of the fixed $195.75 weekly wage for standard *au pairs*, stating that "host families do each other a disservice when they start to compete with each other (or try to stand out as a 'better family') by offering more pocket money. We don't want *au pairs* shopping for a higher stipend." (Am. Comp. at 30-31);

(6) The Sponsors uniformly advertise *au pair* wages at an identical amount even though the federal government does not require that *au pairs* only receive minimum wage (Am. Comp. at 13-15, 20, 22-29; Resp. at 15, see also *supra*);[13]

(7) There are no adjustments to advertised compensation with relation to geographic differences, varying state laws and/or the number of children in the home (Am. Comp. at 29-30; Resp. at 15);

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[11] In stating this conclusion, the Court emphasizes that it is **not** finding that Plaintiffs have, in fact, presented sufficient evidence to withstand summary **[**27]** judgment (nor could it do so at this juncture); for example, for whatever reason, Plaintiffs may ultimately fail to uncover evidence in discovery to shore up their allegations of a direct agreement, in which case the summary judgment calculus could shift significantly.

[12] Specifically, Judge Tafoya found that "[t]he Amended Complaint alleges a mixture of 'parallel behaviors, details of industry structure, and industry practices, that facilitate collusion.'" (Doc. # 240 at 13) (quoting *In re Text Messaging Litig., 630 F.3d 622, 627 (7th Cir. 2010))*.

[13] With regard to this allegation, Defendants assert that Magistrate Judge Tafoya's Recommendation "disregard[ed] the admission that over a third of the Defendant sponsors advertised stipends above $195.75" for so-called non-standard *au pairs* (i.e., *au pairs* with additional training and education in child care), asserting that this amounts to the Court "ignor[ing] inconvenient evidence." (Doc. # 247 at 3-4.) To the contrary, Magistrate Judge Tafoya's Recommendation addressed this evidence, and she **specifically explained** that she considered this argument to be "disingenuous" because Plaintiffs, and those they seek to represent in a class action, are "standard" *au pairs*, and "[t]he only instance in which Defendants advertise a higher compensation **[**28]** rate is for non-standard positions. . . . [T]herefore, the only issues relevant to the current inquiry[] pertain to Defendants' practices with regard to standard *au pairs*." (Doc. # 220 at 14.)

(8) By depressing wages for *au pair* services, the Sponsors reap artificially **[**26]** high profits because if the host family's direct cost for an *au pair* does not increase, then any increase, while still costing the family less than a full-time nanny on the open market, goes to the Sponsor in the form of fees, and keeping the cost down will theoretically increase the number of potential host families (Am. Comp. at 32);
. . . [and][14]

(10) Defendants advertise that their labor costs are set lower than the cost of a comparable child-care worker in the free market. (Am. Comp. at 5, 54, 55; Resp. at 23-24.) Plaintiffs also contend that in a competitive marketplace, at least some Defendants would either offer higher salaries to potential *au pairs*, thereby attracting more and higher quality *au pairs* and charging higher fees to families, or the Sponsors might have to compete with agencies that place other domestic workers, such as nannies, or react to market forces, including location or higher salaries based on unique childcare responsibilities, such as the number of children. (Resp. at 23.) None of these natural consequences have occurred.

(Doc. # 240 at 11-12.)

Thus, although Defendants' Objection asserts that Judge Tafoya mis-applied *Twombly* and improperly disregarded the "common-sense and independent business rationale[s]" for Plaintiffs' allegations of circumstantial evidence, unlike *Twombly*, Plaintiffs' complaint does not rely exclusively on parallel conduct, but contains well-pled allegations of a direct agreement among the Sponsors as well circumstantial evidence to establish a setting that would **[*1079]** make such an agreement plausible. *See Twombly, 550 U.S. at 557*. Because ***HN7***[] the Court must take Plaintiffs' factual allegations as true, consider them as a whole, and view them in the light most favorable to Plaintiffs in evaluating a motion to dismiss, the Court finds Defendants' arguments unpersuasive at this stage, particularly in light of Plaintiffs' well-plead allegations of direct agreement. *See Arapahoe Surgery Ctr., LLC v. Cigna Healthcare, Inc., 80 F. Supp. 3d 1257, 1265 (D. Colo. 2015)* (citing **[**29]** *Twombly, 550 U.S. at 556*) (noting that a defendant's arguments about an alleged conspiracy's remote plausibility "suggest that the alleged conspiracy is less likely," but because the plaintiffs sufficiently pled an overt agreement, such arguments "do not render Plaintiffs' allegations implausible, and thus do not mandate dismissal"); *Heartland Surgical Specialty Hosp., LLC v. Midwest Div., Inc., 527 F. Supp. 2d 1257, 1309 (D. Kan. 2007)* (citing *Champagne Metals* and finding that plaintiff's "weak" direct evidence plus circumstantial evidence outlining a plausible economic theory were sufficient to survive summary judgment).

For the foregoing reasons, the Court determines that, although Judge Tafoya did not apply the framework from *Champagne Metals*, she still correctly concluded that Plaintiffs have adequately stated a *Section 1* Claim; accordingly, this claim remains.

2. Defendants' Status as "Joint Employers" of Plaintiffs

In her Recommendation, Judge Tafoya applied the Tenth Circuit's "economic realities" test[15] to Plaintiffs' allegations and determined that Plaintiffs stated a plausible claim that the Sponsors are "joint employers" of *au pairs* (along with the *au pairs'* host families). (Doc. # 240 at 23.) Specifically, she noted that Plaintiffs make the following allegations: (1) the Sponsors recruit, interview, and hire **[**30]** *au pairs* for host families; (2) the Sponsors

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[14] Item number nine in Judge Tafoya's list was Plaintiffs' allegation that three of the Sponsors expressly admitted that they had agreed to keep au pair wages at $195.75 per week. (Doc. # 240 at 12.)

[15] This test "includes inquiries into whether the alleged employer has the power to hire and fire employees, supervises and controls employee work schedules or conditions of employment, determines the rate and method of payment, and maintains employment records." *Baker v. Flint Eng'g & Constr. Co., 137 F.3d 1436, 1439 (10th Cir. 1998)* (citing *Watson v. Graves, 909 F.2d 1549, 1553 (5th Cir.1990))*. In applying the economic realities test, courts consider the following factors: "(1) the degree of control exerted by the alleged employer over the worker; (2) the worker's opportunity for profit or loss; (3) the worker's investment in the business; (4) the permanence of the working relationship; (5) the degree of skill required to perform the work; and (6) the extent to which the work is an integral part of the alleged employer's business." *Baker, 137 F.3d at 1440*.

effectively dictate *au pair* wages (as described in their antitrust allegations); (3) the Sponsors have a statutory obligation to ensure that *au pairs* are paid a stipend, do not provide more than 10 hours of child care per day or 45 hours of child care in any week, receive a minimum of one and one-half days off per week in addition to one complete weekend off each month, and receive two weeks of paid vacation; (4) the Sponsors exert control over *au pair* working conditions, including providing *au pairs* with training, visiting *au pairs* on a monthly basis (and twice-monthly visits in the first two months of *au pair* placement), making quarterly contact with host families, and even providing specific employment tasks;[16] (4) the Sponsors act as **[*1080]** the final arbiters of any disputes between *au pairs* and host families regarding wages and hours; (5) the Sponsors can terminate *au pairs* without the consent of the host family and cause their removal from the United States,[17] and a host family cannot terminate an *au pair* without approval from the Sponsor; (6) the Sponsors draft the contracts governing the relationships between *au pairs* and their host families; **[**31]** and (7) the Sponsors provide *au pairs* with health insurance. (Doc. # 240 at 18-23.) She also noted that, "as 'a general rule, determining whether an entity qualifies as an employer is ***HN8***[] a fact issue for the jury.'" (*Id.* at 17, 18) (citing *Bristol v. Bd. of Cnty. Comm'rs of Clear Creek, 312 F.3d 1213, 1221 (10th Cir. 2012))*.

Defendants contend that Judge Tafoya erred because she essentially "confuse[d] the host family's status as employer of an *au pair* with the sponsor's role as a visa sponsor," citing to federal regulations that generally describe the *au pair* program as an "exchange program," rather than an employment program. (Doc. # 247 at 7.) That the *au pair* program has been generally described an "exchange **[**33]** program" is in no way probative of the Sponsors' status as a joint employer. Indeed, the doctrine of "joint employment" exists to recognize that an apparently-independent entity can still "employ" an individual for purposes of the *FLSA*, and Defendants point to no legal authority, either from the joint employment case law or otherwise, indicating that a "visa sponsor" cannot be considered a joint employer. The Court also determines that Judge Tafoya properly distinguished *Ivanov v. Sunset Pools Mgmt., Inc., 567 F. Supp. 2d 189 (D.D.C. 2008)*. As such, the Court adopts this aspect of her Recommendation.

3. Plaintiffs' *FLSA* Claims

Plaintiffs' *FLSA* claims are based upon four purported violations of the *FLSA*: (1) the Sponsors' failure to pay them minimum wage; (2) the Sponsors' failure to compensate them for their mandatory week-long training; (3) the Sponsors' unlawful deduction of room and board from their compensation (including but not limited to during vacations when they are not provided room and board), and (4) the Sponsors' failure to pay them overtime compensation when they worked in excess of 40 hours per week.[18]

a. Whether the *FLSA* Applies to Plaintiffs' Wage Claims

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[16] Indeed, Defendant Go Au Pair's contract with its *au pairs* sets out an *au pair*'s daily employment responsibilities, including "daily maintenance of the children, including meal preparation, doing the children's laundry, transporting the children to various activities, **[**32]** assisting with homework, playing, teaching and caring for the children. [] Minor housekeeping, including but not limited to, washing the children's dishes, tidying up the children's rooms and making their beds, vacuuming and dusting the children's rooms and cleaning their bathrooms. [] pick up after the children in any room in which they have played." (Doc. # 101 at 66-67.)

[17] Defendant Cultural Care's employment contract provides that the *au pair* must agree that Cultural Care (not the host family) will terminate the *au pair* if it determines that her emotional or physical state makes her unsuitable for providing childcare, **if she gets married or pregnant, engages in behavior Cultural Care determines to be unsuitable, or Cultural Care deems her performance unsatisfactory "for whatever reason**." (Doc. # 101 at 63.)

[18] As Magistrate Judge Tafoya noted, "Defendants do not request dismissal of Plaintiffs' *FLSA* claims based upon Defendants' failure to pay them **[**34]** for the one-week mandatory training, nor Plaintiffs' claims that room and board is unlawfully deducted from their weekly stipends during vacations." (Doc. # 240 at 16, n. 7.)

The Sponsors' objections to Judge Tafoya's Recommendation are that:

1. *Au pair* wages have **never** been governed by the *FLSA*, but rather, by a so-called separate "DOS formula" - a term of their own invention - that purportedly "governs calculations of the weekly stipend." (Doc. # 247 at 2.)

2. "Nothing in the language of the 1997 regulation or the accompanying commentary **[*1081]** reflects any intent to depart from th[e] 1995 [DOS] formula." (*Id.* at 4).

3. A DOS Notice issued to Sponsors in 2007, for example, is an indication that the *FLSA* does not apply to Plaintiffs' claims, because the DOS issued such notices after 1997 that purportedly continued to use "the stipend formula adopted in 1995 to calculate the weekly stipend." (*Id.* at 5).

Specifically, the Sponsors point to the fact the DOS' predecessor, the United States Information Agency (USIA), promulgated an interim rule in 1995 providing that *au pairs* should receive a weekly stipend of "not less than $115 per week," which was calculated by **[**35]** multiplying the federal minimum wage rate at that time by 45 hours (i.e., the maximum number of hours an au pair could work under the regulations) and subtracting $36 per week for room and board. *See 60 Fed. Reg. 8547-02 at 8443*. In 1997, however, the USIA implemented **amended regulations**, which contain **no mention** of a "formula," much less a stipend of "not less than $115 per week." *See 62 Fed. Reg. 34632 (June 27, 1997)*. The amended regulations, however, specifically provided that the Sponsors "shall require that *au pair* participants" are "compensated at a weekly rate based upon 45 hours per week and paid in conformance with the requirements of the *Fair Labor Standards Act* as interpreted and implemented by the United States Department of Labor." *Id. at 34634* (codified at *22 C.F.R. § 62.31(j)(1)*). Additionally, the interim final rule specifically explained that such a change was necessary because "[t]he United States Department of Labor has determined that *au pair* participants are covered under the provisions of the *Fair Labor Standards Act* and therefore must receive federal minimum wage. The [USIA] is amending this regulation to ensure that there is no future confusion regarding the payment of minimum wage." *62 Fed. Reg. 34632, 34633*.

Accordingly, both the plain language of the regulation (explicitly requiring **[**36]** *au pairs* to be "paid in conformance with" the requirements of the *FLSA*, **"as interpreted and implemented by the United States Department of Labor" - not** "as interpreted and implemented by" the DOS), as well as the DOL's explanation for the change ("to ensure that there is no future confusion regarding payment of the minimum wage), belies both of the Sponsors' assertions that (1) "[t]he 1997 stipend provision simply codifies the [prior DOS] formula on which the previous fixed-sum stipend of $115 was based, while referencing the *FLSA* in a way that incorporates adjustments in the [wage] rate" and (2) "Nothing in the language of the 1997 regulation or the accompanying commentary reflects any intent to depart from th[e] 1995 formula." (*See* Doc. # 247 at 4).

Although the Sponsors acknowledge the 1997 amendment to the *au pair* regulations as well as the amendment's explanatory language (that *au pairs* are "covered under the provisions of the *Fair Labor Standards Act*" and that the amendment was necessary to "ensure that there is no future confusion regarding the payment of minimum wage"), they conclusorily characterize this language as simply "repeat[ing] [the] conclusions that USIA reached in 1995." (Doc. # 247 at **[**37]** 4.) In 1995, however, the USIA did not opine broadly regarding whether *au pairs* should be "paid in conformance with the requirements of the *Fair Labor Standards Act* as interpreted and implemented by the United States Department of Labor," but rather, concluded that *au pairs* were "employees" of host families. *See* 60 Fed. Reg. at 8550-51 (noting that "the Agency has been obligated to examine the question of whether *au pairs* are employees [of host families] subject to **[*1082]** the provisions of the *Fair Labor Standards Act*. . . . The Department of Labor has specifically advised the Agency that an employment relationship is established").

Moreover, with regard to the DOS' conduct in continuing to issue Notices to Sponsors, the Sponsors have cited no legal authority for the notion that the conduct of an agency like the DOS can somehow trump the plain language of a regulation. Regardless, these Notices in no way support Defendants' theory that an entirely separate, DOS regime governs *au pair* wages. Rather, the 2007 Notice simply advises "[a]ll *Au Pair* sponsors" of an increase to the federal minimum wage, correctly notes that "[t]he weekly stipends for the standard *Au Pair* Program and EduCare Program **are directly connected to the [**38] federal minimum wage**," and indicates that *au pair* stipends, given this increase in the minimum wage, will be $195.75 per week as of July 24, 2009. (Doc. # 127-1 at 2) (emphasis added).[19] As such, the Court agrees with Judge Tafoya's conclusion that the *FLSA* applies to Plaintiffs' claims.

b. Whether Sponsors May Lawfully Deduct Room and [39] Board**

The Sponsors first argue that the Recommendation's determination that the Sponsors may not deduct the costs for room and board against *au pairs'* wages is erroneous because it is "premised on the incorrect conclusion that the *FLSA*, rather than the DOS's stipend formula, governs credit of the stipend." (Doc. # 247 at 6.) This argument necessarily fails because, as discussed above, the Court believes that the *FLSA* does, in fact, apply to Plaintiffs' claims here.

Judge Tafoya's Recommendation also noted that ***HN9***[] pursuant to *29 C.F.R. § 531.27(a)*, an employer may include the reasonable cost or fair value of furnishing an employee board, lodging or other facilities in the employee's wages. However, pursuant to *29 C.F.R. § 531.30*,[20] an employer may not credit the cost of facilities toward an employee's wages if the employer is required by law to provide the same. *22 C.F.R. § 62.31(e)(6)* provides that "Sponsors shall secure . . . a host family placement for each participant. Sponsors shall not . . . place the *au pair* with a family who cannot provide the *au pair* with a suitable private bedroom.'" Additionally, the DOL issued a Wage and Hour Opinion Letter in 1997, cited by Judge Tafoya, stating that with regard to the hiring of an employee on an *au pair* ***[**40]*** visa, "an employer may not take credit for facilities which the employer is required by law or regulation to provide," and specifically noting that a host family could not deduct the use of the family automobile to meet the minimum wage requirement. 1997 WL 998029. Judge **[*1083]** Tafoya concluded that the Sponsors and host families were accordingly prohibited from deducting the cost of room and board because

> There is no question that pursuant to *22 C.F.R. § 62.31(e)(6)* host families are required to provide room and board to their *au pairs*. Defendants do not cite to any *FLSA* provision providing an exception from *29 C.F.R. § 531.30*'s requirement for the *au pair* program that otherwise prohibits an employer from crediting the cost of room and board from an employee's wages if the employer is required by law to provide the same.

(Doc. # 240 at 25.)

Defendants' Objection obliquely **[**41]** addresses Judge Tafoya's argument about Defendant's failure to cite an exception to *29 C.F.R. § 531.30*, in citing generalized language about the benefits to the *au pair* from the immersion of the home life of the host family, and asserting that "provision of room and board, thus, benefits **both** the host family and the *au pair."* (Doc. # 247 at 7.) The Sponsors also (unironically) cite another regulation interpreting the *FLSA*, which provides that acceptance of lodging must be "voluntary and uncoerced," but that "[i]n the case of lodging furnished to live-in domestic service employees, the Administrator will accept a credit taken by the employer of up to seven and one-half times the statutory minimum hourly wage for each week lodging is furnished." *29 C.F.R. § 552.100(a)*, *(c)*. These arguments represent, at best, red herrings, as neither the statutory provisions cited nor the Sponsors' generalized assertions that *au pairs* also benefit from housing trump the far more specific provision at *29 C.F.R. § 531.30*, nor do they indicate, in any way, that the *au pair* program is exempt from *29 C.F.R. § 531.30*.

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[19] Defendants' arguments that the terms of the so-called "DOS formula" are "irreconcilable" with the *FLSA* are also unavailing. (Doc. # 187 at 3.) Specifically, the Sponsors note that the *FLSA* has no cap on weekly hours, but that *au pairs* are only permitted to work 45 hours a week; this presents no conflict whatsoever, and simply indicates that the *au pair* regulations are more restrictive in terms of work hours than the *FLSA* - **not that the *FLSA* does not apply**. They also cite a 1997 Opinion Letter issued by the DOL, in which it stated that it did not have the authority to **lower** the amount of the stipend if an *au pair* works fewer than 45 hours. Again, this says nothing about whether the *au pair* stipend must conform with the *FLSA* generally, because paying an *au pair* for 45 hours of week when that *au pair* actually worked fewer hours would result in a higher wage.

[20] *29 C.F.R. § 531.30* provides that "The reasonable cost of board, lodging, or other facilities may be considered as part of the wage paid an employee only where customarily 'furnished' to the employee. **Not only must the employee receive the benefits of the facility** for which he is charged, **but it is essential that his [or her] acceptance of the facility be voluntary and uncoerced."** (Emphasis added).

Accordingly, Judge Tafoya did not err in determining that Plaintiffs have stated a plausible claim that the Sponsors' unlawfully deducted the cost of room and board from their **[**42]** wages.

c. Whether Sponsors Must Pay Overtime Compensation Under the *FLSA*

Defendants' Objections did not challenge Judge Tafoya's analysis regarding Plaintiffs' entitlement to federal overtime provisions. (*See* Doc. # 247.) Nevertheless, the Court agrees with Judge Tafoya's conclusion that Plaintiffs have stated a viable claim for overtime for any work performed after January 1, 2015, due to a new DOL regulation, recently upheld by the District of Columbia Circuit Court of Appeals,[21] providing that ***HN10***[] "[T]hird party employers of employees engaged in live-in domestic service employment [] may not avail themselves of the overtime exemption provided by [*29 U.S.C. § 213(b)(21)*], even if the employee is jointly employed by the individual or member of the family or household using the services." *29 C.F.R. § 552.109(c)*.

4. Plaintiffs' State Wage Law Claims

a. Preemption

Defendants assert that Plaintiffs' state wage law claims are preempted by virtue of the "regulatory framework designed by USIA, which embodies the government's policy judgments regarding *au pair* compensation. USIA expressly recognized 'the programmatic need for a uniform wage' and adopted a compensation structure that would 'ensure that all au pair participants receive uniform wage compensation' **[**43]** . . . Application of state minimum wage laws presents an obstacle to the accomplishment of this objective because it eliminates any uniformity in the wage calculation," as some states have **[*1084]** higher minimum wages than those required by the *FLSA*. (Doc. # 247 at 10) (citing 60 Fed. Reg. at 8551; 49 Fed. Reg. at 64298.) The Sponsors also assert that the "regulatory framework" establishing a uniform wage "reflects a careful balance of policy objectives concerning the government's interest in furthering cultural exchange, affording adequate protection to *au pair* participants and their American host programs, and safeguarding the continuing viability of *au pair* program." (*Id.* at 9-10.) Although Defendants have slightly recast their arguments from those that appeared before Judge Tafoya (which focused on the immigration aspects of the *au pair* program),[22] the Court nevertheless agrees that Judge Tafoya properly decided that state wage laws are not preempted. First, as has already been discussed, the regulations implemented by the USIA expressly provided that the *au pair* program **must** conform with the *FLSA*, **without exception;** the *FLSA*, in turn, explicitly provides that, ***HN11***[] if a state sets a higher minimum wage than that mandated by the *FLSA*, employees **[**44]** within that state are entitled to receive that higher wage. *See* *22 C.F.R. § 62.31(j)(1)*; *29 U.S.C. § 218(a)*. Additionally, the Court agrees with Judge Tafoya's analysis of the Sponsors' arguments regarding uniformity in wage calculation:

> Defendants cite to *60 Fed. Reg. 8547 (1995)* as indicating that the federal government "identified a programmatic need for a uniform wage." Defendants' characterization of this statement is misleading. In the Supplementary Information section preceding the Final Rule, the USIA discussed the appropriate amount of credit a host family could use with regard to the room and board provided to an au pair and considered the options of crediting actual cost or a fixed cost. *Id. at 8551*. The USIA weighed the preference for crediting actual cost against the need for the credit to be uniform so that host families would not have to maintain individualized records. *Id.*

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[21] *Home Care Ass'n of Am. v. Weil, 799 F.3d 1084 (D.C. Cir. 2015)*.

[22] To the extent that the Sponsors are presenting "new" arguments before the Court in their Objection, "issues raised for the first time in objections to the magistrate judge's recommendation are deemed **[**45]** waived." *Marshall v. Chater, 75 F.3d 1421, 1426 (10th Cir. 1996)*.

(Doc. # 240 at 30-31 n. 10.) Accordingly, the Court agrees that Plaintiffs' claims under state wage laws are not, in fact, preempted by some kind of amorphous "federal framework."

b. Plaintiffs' Claims Under Colorado Minimum Wage Law

Colorado Minimum Wage Order Number 31 provides that "domestic employees employed by households or family members to perform duties in private residences," are not entitled to overtime compensation under Colorado state law ("Domestic Employee Exemption"). *7 Colo. Code Regs. § 1103-1:5*. The "preamble" to the Minimum Wage Order, however, provides as follows:

> [I]f either of the following two situations applies to an employee, then the employee is entitled to the $8.31 state minimum wage . . .
> [1] The employee is covered by the minimum wage provisions of Colorado Minimum Wage Order Number 32.2.
>
> [2] **The employee is covered by the minimum wage provisions of the *Fair Labor Standards Act***.
>
> **Some restrictions and exemptions may apply; contact the Colorado Division of Labor for additional information**.

7 Colo. Code Regs. § T.1100 (emphasis added). Noting that *au pairs* are covered by the *FLSA's* minimum wage provisions, **[*1085]** see *22 C.F.R. § 62.31(j)(1)*, Judge Tafoya concluded that Plaintiffs fall within the second of the two categories enumerated above, and thus, that the Domestic Employees Exemption did not apply. (Doc. # 240 at 33.) Defendants, however, note that the last sentence of the preamble states **[**46]** that "[s]ome restrictions and **exemptions may apply**." (Doc. # 247 at 11) (emphasis added). Judge Tafoya apparently did not consider this language, and the existing briefing on this matter does not allow the Court to make a determination at this juncture as to whether *au pairs* do, in fact, qualify for the Domestic Employees Exemption. Accordingly, the Court neither adopts nor rejects Judge Tafoya's determination on this issue, and Defendants' Motion to Dismiss is denied without prejudice with respect to Plaintiffs' wage claims under Colorado state law.

c. Plaintiffs' Claims Under New York Minimum Wage Law

Defendants merely reiterate their arguments about how a "Fact Sheet for Employers," disseminated by the New York Department of Labor, indicated that *au pairs* are exempted from New York state labor law coverage. Specifically, that "Fact Sheet" stated that that New York State labor laws "cover ALL workers. Their Immigration status does not matter," but that there was one exception, namely, "*au pairs* hired through the federal *au pair* program and admitted into he United States under a J-1 visa . . . [who] are subject to special federal rules." (Doc. # 127-4 at 4; Doc. # 247 at 12.) Judge Tafoya's **[**47]** analysis on this point is well-taken:

> The Fact Sheet upon which Defendants rely does not cite to any state law that exempts au pairs from minimum wage and/or overtime exemptions, nor do Defendants. The Fact Sheet is most analogous to an opinion letter and therefore, may be entitled to a certain amount of deference with regard to the interpretation of New York's wage and hour laws, but it does not displace or supersede a court's own interpretation and judgment. *See Salazar v. Butterball, LLC, No. 08-cv-02071-MSK-CBS, 2009 U.S. Dist. LEXIS 125989, 2009 WL 6048979, at *8 (D. Colo. Dec. 3, 2009)* (finding that [DOL's] opinion letters are entitled to deference, but the level of deference accorded depends upon the "thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.") (citing *McGraw v. Barnhart, 450 F.3d 493, 501 (10th Cir. 2006)* ("Under *Skidmore*, the degree of deference given informal agency interpretations will vary with circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position.")). While the New York DOL's opinion with regard to whether its state **[**48]** labor laws applies to au pairs may be persuasive depending upon the above mentioned factors, it is not determinative of whether Plaintiffs have stated a viable claim. As that is the only authority upon which Defendants have relied, the court finds their request for dismissal should be denied.

(Doc. # 240 at 33-34.) Accordingly, the Court will adopt the Recommendation with respect to New York wage laws.[23]

5. Plaintiffs' Fraud Claims

Defendants claim that Plaintiffs fail to plead fraud with the particularity **[*1086]** required by *Rule 9(b) of the Colorado Rules of Civil Procedure*, in alleging that the Sponsors falsely informed them, other *au pairs*, and host families that $195.75 was a "set" or "fixed" salary and that they could not receive higher wages. Specifically, they assert that Judge Tafoya "simply concluded" that Plaintiffs met their burden "without analysis." (Doc. # 247 at 13.) To the contrary, Judge Tafoya specifically noted that Plaintiffs provided the following specific examples of fraudulent statements,[24] including the fact that

> Plaintiffs **[**49]** . . . allege that through a blog entry on its website, Defendant InterExchange informed *au pairs* that if they received offers for higher salaries, they should consider such offers bogus and/or the product of a scam. . . . Defendant InterExchange informed *au pairs* through another blog post that the salary of $195.75 per week was the product of a "strict equation." Plaintiffs allege that Defendant AIFS has informed *au pairs* that if they received more than $195.75/week, they could be subject to deportation and that its website listed the weekly stipend as simply $195.75 and instructed host families that they "needed to 'pay th[at] published fee.'" Similarly, Plaintiffs allege that Defendant American Cultural Exchange LLC d/b/a GoAuPair created a handbook entitled, "GoAuPair *Au Pair* Household Handbook," that instructs GoAuPair host families that au pair wages are set by the federal government at $195.75. . . . **Finally, Defendant Cultural Care again argues (alone) that the $195.75 is the maximum amount *au pairs* are permitted to receive**. As an alternative argument, it argues that if its position in that regard is inaccurate, "Plaintiffs have failed to plead facts sufficient to show that Cultural **[**50]** Care was aware of this . . . . and therefore acted to mislead *au pairs*." **The fact that $195.75/week does not represent a fixed wage is well established. With regard to its alternative argument, Defendant Cultural Care has essentially conceded they informed *au pairs* that $195.75 was a fixed rate, which aligns with Plaintiffs' allegations**.

(Doc. # 240 at 36-37) (internal citations omitted, emphasis added). The Court agrees with Judge Tafoya that these allegations are sufficient to satisfy *Rule 9(b)*. Additionally, even though Defendants' objection to Judge Tafoya's analysis of Plaintiffs' fraud claims was limited to the claims' purported lack of particularity, the Court notes that it is undisputed that the $195.75 represented, at best, a "wage floor," such that families **could** pay *au pairs* more if they wished[25] - but Plaintiffs' allegations indicate that the Sponsors led both *au pairs* and host families to believe otherwise. As such, Plaintiffs' fraud claims will not be dismissed.

6. Plaintiffs' Fiduciary Duty Claims

The Sponsors' arguments regarding Magistrate Judge Tafoya's conclusions about Plaintiffs' fiduciary duty claim are **[*1087]** cursory, conclusory, and difficult to follow, but as far as the Court can surmise from an examination of the

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[23] The Sponsors did not object to Judge Tafoya's recommendations regarding the applicability of the state wage laws of Pennsylvania or California. (*See* Doc. # 47.)

[24] The Sponsors note that Judge Tafoya improperly referenced Plaintiffs' assertion, made in their Response to Defendants' Motion to Dismiss, that Defendant InterExchange's website informed *au pairs* that they can make "**almost [**51]** $10,000 per year," in considering whether Plaintiffs pled their fraud allegations with sufficient particularity, as this allegation did not appear in Plaintiff's Complaint. (Doc. # 247 at 14 n. 5.) The Court reviewed the Complaint and determined that this allegation was not, in fact, included (see Doc. # 101); as such, the Court did not consider that particular assertion here.

[25] Of course, Plaintiffs also allege that the Sponsors should have ensured the host families did, **in fact**, pay more than $195.75 per week, because they allege that the *au pairs* were entitled to additional wages under the *FLSA* and/or state wage law.

Defendants' Motions to Dismiss, the Sponsors apparently are attempting to argue that Judge Tafoya erred in finding that Plaintiffs stated a plausible claim for breach of fiduciary duty because she entirely "failed to address" issues relating to contracts between the *au pairs* and the Sponsors and how such contracts **[**52]** essentially preclude a fiduciary duty claim. (Doc. # 147 at 14.) In fact, she discussed these issues in depth, including an extensive analysis of *DerKevorkian v. Lionbridge Techs., Inc., 316 F. App'x 727 (10th Cir. 2008)*, a case which specifically addressed a breach of fiduciary duty under Colorado law in the context of an employment contract and employer-employee relationship, and noted that ***HN12***[] "[a] confidential relationship exists when one party justifiably reposes confidence in another such that the parties drop their guard and assume that each side is acting fairly. Colorado does not recognize a separate tort founded upon breach of a confidential relationship. However, a confidential relationship may serve as an indication of fiduciary status." *Id. at 737*.

Defendants ignore Judge Tafoya's treatment of *DerKevorkian*, much less attempt to distinguish it, and the Court agrees with her conclusion that, taking Plaintiffs' allegations as true, they present "a stronger basis to find a confidential relationship than that described in *DerKevorkian."* (Doc. # 240 at 40.) As such, the Court agrees with Judge Tafoya's analysis and adopts her Recommendation as to Plaintiffs' Fiduciary Duty Claims.

7. Plaintiffs' Quasi-Contract and Unjust Enrichment Claims

Finally, Defendants note **[**53]** that the Recommendation properly dismissed Plaintiffs' breach of contract claim because "Plaintiffs do not allege that Defendants violated a provision within their respective contracts with the *au pairs."* (Doc. # 240 at 41-42.) Nevertheless, they object that she did not also dismiss Plaintiffs' quasi-contract or unjust enrichment claims. (Doc. # 247 at 15.) However, she correctly noted that "Defendants have not requested dismissal" of either of those claims in any of their Motions to Dismiss, and Defendants do not disagree with this conclusion. (*Id. at 42*.) ***HN13***[] "Issues raised for the first time in objections to the magistrate judge's recommendation are deemed waived." *Marshall v. Chater, 75 F.3d 1421, 1426 (10th Cir. 1996)*. Accordingly, both of these claims will stand.

III. CONCLUSION

The Court has conducted a full *de novo* review of this matter, including reviewing all relevant pleadings, the Recommendation, Defendants' Objections thereto, and the Plaintiffs' Response to Defendants' Objections. Based on this *de novo* review, the Court concludes that Judge Tafoya's thorough and thoughtful Recommendation is correct and is not called into question by Defendants' Objections, except as discussed above.

Accordingly, it is hereby ORDERED that Defendants' Objections **[**54]** (Doc. ## 247, 248) are OVERRULED IN PART. It is

FURTHER ORDERED that the Recommendation of United States Magistrate Judge Kathleen Tafoya (Doc. # 240) is ACCEPTED IN PART AND REJECTED IN PART; specifically, the Court adopts Judge Tafoya's conclusions regarding the dismissal of Plaintiffs' claim under the Utah Minimum Wage Act and Plaintiffs' claim for breach of contract; neither accepts nor rejects Judge Tafoya's conclusions regarding Plaintiffs' Colorado wage claim; and adopts her conclusions regarding the remainder of Plaintiffs' claims. Accordingly, it is

FURTHER ORDERED that Defendants' Motions to Dismiss (Doc. ## 127, **[*1088]** 130, 131, and 136) are GRANTED IN PART (with respect to Plaintiffs' claim under the Utah Minimum Wage Act and Plaintiffs' claim for breach of contract), denied without prejudice with respect to the Colorado wage claim, and denied as to the remainder. It is

FURTHER ORDERED that the Joint Motion by Certain Defendants to Dismiss the First Amended Complaint (Doc. # 135) is DENIED in its entirety. Finally, it is

FURTHER ORDERED that Defendants' Unopposed Motion for Oral Argument Regarding Recommendation of United States Magistrate Judge (Doc. # 257) is hereby DENIED AS MOOT. **[**55]**

Dated: March 31, 2016

BY THE COURT:

/s/ Christine M. Arguello

CHRISTINE M. ARGUELLO

United States District Judge

[BRFHH Shreveport, LLC v. Willis Knighton Med. Ctr.](#)

United States District Court for the Western District of Louisiana, Shreveport Division

March 31, 2016, Decided; March 31, 2016, Filed

CIVIL ACTION NO. 15-2057

Reporter

176 F. Supp. 3d 606 *; 2016 U.S. Dist. LEXIS 44778 **; 2016-1 Trade Reg. Rep. (CCH) P79,597

BRFHH SHREVEPORT, LLC, ET AL VERSUS WILLIS KNIGHTON MEDICAL CENTER

Subsequent History: Motion granted by, in part, Motion denied by, in part *BRFHH Shreveport, LLC v. Willis-Knighton Med. Ctr., 2017 U.S. Dist. LEXIS 59815 (W.D. La., Apr. 19, 2017)*

Motion denied by *BRFHH Shreveport, LLC v. Willis-Knighton Med. Ctr., 2017 U.S. Dist. LEXIS 222615 (W.D. La., May 25, 2017)*

Motion denied by *BRFHH Shreveport, L.L.C. v. Willis-Knighton Med. Ctr., 2020 U.S. Dist. LEXIS 29221 (W.D. La., Jan. 23, 2020)*

Dismissed by, Injunction denied by, Without prejudice *BRFHH Shreveport, L.L.C. v. Willis-Knighton Med. Ctr., 2020 U.S. Dist. LEXIS 52196 (W.D. La., Mar. 25, 2020)*

Core Terms

acquisitions, antitrust, anticompetitive conduct, anticompetitive, allegations, clinics, monopolization, manufacturer, referrals, argues, patients, monopoly power, terminated, non-compete, competitor, provider, hiring, Sherman Act, prices, anti trust law, market power, entities, talent, procompetitive, consumers, merits, business purpose, monopolist, airline, insured

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For Willis-Knighton Medical Center, doing business as Willis-Knighton Health System, Defendant: Darryl W Anderson, Eliot Turner, Lauren Etlinger, Layne E Kruse, PRO HAC VICE, Norton Rose Fulbright (HOU), Houston, TX; Lamar P Pugh, Pugh Pugh & Pugh, Shreveport, LA; Lesley Reynolds, PRO HAC VICE, Norton Rose Fulbright (DC), Washington, DC.

Judges: ELIZABETH ERNY FOOTE, UNITED STATES DISTRICT JUDGE. MAGISTRATE JUDGE HORNSBY.

Opinion by: ELIZABETH ERNY FOOTE

Opinion

[*611] MEMORANDUM RULING

Plaintiffs BRFHH Shreveport, LLC ("BRFHH"), and Vantage Health Plan, Inc. ("Vantage"), a healthcare provider and a healthcare insurer respectively, allege that **[**2]** past and present acquisitions by the Defendant, also a healthcare provider, in Shreveport and Bossier City, Louisiana, violate federal antitrust laws. Before the Court is the Defendant's Motion To Dismiss, [Record Document 30], limited at this stage in the litigation to the question of whether *Federal Rule of Civil Procedure 12(b)(6)* requires dismissal of Plaintiff Vantage Health Plan Inc.'s federal monopolization claims, Record Document 83. The parties have extensively briefed this question, together filing three memorandums on the initial, broader dismissal arguments raised by the Defendant, Record Documents 30, 65, 75, and four memorandums on the narrower dismissal issue now before the Court, Record Documents 89, 90, 93, 97. After consideration of the foregoing, the Court hereby **DENIES** the Defendant's motion.

I. Background

A. The Parties

Plaintiff BRFHH Shreveport, LLC, is the operator of University Health Hospital ("University Health") in Shreveport. Once a state-owned and -operated charity hospital, University Health has been operated by BRFHH Shreveport since September of 2013, when Louisiana State University ("LSU"), whose neighboring medical school has traditionally supplied physicians for University Hospital, and the **[**3]** parent entities of BRFHH Shreveport signed a Cooperative Endeavor Agreement transferring hospital management authority from the state of Louisiana to BRFHH Shreveport's parent entity. Record Documents 49, p. 3, and 77-1, p. 89. The privatization effected by the 2013 agreement, however, is not unbounded: under the terms of the 2013 agreement, University Hospital continues to depend exclusively on admissions from LSU physicians and treat a substantial portion of the Shreveport area's indigent population. Record Document 1, p. 6, 8. According to BRFHH Shreveport, sustaining these mandates while remaining financially viable requires that a critical, if minority, mass of the patients treated at University Health have private, commercial insurance; the higher reimbursement rates associated with commercial insurance help offset the relatively low profitability of treating the indigent. Id. at 8. Vantage Health Plan, Inc., is a health insurance provider specializing in lower-cost HMO coverage. Id. at 6, 18. Vantage is headquartered in Monroe, Louisiana, where the large majority of its 35,000 subscribers reside. Id. at p. 6, 18, 43. Defendant Willis-Knighton Medical Center ("Willis-Knighton") is a competing healthcare provider that **[**4]** operates four hospitals and at least six free-standing clinics in Shreveport and Bossier City. Record Document 48, p. 39. University Health participates in Vantage's Tier-1 network; Willis-Knighton does not. Id. at 18.

B. Relevant Geographic Market

According to the Plaintiffs, Shreveport and Bossier City (the "Shreveport area") together form the relevant geographic market in which Defendant's antitrust violations occurred and will occur. Id. at 43. Within the Shreveport area there are three entities that operate hospitals: Willis-Knighton, BRFHH Shreveport, and CHRISTUS Health Northern Louisiana ("CHRISTUS"). Id. at 7. According to the Plaintiffs, Willis-Knighton's share of hospital admissions in the Shreveport area is approximately 60% overall and approximately 75% among commercially insured **[*612]** patients, while University Health and CHRISTUS each approximately have a 12% share of commercially insured patients. Id.

C. Plaintiffs' Claims

1. *Past Conduct*

BRFHH Shreveport and Vantage describe two sets of antitrust claims. The first set is about prior conduct: Vantage—and Vantage alone—asserts that some of Willis-Knighton's prior acquisitions, physician referral practices, and non-compete employment contracts violated *section 2* **[**5]** of the Sherman Act, which prohibits monopolization and attempted monopolization, and *section 7* of the Clayton Act, which prohibits anticompetitive acquisitions and mergers. Id. at 10, 15-21, 74-76. From Vantage's perspective, this prior-conduct theory of liability explains how Willis-Knighton has historically violated antitrust laws to exclude Vantage from participating in the

Shreveport area healthcare insurance market and why Vantage is therefore entitled to recover damages. It proceeds in four parts.

First, at some point in the last fifteen years, Willis-Knighton allegedly gained monopoly power in the Shreveport area in at least the markets for general acute-care hospital services, adult primary care, and Obstetrics/Gynecology ("Ob/Gyn"). Id. at 10, 74. As broad evidence of this ascent, the complaint states that since 2000, Willis-Knighton has enjoyed a sevenfold increase in the number of physicians it employs and a fivefold increase in revenues.[1] Id. at 10. It cites assertions made by Willis-Knighton CEO James Elrod in his autobiography that Willis-Knighton is the "dominant" provider in the area. Id. at 10. It also alleges that based on Blue Cross reimbursement rates, Willis-Knighton now charges up to three times more than University Health does for the same general category of service, such as inpatient stays. Id. at 14. More **[**6]** specifically, Vantage alleges that as of 2014-2015, Willis-Knighton's market share of commercially insured patients in the Shreveport area was 78% for general acute-care hospital services, 80% for adult primary care, and 60% for Obstetrics/Gynecology ("Ob/Gyn"). Id. at 10-11, 42-43, 74-75.

Second, over this same period, and while it had monopoly power, Willis-Knighton is alleged to have engaged in various anticompetitive acts in the Shreveport area to gain or maintain the monopolies described above. Some of these anticompetitive acts were acquisitions of rival healthcare providers. Specifically, the complaint alleges Willis-Knighton acquired the following five providers: Bossier Medical Center, Doctor's Hospital, CHRISTUS's acute-care services, the Northwest Louisiana Surgery Hospital, and "a previously independent cardiology group." Id. at 5-6, 10, 17. With respect to the acquisitions of Bossier Medical Center, Doctor's Hospital, and CHRISTUS's acute care services, the complaint describes a type **[**7]** of multi-step acquisition in which first Willis-Knighton acquired physicians from the competing provider, then the competing provider failed, and finally, in two (unidentified) instances, Willis-Knighton purchased the remaining physical assets of the shuttered entities. Id. at 5-6. According to the complaint, the closure of CHRISTUS Schumpert's acute care services occurred in 2013. The complaint does not date the other acquisitions.[2]

[*613] In addition to acquisitions, Vantage also alleges that Willis-Knighton gained or maintained its monopoly **[**8]** power through coercive offers to buy medical offices of competing physicians, non-compete contracts with its physicians, and "ruthless" control of physician referrals. Id. at 12-13. According to the Plaintiffs, Willis-Knighton has coerced competing physicians by "offering to purchase their medical offices and move them to the Willis-Knighton campus." Id. at 12. If the physicians decline the offer, they likely suffer "huge declines in referrals from Willis-Knighton's primary care physicians." Id. Willis-Knighton also allegedly requires anticompetitive non-compete agreements with its physicians. Id. The agreements allegedly prohibit "the physician from practicing anywhere in Caddo or Bossier Parishes for two years after termination of the agreement." Id. Further, many of the agreements provide a financial penalty for failing to treat a prescribed number of patients annually but also defer collection of that penalty until the physician leaves Willis-Knighton, the alleged result of which is that the debt accumulated by many Willis-Knighton physicians deters them from leaving Willis-Knighton when they otherwise would do so. Id. Finally, Willis-Knighton allegedly restricts virtually all of the referrals by its **[**9]** physicians to other Willis-Knighton physicians. Id. at 13. According to the Plaintiffs, Willis-Knighton accomplishes this by imposing sanctions on noncompliant physicians. Those sanctions allegedly include "the termination or non-renewal of leases for physician office space, and the direction of its network primary care physicians' referrals away from those specialty physicians who compete with Willis-Knighton or do not refer the bulk of their patients to Willis-Knighton facilities." Id.

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[1] The complaint does not specify whether those gains occurred within the Shreveport area or whether Willis-Knighton enjoyed those gains in all markets it serves. Willis-Knighton also operates a hospital in Arkansas. Record Document, p. 9.

[2] Filings subsequent to the complaint, however, have shed additional light on some of these acquisitions. One of the exhibits filed in conjunction with the Plaintiffs' Motion for Preliminary Injunction indicates that Willis-Knighton "purchased" Bossier Medical Center for $3.7 million in 2012. Record Document 24-30. In its briefing supporting its motion to dismiss Vantage, Willis-Knighton alleges that "Doctor's Hospital was forced into bankruptcy by in [sic] creditors in 2007, and eventually closed its doors in February 2010 . . . ." Record Document 97, p. 7-8 n. 1 (citation omitted) (citing *In re Shreveport Doctors Hospital 2003 Ltd.*, Case No. 07-BK-10415 (W.D. La.)).

Third, throughout this same period, Willis-Knighton never accepted Vantage's repeated offers to include Willis-Knighton in Vantage's Tier-1 network. Id. at 15-16. According to Vantage, it has unsuccessfully tried to contract with Willis-Knighton for fifteen years. Id. Those attempts were apparently fruitless because Willis-Knighton either was unwilling to engage with Vantage or was willing to engage but only under terms—90% reimbursement of Willis-Knighton's charges—that Vantage saw as "completely uneconomic for any health plan, and would not allow it to compete effectively in virtually any market."[3] Id. at 16. Vantage labels Willis-Knighton's posture toward it as "effectively a refusal to deal." Thus, Willis-Knighton has never been **[**10]** a participant in Vantage's primary Tier-1 network. Id. at 16-17. And while Willis-Knighton does participate in Vantage's Tier-2 network, its Tier-2 status means that Vantage subscribers must pay a markedly higher out-of-pocket rate to receive care at Willis-Knighton. Id.; see also id. at 32, 64.

Fourth, according to Vantage, the effect of these combined Willis-Knighton efforts **[*614]** has been to foreclose business opportunities in the Shreveport area that otherwise would have been available to Vantage. Id. at 66. But for Willis-Knighton monopolizing the Shreveport area provider market through its acquisitions, referral practices, and non-compete agreements and then leveraging that monopoly power to box Vantage out of the Shreveport area market, Vantage estimates that it "would have achieved a per capita level of success in the Shreveport area of at least one-third of the level that it has achieved in the Monroe **[**11]** area." Id. at 17, 66. The loss Vantage describes is thus not a loss of preexisting business, but the loss of opportunities to expand its business in the Shreveport area. Id. at 17. Vantage monetizes this loss of business at a minimum of $5.7 million annually, or at least $22.8 million in the last four years, the relevant limitation period. Id. at 66; see *15 U.S.C. § 15b (2012)*. Pursuant to the Sherman Act's treble-damages scheme, *15 U.S.C. § 15(a)*, Vantage seeks an award of "three times any damages suffered," which presumably means it seeks roughly $67 million in damages. Id. at 76.

2. Present and Future Conduct

The second set of antitrust claims revolve around present and future conduct. Vantage and BRFHH Shreveport assert that a new joint venture to open clinics located at Willis-Knighton facilities but staffed by LSU physicians—the same LSU physicians who staff University Hospital—constitutes an illegal combination under *section 1* of the Sherman Act, both an illegal monopoly and an illegal attempted monopoly under *section 2* of the Sherman Act, and an illegal merger under *section 7* of the Clayton Act.[4] Id. at 70-76. The Plaintiffs seek the Court to enjoin the opening of the new clinics. Id. at 76.

In March of 2015, Willis-Knighton and LSU's medical school in Shreveport signed a series of agreements governing the operation of several new clinics providing care in as many as eleven specialty or subspecialty fields of medicine. Id. at 27; Record Documents 24-6 to 24-15, 30-6, and 42. According to the terms of these agreements, LSU would supply the physicians for the clinics and Willis-Knighton would supply the facilities and remaining staff. Record Documents 24-6 to 24-15, 30-6, 42.

The Plaintiffs' description of control over the clinics goes further, placing Wills-Knighton at the center of both business and medical decision making—to the point that LSU physicians involved in the clinics "would effectively be working for Willis-Knighton." Record Document 1, pp. 23-24. According to the Plaintiffs, Willis-Knighton will supervise physician performance—giving it more influence over physician referrals—and control billing—meaning the clinics will not accept coverage by managed care providers like Vantage without substantially increasing its charges. Id. at 23-24, 28, 46-47. Plaintiffs also assert that the clinics will **[**13]** primarily treat commercially insured patients. Id. at 24.

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[3] Vantage argues that a more customary rate would be 50% of charges that are set by Medicare's Diagnostic Related Group system, not by the hospital. Record Document 1, p. 16. Plaintiffs also assert that "Willis-Knighton's reimbursement rates are from 50% to several hundred percent higher than those at UH-Shreveport." Id. at 14.

[4] The complaint also initially alleged that Willis-Knighton was planning an outright takeover of University Hospital. **[**12]** Record Document 1, p. 23-30. But Plaintiffs later abandoned this theory. Record Document 83, p. 2.

Given this alleged level of control and the assumption that more time worked by LSU physicians at the new joint clinics means less time worked at University Health, Plaintiffs believe that by design these clinics will shift the treatment of all of University Health's commercially insured patients from University Health facilities to Willis-Knighton facilities. Id. Plaintiffs thus allege that Willis-Knighton is in effect attempting to acquire the commercially insured business of BRFHH Shreveport. Id. at 2. Willis-Knighton would accomplish this coup not only by shifting **[*615]** initial treatment away from University Health, but also by steering all subsequent referrals away from University Health. Id. at 46-47. To substantiate this allegation, Plaintiffs indicate that the capacity of the new clinics to treat new patients will meet the current volume of commercially insured patients currently treated at University Health. Id. at 27. Further, Plaintiffs point to the alleged pattern of Willis-Knighton's previous acquisitions and offer statements by BRFHH, LSU, and Willis-Knighton officials suggesting, in Plaintiffs' eyes, a scheme to deprive University Health of it commercially **[**14]** insured business. Id. at 27. BRFHH estimates that the loss of its commercially insured business would cause it to lose $15 million annually in profits and endanger its survival as the operator of University Health.

Inversely, the migration of commercially insured patients from University Health to Willis-Knighton would significantly increase Willis-Knighton's market share in the Shreveport area, according to the Plaintiffs. Id. at 47-51. Were the new clinics to siphon away all of University Health's commercially insured care, "Willis-Knighton's 75% share in the relevant hospital market will increase to even higher levels, near 90%." Id. at 4. Among some of the specialties identified in the clinic agreements, a total shift in care to the clinics would result in Willis-Knighton's share of the commercially insured market increasing to 50% in Otorhinolaryngology (ENT), 58% in hematology/oncology, 80% in neurology, 70% in Ob/Gyn, and 65% in general pediatrics. Id. at 55.

The new clinics would also allegedly injure Vantage. Id. at 67-69. Because University Health is currently in Vantage subscribers' Tier-1 network but Willis-Knighton is not, Vantage contends that a migration of commercially insured patients from University Health to Willis-Knighton **[**15]** will be followed by an equivalent loss of Vantage subscribers. Id. at 5, 18, 58, 67-69. This is so allegedly because in the past, whenever a physician under contract with Vantage joined the Willis-Knighton Physician Network, that contract was immediately terminated. Id. at 58. Vantage also alleges that in the past whenever a LSU physician in other regions of the state joined a clinic operated by a provider with whom Vantage does not have a relationship, that physician stops accepting Vantage coverage. Id. Thus, because LSU physicians allegedly represent more than half of the physicians in Vantage's Shreveport area network, the loss of those patients would "effectively shut Vantage out of the market in the Shreveport Area." Id. at 67. Vantage believes this loss would be irreparable. Id. at 69.

D. Procedural History

After limited initial discovery, Plaintiffs moved to preliminarily enjoin the Willis-Knighton/LSU clinics, Record Document 24, and Willis-Knighton moved to dismiss all claims against them soon thereafter, Record Document 30. The Court held a hearing to address the parties' motions. Record Document 83. Ruling from the bench, the Court denied the Plaintiffs' Motion for Preliminary Injunction and denied Willis-Knighton's Motion **[**16]** To Dismiss on all but one ground. Record Document 83, p. 2. With respect Vantage's *section 2* claims, the Court declined to rule on dismissal and instead ordered additional briefing from both parties. Id. After thorough briefing from the parties, see Record Documents 89, 90, 93, and 97, the question now ripe before the Court is whether Vantage's *section 2* claims should be dismissed pursuant to *Federal Rule of Civil Procedure 12(b)(6)*.

Willis-Knighton argues that there are three principal reasons to dismiss Vantage's claims. First, Vantage has not, according to Willis-Knighton, alleged a cognizable theory of anticompetitive conduct, **[*616]** an element of a *section 2* claim. Record Document 90, p. 6-7. Second, Willis-Knighton asserts that Vantage has not established antitrust injury, a threshold requirement for a plaintiff in any antitrust claim. Id. at 7. Because antitrust injury is a universal requirement for antitrust claims, Willis-Knighton further argues that Vantage's inability to establish it warrants dismissal of all of its antitrust claims, not just its *section 2* claims. Id. Third, Willis-Knighton argues that the conduct of which Vantage complains is so vaguely or conclusorily described in its complaint that it cannot support a plausible, non-speculative claim under *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* **[**17]** .

II. Dismissal Pursuant to *Rule 12(b)(6)*

To survive a challenge under *Rule 12(b)(6)*, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. Courts are required to accept the plaintiff's "well-pleaded" facts as true and construe the complaint in a light favorable to that plaintiff. *In re Great Lakes Dredge & Dock Co., 624 F.3d 201, 210 (5th Cir. 2010)* (citations omitted). Nonetheless, courts are not required to accept the veracity of legal conclusions framed as factual allegations. *Iqbal, 556 U.S. at 678* (reasoning that under *Rule 8*, it is not sufficient to merely recite a cause of action's elements with supporting conclusory statements). Overall, determining when a complaint states a plausible claim is a context-specific task, requiring courts to rely on judicial experience and common sense to assess when a complaint crosses the line from conceivable to plausible. *Id. at 678-80*.

A claim is facially plausible when a plaintiff pleads factual content that permits the court to reasonably infer a defendant is liable for the alleged misconduct. *Iqbal, 556 U.S. at 678-79*. This plausibility standard is not a probability requirement, "but it asks for more than a sheer possibility that a defendant has acted unlawfully." Id. "Where a complaint pleads facts that are 'merely **[**18]** consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.'" Id. (quoting *Twombly, 550 U.S. at 557*).

III. Discussion

A. Failure To Plead Anticompetitive Conduct Under *Section 2* of the Sherman Act

Willis-Knighton argues that Vantage fails to plead anticompetitive conduct, an element of a monopolization claim asserted pursuant to *section 2* of the Sherman Act. Record Document 90, 4-8. A defendant is liable for monopolization under *section 2* where it (1) possesses monopoly power and (2) achieves or maintains its monopoly power through anticompetitive conduct.[5] See *15 U.S.C. § 2 (2012)*; *Verizon **[*617]** Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 407-08, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)*; *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*. The necessity of proving more than monopoly power reflects federal courts' judgment that in the short term, the monopolist's ability to charge above-market prices invites more, rather than less, competition. *Trinko, 540 U.S. at 407* ("The opportunity to charge monopoly prices . . . induces risk taking that produces innovation and economic growth."). Thus, while the definition of anticompetitive conduct[6] has many accepted permutations,[7] the essence of the conduct that it makes actionable is the

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[5] Vantage has alleged attempted monopolization, another cause of action under *section 2* of the Sherman Act. See *15 U.S.C. § 2 (2012)*; *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993)*; Record Document 1, pp. 73-75. Vantage's attempted monopolization claim is indistinguishable from Vantage's monopolization claim for the purposes of evaluating Willis-Knighton's dismissal arguments. Because anticompetitive conduct is still an element of an attempted monopolization claim, *Spectrum Sports, 506 U.S. at 456*, the viability of both Vantage's monopolization and attempted monopolization claims turns in equal measure on whether Vantage can show anticompetive conduct. Moreover, Willis-Knighton's remaining two dismissal arguments—lack of antitrust injury and lack of Twombly specificity—also equally affect Vantage's monopolization **[**20]** and attempted monopolization claims. The Court therefore need not separately address Vantage's attempted monopolization claim for a large part of this ruling.

[6] Courts also label anticompetitive conduct exclusionary conduct, predatory conduct, and improper conduct. See *Taylor Pub. Co. v. Jostens, Inc., 216 F.3d 465, 475 n.2 (5th Cir. 2000)* ("We use the terms 'predatory' and 'exclusionary' interchangeably . . . ."); *Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 298 (2d Cir. 1979)* ("improper" conduct). Some authorities, however, view the term "exclusionary" as too narrow. See 3 Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** ¶ 701b (3d ed. 2008) ("Although we often say that *§ 2* requires an 'exclusionary' act, our real meaning is that *§ 2* requires one or more forbidden *anticompetitive* acts. Not all anticompetitive acts are exclusionary.").

achievement or maintenance of monopoly power by means other than competition on the merits. See *Stearns Airport Equip. Co. v. FMC Corp., 170 F.3d 518, 522 (5th Cir. 1999)* (citing *Aspen Skiing Co. v. Aspen Highlands, 472 U.S. 585, 605, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985)* ("If a firm has been **[**19]** attempting to exclude rivals on some basis other than efficiency, it is fair to characterize its behavior as [anticompetitive]."); see also *United States v. Microsoft Corp., 253 F.3d 34, 58-59, 346 U.S. App. D.C. 330 (D.C. Cir. 2001)* (To be condemned as anticompetitive under *section 2*, the conduct "must harm the competitive process and thereby harm consumers.").[8] In the Fifth Circuit, proving anticompetitive conduct also "[g]enerally" requires "some sign that the monopolist engaged in behavior that—examined without reference to its effects on competitors—is economically irrational." *Stearns, 170 F.3d at 523*.

Vantage argues that by alleging that Willis-Knighton has acquired (and is attempting to acquire) competing healthcare providers, has used punitive non-compete contracts with its physicians, and has restricted patient referrals to other Willis-Knighton **[*618]** providers, the complaint has plead anticompetitive conduct.[9] The Court separately addresses whether any of these three groups of allegations constitute a viable theory of anticompetitive conduct.[10]

1. *Acquisitions*

In general, Willis-Knighton argues that none of the conduct that Vantage claims is anticompetitive—the acquisitions, the non-competes, the referrals—can be anticompetitive because in the Fifth Circuit, conduct is anticompetitive under *section 2* only where it is economically irrational for the defendant and here Willis-Knighton had a rational business purpose for all of its challenged actions: growing its business. See id; Record Document 90, pp. 9-10.

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[7] See *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 605 n.32, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985)* ("[E]xclusionary comprehends at the most behavior that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way.") (quoting 3 Phillip E. Areeda & Donald F. Turner, ***Antitrust Law*** 78 (1978)); *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)* (The monopolist must have "acquired or maintained that power wilfully, as distinguished from the power having arisen and continued by growth produced by the development of a superior product, business **[**21]** acumen, or historic accident."); 3 Areeda & Hovenkamp, ***Antitrust Law*** ¶ 651a (3d ed. 2008) ("We define monopolistic conduct as acts that: (1) are reasonably capable of creating, enlarging or prolonging monopoly power by impairing the opportunities of rivals; and (2) that either (2a) do no benefit consumers at all, or (2b) are unnecessary for the particular consumer benefits claimed for them, or (2c) produce harms disproportionate to any resulting benefits.")

[8] See also *United States v. Aluminum Co., 148 F.2d 416, 430 (2d. Cir. 1945)* (Hand, J.) ("The successful competitor, having been urged to compete, must not be turned upon when he wins.").

[9] Notably, Vantage does not contend that Willis-Knighton's "effective refusal to deal" with it constituted anticompetitive conduct. A refusal to deal may qualify as anticompetitive **[**22]** conduct, but only under limited circumstances. See *Aspen Skiing, 472 U.S. 585, 105 S. Ct. 2847, 86 L. Ed. 2d 467*; *Trinko, 540 U.S. 398, 124 S. Ct. 872, 157 L. Ed. 2d 823*. Instead, Vantage alleges that Willis-Knighton's refusal to deal with it represents its injury. Record Document 89, p. 25.

[10] The separate analysis of these three groups of conduct is not impermissible "compartmentalizing" of allegedly anticompetitive conduct. See *Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 698, 82 S. Ct. 1404, 8 L. Ed. 2d 777 (1962)*. As Vantage has alleged elsewhere Continental Ore and Associated Radio Services Co. v. Page Airways, Inc. hold that courts should determine anticompetitive conduct by measuring the cumulative effect of the defendant's allegedly anticompetitve conduct, rather than evaluating each instance of allegedly illegal conduct in isolation. See *Continental Ore, 370 U.S. at 698*; *Assoc. Radio Serv. Co. v. Page Airways, Inc, 624 F.2d 1342, 1356 (5th Cir. 1980)*. This instruction, however, is limited to the analysis of conduct that although in theory may constitute anticompetitive conduct, in fact has such a *de minimis* effect on competition that it should not be actionable. See *Assoc. Radio, 624 F.2d at 1353-56* ("We agree . . . that a *de minimis* rule should be applied by our courts, but we believe that [there were] enough instances of exclusionary behavior on the part of defendants to constitute far more than *de minimis* violations of *section 2*."). The Court may therefore separately address whether Willis-Knighton's acquisitions, non-competes, **[**23]** or referrals theoretically could give rise to anticompetitive conduct before cumulatively determining the effect of these actions.

In Stearns, a manufacturer of airport-to-airplane boarding bridges sued a rival manufacturer for monopolization under *section 2* of the Sherman Act. *Id. at 520-21*. Stearns, the plaintiff manufacturer, alleged in relevant part that its competitor, FMC, illegally gained and maintained its monopoly through exclusionary manipulation of municipal bids. Specifically, Stearns alleged that FMC illegally manipulated the airport competitive bid process through four strategies:

> First, FMC was to attempt to convince municipalities that they should avoid competitive bidding and strike a purchase agreement with FMC directly—so called "sole-sourcing." **[**24]** Second, if bidding appeared inevitable, FMC should strive to drive the criteria for the award away from price alone by requesting various product features be weighted against cost in the final calculation of the best bid. Third, efforts were to be made to insure that the specifications adopted by a municipality were tailored to fit FMC's product and exclude Stearns. Lastly, FMC would "induce complexities in the bidding process" by suggesting certain certifications and restrictions be added that worked to the detriment of Stearns.

Id. at 522. The Fifth Circuit held that these strategies did not amount to anticompetitive conduct for the purposes of a *section 2* monopolization claim. *Id. at 527*. The court found that the test for determining when conduct becomes anticompetitive **[*619]** is when the conduct does not involve competition on the merits. *Id. at 522-23, 527*. For three reasons, Stearns failed to show that FMC's four-part strategy did not constitute competition on the merits. *Id. at 523-27*. One reason was that this type of competition generally is not an antitrust violation under *section 1* of the Sherman Act. *Id. at 522-523, 527* (citing *Security Fire Door Co. v. County of Los Angeles, 484 F.2d 1028, 1030-31 (9th Cir. 1973))*. The second reason that FMC's conduct was competition on the merits was that it was done for a rational business purpose. *Id. at 523-24*. The court found **[**25]** that the lack of a rational business purpose, i.e., engaging in conduct that may harm a competitor but also knowingly causes itself real losses, is the key factor in determining when there is competition on the merits: "If the conduct has no rational business purpose other than its adverse effects on competitors, an inference that it is exclusionary is supported." *Id. at 522*.[11] The court stated that there was an "obvious" rational business justification for FMC's four-part strategy: selling more of its product. *Id. at 524*. The third reason that FMC's strategy was competition on the merits was that it could not succeed without the active, voluntary consent of the consumer, the airport. *Id. at 524*.[12] Based on these reasons, the court concluded that "Stearns does not and cannot claim that it has been excluded from competing on the merits" and affirmed summary judgment dismissal of Stearn's *section 2* claims. *Id. at 527*.

Vantage argues that Stearns notwithstanding, the allegations of Willis-Knighton acquiring competitors is a viable theory of anticompetitive conduct because courts—including the Supreme Court—recognize horizontal acquisitions as anticompetitive conduct. Record Document 89, pp. 13-14. The Supreme Court has established that acquiring a viable competitor constitutes anticompetitive conduct under *section 2*. See *Grinnell, 384 U.S. at 576*; see also 3 Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** ¶ 701a (3d ed. 2008) ("Historically and today, merging viable competitors to create a monopoly is a clear *§ 2* offense . . . ."). In Grinnell, the Court held that a home security conglomerate had engaged in anticompetitive conduct under *section 2* because it achieved its monopolization through the acquisition of competing entities, among other acts. *384 U.S. at 576*. The Court explained that because the acquired entities were previously the defendant's competitors, their acquisitions by the defendant lessened competition in the given market and increased the defendant's market power, allowing **[**27]** the Court to determine that they qualified as the types of anticompetitive conduct that *section 2* forbids. See id.

Courts continue to hold that acquisitions can give rise to anticompetitive conduct for the purposes of a *section 2* claim. See *Behrend v. Comcast Corp., No. CIV.A. 03-6604, 2012 U.S. Dist. LEXIS 51889, 2012 WL 1231794, at *20 (E.D. Pa. Apr. 12, 2012)*. In Behrend, consumers sued Comcast, a cable provider, in part under *section 2* of the

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[11] See also *id. at 523* ("Generally, a finding of exclusionary conduct requires some sign that the monopolist engaged in behavior that—examined without reference to its effects on competitors—is economically irrational.").

[12] Although the court stated that this determination would be upset if there were evidence that airports' decision making **[**26]** had been coopted or coerced, *id. at 526* ("Bribery and threats are not competition on the merits."), the court found that Stearns had failed to introduce any such evidence. Id.

Sherman Act for monopolizing cable services in the greater Philadelphia market. *2012 U.S. Dist. LEXIS 51889, [WL] at *1*. Comcast accomplished this monopolization through a series of acquisitions, taking the various forms of outright acquisitions, swaps of assets in different geographic regions, and **[*620]** purchases of assets in receivership through bankruptcy, over the span of a decade. *2012 U.S. Dist. LEXIS 51889, [WL] at *3-5*. These acquisitions increased Comcast's market share in the greater Philadelphia area from 24% in 1998 to 69.5% in 2007. *2012 U.S. Dist. LEXIS 51889, [WL] at *20*. On summary judgment, the plaintiff consumers argued that the acquisitions themselves represented the anticompetitive conduct required to prevail on a *section 2* claim. Id. The court agreed, holding that the acquisitions constituted anticompetitive conduct. The court reasoned that because the consumers had provided evidence that the acquisitions and the increased market power that followed the acquisitions allowed Comcast to increase price, **[**28]** the consumers could rely on the "transactions themselves . . . as proof of [anticompetitive] conduct."[13] Id.

For three reasons, Willis-Knighton argues that Grinnell and its progeny do not support a finding that the acquisitions challenged in this lawsuit are anticompetitive under *section 2*.

First, as a threshold issue, Willis-Knighton argues that the label "acquisition" mischaracterizes its past conduct. According to Willis-Knighton, the complaint only pleads that it has hired talent from its rivals, not that it has acquired them. Record Document 90, pp. 6-8. And whether hiring talent from a rival is anticompetitive under *section 2* is governed by a standard that is far more stringent than the one set forth in Grinnell. Vantage for its part asserts that the complaint alleges more than the mere hiring of talent. The complaint, according to Vantage, alleges that hiring talent from a target provider is but one initial step Willis-Knighton takes in accomplishing its ultimate aim of acquiring the target provider.

The question then becomes how courts distinguish an acquisition from hiring talent for the purposes of assessing *section 2* anticompetitive conduct. Unfortunately, neither the parties nor the Court have been able to find any law that draws this distinction. But the law in the Fifth **[**30]** Circuit is that the hiring of rival talent, even if it strengthens a monopolist and weakens a competitor, is generally not anticompetitive. *Taylor Pub. Co. v. Jostens, Inc., 216 F.3d 465, 480-81 (5th Cir. 2000)*. Because of the "high social and personal interest in maintaining a freely functioning market for talent," "hiring talent cannot generally be held exclusionary even if it does weaken actual or potential rivals and strengthen a monopolist." *Id. at 479* (citing 3 Areeda & Hovenkamp, ***Antitrust Law*** ¶ 702, at 204). Consequently, in the Fifth Circuit, a monopolist hiring rival talent is anticompetitive only where the monopolist (1) engages in predatory hiring, **[*621]** i.e., acquiring talent from a rival firm not for its own use but only to deny it to the competitor, and (2) induces the targeted talent, while still employed by the competitor, to act disloyally toward the competitor by steering its customers toward the monopolist. *Id. at 480-81*. In Taylor Publishing, a monopolist in the school yearbook publishing industry instituted a multi-faceted campaign "to take [the plaintiff competitor] out of business." *216 F.3d at 471*. One prong of the defendant's strategy was to hire away key sales personnel from the plaintiff. Id. The court held that the defendant's hiring of talent was anticompetitive because **[**31]** the plaintiff was able to demonstrate at trial that (1) the defendant had hired talent away from the plaintiff not for its own use but to deny it to the plaintiff and (2) the defendant had induced the plaintiff's employees, while still in the plaintiff's employ, to violate their non-compete agreements and convert their sales accounts to the defendant. See *id. at 480-81*.

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[13] Vantage also asserts that *Electronic Data Systems v. Computer Associates, 802 F. Supp. 1463 (N.D. Tex. 1992)*, and *Brown Shoe Co. v. United States, 370 U.S. 294, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*, support its contention that acquisitions alone constitute anticompetive conduct under *section 2*. Record Document 89, p. 20. No such holding is found in either case. In Electronic Data Systems, the defendant moved to dismiss the plaintiff's *section 2* claim not because it did not allege anticompetive conduct, but because it did not allege monopoly power. See *id. at 1466-67*. The question of whether the defendant's acquisitions gave rise to anticompetitive conduct was therefore not before the court. In Brown Shoe, the Court, in evaluating whether a horizontal and vertical merger violated *section 7* of the Clayton Act, stated, "If the share of the market foreclosed is so large that it approaches monopoly proportions, the Clayton Act will, of course, have been violated; but the arrangement will also have run afoul of the Sherman Act." *370 U.S. at 328*. This statement does not support Vantage's position because it was not the holding of the Court and, even if it were, its import is substantially diminished by the fact that it was made before Grinnell, which was the first Supreme Court case requiring anticompetitive **[**29]** conduct as an element of a *section 2* violation.

Taylor Publishing governs any acquisition alleged by the Plaintiffs in which the target provider fails because Willis-Knighton hires away its physicians but otherwise does not involve Willis-Knighton acquiring assets of the target provider before it fails. See id. at 471, 480-81. The acquisitions in the complaint that meet these criteria are the acquisitions of Bossier Medical Center,[14] Doctor's Hospital, CHRISTUS's acute-care services, and University Hospital's commercially insured business. Like the hiring of talent in Taylor Publishing, Willis-Knighton's hiring of physicians from these four entities is alleged to have weakened (or will weaken) those entities and was (or is) part of Willis-Knighton's alleged plan to put them out of business. See id. at 471; Record Document 1, pp. 2, 5-6.

And with respect to these four alleged acquisitions, Vantage has pleaded no facts to support either element of anticompetitive hiring under Taylor Publishing. The complaint has not alleged that Willis-Knighton hired physicians not for its own use but to deny them to any of the target entities. See Taylor Publ'g, 216 F.3d at 480. The complaint has also not alleged that Willis-Knighton induced any physicians to act disloyally before their employ with Willis-Knighton. See id. Consequently, these four acquisitions do not give rise to section 2 liability.

However, the two remaining acquisitions identified in the complaint, the acquisitions of Northwest Louisiana Surgery Hospital and "a previously independent cardiology group," were apparently outright takeovers and therefore are not governed by Taylor Publishing. For these acquisitions, Willis-Knighton's second argument against the application of Grinnell is relevant. Willis-Knighton contends that Grinnell does not support a blanket rule that **[**33]** acquisitions establish anticompetitive conduct under section 2. Record Document 97, p. 4. Willis-Knighton emphasizes that in Grinnell, the defendant's prior acquisitions were not an independent ground for a finding of anticompetitive conduct. See 384 U.S. at 576; Record Document 97, p. 4. In addition to the defendant's prior acquisitions, the Court in Grinnell also included defendant's inclusion of restrictive agreements among the defendant's subsidiaries that prevented competition among them[15] and **[*622]** the defendant's pricing practices in its catalogue of acts that together "plainly and explicitly" established anticompetitive conduct. See Grinnell, 384 U.S. at 571, 576. Willis-Knighton thus distinguishes this matter from Grinnell, arguing that unlike the Grinnell defendant's multifaceted anticompetitive conduct, Willis-Knighton is only alleged to have acquired competing entities. See 384 U.S. at 576; Record Document 97, p. 4. Willis-Knighton also argues, perhaps implicitly, that Grinnell must be read in concert with Stearns, which means that an acquisition is anticompetitive only where it is not done for a rational business purpose. Record Document 90, pp. 4-5.

This line of argument is unpersuasive for several reasons. First, although not explicit, the language in Grinnell suggests that acquisitions of viable competitors alone may establish the anticompetitive conduct element of a section 2 claim. In its relatively brief discussion of the defendant's anticompetitive conduct, the Court in Grinnell stated that the defendant's "monopoly was achieved in large part by unlawful and exclusionary practices. The restrictive agreements . . . *were one device*. Pricing practices . . . *were another*. The acquisitions . . . *were still another*." 384 U.S. at 576 (emphasis added). This language implies that any of the three practices by the defendant could have satisfied the Court that the defendant's actions constituted anticompetitive conduct. See id. Second, courts continue to hold that acquisitions alone establish anticompetitive conduct under section 2. See, e.g., Behrend v. Comcast Corp., No. CIV.A. 03-6604, 2012 U.S. Dist. LEXIS 51889, 2012 WL 1231794, at *20 (E.D. Pa. Apr. 12, 2012) (citing Grinnell, 384 U.S. at 576) (finding that defendant's acquisitions were prima facie evidence of anticompetitive conduct). Third, Willis-Knighton offers no authority challenging or even questioning the relevant holding in Grinnell as good law. Although it is true, as Willis-Knighton states, that the Second Circuit **[**35]** has held that a vertical acquisition is not by itself anticompetitive conduct, see Record Document 97, pp. 3-4; Port Dock & Stone Corp. v. Oldcastle Ne., Inc., 507 F.3d 117, 124-25 (2d Cir. 2007), that holding has no bearing on Willis-Knighton's alleged acquisitions because neither party characterizes them as vertical. Fourth, Stearns does not require that acquisitions must lack a rational business justification before they may be characterized as

[14] The Court notes that while a filing subsequent to the complaint indicates **[**32]** that Willis-Knighton "purchased" Bossier Medical Center for $3.7 million in 2012, Record Document 24-30, that filing was not an exhibit attached to the complaint and therefore the Court may not consider it in a 12(b)(6) motion to dismiss.

[15] Courts no longer consider intrabrand restrictions on competition enforced by the parent company **[**34]** to be anticompetitive. See Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 752-53, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984).

anticompetitive. In Stearns, the court stated that it "generally" requires "some sign that the monopolist engaged in behavior that . . . is economically irrational," *Stearns, 170 F.3d at 523*. Thus, by its very own terms, the lack of a rational business purpose is not a universal requirement for anticompetitive conduct. See id. Instead, under Stearns, the universal test is whether the conduct is competition on the merits. *Id. at 522-23, 527*. Thus, while a rational business purpose is the most important factor in determining whether there is competition on the merits, it is still a component of the overarching test of competition on the merits. See id. And even if *Stearns* does conflict with Grinnell, it must give way to Supreme Court precedent. Finally, as shown below, the tension between the analyses of Grinnell and Stearns is alleviated by the viability of a rational **[**36]** business justification as an affirmative defense.

Willis-Knighton's third argument against the application of Grinnell is that even if the Court does not adopt economic **[*623]** irrationality as the test for establishing *section 2* anticompetitive conduct, it provides Willis-Knighton with an affirmative defense. Record Document 97, pp. 4-5. To assess anticompetitive conduct under *section 2* of the Sherman Act, many courts have adopted the burden-shifting framework articulated by the D.C. Circuit in *United States v. Microsoft Corp., 253 F.3d 34, 59, 346 U.S. App. D.C. 330 (D.C. Cir. 2001)*. See, e.g., *New York ex rel. Schneiderman v. Actavis PLC, 787 F.3d 638, 652 (2d Cir.)*, cert. dismissed sub nom., *Allergan PLC v. New York ex. rel. Schneiderman, 136 S. Ct. 581, 193 L. Ed. 2d 421 (2015)*. Under Microsoft, once a plaintiff has met his burden of demonstrating a prima facie case of *section 2* anticompetitive conduct, the burden shifts to the defendant to offer a procompetitive justification, i.e., "a nonpretextual claim that its conduct is indeed a form of competition on the merits because it involves, for example, greater efficiency or enhanced consumer appeal." *Microsoft, 253 F.3d at 59*. Then, "if the monopolist's procompetitive justification stands unrebutted . . . the plaintiff must demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefit." Id. Though the Fifth Circuit has not explicitly accepted or rejected the Microsoft framework, it previously has suggested **[**37]** that some type of burden-shifting framework is appropriate for analyzing *section 2* claims. See *Mid-Texas Commc'ns Sys., Inc. v. Am. Tel. & Tel. Co., 615 F.2d 1372, 1389 n.13 (5th Cir. 1980)* (finding that analysis of a *section 2* claim is similar to the rule of reason analysis for a section 1 claim, which weighs the anticompetitive effects of the plaintiff's conduct against its procompetitive benefits).

For Willis-Knighton to prevail on this affirmative defense at the 12(b)(6) stage in the litigation, the complaint alone must prove its requisite elements, i.e., the complaint must demonstrate as a matter of law (1) nonpretextual, procompetitive justifications for Willis-Knighton's allegedly anticompetitive actions, which would include its acquisitions, the non-compete agreements, and the restrictive referrals, and (2) that the procompetitive benefit of these actions outweigh their anticompetitive harm. See *Microsoft, 253 F.3d at 59*; *Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc., 677 F.2d 1045, 1050 (5th Cir. 1982)*. Vantage argues that Willis-Knighton cannot prevail on a procompetitive justification affirmative defense at the 12(b)(6) stage because the defense requires proof of facts that lie beyond the complaint. Record Document 93, p. 3. Willis-Knighton responds by asserting that courts regularly entertain antitrust affirmative defenses and procompetitive/efficiency arguments in 12(b)(6) motions. Record Document **[**38]** 97, pp. 4-5. Willis-Knighton therefore asserts that the complaint itself supports dismissal under this defense because it alleges a legitimate business purpose for all of Willis-Knighton's challenged actions: treating more patients. See id. at 4; Record Document 90, pp. 10-11.

The Fifth Circuit has long held that "a claim may [] be dismissed if a successful affirmative defense appears clearly on the face of the pleadings." *Clark v. Amoco Prod. Co., 794 F.2d 967, 970 (5th Cir. 1986)* (citing *Kaiser, 677 F.2d at 1050*); see also *Airline Car Rental, Inc. v. Shreveport Airport Auth., 667 F. Supp. 293, 297 (W.D. La. 1986)* ("[A] cause of action cannot be dismissed on a 12(b)(6) motion on the basis of an affirmative defense unless the defense clearly appears on the face of the pleading."). In Kaiser Aluminum, the defendant filed an antitrust counterclaim that the plaintiff sought to dismiss under *Rule 12(b)(6)* based on the affirmative defense that the claim was filed after the relevant limitation period. *677 F.2d at 1049*. The counterclaim, filed in 1979, alleged that a **[*624]** contract executed between the defendant and the plaintiff in 1973 constituted an illegal tying arrangement under ***antitrust law***. *Id. at 1048*. The court affirmed dismissal, reasoning that the face of the counterclaim revealed that it was barred by antitrust's four-year statute of limitations and the facts pleaded in the counterclaim, even if taken **[**39]** as true, could not support any judicially recognized exception to the limitation period. *Id. at 1050-57*. In Airline Car Rental, the defendant sought dismissal under *Rule 12(b)(6)* based on the affirmative defense that the claim was barred by the state action doctrine. 667 F. Supp. at 297 (citing Parker v. Brown, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943)). In its complaint, the plaintiff alleged that the defendant, Shreveport Airport Authority, was "a body politic and corporate organized and existing pursuant to the laws of the State of Louisiana." Id. at 297-98. But the court denied dismissal, holding that the complaint had not stated facts sufficient to meet the requirements of the state action doctrine because that defense requires that the state entity party acted pursuant to a state policy to displace competition and the complaint had made no such claim. Id. at 298.[16]

Because the Plaintiffs' complaint does not demonstrate as a matter of law either that there were nonpretextual, procompetitive justifications for Willis-Knighton's allegedly illegal conduct or that the procompetitive benefits of the acquisitions outweighed their anticompetitive harm, Willis-Knighton is not entitled to prevail on a Microsoft procompetitive affirmative defense at this stage in the litigation. Unlike the statute of limitation defense in Kaiser Aluminum, but like the state action doctrine defense in Airline Car Rental, the procompetitive defense that **[*625]** Willis-Knighton raises cannot be resolved based solely on the Plaintiffs' complaint because, at the very least, the complaint does not reveal whether the procompetitive benefits of the acquisitions, **[**42]** non-competes, and control of referrals outweigh their anticompetitive harm. See Microsoft, 253 F.3d at 59. This affirmative defense is thus better suited for a summary judgment motion. See Behrend, 2012 U.S. Dist. LEXIS 51889, 2012 WL 1231794, at *22-24 (holding that although consumer plaintiff's allegations of Comcast's acquisitions constituted a viable theory of anticompetitive conduct under section 2, Comcast was entitled to summary judgment on that claim because Comcast had shown that it had legitimate business justifications for its acquisitions and the consumers could not demonstrate that there was a genuine dispute of material fact that Comcast's business justifications were pretextual).

Therefore, Willis-Knighton's alleged acquisitions of Northwest Louisiana Surgery Hospital and "a previously independent cardiology group" constitute anticompetitive conduct under section 2 of the Sherman Act. See Grinnell, 384 U.S. at 576; Record Document 1, pp. 10, 17. These acquisitions could plausibly constitute the type of competitor acquisitions described in Grinnell. See 384 U.S. at 576; Record Document 1, pp. 5-6, 10, 17. Like the entities acquired in Grinnell, Northwest Louisiana Surgery Hospital and the cardiology group were competitors of the defendant in the relevant market so their acquisition lessened competition and increased **[**43]** the defendant's market share[17] in the relevant market. See 384 U.S. at 576; Record Document 1, pp. 10, 17. Thus, based on its

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[16] The other cases on which Willis-Knighton relies to support its affirmative defense argument, Port Dock, 507 F.3d at 124-25, and Morris Commc'ns Corp. v. PGA Tour, Inc., 364 F.3d 1288 (11th Cir. 2004), are misplaced. See Record Document 97, pp. 3-4.

In Port Dock, the Second Circuit held that a section 2 monopolization claim alleging a vertical acquisition accompanied by a refusal to deal should be dismissed under Rule 12(b)(6) because it failed to allege anticompetitive conduct. 507 F.3d at 124-26. The court noted that a vertical acquisition standing alone does not qualify as anticompetitive **[**40]** conduct, id. at 124 (citing Belfiore v. N.Y. Times Co., 826 F.2d 177, 181 (2d Cir. 1987)), and that a refusal to deal generally does not qualify as anticompetitive conduct unless there is an absence of a valid business purposes, id. (citing Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 608, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985)). The court further noted that in the Second Circuit, "when a monopolist has acquired its monopoly at one level of a product market, its vertical expansion into another level of the same product market will ordinarily be for . . . a prototypical valid business purpose." Id. (citing G.K.A. Beverage Corp. v. Honickman, 55 F.3d 762 (2d Cir. 1995). Vantage's monopolization claims and the monopolization claim dismissed in Port Dock are easily distinguishable. Unlike the relevant challenged acquisition in Port Dock, the acquisitions that Vanta challenges were horizontal, not vertical. See id. at 119; Record Document 5-6, 10, 17. Thus, the relevant holdings from Port Dock, that vertical acquisitions are not anticompetitive under section 2 and are usually done for a rational business purpose, have no bearing on Willis-Knighton's acquisitions.

In Morris Communications, a publisher sued the Professional Golf Association for monopolizing the publication of real-time golf scores. Id. at 1290-93. The Eleventh Circuit affirmed summary judgment dismissal of the publisher's claim, holding that the defendant had demonstrated, **[**41]** as a defense, that its conduct had a nonpretextual, valid business justification. Id. at 1297-98. Because the court in Morris Commc'ns affirmed dismissal of the publisher's monopolization claim on summary judgment, rather than under Rule 12(b)(6), Morris Commc'ns does not support Willis-Knighton's argument that it is entitled to prevail on its affirmative defense of a nonpretextual, procompetitive justification for its allegedly illegal acquisitions. See id. at 1292.

allegation that Willis-Knighton acquired Northwest Louisiana Surgery Hospital and an unknown cardiology group, Vantage has plead anticompetitive conduct.

2. *Non-Compete Agreements and Control of Referrals*

Vantage also asserts that its allegations of Willis-Knighton's non-compete agreements with its physicians and its control of physician referrals are anticompetitive under *section 2* of the Sherman Act. Vantage, however, has offered no authority specifically holding or suggesting that non-compete agreements or control of physician referrals are anticompetitive under *section 2*. Absent any conflicting authority, the non-competes and the control of referrals are anticompetitive if they lacked competition on the merits. See *Stearns, 170 F.3d at 522-23, 527*. And the most important factor in determining competition on the merits is whether Willis-Knighton had a rational business purpose for its actions. See id. Other relevant factors under Stearns are whether courts find these acts violate *section 1* of the Sherman **[**44]** Act and whether Willis-Knighton could have accomplished these acts without the consent and participation of consumers. See *id. at 522-24*.

Willis-Knighton has a rational business purpose for both the non-compete agreements and its control of referrals. See *id. at 524*. As previously stated, Willis-Knighton argues that its rational business purpose for both of these actions was the same: to treat more patients. The complaint alleges nothing to contradict Willis-Knighton's argument that the purpose and the effect of the non-compete agreements and the restriction of referrals was to treat more patients. There is no allegation, for **[*626]** instance, that Willis-Knighton does not need the physicians subject to the non-compete agreements and keeps them at a loss just for the sake of ensuring that other hospitals do not have access to them. Nor is there any allegation that Willis-Knighton has steered patients back to Willis-Knighton not because their treatment would be profitable, but because it would ensure that they are not treated by other providers. These acts therefore had a rational business purpose.

The other two, less important, factors under *Stearns* point in different directions. Neither party has argued that these **[**45]** acts may violate *Section 1* of the Sherman Act. See *id. at 522-23*. On the other hand, these acts were done without the participation of consumers, i.e., patients. See *id. at 523*. On the whole, then, the strict application of Stearns to the allegations of Willis-Knighton's non-compete agreements and control of physicians referrals shows that they are not anticompetitive under *section 2* of the Sherman Act and therefore do not give rise to a claim of monopolization or attempted monopolization under the Sherman Act.

For the reasons stated above, the Court finds that Vantage has plead anticompetitive conduct with respect to the acquisitions of Northwest Louisiana Surgery Hospital and the cardiology group listed in the complaint. The Court therefore **DENIES** Willis-Knighton's motion to dismiss for failure to plead anticompetitive conduct.

B. Antitrust Injury

Willis-Knighton argues that Vantage has not suffered antitrust injury. Antitrust injury is a component of antitrust standing. Antitrust standing, in turn, is a judicially-created set of threshold requirements that a private plaintiff must show before a court can entertain its antitrust claims. See *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters ("AGC"), 459 U.S. 519, 535, 103 S. Ct. 897, 74 L. Ed. 2d 723 & n. 31 (1983)*. **[**46]** The three antitrust standing requirements are "1) injury-in-fact, [i.e.,] an injury to the plaintiff proximately caused by the defendants' conduct; 2) antitrust injury; and 3) proper plaintiff status, which assures that other parties are not better situated to bring suit." *Sanger Ins. Agency v. HUB Int'l, Ltd., 802 F.3d 732, 737 (5th Cir. 2015)* (citing *Jebaco, Inc. v. Harrah's Operating Co., 587 F.3d 314, 318 (5th Cir. 2009))*. These requirements, which supplement Article III standing requirements, ensure that successful antitrust claims only redress the types of harm that ***antitrust law*** was designed to prevent, rather than create a fortuitous windfall for all parties proximate to the defendant, regardless of whether they were injured by anticompetitive conduct. See *AGC, 459 U.S. at 535*.

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[17] While not dispositive of market power, market share often serves as an imperfect proxy for market power. See *Domed Stadium Hotel, Inc. v. Holiday Inns, Inc., 732 F.2d 480, 489-90 (5th Cir. 1984)* (citing *United States v. Aluminum Co. of Am., 148 F.2d 416, 424 (2d Cir. 1945)* (Hand, J.)).

The second component of antitrust standing, antitrust injury, requires that a plaintiff's injury is "of the type the antitrust laws were intended to prevent and . . . flows from that which makes the defendant's acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*. This means that in an antitrust suit, but-for causation is insufficient. Instead, a plaintiff must be able to trace its injury to the anticompetitive effects of the defendant's antitrust violation. See id. An inquiry into antitrust injury thus always asks whether there is a causal connection between the alleged injury of the plaintiff and **[**47]** the anticipated anticompetitive effect of the specific practice that allegedly violates ***antitrust law***. See *Port Dock, 507 F.3d at 122* ("We can ascertain antitrust injury only by identifying the anticipated anticompetitive effect of the specific practice **[*627]** at issue and comparing it to the actual injury the plaintiff alleges.").

Vantage asserts that it has suffered antitrust injury because Willis-Knighton's refusal to contract with it (its alleged injury) was made possible by the monopoly power Willis-Knighton achieved through its anticompetitive acquisitions (the anticompetitive effect of the specific practice that allegedly violates ***antitrust law***). See Record Document 89, p. 25.

For monopolization claims, refusals to contract with the plaintiff do not constitute antitrust injury because the injury suffered by the plaintiff is one that could have just as easily occurred in the absence of monopoly power. See *Jebaco, 587 F.3d at 319-20*; *Port Dock, 507 F.3d at 123*; *Fischer v. NWA, Inc., 883 F.2d 594, 596 (8th Cir. 1989)*; *Serpa Corp. v. McWane, Inc., 199 F.3d 6 (1st Cir. 1999)*. In Jebaco, the Fifth Circuit held that a lessor assignee did not suffer antitrust injury from lessee casinos where the complaint alleged that the casinos had violated ***antitrust law*** through an illegal market division and the lessor was injured because the casinos terminated the lease and moved elsewhere. **[**48]** *587 F.3d at 316-17, 319-20*. The lessor plaintiff, Jebaco, was an assignee to a lease with Harrah's casino for two riverboat casinos and as such was entitled to a per-patron fee. *Id. at 16*. After Hurricane Rita, Harrah's decided to sell the casinos and all related licensing rights. Id. Though Jebaco bid for the casinos and licensing rights, Harrah's sold them to another defendant, Pinnacle, and coordinated with Pinnacle to secure the license transfer with the Louisiana Gaming Control Board. *Id. at 316-17*. As part of the licensing process, Pinnacle represented that it would move the operations of the two casinos to different locations. *Id. at 317*. Jebaco alleged that these acts injured it in antitrust by depriving it of all revenue under the lease assignment.[18] *Id. at 319*. The Fifth Circuit disagreed, ruling that Jebaco had not suffered antitrust injury in part because Jebaco could have been deprived of its per-patron fees just as easily if Harrah's had not engaged in the illegal market-division scheme.[19] *Id. at 320*. The court reasoned: "[I]f a different firm had purchased Harrah's assets, it too might have chosen not to operate at Jebaco's preferred berths. No antitrust violation would have occurred, but Jebaco would have suffered the same injury." Id. The court therefore **[**49]** held that Jebaco had not suffered antitrust injury by the casinos terminating the leases. Id.

Similarly, in Port Dock, the Second Circuit held that a distributer did not suffer antitrust injury from a manufacturer where the complaint alleged that the manufacturer **[*628]** illegally monopolized the manufacturing level through acquisitions and the retailer was injured because the manufacturer, post-monopolization, refused to sell to it. *507 F.3d at 122-24*. The plaintiff distributer, Port Dock, alleged that prior to their alleged antitrust violations, the defendant entities (collectively "Tilcon") possessed an 85% market share in the manufacture of crushed stone in the

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[18] Jebaco also alleged it was injured because the defendants deprived it of an opportunity to compete for the casino bid. Id. The court dismissed this claim as failing to allege antitrust injury, albeit for reasons not relevant to Vantage's claims. See *id. at 321*.

[19] The court also reasoned that there was no antitrust injury because the termination of the lease was the product of "downstream" allegedly anticompetitive conduct. *Id. at 320*. The court found that courts generally do not recognize antitrust injury for the termination of a contract or lease that is caused by "downstream" anticompetitive conduct, i.e., conduct by entities that are closer to the consumer in the stream of commerce than the plaintiff. See id. (citing 2 P. Areeda & H. Hovenkamp, ***Antitrust Law***, 350(f-g), at 422-23 (2d ed. 2000) ("When a downstream firm merely substitutes one supplier for another, there is certainly injury-in-fact to the terminated supplier, but there is rarely antitrust injury.")). Applying this rule to Jebaco's claims, the court reasoned that Jebaco had not suffered antitrust injury because it alleged that its lease (assignment) **[**50]** was terminated as a result of anticompetitive acts by casinos operators, which are farther "downstream" in the market for gambling than Jebaco as lessor. Id.

relevant geographic market, with only one viable competitor, Trap Rock. Id. at 119. As a distributor of the crushed stone, Port Dock was Tilcon's biggest customer. Id. In that same time period, Tilcon tried to raise prices unilaterally, but when Trap Rock did not follow suit, Tilcon was forced to lower prices to their former levels. Id. Tilcon then decided to sell its crushed stone directly to Port Dock's customers, thereby integrating vertically into the distributer level of the market and competing **[**51]** with Port Dock. Id. at 120. After its vertical integration, Tilcon acquired Trap Rock, perfecting a complete monopoly in the manufacture of crushed stone in the relevant market. Id. With its newfound monopoly, Tilcon refused to sell stone to Port Dock, and, because Port Dock lacked any alternate supply of stone, proposed buying Port Dock's assets at a sacrifice to Port Dock. Id. Port Dock sold its assets and eventually filed for bankruptcy; Tilcon, after acquiring Port Dock's assets, raised the price for crushed stone. Id. The Second Circuit held that Port Dock had not suffered antitrust injury. Id. at 124. The anticompetitive effect of Tilcon's acquisition of Trap Rock, according to the court, was the specter of Tilcon rasing prices and restricting output due to its enhanced monopoly power. Id. at 123. The court identified the injury to Port Rock as Tilcon's complete refusal to deal with Port Rock, an injury that the court distinguished from a claim that Tilcon had raised prices, which Port Rock conceded had never occurred. Id. Based on these findings, the court reasoned that Port Dock's injury of being cut off by Tilcon was unconnected to the anticompetitive danger of monopolization, i.e., increased prices, because **[**52]** it was something Tilcon "could have just as well done without having monopoly power." Id. The court stated that antitrust injury was suffered not by Port Dock, but instead by "the dealers or consumers who were forced to buy at higher prices (or inferior quality) because the defendant had acquired the market power to charge monopoly prices." Id. at 124.

In Fischer, the Eighth Circuit held that a regional airline did not suffer antitrust injury from a national airline where the complaint alleged that the national airline monopolized the market for air service to a particular destination and the regional airline was injured because the national airline, post-monopolization, terminated its service contract with the regional airline at that destination. Id. at 600. The regional airline plaintiff, Fischer, was the exclusive carrier for all of Northwest Airlines's regional flights originating in Detroit under a contract that either party could terminate with or without cause. Id. at 595-96. Northwest then acquired Republic Airlines, another national carrier at the time, which had its own regional airline partner, Simmons Airlines, exclusively servicing its regional flights through Detroit. Id. at 596. That contract was not terminable **[**53]** at will. Id. After considerable effort to mediate the inevitable conflicting demands of Fischer and Simmons, Northwest terminated Fischer, its Detroit carrier. Id. at 597. Fischer sued Northwest under Section 2 for monopolizing the Detroit market, of which Northwest had gained a 75% share though its acquisition of Republic. Id. The court reasoned that Fischer had not plead antitrust injury because its injury, the termination of its Detroit service agreement, had not been caused by the anticompetitive effects of the Republic acquisition, such as **[*629]** increased prices; instead it was caused by Northwest's need to eliminate redundant services out of Detroit, a need that Northwest would have had irrespective of its market power. Id. at 600.

In Serpa, the First Circuit held that a distributer did not suffer antitrust injury from a manufacturer where the complaint alleged that the manufacturer illegally monopolized the manufacturing level through acquisitions and the retailer was injured because the manufacturer, post-monopolization, terminated their distribution arrangement. See 199 F.3d at 8, 12. Prior to it filing suit, Serpa had been the exclusive distributor for certain plumbing parts manufactured by Anaco, one of several manufacturers **[**54]** for these parts. Id. at 9. One of those competing manufacturers, McWane, acquired Anaco, giving it an 85% share of the relevant manufacturing market, and thereafter terminated Serpa as a distributor of Anaco products. Id. Serpa sued McWane for attempting to monopolize the relevant manufacturing market. Id. Relying heavily on Fischer, the court reasoned that Serpa had not suffered antitrust injury because its alleged injury, McWane's termination of the distribution contract, was "neither connected with, nor resulted from, defendant's market power in the [relevant plumbing part manufacturing] industry." Id. at 11-12.

Vantage argues that almost all of these cases are distinguishable from its claims. Record Document 89, pp. 25-59. Vantage distinguished the position and nature of the plaintiff in Jebaco, a lessor standing above the defendants in the stream of commerce, from itself, a customer standing below Willis-Knighton in the healthcare stream of commerce. Id. at 28 (emphasizing that the consumer is the intended beneficiary under ***antitrust law***). This distinction, while in itself true, does not disturb Jebaco's reasoning of the defendant's termination of the lease contract could have been done just as easily regardless **[**55]** of its antitrust violations. See 587 F.3d at 320. Next, Vantage attempts to distinguish Willis-Knighton's refusal to contract from the contract termination in Fischer and Serpa, arguing in effect that while those courts found that those specific acquisitions had not in fact increased the monopolist's power to terminate the contracts at issue there, those findings do not compel a conclusion that monopoly power can never under any circumstance enhance the ability of a monopolist to terminate or create a contract. Regarding Fischer, Vantage argues that unlike Northwest's power to terminate its contract with Fischer, which the court found "was in no way enhanced by the acquisition," *883 F.2d at 600*, Willis-Knighton's power to refuse to contract with Vantage was enhanced by its acquisitions of competing healthcare providers because the acquisitions "resulted in fewer and fewer physicians who were available to Vantage in its network," Record Document 89, pp. 23-27. Vantage makes essentially the same argument with respect to Serpa.

Vantage's reasoning here is faulty for two reasons. First, it misses the logic underlying the holdings in *Fischer* and its cousin cases, which is that *in all instances*, a firm can terminate a **[**56]** contractual relationship (or refuse to start a contractual relationship) just as easily without market power as it can with market power. Second, it seems to recharacterize Vantage's injury not as Willis-Knighton's refusal to deal, but the shrinking pool of providers available to contract with Vantage. This is the consequence of Vantage's injury, not its injury in itself. If Willis-Knighton had agreed to contract with Vantage, Vantage would be unaffected by the shrinking pool of non-Willis-Knighton providers in the Shreveport area.

Vantage also argues that Christian Schmidt Brewing v. G. Heileman Brewing **[*630]** supports the conclusion that acquisitions coupled with refusals to deal can give rise to antitrust injury. See *753 F.2d 1354 (6th Cir. 1985)*. There, the Sixth Circuit held that small brewers in the Midwest suffered antitrust injury from two large Midwest brewers where the complaint alleged that large brewers illegally merged (under *Section 7* of the Clayton Act) and the small brewers would be injured because the brewers combined together would be so big that they would be able to predatorily induce all wholesalers and distributors not to do business with the small brewers.[20] *Id. at 1355-57*. This holding is distinguished from Port Dock and **[**57]** the like for two reasons. First, the plaintiff competed with the defendant at the market level that the defendant is alleged to have monopolized, rather than participated with the defendant sitting upstream, see *Jebaco, 587 F.3d at 319-20*, or downstream, see, e.g., *Serpa, 199 F.3d at 8-9*, of the market level that the defendant is alleged to have monopolized. Second, and more important, the plaintiff's injury, the deprivation of wholesalers and distributors, resulted from the anticompetitive effects of the merger because it could only could have occurred with the heightened monopoly power that flowed from the merger, unlike the injuries in Port Dock and its kin, which did not result from anticompetitive effects of the acquisitions because they just as easily could have occurred without the increased monopoly power that flowed from the acquisitions, see, e.g., *Port Dock 507 F.3d at 124*.

Thus, to the extent that Vantage has alleged that it was injured by Willis-Knighton refusing to contract with it, Vantage has not alleged anticompetitive conduct. See, e.g., *Jebaco, 587 F.3d at 319-20*. Like the defendants' refusals to contract with the plaintiffs in Jebaco and its kin, Willis-Knighton's refusal **[**58]** to contract with Vantage was unrelated to its ability to exploit its monopoly power because Willis-Knighton could have decided not to contract with Vantage even if it had no market power whatsoever. See, e.g., id.

However, to the extent that Vantage has alleged that it was injured because Willis-Knighton demanded exorbitant reimbursement rates, it has plead antitrust injury. Unlike the injuries alleged by the plaintiff in *Port Dock* and the like, Willis-Knighton requiring high reimbursement rates is the type of injury that flows from Willis-Knighton's market power because Willis-Knighton could not have demanded what were effectively higher prices without market power. See *Port Dock, 507 F.3d at 123* (finding that the plaintiff never alleged that the defendant was injured by increased prices.) Although it survives 12(b)(6) dismissal, this theory of antitrust standing may not constitute antitrust injury if later Vantage cannot demonstrate that Willis-Knighton *increased* prices as result of its anticompetitive acts. That is, if Willis-Knighton had always demanded high prices from Vantage—both before and after its attainment of market power—then Vantage suffered no antitrust injury because the high prices demanded **[**59]** of it did not flow from Willis-Knighton's increased market power. In its complaint, Vantage indicates that for fifteen years, it has tried to

[20] The court also found "tentative evidence" that these adverse effects would actually occur. *Id. at 1357*.

contract with Willis-Knighton, but without success. The complaint is silent on when these efforts were unsuccessful because Willis-Knighton demanded high prices and when they were unsuccessful because Willis-Knighton refused to deal. The complaint is also silent on whether the prices **[*631]** demanded by Willis-Knighton ever increased. Nonetheless, Vantage's allegation of Willis-Knighton demanding high reimbursement rates for its services states a plausible theory of antitrust injury and is thus sufficient to survive 12(b)(6) dismissal.

Based on the above discussion, the Court therefore **DENIES** Willis-Knighton's motion to dismiss based on Vantage's lack of antitrust injury.

C. Insufficient Detail Under Iqbal and Twombly

Finally, Willis-Knighton argues that all of Vantage's claims must be dismissed because they lack the specificity required under Twombly and Iqbal. Record Document 90, pp. 21-27. Under Twombly, a complaint must allege facts sufficient "to raise a right to relief above the speculative level" so that a right to relief "is plausible on its face." **[**60]** *550 U.S. at 555, 570*. Also, "[a] complaint must contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory." *In re Plywood Antitrust Litig., 655 F.2d 627, 641 (5th Cir. Unit A Sept. 1981)*. So long as it raises a plausible right of recovery and puts the defendant on notice of the plaintiff's claim and grounds upon which it rests, however, the complaint does not need to specify detailed factual allegations. See *Twombly, 550 U.S. at 555*. Generally, then, Vantage's complaint must allege facts that, either directly or inferentially, plausibly show that Vantage has met all the elements of all of its causes of action in this suit. See *Twombly, 550 U.S. at 555*; *In re Plywood, 655 F.2d at 641*. Willis-Knighton, however, has not challenged all aspects of Vantage's allegations under Twombly and instead attacks two categories of Vantage's allegations.

1. *Whether Vantage Plausibly Alleged that LSU Physicians Working at the Joint Clinics Will Drop Vantage*

Willis-Knighton argues that Vantage's allegations about Willis-Knighton's involvement with LSU fail to state a claim under Twombly because they are conclusory with respect to how Vantage would be injured by LSU physicians treating patients at Willis-Knighton clinics. Record Document 90, pp. 21-24.

Vantage's complaint must allege facts **[**61]** that, either directly or inferentially, plausibly show that Vantage has been injured. See *Twombly, 550 U.S. at 555*; *In re Plywood, 655 F.2d at 641*; *Torch Liquidating Trust ex rel. Bridge Assocs. L.L.C. v. Stockstill, 561 F.3d 377, 384 (5th Cir. 2009)*. Although injury is not strictly an element of an antitrust cause of action, it is necessary for recovery and thus courts may dismiss a claim under Twombly for failing to provide sufficient detail explaining how the defendant's conduct would injure the plaintiff. See *Torch Liquidating, 561 F.3d at 384* ("A complaint must contain direct allegations or permit properly drawn inferences to support 'every material point necessary to sustain a recovery.'" (quoting *Campbell v. City of San Antonio, 43 F.3d 973, 975 (5th Cir. 1995)))*.

Willis-Knighton cites two cases to support its argument. Corr Wireless Commc'ns, L.L.C. v. AT&T, Inc., is illustrative of the level of specificity required to plead injury. See *893 F. Supp. 2d 789 (N.D. Miss. 2012)*. There, a regional wireless carrier, Corr, sued AT&T in antitrust in part because it alleged that AT&T was going to abuse its monopoly power over certain wireless frequencies to deny Corr access to roaming service. *Id. at 799*. The extent of the pleaded basis for this allegation was Corr's "prior knowledge and experience." Id. At oral argument Corr was **[*632]** likewise unable to produce any allegations of present conduct by AT&T that served as the basis for its assertion that AT&T would deny it roaming service. **[**62]** Id. The court dismissed Corr's roaming antitrust claim under *Rule 12(b)(6)* in part because its allegation of future conduct was too conclusory and speculative to state a claim for relief under Twombly. *Id. at 807*. The court reasoned that similar to the plaintiff's assertion in Twombly that an agreement to conspire, a section 1 element, existed because there was parallel conduct among the defendants, "conclusory speculation [by Corr] regarding what could happen at some unknown date in the future also fails to plausibly state a violation of federal antitrust laws." Id.

The second case cited by Willis-Knighton, In re Elevator Antitrust Litigation, shows the limits to which an antitrust plaintiff can rely on conduct by the defendant in one context to plausibly plead that the defendant has engaged in the same conduct in another context. See *502 F.3d 47, 52 (2d Cir. 2007)*. There, the Second Circuit held that the plaintiff's claim was not entitled to relief under Twombly where its allegation of an agreement to violate ***antitrust law*** was supported in part by allegations that the defendants were under investigation in Europe for similar agreements to violate ***antitrust law***. *Id. 50-52*. The plaintiffs, elevator maintenance companies, sued the defendants, manufacturers and sellers **[**63]** of elevators, for conspiring to fix prices and to monopolize the elevator maintenance market, causes of action under *sections 1* and *2* of the Sherman Act that require proof of an agreement among the defendant manufacturers to so conspire. *Id. at 49*. The complaint supported its allegation of such an agreement in part with an allegation that the defendants were under investigation by European antitrust officials for colluding to similarly fix prices for their elevators in the European market. *Id. at 51 & n.6*. The court held that the allegations about European antitrust collusion by itself did not provide a plausible ground to support the inference of an unlawful agreement to conspire in the United States and dismissed the plaintiffs' claims. *Id. at 49, 52*. The court reasoned, "Allegations of anticompetitive wrongdoing in Europe—*absent any evidence of linkage between such foreign conduct and conduct here*—is merely to suggest (in defendants' words) that 'if it happened there, it could have happened here.'" *Id. at 52* (emphasis added). "Without an adequate allegation of facts linking transactions in Europe to transactions and effects" in the United States, the court concluded that "plaintiffs' conclusory allegations do not 'nudge[their] **[**64]** claims across the line from conceivable to plausible.'" Id. (quoting *Twombly, 550 U.S. at 550*).

Vantage's allegation of how physicians migrating from University Health to LSU clinics would harm Vantage is distinguishable from the allegation of harm in *Corr Wireless*. Unlike the plaintiff in Corr Wireless, who was unable to produce any allegations of present conduct by the defendant that served as the basis for its assertion that the defendant would injure it in the future, Vantage has described with some detail how Willis-Knighton is presently engaged in a joint clinic with LSU physicians working at University Health. And Vantage's reliance on prior conduct by Willis-Knighton and LSU to establish that LSU physicians working at the joint clinics will drop Vantage is distinguishable from the plaintiff's reliance in *Elevator Antitrust* on the defendant's antitrust violations in Europe to establish that the defendant violated antitrust laws in the United States. Unlike the plaintiff in Elevator Antitrust, who was unable to provide any link explaining why the antitrust violations by the defendants in one market **[*633]** would make it plausible that the defendants committed the same violations in a different market, Vantage **[**65]** has provided a link to explain how the LSU/Willis-Knighton clinics are like other Willis-Knighton clinics in which LSU physicians practice and do not accept Vantage Tier-1 coverage. Specifically, Vantage has alleged that LSU physicians, currently in their Tier-1 network, will effectively become employees of Willis-Knighton when they participate in the joint LSU-Willis-Knighton clinics because of Willis-Knighton's control over billing and referrals. Id. at 23-24, 28, 46-47. Vantage has also alleged that in the past, whenever a physician under contract with Vantage joined the Willis-Knighton Physician's Network, that physician immediately cancels his contract with Vantage. Id. at 58. These facts provide the causal link that was missing in Elevator Antitrust. Vantage's claims of future harm by Willis-Knighton's actions thus should not be dismissed under *Twombly*.

Amid this discussion, Willis-Knighton also inserts an Article III standing rationale for its arguments that Vantage's claims of injury are too speculative. See Record Document 90, p. 23, and 97, p. 8. Vantage does not directly address this argument. Article III standing requires in part that the plaintiff demonstrate it has suffered injury in fact, which is "an **[**66]** invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)* (citations omitted). Allegations of future injury "must be certainly impending to constitute injury in fact." *Whitmore v. Arkansas, 495 U.S. 149, 158, 110 S. Ct. 1717, 109 L. Ed. 2d 135 (1990)*.

To establish standing for future injury, a plaintiff needs to credibly explain how present facts create a realistic threat of future injury. See *Lyons, 461 U.S. at 98*; *United Transp. Union v. Interstate Commerce Comm'n, 891 F.2d 908, 913, 282 U.S. App. D.C. 38 (D.C. Cir. 913)*. In Lyons, the Supreme Court reviewed the claim of an individual who alleged that he had been injured by an unjustified chokehold administered to him by a Los Angeles police officer and that he "justifiably fears that any contact he has with Los Angeles Police officers may result in his being choked and strangled to death." *461 U.S. at 98*. The Court dismissed on Article III grounds the complainant's prayer for an injunction forbidding the use of such chokeholds by police officers, finding it unduly speculative that the complainant "was likely to suffer future injury from the use of the chokeholds by police officers." *Id. at 105*. The Court asserted that, "to have a case or controversy with the City that could sustain [his claim for an injunction, the complainant] would have to credibly allege that he faced a realistic **[**67]** threat from the future application of the City's policy." *Id. at 106-07 n.7*.

Similarly, in United Transportation Union, the D.C. Circuit held that a union plaintiff failed to plead Article III injury where it alleged that the ICC's approval of interlocking directorates of railroad companies would injure the workers of the affected railroad companies. *891 F.2d at 913*. The union had alleged that its members "stand to be hurt" by the "financial wrecking" that would result from the ICC approving the interlocking directorate and sought to enjoin the ICC's approval of the interlocking directorate. Id. The court held that the union had failed to allege Article III injury because it offered no explanation for how or why the interlocking directorate would hurt either the companies or the union workers. *Id. at 913-14*. Without any causal explanation for how the approval of the interlocking directorate **[*634]** would hurt the union workers, the court reasoned that the allegation of injury in the case was "unadorned speculation" and dismissed the union's claims for want of Article III standing. Id.

Vantage has credibly explained how present facts create a realistic threat of future injury. Unlike the plaintiff's claims in *Lyons* and *United Transportation **[**68]** Union*, which provided no information to link present facts with future injury, Vantage has, as discussed above, provided facts explaining why LSU physicians practicing at the LSU/Willis-Knighton clinics would result in those physicians leaving Vantage's Tier-1 network. See *Lyons, 461 U.S. at 98*; *United Transp. Union 891 F.2d, at 913-14*; Record Document 1, p. 58. These facts provide the causal link that creates a realistic threat of future injury to Vantage from the joint clinics. Vantage has therefore satisfied the injury-in-fact requirement of Article III standing.

2. *Whether Vantage Plausibly Stated a Claim for Past Antitrust Violations by Willis-Knighton*

Next, Willis-Knighton argues that Vantage's allegations about Willis-Knighton's past conduct fail to state a claim under Twombly because they allege insufficient details about either the prior alleged acquisitions or the relevant markets that Willis-Knighton monopolized/attempted to monopolize. The complaint must plead facts that, either directly or inferentially, plausibly show Willis-Knighton had market power/a dangerous probability of market power and committed acts that, when viewed as a whole, constitute anticompetitive conduct.[21] See *Twombly, 550 U.S. at 555*; *In re Plywood, 655 F.2d at 641*; *Assoc. Radio Serv. Co. v. Page Airways, Inc., 624 F.2d 1342, 1356 (5th Cir. 1980)*.

Specifically, Willis-Knighton argues that the complaint does not plausibly plead market power for Willis-Knighton's past conduct because it does not **[**70]** provide any past market shares for Willis-Knighton. To demonstrate monopoly power, a complaint must specify the specific product and geographic market which defendant is alleged to have monopolized. *Rockbit Indus. U.S.A., Inc. v. Baker Hughes, Inc., 802 F. Supp. 1544, 1550-51 (S.D. Tex. 1991)*. The complaint satisfies this requirement because it alleges Shreveport-Bossier as the relevant geographic market at all times and the product markets as general acute-care services, primary care, and OB/GYN. Willis-Knighton also insists that the complaint needs to state Willis-Knighton's shares in these markets at the times at which it is alleged to have committed illegal acts, but cites no case so **[*635]** requiring. The Court finds this standard too high; instead, all the complaint must do is plead facts that inferentially make a high market share in the past plausible. By providing the high shares in these markets that Willis-Knighton currently enjoys, the complaint has provided sufficient information to make past monopoly power plausible.

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[21] The elements of Vantage's monopolization claim based **[**69]** on Willis-Knighton's past conduct are (1) Willis-Knighton possessed market power in the relevant market and (2) Willis-Knighton engaged in anticompetitive conduct. See *Stearns, 170 F.3d at 522*. The elements of Vantage's attempted monopolization claim based on Willis-Knighton's past conduct are (1) Willis-Knighton engaged in anticompetitive conduct, (2) with a specific intent to monopolize, while (3) there was a dangerous probability of Willis-Knighton achieving monopoly power in a relevant market. See *Spectrum Sports v. McQuillan, 506 U.S. 447, 456, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993)*. With respect to the anticompetitive conduct element, where the defendant is alleged to have engaged in a pattern of illegal conduct, courts assess whether a *section 2* claim demonstrates anticompetitive conduct by measuring the cumulative effect of the defendant's allegedly illegal conduct, rather than evaluating each instance of allegedly illegal conduct in isolation. See *Assoc. Radio, 624 F.2d at 1356* ("[N]o one of the instances of improper conduct, standing alone, would lead to *section 2* liability. Taken together, however, they show a pattern of exclusionary behavior sufficient to support the jury's verdict.").

Willis-Knighton also specifically argues that the complaint provides insufficient detail about the past acquisitions, such as their dates, to plausibly plead anticompetitive conduct. The Court finds that requiring the complaint to identify the details of every **[**71]** prior acquisition would ask more than Twombly demands. Instead, the complaint must plead facts that, when viewed together, make anticompetitive conduct plausible. See *Twombly, 550 U.S. at 555*; *Assoc. Radio, 624 F.2d at 1356*. The complaint accomplishes this by providing the names of all entities that Willis-Knighton has acquired, the way in which Willis-Knighton controls referrals, and the type of non-compete agreements it employs. The complaint has therefore stated a plausible claim for Willis-Knighton's prior antitrust violations. Accordingly, the Court **DENIES** Willis-Knighton's motion to dismiss based on Twombly and Article III.

IV. Conclusion

For all of the foregoing reasons, the Defendant's motion to dismiss [Record Document 30] is **DENIED**.

THUS DONE AND SIGNED on this 31st day of March, 2016.

/s/ Elizabeth Erny Foote

ELIZABETH ERNY FOOTE

UNITED STATES DISTRICT JUDGE

Meyer v. Kalanick

United States District Court for the Southern District of New York

March 31, 2016, Decided

15 Civ. 9796

Reporter

174 F. Supp. 3d 817 *; 2016 U.S. Dist. LEXIS 43944 **; 2016-1 Trade Reg. Rep. (CCH) P79,565

SPENCER MEYER, individually and on behalf of those similarly situated, Plaintiffs, -v- TRAVIS KALANICK, Defendant.

Subsequent History: Reconsideration denied by *Meyer v. Kalanick, 185 F. Supp. 3d 448, 2016 U.S. Dist. LEXIS 60816 (S.D.N.Y., May 7, 2016)*

Motion denied by, On reconsideration by *Meyer v. Kalanick, 2016 U.S. Dist. LEXIS 74214 (S.D.N.Y., June 7, 2016)*

Motion granted by *Meyer v. Kalanick, 2016 U.S. Dist. LEXIS 82519 (S.D.N.Y., June 19, 2016)*

Injunction granted at *Meyer v. Kalanick, 212 F. Supp. 3d 437, 2016 U.S. Dist. LEXIS 96583 (S.D.N.Y., July 25, 2016)*

Motion denied by *Meyer v. Kalanick, 199 F. Supp. 3d 752, 2016 U.S. Dist. LEXIS 99921 (S.D.N.Y., July 29, 2016)*

Motion denied by *Meyer v. Kalanick, 200 F. Supp. 3d 408, 2016 U.S. Dist. LEXIS 189210 (S.D.N.Y., July 29, 2016)*

Stay granted by, Motion granted by *Meyer v. Kalanick, 203 F. Supp. 3d 393, 2016 U.S. Dist. LEXIS 114844 (S.D.N.Y., Aug. 26, 2016)*

Motion denied by *Meyer v. Kalanick, 291 F. Supp. 3d 526, 2018 U.S. Dist. LEXIS 35448 (S.D.N.Y., Mar. 5, 2018)*

Motion denied by *Meyer v. Kalanick, 2020 U.S. Dist. LEXIS 137704 (S.D.N.Y., Aug. 3, 2020)*

Core Terms

drivers, conspiracy, pricing, allegations, horizontal, fares, vertical, algorithm, riders, Sherman Act, antitrust, rule of reason, competitors, motion to dismiss, Terms, plaintiff's claim, resale price, driver-partners, contends, taxis, ride-share, pleaded, rides, manufacturer's, facilitated, negotiate, conspire, mobile, spokes, Reply

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Judges: JED S. RAKOFF, United States District Judge.

Opinion by: JED S. RAKOFF

Opinion

[*819] OPINION AND ORDER

JED S. RAKOFF, U.S.D.J.

On December 16, 2015, plaintiff Spencer Meyer, on behalf of himself and those similarly situated, filed this putative antitrust class action lawsuit against defendant Travis Kalanick, CEO and co-founder of Uber Technologies, Inc. ("Uber"). See Complaint, Dkt. 1. Mr. Meyer's First Amended Complaint, filed on January 29, 2016, alleged that Mr. Kalanick had orchestrated and facilitated an illegal price-fixing conspiracy in violation of Section 1 of the federal Sherman Antitrust Act, *15 U.S.C. § 1*, **[*820]** and the New York State Donnelly Act, *New York General Business Law § 340*. See First Amended Complaint ("Am. Compl."), **[**2]** Dkt. 26, ¶¶ 120-140. Plaintiff claimed, in essence, that Mr. Kalanick, while disclaiming that he was running a transportation company, had conspired with Uber drivers to use Uber's pricing algorithm to set the prices charged to Uber riders, thereby restricting price competition among drivers to the detriment of Uber riders, such as plaintiff Meyer. See id. ¶¶ 1, 7.

On February 8, 2016, defendant Kalanick moved to dismiss the Amended Complaint. See Notice of Motion, Dkt. 27. Plaintiff opposed on February 18, 2016; defendant replied on February 25, 2016; and oral argument was held on March 9, 2016.[1] Having considered all of the parties' submissions and arguments, the Court hereby denies defendant's motion to dismiss.

In ruling on a motion to dismiss, the Court accepts as true the factual allegations in the complaint and draws all reasonable inferences **[**3]** in favor of the plaintiff. *Town of Babylon v. Fed. Hous. Fin. Agency, 699 F.3d 221, 227 (2d Cir. 2012)*. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (internal quotation marks omitted). In the antitrust context, stating a claim under *Section 1* of the Sherman Act "requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made. Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*.

The relevant allegations of the Amended Complaint are as follows. Uber, founded in 2009, is a technology company that produces an application for smartphone devices ("the Uber App") that matches riders with drivers (called "driver-partners"[2] . See Am. Compl. ¶¶ 2, 21, 24, 27. Uber states that it is not a transportation company and does not employ drivers. See id. ¶¶ 2, 23. Defendant Kalanick, in addition to being the co-founder and CEO of Uber, is a driver who has used the Uber app. See id. ¶ 3. Plaintiff Meyer is a resident of Connecticut, who has used **[**4]** Uber car services in New York. See id. ¶ 7.

Through the Uber App, users can request private drivers to pick them up and drive them to their desired location. See id. ¶ 24. Uber facilitates payment of the fare by charging the user's credit card or other payment information on file. See id. ¶ 32. Uber collects a percentage of the fare as a software licensing fee and remits the remainder to the driver. See Am. Compl. ¶ 27. Drivers using the Uber app do not compete on price, see id. ¶ 2, and cannot negotiate fares with drivers for rides, see id. ¶ 34. Instead, drivers charge the fares set by the Uber algorithm. See **[*821]** id.

[1] During oral argument, the Court invited both sides to submit letters regarding certain studies cited by plaintiff in the Amended Complaint. See Transcript of Proceedings dated March 9, 2016 ("Tr."), 24:12-16. These letters, respectively dated March 11, 2016 ("Pl. Letter") and March 15, 2016 ("Def. Letter"), will be docketed along with this Opinion.

[2] The Court uses "drivers" and sometimes "Uber drivers" instead of Uber's term "driver-partners" for the sake of simplicity, but this usage is not meant to imply any employment relationship between Uber and these drivers, which defendant firmly denies.

¶ 2. Though Uber claims to allow drivers to depart downward from the fare set by the algorithm, there is no practical mechanism by which drivers can do so. See id. ¶ 69. Uber's "surge pricing" model, designed by Mr. Kalanick, permits fares to rise up to ten times the standard fare during times of high demand. See id. ¶¶ 26, 48, **[**5]** 50. Plaintiff alleges that the drivers have a "common motive to conspire" because adhering to Uber's pricing algorithm can yield supra-competitive prices, Am. Compl. SI 90, and that if the drivers were acting independently instead of in concert, "some significant portion" would not agree to follow the Uber pricing algorithm. See id. ¶ 93.

Plaintiff further claims that the drivers "have had many opportunities to meet and enforce their commitment to the unlawful agreement." Am. Compl. ¶ 92. Plaintiff alleges that Uber holds meetings with potential drivers when Mr. Kalanick and his subordinates decide to offer Uber App services in a new geographic location. See id. ¶ 40. Uber also organizes events for its drivers to get together, such as a picnic in September 2015 in Oregon with over 150 drivers and their families in attendance, and other "partner appreciation" events in places including New York City. See id. ¶ 41. Uber provides drivers with information regarding upcoming events likely to create high demand for transportation and informs the drivers what their increased earnings might have been if they had logged on to the Uber App during busy periods. See id. ¶ 58. Moreover, plaintiff **[**6]** alleges, in September 2014 drivers using the Uber App in New York City colluded with one another to negotiate the reinstitution of higher fares for riders using UberBLACK and UberSUV services (certain Uber car service "experiences"). See id. ¶¶ 25, 87. Mr. Kalanick, as Uber's CEO, directed or ratified negotiations between Uber and these drivers, and Uber ultimately agreed to raise fares. See id. ¶ 87.

As to market definition, plaintiff alleges that Uber competes in the "relatively new mobile app-generated ride-share service market," of which Uber has an approximately 80% market share. Amended Complaint ¶ 94-95. Uber's chief competitor in this market, Lyft, has only a 20% market share, and a third competitor, Sidecar, left the market at the end of 2015. See id. ¶¶ 95-96. Although, plaintiff contends, neither taxis nor traditional cars for hire are reasonable substitutes for mobile app-generated ride-share service, Uber's own experts have suggested that in certain cities in the U.S., Uber captures 50% to 70% of business customers in the combined market of taxis, cars for hire, and mobile-app generated ride-share services. See id. ¶ 107.

Plaintiff claims to sue on behalf of the following **[**7]** class: "all persons in the United States who, on one or more occasions, have used the Uber App to obtain rides from Uber driver-partners and paid fares for their rides set by the Uber pricing algorithm," with certain exclusions, such as Mr. Kalanick. See id. ¶ 113. Plaintiff also identifies a "subclass" of riders who have paid fares based on surge pricing. See id. ¶ 114. Plaintiff alleges that he and the putative class have suffered antitrust injury because, were it not for Mr. Kalanick's conspiracy to fix the fares charged by Uber drivers, drivers would have competed on price and Uber's fares would have been "substantially lower." See id. ¶ 109. Plaintiff also contends that Mr. Kalanick's design has reduced output and that, as "independent studies have shown," the effect of surge pricing is to lower demand so that prices remain artificially high. Am. Compl. ¶ 110. Based on these allegations, plaintiff claims that Mr. Kalanick has violated the Sherman Act, *15 U.S.C. § 1*, and **[*822]** the Donnelly Act, *New York General Business Law § 340*. See id. ¶¶ 120-140.

The Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce." *15 U.S.C. § 1*. "[A] plaintiff claiming a § 1 violation must first **[**8]** establish a combination or some form of concerted action between at least two legally distinct economic entities." *Capital Imaging Associates, P.C. v. Mohawk Valley Med. Associates, Inc., 996 F.2d 537, 542 (2d Cir. 1993)*. "If a *§ 1* plaintiff establishes the existence of an illegal contract or combination, it must then proceed to demonstrate that the agreement constituted an unreasonable restraint of trade either per se or under the rule of reason." *Id. at 542*.

"Conduct considered illegal per se is invoked only in a limited class of cases, where a defendant's actions are so plainly harmful to competition and so obviously lacking in any redeeming pro-competitive values that they are conclusively presumed illegal without further examination." Id. (internal citation and quotation marks omitted). By contrast, "most antitrust claims are analyzed under a Arule of reason,′ according to which the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect." *State Oil Co. v. Khan, 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997)*.

Antitrust law also distinguishes between vertical and horizontal price restraints. "Restraints imposed **[**9]** by agreement between competitors have traditionally been denominated as horizontal restraints, and those imposed by agreement between firms at different levels of distribution as vertical restraints." *Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 730, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988)*. "Restraints that are per se unlawful include horizontal agreements among competitors to fix prices," while, at least in the context of resale price maintenance, "[v]ertical price restraints are to be judged according to the rule of reason." *Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877, 886, 907, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007)*. In the instant case, the Court finds that plaintiff has adequately pled both a horizontal and a vertical conspiracy.

As to the horizontal conspiracy, plaintiff alleges that Uber drivers agree to participate in a conspiracy among themselves when they assent to the terms of Uber's written agreement (the "Driver Terms") and accept riders using the Uber App. See Am. Compl. ¶¶ 70-71. In doing so, plaintiff indicates, drivers agree to collect fares through the Uber App, which sets fares for all Uber drivers according to the Uber pricing algorithm. See id.[3] In **[*823]** plaintiff's view, Uber drivers forgo competition in which they would otherwise have engaged because they "are guaranteed that other Uber drivers will not undercut them on price." See id. ¶ 72; Memorandum of **[**10]** Law in Opposition to Defendant Travis Kalanick's Motion to Dismiss ("Pl. Opp. Br."), Dkt. 33, at 11. Without the assurance that all drivers will charge the price set by Uber, plaintiff contends, adopting Uber's pricing algorithm would often not be in an individual driver's best interest, since not competing with other Uber drivers on price may result in lost business opportunities. See Am. Compl. ¶ 72. The capacity to generate "supra-competitive prices" through agreement to the Uber pricing algorithm thus provides, according to plaintiff, a "common motive to conspire" on the part of Uber drivers. See Amended Complaint ¶ 90. Plaintiff also draws on its allegations about meetings among Uber drivers and the "September 2014 conspiracy," in which Uber agreed to reinstitute higher fares after negotiations with drivers, to bolster its claim of a horizontal conspiracy. See Pl. Opp. Br. at 14-15; Am. Compl. ¶¶ 41, 87, 92. In plaintiff's view, defendant Kalanick is liable as the organizer of the price-fixing conspiracy, Am. Compl. ¶¶ 76, 88; Pl. Opp. Br. at 9, and as an Uber driver himself, see id. ¶¶ 80-85.

Defendant Kalanick argues, however, that the drivers' agreement to Uber's Driver Terms evinces no horizontal agreement among drivers themselves, as distinct from vertical agreements between each driver and Uber. See Memorandum of Law in Support of Defendant Travis Kalanick's Motion to Dismiss ("Def. Br."), Dkt. 28, at 9, 12-13; Transcript of Oral Argument dated March 9, 2016 ("Tr.") 3:19-22. According to Mr. Kalanick, drivers' individual decisions to enter into contractual arrangements with Uber constitute mere independent action that is insufficient to support plaintiff's claim of a conspiracy. See Def. Br. at 9. Defendant asserts that the most "natural" explanation for drivers' conduct is that each driver "independently decided it was in his **[**13]** or her best interest to enter a vertical agreement with Uber," and doing so could be in a driver's best interest because, for example, Uber matches riders with drivers and processes payment. See Def. Br. at 12-13. In defendant's view, the fact that "a condition of [the

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[3] Defendant Kalanick contends that Uber's Driver Terms "do provide that driver-partners **[**11]** have the discretion to charge less than the suggested price determined by Uber's pricing algorithm." Reply Memorandum of Law in Support of Defendant Travis Kalanick's Motion to Dismiss, Dkt. 34 ("Def. Reply Br.") at 2 n.1, citing Declaration of Michael Colman, Dkt. 29, Exhibit 2 ("Driver Terms") ¶ 4.1 ("Customer shall always have the right to: (i) charge a fare that is less than the pre-arranged fare . . ."). "Customer" here refers to "an independent company in the business of providing transportation services," that is, Uber's driver-partners. See Driver Terms; Memorandum of Law in Opposition to Defendant Travis Kalanick's Motion to Dismiss ("Pl. Opp. Br.") at 4. Plaintiff points out, however, that the Driver Terms also require drivers to agree that "the Fare provided under the Fare Calculation is the only payment Customer will receive in connection with the provision of Transportation Services," Driver Terms ¶ 4.1, and that more importantly, "there is no mechanism by which drivers can charge anything but the Appdictated fare." Memorandum of Law in Opposition to Defendant Travis Kalanick's Motion to Dismiss ("Pl. Opp. Br."), Dkt. 33, at 4. For the purposes of evaluating defendant's **[**12]** motion to dismiss, the Court will assume that drivers have no practical mechanism by which to depart from the fares set by Uber's algorithm. Defendant acknowledges that any discretion drivers may have to charge a lower fare "is not material to this motion," Def. Reply Br. at 2 n.l, and oral argument proceeded on the assumption that Uber sets mandatory prices for drivers to charge. See Transcript of Oral Argument dated March 9, 2016 at 4:12-16.

agreement with Uber] was that the driver-partner agree to use Uber's pricing algorithm" does not diminish the independence of drivers' decisions. See *id. at 13*.

It follows, defendant contends, that such vertical arrangements do not support a horizontal conspiracy claim. See Def. Br. at 13-14, citing, e.g., *Leegin, 551 U.S. at 885* (manufacturer's agreements requiring retailers to charge certain minimum prices, a form of "vertical minimum resale price maintenance," were to be judged by the rule of reason); *United States v. Colgate & Co., 250 U.S. 300, 307,* ***[*824]*** *39 S. Ct. 465, 63 L. Ed. 992, 1919 Dec. Comm'r Pat. 460 (1919)* (a manufacturer with no purpose to create a monopoly may "exercise his own independent discretion as to parties with whom he will deal" and "announce in advance the circumstances under which he will refuse to sell").

The Court, however, is not persuaded to dismiss plaintiff's horizontal conspiracy claim. In *Interstate Circuit v. United States, 306 U.S. 208, 59 S. Ct. 467, 83 L. Ed. 610 (1939)*, the Supreme Court held that competing movie distributors had unlawfully restrained trade when they each agreed to a theater operator's terms, **[**14]** including price restrictions, as indicated in a letter addressed to all the distributors. For an illegal conspiracy to exist, the Supreme Court stated:

> It was enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it. Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act.

Interstate Circuit, 306 U.S. at 226-27. Much more recently, the Second Circuit stated:

> [C]ourts have long recognized the existence of "hub-and-spoke" conspiracies in which an entity at one level of the market structure, the "hub," coordinates an agreement among competitors at a different level, the "spokes." These arrangements consist of both vertical agreements between the hub and each spoke and a horizontal agreement among the spokes to adhere to the [hub's] terms, often because the spokes would not have gone along with [the vertical agreements] except on the understanding that the other [spokes] were agreeing to the same thing.

United States v. Apple, Inc., 791 F.3d 290, 314 (2d Cir. 2015), cert. denied, Mar. 7, 2016 (internal citation **[**15]** and quotation marks omitted); see also *Laumann v. Nat'l Hockey League, 907 F. Supp. 2d 465, 486-87 (S.D.N.Y. 2012)* ("where parties to vertical agreements have knowledge that other market participants are bound by identical agreements, and their participation is contingent upon that knowledge, they may be considered participants in a horizontal agreement in restraint of trade.").

In this case, plaintiff has alleged that drivers agree with Uber to charge certain fares with the clear understanding that all other Uber drivers are agreeing to charge the same fares. See Amended Complaint ¶¶ 70-71. These agreements are organized and facilitated by defendant Kalanick, who as at least an occasional Uber driver, is also a member of the horizontal conspiracy. See id. ¶¶ 76, 84.

On a motion to dismiss, the Court is required to draw all reasonable inferences in plaintiff's favor. See *Town of Babylon, 699 F.3d at 227*. Given this standard, the Court finds that plaintiffs have plausibly alleged a conspiracy in which drivers sign up for Uber precisely "on the understanding that the other [drivers] were agreeing to the same" pricing algorithm, and in which drivers' agreements with Uber would "be against their own interests were they acting independently." *Apple, 791 F.3d at 314, 320*. Further, drivers' ability to benefit from reduced **[**16]** price competition with other drivers by agreeing to Uber's Driver Terms plausibly constitutes "a common motive to conspire." *Apex Oil Co. v. DiMauro, 822 F.2d 246, 254 (2d Cir. 1987)*. The fact that drivers may also, in signing up for Uber, seek to benefit from other services that Uber provides, such as connecting riders to drivers and processing **[*825]** payment, is not to the contrary. Of course, whether plaintiff's allegations are in fact accurate is a different matter, to be left to the fact-finding process.

The Court's conclusion that plaintiff has alleged a plausible horizontal conspiracy is bolstered by plaintiff's other allegations concerning agreement among drivers. Plaintiff, as noted supra, contends that Uber organizes events for drivers to get together, see Am. Compl. ¶ 41, and, more importantly, that Mr. Kalanick agreed to raise fares following drivers' efforts to negotiate higher rates in September 2014. See id. ¶ 87.[4] While it is true that these allegations about agreements among drivers reaching even beyond acceptance of Uber's Driver Terms are not extensive, see Def. Reply Br. at 7 n.8, nonetheless, they provide additional support for a horizontal conspiracy, and plaintiff need not present a direct, "smoking gun" evidence of a conspiracy, **[**17]** particularly at the pleading stage. *Mayor & City Council of Baltimore, Md. v. Citigroup, Inc., 709 F.3d 129, 136 (2d Cir. 2013)*.

More basically, it is well to remember that a Sherman Act conspiracy is but one form of conspiracy, a concept that is as ancient as it is broad. It is fundamental to the law of conspiracy that the agreements that form the essence of the misconduct are not to be judged by technical niceties but by practical realities. Sophisticated conspirators often reach their agreements as much by the wink and the nod as by explicit agreement, and the implicit agreement may be far more potent, and sinister, just by virtue of being implicit. Recently, for example, in *United States v. Ulbricht*, the Government alleged that defendant Ulbricht had organized an online marketplace for illicit goods and services called Silk Road. See *United States v. Ulbricht, 31 F. Supp. 3d 540, 546-47 (S.D.N.Y. 2014)*. In ruling on motions in limine **[**18]** in Ulbricht, Judge Forrest rejected the defense's argument that transactions among Silk Road's users gave rise to "only buy-sell relationships and not conspiratorial behavior" or, at most, to "a multitude of discrete conspiracies." *United States v. Ulbricht, 79 F. Supp. 3d 466, 481 (S.D.N.Y. 2015)*. Instead, Judge Forrest noted that the Government charged the defendant with sitting "atop an overarching single conspiracy, which included all vendors who sold any type of narcotics on Silk Road at any time." *Id. at 490*. In the instant case, Uber's digitally decentralized nature does not prevent the App from constituting a "marketplace" through which Mr. Kalanick organized a horizontal conspiracy among drivers.

Defendant argues, however, that plaintiff's alleged conspiracy is "wildly implausible" and "physically impossible," since it involves agreement "among hundreds of thousands of independent transportation providers all across the United States." Def. Br. at 1. Yet as plaintiff's counsel pointed out at oral argument, the capacity to orchestrate such an agreement is the "genius" of Mr. Kalanick and his company, which, through the magic of smartphone technology, can invite hundreds of thousands of drivers in far-flung locations to agree to Uber's terms. See Tr. **[**19]** 12:15-16. The advancement of technological means for the orchestration of large-scale price-fixing conspiracies need not leave ***antitrust law*** behind. Cf. *Ulbricht, 31 F. Supp. 3d at* ***[*826]*** *559* ("if there were an automated telephone line that offered others the opportunity to gather together to engage in narcotics trafficking by pressing "1," this would surely be powerful evidence of the button-pusher's agreement to enter the conspiracy. Automation is effected through a human design; here, Ulbricht is alleged to have been the designer of Silk Road ."). The fact that Uber goes to such lengths to portray itself - one might even say disguise itself - as the mere purveyor of an "app" cannot shield it from the consequences of its operating as much more.

Recent jurisprudence on vertical resale price maintenance agreements does not, as defendant would have it, undermine plaintiff's claim of an illegal horizontal agreement. See Def. Br. at 15. In Leegin, the Supreme Court held that resale price maintenance agreements - e.g., a retailer's agreement with a manufacturer not to discount the manufacturer's goods beneath a certain price - are to be judged by the rule of reason, unlike horizontal agreements to fix prices, which are per **[**20]** se illegal. See *Leegin, 551 U.S. at 886, 907*. The Court cited various "procompetitive justifications for a manufacturer's use of resale price maintenance," *id. at 889*, and concluded that although this practice may also have anticompetitive effects, the rule of reason is the best approach to distinguishing resale price maintenance agreements that violate the antitrust laws from those that do not. See *id. at 897-900*.

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[4] Though defendant's counsel argued at oral argument that if these events were "an antitrust violation, Mr. Kalanick would be a victim and not a participant in the conspiracy," since he allegedly initially opposed the higher rates, Tr. 37:8-9, the fact remains that, if plaintiff's allegations are taken as true, Mr. Kalanick agreed to a fare raise that set higher fares for all Uber drivers in the relevant groups.

Here, unlike in *Leegin*, Uber is not selling anything to drivers that is then resold to riders.[5] Moreover, the justifications for rule of reason treatment of resale price maintenance agreements offered in Leegin are not directly applicable to the instant case. See Pl. Opp. Br. at 15-16; Tr. 20-21. In particular, the Court's attention has not been drawn to concerns about free-riding Uber drivers, or to efforts that Uber drivers could make to promote the App that will be under-provided if Uber does not set a pricing algorithm. See *Leegin, 551 U.S. at 890-91*. While Mr. Kalanick asserts that Uber's pricing algorithm facilitates its market entry as a new brand, see Def. Br. at 16-17, this observation - which is fairly conclusory - does not rule out a horizontal conspiracy among Uber drivers, facilitated by Mr. Kalanick both as Uber's CEO and as a driver himself. **[**21]** The Court therefore finds that plaintiff has adequately pleaded a horizontal antitrust conspiracy under *Section 1* of the Sherman Act.

As to plaintiff's claim of a vertical conspiracy, a threshold question is whether plaintiff has alleged a vertical conspiracy in the Amended Complaint, which defendant denies. See Def. Reply Br. at 8; Def. Letter at 1. Although plaintiff's allegations of a vertical conspiracy are much more sparse than his contentions about a horizontal conspiracy, the Court finds that the Amended Complaint adequately pleads a vertical conspiracy between each driver and Mr. Kalanick.[6] In particular, plaintiff **[*827]** alleges that "[a]ll of the independent driver-partners have agreed **[**22]** to charge the fares set by Uber's pricing algorithm," Am. Compl. ¶ 68, and that Mr. Kalanick designed this business model, see id. ¶¶ 76, 78. The Amended Complaint also includes several allegations that would be pertinent to a rule of reason, vertical price-fixing theory. See id. ¶¶ 94-108. Under the Sherman Act count, plaintiff states that the "unlawful arrangement consists of a series of agreements between Kalanick and each of the Uber driver-partners, as well as a conscious commitment among the Uber driver-partners to the common scheme of adopting the Uber pricing algorithm . . ." Am. Compl. ¶ 124. Plaintiff claims that Mr. Kalanick is per se liable as organizer of the conspiracy and as an occasional Uber driver, ¶¶ 128-29, and then states that "[i]n the alternative, Kalanick is also liable under *Section 1* of the Sherman Act under a 'quick look' or 'rule of reason' analysis." Id. ¶ 130. In the Court's view, these allegations of legal theory, when coupled with the allegations of pertinent facts, are sufficient to plead a vertical conspiracy theory.

The question, then, is whether this theory is plausible under a "rule of reason" analysis. Under this analysis, "plaintiff bears the initial burden of showing that the challenged action has had an actual adverse effect on competition as a whole in the relevant market." *Capital Imaging, 996 F.2d at 543*. "To survive a Rule 12(b) (6) motion to dismiss, an alleged product market must bear a rational relation to the methodology courts prescribe to define a market for antitrust purposes — analysis of the interchangeability of use or the cross-elasticity of demand, and it must be plausible." *Todd v. Exxon Corp., 275 F.3d 191, 200 (2d Cir. 2001)* (internal citation and quotation marks omitted).

As to market definition, plaintiff defines the relevant market as the "mobile app-generated ride-share service market." Am. Compl. ¶ 94. Plaintiff alleges that Uber has an approximately 80% market share in the United States in this market; Uber's chief competitor Lyft has nearly a 20% market share; and a third competitor, Sidecar, left the market at the end of 2015. Id. ¶¶ 95-97. Plaintiff then explains that traditional taxi service is not a reasonable substitute for **[**24]** Uber, since, for example, rides generated by a mobile app can be arranged at the push of a button and tracked on riders' mobile phones; riders need not carry cash or a credit card, or, upon arrival, spend time paying for the ride; and riders can rate drivers and see some information on them before entering the vehicle. Id. ¶ 104. Indeed, plaintiff claims, Uber has itself stated that it does not view taxis as ride-sharing competition. Id. ¶ 105.

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[5] Leegin's statement that "[t]o the extent a vertical agreement setting minimum resale prices is entered upon to facilitate either type of cartel, it, too, would need to be held unlawful under the rule of reason," *551 U.S. at 893*, thus does not clearly apply to the instant case, since Uber is setting no minimum resale prices. Moreover, *Leegin* did not purport to overrule Interstate Circuit, which, for the reasons described supra, permits a finding of a conspiracy among competitors in circumstances such as those of the instant case. See *Interstate Circuit, 306 U.S. at 226-27*.

[6] Indeed, defendant himself referred in the briefing to "a vertical price arrangement like that described in the Amended Complaint." Def. Br. at 17. **[**23]** But see Def. Reply Br. at 8 ("The Amended Complaint . . . does not allege a vertical restraint in violation of the antitrust laws.").

Plaintiff also alleges that traditional cars for hire are not reasonable substitutes, since they generally need to be scheduled in advance for prearranged locations. Id. ¶ 106. However, plaintiff nevertheless contends that "Uber has obtained a significant share of business in the combined markets of taxis, cars for hire, and mobile-app generated ride-share services," and that Uber's own experts have suggested that in some U.S. cities, Uber has 50% to 70% of business customers "among all types of rides," which seems to refer to these combined markets. Id. ¶ 107.

Defendant contests plaintiff's proposed market definition, arguing that plaintiff provides inadequate justification for the exclusion not just of taxis and car services, but also of public **[**25]** transit such as subways and buses, personal vehicle use, and walking. See Def. Br. at 18; Def. Reply Br. at **[*828]** 8. In defendant's view, "[e]ach of these alternatives is a clear substitute for the services provided by driver-partners." Def. Br. at 18.

One could argue this either way (and defendant's attorneys are encouraged to hereinafter walk from their offices to the courthouse to put their theory to the test). But for present purposes, plaintiff has provided plausible explanations for its proposed market definition, and the accuracy of these explanations may be tested through discovery and, if necessary, trial. "Market definition is a deeply fact-intensive inquiry [and] courts [therefore] hesitate to grant motions to dismiss for failure to plead a relevant product market." *Chapman v. New York State Div. for Youth, 546 F.3d 230, 238*. Plaintiff's allegation that Uber - an industry member - recognizes that it does not compete with taxis, see Am. Compl. ¶ 105, also deserves consideration. See *Todd v. Exxon Corp., 275 F.3d 191, 206 (2d Cir. 2001)* (declining to exclude evidence of industry recognition from the analysis of market definition). The Court finds that plaintiff has pleaded a plausible relevant product market. See *Capital Imaging Associates, 996 F.2d at 546*.

The Court further finds that plaintiff has adequately pleaded adverse effects in the **[**26]** relevant market. Specifically, plaintiff pleads that "Kalanick's actions have further restrained competition by decreasing output," Am. Compl. ¶ 110 (citing "independent studies"); "Uber's market position has already helped force Sidecar out of the marketplace," id. ¶ 102; "Uber's dominant position and considerable name recognition has also made it difficult for potential competitors to enter the marketplace," id. ¶ 103.[7]

Defendant counters that Uber provides many pro-competitive benefits, see Def. Reply Br. at 9, and also disputes the conclusions that plaintiff purports to draw from the cited studies. See Def. Letter. Defendant's counter-assertions, while certainly well worth a fact-finder's consideration, do not persuade the Court to grant a motion to dismiss. The Court hence determines that plaintiff has plausibly pleaded adverse effects in the relevant market. Consequently, the Court finds that plaintiff has presented a plausible claim of a vertical conspiracy under *Section 1* of the **[**27]** Sherman Act.

Finally, the Court addresses plaintiff's state law Donnelly Act claim. The Second Circuit has held that this New York antitrust statute "was modeled on the Sherman Act and has generally been construed in accordance with federal precedents." *Williams v. Citigroup Inc., 659 F.3d 208, 211 n.2 (2d Cir. 2011)*. Though plaintiff contends that his Donnelly Act claim survives even if his Sherman Act claim fails, see Pl. Opp. Br. at 21, the Court has no occasion to assess this contention, for it holds that plaintiff's Sherman Act claim withstands defendant's motion to dismiss and, for the same reasons, the Court declines to dismiss plaintiff's Donnelly Act claim.[8]

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[7] In plaintiff's letter submitted after oral argument, plaintiff further described the "independent studies" quoted anonymously in Amended Complaint ¶ 110 that supposedly support these assertions. See Pl. Letter.

[8] Defendant argues that plaintiff is equitably estopped from avoiding the class action waiver in the user agreement that plaintiff made with Uber. See Def. Br. at 21; Colman Declaration, Dkt. 29, Exhibit 1 (User Agreement), at 8-9. The relevant provision of the User Agreement reads:

> Dispute Resolution: You and Company agree that any dispute, claim or controversy arising out of or relating to this Agreement . . . will be settled by binding arbitration . . . You acknowledge and agree that you and Company are each waiving the right to a trial by jury or to participate as a plaintiff or class User in any purported **[**28]** class action or representative proceeding.

[*829] For these reasons, the Court denies defendant Kalanick's motion to dismiss. Concomitantly, the Court lifts the stay of discovery previously imposed pending the Court's decision on this motion. Counsel are directed to submit to the Court, by no later than April 7, 2016, a case management plan in the Court's Form D that will have this case ready for trial by November 1, 2016.

The Clerk of Court is directed to close docket entries 22 and 27.

Dated: New York, NY

March 31, 2016

/s/ Jed S. Rakoff

JED S. RAKOFF, U.S.D.J

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User Agreement at 8-9. Although plaintiff has sued Mr. Kalanick personally and not Uber, defendant claims that plaintiff's claims against Mr. Kalanick are "intimately founded in and intertwined with" the underlying agreement with Uber. See Def. Br. at 23, quoting *Kramer v. Toyota Motor Corp., 705 F.3d 1122, 1128 (9th Cir. 2013)*. The Court finds, however, that since defendant is not seeking to compel arbitration, and plaintiff is not seeking to enforce the User Agreement against defendant, plaintiff is not equitably estopped from pursuing a class action suit against Mr. Kalanick, nor has plaintiff waived the right to proceed through this mechanism.

Bloyer v. St. Clair County

United States District Court for the Southern District of Illinois

April 7, 2016, Decided; April 7, 2016, Filed

Case No. 14-cv-1119-SMY-PMF

Reporter

179 F. Supp. 3d 843 *; 2016 U.S. Dist. LEXIS 47202 **; 2016-1 Trade Reg. Rep. (CCH) P79,584

JOHN R. BLOYER, JR., et al., Plaintiffs, vs. ST. CLAIR COUNTY ILLINOIS, et al., Defendants.

Prior History: *Bloyer v. St. Clair Cnty., 2016 U.S. Dist. LEXIS 10801 (S.D. Ill., Jan. 28, 2016)*

Core Terms

allegations, conspiracy, antitrust, tax sale, Sherman Act, properties, motion to dismiss, bidding, relevant market, monopoly power, auction, Counts, statute of limitations, civil conspiracy, anticompetitive, exclusionary

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For Edward Beasley, Defendant: Robert J. Bassett, LEAD ATTORNEY, Jennifer L. Dickerson, Williams Venker & Sanders LLC, St. Louis, MO.

For Kurt Prenzler, Movant: Stephen J. Maassen, LEAD ATTORNEY, Hoagland, Fitzgerald & Pranaitis, Generally Admitted, **[**3]** Alton, IL.

Judges: STACI M. YANDLE, DISTRICT JUDGE.

Opinion by: STACI M. YANDLE

Opinion

[*845] MEMORANDUM AND ORDER

This matter comes before the Court on Defendants Dennis Ballinger, Sr., Dennis Ballinger, Jr., Empire Tax Corp. and Vista Securities, Inc.'s ("Defendants") Combined Motion to Dismiss Pursuant to *Rules 9(a)* and *12(b)(6)* (Doc. 59). Plaintiffs responded (Doc. 92). For the following reasons, Defendants' motion is **DENIED**.

BACKGROUND

Plaintiffs' Complaint (Doc. 2) alleges that persons who owned property located in St. Clair County and who redeemed that property at county tax auctions paid a "penalty" rate in excess of that which would have been required had they not been forced to participate in a "rigged tax sale." Specifically, Defendants Dennis Ballinger, Sr., Dennis Ballinger, Jr., Empire Tax Corp. and Vista Securities, Inc. (referred to collectively in the Complaint as the "Ballinger Defendants") are alleged to have conspired with co-defendants St. Clair Co. and Suarez to diminish competitive bidding in order to ensure that lucrative **[*846]** properties were sold at the statutory maximum penalty percentage of 18% beginning at least as early as November 2006.

Plaintiffs further allege that the Ballinger Defendants knowingly participated **[**4]** in the conspiracy as tax purchasers as follows: Dennis Ballinger Jr. and Dennis Ballinger Sr. are alleged to have purchased 222 properties at the 2006 tax sale and 190 properties at the 2007 tax sale, Empire Tax Corp. is alleged to have purchased 60 properties at the 2006 tax sale and 135 properties at the 2007 tax sale and Vista Securities, Inc. is alleged to have purchased 92 properties at the 2006 tax sale and 133 properties at the 2007 tax sale all at the conspiratorial maximum 18% interest rate. Plaintiffs claim civil conspiracy against all Defendants (Count I), money had and received against all Defendants except Suarez (Count II), violations of the Sherman Act against all Defendants (Counts III and IV), violations of the Illinois Antitrust Act against all Defendants (Counts V-VII) and breach of fiduciary duty against Suarez (Count VIII).

Defendants contend that Plaintiffs' Complaint (Doc. 2) fails to include the necessary factual allegations to support antitrust claims and the existence of a conspiracy. Defendants further contend that all of Plaintiffs' claims are time-barred and that the fraudulent concealment claim is insufficient under *Fed. R. Civ. P. 9(b)*.

DISCUSSION

When reviewing a Rule 12(b)(6) motion to **[**5]** dismiss, the Court accepts as true all allegations in the complaint. *Erickson v. Pardus, 551 U.S. 89, 94, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007)* (citing *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. The federal system of notice pleading requires only that a plaintiff provide a "short and plain statement of the claim showing that the pleader is entitled to relief." *Fed. R. Civ. P. 8(a)(2)*. However, the allegations must be "more than labels and conclusions." *Pugh v. Tribune Co., 521 F.3d 686, 699 (7th Cir. 2008)*. This requirement is satisfied if the complaint (1) describes the claim in sufficient detail to give the defendant fair notice of what the claim is and the grounds upon which it rests and (2) plausibly suggests that the plaintiff has a right to relief above a speculative level. *Twombly, 550 U.S. at 555*; *see Ashcroft v. Iqbal, 556*

U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009); EEOC v. Concentra Health Servs., 496 F.3d 773, 776 (7th Cir. 2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 129 S. Ct. at 1949 (citing Twombly, 550 U.S. at 556).[1]

Statute of Limitations

Defendants argue for dismissal of all counts as barred by the applicable statute of limitations. They assert that antitrust and conspiracy actions must commence within four years and that a claim for money had and received must commence within five years of the accrual of the claim. Further, Defendants contend that Plaintiffs have failed to adequately allege a proper basis for tolling these statutes of limitations.

[*847] Plaintiffs acknowledge the statutes of limitations but argue that the discovery rule tolled the statute of limitations in this case. In support of their position, Plaintiffs cite Clark v. City of Braidwood, 318 F.3d 764 (7th Cir. 2003). In *Clark*, the Seventh Circuit held that the question was "whether *any* set of facts that if proven would establish a defense to the statute of limitations..."and that where a plaintiff relies on the discovery rule, a determination of timeliness is premature at the pleading stage. Clark, 318 F.3d at 768 (emphasis in original)

The discovery rule "postpones the beginning of the limitations period... to the date when [a plaintiff] discovers he has been injured." In re Copper Antitrust Litig., 436 F.3d 782, 789 (7th Cir. 2006), quoting Cada v. Baxter Healthcare Corp., 920 F.2d 446, 450 (7th Cir.1990). Therefore, the appropriate inquiry is whether the Complaint **[**7]** pleads sufficient facts that, if proven, would raise a reasonable inference that the limitations period was tolled until 2014 when Plaintiffs discovered the injury. Accepting all allegations of the Complaint as true, the Court finds they are sufficient to raise such an inference.

The Complaint alleges that Defendants and tax purchaser Co-Defendants directed "contributions" to the Democrat Party instead of to Suarez, that Suarez seated Co-Defendants at the front of the auction room to facilitate the conspiracy and that other bids were allowed on less lucrative properties in order to cover up the conspiracy. The Complaint further alleges that Defendants' conspiracy to rig tax auctions was inherently self-concealing so that Plaintiffs could not have discovered through reasonable diligence that they had been injured until 2014. Accordingly, Defendants' motion to dismiss Plaintiffs' claims as barred by the applicable statutes of limitations is denied.

Civil Conspiracy

Defendants argue Count I should be dismissed because antitrust claims cannot be asserted as civil conspiracy claims under Illinois law. Plaintiffs respond that independent, actionable tortious conduct is not required and that **[**8]** their Complaint alleges unlawful acts sufficient to plead a claim of civil conspiracy.

Section 9 of the Illinois Antitrust Act provides, "No contract, combination, conspiracy, or other act which violates this Act shall constitute or be deemed a conspiracy at common law." 740 ILCS § 10/9. The Committee Comment clarifies that the purpose of the provision is "*to confine remedies* for what were formerly common law conspiracies to proceedings under the new Act, if violative of the new Act, and thus prevent another form of 'double jeopardy.'" *Id (*emphasis added). The statute is clear that a plaintiff may not *recover* under both theories but is silent as to whether a plaintiff may *allege* both theories.

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[1] While Defendants entitle their motion "Motion to Dismiss... Pursuant to Rules 9(a) and 12(b)(6)," Defendants' arguments implicate Rule 9(b), not 9(a). Further, Plaintiffs' Complaint does not include a claim for fraud or fraudulent concealment. Plaintiffs raise the issue of fraudulent concealment as a negation to the statute of limitations defense and in regards to the discovery rule. Therefore, Rule 9 is inapplicable. Accordingly, **[**6]** the Court declines to consider Defendants' arguments arising under Rule 9(b).

Defendant cites Nichols Motorcycle Supply, Inc. v. Dunlop Tire Corp., No. 93-C-5578, 1994 U.S. Dist. LEXIS 17761, 1994 WL 698486, at *4 (N.D. Ill. Dec. 12, 1994) in support of their argument that Section 9 also prohibits Plaintiff from *alleging* a civil conspiracy based upon a purported violation of the Illinois Antitrust Act. The court in *Nichols* did, in fact, hold that a civil conspiracy claim is redundant and duplicative of the antitrust claims arising under the same set of facts and dismissed a conspiracy claim on that basis.

However, the statute does not bar a plaintiff from asserting claims under both theories. In fact, the Committee Comment to Section 9 also states, "an injured **[**9]** party might still recover under the doctrine of a common law conspiracy where the conduct in question did not violate the new Act." 740 ILCS § 10/9. Additionally, plaintiffs may plead alternative legal theories and, at trial, choose which theories of recovery **[*848]** to pursue. Fed. R. Civ. P. 8(d). Accordingly, Defendants' motion as to Count I is denied.

"Money Had And Received"

Defendants further argue that Count II should be dismissed because the Complaint fails to state a claim for money had and received. Specifically, Defendants contend that the Illinois Property Tax Code expressly permits an 18% penalty rate. Because no more than an 18% penalty was charged, Defendants argue Plaintiffs' allegations in Count II fail to state a claim.

In Illinois, a plaintiff bringing a claim for money had and received must allege that "(1) he was compelled to pay money to the defendant, (2) the defendant had no legal right to demand the money, and (3) payment was necessary in order to avoid an injury to his business, person or property." Butitta v. First Mortgage Corp., 218 Ill. App. 3d 12, 578 N.E.2d 116, 118-19, 160 Ill. Dec. 937 (Ill. App. 1991). If allegations demonstrate that the receipt of money is "unjust given the unfair practice under which it was obtained," the claim is sufficient to survive a 12(b)(6) motion to dismiss. **[**10]** Fields v. Alcon Labs., Inc., No. 313CV00197DRHDGW, 2014 U.S. Dist. LEXIS 34897, 2014 WL 1041191, at *4 (S.D. Ill. Mar. 18, 2014).

Here, Plaintiffs allege illegally rigged tax sales that unfairly ensured the highest penalties would be charged. This is sufficient to state a claim for money had and received. Accordingly, Defendants' motion is denied as to Count II.

The Sherman Act

Defendants move to dismiss Counts III and IV for failure to state a claim under Sections 1 and 2 of the Sherman Act. In particular, Defendants assert that Plaintiffs' claim under Section 1 for unlawful agreement or conspiracy in restraint of trade contains "fundamentally deficient allegations." Defendants also assert a lack of antitrust injury and defined market under Section 1 and argue that the named Plaintiffs lack standing. Under Section 2, Defendants assert "fundamentally deficient allegations" of monopoly power and exclusionary conduct and lack of a market definition.

Section 1 of the Sherman Act provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1. To plead a violation of § 1 of the Sherman Act, a plaintiff must plead: "(1) a contract, combination, or conspiracy; (2) a resultant unreasonable restraint of trade **[**11]** in [a] relevant market; and (3) an accompanying injury." Agnew v. Nat'l Collegiate Athletic Ass'n, 683 F.3d 328, 335 (7th Cir. 2012) (quoting Denny's Marina, Inc. v. Renfro Prods., Inc., 8 F.3d 1217, 1220 (7th Cir.1993)).

Proof of an explicit agreement is not required to plead a Sherman Act antitrust conspiracy claim. United States v. General Motors Corp., 384 U.S. 127, 142-43, 86 S. Ct. 1321, 16 L. Ed. 2d 415 (2010). Rather, a Section 1 claim of conspiracy "requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). Here, Plaintiffs plead sufficient facts to survive a motion to dismiss. The factual allegations include specific details about the agreement and how sales were structured to eliminate competition. This is sufficient to plausibly suggest an illegal conspiracy for purposes of *Section 1* of the Sherman Act.

As to the second requirement—an unreasonable restraint of trade in a relevant market resulting from the conspiracy— Plaintiffs must allege a cognizable market on which Defendants' actions could have **[*849]** had anticompetitive effects. *Agnew, 683 F.3d at 337-338*. "Relevant market" has been defined by the United States Supreme Court as "commodities reasonably interchangeable by consumers for the same purposes." *United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 395, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)*. Unless it is inconceivable that Plaintiffs could prove a set of facts supporting the market definition alleged, Count III should not be dismissed. *MCM Partners, Inc. v. Andrews-Bartlett & Associates, Inc., 62 F.3d 967, 977 (7th Cir. 1995)* (reversing a *12(b)(6)* dismissal as erroneous where district court "believed **[**12]** [plaintiff] had not alleged facts to support the complaint's market definition").

Here, Plaintiffs do not provide an explicit definition of the alleged relevant market. Rather, the Complaint allegations provide an overview of the Illinois tax sale procedure, an outline of the situations in which a successful purchaser of property at a tax sale may double his initial investment or gain title to property at less than market value and citations to the Illinois Property Tax Code regarding the public sale process. Further, the Complaint cites Illinois case law to support the allegation that the Illinois Property Tax Code "envisions that the public sale process will foster competition in bidding, reducing the [penalty rate] percentage, thereby enabling property owners to redeem their property for the lowest amount." Doc. 2, p. 12, P60. The Complaint further alleges that the auctioneer is "obligated to engage in a 'reverse auction' process whereby he solicits and accepts bids to obtain this least penalty percentage." *Id.*

The Court finds that these allegations sufficiently identify the relevant market. Competition is clearly envisioned by the Property Tax Code. Plaintiffs' allegations reasonably **[**13]** set forth tax lien certificates as products that fall within the definition of commodity. The Complaint sufficiently defines the relevant market in terms of its product (tax lien certificates) and its location (St. Clair County).

To meet the third requirement, because "[t]he purpose of the Sherman Act is to protect consumers from injury that results from diminished competition," Plaintiffs must allege not only an injury to themselves, but an injury to the market as well. *Agnew, 683 F.3d at 334-35*. "Such injury must involve 'loss [that] comes from acts that reduce output or raise prices to consumers.'" *James Cape & Sons Co. v. PCC Const. Co., 453 F.3d 396, 399 (7th Cir. 2006)* (quoting *Chi. Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n, 961 F.2d 667, 670 (7th Cir.1992))*.

Contrary to Defendants' contentions, it is not necessary to show that one plaintiff was injured by the sale of another property owner's taxes. What needs to be shown is a loss that comes from acts that raise prices to consumers. Plaintiffs' Complaint alleges an inflated penalty rate caused by Defendants' anticompetitive activity— a rate that Plaintiffs and hundreds of other property owners would have been forced to pay in order to redeem their properties. Doc. 2, p. 18, ¶ 87. These allegations are sufficient to establish injury. Accordingly, Defendants' motion to dismiss Count III is denied.[2]

Section 2 of the Sherman Act, *15 U.S.C. § 2*, makes it unlawful for a person or company to "monopolize" and exclude competition. To prove monopolization under *§ 2*, a plaintiff must allege: "(1) the possession of monopoly power in the relevant market and (2) the willful . . . maintenance of that power as distinguished **[*850]** from growth or development as a consequence of a superior product, business acumen, or historical accident." *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*. The Supreme Court has defined monopoly power as "the power to control prices or exclude competition." *United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)*.

[2] Pursuant to *Local Rule 7.1(d)* **[**14]** , the Court declines to consider Defendants' standing argument— unsupported by citations to relevant legal authority.

A plaintiff may establish monopoly power by evidence that a firm has profitably raised prices above the competitive level. *United States v. Microsoft Corp., 253 F.3d 34, 51, 346 U.S. App. D.C. 330 (D.C. Cir. 2001)*. However, possessing monopoly power does not by itself constitute monopolization. *Grinnell Corp., 384 U.S. at 570-71*. Rather *§ 2* of the Sherman Act makes it unlawful to maintain monopoly power through exclusionary conduct. *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)*.

The test for exclusionary conduct is set forth in *United States. v. Microsoft Corp.* First, a plaintiff must prove that a monopolist's conduct has had an "anticompetitive effect." *Microsoft, 253 F.3d at 58*. Second, if a plaintiff is successful in showing an anticompetitive effect, the alleged **[**15]** monopolist may proffer a non-pretextual "procompetitive justification" for its conduct. *Id. at 59*. Lastly, if the alleged monopolist's proffering of procompetitive justification is unrebutted, the plaintiff "must demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefit." *Id.*

Here, the Complaint includes allegations of assigned seating arrangements to place tax-buyer defendants in the front and purposeful ignoring of non-defendant bidders who were not part of the illegal agreement. Plaintiffs further allege that winning bids that were not a result of "superior business acumen" but rather were a result of an illegal agreement to eliminate competition in bidding for tax liens. The alleged conduct is exclusionary in that it "had the effect of preventing other competitors from receiving the winning bid at the tax sale auctions" by "fixing, controlling, maintaining, limiting, and/or discontinuing the bidding of lower rates during the auction process...." Doc. 2, p. 29, ¶¶ 131-132. The alleged arrangement between Defendant Suarez and tax-purchaser defendants (including the Ballinger Defendants) prevented competitive bids except on less lucrative properties, which **[**16]** were allowed in order to conceal the conspiracy. Based on these allegations, Plaintiffs have sufficiently pled exclusionary conduct and monopoly power to survive a motion to dismiss. Defendants' motion as to Count IV is denied.

The Illinois Antitrust Act

Defendants next move to dismiss Plaintiffs' state law antitrust claims, Counts V, VI and VII, on the same bases as their federal counterparts— Counts V and VI (antitrust conspiracy claims) mirror Count III and Count VII (monopolization claim) mirrors Count IV. "Illinois law provides that its courts should use the construction of federal ***antitrust law*** by federal courts to guide their construction of those state antitrust laws that are substantially similar to federal ***antitrust law***." *State of Ill., ex rel. Burris v. Panhandle Eastern Pipe Line Co., 935 F.2d 1469, 1480 (7th Cir. 1991)*. As such, Defendants' motion as to Counts V, VI and VII is denied for the reasons set forth in the Court's analysis under the Sherman Act.

For the above-stated reasons, Defendants' Motion to Dismiss is **DENIED** in its entirety.

IT IS SO ORDERED.

DATE: April 7, 2016

/s/ Staci M. Yandle

STACI M. YANDLE

DISTRICT JUDGE

Suture Express, Inc. v. Owens & Minor Distrib.

United States District Court for the District of Kansas

April 7, 2016, Decided; April 7, 2016, Filed

Case No. 12-2760-DDC-KGS

Reporter

2016 U.S. Dist. LEXIS 47421 *; 2016-1 Trade Reg. Rep. (CCH) P79,602

SUTURE EXPRESS, INC., Plaintiff, v. OWENS & MINOR DISTRIBUTION, INC., AND CARDINAL HEALTH 200, LLC, Defendants.

Subsequent History: Affirmed by *Suture Express, Inc. v. Owens & Minor Distrib., 2017 U.S. App. LEXIS 4431 (10th Cir. Kan., Mar. 14, 2017)*

Prior History: *Suture Express, Inc. v. Cardinal Health 200, LLC, 963 F. Supp. 2d 1212, 2013 U.S. Dist. LEXIS 109235 (D. Kan., 2013)*

Core Terms

Suture, customers, med-surg, endo, distributors, products, bundling, summary judgment, contracts, prices, defendants', terms, purchasing, markups, discount, market power, broadline, regional, acute care, antitrust, manufacturer, costs, terms of the contract, sales, distribute, rival, competitors, asserts, delivery, market share

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Judges: Daniel D. Crabtree, United States District Judge.

Opinion by: Daniel D. Crabtree

Opinion

AMENDED MEMORANDUM AND ORDER

NOTICE: On March 3, 2016, the Court entered a Sealed Memorandum and Order (Doc. 310) ruling on the parties' summary judgment motions. The Court also entered a Notice of Unsealing and Order (Doc. 312) that advised the parties that the Court intended to unseal the entire Memorandum and Order unless the parties filed a notice identifying the portions of the Memorandum and Order that qualify to remain under seal. In response to the Court's order, the parties filed a Joint Notice of Portions of Memorandum and Order to Redact (Doc. 318). The Court has considered the parties' submissions and issues this Amended Memorandum and Order. As identified below, the Court has removed certain references to specific customers and membership associations and confidential business information identified in the sealed version of the Memorandum and Order because the parties have demonstrated that "countervailing interests heavily outweigh the public interests in access." *Mann v. Boatright, 477 F.3d 1140, 1149 (10th Cir. 2007)* (citation and internal quotation marks omitted). Moreover, the Court **[*3]** does not find the identity of these entities and the specific confidential business information essential to its analysis. Instead, the Court references these entities and information generically in this publically-filed Amended Memorandum and Order. If the specific identities of the entities or confidential business information should become important to the analysis at some later stage of the proceedings, the sealed Memorandum and Order (Doc. 310) contains them.

This case arises under federal and state antitrust laws. Plaintiff Suture Express, Inc. ("Suture Express") alleges that defendants Owens & Minor Distribution, Inc. ("O&M") and Cardinal Health 200, LLC ("Cardinal") have violated antitrust laws by tying and bundling the sale of suture and endomechanical ("endo") distribution to the sale of other medical-surgical ("med-surg") distribution. This matter comes before the Court on defendants O&M and Cardinal's Motion for Summary Judgment (Doc. 253) and plaintiff Suture Express' Partial Motion for Summary Judgment (Doc. 254). After considering the parties' arguments, the Court grants defendants' Motion for Summary Judgment and denies Suture Express' Partial Motion for Summary Judgment. **[*4]**

I. Undisputed Facts

The following facts are either stipulated by the parties in the Pretrial Order (Doc. 251), or are uncontroverted.

Med-Surg Product Distribution

Med-surg products are single-use, disposable products that healthcare providers use on a regular basis. Thousands of med-surg products exist. They fall into about 30 categories that include, for example, custom surgical kits, packs and trays, IV sets and solutions, wound staples, gloves, bedpans, hospital gowns, woven and nonwoven goods, needles and syringes, sutures, endosurgical and endoscopic products, respiratory products, adhesives, bandages, dressings and sponges, and incontinence products.

Suture Express distributes only two categories of med-surg products to healthcare providers: sutures and endo products. Suture Express also provides distribution services to health care providers, including clinics, ambulatory surgery centers, and acute care facilities.

O&M and Cardinal are "broadline distributors" of med-surg products, which means that they distribute a full line of med-surg products in the 30 categories to healthcare providers. This includes suture and endo products. O&M and Cardinal are two of three national broadline **[*5]** distributors in the United States. The third national broadline distributor is Medline Industries, Inc. ("Medline"), which is not a party to this case. O&M and Cardinal, when measured by sales volume, are the two largest distributors of med-surg products to acute care providers in the United States. Cardinal currently distributes more than 300,000 med-surg products. O&M distributes more than 220,000 med-surg products.

Broadline Distributors

National broadline med-surg distributors, like O&M and Cardinal, acquire med-surg products in bulk from the manufacturers of those products. They store, keep in inventory, and distribute those products to healthcare providers through a network of distribution centers spread across the country. The distribution centers are large warehouse-like facilities that, typically, are located within several hours' drive from any given customer's hospital. O&M operates 43 distribution centers nationwide; Cardinal operates 48.

O&M and Cardinal staff each of their local distribution centers with warehouse personnel who pick, pack, and load products onto pallets and then onto trucks, which deliver the products to customers on a regular schedule. O&M and Cardinal **[*6]** use fleets of trucks to make those deliveries. Truck delivery is the primary delivery method that O&M, Cardinal, and other broadline distributors use for med-surg distribution.

Distributors' Relationships With Purchasers

Healthcare providers may contract directly with one or more med-surg distributors. They typically have a primary distributor who provides the large majority of their med-surg needs. Some of O&M and Cardinal's contracts define "primary distributor" to mean that the customer purchases a contractually-specified percentage of med-surg (including suture and endo) from the distributor. Also, healthcare providers sometimes use secondary distributors to fill other product orders for a variety of reasons, including times when the primary distributor cannot provide a requested product.

Healthcare providers also may belong to one or more Group Purchasing Organizations ("GPOs"), Integrated Delivery Networks ("IDNs"), Regional Purchasing Cooperatives ("RPCs"), member alliances, or other buying groups that have consolidated the purchasing power of their members to negotiate contracts with one or more med-surg distributors. The majority of acute healthcare providers are members of one **[*7]** or more GPOs. GPO members often purchase med-surg distribution from a distributor under the terms of the GPO's agreement with that distributor. And GPO agreements often include volume discount tiers. Acute healthcare providers evaluate, change, and join new GPOs in an effort to obtain more favorable contract terms with med-surg distributors.

RPCs and member alliances are coalitions of GPO members that join together to negotiate contract terms with med-surg distributors. RPCs, member alliances, or even individual hospitals sometimes negotiate for different terms than those found in GPO distribution contracts accessible to them. These groups may enter into a "local contract" with a med-surg distributor, which could represent an amendment to a national GPO contract or an entirely different contract.

Alternatively, some hospital systems use a self-distribution strategy. This means that they purchase products directly from manufacturers and perform distribution functions themselves. Self-distribution customers still may use outside distributors for services that they choose not to handle themselves. But some purchasers recognize the disadvantages of purchasing med-surg products directly from **[*8]** a manufacturer instead of using a distributor. Using a manufacturer instead of a distributor may increase a purchaser's administrative and staff costs because the purchaser must establish separate purchasing relationships with each manufacturer and manage receipt of separate shipments from each manufacturer. In contrast, a purchaser who uses a distributor can purchase multiple manufacturers' goods from that one distributor and receive a shipment containing those goods from multiple manufacturers.[1]

Some med-surg distributors testified in their depositions that healthcare providers have consolidated recently, thereby creating larger hospital systems. This has consolidated buying power, and, as some med-surg distributors testified, produced a more competitive marketplace.

Revenues

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[1] This description is a paraphrase of the parties' Stipulated Fact No. 20 (Doc. 251-1 at 5).

Med-surg distributors generate income from two sources: (1) funding paid by manufacturers ("vendor funding"); and (2) "markups," or distribution fees paid by purchasers. Many manufacturers of med-surg products pay distributors various forms of vendor funding, and generally, it is paid as a percentage of the underlying product **[*9]** cost.

Med-surg distributors, including Cardinal, O&M, and Suture Express, acquire products from manufacturers at a standard list price. Then, they charge most customers on a cost-plus basis, which means that they add a negotiated, fixed percentage distribution fee ("cost-plus markup") to the product cost agreed to by the customer and the manufacturer.[2] Sometimes, O&M and Cardinal include the cost of freight in their cost-plus markup. Certain regional distributors, such as Seneca Medical and MMS Inc., LLC, also offer cost-plus markup pricing. As an alternative, some broadline distributors, including Cardinal and O&M, charge some customers a service fee based on the specific distribution services received ("activity-based fee"). The services covered by med-surg distribution contracts differ from customer to customer.

Suture Express' Entry into Suture and Endo Distribution

Suture Express opened its business in 1998. It developed a business model to respond to the differences between suture and endo distribution and other med-surg distribution. Sutures and endo products account for about 10% of the med-surg supplies **[*10]** distributed in the United States to acute care providers. No acute care providers need just sutures and endo products but no other med-surg products. And no acute care providers need other med-surg products but not sutures and endo products. However, more stock keeping units (SKUs) exist for sutures than any other category of med-surg products. And while suture and endo products are smaller and lighter than most other med-surg products, they have a high-dollar value relative to their size and weight. Because the products are lightweight and small volume—"low cube"—a distributor easily can ship them in a FedEx box to an acute care provider.

Suture Express has one, centralized warehouse located in Lenexa, Kansas. There, it stocks a large variety of suture and endo SKUs, including "slower moving" SKUs. It ships those products from its warehouse across the country via overnight delivery by FedEx (or by courier within the Kansas City metropolitan area). Suture Express imposes no requirements on its customers for order size or frequency. But typically it charges a separate freight fee. This fee is often $7 per day/per location on top of its cost-plus markups. But Suture Express may charge **[*11]** some customers less, more, or not at all for freight. When the $7 per freight fee is added, it increases a customer's actual distribution costs above the cost-plus markup, adding, on average, one quarter of a percent (0.25 %) to the markup.

Suture Express achieves high "fill rates" for its customers. A "fill rate" represents the percentage of times that a distributor can fill a customer's order on a timely basis. For example, if a distributor ships nine of ten items a customer orders, then the fill rate for that particular customer is 90%. Many acute care customers demand high fill rates for suture and endo distribution. Historically, Suture Express has maintained a fill rate higher than 99%, and, in many instances, has higher fill rates than O&M and Cardinal.

Market Definitions and Market Share

Market definitions are an important piece of antitrust analysis. Here, the parties largely agree on the summary judgment definitions of the relevant geographic and product markets. They agree that: (1) the geographic market is national in scope, that is, limited to the United States, and (2) the product market is for distribution of med-surg products to acute care customers (*i.e.*, hospitals).[3]

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[2] The parties recite these facts in Stipulated Fact No. 27 (Doc. 251-1 at 6).

[3] **[*12]** O&M and Cardinal do not dispute Suture Express' Statement of Fact No. 34: "For purposes of this case, the relevant markets are appropriately limited to distribution of Med-Surg products to acute care customers (*i.e.*, hospitals)." Doc. 269 at 21

Industry-wide med-surg (including suture and endo distribution) revenues increased year-over-year during the relevant period, 2007 to 2012. From 2007 to 2012, O&M's sales of other med-surg products accounted for 32-38% of the total distribution of other med-surg products to acute care customers. In 2012 (the last year for which data is available), O&M had 38% of those sales. O&M attributes over half its growth during these five years to acquisitions of two smaller distributors and the addition of two large hospital systems as customers. The remainder of O&M's growth came from acquiring new customers and organic growth from existing customers. From 2007 to 2012, O&M's sales accounted for 40-43% of the total sales of distribution of suture and endo products to acute care customers. In 2012 (the last year for which data is available), O&M had 42% of those sales.

From 2007 to 2012, Cardinal's sales accounted for 27-31% of the total distribution of other med-surg products to acute care customers. In 2012 (the last year for which data is available), Cardinal had 27% of those sales. From 2007 to 2012, **[*14]** Cardinal's sales accounted for 26-31% of the total distribution of suture and endo products to acute care customers. In 2012 (the last year for which data is available), Cardinal had 26% of those sales.

Suture Express' market share in the suture and endo distribution market has varied between 8% and 10% from 2007 to 2012. In 2010, Suture Express' market share was 10% but decreased to 8% by 2012.

O&M and Cardinal's Implementation of Bundling Contract Terms

Between 1998 and about 2008, Suture Express successfully grew its business. Both O&M and Cardinal engaged in separate, internal communications about the increasing threat that Suture Express, because of its superior fill rates and low pricing, posed to their businesses. Around the same time, O&M and Cardinal adopted contractual terms that made pricing contingent on a customer's purchase of suture and endo distribution through them.

Cardinal implemented these contractual terms in different ways. In some contracts, Cardinal imposes markups on med-surg distribution unless the customer purchases 100% of its suture and endo products from Cardinal. Other Cardinal contracts give Cardinal the right to renegotiate the distribution markup and the **[*15]** payment terms provided in the contract if the customer stops buying its suture and endo products from Cardinal. Yet other agreements provide for higher markups on med-surg distribution if the customer reserves the right to purchase suture and endo products from other distributors. And, some agreements make markups on med-surg distribution contingent on the customer purchasing a certain percentage (in some cases, 95%) or a minimum dollar amount (specifically tailored to that customer) of all med-surg products from Cardinal. Suture Express' expert, Professor Einer Elhauge, calculated that almost 70% of Cardinal's contracts included at least one of the following contract terms: (1) an 80%+ med-surg distribution purchase requirement, or (2) a suture and endo distribution volume purchase requirement.

Cardinal also included similar contract terms in standardized agreements that it negotiated with GPOs. Currently, Cardinal's standardized agreements with the five largest GPOs have contingent pricing terms or impose markups if the customer fails to purchase a certain percentage (in some cases 100%) of suture and endo distribution from Cardinal. Many of Cardinal's customers have not entered into **[*16]** individually-negotiated contracts. Instead, they have purchased med-surg distribution from Cardinal under a GPO standardized agreement.

(Suture Express' Memo. in Support of Partial Summary Judgment); Doc. 304 at 2 (stating that Suture Express' Statement of Fact No. 34 is not disputed for purposes of summary judgment).

O&M and Cardinal assert in their summary judgment motion that the relevant market is for distribution *services*, rather than the physical items themselves. Doc. 266 at 6; Doc. 303 at 6 (sealed corrected version). Suture Express disputes this statement of fact, arguing that the relevant market is for the distribution of physical items because meg-surg distributors provide the actual products in addition to distribution-related services. Doc. 280 at 7. The Court views this statement of fact in the light most favorable to Suture Express, as it must when it considers defendants' motion for summary judgment. The Court therefore concludes that the relevant market is the distribution of med-surg products. Moreover, O&M and Cardinal fail to dispute that characterization of **[*13]** the relevant market in their response to Suture Express' motion for partial summary judgment.

O&M uses similar contract strategies. O&M includes contractual terms in its customer agreements that allow O&M to increase the price charged for other med-surg distribution if the customer switches suture and endo distribution to another distributor. For instance, one version of O&M's contracts imposed a markup on other med-surg distribution if the customer purchased suture and endo distribution from a distributor other than O&M. Other O&M agreements rendered markups on all med-surg distribution contingent on the customer purchasing a high percentage of med-surg distribution from O&M. Other O&M agreements required the customer to purchase a minimum amount (measured in dollars) of total med-surg distribution. That minimum amount was tailored to that particular customer so that the customer would violate the contract if it switched all of its suture and endo distribution to another distributor. And, in other agreements, O&M made markups contingent on customers purchasing the top 10 Healthcare Products Information Services categories (which include suture **[*17]** and endo) from O&M. Based on his review of O&M contracts, Professor Elhauge opined that almost every agreement included a term allowing O&M to increase prices on other med-surg distribution if the customer switched its suture and endo distribution to another distributor, such as Suture Express.

O&M also included similar contract terms in standardized agreements that it negotiated with GPOs. Many O&M customers who did not enter into individually-negotiated contracts purchased med-surg distribution from O&M under a GPO standardized agreement. O&M's current standardized agreements with the five largest GPOs impose markups if the customer fails to purchase a certain percentage of suture and endo distribution from O&M.

Typically, O&M, Cardinal, and Suture Express' contracts with customers have three to five year terms. Many of O&M and Cardinal's contracts include provisions allowing the customer to terminate without cause after giving notice of six months or less. Although customers may have the ability to change distributors under their contracts, customers have described the process as a time consuming one and not insignificant. Those customers also recognize the overhead costs and investment **[*18]** required to switch distributors. Despite the complexity of switching distributors, about one-half of Cardinal's acute care customers continue to do business with Cardinal within three or four years of initiating the relationship. The same is true for O&M.

Effect of O&M and Cardinal's Contract Terms as Analyzed by Plaintiff's Expert

Suture Express' expert, Professor Elhauge, analyzed the contract terms for 102 of O&M and Cardinal's customers. He created this pool of sample contracts by identifying Cardinal's 50 largest customers and O&M's 52 largest customers. Together, these 102 customers account for 3,271 separate acute care facilities. The 50 Cardinal customers account for 53% of Cardinal's med-surg sales. And the 52 O&M customers account for 47% of O&M's med-surg sales. After reviewing these 102 contracts, Professor Elhauge concluded that between 2006 and 2013, O&M made about 98% of its suture and endo sales and Cardinal made about 71% of its suture and endo sales under a contract containing one of the contractual terms described above—that is, one that makes pricing contingent on the purchase of suture and endo distribution through them.

Professor Elhauge also analyzed cost data produced **[*19]** by Cardinal to calculate the minimum markup that an equally efficient suture and endo distributor would have to charge to remain in the market. Professor Elhauge then used data about the contingent pricing terms in Cardinal's contracts to determine how often Cardinal's incremental suture and endo markups fell below the minimum markups. To put it another way, Professor Elhauge examined how often the contract terms produced sales of suture and endo distribution products below cost. For Cardinal, he concluded that customers with contracts containing the bundling provision paid an incremental price lower than the minimum markup 67% of the time. For O&M customers[4] with such contracts, Professor Elhauge opined that the resulting incremental price was lower than the minimum markup 85% of the time.

Professor Elhauge also applied an economic test to determine whether bundled discounts have the same economic effect as a tying arrangement. Applying that test, Professor Elhauge used sales data from Suture **[*20]** Express,

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[4] O&M did not produce cost data sufficient for Professor Elhauge to perform a similar calculation for its markups. So, Professor Elhauge relied on Cardinal's cost data to perform the analysis for O&M.

Cardinal, and O&M to calculate whether purchases of Suture Express' suture and endo distribution by customers who purchased other med-surg distribution from O&M and Cardinal (*i.e.*, customers who "broke the bundle") are less than 10% of the sum of those purchases plus purchases of defendants' suture and endo distribution by customers who accepted the bundle.[5] Professor Elhauge determined that this ratio ranged from 3% to 7%, depending on the year.

Professor Elhauge also examined Suture Express' performance among defendants' customers who had entered into contracts containing the bundling terms and compared them to customers who were not bound by contracts containing the bundling terms. Professor Elhauge determined that Suture Express' market share among customers who had entered into contracts with bundling terms ranged from 2% to 6% between 2006 and 2013, while its market share for customers **[*21]** not bound by the contractual bundling terms ranged from 13% to 41% for the same time period. From his conclusions, Suture Express' market share among customers not subject to the bundling terms (depending on the year) was four to 15 times greater than its share among customers who were subject to bundling terms.

Practical Effects of the Bundling Terms and Market Structure

O&M and Cardinal have acknowledged that the bundling terms successfully prevented Suture Express from selling suture and endo distribution to many of their customers. In a 2010 document, O&M noted that it has had some success defending against Suture Express by bundling pricing for suture and endo with other med-surg products. In another document, O&M recognized that customers subject to bundling will face higher prices if they choose to purchase suture and endo distribution from Suture Express. Cardinal identified "contract obligations" as a reason that one of its customers did not switch its business to Suture Express. Cardinal also described a situation when a customer agreed to stop purchasing suture and endo from Suture Express and move the business to Cardinal after Cardinal informed the customer of a "compliance **[*22]** issue." The Court understands Cardinal's reference to this "compliance issue" to mean that the customer was not complying with the bundling terms in its contract that required the customer to purchase suture and endo from Cardinal to obtain certain pricing on other med-surg distribution. Cardinal noted other situations when it had retained customers' suture and endo distribution purchases because of contractual requirements that effectively prevented the customers from purchasing suture and endo distribution from other sources (including Suture Express).

Many customers have informed Suture Express that they understand that the bundling terms in defendants' contracts prevent them from purchasing suture and endo distribution from Suture Express. Some customers stated that they could not purchase suture and endo distribution from Suture Express because their contracts with defendants effectively prevented them from doing so. Other customers moved their business away from Suture Express after signing contracts with defendants containing the bundling terms. And some customers informed Suture Express that any savings they realized by moving their business to Suture Express was offset by the **[*23]** costs they incurred under their contracts' bundling requirement. But, the bundling provisions notwithstanding, some customers subject to such contractual terms continued to purchase suture and endo distribution from Suture Express. For example, one Suture Express customer[6] paid increased prices on its med-surg distribution purchased from Cardinal because it failed to abide by the suture and endo commitment requirement in its contract with Cardinal after it purchased suture and endo distribution from Suture Express.

Also, customers testified under subpoena about their decisions and how they made them when entering into contracts with O&M, Cardinal, and other distributors that contain bundling terms. For example, a hospital membership association[7] entered into a contract with Cardinal in January 2008. Cardinal was the only distributor

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[5] *See* Doc. 262-1 at 148 (Elhauge report at ¶ 154) (explaining that Professor Elhauge used this formula because it is "a prominent economic test" used to determine if a bundled discount has the same economic effect as tying (citing X Areeda, Elhauge, & Hovenkamp, ***Antitrust Law*** ¶ 1758b (1996)).

[6] The sealed version of this Memorandum and Order (Doc. 310) identifies this customer specifically.

awarded a contract by this membership association at that time. Of the membership association's 34 members, no more than 22 of them entered into the Cardinal contract. In December 2011, Medline beat Cardinal, O&M, and Suture Express to win a sole-source contract **[*24]** with this membership association.

One hospital, who is a member of this association and thus had the option to sign the membership association's med-surg distribution contracts, contracted with Cardinal until April 2012, when it switched to Medline as its primary distributor. In 2006, this hospital declined to move business to Suture Express from Cardinal because the move would produce minimal savings over its existing Cardinal contract. This existing contract called for an increase in the cost plus markup for med-surg distribution if the hospital failed to meet the 90% suture and endo purchase requirement.

A second hospital who is a member of this association also had the option to enter into the membership association med-surg distribution contracts or contract locally with a different distributor. This hospital signed the membership association contract with Cardinal for med-surg distribution services until 2012, when it moved its business to Medline. The hospital did not **[*25]** move its business to Suture Express because it made fiscal sense to purchase suture and endo through Medline based on the pricing structure of Medline's contract.

A third hospital[8] is an equity member of a GPO and thus had committed to use a med-surg distributor authorized by the GPO. In 2008, this hospital had the choice of four authorized med-surg distributors—O&M, Cardinal, Medline, or Suture Express. The hospital switched from Cardinal to O&M in 2008, after having switched from O&M to Cardinal in 2007. The hospital declined to move its suture and endo distribution to Suture Express because it wanted to consolidate services, and it recognized that moving the business would increase its costs under its existing contract with O&M.

A fourth hospital chose to contract with O&M instead of Cardinal, Medline, and Professional Hospital Supply (a regional distributor). The hospital was subject to bundling terms under its O&M contract, which it considered when making the decision not to move business to Suture Express. But **[*26]** that was not the "overriding reason" for the decision. Instead, this hospital decided to keep its business with O&M because of the benefits of having a local distributor.

A fifth hospital purchased suture and endo distribution from Suture Express and other med-surg from Medline until 2010, when it switched its med-surg distribution to O&M and was subject to a bundling term. In 2012, the hospital switched from O&M to Medline as its distributor for med-surg products, including suture and endo. When it made the switch, the hospital considered contract proposals from O&M, Cardinal, Medline, and Seneca (a regional distributor).

A sixth hospital understood that it had many options for contracting with med-surg distributors through its GPO. It even had switched GPOs to receive better contracting opportunities. In 2009, the hospital signed a contract with O&M through a regional purchasing group within its GPO. Before entering that contract, the hospital purchased suture and endo distribution from Suture Express. After signing the contract with O&M, the hospital moved its suture and endo business to O&M because the contract required it to do so or incur increased markups. The contract also provided **[*27]** that the hospital could move suture and endo distribution back to Suture Express if O&M failed to comply with a 99% fill rate requirement.

A seventh hospital chose to contract with Cardinal in 2009, as its primary med-surg distributor, over Medline and O&M. The hospital considered purchasing suture and endo distribution from Suture Express but chose not to do so for efficiency reasons, and because it wanted to work with one single distribution channel. While the hospital's contract with Cardinal required it to purchase suture and endo distribution through Cardinal, the hospital testified

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[7] The sealed version of this Memorandum and Order (Doc. 310) identifies this membership association specifically and the specific hospitals who are members of this association as described the following paragraphs.

[8] The sealed version of this Memorandum and Order (Doc. 310) specifically identifies this hospital and the six additional hospitals described in the following six paragraphs.

that the bundling contractual terms were not necessarily a factor in its decision to keep its suture and endo distribution with Cardinal instead of Suture Express.

An eighth hospital implemented an expense reduction plan in 2009 or 2010, part of which involved reevaluating its med-surg distribution contract with Cardinal. The hospital solicited RFPs, and Cardinal, O&M, Medline, and Claflin (a regional distributor) responded. The hospital did not send an RFP to Suture Express because it decided to seek bids only from broadline distributors. The hospital awarded the contract to Cardinal because of its **[*28]** lower markup, better payment terms, and other considerations. The hospital purchased suture and endo from Suture Express before it entered the new agreement with Cardinal in 2010, but stopped doing so because it wanted to achieve the financial benefits of its Cardinal contract. The Cardinal contract included a bundling provision that required the hospital to repay part of Cardinal's discount if the hospital failed to meet its suture and endo commitment.

A ninth hospital changed distributors from Medline and Suture Express to O&M in 2011. The hospital told Suture Express that it was moving its business to O&M in an effort to consolidate purchases, minimize inventory, and realize savings. The hospital's contract with O&M contained a bundling term that required it to purchase a certain volume of suture and endo from O&M, or incur price markups.

Broadline Distributors' Distribution of Suture and Endo and Value-Added Services

Broadline distributors, like O&M and Cardinal, provide economies of scale. This means that per-unit costs are lower when they distribute high volumes of med-surg products. Some common costs exist when O&M and Cardinal distribute suture and endo products and other med-surg **[*29]** products together by truck. As described above, suture and endo products account for about 10% of an acute care provider's total spending on med-surg products. Suture and endo products are smaller and lighter than most other med-surg products, and have high-dollar value relative to their size and weight. They also are more expensive than most other med-surg products, yielding higher revenue for distribution services priced on a cost-plus basis. In contrast, med-surg products that are bulky or heavy are more expensive to deliver, and they contribute relatively less revenue for the amount of space they consume on a distribution truck.

A broadline distributor's trucks make regular deliveries of med-surg products to its customers regardless whether the customers have ordered suture and endo through it. The distributor can add suture and endo products to the customer's existing delivery without adding meaningful cost to that delivery because the same truck and driver, using virtually the same amount of fuel, will deliver the customer's med-surg products regardless of whether the load contains suture and endo products.

But O&M and Cardinal also recognize that some customers prefer more frequent **[*30]** deliveries of suture and endo products than other med-surg products. To that end, O&M and Cardinal have established distribution practices specific to suture and endo products. Cardinal has the National Suture Center, a separate, centralized distribution facility for suture and endo distribution. Cardinal set up this facility to improve customer service and reduce eroding sales to Suture Express. O&M operates a centralized facility that resupplies its local facilities and from which certain customers can order suture and endo products directly.

Broadline distributors, including O&M and Cardinal, also offer special services,[9] such as inventory management that can help customers save money. But, in many cases, customers pay additional fees for these special services. Some broadline distributors, including O&M and Cardinal, offer logical- or low-unit-of-measure ("LUM") programs. Other broadline distributors, including O&M and Cardinal, offer just-in-time ("JIT") inventory replenishment programs that may require additional deliveries to customers. O&M and Cardinal also offer wound closure inventory management programs; they permit the distributor to work directly with the purchasing customer **[*31]** to manage their suture and endo inventory. Cardinal's Wound Closure Management Services program enables Cardinal to

[9] Suture Express also offers similar services.

make recommendations to customers about the appropriate size, storage, and stocking locations for suture and endo inventory. Less than 1% of Cardinal's customers use this program. O&M's program—PANDAC—involves on-site cost containment and inventory management services for suture and endo and certain other med-surg products. About 20% of O&M's suture and endo customers use PANDAC. Some broadline distributors also provide same-day delivery to customers if they operate within specified driving distance of the nearest distribution center. However, requests for same-day deliveries are rare. Same-day deliveries also may cost more, and a distributor is able to fulfill a same-day request only if it already has the product in stock at its local distribution center.

Competition Among National and Regional Distributors

O&M and Cardinal have won and lost customers from and to one another. As already discussed, O&M and Cardinal also compete against a third national broadline distributor, Medline. Medline has grown its business in recent years. **[*32]** In early 2014, it acquired Professional Hospital Supply ("PHS"), a regional distributor located primarily in the western United States. Medline's med-surg product distribution to acute and non-acute providers has grown from less than $2 billion in sales in 2008 to over $5 billion in sales in 2014. These numbers exclude growth derived from Medline's acquisition of PHS. For suture and endo distribution only, Medline distributed about $35 million to both acute and non-acute providers in 2008. By 2014, Medline's suture and endo distribution to both acute and non-acute providers increased to about $220 million (not including PHS suture and endo distribution figures). Medline has won customers from O&M and Cardinal. Medline also has negotiated contracts with GPOs and regional buying groups. Suture Express also has won and lost contracts against Medline.

The three national broadline distributors also sometimes compete with regional med-surg distributors for business. Suture Express also has lost and won contracts against certain regional distributors. For example, Seneca Medical ("Seneca") is a regional distributor that distributes 90,000 different products from 1,500 different manufacturers. **[*33]** Seneca operates in 12 states out of six distribution centers. It has a fleet of more than 80 trucks and 30 account managers in the field. Since 2007, Seneca has opened three additional distribution centers. A Seneca representative estimated that in the last five or six years, Seneca has grown by 50%. The Seneca representative also estimated that Seneca's market share has grown to 50% (and as high as 75% market share in some geographic areas it serves), and that Seneca has a 15% to 16% share overall in the 12-state region that it serves. Seneca has won customers from O&M and Cardinal. Between January 2011 and May 2014, Seneca won several major health systems customers competing against Cardinal, O&M, and Medline.

MMS Inc., LLC ("MMS") is another regional full-line distributor. It has distribution centers in eight states and Guam. MMS provides same day service by distributing to its acute care customers located within a six hour drive of its distribution centers. The Claflin Company ("Claflin") is a regional distributor of med-surg supplies located in Providence, Rhode Island. It serves the New England region, and it has grown in the last 30 years by purchasing other distributors. In **[*34]** 2009, Claflin beat both O&M and Cardinal to win an estimated $25 million med-surg distribution contract with a certain hospital.[10] Before that, Cardinal had served as the distributor for that hospital for five years.

Before Medline acquired it in 2014, PHS operated as a regional acute care distributor. It had eight distribution centers in six states. Buffalo Hospital Supply is another distributor of med-surg products. It currently serves over 500 healthcare organizations, and it competes with O&M and Cardinal for business. DeKroyft-Metz & Co., Inc. ("DeKroyft") is another regional distributor based in Peoria, Illinois. It operates one distribution center that serves three states. Kreisers Inc. ("Kreisers") is a regional med-surg distributor located in Sioux Falls, South Dakota. It operates six distribution centers. Midland Medical Supply is a regional med-surg distributor located in Lincoln, Nebraska, with a customer base of nearly 600 clients that includes hospitals, clinics, doctor's offices, surgery centers, long term care homes, and medical and industrial laboratories. American Medical **[*35]** Depot is another regional med-surg distributor with two corporate offices—one in Florida and the other in Pennsylvania. It carries 350,000 products from over 2,000 suppliers.

[10] The sealed version of this Memorandum and Order (Doc. 310) identifies this hospital specifically.

In 2007, O&M bought the acute care business of McKesson Medical-Surgical ("McKesson"). McKesson operates a med-surg business unit that supplies med-surg products to physicians' offices, home care agencies, long-term care facilities, and surgery centers. It carries more than 200,000 med-surg products which it distributes from a network housed in more than 45 different locations. Although O&M now operates McKesson's acute care business, McKesson is not subject to a non-compete agreement that prevents it from reentering the acute-care market.

Also, Henry Schein Medical is a broadline distributor of med-surg products to primary care physicians and specialists, group practices, physician-owned labs, and ambulatory surgery centers. In 2006, it sold its hospital supply (which is the relevant market here). But all the parties in this case recognize Henry Schein Medical as a competitor in the non-acute and ambulatory care markets.

Competition from Manufacturers

As described above, some hospital systems use a self-distribution **[*36]** strategy. That is, they purchase products directly from manufacturers and perform distribution functions themselves. With self-distribution, an IDN or collective of hospitals uses its own distribution center or centers to distribute products to member hospitals. But self-distribution customers still may rely on outside distributors for services that they choose not to handle themselves.

O&M has lost at least two customers to self-distribution. Suture Express likewise identifies direct distribution from suture and endo manufacturers Johnson & Johnson (Ethicon) and Covidien as competition in the market. Ethicon and Covidien provide direct purchasing services to customers, and, in recent years, have offered changes in their pricing structure for customers making direct purchases.

Pricing in Distribution Contracts

Many factors may influence the distribution pricing that a distributor and acute care customer agree to in a contract. As already mentioned, GPOs tend to negotiate contracts with one or more med-surg distributors on behalf of their members. For several GPOs, the RFP and negotiation process is handled by GPO member advisory councils. Usually, this process starts with a GPO issuing **[*37]** an RFP, and then med-surg distributors respond. The RFP describes various contract terms and asks the distributors if they are willing to agree to those terms. The contract terms in the RFP are a starting point for negotiation.

Some RFPs from GPOs specifically have requested contract terms containing product category commitments from customers. But GPOs earn administrative fees in proportion to the total volume of med-surg distribution that passes through the distributors. For that reason, GPOs have an incentive to include volume commitments in med-surg distribution contracts.

Some, but not all, of the national and regional med-surg distributors include volume and product commitments in their customer contracts. A customer who purchases higher volumes from a distributor has greater leverage to obtain lower prices. Suture Express also includes volume commitments in its contracts. These contractual terms offer more favorable pricing in exchange for purchasing larger quantities of products. But such terms do not make pricing contingent on the purchase of another type of product, similar to the bundling provisions used by O&M and Cardinal.

Other national and regional broadline distributors **[*38]** have included in their contracts terms similar to the terms used by O&M and Cardinal, where pricing depends on the customer's commitment to purchase a certain volume of suture and endo distribution. Medline includes in its agreements a price increase by one half point if a customer stops purchasing suture and endo distribution from Medline. The majority of Seneca's local agreements also include a percentage or other commitment to obtain suture and endo products and custom procedure trays from Seneca. Two distributors, MMS and Seneca, testified that they include suture and endo commitment terms in their contracts because the product category is important to their profitability and pricing.

Some of O&M and Cardinal's contracts contain a cost-plus markup fee for med-surg distribution that represents one blended rate for all med-surg product categories. Other of their contracts contain more than one cost-plus markup fee, with markup fees that may differ for certain specific product categories. Suture and endo products are two product categories that, sometimes, have a different distribution markup than the one that applies to med-surg product markups.

Suture Express' expert, Professor Elhauge, **[*39]** performed an analysis that concluded that defendants' markup to acute care facilities for other med-surg products has been over 50% higher than the distribution markup charged to acute care facilities for suture and endo products. But, when customers contracted with defendants on a "blended" rate for both types of distribution, defendants sometimes based the rate on the product mix, and charged lower rates when customers bought more suture and endo products.

Profits

On average, O&M and Cardinal's markups for the distribution of med-surg products were lower in 2013 than they were in 2008. Markups also have declined for regional distributors Seneca and MMS. And, on average, O&M and Cardinal's markups for the distribution of suture and endo products were lower in 2013 than they were in 2008. Professor Elhauge and Suture Express' former CEO concede that Suture Express restrains the prices that O&M and Cardinal can charge for suture and endo distribution services. Suture Express also acknowledges that competition has pushed the markups for suture and endo products down.

O&M and Cardinal's profit margins have declined since 2008. Cardinal's operating margins for distribution-only activity have **[*40]** decreased by about 80% from 2008 to the end of 2011. O&M's operating margins for med-surg distribution also have decreased by about 17% between 2008 and 2013. O&M and Cardinal's distribution services margins also declined during this period. Cardinal's distribution services margin (which is roughly seven to eight times greater than its operating margin) decreased by about 75% between 2008 and 2013. But O&M's distribution services margin (which is about 10 to 11 times greater than its operating margin) only decreased by about 8% from 2008 to 2013.[11] Suture Express' distribution services margin is higher than either O&M or Cardinal's med-surg distribution services margins.

Barriers to Entry [*41] in the Market

A business seeking to enter the med-surg distribution market would incur large investment costs associated with that effort, including costs for building or leasing one or more distribution center(s) and leasing or purchasing delivery trucks. For example, O&M has distribution centers located throughout the country. Each distribution center distributes med-surg products within a geographic area consisting of one to three states. Cardinal also has located distribution centers across the country in close proximity to heavily populated areas.

The process for switching broadline distributors requires time and expense on the customer's part. One customer has described it as a complex and detailed process, especially if the customer operates more than one facility. The process of switching involves an assessment of current inventories and order histories of the different types of med-surg products with the incumbent distributor, ensuring availability of the current products with the new distributor, determining pricing structures, loading and coordinating computer systems with the new distributor, and coordinating placement of orders and deliveries with the new distributor. But, **[*42]** as shown by examples described above, acute care customers often switch distributors for various reasons, including more favorable contract terms.

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[11] The sealed version of this Memorandum and Order contains specific data for defendants' profit margins described in the above paragraph. Defendant O&M argued, persuasively, that revealing of this specific data could place it at a competitive disadvantage in the marketplace. The Court thus expresses this data in broader terms in the Amended Memorandum and Order. If that data should become relevant to issues in later proceedings, the sealed version of this Memorandum and Order recites this data specifically.

Challenges to Suture Express' Business

Since its inception, Suture Express has never distributed the full range of med-surg products. Thus, most of the med-surg product categories purchased by hospitals are not available from Suture Express. Suture Express also does not offer same-day service outside of the area near its warehouse in Kansas.

From 2006 to 2008, Suture Express successfully gained suture and endo business from Medline customers. But this success declined after Medline improved its service in suture and endo distribution, offered discounted pricing, and included bundling terms in its contracts. Since 2010, Medline has experienced significant growth in its suture and endo distribution to both acute and non-acute providers, more than doubling the amount of its sales in this market.

In mid-2010, a certain hospitall[12] notified Suture Express that, effective January 2011, it would move its business to O&M. This hospital was Suture Express' largest revenue-producing customer between 2006 and 2010. The hospital accounted for about 20% of **[*43]** Suture Express' net sales in 2009 and 2010. The loss of this customer had a negative effect on Suture Express' revenues and profits.

II. Summary Judgment Standard

The standard for deciding summary judgment is well-known. Summary judgment is appropriate if the moving party demonstrates that there is "no genuine dispute as to any material fact" and that it is "entitled to a judgment as a matter of law." *Fed. R. Civ. P. 56(a)*; *see also In re Aluminum Phosphide Antitrust Litig., 905 F. Supp. 1457, 1460 (D. Kan. 1995)*. When it applies this standard, the Court "view[s] the evidence and make[s] inferences in the light most favorable to the non-movant." *Nahno-Lopez v. Houser, 625 F.3d 1279, 1283 (10th Cir. 2010)* (citing *Oldenkamp v. United Am. Ins. Co., 619 F.3d 1243, 1245-46 (10th Cir. 2010))*.

"An issue of fact is 'genuine' 'if the evidence is such that a reasonable jury could return a verdict for the non-moving party' on the issue." *Id.* (quoting *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986))*; *see also* *In re Urethane Antitrust Litig., 913 F. Supp. 2d 1145, 1150 (D. Kan. 2012)* (explaining that "[a]n issue of fact is 'genuine' if 'the evidence allows a reasonable jury to resolve the issue either way.'" (quoting *Haynes v. Level 3 Commc'ns, LLC, 456 F.3d 1215, 1219 (10th Cir. 2006))*. "An issue of fact is 'material' 'if under the substantive law it is essential to the proper disposition of the claim' or defense." *Nahno-Lopez, 625 F.3d at 1283* (quoting *Adler v. Wal-Mart Stores, Inc., 144 F.3d 664, 670 (10th Cir. 1998)* (citing *Anderson, 477 U.S. at 248*)).

The moving party bears "'both the initial burden of production on a motion for summary judgment and the **[*44]** burden of establishing that summary judgment is appropriate as a matter of law.'" *Kannady v. City of Kiowa, 590 F.3d 1161, 1169 (10th Cir. 2010)* (quoting *Trainor v. Apollo Metal Specialties, Inc., 318 F.3d 976, 979 (10th Cir. 2002))*. To meet this burden, the moving party "'need not negate the non-movant's claim, but need only point to an absence of evidence to support the non-movant's claim.'" *Id.* (quoting *Sigmon v. CommunityCare HMO, Inc., 234 F.3d 1121, 1125 (10th Cir. 2000))*; *see also* *In re Urethane Antitrust Litig., 913 F. Supp. 2d at 1150* (explaining that "a movant that does not bear the ultimate burden of persuasion at trial need not negate the other party's claim; rather, the movant need simply point out to the court a lack of evidence for the other party on an essential element of that party's claim." (citation omitted)).

If the moving party satisfies its initial burden, the non-moving party "'may not rest on its pleadings, but must bring forward specific facts showing a genuine issue for trial as to those dispositive matters for which it carries the burden of proof.'" *Id.* (quoting *Jenkins v. Wood, 81 F.3d 988, 990 (10th Cir. 1996))*; *see also* *Celotex Corp. v. Catrett, 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*; *Anderson, 477 U.S. at 248-49*. "To accomplish this, the facts must be identified by reference to affidavits, deposition transcripts, or specific exhibits incorporated therein."

[12] The sealed version of this Memorandum and Order (Doc. 310) identifies this hospital specifically.

Adler, 144 F.3d at 671 (citing *Thomas v. Wichita Coca-Cola Bottling Co., 968 F.2d 1022, 1024 (10th Cir.)*, *cert. denied*, *506 U.S. 1013, 113 S. Ct. 635, 121 L. Ed. 2d 566 (1992))*.

Here, plaintiff and defendants both have filed motions for summary judgment. When the parties file cross-motions for summary judgment, the legal standard does not change. Each **[*45]** movant bears the burden of establishing that no genuine issue of material fact exists and it is entitled to judgment as a matter of law under its summary judgment theory. *Atl. Richfield Co. v. Farm Credit Bank of Wichita, 226 F.3d 1138, 1148 (10th Cir. 2000)*. The Court must treat cross motions for summary judgment separately—"the denial of one does not require the grant of another." *Buell Cabinet Co. v. Sudduth, 608 F.2d 431, 433 (10th Cir. 1979)*. However, where the cross motions overlap, the Court may address the legal arguments together. *Berges v. Standard Ins. Co., 704 F. Supp. 2d 1149, 1155 (D. Kan. 2010)* (citation omitted). Also, the Court may assume that it need not consider evidence beyond that cited by the parties. *Atl. Richfield Co., 226 F.3d at 1148* (quoting *James Barlow Family Ltd. P'ship v. David M. Munson, Inc., 132 F.3d 1316, 1319 (10th Cir. 1997))*. Nevertheless, the Court must deny summary judgment if disputes remain about material facts. *Id.* (quoting *James Barlow, 132 F.3d at 1319*).

Finally, summary judgment is not a "disfavored procedural shortcut." *Celotex, 477 U.S. at 327*. Instead, it is an important procedure "designed 'to secure the just, speedy and inexpensive determination of every action.'" *Id.* (quoting *Fed. R. Civ. P. 1*). And, summary judgment has "particular importance in the area of ***antitrust law***, because it helps to avoid wasteful trials and prevent lengthy litigation that may have a chilling effect on pro-competitive market forces." *Major League Baseball Props., Inc. v. Salvino, Inc., 542 F.3d 290, 309 (2d Cir. 2008)* (citation, internal quotation marks, and alterations omitted); *see also* *Race Tires Am., Inc. v. Hoosier Racing Tire Corp., 614 F.3d 57, 73 (3d Cir. 2010)* (stating that "[t]he entry of summary judgment in favor of an antitrust **[*46]** defendant may actually be required in order to prevent lengthy and drawn-out litigation, which may have a chilling effect on competitive market forces." (citation omitted)). Indeed, the Supreme Court has recognized that "[s]ummary judgments have a place in the antitrust field" because "[s]ome of the law in this area is so well developed that [when] the gist of the case turns on documentary evidence, the rule at times can be divined without a trial." *White Motor Co. v. United States, 372 U.S. 253, 259, 83 S. Ct. 696, 9 L. Ed. 2d 738 (1963)*; *see also* *SEC v. Geyser Minerals Corp., 452 F.2d 876, 881 (10th Cir. 1971)* (explaining that "even in antitrust litigation, if the pertinent area of law is well developed and the case turns on documentary evidence, disposition by summary judgment may be appropriate" (citing *White Motor Corp., 372 U.S. at 259*)).

III. Analysis

Suture Express has filed a Partial Motion for Summary Judgment (Doc. 254) asking the Court to find that O&M and Cardinal's bundling actions are an illegal tying practice that violates: (1) *Section 1* of the Sherman Antitrust Act; (2) Section 3 of the Clayton Act; and (3) the Kansas Restraint of Trade Act ("KRTA"), *K.S.A. § 50-101 et seq.* Defendants have filed a Motion for Summary Judgment (Doc. 253), seeking summary judgment against all three legal theories invoked by Suture Express' claims. The Court exercises its discretion to address the parties' cross-motions together. **[*47]**

A. Sherman Act § 1

Suture Express asserts that defendants' bundling practices constitute an illegal tying arrangement that violates *section 1* of the Sherman Act. A tying arrangement exists when a seller conditions its sale of a product (the "tying" product) on the purchase of a second product (the "tied" product). *Ill. Tool Works, Inc. v. Indep. Ink, Inc., 547 U.S. 28, 31, 126 S. Ct. 1281, 164 L. Ed. 2d 26 (2006)*. The Supreme Court has explained that "'the essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms.'" *Id.* (quoting *Jefferson Par. Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 12, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984))*. But, even in concentrated markets, tying arrangements "may serve procompetitive purposes, such as quality control, production and sales efficiencies, and facilitation of indirect price competition." *Town Sound & Customer Tops, Inc. v. Chrysler Motors Corp., 959 F.2d 468, 477 (3d Cir. 1992)*; *see also Cascade Health Sols. v. PeaceHealth, 515 F.3d 883, 895 (9th Cir. 2007)* (explaining tying in the form of bundled discounts "generally benefit[s] buyers because the discounts allow the buyer to get more for less" and that tying can produce "savings to the seller because it usually costs a firm less to sell multiple products to one customer at the same time than it does to sell the products individually").

Here, Suture **[*48]** Express claims that defendants have conditioned the sale of other med-surg distribution (the "tying" product) on the purchase of suture and endo distribution (the "tied" product). Each defendant imposed a tying arrangement, according to Suture Express, by offering a bundled discount that makes it uneconomic for customers to contract for suture and endo distribution separate and apart from other med-surg distribution. Suture Express characterizes the bundled discount as a "penalty" that defendants impose on customers who choose to purchase suture and endo distribution elsewhere. And, Suture Express contends, this bundling arrangement amounts to an unreasonable restraint on trade in violation of the Sherman Act *§ 1*.

Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." *15 U.S.C. § 1*. Notwithstanding its words, *§ 1* does not prohibit every restraint of trade, but only "unreasonable restraints of trade." *Law v. NCAA, 134 F.3d 1010, 1016 (10th Cir.)*, *cert denied*, *525 U.S. 822, 119 S. Ct. 65, 142 L. Ed. 2d 51 (1998)* (internal quotation marks and citation omitted). Courts employ two different tests to determine whether a defendant's conduct unreasonably restrains trade. *Id.* They are: (1) the per **[*49]** se rule, and (2) the rule of reason. *Id.* (citing *SCFC ILC, Inc. v. Visa USA, Inc., 36 F.3d 958, 963 (10th Cir. 1994))*.

The elements of a tying violation are: "(1) two separate products or services are involved; (2) the sale or agreement to sell one product or service is conditioned on the purchase of another; (3) the seller has sufficient economic power in the tying product market to enable it to restrain trade in the tied product market; and (4) a not insubstantial amount of interstate commerce in the tied product is affected." *Sports Racing Servs., Inc. v. Sports Car Club of Am., Inc., 131 F.3d 874, 886 (10th Cir. 1997)* (citations omitted); *see also* *Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 461-62, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)*; *Jefferson Par., 466 U.S. at 12-18*, *abrogated on other grounds by* *Ill. Tool Works, Inc., 547 U.S. at 31*; *Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publ'n, Inc., 63 F.3d 1540, 1546 (10th Cir. 1995)* (reciting the elements of a "per se violation").

The per se rule "condemns practices that 'are entirely void of redeeming competitive rationales.'" *Id.* (quoting *SCFC ILC, Inc., 36 F.3d at 963*). When presented with a practice that is illegal per se, the court "need not examine the practice's impact on the market or the procompetitive justifications for the practice advanced by a defendant before finding a violation of ***antitrust law***." *Id.* Some courts have recognized, however, that the "per se" rule in tying cases is not "like other, truly per se rules in ***antitrust law***" because it requires an "inquiry into [the] tying product market structure (which is frequently costly and time-consuming) . **[*50]** . . but if the defendant is found to have market power there, the plaintiff is, in theory, relieved of proving actual harm to competition and of rebutting justifications for the tie-in." *Town Sound & Customer Tops, Inc., 959 F.2d at 477*; *see also* *Sheridan v. Marathon Petroleum Co., 530 F.3d 590, 593-94 (7th Cir. 2008)* (explaining that despite several Supreme Court decisions applying the rule of reason test to vertical restraints, the Supreme Court has not discarded the "per se" tying rule and, instead, it has modified the rule by requiring that the seller hold market power in the tying product); *U.S. Healthcare, Inc. v. Healthsource, Inc., 986 F.2d 589, 593 n.2 (1st Cir. 1993)* (stating that "[t]ying is sometimes also described as a per se offense but, since some element of power must be shown and defenses are effectively available, 'quasi' per se might be a better label." (citing *Eastman Kodak Co., 504 U.S. 451, 112 S. Ct. 2072, 119 L. Ed. 2d 265*)).

Absent per se liability, a plaintiff still may prevail on a tying claim if the challenged practice unreasonably restrains competition. *See* *Jefferson Par., 466 U.S. at 29*; *Fortner Enters., Inc. v. U.S. Steel Corp., 394 U.S. 495, 500, 89 S. Ct. 1252, 22 L. Ed. 2d 495 (1969)* ("A plaintiff can still prevail on the merits whenever he can prove, on the basis of a more thorough examination of the purposes and effects of the practices involved, that the general standards of the Sherman Act have been violated."). When making this determination, courts use a rule of reason test that "requires an analysis of the restraint's effect on competition." **[*51]** *Law, 134 F.3d at 1016-17* (citing *Nat'l Soc'y of*

Prof'l Eng'rs v. United States, 435 U.S. 679, 695, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978)). A court first must determine "whether the challenged restraint has a substantially adverse effect on competition." *Id. at 1017* (citing *SCFC ILC, Inc., 36 F.3d at 965*). If so, "[t]he inquiry then shifts to an evaluation of whether the procompetitive virtues of the alleged wrongful conduct justifies the otherwise anticompetitive impacts." *Id.* (citing *United States v. Brown Univ., 5 F.3d 658, 669 (3d Cir. 1993))*.

To determine whether the challenged practice imposes an unreasonable restraint on trade, the Court must examine "a variety of actual market factors." *Reazin v. Blue Cross & Blue Shield of Kan., Inc., 899 F.2d 951, 960 (10th Cir. 1990)* (citation and internal quotation marks omitted). Under this analysis, plaintiff bears the burden of showing an "adverse effect on competition." *Id.* (citation and internal quotation marks omitted). Importantly, the challenged restraint must inflict an adverse impact on competition, not just on an individual competitor or the plaintiff's business. *Id.* (citing *Westman Comm'n Co. v. Hobart Int'l, Inc., 796 F.2d 1216, 1220 (10th Cir. 1986)*, *cert. denied*, *486 U.S. 1005, 108 S. Ct. 1728, 100 L. Ed. 2d 192 (1988)*; *Christofferson Dairy, Inc. v. MMM Sales, Inc., 849 F.2d 1168, 1172 (9th Cir. 1988))*.

When Judge Rogers decided defendants' motion to dismiss, he ruled that the Complaint failed to state a plausible Sherman Act violation under a per se analysis. Doc. 50 at 8-10. But, Judge Rogers held that Suture Express' tying claim properly stated a claim under the rule of reason analysis. *Id.* at 10-11. In its summary judgment motion, Suture Express recites the **[*52]** elements of a tying violation (Doc. 268 at 67), and asserts that the summary judgment facts demonstrate each of these elements under a rule of reason analysis, thereby warranting summary judgment in its favor. *See* Doc. 268 at 66-80. Suture Express also argues that the bundling provisions have affected competition adversely and no procompetitive justifications exist for the practice. Conversely, defendants argue in their summary judgment motion that the undisputed facts, even when viewed in Suture Express' favor, fail to establish the elements of a tying claim. And, defendants assert, even if Suture Express could establish the elements of a tying claim under a rule of reason analysis, the summary judgment facts present no anticompetitive effects from defendants' bundling but instead demonstrate pro-competitive and valid business reasons for the bundling practices. Thus, analyzing Suture Express' claim under a rule of reason analysis, defendants contend they are entitled to summary judgment.

The Court addresses each of these arguments below and concludes that the summary judgment facts, even when viewed in the light most favorable to Suture Express, present no basis for a reasonable jury **[*53]** to find the existence of an illegal tying arrangement violating *§ 1* of the Sherman Act. Thus, Cardinal and O&M are entitled to summary judgment against Suture Express' Sherman Act § 1 claim.

1. Elements of a Tying Arrangement

Suture Express asserts that the undisputed summary judgment facts establish all four elements of an illegal tying arrangement in violation of *§ 1*. As stated, those four elements require proof of: "(1) two separate products or services are involved; (2) the sale or agreement to sell one product or service is conditioned on the purchase of another; (3) the seller has sufficient economic power in the tying product market to enable it to restrain trade in the tied product market; and (4) a not insubstantial amount of interstate commerce in the tied product is affected." *Sports Racing Servs., Inc., 131 F.3d at 886* (citations omitted). Suture Express contends that the summary judgment facts entitle it to summary judgment on the issue of liability on its Sherman Act claim.

In contrast, defendants O&M and Cardinal assert that Suture Express cannot establish all four elements. They argue that certain disputed facts exist on some elements, and they thus preclude summary judgment for Suture Express. More specifically, O&M and **[*54]** Cardinal argue that any disputed facts germane to the first element of a tying claim—whether two separate products are involved—preclude summary judgment for Suture Express. But those disputes do not matter, defendants say, to the legal theory advanced by their summary judgment motion. Defendants assert that no triable issue of material fact exists about the second and third elements of the Sherman Act claim.

The Court examines the second and third elements below. In subpart a, the Court considers the second element of a tying claim—whether the agreement to sell med-surg distribution is conditioned on purchasing suture and endo distribution. As explained in that section, the Court concludes that factual issues preclude a summary judgment finding for either party on this element. In subpart b, the Court concludes that the summary judgment facts preclude the possibility that Suture Express can establish the third element of a tying claim, *i.e.*, that O&M and Cardinal have sufficient market power in the tying product to permit them to restrain trade in the tied product market. This conclusion leads the Court to grant summary judgment for defendants against Suture Express' §1 tying claim. **[*55]** Likewise, it negates Suture Express' motion for summary judgment.

a. The Court Cannot Decide on Summary Judgment whether Defendants Condition the Sale of Med-Surg Distribution on the Purchase of Suture and Endo Distribution.

In its discretion, the Court begins with Suture Express' summary judgment motion, addressing the conditioning element of a tying claim. In this analysis, the Court views the evidence in the light most favorable to defendants, and concludes that these summary judgment facts present triable issues about the conditioning element of a tying claim.

i. Suture Express' Summary Judgment Arguments on the Conditioning Element

Suture Express asserts that defendants have conditioned the sale of other med-surg distribution on the sale of suture and endo distribution. Suture Express does not assert that the bundling discounts actually prohibit customers from purchasing the two types of distribution separately. Instead, Suture Express contends that the economic penalties imposed by defendants' bundling contracts coerce customers into purchasing both kinds of distribution services from them. *See* *Monument Builders of Greater Kansas City, Inc. v. Am. Cemetery Ass'n of Kan., 891 F.2d 1473, 1476, 1483 (10th Cir. 1989)* (holding that plaintiff had stated a tying claim against defendants who had imposed "prohibitively **[*56]** expensive" surcharges on purchasers of cemetery plots who bought grave markers separately instead of purchasing them from the cemetery).

Suture Express relies on two different tests to prove that defendants' bundling practices have an illegal, coercive effect: (1) the buyer behavior test, which focuses on the percentage of buyers of the tied product that take the bundle; and (2) the discount attribution test which examines, after allocation of the alleged discounts to the tied product, whether the incremental price of the tied product is below its costs.

The buyer behavior test, examines "whether nearly all or a very high percentage of buyers purchased the [bundle] from the defendant rather than purchasing [the tying product] from defendant and [the tied product] from a rival." X Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** ¶ 1758a (3d ed. 2011). Suture Express' expert, Professor Elhauge, performed the buyer behavior test two different ways.

First, he examined Suture Express' performance among defendants' customers who had entered into contracts containing the bundling terms and compared it to Suture Express' performance with customers who were not bound by bundling terms. From **[*57]** that data, plaintiff's expert determined that Suture Express' market share among customers who had entered into contracts with bundling terms ranged from 2% to 6%. Second, Professor Elhauge performed a similar buyer behavior test by using sales data from Suture Express, Cardinal, and O&M to calculate whether purchases of Suture Express' suture and endo distribution by customers who purchased other med-surg distribution from O&M and Cardinal (*i.e.*, customers who "broke the bundle") was less than 10% of the sum of those purchases plus purchases of defendants' suture and endo distribution by customers who accepted the bundle. Professor Elhauge determined that this ratio ranged between 3% and 7%, depending on the year.

Defendants respond that Professor Elhauge performed the buyer behavior tests incorrectly, using only Suture Express' sales data as the rival tied product. Indeed, Areeda and Hovenkamp suggest a presumption of non-tying if "a sufficiently large number of customers are observed who purchase the secondary product *from someone other than defendant*." X Areeda & Hovenkamp ¶ 1758a (emphasis added). Here, Professor Elhauge only examined the percentage of customers who broke the bundle **[*58]** by purchasing the tied product (suture and endo distribution) from Suture Express—not the percentage of *all* purchases of the tied product from any rival med-surg distributor. Suture Express counters defendants' attack by explaining that Professor Elhauge used all the data available to him to make his calculations, but this data did not include data from non-party med-surg distributors. But, even if he had, Professor Elhauge asserts that the data would not favor defendants because the other broadline distributors also use bundling contracts and any suture and endo sales made by other broadline distributors under their bundling contracts would increase the denominator in the ratio, thereby producing an even smaller percentage than the 3% to 7% that he calculated from just the parties' data (and, thus, the Court infers, establishing even stronger evidence of coercion). Professor Elhauge also opines that, if a customer orders other med-surg from defendants but not suture and endo, then the customer likely orders suture and endo from Suture Express; and not from another broadline distributor because Suture Express offers lower markups than any other distributors in the market. Defendants **[*59]** launch yet another line of attack on Professor Elhauge's analysis, asserting that neither of these buyer behavior tests is dispositive. Therefore, defendants say, Suture Express cannot show it is entitled to summary judgment based solely on these tests.

Areeda and Hovenkamp explain that the results of the buyer behavior test can play a useful—but not dispositive—role. That is, the test may suggest an illegal tying arrangement, or even create presumptions or inferences for and against illegal tying under certain circumstances. X Areeda & Hovenkamp ¶ 1758a. But the commentators never endorse the test as a dispositive one, capable of deciding the entire question. *Id.*

The Court concludes that defendants' criticisms of Professor Elhauge's analysis under the buyer behavior test present fact issues that preclude Suture Express from establishing coercion on summary judgment. While these tests might persuade a reasonable jury to conclude that coercion exists, a reasonable jury also could conclude otherwise—*i.e.*, that consumer choices and preferences drive the results, not coercion from defendants' bundling provisions. Based on this record, the undisputed facts fail to establish that defendants' **[*60]** contracts have a coercive effect.

This leaves Professor Elhauge's analysis under the discount attribution test. He used this test to analyze cost data produced by Cardinal to determine how often the contract terms brought the suture and endo distribution charges below cost. He concluded that among Cardinal customers with contracts containing the bundling provision, the resulting incremental price was lower than the minimum markup 67% of the time. He also opined that among O&M customers[13] with such contracts, the resulting incremental price was lower than the minimum markup 85% of the time.

Other courts have applied the discount attribution test to tying or bundled discount cases to assess the likelihood that coercion exists. *See* *Collins Inkjet Corp. v. Eastman Kodak Co., 781 F.3d 264, 275 (6th Cir. 2015)* (applying the discount attribution standard and finding a likelihood that plaintiff could prove coercion because the record suggested that defendant was selling the product below its incremental cost); *Cascade Health Sols. v. PeaceHealth, 515 F.3d 883, 906 (9th Cir. 2007)* (adopting a discount attribution standard that examined whether "the resulting **[*61]** price of the competitive product or products is below the defendant's incremental cost to produce them," and, if it is, "the trier of fact may find that the bundled discount is exclusionary for the purpose of *§ 2*.").

Defendants contend that Suture Express cannot use the discount attribution test to prove coercion here, and they make two principal arguments. First, defendants argue that the discount attribution test applies only to monopolization claims under Sherman Act *§ 2*, and that no court ever has applied the test to non-monopolists, as are defendants in this case. In *Collins Inkjet Corp.*, the Sixth Circuit applied the discount attribution test when plaintiff asserted a *§ 1* Sherman Act claim because it found no reason to treat economically identical behavior differently under *§§ 1* and *2* when both sections prohibit anticompetitive conduct. *781 F.3d at 267*. But, in that case, defendant had a 100% monopolistic share of the market. *Id. at 281*.

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[13] Because O&M did not produce cost data sufficient for Professor Elhauge to perform a similar calculation for its markups, he used Cardinal's cost data to perform the analysis for O&M.

Defendants contend that no court ever has applied the discount attribution test to a non-monopolist. The Court's research reveals the same. This absence of authority makes sense because the test examines whether defendant is selling "the competitive (or tied) [product at a] price below **[*62]** cost," which may exclude a rival who sells only the tied product. *Id. at 274*. But, in a market without a monopolist, a seller of a full range of products has no incentive to exclude the rival who sells only the tied product because other full range sellers competing in the market still can defeat any effort to raise prices. Here, defendants are not monopolists. And so, even if defendants excluded Suture Express, other med-surg distributors in the market (such as Medline) can prevent defendants from raising prices. In a market without a monopolist, customers have the option to move their business from defendants to other med-surg distributors (such as Medline) if they are unsatisfied with defendants' prices.

When discussing the "formulation for cost-based tests for determining when a bundled discount is 'exclusionary' in the sense that it keeps rivals out of the market," the commentators have described a scenario similar to the one presented here:

> In order to have antitrust significance a bundle must not merely keep one rival out of the market; it must exclude all of them. That is to say, a firm's aggregate discount of product A, B, and C might very well exclude a rival who produces only B and **[*63]** C, but not A. However, if there are other rivals in the market who also make the full range of A, B, and C, then the practice is not exclusionary, although it may limit the range of effective competition to those firms capable of competing across the full range of goods.

Herbert Hovenkamp & Eric Hovenkamp, *Complex Bundled Discounts and Antitrust Policy*, *57 Buff. L. Rev. 1227, 1231 (July 2009)*. As applied here, defendants' bundling of suture and endo distribution does not exclude *all* rivals. For instance, defendants' bundling arrangements have not excluded Medline, a third national broadline distributor who offers similar bundling provisions. Likewise, defendants have not excluded Seneca and MMS, regional broadline distributors who also offer bundling, from competing in the relevant market. The summary judgment facts thus fail to show that defendants' bundling practices have excluded *all* rivals, and the discount attribution test cannot serve as a strong indicator of coercion because defendants are not monopolists.

Second, defendants attack Professor Elhauge's analysis by asserting that he used an improper measure of costs and an unrepresentative sample size. These criticisms create fact issues that preclude Suture Express **[*64]** from prevailing on the coercion element of a tying claim and thus preclude summary judgment in its favor. Also, like the buyer behavior test, the discount attribution test may suggest evidence of coercion, but it is not a dispositive test that warrants summary judgment for Suture Express. *See* Hovenkamp & Hovenkamp, *57 Buff. L. Rev. at 1255* (explaining that the discount attribution test "produces very severe false positives and should be regarded as nothing more than a starting point for analysis"). In short, the results of Professor Elhauge's discount attribution test cannot establish coercion at the summary judgment stage.

Finally, Suture Express relies on anecdotal statements by its customers to establish coercion. Suture Express cites comments from defendants' customers giving their understanding of the bundling terms in defendants' contracts, *i.e.*, that they prevented the customer from purchasing suture and endo distribution from Suture Express. Some customers informed Suture Express that their contracts prohibited the purchases while other customers explained that any savings that they may realize from purchasing suture and endo distribution from Suture Express was offset by the costs incurred under their **[*65]** contracts with defendants. Defendants respond that evidence of customers adhering to their contract terms is not coercion. If that were true, defendants argue, the antitrust laws would prohibit all contracts restraining a customer's ability to do business with another. But that is not the law. *See, e.g., NCAA v. Bd. of Regents, 468 U.S. 85, 98, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984)* (explaining that "every contract is a restraint of trade, and as we have repeatedly recognized, the Sherman Act was intended to prohibit only unreasonable restraints of trade").

Viewing this evidence in the light most favorable to defendants, as the Court must when it considers Suture Express' summary judgment motion, the Court concludes that the summary judgment facts present genuine issues precluding Suture Express from establishing the second element of a tying claim—that defendants have conditioned the sale of other med-surg distribution on the sale of suture and endo distribution. Because Suture

Express cannot prove at least one element of a tying claim on summary judgment, the Court denies Suture Express' motion for partial summary judgment.

ii. Defendants' Summary Judgment Arguments on the Conditioning Element

The Court now turns to defendants' summary judgment arguments on this **[*66]** same element. Defendants contend that the Court must grant summary judgment against Suture Express' § 1 tying claim because the summary judgment facts present no triable issues about the conditioning element of that claim. Specifically, defendants argue that no evidence of coercion exists because med-surg distributors compete vigorously for contracts before a customer enters into a med-surg distribution contract. And, defendants assert, customers are not coerced into entering those contracts. Instead, defendants claim that the evidence simply shows that customers freely decide to enter contracts and then adhere to the contract terms they have chosen. Also, defendants argue that the contracts allow customers to terminate them, generally with six months' notice, and defendants have a history of lax enforcement of the bundling terms.

The summary judgment record contains conflicting evidence about this last point—defendants' enforcement of their contracts. A jury could examine defendants' evidence and conclude that no coercion exists. But a reasonable jury also could find that the results of Professor Elhauge's tests, notwithstanding defendants' criticism of them, prove coercion. Thus, the **[*67]** Court finds that disputed factual issues preclude it from deciding on summary judgment whether defendants condition the purchase of other med-surg distribution on the purchase of suture and endo distribution.

Because the summary judgment facts present a genuine issue of fact on the second element of a tying claim—that is, whether defendants have conditioned the sale of other med-surg distribution on the sale of suture and endo distribution—the Court turns now to defendants' other summary judgment theory. As the next section explains, the summary judgment facts present no genuine issues about a separate element of Suture Express' tying claim—market power.

b. Defendants Lack Economic Power in Tying Market.

The Supreme Court requires that "in all cases involving a tying arrangement, the plaintiff must prove that the defendant has market power in the tying product." *Ill. Tool Works, 547 U.S. at 46*. But "[t]he standard of 'sufficient economic power' does not . . . require that the defendant have a monopoly or even a dominant position throughout the market for the tying product." *Fortner Enters., 394 U.S. at 502*. Instead, "economic power over the tying product can be sufficient even though the power falls far short of dominance and even though the power exists **[*68]** only with respect to some of the buyers in the market." *Id. at 502-03* (citations omitted). "'Even absent a showing of market dominance, the crucial economic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes.'" *Id. at 503* (quoting *United States v. Loew's Inc., 371 U.S. 38, 45, 83 S. Ct. 97, 9 L. Ed. 2d 11 (1962))*.

A plaintiff can demonstrate that market power exists by adducing evidence of either "power to control prices" or "the power to exclude competition." *Westman Comm'n Co. v. Hobart Int'l, Inc., 796 F.2d 1216, 1225 n.3 (10th Cir. 1986)*; *see also* *Fortner Enters., Inc. v. U.S. Steel Corp., 394 U.S. 495, 503 (1969), 89 S. Ct. 1252, 22 L. Ed. 2d 495* ("Market power is usually stated to be the ability of a single seller to raise price and restrict output."). The power to control prices and the power to exclude competition "may, in turn, depend on various market characteristics, including the existence and intensity of entry barriers, elasticity of supply and demand, the number of firms in the market, and market trends." *Reazin v. Blue Cross & Blue Shield of Kan., Inc., 899 F.2d 951, 967 (10th Cir. 1990)* (citing *Shoppin' Bag of Pueblo, Inc. v. Dillon Cos., 783 F.2d 159, 162 (10th Cir. 1986))*; *see also* *FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 460-61, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986)* (explaining that "[s]ince the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, 'proof of actual detrimental effects, such as a reduction of output,' can obviate the need for an inquiry into market power, which is but a 'surrogate for detrimental effects'" (quoting **[*69]** 7 P. Areeda, ***Antitrust Law*** ¶ 1511, p. 429 (1986)).

i. Suture Express' Summary Judgment Arguments on the Market Power Element

Again, the Court begins by addressing Suture Express' summary judgment arguments. In so doing, the Court views the evidence in the light most favorable to defendants, the non-moving parties on Suture Express' summary judgment motion.

Suture Express argues that the summary judgment facts establish that defendants possess power in the market for other med-surg distribution. To support this claim, Suture Express points to defendants' large market share in other med-surg products, the substantial barriers to entering this market, the imposition of the bundling terms in a large percentage of defendants' contracts, the infrequency of customers "breaking" the bundle, and Suture Express' sales losses to defendants because of the bundling provisions.

First, Suture Express asserts that defendants comprise the large majority of nationwide broadline distribution of other med-surg products. From 2007 to 2012, O&M's share of the market ranged from 32% to 38%, and Cardinal's share ranged from 27% to 31%. Suture Express cites several cases in which courts have determined that lesser **[*70]** market shares establish market power. But defendants correctly explain that those cases involved different market conditions than those presented here. *See, e.g., United States v. Visa U.S.A., Inc., 344 F.3d 229, 239-40 (2d Cir. 2003)* (finding market power existed when one defendant had 47% market share and the other defendant had 26% market share in a highly concentrated market where customers could not refuse to do business with defendants, even when subject to significant price increases, because of customer preference); *Toys "R" Us, Inc. v. F.T.C., 221 F.3d 928, 937 (7th Cir. 2000)* (finding market power when a retailer, with 20% of the national wholesale market and up to 49% in some local wholesale markets, successfully had reduced output from manufacturers thereby insulating it from having to lower prices); *Eiberger v. Sony Corp. of Am., 622 F.2d 1068, 1080-81 (2d Cir. 1980)* (explaining that defendant had a "strong market position" because it had established 12% market share within just four years of entering the market and defendant was the fastest growing company among four other competitors who accounted for 96% of the market); *United States v. Am. Express Co., 88 F. Supp. 3d 143, 188-91 (E.D.N.Y. 2015)* (concluding that defendant's 26.4% market share of a highly concentrated market with significant barriers to entry alone was not likely sufficient to prove market power without "the amplifying effect of cardholder insistence" on paying with **[*71]** an American Express card); *Johnson v. Blue Cross/Blue Shield of New Mexico, 677 F. Supp. 1112, 1119-20 (D.N.M. 1987)* (concluding that genuine issues precluded summary judgment for defendant on market power because defendant's market share of 25% to 30% was "artificially depress[ed]" and entering companies were unable to capture any significant portion of the market).

Importantly, while defendants' market share is relevant to determining market power, it "alone is insufficient to establish market power." *Reazin, 899 F.2d at 967* (citation and internal quotation marks omitted). Thus, the Court cannot conclude that O&M and Cardinal have sufficient market power based on their market shares alone.

Second, the barriers to entry into the market fail to establish market power. "Entry barriers are particular characteristics of a market which impede entry by new firms into that market." *Reazin, 899 F.2d at 968* (citations omitted). Barriers to entry "may include high capital costs or regulatory or legal requirements such as patents or licenses." *Id.* Suture Express argues that the barriers to entry here are substantial because national broadline distribution requires a network of local distribution facilities and sufficient infrastructure that is expensive to build. It also requires hospital customers to support the operation. But, the summary **[*72]** judgment facts show that competitors in this med-surg market are growing their businesses as they compete against O&M, Cardinal, and Suture Express for acute care customers. For example, Medline has grown its business significantly from 2008 to 2014. It has won customers from O&M, Cardinal, and Suture Express, and it has successfully negotiated contracts with GPOs and regional buying groups. Also, regional distributors are competing successfully in this market, winning contracts from national broadline distributors. For example, regional distributor Seneca has grown its business by 50% in the last five or six years, and it has opened three new distribution centers since 2007. As these competitors have expanded in the market, O&M and Cardinal's market shares have declined or remained relatively flat. These facts fail to establish that barriers to entry exist in the market.

Suture Express also argues that a customer's cost to switch med-surg distribution precludes competitors from entering the market. But, the summary judgment facts establish just the opposite. While some customers describe the process of switching distributors as an involved one requiring an investment of time and overhead, **[*73]** the record is filled with examples of customers who, in fact, have switched distributors on a regular basis. Indeed, O&M and Cardinal retain only about half of all acute care customers after three or four years of beginning to do business with them.

Third, that defendants have managed to secure the bundling terms in a large number of defendants' contracts fails to establish market power. Suture Express' expert reviewed 102 of defendants' customer contracts and concluded that, between 2006 and 2013, O&M made about 98% of its suture and endo sales and Cardinal made about 71% of its suture and endo sales under contracts containing a bundling provision. But the mere existence of these terms in customer contracts cannot create an inference of market power. *See* *Tele Atlas N.V. v. NAVTEQ Corp., No. C-05-01673 RMW, 2008 U.S. Dist. LEXIS 111866, 2008 WL 4809441, at *16 (N.D. Cal. Oct. 28, 2008)* (explaining that "[t]o permit the mere existence of a tying arrangement to satisfy the plaintiffs' burden of production on market power is to permit every tying case to proceed to a jury, even where the defendant lacks a shred of market power. This is bad policy, as '[m]any tying arrangements, even those involving patents and requirements ties, are fully consistent with a free, competitive market.'" **[*74]** (quoting *Ill. Tool Works, 547 U.S. at 45*)).

The summary judgment facts also establish that other competitors in the market, including national distributor Medline and regional distributors Seneca and MMS, use similar bundling terms for suture and endo distribution in their customer contracts. And Suture Express does not contend that these firms have market power. The undisputed facts reveal a market where customers have a range of choices before deciding which contracts to enter. They can contract through a GPO or regional buying group, or they can contract directly with a med-surg distributor. Customers make the choice to enter into contracts containing bundling terms, both with defendants and other competitive rivals. The existence of these terms in defendants' contracts does not raise an inference of market power.

Also, competitive rivals offer similar bundling terms, which demonstrates that defendants' bundling is not a barrier to entry. As the Seventh Circuit has explained, "[i]f rivals may design and offer a similar package for a similar cost, there is no barrier, and without a barrier there is no market power." *Will v. Comprehensive Accounting Corp., 776 F.2d 665, 672 (7th Cir. 1985)*. Here, other med-surg distributors, including Medline, Seneca, and MMS, offer contractual terms similar **[*75]** to the ones used by defendants. Thus, defendants' use of bundling terms is not unique among competitors in the market, and this practice fails to establish market power.

Fourth, Suture Express asserts that defendants' bundling terms are predatory because they fail the discount attribution test. But, as described above, the Court cannot find on summary judgment that defendants fail this test because fact issues preclude such a finding. The Court also refuses to find that the fact issues attendant to this test demonstrate market power. Suture Express cites no legal authority for that conclusion. And, as noted above, no court has applied the discount attribution test to a non-monopolist. Defendants are not monopolists, and they would not benefit from excluding a rival who produces less than a full range of products because other broadline distributors exist to compete against defendants and prevent them from raising prices.

Fifth, because defendants' customers "break the bundle" infrequently, Suture Express contends this establishes O&M and Cardinal's market power. This fact, it contends, shows an indirect detrimental effect on competition, thereby demonstrating market power. However, as **[*76]** already explained, customers have many alternatives in this market before deciding to enter contracts. That customers make business decisions to enter into contracts and then adhere to their terms does not support a finding of market power.

Sixth, Suture Express asserts that its loss of sales to defendants because of the bundling provisions shows market power. Suture Express' expert concluded that Suture Express' market share among "unrestrained customers" (*i.e.*, those not parties to contracts containing the bundling terms) was four to 15 times greater than its share among customers who were subject to bundling terms, depending on the year. But, like other arguments Suture Express makes, this fact reveals nothing more than customers adhering to their contracts' terms after they have made the decisions to enter into them. Suture Express cites no authority for the proposition that this fact demonstrates market power.

Seventh, Suture Express argues that defendants' intent in implementing the bundling terms was to leverage its market power and protect its business from Suture Express. *See* Doc. 268 at 78 (citing *Chicago Bd. of Trade v. United States, 246 U.S. 231, 238, 38 S. Ct. 242, 62 L. Ed. 683 (1918)* ("knowledge of intent may help the court to interpret facts and to predict consequences"); **[*77]** *Hahn v. Or. Physicians' Serv., 868 F.2d 1022, 1026 (9th Cir. 1988)* (explaining the intent of defendants may be relevant to the effect on competition)). Several of defendants' internal documents and communications acknowledge that using bundling terms successfully has prevented Suture Express from selling suture and endo distribution to their customers. But, as the Ninth Circuit recognized in *Hahn*, intent is not dispositive. *868 F.2d at 1026*. And, the Tenth Circuit has held that "intent to harm a rival, protect and maximize profits, or 'do all the business [ ] they can,' is neither actionable nor sanctioned by the antitrust laws." *SCFC ILC, Inc., 36 F.3d at 969* (quoting *Ball Mem'l Hosp., Inc. v. Mut. Hosp. Ins., Inc., 784 F.2d 1325, 1339 (7th Cir. 1986))*. The Court cannot find market power from defendants' intent to protect its suture and endo business from Suture Express' rival business model.

The Court concludes that none of Suture Express' arguments establish that defendants have sufficient market power to entitle Suture Express to summary judgment. Thus, the Court cannot grant summary judgment for Suture Express on this element of their § 1 tying claim.

ii. Defendants' Summary Judgment Arguments on the Market Power Element

The Court now turns to defendants' summary judgment arguments on the market power element. In this analysis, of course, the Court views the facts in the light **[*78]** most favorable to Suture Express, the non-moving party. And, the Court concludes that the undisputed facts, when viewed in Suture Express' favor, present no triable issues about defendants' power to exclude competition or control prices. *See* *Westman Comm'n Co. v. Hobart Int'l, Inc., 796 F.2d 1216, 1225 n.3 (10th Cir. 1986)* (explaining that an antitrust plaintiff may demonstrate market power with evidence of either power to control prices or the power to exclude competition). Thus, the summary judgment facts preclude Suture Express from establishing market power, and the Court must grant summary judgment for defendants.

As described above, the summary judgment facts describe a market rife with competitive rivals who are growing and expanding their business while Cardinal and O&M's market shares have declined or remained relatively flat. Indeed, O&M and Cardinal compete vigorously against one another, winning and losing customers back and forth. They also compete with a third national broadline distributor, Medline, who has grown its business significantly in recent years. The record also includes undisputed examples of growth among regional distributors who compete against national broadline distributors, including defendants, for acute care business. And, at least **[*79]** two competitors in the non-acute care business, McKesson and Henry Schein Medical, potentially could enter the acute care markets and compete against defendants using their existing national distribution networks for non-acute care distribution. The parties also face competition from manufacturers who sell directly to hospital systems that have implemented a self-distribution strategy. All of this evidence demonstrates that defendants lack the power to exclude competition.

Also, the existence of a competitive rival that offers similar bundling—Medline—forecloses defendants' ability to exclude competition here. As Hovenkamp & Hovenkamp explain, "if bundle-to-bundle discount competition can occur in a market, then a particular firm's bundled discount cannot be exclusionary unless its overall price is below its costs. Otherwise an equally efficient firm exists that would be able to match the discounted price and earn a profit."[14] Herbert Hovenkamp & Eric Hovenkamp, *Complex Bundled Discounts and Antitrust Policy*, *57 Buff. L. Rev.*

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[14] Suture Express does not allege that defendants' overall price is below its costs.

1227, 1231 (July 2009). *Cf. Cascade Health Sols. v. PeaceHealth, 515 F.3d 883, 915 (9th Cir. 2007)* (concluding that defendant possessed "substantial market power" when it was the exclusive provider of tertiary services in the market). Here, Medline uses similar bundling **[*80]** provisions, is growing its business, and competing with O&M and Cardinal. These undisputed facts prevent Suture Express from demonstrating any triable issues about defendants' ability to exclude competition.

The record also lacks evidence of defendants' ability to control prices. Instead, the summary judgment facts show that O&M and Cardinal's markups for the distribution of med-surg products were lower, on average, in 2013 than they were in 2008. Their markups for suture and endo distribution also were, on average, lower in 2013 than they were in 2008. Regional distributors Seneca and MMS also experienced declines in markups, which they attributed to competitive pressures from customers and other distributors. And, as Suture Express concedes, competition has lowered markups for suture and endo products.

Also, O&M and Cardinal's profit margins have declined since 2008. Cardinal's operating margins for distribution-only activity have decreased by about 80% from 2008 to 2011. O&M's operating margins for med-surg distribution also have decreased by about 17% between 2008 and 2013. Suture Express contends that **[*81]** these figures are misleading because they calculate the ratio using a figure that includes the value of the product distributed, thereby understating the margins. Suture Express asserts that the more appropriate figure to examine is the distribution services margin. But both O&M and Cardinal's distribution services margins also declined during this time period. The margin for Cardinal's distribution services (which is roughly seven to eight times greater than its operating margins) decreased by about 75% between 2008 and 2013; and O&M's margin (which is about 10 to 11 times greater than its operating margin) decreased by about 8% between 2008 and 2013.[15] This decline in markups and margins shows that defendants lack the ability to control prices.

The summary judgment record also establishes that acute care customers are consolidating, thereby forming larger and larger hospital systems. While Suture Express argues that no causal relationship exists between customers' consolidation and lowered prices in the market, several med-surg distributors, **[*82]** including Suture Express' CFO, testified that consolidation has increased customers' buying power and created a very competitive marketplace. The evidence of customer consolidation in a competitive market with declining profits also demonstrates that defendants lack the power to control prices.

Under these facts, no reasonable jury could conclude that defendants have the power to exclude competition or control price. Instead, the undisputed facts demonstrate a market where O&M and Cardinal compete vigorously against Medline, certain regional distributors, and each other. And, after three or four years, O&M and Cardinal can retain only about half of their acute care customers. These facts preclude any triable dispute about defendants' market power. *See In re Wireless Tele. Servs. Antitrust Litig., 385 F. Supp. 2d 403, 417 (S.D.N.Y. 2005)* (granting summary judgment for defendants because plaintiff failed to present evidence raising a question of fact that any one of the defendants had sufficient market power to force a tie when "defendants compete against each other in terms of service and price" and "the high churn rate is striking evidence of their respective lack of control over the market and the impediments each of them faces to any effort to control price").

Because **[*83]** the summary judgment facts fail to present a triable issue about market power—one of the required elements for proving a tying claim—Suture Express' Sherman Act § 1 claim fails as a matter of law. Consequently, the Court must grant summary judgment for defendants.

2. The Summary Judgment Facts Fail to Establish Harm to Competition or an Antitrust Injury.

Defendants argue that they also are entitled to summary judgment against Suture Express' Sherman Act § 1 claims for another, independent reason—Suture Express cannot establish an antitrust injury. The Court agrees.

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[15] The sealed version of this Memorandum and Order contains specific data for defendants' profit margins described in the above paragraph. *See supra* n.11.

A plaintiff asserting an antitrust claim must establish an antitrust injury, as the Sherman Act defines this term. *Cohlmia v. St. John Med. Ctr., 693 F.3d 1269, 1280 (10th Cir. 2012)* (quoting *Tal v. Hogan, 453 F.3d 1244, 1253 (10th Cir. 2006))*. "'The primary concern of the antitrust laws is the corruption of the competitive process, not the success or failure of a particular firm' or individual." *Id.* (quoting *Tal, 453 F.3d at 1258*). Therefore, the antitrust laws require a plaintiff to demonstrate "'an injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.'" *Id.* (quoting *Tal, 453 F.3d at 1253*).

Here, Suture Express argues that it has demonstrated an antitrust injury because defendants' bundling terms have prevented customers **[*84]** from purchasing suture and endo distribution from it. As a result, Suture Express contends, customers are denied Suture Express' superior service and higher fill rates and, in some cases, lower prices. Suture Express asserts that, but for defendants' conduct, it would have won more customers and experienced greater growth. At oral argument on the summary judgment motions, Suture Express emphasized that it offers a superior product—"a better mousetrap." That is, Suture Express contends that its overnight delivery of suture and endo products by air is a more efficient distribution method. And, Suture asserts that customers should have access to it.

But the antitrust laws are not designed to protect competitors like Suture Express; instead, those laws were enacted to promote competition so that market participants could decide who had "a better mousetrap." *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)* (stating that the "antitrust laws . . . were enacted for the protection of competition not competitors" (citation and internal quotation marks omitted)); *Reazin v. Blue Cross & Blue Shield of Kan., Inc., 899 F.2d 951, 960 (10th Cir. 1990)* (explaining that a challenged practice must adversely impact competition, not just an individual competitor or plaintiff's business). Thus, Suture Express must show harm to competition, **[*85]** not just harm to Suture Express. *See Cohlmia, 693 F.3d at 1281* ("'An antitrust plaintiff must prove that challenged conduct affected the prices, quantity or quality of goods or services, not just his own welfare.'" (quoting *Mathews v. Lancaster Gen. Hosp., 87 F.3d 624, 641 (3d Cir. 1996))*.

The Supreme Court has described raised prices and reduced output as the "hallmarks of anticompetitive behavior." *NCAA v. Bd. of Regents, 468 U.S. 85, 113, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984)*. Neither one exists here. The summary judgment facts, when viewed in Suture Express' favor, fail to demonstrate raised prices. Instead, as described above, the facts show declining markups for many competitors in the market—including both defendants, certain regional distributors, and Suture Express. The facts also show that defendants experienced declining margins. The record also contains evidence from med-surg distributors, including Suture Express' CFO, about competitive pressures in the marketplace that have produced pricing decreases.

The record also lacks admissible evidence of reduced output. Instead, rival national and regional competitors are growing and expanding their businesses. And, even Suture Express' expert calculated that industry-wide med-surg (including suture and endo distribution) revenues increased year-over-year during the relevant period. These summary **[*86]** judgment facts prevent a reasonable jury from inferring harm to competition, even when viewed in the light most favorable to Suture Express.

Suture Express argues that the Court should not examine the harm to competition by examining historical prices or output in the market. Instead, Suture Express asserts that it has demonstrated anticompetitive harm through its expert's analysis which shows that prices are higher than they would be but for the defendants' contracts containing bundling terms. And, Suture Express contends, customers paid these higher prices while suffering lower fill rates. Professor Elhauge estimates that customers paid higher prices, amounting to $36 million from 2007 to 2012. To calculate this figure, Professor Elhauge compared the average of defendants' markups on suture and endo distribution overall to Suture Express' markups overall. Defendants argue that by limiting the analysis to these firms, Suture Express fails to show that market-wide prices were higher and quality was lower than it would have been absent defendants' bundling. *See Elec. Commc'ns Corp. v. Toshiba Am. Consumer Prods., Inc., 129 F.3d 240, 244 (2d Cir. 1997)* (explaining that an antitrust violation requires a showing "of an actual adverse effect on competition market-wide").

The Court **[*87]** agrees. The difference in price for suture and endo distribution between these three competitors fails to show that competition is harmed across the market. As one court has explained, "[i]f a plaintiff could generate a jury question on injury to competition simply by asserting that his less expensive or superior product was excluded from the market, the distinction between injury to a competitor and injury to competition would be lost." *Brookins v. Int'l Motor Contest Ass'n, No. CIV. C96-134 MJM, 1998 U.S. Dist. LEXIS 14225, 1998 WL 937242, at *4 (N.D. Iowa July 15, 1998)*. It is "[f]or that reason, the courts have held that the mere fact that a certain supplier is prevented from participating in the market does not of itself show an actual adverse effect." *Id.* (citation omitted).

Defendants challenge Professor Elhauge's analysis for another reason, asserting that it fails to account for the fact that acute care customers also require distribution of other med-surg products. Professor Elhauge concedes that the theory of anticompetitive harm depends on the harm in the tied market not being offset by a consumer surplus benefit in the tying market. While Suture Express contends that customers would have paid less for suture **[*88]** and endo distribution but for defendants' bundling, the analysis fails to show that prices for other med-surg distribution would not increase if defendants omitted the contractual bundling terms and thereby lost the benefit of efficiencies created by the bundle. *See, e.g., Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp., 959 F.2d 468, 492 (3d Cir. 1992)* (pointing out the flaw in plaintiff's logic that defendant would not raise the price of the tying product if the challenged tie-in was prohibited; instead, in a competitive market where defendant lacked supranormal profits, defendant would have to raise the price of the tying product "and consumers would be no better off than before").

Professor Elhauge's analysis does not present a genuine issue that the challenged practice harmed competition in the overall market. *See It's My Party, Inc. v. Live Nation, Inc., 811 F.3d 676, 2016 WL 426085, at *5 (4th Cir. 2016)* (affirming summary judgment against plaintiff's antitrust claims and holding that the district court was not required "to accept uncritically" an expert's opinion "that coincidentally fit plaintiff's precise circumstances" because "[n]o party can expect to gerrymander its way to an antitrust victory without due regard for market realities."). Thus, Suture Express cannot withstand summary judgment because the facts, even when viewed in Suture Express' **[*89]** favor, fail to show a harm to competition. And without it, Suture Express cannot establish an antitrust injury.

3. Defendants Have Established Procompetitive Justifications for the Contractual Bundling.

Defendants also argue that, even if Suture Express could make a showing that the challenged action has an adverse effect on competition under the rule of reason approach described above, defendants' pricing terms provide customers with procompetitive benefits that are greater than any alleged anticompetitive harm. *See Law, 134 F.3d at 1017* (explaining that if the challenged conduct results in an adverse effect on competition, then "[t]he inquiry . . . shifts to an evaluation of whether the procompetitive virtues of the alleged wrongful conduct justifies the otherwise anticompetitive impacts." (citation omitted)); *see also NCAA v. Bd. of Regents, 468 U.S. 85, 104 n.26, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984)* (explaining that the Supreme Court recognizes that "tying may have procompetitive justifications that make it inappropriate to condemn without considerable market analysis" (citing *Jefferson Par., 466 U.S. at 11-12*)); *Grappone, Inc. v. Subaru of New England, Inc., 858 F.2d 792, 798-99 (1st Cir. 1988)* (Breyer, J.) (concluding that a tying arrangement was lawful under a rule of reason analysis because of an "absence of serious anticompetitive impact" and "evidence of justification").

Because the Court has determined **[*90]** that Suture Express has failed to present a triable tying claim when it cannot establish market power or anticompetitive harm, the Court could stop short of this argument and decline to address it. But given the case's breadth and complexity and to facilitate a full review on appeal, the Court elects to address this argument. *See, e.g., United States v. Microsoft, 253 F.3d 34, 94-95, 346 U.S. App. D.C. 330 (D.C. Cir. 2001)* (remanding case to the district court to consider the procompetitive justifications of a tying arrangement under a rule of reason analysis). And, for the reasons explained below, the Court agrees with defendants.

Defendants argue that the contracts' bundling terms benefit customers because it is more efficient to distribute suture and endo products with other med-surg products, and defendants can pass the savings from those efficiencies on to customers. Indeed, as Areeda and Hovenkamp explain, "tying doctrine and antitrust policy do not condemn the defendant who [sells packaged products and] merely passes on [the] cost savings [from the package] because this "improve[s] customer welfare immediately, tend[s] to increase sales and profits and thereby encourage[s] cost-cutting innovations, and would occur in perfectly competitive markets." X Areeda & Hovenkamp ¶ 1758d1.

Defendants **[*91]** recognize these efficiencies because: (1) sutures and endo products are light weight and take up little space, and therefore little incremental cost results from adding suture and endo to an existing distribution of other med-surg products; (2) suture and endo products are more expensive than other med-surg products, and thus yield higher revenues for distribution services marked up on a percentage basis of the product's cost; (3) suture and endo manufacturers fund distribution of their products on a higher basis than funding provided by other med-surg vendors; and (4) suture and endo products constitute a high volume of customers' med-surg product needs in comparison to the other categories of med-surg products.

Customers who purchase other med-surg distribution from defendants will receive those products from defendants by truck regardless of whether they also purchase suture and endo products. By adding suture and endo products to the truck with the other med-surg products, defendants realize efficiencies. They also can allocate the costs for the truck delivery that it must incur already while generating more revenue dollars. This, in turn, allows defendants to charge a lower mark-up **[*92]** on other med-surg products than they otherwise would charge for delivery of only the lowered-priced and higher-cost med-surg products.

Suture Express argues that the summary judgment record fails to demonstrate these efficiencies. It contends that the efficiencies do not exist if a customer wants more frequent deliveries of suture and endo than other med surg products. It also asserts that distribution of suture and endo by truck creates additional, significant costs that do not exist when delivering suture and endo by air. But defendants respond. To establish competitive benefits, defendants say, they need not prove that their distribution model by truck is more efficient than Suture Express' model. Instead, defendants must demonstrate that their distribution of suture and endo and other med-surg together produces savings compared to what they would incur if they distributed them separately. *See Cascade Health Sols. v. PeaceHealth, 515 F.3d 883, 895 (9th Cir. 2007)* (explaining that bundling discounts "generally benefit buyers" and may produce "savings to the seller because it usually costs a firm less to sell multiple products to one customer at the same time than it does to sell the products individually"); *see also* *It's My Party, Inc. v. Live Nation, Inc., 811 F.3d 676, 2016 WL 426085, at *10 (4th Cir. 2016)* (describing defendant's bundling **[*93]** as a "one-stop shop" and stating that "[i]n such a case, the practice of 'bundling obviously saves distribution and consumer transaction costs . . . [and] can also capitalize on certain economies of scope.'" (quoting *United States v. Microsoft Corp., 253 F.3d 34, 87, 346 U.S. App. D.C. 330 (D.C. Cir. 2001))*.

The summary judgment facts, when viewed in Suture Express' favor, show that defendants realize savings by adding suture and endo distribution to other med surg distribution, thereby producing a procompetitive benefit. Defendants use the same inputs to distribute suture and endo that they employ for other med-surg distribution. They rely on the same warehouses, trucks, and personnel to distribute thousands of types of med-surg products (including suture and endo). And, they experience economies of scope when they can distribute multiple products at the same time. As described above, defendants incur very little incremental cost to add suture and endo distribution to a customer's existing delivery of other med-surg products. But, when they deliver them together, defendants generate substantially more revenue because suture and endo are more expensive products and produce higher funding from vendors.[16] When that occurs, defendants can charge lower prices for distribution of the **[*94]** products together. The joint distribution of both kinds of products together produces efficiencies and thus a procompetitive benefit.

In contrast, if a customer does not purchase suture and endo from defendants, then they must charge higher markups on the other med-surg products to cover the costs incurred for that delivery. The removal of suture and

[16] It is undisputed that vendor funding generally is paid as a percentage of the underlying product cost. Thus, the more expensive the product, the more vendor funding it generates.

endo from the order does not eliminate much cost but results in substantially less revenue. But, defendants still incur the same costs for delivery without the suture and endo, and thus the increased pricing on other med-surg products bears those costs.

Suture Express also asserts that, even if defendants realize efficiencies from their bundling, they offer no evidence to demonstrate that they have passed any cost savings from the bundle on to customers. But the bundling terms, themselves, demonstrate such savings. When customers purchase suture and endo distribution along with other med-surg distribution, they realize savings in the form of lower markups for other **[*95]** med surg distribution than they otherwise would pay if they purchased other med-surg distribution without the bundle.

Trying to neutralize the undisputed facts, Suture Express contends that the bundled pricing terms do not reflect discounted savings to customers but instead allow defendants to impose penalties on customers who chose to buy suture and endo from another distributor. If that were true, defendants must increase prices artificially before discounting them. The record contains no admissible evidence of that practice. Also, no evidence suggests that prices are higher than they would be but for defendants' bundling terms. And, even if they were, the market here includes competitors (like Medline) who can prevent defendants from inflating prices artificially.

Suture Express also argues that defendants cannot realize efficiencies or justify anticompetitive conduct by claiming that any anticompetitive effects in one market (suture and endo distribution) are offset by the benefits to competition in another (other med surg distribution). Suture Express asserts that *Eastman Kodak Co. v Image Tech. Servs., Inc.*[17] rejected a firm's use of a tie to take profits from one market to cover **[*96]** their investment in another market. But the material facts here are different. No evidence suggests that defendants are taking profits from suture and endo distribution to invest in other med-surg distribution. Instead, the summary judgment facts show that defendants realize efficiencies from selling both types of distribution *together*. Thus, if customers purchase both types of distribution together thereby producing the efficiency, defendants can offer them lower prices for other med-surg distribution.

Providing additional support for these recognized efficiencies, other broadline distributors offer similar bundling provisions. This reinforces the undisputed facts about the bundle's efficiency. Here, the summary judgment record establishes that rival distributors who lack market power, including Medline, Seneca, and MMS, use similar bundling provisions. They require the same types of suture and endo commitments from customers in exchange for lower pricing on other med-surg products. As one court has observed, "firms without market power will bundle two goods only when the cost savings from joint sale outweigh the value consumers place on separate choice." *United States v. Microsoft Corp., 253 F.3d 34, 88, 346 U.S. App. D.C. 330 (D.C. Cir. 2001)*. Some distributors also **[*97]** testified that when a customer orders a certain product mix that allows the distributor to realize economics of scale, and the distributor is able to reflect those efficiencies through lower pricing to the customer.

Suture Express also testified that it offers discounted prices to customers who commit to purchase a certain volume of product. These types of commitments differ from defendants' bundling arrangements because they do not involve tying two products together, but nevertheless they are premised on similar efficiencies. Indeed, Suture Express' CFO testified that Suture Express offers discounted prices for volume commitments because different cost components exist when a customer brings all of its suture and endo business to Suture Express instead of "cherrypick[ing]" certain products for distribution. Doc. 303-3 at 5. Suture Express' CFO also agreed that the customer should pay a different price under the two different scenarios because of the "very different" cost components involved. *Id.*

As the case law cited above recognizes, bundling allows a seller to save on costs and capitalize on economies of scope. Because of efficiencies like these, "cost-justified bundled discounts [are] essential **[*98]** to the efficient operation of markets, even though such discounts may exclude an equally efficient rival." X Areeda & Hovenkamp ¶ 1758d1. Areeda and Hovenkamp describe how a seller realizes efficiencies through a bundled discount in the following example:

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[17] *504 U.S. 451, 485, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)*.

> Consider this illustration: to drive a truck from Chicago to St. Louis costs $100, no matter how full the truck is. The buyer needs half a load of beans and half a load of corn and shipping them separately would cost $100 per shipment, but shipping them together costs $100 total. So the seller offers a discount of $60 if the buyer purchases both corn and beans and accepts them in a single shipment, effectively "tying" the corn and bean purchases via the discount. In this case the buyer profits by $60 over what separate sales from separate sellers would produce. The seller is $40 ahead after taking a $60 price cut but avoiding a $100 truck trip, and the rest of society is better off because unneeded truck trips consume resources. Nevertheless, the policy injures a rival who sells beans but not corn, even if that seller is an equally efficient bean producer and has tucking costs that are no higher.

X Areeda & Hovenkamp ¶ 1758d1. Suture **[*99]** Express asserts that this example does not apply here, where the comparison is distribution by truck to distribution by air. It argues that joint distribution by truck does not offer a procompetitive benefit to the market when Suture Express can distribute suture and endo more efficiently by air. But, as stated above, defendants need not prove that their model is more efficient than Suture Express' business model. Instead, the procompetitive benefit realized in the market at issue here is the lower pricing offered to customers on other med-surg distribution. Suture Express cannot match the bundle offered by defendants, but that is because of a decision it and it alone has made: to limit its business model to suture and endo distribution.

In essence, Suture Express is asking the Court to insert itself into the market and decide which business model customers should choose when they purchase suture and endo distribution. The Court declines. The Court's involvement in this type of discussion could very well "lead to an environment of commercial parochialism." *It's My Party, Inc., 811 F.3d 676, 2016 WL 426085, at *13*. Actually, it could produce harm to competition. Suture Express wants the Court to enjoin defendants from offering the bundled **[*100]** terms to customers. But this order, if the Court were to issue it, would not stop other market participants like Medline, Seneca, and MMS from offering similar bundling terms—as they do already. The Court cannot issue an order that restrains defendants from bundling but leaves their competitors free to use them to their benefit (and to defendants' harm). Under these facts, it is most appropriate to let the market's customers decide which business model offers the most efficient distribution of their med-surg needs. *See id.* (concluding that plaintiff could not employ the antitrust laws for "anticompetitive ends" and stating that it was "sending this tussle between two rivals back to the marketplace from whence it came").

Suture Express also argues that defendants cannot demonstrate procompetitive justifications for their bundling because this practice fails the "less restrictive alternative test." Under this test, an antitrust plaintiff may rebut a claim that a tie is procompetitive "by showing that the claimed function is not legitimate in principle, is served poorly by the restraint, or is adequately attainable by substantially less restrictive means." IX Areeda & Hovenkamp ¶ 1729a; **[*101]** *see also* *Law, 134 F.3d at 1019* (stating that "[i]f the defendant is able to demonstrate procompetitive effects, the plaintiff then must prove that the challenged conduct is not reasonably necessary to achieve the legitimate objectives or that those objectives can be achieved in a substantially less restrictive manner"). Here, Suture Express argues, if bundling produces efficiencies, then the less restrictive approach to implementing that efficiency is for defendants to lower the price of suture and endo distribution. Defendants did not take that approach, but instead altered the price for distribution of other med-surg products. Thus, Suture Express contends, defendants fail the less restrictive alternative test.

Defendants respond that the less restrictive alternative advanced by Suture Express fails to realize the efficiencies described above when defendants are able to distribute both suture and endo and other med-surg together. If defendants discounted only the suture and endo distribution, they would fail to cover the costs incurred for delivery to a customer who purchased only suture and endo distribution but not other med-surg. Defendants also could not match the bundled prices to customers who purchased **[*102]** both suture and endo and other med-surg, thereby producing the described efficiencies and cost savings.

Defendants also reject Suture Express' suggestion that they should reverse the bundle. That is, Suture Express asserts that the less restrictive alternative is for defendants to offer lower pricing on suture and endo distribution in exchange for loyalty in purchasing other med-surg products. This proposal again fails to recognize the efficiencies of distributing the products together, which reduces the *overall* costs of distribution and not simply the cost of one subset of products. Also, defendants assert that customers do not select a broadline distributor based on one category of med-surg products. Instead, customers select broadline distributors based on their ability to distribute across the broader line of med-surg distribution. Thus, defendants would not offer a bundle premised on a discount of one category of med-surg products in exchange for purchase of other-med surg because customers already go to the distributor to purchase their other med-surg needs. The undisputed facts, viewed in Suture Express' favor, do not establish that defendants could achieve the procompetitive **[*103]** benefits of defendants' bundling through a less restrictive alternative.

The Court finds that the summary judgment facts demonstrate procompetitive benefits of bundling, and they justify any anticompetitive effect. Thus, Suture Express cannot survive summary judgment under a rule of reason analysis on its Sherman Act § 1 claim.

B. Clayton Act § 3

Suture Express also asserts that defendants' contractual terms violate § 3 of the Clayton Act. Section 3 of the Clayton Act prohibits "any person engaged in commerce, in the course of such commerce, to . . . make a sale or contract for sale of goods . . . for use, consumption, or resale within the United States . . . on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods . . . of a competitor or competitors of the . . . seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce." *15 U.S.C. § 14*.

Defendants seek summary judgment against this Clayton Act claim because, defendants argue, the Clayton Act applies only to the sale of "goods, wares, merchandise, machinery, **[*104]** supplies, or other commodities." *15 U.S.C. § 14*. And, it does not apply to services. *See* *Hudson Valley Asbestos Corp. v. Tougher Heating and Plumbing Co., 510 F.2d 1140, 1145 (2d Cir. 1975)* (explaining that "[i]t is, of course, well settled that section 3 [of the Clayton Act] does not apply to sales of services"). Here, defendants argue, the relevant market is distribution *services*, not the products themselves. Thus, defendants contend the Court must grant summary judgment against Suture Express' Clayton Act claim.

As explained above, the Court has determined that the undisputed facts establish that the relevant product market here is distribution of med-surg products to acute care customers, not distribution services as defendants assert. *See supra* n.3. And Suture Express cites several cases in which courts have held that the Clayton Act applies to distribution agreements for physical goods. *See, e.g., W. Power Sports, Inc. v. Polaris Indus. Partners L.P., 951 F.2d 365, 1991 WL 266523, at *3 (9th Cir. 1991)* (unpublished table opinion) (reversing district court's grant of summary judgment on a Clayton Act § 3 claim and holding that the statute applied to distribution agreements requiring distributors to purchase a certain amount of snowmobiles from the manufacturer); *see also* *Chelson v. Oregonian Publ'g Co., 715 F.2d 1368, 1369 (9th Cir. 1983)* (holding that the Clayton Act applied to an agreement between a newspaper publishing company and its retail distributors that prohibited the **[*105]** distributors from distributing advertising inserts for another company because the agreement provided that that distributors would purchase goods and resell them); *see also* X Areeda & Hovenkamp ¶ 1752f2 (explaining that the Clayton Act applies even when "services [are] embodied in corporeal goods" and "[w]hen the item sold is a physical product from which buyers derive value, it should be considered a commodity").

Defendants distinguish these cases because they involve the traditional purchase and resale of goods but do not discuss prices that customers pay for distribution services, as customers of med-surg distribution pay in this case. Indeed, Suture Express' expert opined that the relevant product market here is the market for distribution services, not the physical items themselves. He also based his analysis on that market definition. Though defendants seem to have the better end of this argument, the Court concludes that it need not decide this issue to determine the viability of the Clayton Act claim. Even assuming that the Clayton Act applies to the med-surg distribution at issue here, Suture Express' claim fails for the same reasons described above in the context of the Sherman **[*106]** Act.

Suture Express asserts that the economic effect of defendants' bundling terms makes them exclusive contracts that violate § 3. Thus, Suture Express' claim under the Clayton Act mirrors its tying claim under *§ 1* of the Sherman Act.

And, "the standard for adjudicating tying [under Sherman Act *§ 1* and Clayton Act § 3] are now recognized to be the same." *Sheridan v. Marathon Petroleum Co., 530 F.3d 590, 592 (7th Cir. 2008)* (citing *Southern Card & Novelty, Inc. v. Lawson Mardon Label, Inc., 138 F.3d 869, 874 (11th Cir. 1998)*; *Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp., 959 F.2d 468, 495-96 (3d Cir. 1992)* (en banc); *Smith Mach. Co. v. Hesston Corp., 878 F.2d 1290, 1298-99 (10th Cir. 1989))*; *see also* IX Areeda & Hovenkamp ¶ 1719b (explaining that although the words of Sherman Act *§ 1* and Clayton Act § 3 "differ, the two statutes apply a single substantive standard"). Thus, for the same reasons explained in the analysis for Suture Express' Sherman Act claim, defendants are entitled to summary judgment against Suture Express' tying claim under § 3 of the Clayton Act.[18]

C. Kansas Restraint of Trade Act

Finally, Suture Express and defendants both move for summary judgment on Suture Express' claim under the Kansas Restraint of Trade Act. The KRTA "is broad in scope" but case law under the Act is "largely undeveloped" and "the bulk of [the Act's] provisions have not **[*107]** been meaningfully interpreted by Kansas courts." *O'Brien v. Leegin Creative Leather Prods., Inc., 294 Kan. 318, 277 P.3d 1062, 1068 (Kan. 2012)* (citing *Bergstrom v. Noah, 266 Kan. 829, 974 P.2d 520, 530 (Kan. 1999))*. The Kansas Supreme Court has noted that the KRTA and federal antitrust laws share some similarities, but "they are not, in fact, the same." *Id.* (citing *Bergstrom, 974 P.2d at 531*). Federal ***antitrust law*** may supplement the remedies available under this Kansas law, but it does not displace the substantive antitrust provisions of the KRTA. *Id.* Therefore, "[w]hile . . . cases [interpreting federal antitrust statutes] may be persuasive authority for any state court interpreting [Kansas'] antitrust laws, such authority is not binding upon any court in Kansas interpreting Kansas antitrust laws." *Bergstrom, 974 P.2d at 531*.

K.S.A. § 50-112 prohibits all agreements or contracts "made with a view or which tend to prevent full and free competition in the . . . sale of articles imported into [Kansas]" and those "designed or which tend to advance, reduce or control the price . . . of any such products or articles." In *O'Brien*, the Kansas Supreme Court held that *K.S.A. § 50-112*, in its form on the date of that opinion,[19] omitted any mention of reasonableness, or a rule of reason. *277 P.3d at 1079*. The Kansas Supreme Court thus held that the statute "leaves no room" for applying a rule of reason approach, and held that "reasonableness does not **[*108]** set the antitrust violation standard in Kansas . . . ." *Id. at 1083*. Given this holding, the Court cannot simply apply its federal analysis to decide whether the KRTA claim survives summary judgment.

Instead, the Court begins its analysis of the KRTA claim with the requirement of antitrust injury. While this requirement originates in "federal antitrust jurisprudence,"[20] it undoubtedly plays an important role under the KRTA. As the Kansas Supreme Court explained in *O'Brien*, the antitrust injury requirement "equates to the Kansas concept of causation, or the 'requirement that a plaintiff's theory of damages ... correspond[s] to an economic effect that the statute ... invoked as the basis for liability aims to prevent.'" *277 P.3d at 1075* (quoting Ronald W. Davis, **[*109]** *Standing on Shaky Ground: The Strangely Elusive Doctrine of Antitrust Injury*, 70 Antitrust L.J. 697, 698 (2003) (first ellipsis in original)). *O'Brien* illustrates how Kansas law applies this requirement, whether one thinks of it as antitrust injury or damages causation.

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[18] And, for the same reasons explained above when discussing the Sherman Act claim, the Court denies Suture Express' summary judgment motion on its Clayton Act claim.

[19] The Kansas legislature enacted "substantial changes" to the KRTA after the Kansas Supreme Court's opinion in *O'Brien. Smith v. Phillip Morris Cos., 50 Kan. App. 2d 535, 335 P.3d 644, 652 (Kan. Ct. App. 2014)*. The amendments to the KRTA went into effect on April 18, 2013, but generally do not apply retroactively to cases already pending at the amendments' effective date. *Id.* (citing *K.S.A. § 50-164* (Supp. 2013)) (further citation omitted). Because this case was filed before the 2013 effective date of the KRTA amendments, the current version of the KRTA does not apply to this case.

[20] *O'Brien, 277 P.3d at 1075* (citing *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977))*.

In *O'Brien*, a class of retail consumers who had purchased a particular brand of fashion accessories and luggage from retail stores sued the products' manufacturer. This class claimed that the manufacturer had violated the KRTA by adopting a pricing policy "suggesting" retailers should sell its products at "keystone," which was "twice wholesale plus a small amount that varie[d] by product." *Id. at 1068*. The manufacturer also shipped its products to retailers tagged with a "manufacturer's suggested retail price (MSRP)." *Id.* And while the manufacturer characterized its policy merely as "suggested pricing," *id.*, the summary judgment facts established that:

• the manufacturer required its retailers to initial and sign an acknowledgment that violating the pricing policy was "grounds for dismissal" from selling the products at retail;

• while never "systematic[ally]" or "comprehensive[ly]" monitoring compliance with this pricing policy, the manufacturer "occasionally enforced" it by refusing to deal **[*110]** with retailers who sold its products at discounted prices; and

• the pricing policy had *increased* the price that the plaintiff class of retail buyers had paid to purchase the products.

Id. at 1068-70.

These summary judgment facts sufficed, the Kansas Supreme Court held, to permit a reasonable jury to find that the plaintiff class "actually [had] paid prices for [the manufacturer's goods that were] *inflated* by its pricing combinations or arrangements with retailers." *Id. at 1078* (emphasis added). The Kansas court deemed these facts sufficient to avoid summary judgment because the KRTA requires a plaintiff seeking to recover under this act to "come forward with evidence that [the plaintiff] has been injured or damaged by" conduct that the KRTA renders illegal. *Id. at 1077*. But *O'Brien* also held that not just any kind of injury will do. A KRTA plaintiff also must seek to recover for "an economic effect that the [KRTA] aims to prevent." *Id. at 1075*. The Kansas court concluded that the manufacturer's policy had caused retail customers to pay an inflated price, and this was sufficient to support a finding that the claimed damages met both aspects of the KRTA's requirement for antitrust injury/damage causation. *Id. at 1078*. The Kansas Supreme Court **[*111]** thus reversed the trial court's decision granting summary judgment. *Id.*

Close attention to *O'Brien*'s rationale focuses the analysis on the very facts that make summary judgment appropriate here. The summary judgment facts in this case establish a market where both defendants, many regional broadline competitors, and even Suture Express are experiencing *declining* prices and *declining* markups. *See supra* Part III.A.2. Such declines, though bad news for defendants, Suture Express, and other participants in the distribution market, actually are good news for acute care providers who purchase distribution from them. These declining prices also are good news for patients who pay the bills issued by those acute care providers.[21]

Offering discounts to customers does not inflate prices—the condition that *O'Brien* held to satisfy the requirement that the claimed **[*112]** harm must be one that the KRTA "aims to prevent." To the contrary, price discounts give customers who choose to subscribe to them the chance to purchase at *deflated* prices. This kind of market condition provides no basis for a reasonable jury to find the kind of "economic effect" that the KRTA "aims to prevent." *277 P.3d at 1075*. In short, the summary judgment facts preclude the possibility that Suture Express can satisfy the KRTA's requirement of antitrust injury/damages causation. This makes summary judgment appropriate.

In addition, the summary judgment facts fail to show that defendants' contracts were "made with a view," "designed to," or "tend to" prevent full and free competition, as the KRTA requires. *O'Brien* explained that "it is enough [for a plaintiff] to show that the arrangement is 'designed to' or 'tends to' control prices . . . a plaintiff does not have to show that the arrangement actually succeeds in increasing prices." *277 P.3d at 1075*. Also, "the phrase 'designed to' contemplates a subjective standard [while] 'tend to' contemplates an objective standard, one that requires

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[21] Also, the summary judgment record contains no admissible evidence of reduced output. Rival national and regional competitors are growing the distribution market. Even Suture Express' expert calculates that industry-wide revenue figures for med-surg distribution had increased, not decreased, during the relevant period. *See supra* Part III.A.2.

examination of the defendant's behavior to discern whether it would reasonably be expected to produce a particular result, regardless **[*113]** of the defendant's intention." *Id. at 1075-76*. Suture Express cites various documents where defendants discussed, separately, their use of bundling contract terms to defend against Suture Express taking defendants' suture and endo distribution business. But no reasonable jury could find that these communications show that the contracts were designed to prevent full and free competition. To the contrary, a reasonable jury only could find that these communications reveal competitors engaged in the activity that the KRTA seeks to promote—trying to meet and counter the effects of competition that Suture Express' innovative business model brought to the market. If the Court were to view these communications sufficient for a jury to find conduct intended to prevent full and free competition, every attempt by one competitor to gain business from a rival would require a trial under Kansas' antitrust laws. The Court does not understand the Kansas Supreme Court's interpretation of the KRTA to require such a result.

Even under the broadest permissible view of the KRTA and viewing all evidence in the light most favorable to Suture Express, the summary judgment record lacks evidence that defendants' contracts **[*114]** were designed to or tend to harm competition. To the contrary, Suture Express cannot demonstrate harm to competition sufficient to survive summary judgment on its KRTA claim.

And, for the same reasons, the Court denies Suture Express' summary judgment motion on its KRTA claim because it cannot establish harm to competition, especially when the Court views the evidence in the light most favorable to defendants, as it must when considering Suture Express' summary judgment motion.

IV. Conclusion

This case exposes the rough-and-tumble business of competition in the American marketplace. In 1998, Suture Express launched an innovative business model designed to capture the most lucrative channel of med-surg distribution. It worked. By 2010, Suture Express had managed to capture a 10% share of that lucrative market segment, suture and endo distribution. Defendants and other broadline distributors didn't like losing that market share to Suture Express, so they did what motived competitors do. They fought back with their own pricing innovation—pricing designed to recapture those lost suture and endo customers. Their innovation worked as well, and it cost Suture Express some of the customers it **[*115]** originally had taken from broadline distributors, including defendants.

The next move in this competitive saga belongs to the market's participants—Suture Express, defendants, other distributors, acute care providers, and other innovators who, as Suture Express once did, can come up with a new idea that customers may fancy. But the Court can find nothing in our antitrust laws that assigns a role, on these summary judgment facts, to the courts. Therefore, the Court grants summary judgment for defendants on all three claims asserted by Suture Express.

IT IS THEREFORE ORDERED THAT defendants Owens & Minor Distribution, Inc. and Cardinal Health 200, LLC's Motion for Summary Judgment (Doc. 253) is granted.

IT IS FURTHER ORDERED THAT plaintiff's Partial Motion for Summary Judgment (Doc. 254) is denied.

IT IS SO ORDERED.

Dated this 7th day of April, 2016, at Topeka, Kansas

/s/ Daniel D. Crabtree

Daniel D. Crabtree

United States District Judge

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Dispatch & Tracking Sols., LLC v. City of San Diego

Court of Appeal of California, Fourth Appellate District, Division One

April 8, 2016, Opinion Filed

D062426, D062927, D063855

Reporter

2016 Cal. App. Unpub. LEXIS 2572 *; 2016 WL 1407739

DISPATCH & TRACKING SOLUTIONS, LLC, Cross-complainant and Appellant, v. CITY OF SAN DIEGO et al., Cross-defendants and Respondents.DISPATCH & TRACKING SOUTIONS, LLC, Cross-complainant and Appellant, v. CITY OF SAN DIEGO et al., Cross-defendants and Appellants; JOHN WICKER et al., Cross-defendants and Respondents.AUTHORIZED CITY TOWING et al., Plaintiffs, Cross-defendants and Appellants, v. DISPATCH & TRACKING SOLUTIONS, LLC, Defendant, Cross-complainant and Appellant; CITY OF SAN DIEGO et al., Cross-defendants and Appellants.

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Prior History: **[*1]** CONSOLIDATED APPEALS from a judgment and orders of the Superior Court of San Diego County, No. 37-2009-00087082-CU-BT-CTL, Timothy B. Taylor, Judge.

Orion Communications, Inc. v. Superior Court, 226 Cal. App. 4th 152, 171 Cal. Rptr. 3d 596, 2014 Cal. App. LEXIS 420 (Cal. App. 4th Dist., May 14, 2014)

Disposition: Affirmed in part; reversed in part.

Core Terms

cause of action, trade secret, software, declaration, towing, summary judgment motion, seal, misappropriation, trial court, costs, bid, copied, database, summary adjudication, misappropriation of trade secrets, bad faith, contractual relationship, documents, cross-complaint, attorney's fees, joint venture, summary judgment, deposition, contends, exclusive license, court erred, parties, intentional interference, dispatch, joint venture agreement

Counsel: ClintonBailey, Mark Bailey, Sean T. McGee; ONE LLP, Peter Afrasiabi and Kathryn M. Davis for Cross-complainant and Appellant in D062426 and D062927 and for Defendant, Cross-complainant and Appellant in D063855.

Moscone Emblidge Sater & Otis, Moscone Emblidge & Otis, G. Scott Emblidge and Matthew K. Yan for Cross-defendants and Respondents City of San Diego, TEGSCO, LLC, John Wicker and John Pendleton in D062426, for Cross-defendants and Respondents John Wicker and John Pendleton in D062927, and for Cross-defendants and Appellants City of San Diego and Tegsco, LLC, in D062927 and D063855.

Chapin Fitzgerald, Fitzgerald Knaier, Kenneth M. Fitzgerald and Jennifer Arnold for Cross-defendants and Respondents Orion Communications, Inc., and Leslie Delatte in D062426, and for Cross-defendants and Appellants Orion Communications and Leslie DeLatte in D062927 and D063855.

Webb & Carey, Patrick D. Webb and Kevin A. Carey for Cross-defendants and Appellants Authorized City Towing, Nancar, Inc., C & D Towing Specialists, **[*2]** Inc., Starrue, Inc., San Diego Police Towing Operators, Inc., and A to Z Enterprises, Inc., in D062927, and for Plaintiffs, Cross-defendants and Appellants Authorized City Towing, Allied Gardens Towing, Inc., Nancar, Inc., C & D Towing Specialists, Inc., Starrue, Inc., San Diego Police Towing Operators, Inc., and A to Z Enterprises, Inc., in D063855.

Judges: NARES, Acting P. J.; McDONALD, J., IRION, J. concurred.

Opinion by: NARES, Acting P. J.

Opinion

INTRODUCTION

This litigation arises out of the decision of the City of San Diego (the City) to award a competitively bid contract to provide the City a computerized system for dispatching tow trucks (the towing contract) to TEGSCO, LLC, doing business as San Francisco AutoReturn (AutoReturn). In providing similar services to other municipalities, AutoReturn used tow dispatching communications software provided by Dispatch & Tracking Solutions, LLC (DTS) known as Law Enforcement Towing System (LETS) and Towing Management System (TMS). AutoReturn's bid proposal to the City referenced AutoReturn's intended use of DTS's LETS/TMS software as a component of AutoReturn's own tow dispatch and impound management software package known as the AutoReturn Integrated Enterprise **[*3]** System (ARIES).

Authorized City Towing and five towing companies it subcontracted with (together ACT) submitted a competing bid for the towing contract in which ACT also proposed using LETS/TMS.[1] ACT had provided computerized tow dispatch services to the City using LETS/TMS before the City awarded the contract to AutoReturn. During the competitive bidding process for the towing contract, ACT informed the City and AutoReturn that it held an exclusive license to use LETS/TMS software in San Diego County. Because of ACT's exclusive license claim, after the City awarded the towing contract to AutoReturn, AutoReturn decided to replace DTS's LETS/TMS software with similar software provided by Orion Communications, Inc. (Orion). However, as a result of the present litigation, Orion decided not to work with AutoReturn in San Diego. After Orion withdrew, AutoReturn developed its own tow management software to replace the LETS/TMS component of its ARIES package.

ACT sued the City, AutoReturn, DTS, Orion and related parties for—among other causes of action—breach of contract, intentional interference with contractual relations, intentional interference with prospective economic advantage, unfair business practices, and misappropriation of trade secrets arising out of its alleged exclusive license agreement with DTS and the City's award of the towing contract to AutoReturn. DTS filed a cross-complaint against ACT, the City, AutoReturn, and Orion. At issue in this appeal are DTS's cause of action under the California Uniform Trade Secrets Act (*Civ. Code,*[2] *§ 3426 et seq.*) (CUTSA or UTSA) against AutoReturn, the City, and Orion and Orion's chief executive officer, Leslie DeLatte,[3] for misappropriation of trade secrets, and a cause of action against AutoReturn for breach of a joint venture agreement.

The trial court **[*5]** entered judgment against ACT and in favor of AutoReturn on ACT's operative fourth amended complaint after granting AutoReturn's motion for summary judgment on that complaint. The court also entered

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[1] The five towing companies that contracted with Authorized City Towing are Allied Gardens Towing, Inc.; C & D Towing Specialists, Inc.; Starrue, Inc.; Nancar, Inc.; and San Diego Police Towing Operators. ACT's opening brief omits Nancar, **[*4]** Inc., from its list of towing subcontractors.

[2] All subsequent statutory references are to the Civil Code unless otherwise specified.

[3] Subsequent references to AutoReturn include AutoReturn's executive officers, John Wicker and John Pendleton, who are identified as cross-defendants in DTS's second amended cross-complaint. Subsequent references to Orion include DeLatte.

judgment against DTS and in favor of AutoReturn, Orion, and the City on DTS's second amended cross-complaint after granting Orion's motion for summary judgment and AutoReturn and the City's motion for summary judgment on the second amended cross-complaint. The court granted a motion by Orion for attorney fees and costs against DTS under *section 3426.4* and awarded Orion fees of $120,000 based on its finding that DTS prosecuted its misappropriation of trade secrets claim against Orion in bad faith. AutoReturn and the City moved for attorney fees and costs under *section 3426.4* against both ACT and DTS. The court denied the motion as to ACT on the ground it lacked jurisdiction to award fees against ACT under *section 3426.4* because ACT had dismissed its trade secret cause of action. The court granted the motion as to DTS and awarded AutoReturn and the City attorney fees and costs against DTS in the amount of $450,000.[4]

DTS, ACT, Orion, and AutoReturn and the City have all appealed. DTS contends the court erred in (1) denying its motions to redact and seal its proprietary information under *section 3426.5*; (2) summarily adjudicating its misappropriation of trade secrets claim in favor of Orion, AutoReturn, and the City; (3) denying its motion to reconsider the summary adjudication of its misappropriation of trade secrets claim; (4) summarily adjudicating its cause of action for breach of joint venture agreement in AutoReturn's favor; (5) awarding Orion attorney fees under *section 3426.4*; (6) awarding AutoReturn attorney fees under *section 3426.4*; and (7) denying it leave to amend its cross-complaint to add causes of action for interference with contractual relations and breach of fiduciary duty against Orion and AutoReturn, respectively, on the ground the proposed causes of action were superseded under the CUTSA.

ACT contends the court should have denied AutoReturn's motion for summary **[*7]** judgment as procedurally defective because AutoReturn did not provide its supporting evidence with the motion. ACT further contends that the court erred in summarily adjudicating, in AutoReturn's favor, ACT's seventh cause of action for unfair business practices, eighth cause of action for intentional interference with contractual relations, and ninth cause of action for intentional interference with prospective economic advantage.

Orion contends the court erred in denying attorney fees incurred by its Texas counsel as part of the fee award to Orion under *section 3426.4*. AutoReturn and the City contend that the court erred in denying their motion for attorney fees under *section 3426.4* as to ACT. They also contend that the court erred in denying AutoReturn certain expert witness fees against DTS under *section 3426.4*.

We affirm the summary adjudications of DTS's statutory cause of action for misappropriation of trade secrets and reverse the summary adjudication of DTS's cause of action for breach of joint venture agreement. We affirm the orders awarding Orion and the City and AutoReturn attorney fees and costs against DTS under *section 3426.4*. We reverse the orders denying DTS's requests to file records under seal. We reverse the order denying **[*8]** AutoReturn's request for attorney fees under *section 3426.4* against ACT with directions to reconsider that request, and reverse the summary adjudication of ACT's causes of action against AutoReturn for unfair business practices, intentional interference with contractual relations, and intentional interference with prospective economic advantage.

FACTUAL AND PROCEDURAL BACKGROUND

ACT's History with DTS and LETS/TMS

In 1994 ACT contracted with Ball Corporation (Ball), a company that had created satellite tracking software, to design and develop a computer automated tow dispatch system for vehicle tows requested by the San Diego Police Department (SDPD). The system that Ball agreed to develop "to facilitate dispatching and accounting of SDPD tow

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[4] AutoReturn and the City also filed a motion for sanctions under *Code of Civil Procedure section 128.7* against both ACT and DTS based on their having brought **[*6]** a frivolous motion to disqualify AutoReturn and the City's counsel. The court granted the motion and awarded sanctions jointly against ACT and DTS and their respective counsel in the amount of $13,925. Neither ACT nor DTS appeal the award of sanctions under *Code of Civil Procedure section 128.7*.

requests" included a message router system and database query system (MRDBQ), and a computer automated tow system known as CATS. Ball incorporated CATS into the MRDBQ system to interface between an individual tow company's dispatch terminal and MRDBQ. The CATS software took tow requests from SDPD officers and communicated them in a format that was understandable by the tow companies. Ball installed CATS software and supporting hardware at each of the tow companies **[*9]** as a "stand alone" platform for the tow companies to manage their towing. An enhanced version of MRDBQ became known as LETS, and CATS became known as TMS. The Ball contract was assigned to DTS in 2003. The City awarded each of the ACT towing companies a tow contract with a commencement date of January 1, 1995.

In October 2003 DTS and ACT entered into an agreement that extended and modified the original Ball contract (the 2003 amendment). The 2003 amendment provided that in the event ACT's contract with the City was extended past its expiration date of December 31, 2004, DTS was "strictly prohibited from entering into any communications or negotiations with the City . . . or any other person relating to operational or dispatching/communications without first obtaining prior written consent from [ACT's] president or other authorized representative[,]" and that the original Ball contract and the 2003 amendment would "remain in full force and effect . . . for a period of sixty (60) months after the termination of [ACT's] members' services under the City Contract." The 2003 amendment also provided that DTS granted ACT "and its members an irrevocable license for the exclusive use in San Diego **[*10]** County, California, of the TMS software, including, but not limited to, any related software and/or updates or revisions thereto." The 2003 amendment also stated that "DTS shall refrain from offering any similar or competing service to any person operating a tow company or engaged in tow and/or related services within [San Diego County], including, but not limited to . . . the City, and/or any third party tow company."

AutoReturn's History with DTS and LETS/TMS

AutoReturn was founded in 2002 and offers automated, computerized tow management services to municipalities across the United States. In 2012 when AutoReturn filed its motion for summary judgment in this case, it was providing towing management services to the City of San Diego, the City and County of San Francisco, and Baltimore County, Maryland.

According to AutoReturn's chief technology officer, John Pendleton, from 2004 to 2011 AutoReturn included LETS/TMS as part of ARIES, its own integrated tow management software package. AutoReturn used LETS/TMS under a license agreement that gave AutoReturn access and use of the LETS/TMS system to carry out its Baltimore County and San Francisco contracts in return for regular payments **[*11]** to DTS in the form of either a monthly flat rate usage fee or a certain amount for each tow request processed by LETS/TMS. AutoReturn maintains that DTS's relationship to AutoReturn was always that of a vendor and licensor, and that AutoReturn never contemplated forming a joint venture with DTS in which AutoReturn and DTS would share profits, control, and ownership. DTS claims that it formed a joint venture with AutoReturn in 2008 to jointly pursue municipal tow dispatch and management contracts throughout the United States.

The City's Request for Proposals and Award of the Towing Contact

In 2008 the City issued a request for proposals (RFP) seeking bids to provide the City with computerized tow dispatch services. The RFP did not require that any bidding company use LETS/TMS software or any other particular software in its proposal. ACT, the City's incumbent tow dispatch provider, submitted a proposal in response to the RFP.

AutoReturn also submitted a proposal in response to the City's RFP. AutoReturn wanted to use LETS/TMS in its proposal to avoid incurring additional expenses and having to retrain its employees on different software. In the course of AutoReturn's preparing its bid, **[*12]** DTS management notified AutoReturn that DTS had been sold to a company called C:Logic. Before the change in ownership, AutoReturn executives spoke to DTS management about licensing LETS/TMS for use in San Diego. DTS's management suggested that ACT would take issue with DTS's licensing LETS/TMS to AutoReturn for use in San Diego, but agreed to work with AutoReturn on its proposal. After

DTS changed ownership, C:Logic's chief executive officer (CEO), Larry Estes, informed AutoReturn that ACT claimed an exclusive license to use LETS/TMS in San Diego. However, based on the assurances of Estes and DTS management that the exclusive license was invalid and unenforceable, AutoReturn submitted a proposal to the City in May 2008 that specified LETS/TMS as a component of ARIES. ACT also included LETS/TMS in its bid proposal.

In December 2008 the City informed AutoReturn that it had won the towing contract. The City gave AutoReturn's bid an "Overall Rank" of 1 and gave ACT's bid a rank of 2. In January 2009, ACT's counsel sent the City a letter giving notice that ACT intended to protest the bid on the grounds that (1) "City employees and the evaluation team members engaged in misconduct or impropriety **[*13]** in knowingly awarding the [towing] contract to a bidder interfering with [ACT's exclusive license to use LETS/TMS in San Diego County]"; and (2) "the bid of AutoReturn should have been deemed as nonresponsive by virtue of its unauthorized incorporation of LETS and/or TMS into their [*sic*] bid package." The City responded by letter stating that "the City's RFP *did not require that the winning bidder use the LETS and/or TMS systems*." (Original italics.) The City concluded that ACT had not shown any misconduct or impropriety by City staff or other grounds for a formal bid protest hearing. In August 2009 the City and AutoReturn executed a memorandum of agreement (MOA) confirming that AutoReturn would provide tow dispatch services to the City.

Because of the dispute over ACT's claimed exclusive license to use LETS/TMS in San Diego County and the City's award of the towing contract to AutoReturn, AutoReturn contracted with Orion to provide towing services software that would replace LETS/TMS software as a component of AutoReturn's ARIES software package. However, when Orion's CEO DeLatte became aware of the dispute over AutoReturn's use of LETS/TMS in its bid and the potential for Orion to **[*14]** become involved in the present litigation, she terminated Orion's work with AutoReturn. In response to Orion's withdrawal, AutoReturn directed its own software engineers to redesign ARIES to cover the functions that LETS/TMS would have performed under the towing contract with the City. Since completing its overhaul of ARIES in August 2011, AutoReturn has relied exclusively on its own software for tow management.

Procedural Background

As noted, ACT filed a fourth amended complaint against the City, AutoReturn, DTS, and Orion. Relevant to this appeal are ACT's seventh cause of action against AutoReturn for "Unfair Business Practices—Violation of Business & Professions Code [s]ection 17200 et seq."; eighth cause of action against AutoReturn for intentional interference with contractual relations; ninth cause of action against DTS and AutoReturn for intentional interference with prospective economic advantage; and 18th cause of action against DTS, AutoReturn, and the City for misappropriation of trade secrets. On appeal, ACT challenges the court's summary adjudication of the seventh, eighth and, ninth causes of action in AutoReturn's favor.[5]

DTS filed a second amended cross-complaint that included a fifth cause of action against AutoReturn for breach of joint venture agreement; a sixth cause of action for misappropriation of trade secrets and seventh cause of action for "Common Law Misappropriation" against AutoReturn, the City, and Orion; an eighth cause of action against Orion for interference with contractual relations; and a 12th cause of action against AutoReturn and Orion for unfair competition. In July 2012 the court ruled that none of DTS's causes of action against Orion had merit and granted Orion's motion for summary judgment.

In September 2012 the court granted the City and AutoReturn's motion for summary judgment that targeted DTS's fifth cause of action for breach of joint venture agreement and sixth cause of action for misappropriation of trade secrets, resulting in entry of judgment in favor of the City and AutoReturn on DTS's second amended cross-complaint.[6] The minute order granting the City and AutoReturn's summary judgment motion noted that DTS had

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[5] ACT does not challenge the disposition of any of its causes **[*15]** of action as to the City or DTS.

[6] A minute order denying DTS leave to file a third amended cross-complaint notes that a previous judge assigned to the case ruled, in sustaining a demurrer, that "DTS's claims for common law misappropriation, interference with contract and contractual

filed "several motions/applications seeking leave to file under seal documents that were previously filed conditionally under **[*16]** seal. The court denied the first of these on July 6, 2012, and has ruled consistently on the follow-on motions but has stayed the actual unsealing. . . . DTS has appealed these rulings."

As noted, on motions by Orion and the City and AutoReturn seeking attorney fees and costs under *section 3426.4*, the court awarded Orion $120,000 and awarded the City and AutoReturn $450,000 in attorney fees and costs. On February 28, 2013, the court entered an amended judgment that reflects its summary judgment rulings and awards of attorney fees and costs.

DISCUSSION

DTS'S APPEAL

I. *Summary Adjudication of DTS's Sixth Cause of Action for Misappropriation of Trade Secrets*

DTS contends the trial court erred in granting summary adjudication of its sixth **[*17]** cause of action for misappropriation of trade secrets in favor of Orion, AutoReturn, and the City.

Standard of review

A motion for summary judgment or adjudication must be granted when there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. (*Code Civ. Proc., § 437c, subd. (c)*.) "A defendant 'moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact.' [Citation.] A defendant may meet this burden either by showing that one or more elements of a cause of action cannot be established or by showing that there is a complete defense. [Citation.] . . . 'A defendant moving for summary judgment may establish that an essential element of the plaintiff's cause of action is absent by reliance on the pleadings, competent declarations, binding judicial admissions contained in the allegations of the plaintiff's complaint, responses or failures to respond to discovery, and the testimony of witnesses at noticed depositions.'" (*Mills v. U.S. Bank (2008) 166 Cal.App.4th 871, 894, 83 Cal. Rptr. 3d 146* (*Mills*).) "The defendant may, but need not, present evidence that conclusively negates an element of the plaintiff's cause of action. The defendant may also present **[*18]** evidence that the plaintiff does not possess, and cannot reasonably obtain, needed evidence . . . ." (*Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 855, 107 Cal. Rptr. 2d 841, 24 P.3d 493* (*Aguilar*).)

"If the defendant's prima facie case is met, the burden shifts to the plaintiff to show the existence of a triable issue of material fact with respect to that cause of action or defense. [Citations.] '"When opposition to a motion for summary judgment is based on inferences, those inferences must be reasonably deducible from the evidence, and not such as are derived from speculation, conjecture, imagination, or guesswork."'" (*Mills, supra, 166 Cal.App.4th at p. 894*.) "[R]esponsive evidence that gives rise to no more than mere speculation cannot be regarded as substantial, and is insufficient to establish a triable issue of material fact." (*Sangster v. Paetkau (1998) 68 Cal.App.4th 151, 163, 80 Cal. Rptr. 2d 66*.) For an inference to be sufficient to establish a triable issue of material fact, the inference must show or imply the existence of the required finding *more likely than* the nonexistence of the finding, either by itself or together with other inferences or evidence. (*Aguilar, supra, 25 Cal.4th at p. 857*; accord, *Smith v. Wells Fargo Bank, N.A. (2005) 135 Cal.App.4th 1463, 1474, 38 Cal. Rptr. 3d 653*.) That is because an "inference is reasonable if, and only if, it implies [existence of the finding is] *more likely than* [its nonexistence]." (*Aguilar, at p. 857*; accord, *Smith v. Wells Fargo Bank, at p. 1474*.)

"On appeal after a motion for summary judgment has been **[*19]** granted, we review the record de novo, considering all the evidence set forth in the moving and opposition papers except that to which objections have

relations, and undue business practices were superseded by DTS's claim for Misappropriation of Trade Secrets (*Civil Code section 3426 et seq.*), as all of these claims were premised on a common nucleus of fact relating to alleged misuse of DTS's software."

been made and sustained." (*Guz v. Bechtel National, Inc. (2000) 24 Cal.4th 317, 334, 100 Cal. Rptr. 2d 352, 8 P.3d 1089*.) "'In practical effect, we assume the role of a trial court and apply the same rules and standards which govern a trial court's determination of a motion for summary judgment.' [Citation.] '[W]e are not bound by the trial court's stated reasons for its ruling on the motion; we review only the trial court's ruling and not its rationale.'" (*Mills, supra, 166 Cal.App.4th at p. 895*.) "In performing our de novo review, we must view the evidence in a light favorable to plaintiff as the losing party [citation], liberally construing [plaintiff's] evidentiary submission while strictly scrutinizing defendants' own showing, and resolving any evidentiary doubts or ambiguities in plaintiff's favor." (*Saelzler v. Advanced Group 400 (2001) 25 Cal.4th 763, 768, 107 Cal. Rptr. 2d 617, 23 P.3d 1143* (*Saelzler*); *Aguilar, supra, 25 Cal.4th at p. 843*.) However, "[a] different standard of review applies to the court's evidentiary rulings in connection with the motion, which we review for abuse of discretion." (*Garrett v. Howmedica Osteonics Corp. (2013) 214 Cal.App.4th 173, 181, 153 Cal. Rptr. 3d 693*; *Kincaid v. Kincaid (2011) 197 Cal.App.4th 75, 82-83, 127 Cal. Rptr. 3d 863*.)

Authority regarding misappropriation of trade secrets

Under the UTSA, "[a] 'trade secret' is 'information, including a formula, pattern, compilation, program, device, method, technique, or **[*20]** process that: [¶] (1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and [¶] (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.' (*Civ. Code, § 3426.1, subd. (d)*.)" (*Whyte v. Schlage Lock Co. (2002) 101 Cal.App.4th 1443, 1452, 125 Cal. Rptr. 2d 277* (*Whyte*).) "The test for trade secrets is whether the matter sought to be protected is information (1) which is valuable because it is unknown to others and (2) which the owner has attempted to keep secret." (*Id. at p. 1454*.) "Under the UTSA, a prima facie claim for misappropriation of trade secrets 'requires the plaintiff to demonstrate: (1) the plaintiff owned a trade secret, (2) the defendant acquired, disclosed, or used the plaintiff's trade secret through improper means, and (3) the defendant's actions damaged the plaintiff.'" (*CytoDyn of New Mexico, Inc. v. Amerimmune Pharmaceuticals, Inc. (2008) 160 Cal.App.4th 288, 297, 72 Cal. Rptr. 3d 600*.) "The ultimate determination of trade secret status is subject to proof presented at trial." (*Whyte, supra, 101 Cal.App.4th at p. 1453*.)

In an action for misappropriation of a trade secret under the UTSA, "before commencing discovery relating to the trade secret, the party alleging the misappropriation shall identify the trade secret with reasonable particularity subject to any orders that may be **[*21]** appropriate under *Section 3426.5 of the Civil Code*." (*Code Civ. Proc., § 2019.210*.) "[A] party seeking to protect trade secrets must 'describe the subject matter of the trade secret with sufficient particularity to separate it from matters of general knowledge in the trade or of special knowledge of those persons who are skilled in the trade, and to permit the defendant to ascertain at least the boundaries within which the secret lies.'" (*Whyte, supra, 101 Cal.App.4th at p. 1453*.)

"[*Code of Civil Procedure] section 2019.210* serves four interrelated goals: '"First, it promotes well-investigated claims and dissuades the filing of meritless trade secret complaints. Second, it prevents plaintiffs from using the discovery process as a means to obtain the defendant's trade secrets. [Citations.] Third, the rule assists the court in framing the appropriate scope of discovery and in determining whether plaintiff's discovery requests fall within that scope. [Citations.] Fourth, it enables defendants to form complete and well-reasoned defenses, ensuring that they need not wait until the eve of trial to effectively defend against charges of trade secret misappropriation."'" (*Brescia v. Angelin (2009) 172 Cal.App.4th 133, 144, 90 Cal. Rptr. 3d 842*.)

In the present case, DTS filed a "second amended statement . . . in compliance with *Code of Civil Procedure [section] 2019.210*" that identified the following five "trade secret databases:" (1) The "reasons **[*22]** code database," which collects, tracks, and propagates information about the reasons for a tow; (2) the "beat or district database," which provides information about the geographic region at issue; (3) the "hold reasons database," which collects information concerning the reasons that vehicles are held; (4) the "holding unit database," which collects information relevant to the agency holding an impounded vehicle; and (5) the "administrative fees database," which collects information relative to reason codes connected with fee charges.

DTS's trade secret statement also identified "[f]low of control trade secrets" with the following explanation: "The static information in the [specified trade secret] databases is valuable in and of itself, but of greater value in any automated system is the way in which that information is used. The data in each of the databases . . . also controls both the functioning of the program and the flow of information. Each new data entry triggers different parts of each database and directs both the program and its users to do different things. The database can direct the program to ask the users for additional information, transmit information to a third party, **[*23]** or direct the users to take specific courses of action outside the confines of the program. Because each combination of instances can trigger a different set of directions, the number of different direction sets is enormous. DTS contends that each possible combination is a trade secret that has been misappropriated by Cross-Defendants and is at issue in this litigation. Each instruction set which translates a combination of inputs into a concrete course of action represents a use of the underlying data and is therefore a trade secret distinct from the trade secret claimed in the static databases. [¶] . . . In the present case, DTS alleges the Cross-Defendants misappropriated both the static data and the dynamic flow of control or instruction sets."

A. *Summary Adjudication in Favor of Orion*

In its motion for summary judgment/adjudication, Orion argued there was no evidence that it misappropriated any trade secrets and that DTS's specified trade secrets did not qualify as trade secrets because DTS did not make reasonable efforts to maintain their secrecy. The trial court concluded that DTS failed to raise a triable issue of fact on any of these points and that DTS did not show that it **[*24]** was damaged by Orion's alleged misappropriation of trade secrets.

Assuming, without deciding, that DTS's opposition evidence was sufficient to raise a triable issue of facts as to whether the databases DTS specified as trade secrets qualify as trade secrets and DTS made reasonable efforts to maintain their secrecy, we conclude the court nevertheless correctly granted Orion's motion for summary judgment based on the lack of evidence that Orion misappropriated any trade secret. As evidence that Orion misappropriated DTS's trade secret databases, DTS presented an e-mail sent by AutoReturn employee Jason Miller that includes XML schema[7] that DTS suggests was from Orion. DTS also presented an e-mail from Miller that included reason code script allegedly prepared by Orion that was similar to DTS's reason code script.

DTS's computer science expert Bruce Abramson stated in a declaration that "[t]he defendants had access to DTS's software **[*25]** including its databases, and at least some if not all of the underlying source code[,]" and that "DTS granted the Defendants such access subject to an agreed code of confidentiality and limitations on the ways that the Defendants could use the software." Abramson asserted that "[a]t least some parts of the Defendants' competing software system was copied directly from DTS's software," and that evidence "proves conclusively that the Defendants made at least some improper use of DTS's software." Abramson had "seen one document purporting to be part of the Defendants' implementations of its database paralleling one of DTS's claimed trade secret databases, and compared it to the analogous portion of the DTS system." He opined that "the two database fragments are similar enough to suggest that Defendants['] inappropriate use of DTS's software extended to this particular trade secret."[8]

Orion objected to these statements by Abramson on the grounds of lack of foundation and assuming facts not in evidence. Orion explained that Abramson's opinions were not based on reasonable inferences, there was no evidence that DTS granted Orion access to DTS's software subject to a code of confidentiality and limitation on the

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[7] In its opposition to Orion's summary judgment motion, DTS explained that "XML is a 'markup language' designed to present materials in a way that both machines and humans can read and understand. [Citation.] An XML schema is one type of document written in XML language."

[8] The record does not contain a complete copy of the declaration that Abramson prepared in opposition to Orion's summary judgment motion. The copy in the record begins on page seven and portions of the declaration are redacted. In DTS's sealed appendix, the declaration that Abramson prepared in opposition to *AutoReturn* ***[*26]*** *and the City's* motion for summary judgment appears twice, presumably through inadvertence. However, portions of Abramson's declaration in opposition to Orion's motion not otherwise in the record are quoted in Orion's written objections to DTS's evidence.

ways the software could be used, Abramson did not state the basis for his opinion that Orion had access to or copied DTS's software, and he assumed without factual support that the document he referred to was developed by Orion. The court sustained Orion's objections.

Abramson also compared the alleged Orion XML schema and reason code script to DTS's XML schema and reason code script and noted "a number of stylistic similarities that are unlikely to have arisen by sheer coincidence, including words misspelled the same way in both schemas, and arbitrary-length lists assigned the same arbitrary lengths." He concluded **[*27]** that "[t]he only plausible explanation for such stylistic similarities is that the designers of the second schema-*Orion's by assumption*-simply copied the first schema (i.e. DTS's schema)." (Italics added.) Regarding his comparison of the reason code scripts, Abramson stated: "Though they are not identical, the similarities overwhelm the differences—thereby suggesting that Defendants' inappropriate use of DTS's systems and software extended into the specific components claimed as trade secrets." Abramson concluded that "it appears quite clear that Orion copied DTS's schema—thereby making inappropriate use of DTS's property in violation of existing confidentiality agreements—and likely continued its copying to the full extent possible given the access that DTS granted it, including into the realm of the protected trade secrets that DTS has indentified in this matter."

Orion objected to Abramson's statements about the similarities between the XML schema he compared, his opinion that the only plausible explanation for the similarities was that Orion copied DTS's schema, and his suggestion that "Defendants' inappropriate use of DTS's systems and software extended into the specific components **[*28]** claimed as trade secrets" on the grounds they were irrelevant, lacked foundation, assumed facts not in evidence, and were speculative. Regarding relevancy, Orion noted that Abramson did not opine that Orion misappropriated DTS's claimed trade secrets; his opinion was limited to his conclusion that Orion copied a schema that was not one of DTS's claimed trade secrets. Orion also objected that Abramson did not support his assumption that the XML schema in question was Orion's, and the e-mail containing the schema showed that it was sent by an AutoReturn employee. The court sustained the objections.

Orion objected to Abramson's statements that stylistic similarities between the schemas he compared were "unlikely to have arisen by sheer coincidence, including words misspelled the same way in both schemas, and arbitrary-length lists assigned the same arbitrary lengths," and that "[t]he only plausible explanation for such stylistic similarities is that the designers of the second schema—Orion's by assumption—simply copied the first schema (i.e. DTS's schema)." Orion objected the statements were irrelevant because Abramson's opinion was "limited to his conclusion that Orion copied a schema, which **[*29]** DTS does not claim to be a trade secret." Orion further objected that the statements lacked foundation, assumed facts not in evidence, and were speculative, contending that the XML schema in question was AutoReturn, and Abramson did not support his assumption that it was Orion's. The court sustained Orion's objections on all stated grounds.

Among other grounds, Orion objected to Abramson's statement that the similarities between the reason code scripts he compared "overwhelm the differences-thereby suggesting that Defend[an]ts' inappropriate use of DTS's systems and software extended into the specific components claimed as trade secrets[,]" as speculative and lacking foundation. Orion argued that Abramson had not provided "any factual basis for his speculation that copying of the non-trade secret code fragment suggests inappropriate use that extended to claimed trade secrets." The court sustained the objection. The court also sustained Orion's objection on grounds of lack of foundation and speculation to Abramson's conclusion that Orion copied DTS's, "thereby making inappropriate use of DTS's property in violation of existing confidentiality agreements—and likely continued its copying to the full **[*30]** extent possible given the access that DTS granted it, including into the realm of the protected trade secrets that DTS has indentified in this matter."

We find no abuse of discretion in the court's evidentiary rulings. The court reasonably sustained the noted objections for the reasons stated by Orion. DTS complains that the court denied it due process by not allowing it "discourse" on the sustained objections and an opportunity to cure any foundational defects. There was no due process violation. DTS received Orion's evidentiary objections and the court's rulings on them before oral argument and therefore had the opportunity to address them then. The court was not required to provide the parties an opportunity to argue the merits of each other's evidentiary objections; it was required only to rule on them. (See Cal.

Rules of Court, rule 3.1354; Mora v. Big Lots Stores, Inc. (2011) 194 Cal.App.4th 496, 512, fn. 15, 124 Cal. Rptr. 3d 535 [trial court is not required to explain evidentiary rulings; it need only expressly rule on each evidentiary objection].)

In any event, Abramson's declaration had no evidentiary value on the issue of Orion's alleged copying of DTS's trade secrets. It was purely speculative for Abramson to infer from evidence that Orion *may have* copied material that was not a trade secret that **[*31]** Orion also copied trade secret material. It was further speculative for Abramson to *assume* that the copying (i.e., designing of the second schema) was done by Orion without articulating any basis for that assumption. Orion submitted DeLatte's declaration explaining that the EML schema was not Orion's and that Jason Miller, the sender of the e-mail that included the XML schema in question, was an AutoReturn employee. The Abramson declaration that DTS filed in opposition to AutoReturn and the City's later motion for summary judgment was modified to reflect that AutoReturn rather than Orion authored the XML code that was copied.

As noted, to defeat summary judgment, inferences from opposition evidence must be reasonably deducible and not constitute mere "'speculation, conjecture, imagination, or guesswork.'" (Mills, supra, 166 Cal.App.4th at p. 894.) An inference must show or imply the existence of the required finding *more likely than* the nonexistence of the finding, either by itself or together with other inferences or evidence. (Aguilar, supra, 25 Cal.4th at p. 857.) Further, although an expert may rely on inadmissible matter in forming an opinion, "that matter relied upon must 'provide a reasonable basis for the particular opinion offered.' [Citation.] An **[*32]** expert opinion may not be based on conjectural or speculative matters." (Howard Entertainment, Inc. v. Kudrow (2012) 208 Cal.App.4th 1102, 1115, 146 Cal. Rptr. 3d 154.) Abramson's inference that Orion or some other entity "likely" copied DTS's trade secret material based on evidence that someone copied DTS's non-trade-secret XML schema is conjectural and insufficient to raise a triable issue of material fact on the issue of trade secret misappropriation.

Moreover, notwithstanding its rulings on Orion's evidentiary objections to Abramson's declaration, the court considered the XML schema and reason code documents that Abramson compared and ruled that they did not raise a triable issue of fact as to whether Orion misappropriated DTS's trade secrets. The court stated: "[T]he only two pieces of evidence DTS argues creates a material issue of fact whether Orion misappropriated DTS's trade secrets, an XML schema and reason code script, do not do so. The XML schema and reason code script are not the five (5) databases DTS . . . identified as its trade secrets. Further, DTS has not shown that these . . . documents have any independent economic value to DTS by virtue of being secret. The XML schema was not created by Orion . . . . Thus, it is not evidence of Orion copying anything belonging **[*33]** to DTS. Also, the reason script does not create a triable issue as it is nothing more than a program used to harvest the reason cars are towed from the City's database. There is nothing secret, or valuable by virtue of being secret, about the reason cars are towed, nor about a script to migrate the City's tow reason data from one system to the other. Many of the 'reason codes' are simply citations to the California Vehicle Code or the Municipal Code, undeniably public documents. There is no evidence that Orion copied the DTS system or the database programming. Rather, it only prepared to harvest the data (which is owned by the City) from that database. Orion never got to that point, as it pulled out of the project when it found out DTS was suing over the bid it lost."

The court's key findings, which the record supports, were that DTS did not identify the XML schema and reason code script as trade secrets,[9] the XML schema was not created by Orion, and there is nothing secret, or valuable by virtue of being secret, about the reason cars are towed. Further, as Abramson acknowledged, there were differences between DTS's reason codes database and the reason code script Abramson compared it **[*34]** to that the court noted were "sufficient to negate the assertion of wholesale copying." The court correctly granted summary judgment in Orion's favor as to DTS's cause of action for misappropriation of trade secrets.

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[9] Although DTS identified its "reasons code" database as one its trade secrets, Abramson stated in his declaration that the reason code script and DTS's database were not identical. As noted, Abramson stated that "the similarities overwhelm the differences—thereby suggesting that Defend[an]ts' inappropriate use of DTS's systems and software extended into the specific components claimed as trade secrets." The trial court correctly sustained Orion's objection to Abramson's "suggestion" of trade secret misappropriation on the grounds it lacked foundation and was speculative.

B. *Summary Adjudication in Favor of AutoReturn and the City*

AutoReturn and the City sought summary adjudication of DTS's sixth cause of action for misappropriation of trade secrets on the grounds that DTS failed to identify a trade secret and neither AutoReturn nor the City misappropriated any trade secret. In its order granting summary judgment as to the sixth cause of action, the court stated it "continues to be of **[*35]** the view that DTS has failed to demonstrate the existence of any trade secrets in the first place."

The court further ruled that there was "no material evidence of misappropriation." Similar to its ruling on Orion's summary judgment motion, the court noted that depositions had "narrowed the dispute to two documents AutoReturn allegedly sent to Orion: an XML schema file and an Orion reason code script." The court concluded that the City was entitled to summary adjudication because "[t]here is nothing implicating the City in any misappropriation." The court ruled that as to AutoReturn, DTS failed to raise a triable issue of fact, noting, among other things, that "DTS failed to indentify the 'schema' as a trade secret[, and that Abramson stated in] his declaration that '[l]ittle if anything about XML is important . . . to the present dispute.'" Regarding the reason code script, the court stated that it had "already expressed its view that this document is largely based on the California Vehicle Code, the exact opposite of a protectable trade secret, and even if it were otherwise, there are differences between the databases . . . sufficient to negate the assertion of wholesale copying."

We conclude the **[*36]** trial court correctly found that DTS failed to raise a triable issue of fact as to whether AutoReturn or the City misappropriated any alleged trade secret. AutoReturn presented evidence that it developed ARIES for use in San Diego from the public information and SDPD's tow operations manual provided by the City. AutoReturn's former chief technology officer Pendleton stated in a declaration that AutoReturn developed AIRES based on AutoReturn's 10 years of experience in towing and impound management and consideration of the specific needs of San Francisco, Baltimore County, San Diego and other prospective clients. During the development of ARIES, AutoReturn isolated the development team from other competing tow dispatch platforms, including LETS/TMS. Pendleton averred that although he had used LETS/TMS, neither he nor anyone on the ARIES development team had knowledge of LETS/TMS's internal functions and "inner workings" beyond what can reasonably be deduced from using the software and having a software engineering background. Pendleton stated no part of LETS/TMS was used in developing ARIES and he had "never seen the LETS/TMS source code, object code, database components or any other **[*37]** programming code for LETS and TMS, and [had] no knowledge of any part of LETS and TMS that might be considered a 'trade secret.'"

DTS's opposing evidence included a declaration by Abramson that was substantially the same as his declaration filed in opposition to Orion's motion for summary judgment. Like Orion, AutoReturn and the City objected to Abramson's assertions and suggestions that "Defendants" copied DTS's software as lacking foundation, and the court properly sustained the objections. The exclusion of Abramson's opinion evidence left no evidence raising a triable issue of fact as to whether AutoReturn or the City misappropriated any trade secrets from DTS.

We recognize that Pendleton testified during his deposition that DTS had provided AutoReturn access to DTS's source code with a log-in and password to enable AutoReturn to review the code as part of AutoReturn's "due diligence effort" in connection with discussions about AutoReturn acquiring DTS. Pendleton testified that he did not log into "that passcode," but he provided the passcode to two AutoReturn employees. Only one of those employees, Maxim Glaezer, accessed the source code and reported to Pendleton that he saw "a bunch **[*38]** of files that appeared to be source code" and asked Pendleton what he wanted him to do. Pendleton told the Glaezer it was unnecessary to do anything further because the acquisition was not going to happen and, therefore, there was no need to "go[] through this due diligence exercise." He did not ask Glaezer to make copies of the source code.

Although Pendleton admitted it was possible for him or his employees to have copied the source code, there is no evidence that any such copying occurred. AutoReturn submitted a declaration by Glaezer in which he stated that in early 2009, Pendleton asked him to review and evaluate the LETS/TMS source code as part of due diligence for a potential acquisition, but before he had time to review the code, "DTS and AutoReturn terminated acquisition talks, and DTS rescinded AutoReturn's access to the LETS/TMS code." Glaezer averred that he has never reviewed the code. Pendleton's acknowledgement that it was theoretically possible for AutoReturn employees to have copied DTS's source code is insufficient to raise a triable issue of fact as to whether AutoReturn actually misappropriated a trade secret because it does not imply the existence of misappropriation **[*39]** more likely than the nonexistence of misappropriation, either by itself or together with other inferences or evidence. (*Aguilar, supra, 25 Cal.4th at p. 857*.)

DTS argues that it presented evidence that the City misappropriated DTS's trade secrets within the meaning of *section 3426.1* by knowing that DTS's software was confidential material and using it without DTS's approval. Specifically DTS cites the following paragraph in the declaration of former manager of DTS Sushil Garg: "From my interactions with various City personnel over the years I understood that the City was aware that DTS's software was required to be kept confidential. It was my intent as manager of DTS that the City have the same confidentiality obligations relating to DTS software as AutoReturn had under the San Francisco Agreement and Baltimore Agreement. AutoReturn and the City were exposed to the structure of DTS's software every time they used DTS's programs. Furthermore, AutoReturn was provided source code and script on a need to know basis. However, it was understood that AutoReturn and the City were to keep DTS's information confidential."

DTS also cites the following paragraph in Estes's declaration: "DTS and AutoReturn also agreed that the City of San Diego **[*40]** would be permitted to operate the LETS software as a 'User,' as the term is defined in the Definition section of the San Francisco Agreement. As a User, the City was to be provided limited security access (i.e.[,] password protected) for use by specified personal [*sic*] on a 'need to know' basis only, and for use solely related to performance of the City's tow communications contract with AutoReturn. Furthermore, the City understood it was not to share the contents of DTS's software with any prospective competitors of DTS. While DTS has disclosed portions of its reasons codes and hold reasons databases to the public for marketing purposes, it has not disclosed the majority of these databases as I have been advised AutoReturn contends. Furthermore, contrary to AutoReturn's assertions, the contents of the reasons codes database, holds reasons database and beat or district database were not 'nearly all' derived from public materials or documents provided from the City. While much of the information was publically available, DTS also had to conduct extensive interviews with City employees and other research to collect and compile the information needed for these databases. Moreover, while **[*41]** the information contained in the administrative fee database consists of public information, aggregation of this information took time and effort on DTS's part."

The trial court sustained AutoReturn and the City's objections on the ground of lack of foundation to Garg's statements that he understood the City was aware that DTS's software was required to be kept confidential, that AutoReturn was provided source code and script on a need to know basis, and that "it was understood that AutoReturn and the City were to keep DTS's information confidential." The court also sustained AutoReturn and the City's foundation objections to Estes's statements that the City understood it was not to share the contents of DTS's software with any prospective competitors of DTS, and that "'contrary to AutoReturn's assertions, the contents of the reasons codes database, holds reasons database and beat or district database were not "nearly all" derived from public materials or documents provided from the City.'" The court's sustaining the foundation objections to Garg's and Estes's assertions about what the City understood was not an abuse of discretion.

In any event, evidence that use of DTS's software by **[*42]** the City was password protected and that City employees understood the software was to be kept confidential does not support a reasonable inference that City employees misappropriated any trade secret aspect of the software. DTS acknowledges that the databases it identifies as trade secrets are, in DTS's words, "largely comprised of public information." DTS argues that the trade secret aspect of the databases is "how these specific databases operate to correlate complex sets of information and make those correlated data sets generate results. . . . [H]ow the data bases interrelate to pull information, query users for more information, and generate results based on data sets is the 'flow of control['] trade secret."[10] Even if

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[10] In its second amended trade secret statement under *Code of Civil Procedure section 2019.210*, DTS **[*43]** stated the following under the heading, "Flow of control trade secrets:" "The static information in the [specified trade secret] databases is valuable in and of itself, but of greater value in any automated system is the way in which that information is used. The data in each of the databases . . . also controls both the functioning of the program and the flow of information. Each new data entry triggers different parts of each database and directs both the program and its users to do different things. The database can

there were substantial evidence that the City, through unspecified employees, understood that DTS's software was required to be kept confidential, there is no evidence that any agent of the City had sufficient knowledge and understanding of DTS's claimed "flow of control" secrets to be able to misappropriate them. The court properly ruled that there was no evidence "implicating the City in any misappropriation."

The court did not err in summarily adjudicating DTS's cause of action for misappropriation of trade secrets in the City and AutoReturn' favor.

II. *Denial of DTS's Motion for Reconsideration*

DTS contends the court abused its discretion in denying DTS's motion for reconsideration of the order granting AutoReturn and the City's motion for summary judgment. *Code of Civil Procedure section 1008, subdivision (a)* provides that "any party affected by [an] order may, within 10 days after service upon the party of written notice of entry of the order and based upon new or different facts, circumstances, or law, make application to the same judge or court that made the order, to reconsider the matter and modify, amend, or revoke the prior order." "The party seeking reconsideration must provide not just new evidence or different facts, but a satisfactory explanation for the failure to produce it at an earlier time. . . . A trial court's ruling on a motion for reconsideration is reviewed under the abuse of discretion standard." (*Glade v. Glade (1995) 38 Cal.App.4th 1441, 1457, 45 Cal. Rptr. 2d 695*.)

DTS moved for reconsideration based on the **[*45]** "newly discovered fact" that AutoReturn did not produce relevant components of its ARIES software for inspection by DTS's computer science expert Abramson. Specifically, DTS complained that AutoReturn failed to provide access to the maintenance section of the ARIES software, and that without access to maintenance screens, DTS could not determine whether AutoReturn copied significant portion of DTS's software.

In opposition to DTS's motion, AutoReturn and the City noted that after amending its cross-complaint to allege misappropriation of trade secrets, DTS obtained over 40,000 pages of documents from the cross-defendants, took six depositions, and demanded a five-day review of ARIES by its software expert. Pendleton and AutoReturn's counsel submitted declarations stating that the parties agreed that DTS's expert Abramson's access to ARIES would be limited to the portions of the software that a typical user would see, with DTS reserving the right to seek greater access if it deemed it reasonably necessary. AutoReturn complied with the agreement and provided Abramson full user-level access, which included all of the ARIES maintenance screens. Abramson conducted his review over a period **[*46]** of five days, before DTS filed its opposition to AutoReturn and the City's summary judgment motion. At one point he requested a link to the ARIES administrative module and AutoReturn provided the link. DTS never requested additional access to ARIES or indicated that the access it was provided was inadequate. DTS did not refer to its review of ARIES in its opposition to AutoReturn and the City's motion for summary judgment.

AutoReturn asserted that DTS's motion for reconsideration was based on the incorrect assumption that the ARIES software contained similar maintenance screens to those in DTS's software. AutoReturn contended that "ARIES does not manage its data in the same way as DTS, and has just a handful of maintenance screens, unlike the dozens of screens in DTS's software." AutoReturn and the City requested sanctions against DTS for bringing a frivolous motion for reconsideration.

The court denied the motion for reconsideration, ruling that "DTS had ample time and opportunity to conduct discovery necessary to establish its trade secret claim. It received 40,000 pages of documents, took numerous depositions, and was granted wide access to the ARIES software." The court concluded **[*47]** that DTS failed "to

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direct the program to ask the users for additional information, transmit information to a third party, or direct the users to take specific courses of action outside the confines of the program. Because each combination of instances can trigger a different set of directions, the number of different direction sets is enormous. DTS contends that each possible combination is a trade secret that has been misappropriated by Cross-Defendants and is at issue in this litigation. Each instruction set which translates a combination of inputs into a concrete course of action represents a use of the underlying data and is therefore a trade secret distinct from the trade secret claimed **[*44]** in the static databases. [¶] . . . In the present case, DTS alleges the Cross-Defendants misappropriated both the static data and the dynamic flow of control or instruction sets."

demonstrate legally cognizable 'new or different' facts [or] circumstances,' as the moving papers do not provide a satisfactory explanation for failing to present the information at or before the [summary judgment] hearing or other indicia of reasonable diligence." The court denied AutoReturn and the City's request for sanctions. Given the evidence that before DTS filed its opposition to the AutoReturn and the City's summary judgment motion, AutoReturn provided DTS full user-level access to the ARIES software in accordance with the parties' agreement, including access to ARIES maintenance screens, the court did not abuse its discretion in denying DTS's motion for reconsideration based on AutoReturn's alleged failure to produce ARIES maintenance screens.

III. *Denial of DTS's Motions to Redact and Seal Its Proprietary Information*

DTS contends the court erred in denying five motions that DTS brought under *section 3426.5* to redact and seal its proprietary information. None of the parties responding to DTS's appeal have addressed this assignment of error. We agree that the court erred in denying the motions.

On June 4, 2012, DTS sought an order under *section 3426.5* to redact and seal verbatim quotes **[*48]** of two of its interrogatory responses that were filed conditionally under seal with AutoReturn and Orion's summary judgment motions. The court denied this sealing motion as a motion under *California Rules of Court, rule 2.550*. The court found it was tardy under *rule 2.551(b)(3)(B)*. The court acknowledged that DTS sought to seal under *section 3426.5*, but ruled that *section 3426.5* did not apply, stating: "This theory was undermined with the withdrawal of the trade secret claims from the main action, as evidenced by paragraph 6 of the Carey Declaration filed May 25[, 2012]. DTS claims this is still a viable theory as the sixth count of the second amended cross-complaint . . . still contains such a claim."

The court ruled that "DTS has failed to substantiate its claim that the lodged documents will disclose a trade secret, and has failed to make a showing justifying the sort of express and detailed findings necessary under [California Rules of Court, r]ule 2.550(d) if the presumption of [r]ule 2.550(c) is to be overcome." Accordingly, the court denied DTS's sealing request and ordered the clerk to unseal all documents lodged provisionally under seal. However, the court stayed that portion of the order for 30 days.

On June 29, 2012, DTS filed two additional motions to seal. One **[*49]** of those motions requested to redact and seal the following documents filed conditionally under seal in connection with AutoReturn's and the City's summary judgment motion: (1) Exhibits 1 through 5 to its second amended trade secret statement under *Code of Civil Procedure section 2019.210*, (2) portions of attorney Matthew Yan's declaration, (3) portions of AutoReturn and the City's points and authorities in support of their summary judgment motion, and (4) portions of AutoReturn and the City's separate statement.

DTS's other motion filed on June 29 requested to redact or seal the following documents filed conditionally under seal in connection with Orion's summary judgment motion: (1) seal Exhibits 1 through 5 to its second amended trade secret statement under *Code of Civil Procedure section 2019.210*, (2) seal DTS's XML schema (DTS's Exh. 6), (3) redact Orion's XML schema represented in July 10, 2010 e-mail from Miller to Hendry (DTS's Exh. 7), (4) seal DTS's summary judgment opposition exhibits 8 through 27, (5) redact Abramson's opposition declaration at paragraphs 21 and 22.

The court denied these sealing requests on September 4, 2012, stating: "The court finds, as it did [in ruling on DTS's first sealing motion], that DTS has failed to substantiate its claim that **[*50]** the lodged documents will disclose a trade secret, and has failed to make a showing justifying the sort of express and detailed findings necessary under [California Rules of Court, r]ule 2.550(d) if the presumption of [r]ule 2.550(c) is to be overcome. The court incorporates fully its detailed findings in part 2 of the July 6 minutes." The court again ordered the clerk to unseal all documents lodged provisionally under seal, but stayed that portion of the order because it was aware that DTS had appealed the court's previous order denying DTS's motion to seal. The court assumed DTS would also appeal the second order denying its sealing requests and stated: "The stay will expire if DTS does not file a timely notice of appeal on this issue."

DTS's fourth motion to seal was an ex parte application on September 13, 2012, that again sought to fully redact and seal its summary judgment opposition exhibits 6 through 27 and to redact specified portions of Abramson's opposition declaration, and to redact and seal certain documents it submitted in opposition to Orion's motion for attorney fees, including portions of a declaration by Abramson. The court denied DTS's requests to seal and redact, but again **[*51]** stayed the unsealing of the conditionally sealed documents "pending the appellate decision."

DTS's fifth request to seal was an ex parte application in December 2012 to seal documents filed in support of AutoReturn and the City's motion for attorney fees and costs. Specifically, DTS sought to seal an exhibit "O," which consisted of excerpts from the deposition transcript of DTS employee Reba Hildebrand and to file a copy of the exhibit with specified redactions. DTS also sought to seal all of AutoReturn and the City's exhibit "P," which was previously an exhibit to Hildebrand's deposition. The court again denied the application but stayed the unsealing.

The court erred in applying *California Rules of Court, rule 2.550* to DTS's requests to seal instead of *section 3426.5*, which provides: "In an action under this title, a court shall preserve the secrecy of an *alleged* trade secret by reasonable means, which may include granting protective orders in connection with discovery proceedings, holding in-camera hearings, sealing the records of the action, and ordering any person involved in the litigation not to disclose an alleged trade secret without prior court approval." (Italics added.) *California Rules of Court, rules 2.550* and *2.551* regarding sealed records "do not apply 'to records **[*52]** that courts must keep confidential by law.'" (*In re Providian Credit Card Cases (2002) 96 Cal.App.4th 292, 298, 116 Cal. Rptr. 2d 833* (*Providian*).) A mandatory confidentiality requirement is imposed only in actions for misappropriation of trade secrets under the UTSA. (*Providian, at p. 298*.)

As the plain meaning of *section 3426.5* and *Providian* make clear, because DTS was prosecuting an action for misappropriation of the alleged trade secrets under the UTSA, it was entitled to file its alleged trade secret material under seal to preserve its secrecy. DTS has not been prejudiced so far by the court's denials of its requests to seal because all of the documents that DTS sought to seal or redact were filed conditionally under seal and remain under seal as a result of the trial court's staying their unsealing pending this appeal. Because DTS claims the right to trade secret protection under *section 3426.5* and we have affirmed summary adjudication of its statutory trade secret cause of action solely based on lack of evidence of misappropriation and not on the ground there is no trade secret, DTS is entitled to maintain the material in question under seal. Accordingly, we will reverse the orders denying DTS's requests to seal and direct the court to grant those requests.

IV. *Attorney Fee Awards Under Section 3426.4*

DTS contends the trial **[*53]** court erred in awarding attorney fees to Orion and AutoReturn under *section 3426.4*.[11] *Section 3426.4* provides: "If a claim of misappropriation is made in bad faith, . . . the court may award reasonable attorney's fees and costs to the prevailing party. Recoverable costs hereunder shall include a reasonable sum to cover the services of expert witnesses, who are not regular employees of any party, actually incurred and reasonably necessary in either, or both, preparation for trial or arbitration, or during trial or arbitration, of the case by the prevailing party."

"'Although the Legislature has not defined "bad faith"' for purposes of *section 3426.4*, 'our courts have developed a two-prong standard: (1) objective speciousness of the claim, and (2) subjective bad faith in bringing or maintaining the action, i.e., for an improper purpose.'" (*Cypress Semiconductor Corp. v. Maxim Integrated Products, Inc. (2015) 236 Cal.App.4th 243, 260, 186 Cal. Rptr. 3d 486* (*Cypress*), quoting *FLIR Systems, Inc. v. Parrish (2009) 174 Cal.App.4th 1270, 1275, 95 Cal. Rptr. 3d 307* (*FLIR*).) "Objective speciousness is said to be present 'where the action superficially appears to have merit but there is a complete lack of evidence to support the claim.' [Citation.] The **[*54]** first clause, of course, is superfluous; there is no logical reason to require that the action 'superficially appear[ ] to have merit.'" (*Cypress, supra, at p. 261*.) "Subjective bad faith may be inferred by evidence that appellants intended to cause unnecessary delay, filed the action to harass respondents, or harbored an improper

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[11] Although the court awarded attorney fees and costs to AutoReturn and the City jointly, DTS's challenge on appeal to that award addresses only the propriety of the award as to AutoReturn.

motive. [Citation.] The timing of the action may raise an inference of bad faith. [Citation.] Similar inferences may be made where the plaintiff proceeds to trial after the action's fatal shortcomings are revealed by opposing counsel." (*FLIR, supra, at p. 1278*.)

"An award of attorney fees for bad faith constitutes a sanction [citation], and the trial court has broad discretion in ruling on sanctions motions. [Citation.] 'Assuming some evidence exists in support of the factual findings, the trial court's exercise of discretion will not be disturbed unless it exceeds the bounds of reason. [Citation.] [¶] In reviewing the facts which led the trial court to impose sanctions, we must accept the version thereof which supports the trial court's determination, and must indulge in the inferences which favor its findings.'" (*Gemini Aluminum Corp. v. California Custom Shapes, Inc. (2002) 95 Cal.App.4th 1249, 1262-1263, 116 Cal. Rptr. 2d 358* (*Gemini*).) Thus, on an appeal from an order under *section 3426.4*, "the appellant has an 'uphill battle' **[*55]** and must overcome both the 'sufficiency of evidence' rule and the 'abuse of discretion' rule. . . . We do not retry cases on appeal and we do not substitute our discretion for that of the trial court." (*FLIR, supra, 174 Cal.App.4th at pp. 1275-1276*.)

"A defendant moving for attorney fees under *section 3426.4* is 'not required to conclusively prove a negative (i.e., that they did not steal [the plaintiff's] trade secrets). Instead, under the "objectively specious" standard, it [i]s enough for defendants to point to the absence of evidence of misappropriation in the record.' [Citation.] Further, the sufficiency of the evidence to support a given finding is not tested solely by examining evidence presented by one party, but raises the question whether '*on the entire record*, there is substantial evidence, contradicted or uncontradicted, which will support the determination . . . . [W]hen two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court.'" (*Cypress, supra, 236 Cal.App.4th at p. 260*.)

Attorney fee award to Orion

We conclude substantial evidence supports the trial court's determination that DTS maintained its trade secret claim against Orion in bad faith. Accordingly, we conclude the court did **[*56]** not exceed the bounds of reason in awarding Orion attorney fees under *section 3426.4* as a sanction against DTS. Although the trial court did not expressly state that DTS's trade secret claim was "objectively specious," the court expressly noted in its order that "'bad faith" as used in *section 3426.4* consists of both 'objective speciousness' of the plaintiff's claim and 'subjective bad faith in bringing or maintaining the claim.'" In ruling on Orion's motion for attorney fees, the court stated: "As foreshadowed by the court's . . . ruling on the DeLatte/Orion motion for summary judgment, DTS's decision to drag them into the case was made without any admissible evidence (as opposed to rumor and suspicion) of any wrongdoing by them, and was thus *objectively unreasonable and in bad faith*." (Italics added.) Regarding subjective bad faith, the court ruled: "And there is more than a little evidence, outlined in [Orion's] moving and reply papers, to suggest that [DTS's] decision to file the cross-action was also made for an improper purpose, and that the cross[-]action was thereafter maintained for an ulterior purpose by DTS long after it should have been clear that DeLatte and Orion had no liability."

During oral argument **[*57]** on the attorney fee motions, DTS's counsel equated "objective bad faith" with "objective speciousness," arguing: "Orion has failed to meet its burden of proof by a preponderance of the evidence. They are required not just to show subjective bad faith, *but also to show objective bad faith*. And the court doesn't specifically address that in its tentative." (Italics added.) The court disagreed, stating, "I specifically say [in the written order] 'and was thus objectively unreasonable and in bad faith,' so you are starting off on the wrong foot. I did make a ruling on that." (Italics omitted.) Thus, the court clarified that the word "objectively" in its written order modified both "unreasonable" and "bad faith." Taking our cue from DTS's counsel and the trial court, we construe "objective bad faith" to mean the same as "objective speciousness" for purposes of Orion's motion for attorney fees under *section 3426.4*.[12]

Bearing in mind that we must accept the version of the facts that supports the trial court's determination, if supported by substantial evidence, and must indulge in the inferences that favor the court's findings (*Gemini, supra, 95 Cal.App.4th at pp. 1262-1263*), we conclude the trial court reasonably found that DTS's trade secret claim against both Orion was objectively specious and subjectively maintained in bad faith. Orion submitted a declaration by its counsel (Kenneth Fitzgerald), with supporting e-mails and other documentation, recounting negotiations between him and DTS's counsel (Mark Bailey) and ACT's counsel (Patrick Webb) regarding Orion's request to be dismissed from DTS's and ACT's lawsuits. Bailey and Webb informed Fitzgerald that "they had sued Orion to dissuade Orion from moving forward in San Diego, and their hope was that without Orion's participation in the project, AutoReturn would not be able to meet the City's [towing] needs, and the City would drop AutoReturn as its vendor." Orion rejected certain settlement demands by ACT and DTS[13] and decided to proceed with the litigation and produce all documents requested by DTS with the view that "DTS would see that none of its source code or trade secrets were **[*59]** provided to or used by Orion, and that DTS would then voluntarily dismiss Orion from the action."

In ensuing e-mail exchanges, Fitzgerald repeatedly requested that DTS dismiss Orion from its lawsuit based on the absence of any evidence that Orion had misappropriated DTS's trade **[*60]** secret. Fitzgerald asserted that the documents Orion produced in discovery showed that Orion and DeLatte "did not receive any source code or other arguably proprietary information belonging to [DTS or ACT], and they certainly were unaware of any possible proprietary status of any information they did receive in the course of their dealings with AutoReturn. . . . [¶] There is no factual basis for the allegations that [Orion] misappropriated [DTS's or ACT's] trade secrets . . . . The continued prosecution of this action against [Orion] makes no sense, and is in bad faith. There is no legitimate reason that my clients remain parties to this case. Please dismiss them immediately."

Before incurring the expense of preparing Orion's summary judgment motion, Fitzgerald again asked DTS to dismiss Orion from its lawsuit and gave DTS notice that Orion would seek sanctions under *section 3426.4* if it were not dismissed. After receiving a message from DTS's counsel asking Orion to identify documents that exonerated Orion from DTS's trade secret misappropriation claim, Fitzgerald pointed out: "I'm afraid you have things reversed. It is not [Orion's] burden to prove a negative, that is, the absence of theft. It **[*61]** is your burden to prove there was theft. In [Orion's] document production there is no transmittal of code, no transmittal of your client's information, and no communication that reflects any copying or transmission of [DTS's] information. There is no evidence of trade secret theft because there was no trade secret theft. If you think I am mistaken, please identify the documents you believe show that [DTS's] trade secrets were stolen." DTS did not identify documents or other evidence of trade secret misappropriation by Orion and Orion successfully moved for summary adjudication of DTS's trade secret cause of action.

DeLatte filed a declaration in support of Orion's motion for attorney fees in which she recounted a number of conversations with DTS officer Morgan Hill in which Hill promised to dismiss Orion from DTS's lawsuit. DeLatte agreed to be interviewed by DTS's counsel in exchange for a dismissal, but DTS never dismissed Orion from the

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[12] Later during oral argument, DTS's counsel again equated objective bad faith with objective speciousness, stating: "Your Honor, for purposes of ruling on this motion, the issue with regard to objective bad faith is whether there is any evidence that supports the filing of this [trade secret] **[*58]** claim."

[13] Bailey told Fitzgerald that DTS and ACT would be willing to dismiss Orion from the litigation if DeLatte provided a predeposition interview with Bailey and if Orion provided an informal production of its documents. Orion agreed to those terms, but was unwilling to produce documents and disclose information that would violate a confidentiality agreement between Orion and AutoReturn. However, Orion agreed to produce documents that would potentially violate the confidentiality agreement if DTS would subpoena them. Rather than subpoena the documents, DTS proposed that Orion assign to DTS claims it might have against AutoReturn so that Orion and DTS would be in privity and could therefore share AutoReturn's confidential information. DTS also suggested that Orion did not have to comply with its confidentiality agreement because AutoReturn had breached the agreement by not disclosing the present litigation to Orion.

case. DeLatte declared: "I tried to do everything possible to obtain a dismissal from this lawsuit, starting with the decision to withdraw from the San Diego project. Then, I agreed to cooperate, to the extent I lawfully could, to provide information **[*62]** to DTS, and to provide a deposition in San Diego if Orion would be dismissed. Orion and I provided all of the discovery requested of us, in the hopes that the parties would see from this discovery that Orion had done nothing wrong, and did not belong in this lawsuit."

In a reply declaration, DeLatte stated that Hill had told her on a number of occasions that his lawyers said they had to sue her in order to obtain her cooperation. Delatte told Hill he did not have to sue her to get information; he could simply take her deposition. Hill said that he did not know he could depose someone without suing them, and that he would talk to his lawyers and get them to dismiss Orion. DeLatte averred that Hill's statement in his opposition declaration that DeLatte told him AutoReturn had provided her with DTS's data and other information was "completely false," and that AutoReturn never provided her with any DTS data.

Based on Orion's evidence, the court could reasonably find that DTS's trade secret claim against Orion was objectively specious and brought in subjective bad faith—i.e., for the improper purpose of dissuading Orion from moving forward in San Diego in the hope Orion's withdrawal from **[*63]** the project would cause the City to drop AutoReturn as its towing contractor.

DTS contends the court's bad faith finding was improperly based on statements by DTS's and ACT's counsel that the court should have excluded from evidence under *Evidence Code sections 1152*[14] and *1154*[15] as statements made during settlement negotiations between Orion, DTS, and ACT. The court rejected that argument in its order, stating: "The information [in Fitzgerald's declaration] is not offered to show liability or damage but rather is offered to show the presence or absence of good faith."

The trial court's consideration of statements made by DTS's counsel during settlement negotiations was not an abuse of discretion. *Evidence Code sections 1152* and *1154* do not absolutely bar admission of evidence of settlement negotiations; such evidence "may be admissible for a purpose other than proving liability[,]" including proving bad faith. (*Volkswagen of America, Inc. v. Superior Court (2006) 139 Cal.App.4th 1481, 1491, 43 Cal. Rptr. 3d 723*; *White v. Western Title Ins. Co. (1985) 40 Cal.3d 870, 887, 221 Cal. Rptr. 509, 710 P.2d 309* [*Evidence Code section 1152* does not preclude evidence of settlement negotiations that is offered to prove an insurer's bad faith rather than liability for the original loss or damage.].) The court properly considered statements by DTS's counsel during settlement negotiations in determining whether DTS acted with subjective bad faith in suing Orion for misappropriation of trade secrets. DTS's counsel's statements are admissible against DTS under the rule that "[s]tatements made by agents authorized to act on behalf of a party are admissible against that party." (*Volkswagen of America, Inc. v. Superior Court, supra, 139 Cal.App.4th at p. 1492*.)

DTS complains that the court considered only Orion's evidence in ruling on the motion for attorney fees and did not consider Hill's declaration, which DTS contends is the only direct evidence of DTS's subjective state of mind. We assume in support of the judgment that the **[*65]** court considered DTS's evidence and found Orion's evidence more credible on the issue of whether DTS maintained its trade secret claim against Orion in bad faith. As noted, we must accept the version of the facts that supports the trial court's determination. (*Gemini, supra, 95 Cal.App.4th at pp. 1262-1263*.)

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[14] *Evidence Code section 1152, subdivision (a)*, provides: "Evidence that a person has, in compromise or from humanitarian motives, furnished or offered or promised to furnish money or any other thing, act, or service to another who has sustained or will sustain or claims that he or she has sustained or will sustain loss or damage, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove his or her liability for the loss or damage or any part of it."

[15] *Evidence Code section 1154* provides: "Evidence that a person has accepted or offered or promised to accept a sum of money or any other thing, act, or service in satisfaction of a claim, as well as any conduct or statements made in negotiation thereof, **[*64]** is inadmissible to prove the invalidity of the claim or any part of it."

Hill's opposition declaration contains his recounting of settlement negotiations with Orion (DeLatte and Fitzgerald) and his assessment of why the negotiations were unsuccessful, but it does not compel a finding that Hill reasonably thought that Orion had misappropriated DTS's alleged trade secrets. Hill averred that software engineers had advised him "that it simply was not possible to create a complex software system such as DTS's from whole cloth[,]" and that the only way to develop such a system in a short time was to copy DTS's existing system. Thus, Hill concluded it was likely that Orion and AutoReturn were copying DTS's proprietary information "with the City's help in providing access." Hill stated: "I was advised that Orion did not need to see DTS's source code to perpetrate this copying, and in fact viewing DTS's source code would be a slow and ineffective way to steal DTS's proprietary information. It would be much **[*66]** more effective . . . for Orion [and AutoReturn] to simply look at LETS [and TMS] and copy how it was set up and the data that was contained on the system. This *readily viewable* information took DTS years to configure and compile so that it was optimally useful by the City." (Italics added.) Based on these statements by Hill, the court could reasonably find that DTS merely *suspected* AutoReturn and Orion of copying only "readily viewable" information that was not *trade secret* information-a finding that supports the court's conclusion that DTS had no evidence that Orion or AutoReturn misappropriated a trade secret and that DTS did not maintain its trade secret claim against Orion and AutoReturn in subjective good faith.

The court did not abuse its discretion in awarding Orion attorney fees under *section 3426.4*.

Attorney fee award to AutoReturn

We conclude that substantial evidence also supports the trial court's determination that DTS maintained its trade secret claim against AutoReturn in bad faith within the meaning of *section 3426.4*. In ruling on AutoReturn's motion for attorney fees, the court found that the "trade secret counts" in this case were "specious" and that "ACT's and DTS's decision to drag [the] City **[*67]** and AutoReturn into the case was made without any admissible evidence (as opposed to rumor and suspicion) of any wrongdoing by the City and AutoReturn, and was thus objectively unreasonable and in bad faith." The court further stated that "DTS fail[ed] to offer any evidence that its trade secret claims were objectively reasonable, instead regurgitating arguments rejected in the prior summary judgment/adjudication motions." Regarding subjective bad faith, the court ruled that "DTS fail[ed] to address or dispute any of the evidence that it acted with subjective bad faith and engaged in gamesmanship." The court noted that DTS "prosecut[ed] its claims against the City and AutoReturn for several months even though an identical claim against DeLatte/Orion was dismissed by summary judgment on July 6, 2012." The court concluded that "without any evidence in support of its trade secrets claim, DTS litigated and pursued this action against the City and AutoReturn without any good faith basis for believing that a trade secret theft had taken place."

As noted, under the "objectively specious" standard, it is enough for a defendant to a trade secret claim to point to the absence of evidence of misappropriation in the record **[*68]** (*Cypress, supra, 236 Cal.App.4th at p. 260*.) Accordingly, the court reasonably based its finding of objective speciousness on its prior determination on summary judgment that DTS presented "no material evidence of actual misappropriation"—i.e., that there was insufficient evidence to raise a material issue of fact as to whether AutoReturn misappropriated a trade secret.

Hill's declaration in opposition to AutoReturn's motion for attorney fees was similar to his declaration in opposition to Orion's motion. Hill stated that "the only means that DTS had to determine whether AutoReturn was in fact copying DTS's proprietary software was to file suit." This statement supports the court's finding that the suit was filed based on *suspicion* rather than evidence of trade secret misappropriation. Hill mentioned DTS's discovery that Orion was in possession of DTS's XML schema and reason code information, but Abramson's declaration filed by DTS in opposition to summary judgment motions did not identify those as trade secrets; Abramson merely speculated that because they had been copied, the copying "likely" extended to trade secret information. Hill's declaration reiterated statements in his prior declaration regarding Orion and AutoReturn's **[*69]** suspected copying of "readily viewable" LETS/TMS information that "took DTS years to configure and compile so that it was optimally useful by the City." As we discussed, these statements reasonably support a finding that DTS merely *suspected* AutoReturn and Orion of copying "readily viewable" information that was not *trade secret* information. The court could reasonably find DTS's trade secret claim against AutoReturn was objectively specious based on the lack of evidence that AutoReturn misappropriated a trade secret. The court could reasonably find subjective bad faith based on DTS's continuing to prosecute the claim "after [its] fatal shortcomings [were] revealed by opposing counsel[,]" as well as the court's prior ruling on Orion's summary judgment motion. (*FLIR, supra, 174 Cal.App.4th at p. 1278*.)

The court did not abuse its discretion in awarding AutoReturn attorney fees under section 3426.4. In light of our affirmance of the attorney fee award to AutoReturn under section 3426.4, we need not address AutoReturn's argument that it is, alternatively, entitled to attorney fees under section 1717 as a prevailing party in a contract dispute.[16]

V. *Summary Adjudication of Cause of Action for Breach of Joint Venture Agreement*

DTS contends the court erred in summarily adjudicating its cause of action for breach of joint venture agreement in AutoReturn's favor. In its fifth cause of action for breach of joint venture agreement, DTS alleged that DTS and AutoReturn "teamed up and entered into an oral and/or implied joint venture agreement in order to jointly submit a bid for the 2008 RFP to provide dispatch communications services to the City and the City's tow contractors. Under the joint venture, AutoReturn and [DTS] agreed to use [DTS's] LETS, TMS, . . . and other communications and integration software and hardware to fulfill the requirements of the 2008 RFP." DTS further alleged that AutoReturn breached the "joint venture agreement by terminating [DTS's] responsibilities under the 2008 RFP, and contracting to have those services performed by Orion, or performing [DTS's] responsibilities under the joint venture in house . . . ."

"'A joint venture . . . is an undertaking by two or **[*71]** more persons jointly to carry out a single business enterprise for profit.' [Citation.] 'There are three basic elements of a joint venture: the members must have joint control over the venture (even though they may delegate it), they must share the profits of the undertaking, and the members must each have an ownership interest in the enterprise. [Citation.]' [Citation.] 'Whether a joint venture actually exists depends on the intention of the parties. [Citations.] [¶] . . . [¶] . . . [W]here evidence is in dispute the existence or nonexistence of a joint venture is a question of fact to be determined by the jury.'" (*Unruh-Haxton v. Regents of the University of California (2008) 162 Cal.App.4th 343, 370, 76 Cal. Rptr. 3d 146*.)

In its motion for summary judgment, AutoReturn, presented declarations of its CEO, Wicker, and chief technology officer, Pendleton. Both averred that DTS did not form a joint venture with AutoReturn and did not share profits, control, or ownership of a separate entity with AutoReturn. Pendleton declared that at all times, AutoReturn considered DTS to be a vendor and that the parties never discussed forming a joint venture. Wicker stated that AutoReturn considered DTS to be a subcontractor, as it had in all of its prior dealings with DTS. The parties contemplated the same type **[*72]** of licensing arrangement they had in San Francisco and Baltimore County—i.e., DTS would provide software and technical support for the software in return for AutoReturn's payment of a fee.

DTS's opposition evidence included deposition testimony and declarations from Estes and Garg. Estes testified that in the spring of 2008, DTS and AutoReturn entered into an oral "global joint venture agreement," which they intended to later put in writing. The parties agreed to "jointly propose deals for prospective clients and share in the revenue and the costs." Estes initially testified that the parties agreed to percentages of revenue they would share, but he did not recall the specific percentages and did not know where to find "that number." However, later in his deposition Estes testified that AutoReturn and DTS agreed to share gross profits on a "pro rata" or percentage basis with a "60/40" split, meaning that AutoReturn would receive 60 percent and DTS would receive 40 percent of the gross profits. At the hearing on AutoReturn and the City's summary judgment motion, AutoReturn's counsel represented that Estes recalled the 60/40 profit percentages after having lunch with his counsel.

In his **[*73]** declaration, Estes averred that in the spring of 2008 "AutoReturn and DTS entered into an oral joint venture agreement to jointly pursue municipal contracts throughout the United States" and that he personally negotiated the agreement with AutoReturn's principals, including Wicker and Pendleton. Under the joint venture

[16] AutoReturn contends it was a prevailing party in its licensing agreements with DTS because, in AutoReturn's words, "DTS's trade-secret **[*70]** claim against AutoReturn was (and still is) premised largely on these 'two agreements that required AutoReturn to keep DTS's software confidential.'"

agreement, DTS and AutoReturn agreed to share the profits and losses associated with pursuing each contract, with the parties sharing joint control over the business of the venture. Regarding profit sharing, Estes declared: "During my deposition in this case, I was asked what the compensation structure was for the joint venture arrangement with AutoReturn in San Diego. At that time I could not recall the figure, but since my deposition I have been able to refresh my recollection and recall that we agreed to split the $22.00 per-tow fee for City authorized tows in San Diego at 60% AutoReturn and 40% DTS."

Garg testified in his deposition that DTS had "pretty vast discussions with AutoReturn about a joint venture relationship which centered around the San Diego contract being in the RFP stage. We had talked about over time . . . having a closer joint venture whereby [AutoReturn] would **[*74]** go out and become . . . an exclusive marketing arm for DTS to go market. [DTS would] do all the development and [AutoReturn would] do all the marketing, and that would be the nature of a joint venture." Garg testified that he sold DTS before the joint venture agreement was finalized, but DTS and AutoReturn reached an "agreement in principle" and "clear understanding" regarding how the joint venture relationship would be structured for San Diego. The parties agreed that DTS would assist AutoReturn in the RFP process, and would work with AutoReturn "to provide whatever they needed to get the response and work with the City to let them know that they are [DTS's] partner in this process, and in return, when they get the contract, [DTS gets] a split of the revenue and provide[s] all the software services." DTS expected "[a] percentage split of the revenue" and agreed to AutoReturn's receiving 60 percent and DTS's receiving 40 percent.

In AutoReturn and the City's reply to DTS's opposition to the summary judgment motion, AutoReturn asserted that DTS's joint venture claim was based entirely on Estes's declaration and that the court should strike the declaration because of DTS's discovery abuse regarding **[*75]** Estes's deposition. AutoReturn contended that DTS had refused to produce Estes to complete his deposition despite a court order.

Although the court overruled AutoReturn and the City's four evidentiary objections that were directed at the portions of Estes's declaration regarding AutoReturn and DTS's joint venture agreement, in its order granting the motion for summary judgment, the court struck Estes's entire declaration. The court stated:

"DTS has not created a triable issue of fact as to the joint venture claim, count 5. The key declarant in opposition to the motion as to count 5 is Lawrence Estes. Much of the Estes declaration is inadmissible, and that which does not run afoul of the Evidence Code is a classic sham declaration. The key passage of the Declaration is in paragraph 14 on page 5. Estes admits that when deposed he 'could not recall' the <u>key element</u> of the joint venture, the 'compensation structure.' He then purports to testify in the Declaration that 'since [his] deposition, I have been able to refresh my recollection.' <u>He never states by what means he was refreshed</u>. There were several other instances of Mr. Estes not recollecting important information . . ., at least until **[*76]** after the lunch break . . . . During argument, counsel for DTS tacitly acknowledged he could not have been refreshed by a document, as there are no documents which reflect the existence of the purported 'joint venture.'"

Regarding Estes's deposition testimony that AutoReturn and DTS agreed to share gross profits on a percentage basis with a 60/40 split, the court stated that "this does not change the result. Contrary to the suggestion at oral argument, this is not a credibility determination, but rather a determination that the referenced testimony is so equivocal in context that it does not raise a triable issue of fact. This is confirmed by the fact that even Estes did not reference it in his own Declaration."

The court struck Estes's entire declaration on the ground it was a "sham declaration," but viewed DTS's discovery abuse regarding Estes's deposition as further support for its decision.[17] The court stated: "The failure of DTS to produce Estes for completion of his deposition until the day before the reply brief was due, despite Judge Denton's order to the contrary and following a series of emails seeking to confirm he would be produced in a timely fashion (which emails went without **[*77]** response), confirms the court's view that the Estes Declaration should be stricken in its entirety."

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[17] AutoReturn did not ask the court to strike Estes's declaration on the ground it contradicted his deposition testimony; its request to strike the declaration was based solely on alleged discovery abuse regarding his deposition.

DTS contends the court erred in striking Estes's entire declaration. We agree. One of the cases the court cited in its ruling as authority for striking Estes's declaration is *Yeager v. Bowlin (9th Cir. 2012) 693 F.3d 1076*, in which the Ninth Circuit Court of Appeals applied what is referred to in federal case law as the "sham affidavit rule." (*Id. at p. 1079*.) Under that rule, "'a party cannot create an issue of fact by an affidavit contradicting his prior deposition testimony.'" (*Van Asdale v. International Game Technology (9th Cir. 2009) 577 F.3d 989, 998* (*Van Asdale*).)

However, federal cases have "recognized that the sham affidavit rule is in tension with the principle that a court's role in deciding a summary judgment motion is not to make credibility determinations or weigh conflicting evidence. Aggressive invocation of the rule also threatens to ensnare parties who may have simply been confused during their deposition testimony and may encourage gamesmanship by opposing attorneys. [The Ninth **[*78]** Circuit has] thus recognized that the sham affidavit rule 'should be applied with caution.'" (*Van Asdale, supra, 577 F.3d at p. 998*.)

There are "two important limitations on a [trial] court's discretion to invoke the sham affidavit rule. First, . . . the rule 'does not automatically dispose of every case in which a contradictory affidavit is introduced to explain portions of earlier deposition testimony,' [citation]; rather, 'the [trial] court must make a factual determination that the contradiction was actually a "sham."' [Citation.] Second, . . . *the inconsistency between a party's deposition testimony and subsequent affidavit must be clear and unambiguous to justify striking the affidavit*." (*Van Asdale, supra, 577 F.3d at pp. 998-999*, italics added.)

California law regarding "sham declarations" is similar to federal law: "[I]n opposing a summary judgment motion, a plaintiff may not create a disputed issue of fact by contradicting his or her deposition testimony with an affidavit or declaration." (*Jogani v. Jogani (2006) 141 Cal.App.4th 158, 177, 45 Cal. Rptr. 3d 792*, citing *D'Amico v. Board of Medical Examiners (1974) 11 Cal.3d 1, 20-22, 112 Cal. Rptr. 786, 520 P.2d 10* (*D'Amico*).) This rule has been referred to as the *D'Amico* rule. (See *Ahn v. Kumho Tire U.S.A., Inc. (2014) 223 Cal.App.4th 133, 136, 143-144, 166 Cal. Rptr. 3d 852* (*Ahn*).)[18]

However, like federal courts considering the sham affidavit rule, California courts have cautioned that "'an uncritical application of the *D'Amico* decision can lead to anomalous results, inconsistent with the general principles of summary judgment law.' . . . *D'Amico* should not be interpreted 'as saying that admissions should be shielded from careful examination in light of the entire record.' [Citation.] This is because the record may contain evidence that credibly contradicts or explains what might appear to be clear and unequivocal admissions, if the admissions are viewed in isolation and without reference to the other evidence." (*Ahn, supra, 223 Cal.App.4th at p. 144*, quoting *Price v. Wells Fargo Bank (1989) 213 Cal.App.3d 465, 482, 261 Cal. Rptr. 735*.) "Courts have consistently refused to apply the *D'Amico* rule to exclude evidence adduced in opposition to a summary judgment motion when either evidence adduced on the motion credibly explains or contradicts a party's earlier admissions." (*Ahn, supra, 223 Cal.App.4th at pp. 144-145*.) "A summary judgment should not be based on tacit admissions or fragmentary and equivocal concessions, which are contradicted by other credible **[*80]** evidence." (*Price v. Wells Fargo Bank, supra, 213 Cal.App.3d at p. 482*.)

Here, the court's decision to strike Estes's entire declaration was, in the words of the *Ahn* court, "an overly broad and erroneous application of the *D'Amico* rule." (*Ahn, supra, 223 Cal.App.4th at p. 136*.) The trial court was not presented with a clear and unequivocal admission by Estes in his deposition that was contradicted by his later declaration. In his deposition, Estes initially stated he could not recall the specific profit sharing percentages to which DTS and AutoReturn agreed under their alleged joint venture agreement. Later in the *same deposition* Estes testified that AutoReturn and DTS agreed to a 60/40 split of profits. In his declaration he again stated that the parties "agreed to split the $22.00 per-tow fee for City authorized tows in San Diego at 60% AutoReturn and 40% DTS." Although circumstances may render Estes's credibility on that point suspect, we cannot say that his

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[18] Under the *D'Amico* rule, ""[w]here . . . there is a *clear and unequivocal admission* by the plaintiff, himself, in his deposition'" and the plaintiff contradicts that admission in a subsequent **[*79]** declaration, "'we are forced to conclude there is no *substantial* evidence of the existence of a triable issue of fact.''" (*Ahn, supra, 223 Cal.App.4th at p. 144*, quoting *D'Amico, supra, 11 Cal.3d at p. 21*, first italics added by *Ahn*.)

deposition testimony and declaration averment about the agreement to share profits with a 60/40 split were so contradictory to his earlier testimony that striking his entire declaration under the *D'Amico* or sham affidavit rule was warranted. Estes's initial testimony was more a "fragmentary and equivocal concession[], which [was] contradicted **[*81]** by other credible evidence" (*Price v. Wells Fargo Bank, supra, 213 Cal.App.3d at p. 482*) than a clear and unequivocal admission that was clearly and unambiguously inconsistent with his later testimony and declaration.

Notwithstanding the court's assertion in its summary judgment ruling that its decision to strike Estes's declaration was "not a credibility determination, but rather a determination that the referenced testimony is so equivocal in context that it does not raise a triable issue of fact," we view the court's striking Estes's declaration as a credibility determination-i.e., the court determined that Estes's deposition testimony and declaration that the parties agreed to a 60/40 profit split was not credible because he initially testified in his deposition that he could not recall the profit sharing percentages. The court's credibility determination contravenes the *D'Amico* rule because there was no "clear and unequivocal" admission in Estes's deposition that his later declaration contradicted. The credibility determination also contravenes the well-settled rule that in ruling on a summary judgment motion, the court must view the evidence in the light most favorable to the opposing party and resolve any evidentiary doubts or ambiguities **[*82]** in the opposing party's favor. (*Aguilar, supra, 25 Cal.4th at p. 843*; *Saelzler, supra, 25 Cal.4th at p. 768*.)

DTS additionally contends that the order striking Estes's declaration constituted an evidence sanction under *Code of Civil Procedure section 2023.030, subdivision (c)* for misuse of the discovery process, and that the court erred by imposing the sanction without providing the notice and opportunity for hearing required by that statute. We agree that the court's striking the declaration cannot be upheld as a sanction under *Code of Civil Procedure section 2023.030* because DTS was not afforded proper notice and opportunity for hearing on the issue. "*Code of Civil Procedure section 2023.030*, provides for discovery sanctions only 'after notice . . . and after opportunity for hearing' *and* only in the manner 'authorized by the chapter governing any particular discovery method or any other provision of this title . . . .'" (*People ex rel. City of Dana Point v. Holistic Health (2013) 213 Cal.App.4th 1016, 1030, 153 Cal. Rptr. 3d 810* [seeking potentially dispositive evidentiary sanctions in a summary judgment brief did not satisfy the notice and hearing requirements of *Code of Civil Procedure section 2023.030*].) As noted, AutoReturn and the City requested the court to strike Estes's declaration in their reply to DTS's opposition to their summary judgment motion; they did not make that request by noticed motion.

Further, in the absence of a violation of an order compelling an answer or further answer, an evidence sanction may be imposed only **[*83]** where the answer given by a party responding to discovery is willfully false. (*Saxena v. Goffney (2008) 159 Cal.App.4th 316, 334, 71 Cal. Rptr. 3d 469*.) The inconsistency between Estes's initial deposition answer that he did not recall the agreed profit sharing percentages and his later deposition testimony and declaration that AutoReturn and DTS agreed to share gross profits on a percentage basis with a "60/40" split does not establish that Estes's later deposition testimony and declaration were willfully false. We conclude the court erred in striking Estes's declaration.

DTS presented evidence that raises a triable issue of fact as to the existence of DTS's alleged joint venture agreement with AutoReturn.[19] As noted, the three basic elements of a joint venture are that the members must jointly control the venture, share the profits of the undertaking, and each have an ownership interest in the enterprise. (*Unruh-Haxton v. Regents of the University of California, supra, 162 Cal.App.4th at p. 370*.) "While in a technical joint venture there is usually a sharing of profits and losses in the prosecution of the common enterprise [citation], the mode of participating in the fruits of the undertaking may be left to the agreement of the parties." (*Universal Sales Corp. v. California Press Mfg. Co. (1942) 20 Cal.2d 751, 764, 128 P.2d 665*.)

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[19] The parties' dispute regarding the alleged joint venture is focused entirely on whether there was a **[*84]** joint venture agreement; there is no argument that to the extent there was such an agreement, AutoReturn did not breach it.

The deposition testimony of both Estes and Garg, and Estes's declaration, provide substantial evidence that the parties discussed and orally agreed to pursue a joint venture to pursue municipal contracts and to share control and the profits of the venture. Additional evidence of a joint venture is the statement in AutoReturn's proposal that "AutoReturn is pleased to present this proposal with support from DTS as *its technology partner*." (Italics added.)

AutoReturn argues that there is no evidence of joint control over the alleged joint venture because AutoReturn and DTS each controlled separate aspects of the venture. However, the element of joint control may be satisfied even though the parties to a joint venture delegate control over a particular aspect of the venture to the party who is qualified to perform that aspect. (See *Scottsdale Ins. Co. v. Essex Ins. Co. (2002) 98 Cal.App.4th 86, 93, 119 Cal. Rptr. 2d 62*.) "Although it has been said that joint control of the undertaking and equal power to direct the enterprise is an essential element of a joint venture [citations][,] this is not to say that there cannot be a joint venture where the parties **[*85]** have unequal control of operations. The requirement of authority and control has been construed to mean that while in the absence of special agreement one joint venturer cannot bind the others, 'they may by agreement grant authority to one or more of their number which would not be implied from the relationship alone.'" (*Stilwell v. Trutanich (1960) 178 Cal.App.2d 614, 619, 3 Cal. Rptr. 285*.) DTS and AutoReturn could delegate control of different aspects of the alleged joint venture between themselves according to their respective areas of expertise.

The evidence properly considered raises a triable issue of fact as to whether DTS and AutoReturn entered into a joint venture agreement that AutoReturn breached. The trial court erred in adjudicating DTS's fifth cause of action for breach of joint venture agreement in AutoReturn's favor.

VI. *Denial of Leave to Amend to Plead Causes of Action for Tortuous Interference with Contract and Breach of Fiduciary Duty*

DTS contends that the court erred in denying its motion for leave to file a third amended cross-complaint on the ground that statutory CUTSA supersession barred DTS's proposed cross-claim against AutoReturn for breach of fiduciary duty and cross-claim against Orion for tortuous interference with contract. **[*86]** DTS's contention mischaracterizes what happened in the trial court.

DTS filed a motion for leave to file a third amended cross-complaint that would add a cause of action of for breach of fiduciary duty against AutoReturn. The motion created a procedural muddle. AutoReturn filed a "Statement of Non-Opposition" to DTS's motion, in which it stated that it did not oppose the motion but did "not concede any of the merits, allegations, or causes of action alleged in the Motion or in the proposed Third Amended Cross-Complaint." In its opening brief, DTS asserts that its motion to amend also sought to add a cause of action against Orion for tortuous interference with contract. However, DTS's operative *second* amended cross-complaint already contained an eighth cause of action against Orion for interference with contractual relations that had not been dismissed when the court ruled on Orion's motion for summary judgment against DTS. DTS's second amended cross-complaint also contained a 10th cause of action for interference with contractual relations against the City. AutoReturn and the City demurred to the 10th cause of action (and other causes of action) on the ground it was superseded by DTS's **[*87]** sixth cause of action for misappropriation of trade secrets under the CUTSA, which DTS brought against AutoReturn, the City, Orion, and DeLatte. *Orion did not file a demurrer to DTS's second amended cross-complaint*. The court (Judge William R. Nevitt, Jr.) sustained AutoReturn and the City's demurrer to the 10th cause of action without leave to amend on the ground the CUTSA superseded that cause of action because it was "based on the same nucleus of facts as the sixth . . . cause of action [for misappropriation of trade secrets]."

In denying DTS's motion to file its proposed third amended cross-complaint, the court (Judge Taylor) noted in its minute order that Judge Nevitt had "previously sustained a demurrer, holding that DTS's claims for common law misappropriation, interference with contract and contractual relations, and undue business practices were superseded by DTS's [statutory] claim for Misappropriation Of Trade Secrets . . . , as all of these claims were premised on a common nucleus of fact relating to alleged misuse of DTS's software." Judge Taylor's minute order stated that "the proposed [third amended cross-complaint] attached to the moving papers . . . continues inexplicably **[*88]** to assert these previously dismissed claims."[20] The proposed third amended cross-complaint attached to DTS's motion included the eighth cause of action against Orion for interference with contractual relations, but omitted the dismissed 10th cause of action for interference with contractual relations against the City. Thus, it appears that at the time he ruled on DTS's motion for leave to amend, Judge Taylor either mistakenly believed the eighth cause of action against Orion for interference with contractual relations had been dismissed on demurrer, or impliedly found that the eighth cause of action lacked merit based on the dismissal of the 10th cause of action for interference with contractual relations against City.[21]

In any event, because the eighth cause of action against Orion for interference with contractual relations had not been dismissed when Orion moved for summary judgment on DTS's second amended cross-complaint, Orion's motion for summary judgment appropriately sought summary adjudication of that cause of action on the **[*90]** ground it was superseded by the CUTSA, and on the additional ground that DTS could not establish that Orion and DeLatte knew about DTS's contractual relations. DTS's opposition to Orion's motion did not address Orion's request for summary adjudication of the eighth cause of action, and the court granted the request on the ground DTS had not opposed it. The court granted summary adjudication of DTS's seventh cause of action for common law misappropriation and 12th cause of action for unfair competition on the same ground. The court stated in its order that by failing to oppose the portion of Orion's motion for summary judgment seeking adjudication of the eighth cause of action, "DTS has failed to preserve for appeal a challenge to the granting of the motion."[22]

The trial court's observation that DTS has forfeited the right to challenge the trial court's adjudication of its cause of action against Orion for interference with contractual relations is correct. (*Arnall v. Superior Court (2010) 190 Cal.App.4th 360, 373, 118 Cal. Rptr. 3d 379* [failure to oppose summary adjudication on a particular ground before the trial court forfeits the right to challenge adjudication on that ground on appeal]; *Newton v. Clemons (2003) 110 Cal.App.4th 1, 11, 1 Cal. Rptr. 3d 90* [issues raised for the first time on appeal that could have been presented to the trial court are generally deemed waived].) Because the court granted Orion's motion for summary adjudication of the eighth cause of action for intentional interference with contractual relations and DTS has forfeited the right to challenge that ruling on appeal, we will not address DTS's argument that the court erred in denying it leave to include that cause of action in a third amended cross-complaint.

Regarding its proposed cause **[*92]** of action for breach of fiduciary duty against AutoReturn, DTS argues on appeal that the court erred in denying leave to amend "across the board on the basis of UTSA supersession, even though AutoReturn did not assert that issue." However, the court did not rule that DTS's proposed breach of

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[20] The causes of action for common law misappropriation, interference with contractual relations, and unfair competition in DTS's proposed third amended cross-complaint were against Orion and DeLatte only.

[21] Although DTS's motion for leave to file a third amended cross-complaint did not seek to add a cause of action against Orion, Orion opposed the motion by arguing that Judge Nevitt's dismissal of the contract interference cause of action against the City established that its **[*89]** contract interference cause of action against Orion was futile. In reply papers and at oral argument, DTS pointed out that Orion had not challenged the eighth cause of action and it had not been dismissed. DTS argued that its contract interference claim against Orion was based on different facts than the dismissed contract interference claim against the City, and was not superseded by its cause of action for misappropriation of trade secrets. The court at oral argument stated, "I think Judge Nevitt did adjudicate this issue. I think he did dismiss these counts. And I think they are the same. And you are asking me to second-guess a colleague, and I'm just not going to do that. I don't have the authority to do that." DTS's counsel responded, "Okay. I will concede that today. That's fine, but we still have the issue of the breach of fiduciary duty claim [against AutoReturn]."

[22] It its reply brief, DTS takes the position that the court's incorrect view that its contract interference claim against Orion had been dismissed operated as a dismissal of that claim. DTS argues that it "could not defend against a motion seeking judgment on an interference claim that had been ruled dismissed already." We do not view the court's erroneous statement that a prior judge had dismissed DTS's eighth cause of action against **[*91]** Orion as constituting a dismissal of that cause of action. DTS could have opposed Orion's request for summary adjudication of the eighth cause of action on the merits and argued that the court misunderstood or misconstrued the effect of the prior dismissal of DTS's 10th cause of action on status of the eighth cause of action.

fiduciary duty cause of action was superseded by its statutory cause of action for misappropriation of trade secrets. As noted, the court denied leave to amend on the ground that "DTS's claims for *common law misappropriation, interference with contract and contractual relations, and undue business practices* were superseded by DTS's [statutory] claim for Misappropriation of Trade Secrets." (Italics added.) After DTS's counsel failed to persuade the court at oral argument that Judge Nevitt had not dismissed those causes of action against Orion and DeLatte, counsel stated, "That's fine, but we still have the issue of the breach of fiduciary duty claim [against AutoReturn]." The court responded, "You have to bring another motion [for leave to amend] and append to it a proposed . . . cross-complaint that doesn't have included in it causes of action that my colleague has already dismissed." "If you want **[*93]** to try and seek leave to amend again . . . with just the fiduciary duty claim appended, just that being the new proposed third amended cross-complaint, that might be another kettle of fish."

Thus, the court did not deny DTS leave to add a cause of action against AutoReturn for breach of fiduciary duty; the court invited DTS to file another motion for leave to amend to add that cause of action with a proposed third amended cross-complaint that omitted the second amended cross-complaint's seventh, eighth, and 12th causes of action against Orion for common law misappropriation, interference with contractual relations, and unfair competition, respectively. The court deferred ruling on whether it would allow DTS to add a cause of action against AutoReturn for breach of fiduciary duty until DTS submitted a proposed third amended cross-complaint that omitted the three causes of action that the court believed had been dismissed. The court later disposed of those three causes of action by granting Orion's motion for summary adjudication of the seventh, eighth, and 12th causes of action of DTS's second amended cross-complaint.

Because the trial court declined to exercise its discretion and rule **[*94]** on whether to grant DTS leave to plead a cause of action for breach of fiduciary duty against AutoReturn, DTS is free on remand to file a motion for leave to amend its second amended cross-complaint to add that cause of action. If DTS files a new motion for leave to file a third amended cross-complaint, its proposed third amended cross-complaint should omit the three causes of action against Orion that court summarily adjudicated in Orion's favor.

ACT'S APPEAL

I. *AutoReturn's Reliance on Declarations Filed with Its Previous Motion for Summary Judgment Against ACT*

ACT's contends the court should have denied AutoReturn's motion for summary judgment on ACT'S fourth amended complaint as procedurally defective because AutoReturn did not provide its supporting evidence with the motion. AutoReturn initially filed a motion for summary judgment on ACT's fourth amended complaint in January 2012. AutoReturn later withdrew the motion and refiled a revised version of it in March 2012. Rather than refile all of the declarations it filed in support of its original motion for summary judgment against ACT, AutoReturn stated in a footnote in its memorandum of points and authorities in support of its second **[*95]** motion: "Each of the declarations referred to in this Memorandum of Points and Authorities was filed with this Court on January 6, 2012, when AutoReturn originally filed a motion for summary judgment against ACT." In its summary judgment order, the court rejected ACT's argument that the declarations in question were irrelevant because they were not served with the moving papers, stating: "The declarations in question were part of a similar although not identical motion filed on 1/9/12 . . . which went off calendar. However, the declarations were served on [ACT] in connection with the earlier motion, so [ACT] is aware of and has copies of same."

We agree with the trial court's implied finding that ACT was not prejudiced by the court's consideration of the declarations that the City and AutoReturn filed with their prior motion for summary judgment, and conclude that the court acted within its discretion in considering the declarations. ACT cites [*Fleet v. CBS, Inc. (1996) 50 Cal.App.4th 1911, 58 Cal. Rptr. 2d 645*] (*Fleet*) for the proposition that the evidence supporting a motion for summary judgment must be provided with the motion; it is not enough to refer to other sources where the evidence may be located. In *Fleet*, the defendant moving for summary **[*96]** judgment stated only one fact in its separate statement of undisputed facts and, in the words of the *Fleet* court, "expected the court to glean the background facts necessary to resolving its motion from the complaint [and other sources]." ([*Id. at p. 1916, fn. 3*].) The *Fleet* court noted that "[e]very motion for summary judgment should be accompanied by a 'separate statement setting forth plainly and concisely all material facts which the moving party contends are undisputed.' (*Code Civ. Proc., § 437c, subd. (b)*.) Facts stated elsewhere need not be considered by the court [citation], and failure to comply with this rule constitutes ground for denial *at the court's discretion* [citation]." (*Fleet, supra, 50 Cal.App.4th at p. 1916, fn. 3*, italics added.) Because the trial court "was apparently willing [to glean the background facts from other sources] and because the crucial facts [were] to be found somewhere in the record and [were] undisputed by appellants, [the *Fleet* court decided it would] not disturb the trial court's ruling on this ground." (*Ibid.*)

In the present case, there is no issue regarding facts not stated in AutoReturn's separate statement; ACT's complaint is that AutoReturn's separate statement's cites declarations that were submitted with a prior summary judgment motion. *Fleet* supports **[*97]** the proposition that the trial court has discretion to overlook defects in the separate statement and the moving party's presentation of evidence.

ACT also cites *Artiglio v. General Electric Co. (1998) 61 Cal.App.4th 830, 71 Cal. Rptr. 2d 817* (*Artiglio*) for the proposition that "facts[]stated elsewhere may not be considered by the court—even if submitted with a party's earlier summary judgment motion." In *Artiglio* the plaintiffs opposing a motion for summary judgment failed to cite specific evidence that contradicted the moving defendant's evidence. The plaintiffs' separate statement of disputed facts simply stated: "'See evidence previously produced in opposition to [defendant's] earlier motions for summary judgment.'" (*Id. at p. 841*.) Further, the plaintiffs' memorandum of points and authorities in opposition to the summary judgment motion did not "provide any greater clue about what evidence they believe contradicted the evidence presented by [the defendant]." (*Ibid.*) Based on the plaintiffs' failure to cite any evidence that contradicted the defendant's evidence, the *Artiglio* court concluded that "the trial court was fully warranted in concluding [the defendant's] evidence was not disputed." (*Id. at p. 842*.) *Artiglio* is inapposite because AutoReturn's separate statement in support of **[*98]** its motion for summary judgment cited specific evidence supporting each fact listed in its separate statement. The trial court was not required to deny AutoReturn's motion simply because certain declarations cited in AutoReturn's separate statement had been filed and served on ACT with AutoReturn's earlier withdrawn motion.

II. *Summary Adjudication of ACT's Seventh Cause of Action for Unfair Business Practices*

ACT contends the trial court erred in granting summary adjudication of its cause of action against AutoReturn for unfair business practices in violation of the *Business and Professions Code section 17200 et seq.*, commonly referred to as the unfair competition law (UCL). *Business and Professions Code section 17200* defines unfair competition as "any unlawful, unfair or fraudulent business act or practice . . . ." Because the statute "'is written in the disjunctive, it establishes three varieties of unfair competition-acts or practices which are unlawful, or unfair, or fraudulent. "In other words, a practice is prohibited as 'unfair' or 'deceptive' even if not 'unlawful' and vice versa."'" (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co. (1999) 20 Cal.4th 163, 180, 83 Cal. Rptr. 2d 548, 973 P.2d 527* (*Cel-Tech*).)

The California Supreme Court in *Cel-Tech* held that in the context of a UCL action against a direct competitor of the plaintiff, in contrast to a consumer action, the word "unfair" **[*99]** in *Business & Professions Code section 17200* "means conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." (*Cel-Tech, supra, 20 Cal.4th at p. 187*, fn. omitted.) The *Cel-Tech* court emphasized that "the '"antitrust laws . . . were enacted for 'the protection of *competition*, not *competitors*.'"' [Citation.] . . . Injury to a competitor is not equivalent to injury to competition; only the latter is the proper focus of antitrust laws." (*Id. at p. 186*.)

"The 'unlawful' practices prohibited by [*Business and Professions Code] section 17200* are any practices forbidden by law, be it civil or criminal, federal, state, or municipal, statutory, regulatory, or court-made. [Citation.] It is not necessary that the predicate law provide for private civil enforcement. [Citation.] . . . [*Business and Professions Code] section 17200* 'borrows' violations of other laws and treats them as unlawful practices independently actionable under [*Business and Professions Code] section 17200 et seq.*" (*Saunders v. Superior Court (1994) 27 Cal.App.4th 832, 838-839, 33 Cal. Rptr. 2d 438*.)

"[U]nder the fraud prong of the UCL a plaintiff need not show that he or others were actually deceived or confused by the conduct or business practice in question. . . . A violation can be shown even if no one was actually deceived, relied upon the fraudulent **[*100]** practice, or sustained any damage." (*Schnall v. Hertz Corp. (2000) 78 Cal.App.4th 1144, 1167, 93 Cal. Rptr. 2d 439*.) The plaintiff need only "show deception to some members of the public, or harm to the public interest" (*Watson Laboratories, Inc. v. Rhone-Poulenc Rorer, Inc. (C.D.Cal. 2001) 178 F.Supp.2d 1099, 1121* (*Watson Laboratories*), or "'that members of the public are likely to be deceived.'" (*Schnall v. Hertz Corp., supra, 78 Cal.App.4th at p. 1167*.)[23]

In its seventh cause of action for unfair business practices in violation of the UCL, ACT alleged that it "sustained actual harm and injury resulting from the unlawful, unfair and fraudulent competition and business practices on the part of AutoReturn . . . ." Specifically, ACT alleged that the City awarded the towing contract to AutoReturn based on "AutoReturn's **[*101]** wrongful inclusion of LETS and TMS software platforms in response to the 2008 RFP and in disregard of ACT's exclusive license to use . . . LETS and TMS software products in San Diego County, and in violation of the City Charter and Municipal Code."

The trial court granted summary adjudication of ACT's seventh cause of action on several grounds. First the court ruled that ACT lacked standing to bring its claim under the UCL because ACT only "leased" DTS's software. The court further ruled that even if ACT could show it had standing, it had "not shown a causal connection between the unlawful practice it alleges and the injury it claims to have suffered. It only speculates that but for AutoReturn's inclusion of LETS/TMS in its bid, [ACT] would have been awarded the contract. This conclusory, speculative statement is insufficient to raise a triable issue of material fact." The court then ruled that to the extent ACT based its UCL claim on its eighth cause of action for interference with contractual relations, "both claims fail because no contract was ever breached." The court also ruled that ACT's seventh cause of action failed under the "'unfair' prong of the UCL because ACT did not and **[*102]** cannot establish AutoReturn's conduct violated an ***antitrust law***[]"—i.e., that it injured competition and not just a particular competitor. Finally, the court ruled that as a result of ACT's having brought its 18th cause of action for misappropriation of trade secrets, ACT's seventh cause of action was "superseded by the CUTSA as a matter of law."[24]

We conclude the court erred in summarily adjudicating ACT's seventh cause of action in AutoReturn's favor. ACT had standing to bring its UCL claim against AutoReturn regardless of whether it had standing to bring a claim for misappropriation of trade secrets based on AutoReturn's use of LETS/TMS in its bid. *Business and Professions Code section 17204* confers standing to bring a UCL action on "a person who has suffered injury in fact and has lost money or property as a result of the unfair competition." ACT's UCL claim is based on its exclusive license to use LETS/TMS in San Diego County **[*103]** and not on the alleged trade secret status of LETS/TMS. ACT claims, and argued in opposition to AutoReturn's motion for summary judgment, that it would have been awarded the towing contract but for AutoReturn's unfair business practice of "bidding the LETS/TMS software products in disregard of ACT's exclusive use rights, to the loss of $1.5 million." Regardless of the merit of that claim, ACT has standing to assert it.

The trial court correctly ruled that ACT's seventh cause of action failed under the "unfair" prong of the UCL. There is no evidence that AutoReturn's alleged unfair practice threatened an incipient violation of an ***antitrust law***, violated the policy or spirit of one of those laws, or significantly threatened or harmed competition as opposed to harming ACT as a direct competitor. (*Cel-Tech, supra, 20 Cal.4th at pp. 186-187*.) However, we conclude there was

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[23] In *In re Tobacco II Cases (2009) 46 Cal.4th 298, 93 Cal. Rptr. 3d 559, 207 P.3d 20*, the California Supreme Court held that to comply with UCL's standing requirements after 2004 amendments to the UCL by Proposition 64, a class representative in a consumer class action alleging misrepresentation under the fraudulent prong of the UCL "must demonstrate actual reliance on the allegedly deceptive or misleading statements, in accordance with well-settled principles regarding the element of reliance in ordinary fraud actions" (*In re Tobacco II Cases, at p. 306*.) The Supreme Court further held, however, that the "standing requirements are applicable only to the class representatives, and not all absent class members." (*Ibid.*)

[24] ACT voluntarily dismissed its 18th cause of action for misappropriation of trade secrets without prejudice the same day it filed its opposition to AutoReturn's motion for summary judgment. Despite the dismissal, the court granted AutoReturn's motion for summary adjudication as to the 18th cause of action.

sufficient evidence to preclude summary adjudication of ACT's seventh cause of action under the "unlawful" and "fraudulent" prongs of the UCL.

As noted, the unlawful practices prohibited under *Business and Professions Code section 17200* include any practices forbidden by civil law. (*Saunders v. Superior Court, supra, 27 Cal.App.4th at pp. 838-839*.) "Since the addition of the word 'unlawful' to the predecessor statute in 1963, this section has been liberally construed **[*104]** so as not to be limited to traditional anticompetitive practices." (*People v. E.W.A.P., Inc. (1980) 106 Cal.App.3d 315, 318, 165 Cal. Rptr. 73*.) As we discuss *infra*, AutoReturn's use of LETS/TMS fell within the unlawful prong of the UCL because it subjected AutoReturn to liability for tortious interference with ACT's contractual relationship with DTS with ACT's prospective economic advantage.

Regarding the fraudulent prong of the UCL, we reiterate that the plaintiff need only "show deception to some members of the public, or harm to the public interest" (*Watson Laboratories, supra, 178 F.Supp.2d at p. 1121*) or "'that members of the public are likely to be deceived.'" (*Schnall v. Hertz Corp., supra, 78 Cal.App.4th at p. 1167*.) ACT's UCL cause of action is viable under the fraudulent prong because it is based on AutoReturn's alleged fraudulent representations to the City that it was authorized to use LETS/TMS in its prospective performance of the City's towing contract and, therefore, implicates public deception or harm to the public interest. (*Watson Laboratories, supra, 178 F.Supp.2d at p. 1121*; *Travelers Prop. Cas. Co. of Am. v. Centex Homes (N.D.Cal. Aug. 26, 2013, No. 12-0371-SC) 2013 U.S.Dist. LEXIS 121401* [corporation may bring a UCL fraud prong claim if it shows the alleged wrongdoing has some impact on the general public].)[25] Deceptive public contract bidding is inherently harmful to the public interest and deceives the general public through **[*105]** public employees who issue requests for public contract bids and award public contracts on behalf of the general public. Accordingly, we conclude that a deceptive bid that harms a direct competitor as well as the public interest may serve as the basis for an action by the direct competitor under the "fraudulent" prong of *Business and Professions Code section 17200*. In the present case, ACT presented evidence that AutoReturn's allegedly deceptive bid harmed the public interest by resulting in a substantial delay in AutoReturn's ability to perform the towing contract while it developed software to replace LETS/TMS after ACT complained that AutoReturn's proposal infringed ACT's exclusive license to use LETS/TMS in San Diego County.

ACT contends the trial court erred in ruling there was no evidence showing a causal connection between AutoReturn's alleged unlawful business practice and the resulting injury ACT claims to have suffered. We conclude the evidence is sufficient to raise a triable issue of fact as to causation. The court made a factual finding based on declarations of three City employees, which the court referred to as "undisputed testimony," that the "City did not require any specific software platform, and that it ranked AutoReturn's proposal highest because of its superior technical score and its oral and written responses." However, ACT presented sufficient evidence to raise a triable issue of fact as to whether AutoReturn's use of the LETS/TMS software in its bid proposal was a substantial factor

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[25] AutoReturn contends that ACT waived the right to argue on appeal that its seventh cause of action falls under the fraudulent prong of the UCL because ACT did not make that argument in opposition to AutoReturn's motion for summary judgment We disagree. In its seventh cause of action, ACT alleged that AutoReturn engaged in fraudulent business practices, and specifically alleged that AutoReturn "falsely represented to the City that AutoReturn was authorized to utilize LETS and TMS systems in AutoReturn's **[*106]** prospective performance of the [towing contract] in the event said contract was awarded to AutoReturn." The seventh cause of action further alleges that AutoReturn falsely represented to the City that "ACT has no rights of exclusivity which would bar an award of the [contract] to AutoReturn." In its opposition to AutoReturn's summary judgment motion, ACT argued that the City awarded the contract to AutoReturn "based upon AutoReturn's false representation that it would use the LETS and TMS products to automate tow dispatching for the City. Having **used** LETS/TMS to bait the City, once AutoReturn was awarded the . . . contract, it then switched to other allegedly non-infringing computer software to avoid ACT's preliminary injunction of its infringement of ACT's exclusive license rights in LETS/TMS." In arguing that it had standing to bring a UCL claim because it lost money as a result of AutoReturn's infringement of its exclusive license, ACT contended that AutoReturn's interference with ACT's rights in LETS/TMS arose when AutoReturn "falsely represented" to the City that AutoReturn was able and intended to use LETS/TMS in the performance of the contract. This argument in ACT's opposition **[*107]** to AutoReturn's motion for summary judgment, along with the allegations in ACT's seventh cause of action, sufficiently preserve ACT's right to argue on appeal that its seventh cause of action is viable under the fraudulent prong of the UCL.

in the City's decision to award the towing contract to AutoReturn. AutoReturn's bid proposal was almost entirely based on its proposed use of LETS/TMS. ACT submitted **[*108]** evidence that AutoReturn represented to the City during the bidding process that AutoReturn's ARIES platform was then comprised of LETS and TMS, that AutoReturn would use LETS/TMS to manage tows under the contract, and that LETS/TMS was already in place and being used by the SDPD. The fact that AutoReturn's proposed use LETS/TMS software was essentially the centerpiece of its proposal raises a reasonable inference that the software was a substantial factor in the City's decision to award AutoReturn the towing contract. The fact that the City ranked ACT's proposal second to AutoReturn's supports a reasonable inference that the City likely would have awarded ACT the contract if AutoReturn had not included LETS/TMS in its proposal.

Further, a "Consensus Technical Evaluation Form-Summary" prepared by the City's Technical Evaluation Committee (the committee) noted AutoReturn's use of a "Dispatch Tow System" as a component of AIRIES and gave AutoReturn's proposal an "Exceptional" rating because "AutoReturn offers a fully comprehensive, all inclusive suite of services that will allow the City of San Diego to migrate their current system seamlessly with little or no impact to the current business **[*109]** operation." The committee's evaluation further stated that AutoReturn's proven experience and expertise "combined with the system capabilities provided by the DTS . . . software platform will fulfill all the requirements to provide the communication and administrative services the City of San Diego requires." The evaluation concluded with the statement that "[t]he integration of LETS/TMS, DTS and the ARIES full-feature solutions will meet and exceed the City Dispatch Towing Services RFP requirements." Another bidder whose proposal was rated acceptable but not exceptional proposed to use software other than LETS and integrate it with TMS. The committee rated this proposal as marginal, stating: "If the TMS system is not available from the other vendor it would require this vendor to develop and integrate a new system to replace its functions. *This may cause of action a delay in implementation and/or unknown additional costs to the City*." (Italics added.) It is reasonable to infer from this statement that the City may not have awarded the contract to AutoReturn if AutoReturn's proposal indicated it would have to develop a new software platform to replace LETS/TMS's functions in its ARIES software. **[*110]** The committee's evaluations raise a triable issue of fact as to whether AutoReturn's use of LETS/TMS in its proposal was a substantial factor in the City's decision to award the contract to AutoReturn.

III. *Summary Adjudication of ACT's 18th Cause of Action for Misappropriation of Trade Secrets and Ruling That It Supersedes the Seventh Cause of Action*

As noted, the court granted AutoReturn's motion for summary adjudication as to ACT's 18th cause of action for misappropriation of trade secrets even though ACT voluntarily dismissed that cause of action without prejudice the same day it filed its opposition to AutoReturn's motion for summary judgment. In the same order, the court ruled that ACT's seventh cause of action for unfair business practices in violation of the UCL was "superseded by the CUTSA as a matter of law." On appeal, ACT challenges the court's jurisdiction to summarily adjudicate the 18th cause of action and rule that it supersedes the seventh cause of action.

We conclude that the court lacked jurisdiction to summarily adjudicate ACT's 18th cause of action after ACT voluntarily dismissed it. Code of Civil Procedure section 581, subdivision (c) provides that "[a] plaintiff may dismiss his or her complaint, or any cause of action **[*111]** asserted in it, in its entirety, or as to any defendant or defendants, with or without prejudice prior to the actual commencement of trial." In ruling that it could properly adjudicate ACT's 18th cause of action despite ACT's having voluntarily dismissed it, the trial court cited Cravens v. State Bd. of Equalization (1997) 52 Cal.App.4th 253, 257, 60 Cal. Rptr. 2d 436 (*Cravens*), in which the Court of Appeal decided the trial court had properly ruled on a motion for summary judgment where the plaintiff had not filed opposition to the motion and voluntarily dismissed the action the day before the hearing on the motion. The *Cravens* court stated: "[R]espondents' moving papers met their burden of negating appellant's claims, entitling them to judgment as a matter of law if no issues of disputed fact were raised. Appellant failed to file opposition within the requisite time. At that point, entry of summary judgment in favor of respondents became a formality which appellant could not avoid by the stratagem of filing a last minute request for dismissal without prejudice." (*Ibid.*)

Cravens is distinguishable from the present case, which is more analogous to Zapanta v. Universal Care, Inc. (2003) 107 Cal.App.4th 1167, 132 Cal. Rptr. 2d 842 (*Zapanta*). The plaintiffs in *Zapanta* filed a request to dismiss their medical malpractice lawsuit without prejudice one day before their **[*112]** opposition to the defendants' motion for summary judgment was due. (*Id. at p. 1169*.) The trial court struck the plaintiffs' request for dismissal and granted defendants' summary judgment motion on the merits. (*Id. at pp. 1170-1171*.) The *Zapanta* court reversed the judgment, concluding that the plaintiffs' request for dismissal was valid and that the trial court exceeded its jurisdiction in granting the defendant's motion for summary judgment. (*Id. at pp. 1171, 1174*.)

The *Zapanta* court distinguished *Cravens*, noting that the plaintiff in *Cravens* filed a request for dismissal one day before the summary judgment hearing and that the defendants had no notice of the dismissal and appeared at the hearing. (*Zapanta, supra, 107 Cal.App.4th at p. 1172*.) The *Zapanta* court stated: "By contrast, appellants here did not fail to file opposition to the summary judgment motion; *they filed their request for dismissal prior to their deadline for filing opposition to the summary judgment motion*, albeit by only one day. Under these circumstances, it cannot be said that judgment on the motion was a mere formality, thus distinguishing this case from *Cravens*." (*Id. at pp. 1172-1173*, some italics added.) The *Zapanta* court concluded: "At the time appellants filed their request for dismissal, the opposition to the summary judgment **[*113]** motion was not past due, no hearing on the motion had been held and no tentative ruling or other decision tantamount to an adjudication had been made in respondents' favor. In other words, the case had not yet reached a stage where a final disposition was a mere formality." (*Id. at pp. 1173-1174*.)

Similar to the situation in *Zapanta*, when ACT filed its request to dismiss its 18th cause of action there had been no hearing on AutoReturn's motion for summary adjudication of the cause of action, there was no tentative decision in AutoReturn's favor on the motion, and it cannot be said a final disposition of the cause of action was a mere formality. Accordingly, the court lacked jurisdiction to summarily adjudicate the 18th cause of action.[26]

We conclude that ACT's voluntary dismissal of the 18th cause of action also deprived the court of jurisdiction to rule, post-dismissal, that ACT's seventh cause of action was superseded under the CUTSA by the dismissed 18th cause of action. "A plaintiff's voluntary dismissal of his action has the effect of an absolute withdrawal of his claim and leaves the defendant as though he had never been a party. . . . '[I]t is a well-settled proposition of law that where the plaintiff has filed a voluntary dismissal of an action . . . , the court is without jurisdiction to act further [citations], and any subsequent orders of the court are simply void.'" (*Paniagua v. Orange County Fire Authority (2007) 149 Cal.App.4th 83, 89, 56 Cal. Rptr. 3d 746*; *Harris v. Billings (1993) 16 Cal.App.4th 1396, 1405, 20 Cal. Rptr. 2d 718* [after a voluntary dismissal of an action under *Code of Civil Procedure section 581* the trial court lacks jurisdiction to act further in the action except to award **[*115]** costs and statutory attorney fees].) Accordingly, at the time it ruled on AutoReturn's motion for summary judgment, the court lacked jurisdiction to rule that the dismissed 18th cause of action superseded the seventh cause of action.

Further, we conclude that if ACT had not voluntarily dismissed its 18th cause of action, it would not supersede its seventh cause of action. "CUTSA provides the exclusive civil remedy for conduct falling within its terms, so as to supersede other [claims and] civil remedies 'based upon misappropriation of a trade secret.' (*§ 3426.7, subds. (a)*, *(b)*.)" (*Silvaco Data Systems v. Intel Corp. (2010) 184 Cal.App.4th 210, 236, 238, 109 Cal. Rptr. 3d 27* (*Silvaco*).) The determination of whether a claim is based on misappropriation of a trade secret is largely factual. (*Angelica Textile Services, Inc. v. Park (2013) 220 Cal.App.4th 495, 505, 163 Cal. Rptr. 3d 192*.) The "UTSA by its terms does not displace a contract claim, even if it is based on the misappropriation of a trade secret. (*Civ. Code, § 3426.7, subd. (b)(1)*.) Moreover, UTSA does not displace noncontract claims that, *although related to a trade secret*

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[26] The court also cited *Mary Morgan, Inc. v. Melzark (1996) 49 Cal.App.4th 765, 57 Cal. Rptr. 2d 4*, in which the Court of Appeal decided the plaintiff could not voluntarily dismiss the action without prejudice after the court announced an adverse tentative summary judgment ruling and the summary judgment hearing had commenced and been continued to permit the plaintiff to produce additional opposition evidence (*id. at pp. 768-769*), and *Hartbrodt v. Burke (1996) 42 Cal. App. 4th 168, 49 Cal. Rptr. 2d 562*, in which the Court of Appeal held that a plaintiff could not avoid dismissal of an action as a discovery sanction by voluntarily dismissing **[*114]** the action without prejudice because that "tactic would simply defeat the trial court's power to enforce its discovery orders." (*Id. at pp. 175-176*.) These cases are distinguishable. ACT voluntarily dismissed its 18th cause of action before the trial court issued a tentative ruling on AutoReturn motion for summary judgment and the dismissal did not implicate the court's power to enforce discovery orders through a terminating sanction.

misappropriation, are independent and based on facts distinct from the facts that support the misappropriation claim." (*Angelica, at p. 506*, italics added.)

ACT's seventh cause of action cause of action on its face is based on facts that are distinct from the alleged facts that support ACT's 18th cause of action for **[*116]** misappropriation of trade secrets. The seventh cause of action was included in ACT's original complaint filed in 2009 after the City awarded AutoReturn the towing contract but before AutoReturn decided not to use LETS/TMS and develop its own software to replace it. The factual basis of the seventh cause of action is AutoReturn's alleged infringement of ACT's exclusive license to use LETS/TMS in San Diego County—i.e., the City's award of the towing contract to AutoReturn "based upon AutoReturn's wrongful inclusion of LETS and TMS software platforms in response to the 2008 RFP and in disregard of ACT's exclusive license to use . . . LETS and TMS software products in San Diego County . . . ." The seventh cause of action contains no reference to a trade secret and is in no way dependent on whether any aspect of LETS/TMS is a trade secret. Thus, it is not a claim "'based upon misappropriation of a trade secret.'" (*Silvaco, supra, 184 Cal.App.4th at p. 238*.)

In contrast, ACT's 18th cause of action for misappropriation of trade secrets is based on allegations that ACT maintained the LETS/TMS programs "as confidential, proprietary, and exclusively licensed trade secrets . . . under passworded lock and key," and that AutoReturn acquired **[*117]** ACT's "confidential, proprietary and trade secret information and trade secrets through improper means[,]" and used and allowed "non-licensed third parties" to use that information to unfairly compete with ACT in violation of its exclusive license. In short, the seventh cause of action is based on alleged infringement of an exclusive license to use software; the 18th cause of action is based on alleged misappropriation of trade secrets contained within the software. Although ACT's seventh cause of action is related to the 18th cause of action, each cause of action is based on distinct facts. Thus, the 18th cause of action does not preempt or supersede the seventh cause of action. The court erred in summarily adjudicating ACT's seventh cause of action in AutoReturn's favor.

IV. *Summary Adjudication of ACT's Eighth Cause of Action for Intentional Interference with Contractual Relations*

ACT contends the trial court erred in summarily adjudicating ACT'S eighth cause of action of intentional interference with contractual relations. The elements of "a cause of action for intentional interference with contractual relations are (1) a valid contract between plaintiff and a third party; (2) defendant's **[*118]** knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage. [Citations.]' [Citation.] The plaintiff need not allege an actual breach, but only interference with or disruption of his or her contractual relations." (*LiMandri v. Judkins (1997) 52 Cal.App.4th 326, 343-344, 60 Cal. Rptr. 2d 539*.) "'[I]t is not necessary that the defendant's conduct be wrongful apart from the interference with the contract itself. [Citation.] [¶] . . . Intentionally inducing or causing a breach of an existing contract is . . . a wrong in and of itself. . . .'" (*Korea Supply Co. v. Lockheed Martin Corp. (2003) 29 Cal.4th 1134, 1158, 131 Cal. Rptr. 2d 29, 63 P.3d 937* (*Korea Supply*).)

The contract that is the subject of this cause of action against AutoReturn is the Ball contract as amended in 2003—the agreement between DTS and ACT that gave ACT an exclusive license to use DTS's LETS/TMS software in San Diego County. In its eighth cause of action, ACT alleged that AutoReturn interfered with ACT's contractual relations with DTS by entering into negotiations and contractual relationships with DTS for the use of LETS/TMS, using confidential, proprietary and trade secret information regarding LETS/TMS in its bid for the towing contract, **[*119]** and falsely representing to the City that ACT's exclusive rights in LETS/TMS had expired or terminated.

In its motion for summary judgment AutoReturn did not separately address the eighth cause of action; it argued generally that it was entitled to summary adjudication of ACT's seventh through 13th, 18th, and 21st causes of action because it never used DTS's software in San Diego and ACT could not establish a causal connection between AutoReturn alleged use of DTS's software and ACT's loss of the towing contract. The trial court ruled: "AutoReturn is entitled to summary adjudication of ACT'S counts #7-14, 18, and 21 because AutoReturn did not interfere with ACT's alleged exclusive license given that AutoReturn never used LETS/TMS. Further, AutoReturn is entitled to summary judgment/adjudication of these same claims because the undisputed facts show that AutoReturn's mentioning of LETS/TMS in its proposal did not cause ACT any harm."

In considering whether AutoReturn could be held liable for inducing a breach of this contract or disrupting the contractual relationship between DTS and ACT, it is important to focus on the contract's relevant terms. The subject agreement (2003 amendment) **[*120]** provided that in the event ACT's contract with the City was extended past its expiration date of December 31, 2004, DTS was "strictly prohibited from *entering into any communications or negotiations with the City . . .* ***or any other person*** *relating to operational or dispatching/communications without first obtaining prior written consent from* [*ACT's*] *president or other authorized representative*." (Italics & boldface added.) The 2003 amendment provided that DTS granted ACT "and its members an irrevocable license for the exclusive use in San Diego County, California, of the TMS software, including, but not limited to, any related software and/or updates or revisions thereto." The 2003 amendment also provided that "*DTS shall refrain from offering any similar or competing service to any person operating a tow company or engaged in tow and/or related services within* [*San Diego County*], including, but not limited to . . . the City, and/or any third party tow company." (Italics added.)

The emphasized language shows that, contrary to the trial court and AutoReturn's reasoning, ACT did not have to present evidence that AutoReturn used DTS's software in San Diego County for DTS to be held liable **[*121]** for breaching its contract with ACT. Regardless of whether AutoReturn "used" LETS/TMS, the evidence shows that DTS committed acts in connection with AutoReturn's bid for the City towing contract that breached the terms of its contract with ACT. DTS cooperated with AutoReturn in AutoReturn's bid preparation without obtaining prior written consent from ACT as the contract required. As noted *ante*, AutoReturn wanted to use LETS/TMS in its bid proposal to avoid incurring additional expenses and having to retrain its employees on different software. DTS's management agreed to work with AutoReturn on its bid proposal despite knowing and communicating to AutoReturn that ACT would take issue with DTS's licensing LETS/TMS to AutoReturn for use in San Diego. DTS's CEO Estes later informed AutoReturn that ACT claimed an exclusive license to use LETS/TMS in San Diego but Estes and DTS's management assured AutoReturn that the exclusive license was invalid and unenforceable. Given that assurance, AutoReturn submitted a bid proposal to the City that was based on its proposed use of LETS/TMS. The relationship between DTS and AutoReturn soured only after AutoReturn decided not to not use LETS/TMS in **[*122]** performing the city contract because of ACT's exclusive license claim.

Thus, there is sufficient evidence to support a claim that AutoReturn induced DTS to breach the provision in its agreement with ACT that "strictly prohibited" it "from entering into any communications or negotiations with . . . any . . . person relating to operational or dispatching/communications without first obtaining prior written consent from [ACT's] president or other authorized representative." The evidence regarding DTS and AutoReturn's working together on AutoReturn's bid for the towing contract also violates the spirit, if not the letter, of the contract provision prohibiting DTS "from offering any similar or competing service to any person operating a tow company or engaged in tow and/or related services within [San Diego County], including, but not limited to . . . the City, and/or any third party tow company."[27]

A trier of fact could reasonably find that AutoReturn induced DTS to breach or disrupt its exclusive license agreement with ACT by cooperating and working closely with AutoReturn on AutoReturn's bid to the City, which was based on AutoReturn's proposed use of DTS's LETS/TMS. DTS's communication and cooperation with AutoReturn regarding AutoReturn's use of LETS/TMS in its bid evidences both DTS's breach of its contract with ACT and AutoReturn's inducement of the breach and disruption of DTS and ACT's contractual relationship. Regarding causation and damages, as we discussed in connection with ACT's seventh cause of action for unfair business practices, there is sufficient evidence to raise a triable issue of fact as to whether AutoReturn's use of LETS/TMS in its bid was a substantial factor in the City's decision to award AutoReturn the towing contract, and whether ACT would have won the contract if AutoReturn had not used LETS/TMS in its bid. The court erred in granting AutoReturn's motion for summary adjudication of the eighth cause of action.

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[27] The only reason it may not violate the letter of that provision is that AutoReturn was not yet engaged in towing related services in San Diego County when DTS helped it with its bid. In any event, regardless of whether DTS actually breached that provision, a trier of fact could reasonably view AutoReturn's **[*123]** working with DTS to prepare a bid based on its proposed use LETS/TMS as a disruption of DTS's contractual relationship with ACT.

V. *Summary Adjudication **[*124]** of ACT's Eighth Cause of Action for Intentional Interference with Prospective Economic Advantage*

The elements of the tort of intentional interference with prospective economic advantage "are usually stated as follows: '"(1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant."'" (*Korea Supply, supra, 29 Cal.4th at p. 1153*.) "[A] plaintiff seeking to recover for alleged interference with prospective economic relations has the burden of pleading and proving that the defendant's interference was wrongful 'by some measure beyond the fact of the interference itself.'" (*Della Penna v. Toyota Motor Sales, U.S.A., Inc. (1995) 11 Cal.4th 376, 392-393, 45 Cal. Rptr. 2d 436, 902 P.2d 740*.) Although intentional interference with prospective economic advantage and intentional interference with contract are distinct torts, a plaintiff may be able to state causes of action for both torts. (*Korea Supply, supra, 29 Cal.4th at p. 1157*.)

ACT alleged in its ninth cause of action that AutoReturn intentionally interfered with ACT's "actual and prospective **[*125]** economic relationships with the City" by engaging in the same conduct alleged in its eighth cause of action for intentional interference contractual relations—i.e., by entering into negotiations and contractual relationships with DTS for the use of LETS/TMS, using confidential, proprietary and trade secret information regarding LETS/TMS in its bid for the towing contract, and falsely representing to the City that ACT's exclusive rights in LETS/TMS had expired or terminated. As noted, AutoReturn sought summary adjudication of both the eighth and ninth causes of action on the grounds it never used DTS's software in San Diego and ACT could not establish a causal connection between AutoReturn alleged use of DTS's software and ACT's loss of the towing contract.

The trial court in its order granting AutoReturn's motion for summary judgment on ACT's fourth amended complaint did not separately address ACT's ninth cause of action for intentional interference with prospective economic advantage. As noted *ante*, the order states that "AutoReturn is entitled to summary adjudication on ACT'S counts #7-14, 18, and 21 because AutoReturn did not interfere with ACT's alleged exclusive license given that **[*126]** AutoReturn never used LETS/TMS. Further, AutoReturn is entitled to summary judgment/adjudication of these same claims because the undisputed facts show that AutoReturn's mentioning of LETS/TMS in its proposal did not cause ACT any harm."[28]

The evidence that AutoReturn intentionally interfered with ACT's exclusive license to use LETS/TMS in San Diego County by using LETS/TMS in its proposal for the City's towing contract and that, as a result, ACT lost the future economic benefit it would have realized by continuing its contractual relationship with the City is sufficient to defeat AutoReturn's motion for summary adjudication of ACT's ninth cause of action for intentional interference with prospective economic advantage. For purposes of summary adjudication, ACT satisfied the requirement of showing **[*127]** independently wrongful conduct by presenting sufficient evidence to raise a triable issue of fact as to whether AutoReturn falsely represented to the City that it had legal access to and the right to use LETS/TMS in its prospective performance of the City's towing contract, and whether AutoReturn induced DTS to breach its exclusive license contract with ACT by working with AutoReturn to include LETS/TMS in AutoReturn's bid proposal. We reiterate that the evidence raises a triable issue of fact as to whether AutoReturn's use of LETS/TMS in its bid was a substantial factor in the City's decision to award AutoReturn the towing contract, and whether ACT would have won the contract if AutoReturn had not used LETS/TMS in its bid. Accordingly, the court erred in granting AutoReturn's motion for summary adjudication of ACT's ninth cause of action.

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[28] Through inadvertence or clerical error, the summary judgment order referred to ACT's 10th cause of action for "Imposition of Constructive Trust" and 11th cause of action for "Equitable Lien" as ACT's eighth and ninth causes of action, respectively, stating: "ACT's counts 8 and 9 alleging a constructive trust or equitable lien fail as a matter of law as each is a remedy and not a cause[] of action."

AUTORETURN AND THE CITY'S APPEAL

I. *Trial Court's Jurisdiction to Consider AutoReturn's Request for Attorney Fees Against ACT Under Section 3426.4*

AutoReturn's contention that the court erred in ruling it lacked jurisdiction to consider AutoReturn's request for attorney fees under section 3426.4 against ACT has merit.[29] The court found that "ACT's and DTS's decision to drag City **[*128]** and AutoReturn into the case was made without any admissible evidence (as opposed to rumor, suspicion, and speculation) of any wrongdoing by City and AutoReturn, and was thus objectively unreasonable and in bad faith." However, the court denied AutoReturn's motion for attorney fees under section 3426.4 as to ACT on the ground it lacked jurisdiction to award fees because ACT had dismissed its trade secret cause of action.

As noted, after a voluntary dismissal of an action under Code of Civil Procedure section 581 the trial court lacks jurisdiction to act further in the action *except to award costs and statutory attorney fees* ***[*129]*** . (Harris v. Billings, supra, 16 Cal.App.4th at p. 1405.) Section 3426.4 provides, in relevant part: "If a claim of misappropriation is made in bad faith . . . the court may award reasonable attorney's fees and costs to the prevailing party."

It is clear under case law that a defendant to a claim for misappropriation of trade secrets may be deemed a prevailing party under section 3426.4 when the plaintiff voluntarily dismisses the claim. In SASCO v. Rosendin Electric, Inc. (2012) 207 Cal.App.4th 837, 143 Cal. Rptr. 3d 828, a former employer sued form employees and a competitor for misappropriation of trade secrets and other causes of action. (Id. at pp. 840-841.) After the defendants filed a motion for summary judgment the plaintiff dismissed its action, including a cause of action for misappropriation of trade secrets, without having filed opposition to the summary judgment motion. (Id. at p. 842.) Defendants then successfully moved for attorney fees and costs under section 3426.4. (Id. at pp. 842-843.) On appeal the plaintiff challenged the trial court's ruling that its trade secret claim was objectively specious, but did not challenge the court's finding that the defendants were prevailing parties under section 3426.4. (Id. at p. 845.) The Court of Appeal affirmed the award of fees and costs. (Id. at p. 849.)

In *Cypress*, the plaintiff voluntarily dismissed its action for misappropriation of trade secrets and the Court of Appeal upheld the trial **[*130]** court's finding that the defendants were prevailing parties under section 3426.4. (Cypress, supra, 236 Cal.App.4th at p. 253.) The Court of Appeal observed that "[a] statute predicating an entitlement to fees solely or predominantly on status as the prevailing party will inevitably raise the question of why a party achieving only an arguable or equivocal victory should be permitted to recoup fees from an opponent. The analogous question here is why a party who has made a trade secret claim in bad faith should be permitted to inflict the costs of defense on his or her opponent. Given the manifest legislative intention to avoid such impositions, [section 3426.4] would seem to warrant a liberal construction of 'prevailing party,' trusting in the 'bad faith' requirement to filter out doubtful cases." (Id. at p. 254.)

Thus, ACT's voluntary dismissal of its cause of action for misappropriation of trade secrets did not deprive the court of jurisdiction to award AutoReturn attorney fees under section 3426.4 against ACT. We will remand the matter to the trial court to reconsider AutoReturn's motion for attorney fees and costs against ACT under section 3426.4.

II. *Denial of AutoReturn's Request for an Award of Expert Witness Fees Against DTS*

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[29] Although AutoReturn's notice of motion for attorney fees identifies the moving parties as both AutoReturn and the City, their argument heading regarding fees under section 3426.4 states that ACT and DTS "must compensate AutoReturn for attorney fees spent in response to trade secret claims brought in bad faith under . . . [section] 3426.4." (Capitalization omitted.) AutoReturn and the City's briefs in this appeal argue only that the court erred in not awarding attorney fees under section 3426.4 to AutoReturn against ACT. We view this challenge to the court's denial of fees against ACT to be limited to the denial as to AutoReturn only, and not as to the City.

AutoReturn contends that under section 3426.4, the court erred in denying it **[*131]** $36,500 in costs it paid for the services of Dr. Howard Cohen, a software engineering expert that AutoReturn retained.[30] As noted, section 3426.4 provides that recoverable costs under that statute "shall include a reasonable sum to cover the services of expert witnesses, who are not regular employees of any party, actually incurred and reasonably necessary in either, or both, preparation for trial or arbitration, or during trial or arbitration, of the case by the prevailing party." AutoReturn contends that under this language, an award of the fees it paid Cohen was mandatory.

AutoReturn did not request recovery of Cohen's fees in its motion for attorney fees and costs under section 3426.4; it listed Cohen's fees as a cost under "Other" on its memorandum of costs. DTS challenged AutoReturn request for Cohen's fees in a motion to tax AutoReturn's costs. DTS argued that the $55,246.66 in total costs that AutoReturn requested in its memorandum of costs, including $36,050.00 for Cohen's services, should be reduced to $10,182.42. Regarding Cohen's fees, DTS argued: "There does not appear to be a reasonable basis for Defendants **[*132]** to have spent $36,000 on a computer expert in this case. However, without a breakdown of the time the expert purportedly spent on the case, it is impossible for DTS to provide further comment."

In its opposition to DTS's motion to tax costs, AutoReturn represented that Cohen "spent over 100 hours on this case reviewing pleadings and other case materials, reading hundreds of pages of documents produced by DTS, learning the ins-and-outs of both AutoReturn's and DTS's software platforms, conducting a five-day extensive review of DTS's software in August 2012, and preparing an expert report for trial." The court granted DTS's request to reduce AutoReturn's costs and awarded AutoReturn costs of $10,182.42. The court did not explain the reduction other than stating that it found DTS's "attack justified to the extent reflected [in DTS's memorandum of points and authorities in support of its motion to tax costs]."

"If the items appearing in a cost bill appear to be proper charges, the burden is on the party seeking to tax costs to show that were not reasonable or necessary. On the other hand, if the items are properly objected to, they are put in issue and the burden of proof is on the party **[*133]** claiming them as costs. [Citations.] Whether a cost item was reasonably necessary to the litigation presents a question of fact for the trial court and its decision is reviewed for abuse of discretion." (*Ladas v. California State Auto. Assn. (1993) 19 Cal. App. 4th 761, 774, 23 Cal. Rptr. 2d 810*.)

"[T]he mere filing of a motion to tax costs may be a 'proper objection' to an item, the necessity of which appears doubtful, or which does not appear to be proper on its face. [Citation.] However, '[i]f the items appear to be proper charges the verified memorandum is prima facie evidence that the costs, expenses and services therein listed were necessarily incurred by the defendant [citations], and the burden of showing that an item is not properly chargeable or is unreasonable is upon the [objecting party].'" (*Nelson v. Anderson (1999) 72 Cal.App.4th 111, 131, 84 Cal. Rptr. 2d 753*.)

We conclude the court did not abuse its discretion in denying AutoReturn Cohen's expert fees as costs. DTS's objection to Cohen's fees designated as "other" costs was proper because the necessity of that item was doubtful—i.e., the necessity was unclear on the face of the cost memorandum. Thus, the burden of proving the cost was proper or reasonably necessary fell on AutoReturn.

The trial court could reasonably find that AutoReturn failed to meet its burden of proving Cohen's services **[*134]** were reasonably necessary in the preparation for trial under section 3426.4. Cohen's declarations filed in opposition to DTS's motion to tax costs and support of AutoReturn's motion for summary judgment against DTS indicate Cohen was retained as a consultant. He was not deposed as an expert designated to testify at trial. Cohen's declaration showed he performed the vast majority of his work on the case after AutoReturn and the City filed their motion for summary judgment in June 2012 and while the hearing on that motion was pending. The court could reasonably find that it was not reasonably necessary for AutoReturn to incur substantial expert fees before any expert depositions had been set and while its summary judgment motion was pending, especially considering Orion's prior success in moving for summary adjudication of DTS's trade secret claim. DTS points out that AutoReturn cited one paragraph of Cohen's declaration in its separate statement of material facts, and the court did

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[30] In the trial court, AutoReturn sought expert fees for Cohen's services in the amount of $36,050.

not rely on Cohen's declaration in granting AutoReturn and the City's motion for summary judgment. The court's conclusion that Cohen's services were not reasonably necessary for trial preparation under *section 3426.4* did not exceed **[*135]** the bounds of reason under "'all of the circumstances before it being considered.'" (*Denham v. Superior Court (1970) 2 Cal.3d 557, 566, 86 Cal. Rptr. 65, 468 P.2d 193*.)

ORION'S APPEAL

I. *Denial of Attorney Fees Incurred by Orion's Texas Counsel*

Orion contends the court erred in denying attorney fees incurred by its Texas counsel as part of the fee award to Orion under *section 3426.4*. In its motion for attorney fees under *section 3426.4*, the total amount Orion requested ($138,631.49) included "the fees and costs charged to Orion by its longtime lawyers in Dallas ($45,536.82)." As summarized by Orion, Texas counsel's "activities included participating in strategy discussions, providing information and documents to California counsel, and reviewing pleadings and submissions to the California court that were prepared by California counsel." In its opposition to Orion's motion, DTS argued the fees sought by Orion's Texas counsel were not compensable because Texas counsel was not licensed to practice law in California and Orion "utterly failed to explain how their efforts were necessary and not duplicative of the work that was also performed by the attorneys of record in San Diego."

The trial court ruled as follows on Orion's request to recover fees paid to its Texas counsel: "The court declines to **[*136]** award the fees of Texas counsel, as to do so [would] send a message that it is acceptable for lawyers in other states to practice law in California without *pro hac vice* admission and make fee applications after having done so." The court added that *Birbrower, Montalbano, Condon & Frank v. Superior Court (1998) 17 Cal.4th 119, 70 Cal. Rptr. 2d 304, 949 P.2d 1* (*Birbrower*) "suggests this is the safest path."

Business and Professions Code section 6125 provides: "No person shall practice law in California unless the person is an active member of the State Bar." Accordingly, the general rule is that no one may recover compensation for attorney services in California unless the person was a member of the State Bar when the services were performed. (*Birbrower, supra, 17 Cal.4th at p. 136*; *Golba v. Dick's Sporting Goods, Inc. (2015) 238 Cal.App.4th 1251, 1261, 190 Cal. Rptr. 3d 337*.)

In *Birbrower*, attorneys at a New York firm that had no California-licensed attorneys traveled to California on multiple occasions to resolve a contract dispute between their California client and a computer software company. (*Birbrower, supra, 17 Cal.App.4th at pp. 124-125*.) The New York firm filed an arbitration demand against the software company in San Francisco, but the parties settled their dispute before hearings commenced. (*Id. at p. 125*.) The firm's California client later sued the firm for malpractice, and the firm filed a cross-complaint to recover fees under a fee agreement. (*Id. at p. 126*.) The trial court dismissed the firm's claim for fees, ruling that **[*137]** the firm was not authorized to practice law in California. (*Ibid.*) The Court of Appeal agreed and denied the petition for writ of mandate and affirmed the trial court's order. (*Id. at p. 127*.)

The Supreme Court in *Birbrower* concluded that the New York attorneys had engaged in unauthorized practice of law in California and could not recover fees for legal services performed in California for the California client. (*Birbrower, supra, 17 Cal.4th at p. 135*.) However, the *Birbrower* concluded that New York counsel *may* be able to recover fees under a fee agreement with a California client for legal services it performed in New York "*to the extent they did not constitute practicing law in California* . . . ." (*Birbrower, supra, 17 Cal.4th at p. 137*, italics added.) The corollary to that conclusion is that out-of-state counsel may *not* recover fees for legal services performed for a client if those services constitute practicing law in California, regardless of where the services were performed.

The *Birbrower* court noted that case law defines the statutory term "practice law" as ""the doing and performing services in a court of justice in any matter depending therein throughout its various stages and in conformity with the adopted rules of procedure."" (*Birbrower, supra, 17 Cal.4th at p. 128*.) The practice of law also **[*138]** includes "legal advice and legal instrument and contract preparation, whether or not these subjects were rendered in the course of litigation." (*Ibid.*) Although *Business and Professions Code section 6125* does not define what it means to practice law "in California," the *Birbrower* court stated that "the practice of law 'in California' entails sufficient contact with a California client to render the nature of the legal service a clear legal representation. . . . The primary inquiry is whether the unlicensed lawyer engaged in sufficient activities in the state, or created a continuing relationship with the California client that included legal duties and obligations." (*Birbrower, at p. 128*.)

The *Birbrower* court explained that its definition of the practice of law "in California" "does not necessarily depend on or require the unlicensed lawyer's physical presence in the state. Physical presence [in California] is one factor [courts] may consider in deciding whether the unlicensed lawyer has violated [*Business and Professions Code] section 6125*, but it is by no means exclusive. For example, one may practice law in the state in violation of [*Business and Professions Code] section 6125* although not physically present here by advising a California client on California law in connection with a California legal dispute by telephone, fax, **[*139]** computer, or other modern technological means." (*Birbrower, supra, 17 Cal.4th at pp. 128-129*.) However, the *Birbrower* court rejected "the notion that a person *automatically* practices law 'in California' whenever that person practices California law anywhere or 'virtually' enters the state by telephone, fax, e-mail, or satellite." (*Ibid.*) The Supreme Court concluded that courts "must decide each case on its individual facts." (*Ibid.*)

We conclude that the trial court properly denied Orion recovery of the fees its Texas counsel incurred because the services that Texas counsel performed constitute the practice of law in California. The services for which Orion seeks compensation unquestionably constitute a "clear legal representation" arising from a continuing relationship that included legal duties and obligations. (*Birbrower, supra, 17 Cal.4th at p. 128*.) The question is whether with respect to this case, Orion is properly viewed as a "California client" despite the fact it is a Texas corporation. We recognize that for purposes of determining whether the provision of legal services constitutes practicing law in California, the Court of Appeal in *Estate of Condon (1998) 65 Cal.App.4th 1138, 76 Cal. Rptr. 2d 922* defined "California client" as a client "that either resides in or has its principle place of business in California." **[*140]** (*Id. at p. 1145*.) We believe, however, that it may be appropriate to view an out-of-state entity involved in litigation in California arising from the entity's activities in California as a California client with respect to legal services provided to the entity in connection with the California litigation. The purpose of *Business and Professions Code section 6125* is to protect California citizens from incompetent attorneys who are not trained, examined, and licensed to provide representation and legal advice in California. (*Birbrower, supra, 17 Cal.4th at p. 132*; *Condon, supra, 65 Cal.App.4th at p. 1146*.) We see no reason why an out-of-state person or entity with sufficient contacts with California to be sued in California is any less deserving of the protection from unauthorized practice of law in California than a California citizen.

Although Orion is a Texas corporation, for purposes of *Business and Professions Code section 6125* and with respect to the instant litigation, we view Orion as a California client because it was sued in California under California law for alleged wrongdoing arising from business activities it conducted in California. Accordingly, Orion's Texas counsel's services in connection with this case constituted the practice of law in California because they entailed sufficient contact with a California client to render the nature of **[*141]** the legal service a clear legal representation, and Texas counsel undisputedly had a continuing relationship with Orion that included legal duties and obligations. (*Birbrower, supra, 17 Cal.4th at p. 128*.)

To the extent Orion's Texas counsel performed services for Orion that did not require them to be licensed in California or obtain *pro hac vice* status, the services are not compensable under *section 3426.4*. *Birbrower* is distinguishable from the present case because the out-of-state law firm in *Birbrower* sought fees under its fee agreement with the client, whereas Orion seeks fees against DTS as a sanction under a fee-shifting statute. An award of attorney fees under a fee-shifting statute like *section 3426.4* authorizes compensation only for attorney services reasonably necessary to the conduct of the litigation. (*Code Civ. Proc., § 1033.5, subdivision (c)(2)* & *(5)*; *Robertson v. Fleetwood Travel Trailers of California, Inc. (2006) 144 Cal.App.4th 785, 817-818, 50 Cal. Rptr. 3d 731* [prevailing party seeking attorney fees under *section 1794* of the Song-Beverly Consumer Warranty Act has the burden of showing the fees incurred were reasonably necessary to the conduct of the litigation].) Attorney services that are reasonably necessary to the prosecution or defense of a California action necessarily require California licensure. (See *Cal. Rules of Court, rule 9.48(f)* [permitting out-of-state attorney under certain conditions "to provide legal assistance or **[*142]** legal services concerning only a transaction or other nonlitigation matter"].) Accordingly, any services that Orion's Texas counsel provided in connection with the instant litigation were either not reasonably necessary to the conduct of the litigation or required *pro hac vice* status to be compensable. The court did not err in denying Orion recovery of attorney fees incurred by its Texas counsel.

DISPOSITION

The portion of the amended judgment entered on February 28, 2013, dismissing DTS's second amended cross-complaint with prejudice as to Orion, DeLatte, and the City and entering judgment in their favor is affirmed. The portion of the amended judgment, dismissing DTS's second amended cross-complaint with prejudice as to AutoReturn and entering judgment in AutoReturn's favor is reversed. The portion of the September 24, 2012 order granting AutoReturn's motion for summary judgment or, alternatively, summary adjudication of the fifth and six causes of action of DTS's second amended cross-complaint is vacated. The court is directed to enter a new order denying the motion for summary judgment as to AutoReturn, denying the motion for summary adjudication as to the fifth cause of action, **[*143]** and granting the motion for summary adjudication as to the sixth cause of action.

The portion of the amended judgment in favor of AutoReturn on ACT's fourth amended complaint based on the court's granting of AutoReturn's motion for summary judgment is reversed. The portion of the June 8, 2012 order granting AutoReturn's motion for summary judgment or, alternatively, summary adjudication of the seventh through 14th, 18th, and 21st causes of action of ACT's fourth amended complaint is vacated. The court is directed to enter a new order denying the motion for summary judgment and motion for summary adjudication as to the seventh, eighth, and ninth causes of action of action and the voluntarily dismissed 18th cause of action, and granting the motion for summary adjudication as to the 10th through 14th causes of action and 21st cause of action.

The portion of the September 24, 2012 order granting Orion's motion for attorney fees and costs against DTS under *section 3426.4* is affirmed and the portion of the amended judgment awarding those fees and costs is affirmed. The portion of the December 31, 2012 order granting the City and AutoReturn's motion for attorney fees under *section 3426.4* as to DTS is affirmed and the **[*144]** portion of the amended judgment awarding those fees is affirmed. The portion of the December 31, 2012 order denying AutoReturn's motion for attorney fees and costs under *section 3426.4* as to ACT is reversed with directions to reconsider the motion as to ACT light of the views expressed in this opinion. The portion of the May 10, 2013 order granting in part DTS's motion to tax costs and reducing the City and AutoReturn's claimed costs to $10,182.41 is affirmed.

The portion of the July 6, 2012 order denying DTS's motion to file documents under seal; the portion of the September 4, 2012 order denying DTS's motions filed on June 29, 2012, to file documents under seal; the September 13, 2012 order denying DTS's ex parte application to file documents under seal; and the December 18, 2012 order denying DTS's ex parte application file to seal documents under seal are reversed. The court is directed to enter an order granting DTS's requests to file documents under seal under *section 3426.5*.

In all other respects the amended judgment is affirmed. The City is awarded its costs on appeal against DTS. ACT is awarded its costs on appeal against AutoReturn. The parties shall otherwise bear their own costs on appeal.

NARES, Acting **[*145]** P. J.

WE CONCUR:

McDONALD, J.

IRION, J.

GreenCycle Paint, Inc. v. PaintCare, Inc.

United States District Court for the Northern District of California

April 8, 2016, Decided; April 8, 2016, Filed

Case No. 15-cv-04059-MEJ

Reporter
2016 U.S. Dist. LEXIS 47960 *

GREENCYCLE PAINT, INC., Plaintiff, v. PAINTCARE, INC., et al., Defendants.

Subsequent History: Motion granted by, in part, Motion denied by, in part, Dismissed by, in part, Motion denied by, As moot *GreenCycle Paint, Inc. v. PaintCare, Inc., 250 F. Supp. 3d 438, 2017 U.S. Dist. LEXIS 55314 (N.D. Cal., Apr. 11, 2017)*

Motion granted by, Costs and fees proceeding at, Request denied by *GreenCycle Paint, Inc. v. PaintCare, Inc., 2018 U.S. Dist. LEXIS 44735 (N.D. Cal., Mar. 19, 2018)*

Core Terms

paint, allegations, recycling, Defendants', antitrust, hauler, Cartwright Act, conspiracy, quotation, latex paint, consumers, unfair, prong, competitors, unfair competition, leave to amend, asserts, post-consumer, alleged facts, processor, contends, audit, restraint of trade, motion to dismiss, fraud claim, particularity, Additionally, manufactured, marketplace, defraud

Counsel: **[*1]** For GreenCycle Paint, Inc., Plaintiff: Greggory C. Brandt, LEAD ATTORNEY, Wendel, Rosen, Black & Dean LLP, Oakland, CA.

For PaintCare, Inc., Defendant: Thomas Edward Wallerstein, LEAD ATTORNEY, Cody Scott Lonning, Kimberly Irene Culp, Venable LLP, San Francisco, CA; Eric Gordon Lasker, PRO HAC VICE, Hollingsworth LLP, Washington, DC.

For Clean Harbors Environmental Services, Inc., Defendant: Katherine Anna Scott-Smith, LEAD ATTORNEY, Thomas Michael Downey, BURNHAM BROWN, Oakland, CA; Eugene Sok Lee, Burnham Brown, LLP, Oakland, CA.

For Stericycle Environmental Solutions, Inc., Defendant: Raymond J. Etcheverry, LEAD ATTORNEY, PRO HAC VICE, Parsons, Behle & Latimer, Salt Lake City, UT; Cory D. Sinclair, PRO HAC VICE, Parsons Behle Latimer, Salt Lake City, UT; Matthew Schechter, McManis Faulkner, San Jose, CA.

Judges: MARIA-ELENA JAMES, United States Magistrate Judge.

Opinion by: MARIA-ELENA JAMES

Opinion

ORDER GRANTING MOTIONS TO DISMISS WITH LEAVE TO AMEND

Re: Dkt. Nos. 25 & 26

INTRODUCTION

Pending before the Court are (1) Defendant Clean Harbors Environmental Services, Inc.'s ("Clean Harbors") Motion to Dismiss and (2) Defendant PaintCare, Inc.'s ("PaintCare") Motion to Dismiss, both pursuant to *Federal Rule of Civil Procedure ("Rule") 12(b)(6)* and joined by Defendant **[*2]** Stericycle Environmental Solutions ("Stericycle"). Dkt. No. 25 (Clean Harbors Mot.); Dkt. No. 26 (PaintCare Mot.); Dkt. No. 28 (Stericycle Joinder to Mots.). Plaintiff GreenCycle Paint, Inc. ("Plaintiff") filed an Opposition (Dkt. No. 35), and Defendants filed Replies (PaintCare Reply, Dkt. No. 38; Clean Harbors Reply, Dkt. No. 36; Stericycle Joinder to Replies, Dkt. No. 39). Having considered the parties' positions, relevant legal authority, and the record in this case, the Court **GRANTS** Defendants' Motions **WITH LEAVE TO AMEND** as discussed below.

BACKGROUND

PaintCare is a non-profit created by the American Coatings Association, which is comprised of companies that manufacture and sell paint. Compl. ¶ 2, Dkt. No. 1-1. It is the only stewardship organization[1] in California approved to implement California's Architectural Paint Recovery Program, *Cal. Pub. Res. Code § 48700, et seq.* (the "Program"). *Id.* ¶¶ 7-8. California developed the Program to reduce the generation of leftover paint, promote its reuse and recycling, and properly manage unwanted leftover paint. *Id.* ¶ 7. PaintCare is the only stewardship organization that submitted a paint stewardship plan to CalRecycle, the state agency responsible for overseeing the Program, **[*3]** to implement a paint recovery program. *Id.* ¶ 8. PaintCare works with the other named Defendants, Clean Harbors and Stericycle, who transport post-consumer paint collected under the Program. *Id.* ¶ 13. The Complaint refers to Clean Harbors and Stericycle as "haulers" for the Program. *Id.*

Plaintiff GreenCycle was founded in 2012 and was both a processor and manufacturer of latex paint. *Id.* ¶ 11. It had a latex paint recycling facility that opened in September 2012, in Oakland, California. *Id.* ¶¶ 11, 15. Prior to its opening, Plaintiff's Chief Executive Officer, Alan Beilke, entered into discussions with PaintCare about participating in the Program as a latex paint processor. *Id.* ¶¶ 12-14. PaintCare introduced Plaintiff to Stericycle and Clean Harbors and advised Plaintiff to go through these haulers to facilitate receipt of paint under the Program. *Id.* ¶ 13. Plaintiff was ready to receive and start recycling paint in November 2012. *Id.* ¶ 15.

Over the next 3 years, Plaintiff tried to get approval from Clean Harbors **[*4]** and Stericycle to begin recycling paint. *Id.* ¶¶ 14-25. During that time, Mr. Beilke attempted to arrange audits, which Stericycle and Clean Harbors told Plaintiff were required before it could receive any used paint under the Program. *Id.* ¶ 14. Plaintiff alleges PaintCare told it that the haulers needed to provide Plaintiff with approval but meanwhile Clean Harbors told Plaintiff to get approval from PaintCare. *Id.* ¶¶ 13-14. Eventually, in April 2014, Stericycle approved Plaintiff as a recycler for used latex paint hauled by Stericycle, but over the following 8 months after obtaining approval, Plaintiff did not receive any used paint from Stericycle or any other hauler under the Program. *Id.* ¶ 19. In January 2015 and then March 2015, however, Plaintiff did receive two truckloads of paint under the Program, but was ultimately forced to shut down in April 2015 "after realizing that it was not going to receive paint[.]" *Id.* ¶ 25.

According to Plaintiff, "although PaintCare represented that it was not involved in determining the recyclers that received shipments of paint under the PaintCare program from the only two haulers, PaintCare was in fact conspiring with the haulers to unfairly **[*5]** and illegally exclude GreenCycle from the market." *Id.* ¶ 22. Plaintiff alleges it is not alone in being excluded from this market by the Defendants, noting that another used paint processor in Dixon, California was likewise told it would never receive paint from PaintCare. *Id.* ¶ 23. Thus Plaintiff alleges Defendants entered into an agreement "to prevent additional recycling facilities from entering the market[,]"

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[1] A "'[s]tewardship organization' means a nonprofit organization created by the [architectural paint] manufacturers to implement the architectural paint stewardship program described in ***Section 48703***." ***Cal. Pub. Res. Code § 48701(h)***.

and instead "shipped used latex paint to facilities they owned and/or controlled[.]" *Id.* ¶¶ 30, 31. Plaintiff alleges it lost profits and was forced to shut down as a result of Defendants' actions. *Id.* ¶ 31.

Plaintiff filed this action in the Superior Court of California, County of Alameda, on August 3, 2015, alleging claims for (1) unfair competition against Defendants;[2] (2) aiding and abetting unfair competition against Stericycle and Clean Harbors; (3) a violation of California's Cartwright Act; and (4) fraud. Compl. ¶¶ 29-48. Clean Harbors subsequently removed this action to this Court on the basis of diversity on September 4, 2015. Dkt. No. 1. All Defendants now challenge Plaintiff's Complaint, contending Plaintiff is unable to state a claim against them.

LEGAL STANDARD

Rule 8(a) requires that a complaint contain a "short and plain statement of the claim showing that the pleader is entitled to relief." *Fed. R. Civ. P. 8(a)(2)*. A complaint must therefore provide a defendant with "fair notice" of the claims against it and the grounds for relief. *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (internal quotations and citation omitted).

A court may dismiss a complaint under *Rule 12(b)(6)* when it does not contain enough facts to state a claim to relief that is plausible on its face. *Id. at 570*. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (quoting *Twombly, 550 U.S. at 557*). "While a complaint attacked by a *Rule 12(b)(6)* motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more **[*7]** than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level." *Twombly, 550 U.S. at 555* (internal citations and parentheticals omitted).

In considering a motion to dismiss, a court must accept all of the plaintiff's allegations as true and construe them in the light most favorable to the plaintiff. *Id. at 550*; *Erickson v. Pardus, 551 U.S. 89, 93-94, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007)*; *Vasquez v. L.A. County, 487 F.3d 1246, 1249 (9th Cir. 2007)*. In addition, courts may consider documents attached to the complaint. *Parks Sch. of Bus., Inc. v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995)* (citation omitted).

If a *Rule 12(b)(6)* motion is granted, the "court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." *Lopez v. Smith, 203 F.3d 1122, 1127 (9th Cir. 2000)* (en banc) (internal quotations and citations omitted). However, the Court may deny leave to amend for a number of reasons, including "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [and] futility of amendment." *Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003)* (citing *Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962)*).

DISCUSSION

Defendants challenge all four of Plaintiff's claims. First, PaintCare argues **[*8]** Plaintiff's claims are barred by the Safe Harbor Provision of Public Resources Code *section 48706*, which it contends protects it from Plaintiff's UCL

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[2] Although the Complaint **[*6]** does not identify Plaintiff's unfair competition claim as one made under California's Unfair Competition Law ("UCL"), *California Business and Professions Code section 17200*, the parties appear to be in agreement that the UCL is the statute that forms the basis this claim.

and Cartwright Act claims. PaintCare Mot. at 6-7. Neither Stericycle nor Clean Harbors suggest they are protected under the Safe Harbor Provision[3] but instead attack Plaintiff's claims on their merits. PaintCare likewise challenges the separate claims and the supporting allegations.

As an initial matter, no court, neither state nor federal, has previously considered this particular Safe Harbor Provision or interpreted its limitations or exceptions. The parties did not submit any legislative history or other materials to assist the Court in considering the provision's applicability in this instance. In any event, as noted below, the Court has not found that Plaintiff presently states a claim for either its Cartwright Act or UCL claims. Accordingly, the Court does not reach the issue of whether the Safe Harbor Provision applies; however, as described below, the Court has granted Plaintiff leave to amend its claims. Accordingly, should Plaintiff choose to amend, in the next round **[*9]** of briefing the Court expects the parties to provide more legislative history and other materials about this Safe Harbor Provision that may assist the Court in interpreting the statute.

The Court now addresses Defendants' challenges to Plaintiff's individual claims.

A. Cartwright Act Claim

Defendants seek dismissal of Plaintiff's claim under California's Cartwright Act, which makes unlawful any agreements having the effect of restraining trade. *Cal. Bus. & Prof. Code §§ 16720, et seq.* The Cartwright Act makes unlawful a "trust," defined as a combination of capital, skill, or acts by two or more persons or businesses to restrict trade, limit production, increase or fix prices, or prevent competition. *Cal. Bus. & Prof. Code §§ 16702*, *16720 et seq.* The California Supreme Court has stated that the purpose of the Cartwright Act is to prevent any action which "has as its *purpose* or *effect* an unreasonable restraint of trade." *Corwin v. L.A. Newspaper Serv. Bureau, Inc., 22 Cal. 3d 302, 314, 148 Cal. Rptr. 918, 583 P.2d 777 (1978)* (emphasis in original) (citations omitted); *Theme Promotions, Inc. v. News Am. Mktg. FSI, 546 F.3d 991, 1000 (9th Cir. 2008)* (recognizing same).

Defendants oppose Plaintiff's Cartwright Act claim by contending, among other things, that there are alternative, innocent explanations for the actions listed in Plaintiff's Complaint and that Plaintiff has made conclusory allegations that fall short of showing an antitrust violation. *See* ***[*10]*** PaintCare Mot. 8-12; Clean Harbors Mot. at 6. Plaintiff, in turn, contends it "has pleaded with particularity the existence of an agreement between the defendants to exclude GreenCycle from receiving shipments of paint under the Architectural Paint Recovery Program." Opp'n at 7. According to Plaintiff, "[t]he complaint sufficiently alleges a group boycott involving GreenCycle's competitors, which is a per se violation of the Cartwright Act." *Id.* But additionally, Plaintiff notes the Complaint also alleges a *vertical* restraint of trade claim[4] under the Cartwright Act, noting "even if the court were to ignore the fact that the defendant-haulers also operate facilities that receive and process post-consumer paint under the Program, the allegations show an attempt by entities that operated at different levels of distribution to restrain trade." *Id.* at 9. Plaintiff asserts "defendants sought to limit competition in order to suppress the amount of paint in the marketplace, which competes with newly manufactured paint supplied by the members of the American Coatings Association, the entity behind PaintCare." *Id.* (citing Compl. ¶¶ 2, 40).

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[3] Stericycle explicitly notes that provision does "not apply to Stericycle." Stericycle Joinder at 1-2.

[4] ***Antitrust law*** differentiates between vertical and horizontal price **[*11]** restraints. "Restraints imposed by agreement between competitors have traditionally been denominated as horizontal restraints, and those imposed by agreement between firms at different levels of distribution as vertical restraints." *Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 730, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988)* (footnote omitted). With limited exceptions, horizontal agreements are *per se* unlawful, whereas vertical restraints are unlawful only if an assessment of market effects, known as the "rule of reason" analysis, reveals they unreasonably restrain trade. *See* *Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 886, 907, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007)* (citations omitted); *see also* *McGlinchy v. Shell Chem. Co., 845 F.2d 802, 811 n.3 (9th Cir. 1988)* (recognizing that generally "[t]he per se analysis is applied to practices that are presumptively illegal, such as. . . *group boycotts* and concerted refusals to deal . . . ." (emphasis added; citations omitted)).

As the Ninth Circuit has recognized, "[t]he analysis under [the Cartwright Act] mirrors the analysis under federal law because [it] was modeled after the Sherman Act." Cty. of Tuolumne v. Sonora Cmty. Hosp., 236 F.3d 1148, 1160 (9th Cir. 2001) (citations omitted); Name.Space, Inc. v. Internet Corp. for Assigned Names & Numbers, 795 F.3d 1124, 1131 n.5 (9th Cir. 2015) ("Because analysis under the Cartwright Act is identical to that under the Sherman Act, we also affirm the district court's dismissal of the Cartwright Act claim."). Accordingly, "California courts" demand a "high degree of particularity in the pleading of Cartwright Act violations." **[*12]** Facebook Inc. v. Power Ventures, Inc., 2009 U.S. Dist. LEXIS 103662, 2009 WL 3429568, at *2 (N.D. Cal. Oct. 22, 2009) (quotation omitted) (discussing and applying *Twombly* to Cartwright claims). "It is not enough merely to include conclusory allegations that certain actions were the result of a conspiracy; the plaintiff must allege facts that make the conclusion plausible." Name.Space, 795 F.3d at 1129 (citing Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1047-48 (9th Cir. 2008)). "This standard does not impose a 'probability requirement,' but 'simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.'" *Id.* (quoting Twombly, 550 U.S. at 556).

As such, "Cartwright Act claims are properly dismissed 'where the complaint makes conclusory allegations of a combination and does not allege with factual particularity that separate entities maintaining separate and independent interests combined for the purpose to restrain trade.'" In re Netflix Antitrust Litig., 506 F. Supp. 2d 308, 320 (N.D. Cal. 2007) (quoting Freeman v. San Diego Assn. of Realtors, 77 Cal. App. 4th 171, 189, 91 Cal. Rptr. 2d 534 (1999)). Among other things, when faced with two possible explanations for a defendant's behavior, a plaintiff cannot offer allegations that are "merely consistent with" their favored explanation but are also consistent with the defendant's alternative explanation. *In re Century Aluminum Co. Sec. Litig., 729 F.3d 1104, 1108 (9th Cir. 2013)* (citing Iqbal, 556 U.S. at 678). "Something more is needed, such as facts tending to exclude the possibility that the alternative explanation is true, . . . in order to render plaintiffs' allegations **[*13]** plausible within the meaning of *Iqbal* and *Twombly*." *Id.* But where a plaintiff's allegations are stuck in "neutral territory," i.e., they do not tend to exclude the innocent explanation, such allegations fall short of what *Iqbal* and *Twombly* require. *See id. at 1108-10* (affirming dismissal of Securities Act claim where plaintiffs' allegations were "merely consistent with both their explanation and the defendants' competing explanation"); *see also* Gonzalez v. Planned Parenthood of L.A., 759 F.3d 1112, 1116 (9th Cir. 2014), *cert. denied sub nom. Gonzalez v. Planned Parenthood of L.A., Cal., 135 S. Ct. 2313, 191 L. Ed. 2d 1001 (2015)* (affirming dismissal where plaintiff's allegation that defendant knowingly submitted false claims was only "merely *possible* rather than plausible," and could not overcome the plausible and obvious explanation that defendant did not knowingly submit false claims (quotation omitted; emphasis in original)); Eclectic Props. E., LLC v. Marcus & Millichap Co., 751 F.3d 990, 996 (9th Cir. 2014) (explaining that courts "must consider" "obvious alternative explanation[s]" for a defendant's behavior when analyzing plausibility); Somers v. Apple, Inc., 729 F.3d 953, 965 (9th Cir. 2013) (affirming dismissal of antitrust claim in part due to an obvious alternative explanation for music pricing).

Plaintiff assigns a nefarious motive to the fact that Defendants worked very little with Plaintiff since it was established, but this motive and any related agreement are not supported by plausible allegations **[*14]** at this point. First, Plaintiff has not adequately alleged a conspiracy exists. *See* William O. Gilley Enters., Inc. v. Atl. Richfield Co., 588 F.3d 659, 663 (9th Cir. 2009) ("Whether a plaintiff pursues a per se claim or a rule of reason claim . . . , the first requirement is to allege a 'contract, combination in the form of trust or otherwise, or conspiracy.'").[5] Identifying the existence and nature of a conspiracy requires determining whether the evidence "reasonably tends to prove that the [defendant] and others had a conscious commitment to a common scheme designed to achieve an unlawful objective." Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764, 104 S. Ct.

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[5] As indicated in the previous footnote, antitrust plaintiffs may prosecute claims "under one of two theories **[*15]** of liability." Solyndra Residual Tr., by & through Neilson v. Suntech Power Holdings Co., 62 F. Supp. 3d 1027, 1039 (N.D. Cal. 2014). "First, under the rule of reason," where "the factfinder 'weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.'" *Id.* (quoting Leegin Creative Leather Prods, 551 U.S. at 885). "Second, antitrust plaintiffs can allege that a restraint is illegal per se because it is 'so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality.'" *Id.* (quoting National Soc. of Professional Engineers v. United States, 435 U.S. 679, 692, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978)).

1464, 79 L. Ed. 2d 775 (1984) (internal quotation marks omitted). Parallel action is not, by itself, sufficient to prove the existence of a conspiracy; such behavior could be the result of "coincidence, independent responses to common stimuli, or mere interdependence unaided by an advance understanding among the parties." *Twombly, 550 U.S. at 556 n.4* (internal quotation marks omitted). On a motion to dismiss, a plaintiff's complaint must provide "plausible grounds to infer an agreement[,]" which "simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Id. at 556; 564*.

Plaintiff has alleged that Defendants formed a conspiracy through a group boycott to exclude competitors, including Plaintiff, from the market. Opp'n at 7. But Plaintiff has not plausibility alleged that it competed with Defendants. While Plaintiff alleges the hauler Defendants and Plaintiff were competitors, the closest it comes to supporting this claim is the allegation the hauler Defendants "shipped used latex paint to facilities they owned and/or controlled[.]" Compl. ¶ 31. But Defendants undermine this motive by submitting judicially noticeable documents showing that none of the hauler Defendants processed latex paint (the only type of paint Plaintiff processed); rather, the hauler **[*16]** Defendants only process oil-based paints. Req. For Judicial Notice ("RJN"), Ex. C at 13, Dkt. No. 26-4; Ex. E at 19, Dkt. No. 26-6.[6] No other facts support that these hauler Defendants and Plaintiff were competitors.

And there are no allegations showing Plaintiff and PaintCare **[*17]** were competitors. PaintCare contends it "has no interest in any recycling facility," PaintCare Reply at 10, and the only allegation Plaintiff provides in support is the statement that "defendants sought to limit competition in order to suppress the amount of paint in the marketplace, which competes with newly manufactured paint supplied by the members of the American Coatings Association, the entity behind PaintCare." *Id.*; Compl. ¶¶ 2, 40. Plaintiff does not explain how this allegation fits with its other arguments, however—particularly as related to the hauler Defendants, whom Plaintiff has alleged wanted to exclude competitors so that they could keep Plaintiff's potential share of the market, which in turn would seem to maintain the amount of recycled paint in the market and likewise create a disincentive for PaintCare to direct business to those haulers—the opposite of what Plaintiff has alleged. Additionally, this allegation lacks plausibility as it appears to run counter to the whole purpose of PaintCare's mission under the Program and for which CalRecycle has selected PaintCare. Perhaps there are more facts Plaintiff can allege to support its claims but at this point Plaintiff's **[*18]** allegations that Defendants competed with Plaintiff and thus formed a conspiracy to exclude Plaintiff from the market lack plausibility.

Even under Plaintiff's second theory that Defendants formed a vertical restraint of trade, its allegations still do not provide enough factual matter for the Court to infer a conspiracy between Defendants. Ultimately, as the Ninth Circuit explained, courts "cannot infer a conspiracy based on speculation that [defendants] must have conspired to restrain trade simply because the system they adopted made it difficult for [the plaintiff] to carry out its business plans." *Name.Space, 795 F.3d at 1131* (footnote omitted). This is particularly true when there have been ongoing relationships with coworkers and where the plaintiff business is comparatively untested. *See id.* ("We cannot infer an illegal agreement with outside interests simply because ICANN's rational business decisions favor the status quo rather than name.space's untested alternative business model.").

Second, and along the same lines, there are potentially innocent explanations for Defendants' conduct. As PaintCare points out, "plaintiff does not allege any facts that would exclude the possibility that the defendants made **[*19]** this decision [not to work with Plaintiff] based upon (1) GreenCycle's lack of any prior experience in

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[6] Pursuant to *Federal Rule of Evidence 201(b)(2)*, PaintCare requests the Court take judicial notice of various documents, including Exhibits C and E, which are PaintCare's Annual Reports from 2013 and 2014 respectively. Dkt. No. 26-1. Plaintiff did not object to PaintCare's request for judicial notice and even relied on these two Annual Reports in its Opposition. *See* Opp'n at 3. The Court has reviewed Exhibits C and E and agrees with PaintCare that it may properly take judicial notice of them as information available in the public record and obtained from government websites. *See* *MGIC Indem. Corp. v. Weisman, 803 F.2d 500, 504 (9th Cir. 1986)* ("On a motion to dismiss, we may take judicial notice of matters of public record outside the pleadings." (citation omitted)); *see also* *Preciado v. Wells Fargo Home Mortg., 2013 U.S. Dist. LEXIS 65835, 2013 WL 1899929, at *3 (N.D. Cal. May 7, 2013)* (taking judicial notice of information available on official government websites). The Court does not rely on the other exhibits for which PaintCare requested judicial notice and as such will not take judicial notice of them at this time.

recycling latex paint, *see* Compl. ¶ 15, and (2) defendants' existing track record of success with the other paint recyclers." PaintCare Mot. at 9-10. Although Plaintiff argues *Name.Space* and related cases requiring consideration of alternative, innocent explanations are inapposite because Plaintiff's Complaint explicitly alleges the existence of a conspiracy, *see* Opp'n at 10, this argument misses the point. Simply providing a conclusory allegation that a conspiracy exists is not enough—there must be plausible factual allegations on which to substantiate such a conspiracy. *Twombly, 550 U.S. at 555* (holding that a threadbare assertion of an unlawful agreement is a "legal conclusion" not entitled to an assumption of truth); *William O. Gilley Enters., 588 F.3d at 659* ("claimants must plead not just ultimate facts (such as a conspiracy), but evidentiary facts" in support of the elements of their claims). Plaintiff's current allegations do not tend to exclude the innocent, competing explanations, rendering its Cartwright Act claim unsustainable.

Finally, Plaintiff's theory of antitrust injury is unclear. "[T]he Cartwright Act, like all antitrust laws, is about **[*20]** the protection of *competition*, not *competitors*." *Asahi Kasei Pharma Corp. v. CoTherix, Inc., 204 Cal. App. 4th 1, 20, 138 Cal. Rptr. 3d 620 (2012)* (internal quotations and citations omitted; emphasis in original). While Plaintiff alleges facts supporting that it suffered injuries personally, it is unclear how Plaintiff alleges Defendants' conduct injured competition. *See* *Brantley v. NBC Universal, Inc., 675 F.3d 1192, 1198 (9th Cir. 2012)* ("[P]laintiffs must plead an injury to competition beyond the impact on the plaintiffs themselves." (citing *McGlinchy, 845 F.2d at 811*)). Plaintiff suggests that because it alleges a group boycott claim, it "does not need to allege market-wide injury to competition." Opp'n at 7. This is not the case. Even if Plaintiff were able to make out a group boycott claim, i.e., a per se antitrust violation, "the antitrust injury requirement applies to cases alleging conduct that is per se unlawful as well as to cases governed by the rule of reason." *Flagship Theatres of Palm Desert, LLC v. Century Theatres, Inc., 198 Cal. App. 4th 1366, 1378, 131 Cal. Rptr. 3d 519 (2011)*, *as modified on denial of reh'g* (Sept. 29, 2011); *see also* *Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 341, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990))* (rejecting "suggestion that no antitrust injury need be shown where a per se violation is involved").

The question then is whether Plaintiff has otherwise articulated a theory of antitrust injury in its Complaint. "Antitrust injury is made up of four elements: '(1) unlawful conduct, (2) causing an injury to the plaintiff, (3) that flows from that which **[*21]** makes the conduct unlawful, and (4) that is of the type the antitrust laws were intended to prevent.'" *Glen Holly Entm't, Inc. v. Tektronix, Inc., 352 F.3d 367, 372 (9th Cir. 2003)* (quotation omitted). The Ninth Circuit has also added a fifth requirement, that the injured party be "a participant in the same market as the alleged malefactors . . . In other words, the party alleging the injury must be either a consumer of the alleged violator's goods or services or a competitor of the alleged violator in the restrained market." *Id.* (quotations omitted). "The antitrust injury requirement ensures that a plaintiff can recover only if the loss stems from a competition-*reducing* aspect or effect of the defendant's behavior." *Flagship Theatres, 198 Cal. App. 4th at 1379* (emphasis in original) (quoting *Atl. Richfield Co., 495 U.S. at 344*). For instance, "[v]ertical agreements that foreclose competitors from entering or competing in a market can injure competition by reducing the competitive threat those competitors would pose." *Id.* Additionally, "[s]ome types of vertical agreements can also injure competition by facilitating horizontal collusion." *Id.*

As noted above, Plaintiff has not alleged plausible allegations that Defendants formed a conspiracy to foreclose Plaintiff from entering the market, and there are no allegations plausibly supporting that Defendants **[*22]** and Plaintiff were competitors, which would give them a motive to restrict Plaintiff's access to the market. Again, the closest Plaintiff comes to alleging facts in support of such an argument is that "defendants sought to limit competition in order to suppress the amount of paint in the marketplace, which competes with newly manufactured paint supplied by the members of the American Coatings Association, the entity behind PaintCare." Opp'n at 9; *see* Compl. ¶¶ 2, 40. But Plaintiff's Complaint lacks adequate factual background to be able to understand how Defendants might have suppressed the amount of paint in the marketplace, or how this theory correlates with Plaintiff's other theory that the hauler Defendants wanted more recycling/processing business for themselves. The Court will not speculate in the face of presently unclear allegations about if and how both of these theories may co-exist. Moreover, there are no facts showing how Plaintiff's presence in the market might have otherwise increased the amount of paint available to consumers. Finally, Plaintiff asserts "defendants increased the cost to consumers through increased transportation costs for recycling and processing paint," **[*23]** Opp'n at 11, but Plaintiff has not explained how consumers interact with Defendants or how Defendants might pass along the costs to consumers.

Even assuming Plaintiff can ultimately allege facts supporting an antitrust violation, Plaintiff must clearly articulate how the violation harms competition and how the system at issue works; it has not done so at this point.

Given the foregoing, the Court cannot find Plaintiff has stated a claim against Defendants for a Cartwright Act claim at this time and dismisses this claim. However, the Court will grant Plaintiff leave to amend so that it may more clearly articulate its antitrust theory and what plausible facts support the elements of its claim. In doing so, Plaintiff should be particularly mindful that "[w]hen considering plausibility, courts must also consider an 'obvious alternative explanation' for defendant's behavior." *Eclectic Props., 751 F.3d at 996* (quotation omitted). Plaintiff may also add its claims for all available relief under the Cartwright Act. *See* Opp'n at 11 (requesting leave to amend to include prayer for treble damages and attorneys' fees).

B. Fraud

Defendants next challenge Plaintiff's fraud claim, contending (1) Plaintiff's claim is not pled with the requisite **[*24]** particularity under *Rule 9(b)*; and (2) Plaintiff has not plausibly alleged Defendants misrepresented a fact or that Plaintiff justifiably relied on any of their purported misrepresentations. PaintCare Mot. at 12-15; Clean Harbors Mot. at 3-5. PaintCare points out that Plaintiff alleges PaintCare told it in April 2012 that there would be enough latex paint such that Plaintiff would have no problem receiving paint under the program. PaintCare Mot. at 13 (citing Compl. ¶ 2). But PaintCare also points out that it made this statement before Plaintiff even built its recycling facility, and furthermore, "[a]s alleged in the Complaint, in every subsequent communication with the plaintiff, PaintCare stated that GreenCycle would not receive shipments of paint unless its recycling facility was approved by the haulers." *Id.* (citing Compl. ¶¶ 13-14, 17-18, 21, 24). PaintCare emphasizes Plaintiff's allegations that PaintCare expressed "a pessimistic view of GreenCycle's chances of obtaining approval from Stericycle." *Id.* at 14 (quoting Compl. ¶ 17). It notes that while Plaintiff may not have believed PaintCare's statements at the time, Plaintiff's "refusal to accept PaintCare's warnings certainly cannot sustain the diametrically **[*25]** opposite argument that PaintCare made promises upon which GreenCycle could justifiably rely." *Id.* Meanwhile, Clean Harbors contends Plaintiff's fraud claim is broadly alleged against all Defendants with little specificity about what representations Clean Harbors made that could constitute fraudulent behavior. Clean Harbors Mot. at 3.

According to Plaintiff, it has alleged multiple specific statements made by Defendants to Plaintiff that "were intended to induce GreenCycle to enter the market for recycling of post-consumer paint." Opp'n at 12 (citing Comp. ¶¶ 12, 14, 18, 21). Plaintiff asserts that at no time did Defendants ever state that they were not going to provide GreenCycle with post-consumer paint, and when Plaintiff inquired about the delays, the haulers pointed to PaintCare and PaintCare pointed to the haulers. *Id.* at 13. As in its antitrust claim, Plaintiff alleges Defendants had agreed to not allow any other recycling facilities to enter the market for post-consumer paint, but that they never informed Plaintiff of this agreement. *Id.*

The elements of fraud in California are: "(1) a misrepresentation (false representation, concealment, or nondisclosure); (2) knowledge of falsity (or **[*26]** scienter); (3) intent to defraud, i.e., to induce reliance; (4) justifiable reliance; and (5) resulting damage." *Robinson Helicopter Co. v. Dana Corp., 34 Cal. 4th 979, 990, 22 Cal. Rptr. 3d 352, 102 P.3d 268 (2004)*. "The intent to defraud may be inferred from a defendant's statements and conduct." *Eclectic Props., 751 F.3d at 997* (citing *United States v. Peters, 962 F.2d 1410, 1414 (9th Cir. 1992))*. "In the absence of direct evidence of intent, the party asserting fraud must first prove 'the existence of a scheme which was reasonably calculated to deceive persons of ordinary prudence and comprehension,' and then, 'by examining the scheme itself' the court may infer a defendant's specific intent to defraud." *Id.* (quoting *United States v. Green, 745 F.2d 1205, 1207 (9th Cir. 1984))*.

Given these elements, the Court agrees with Defendants that there are a variety of deficiencies in Plaintiff's fraud claim as currently pled. The problems are interrelated in that Plaintiff's allegations do not demonstrate justifiable reliance on its part or that Defendants intended to defraud Plaintiff or knew that they were making false statements to Plaintiff when they indicated it could become a processor for recycling latex paint. As pled, the allegations indicate that Plaintiff was aware that there was no promise it would become a processor; rather, the allegations show Plaintiff understood that there was enough business for it to become a processor, **[*27]** but it would have to be approved and audited prior to beginning such operations. But as noted by PaintCare, Plaintiff had not even built its facility—a prerequisite to conducting an audit—when it first began communicating with Defendants. *See* Compl. ¶ 14 (indicating that at the meeting in September 2012 with PaintCare, Clean Harbors, and Stericycle, a Stericycle official told Plaintiff an audit was necessary before Plaintiff could be approved to process paint, which was not possible until its recycling facility was set up). And while Plaintiff finished building the facility in September 2012, according to its own allegations, it was only ready to receive and process paint in November 2012. *Id.* ¶ 15. Defendants' representations about Plaintiff's ability to process paint through the Program were thus contingent on audits of this facility. *See* *Cansino v. Bank of Am., 224 Cal. App. 4th 1462, 1469-71, 169 Cal. Rptr. 3d 619 (2014)* (explaining that predictions as to future events may not be actionable in fraud, particularly where "the future state" of a something is unknown, and "[a]ny future [] forecast must be regarded not as fact but as prediction or speculation").

After opening its facility, Plaintiff vaguely alleges it made "repeated efforts" to obtain paint shipments from **[*28]** Clean Harbors, but it does not allege any specific communications they shared between September 2012, when the facility opened, and August 2014, when Clean Harbors contacted Plaintiff about evaluating its facility. Compl. ¶ 21. There are no allegations that Clean Harbors made any representations to Plaintiff during this period that Plaintiff relied on, and in the August 2014 discussions, Plaintiff merely alleges Clean Harbors told Plaintiff it would send an audit package, but Plaintiff did not receive such a package. *Id.* Plaintiff does not explain how it relied on these representations and was then damaged by them, or that Clean Harbors intended to induce Plaintiff's reliance.

Likewise, while there are more allegations about PaintCare's and Stericycle's communications with Plaintiff, it is still unclear when several of the communications took place, for instance, when PaintCare allegedly expressed a "pessimistic view" to Plaintiff that it would be approved as a processor. *Id.* ¶ 17. Furthermore, Plaintiff asserts Defendants "misrepresented" that it "would receive used latex paint if it met certain requirements[,]" *id.* ¶ 36, but Plaintiff has not alleged facts showing how these statements **[*29]** constitute misrepresentations or that Defendants intended to defraud Plaintiff by making them, particularly when they actually began shipping paint to Plaintiff in early 2015. Finally, it is not clear what motivation Defendants would have had to induce Plaintiff to go through the approval process if they had no intention of working with Plaintiff. Something more is needed to make Plaintiff's allegations plausible and adequate under *Rule 9(b)*. *See* *Fed. R. Civ. P. 9(b)* (requiring "a party . . . state with particularity the circumstances constituting fraud . . . .").

That said, Plaintiff may be able to allege plausible and particular facts to demonstrate Defendants defrauded Plaintiff; accordingly, while the Court dismisses Plaintiff's fraud claim, it does so with leave to amend.

C. Unfair Competition Claims

Defendants also challenge Plaintiff's unfair competition claims on the grounds that Plaintiff has not shown that (1) any of Defendants' conduct was "unlawful" or "fraud" under another statute or law, or (2) that Defendant's conduct was unfair. PaintCare Mot. at 15; Clean Harbors Mot. at 7. Additionally, Clean Harbors asserts that Plaintiff does not have standing to bring a UCL claim against Clean Harbors as it has **[*30]** not shown how it lost money or property as a "direct result" of Clean Harbor's "specific conduct[.]" Clean Harbors Mot. at 6-7.

California's UCL proscribes three types of unfair competition: "practices which are unlawful, unfair or fraudulent." *In re Tobacco II Cases, 46 Cal. 4th 298, 311, 93 Cal. Rptr. 3d 559, 207 P.3d 20 (2009)* (internal quotation marks and citation omitted); *see also* *Cal. Bus. & Prof. Code § 17200* (defining unfair competition to include "any unlawful, unfair or fraudulent business act or practice"). "Each prong of the UCL is a separate and distinct theory of liability," and "an independent basis for relief." *Lozano v. AT&T Wireless Servs., Inc., 504 F.3d 718, 731 (9th Cir. 2007)* (citation omitted).

1. <u>Unlawful Prong</u>

With respect to the UCL's unlawful prong, the California Supreme Court has held: "By proscribing 'any unlawful' business practice, *§ 17200* borrows violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable." *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 20 Cal. 4th 163, 180, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)* (quotations omitted). In other words, claims raised under the UCL's unlawful prong rise or fall with the Court's determination of liability with respect to the underlying violation. *See Krantz v. BT Visual Images, 89 Cal. App. 4th 164, 178, 107 Cal. Rptr. 2d 209 (2001)*. Here, as noted above, the Court has not found that Plaintiff has alleged plausible facts supporting a violation of another law; as such, Plaintiff's UCL claims premised on the "unlawful" **[*31]** prong must be dismissed, but with leave to amend in the event Plaintiff can allege plausible facts to support its antitrust or fraud claim.

2. Unfair Prong

"[W]ith respect to business-competitor cases, to state a claim under the UCL's 'unfair' prong the alleged unfairness must 'be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition.'" *Levitt v. Yelp! Inc., 765 F.3d 1123, 1136 (9th Cir. 2014)* (quoting *Cel-Tech Commc'ns, 20 Cal. 4th at 186-87* (an act or practice is "unfair" under the UCL only if the conduct "threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.")). Additionally, "where the same conduct alleged to be unfair under the UCL is also alleged to be a violation of another law, the UCL claim rises or falls with the other claims." *Hicks v. PGA Tour, Inc., ___ F. Supp. 3d ___, 2016 U.S. Dist. LEXIS 31597, 2016 WL 928728, at *7 (N.D. Cal. Feb. 9, 2016)* (citation omitted). Indeed, California Courts of Appeal have recognized that "[t]o permit a separate inquiry into essentially the same question under the unfair competition law would only invite conflict and uncertainty[.]" *Chavez v. Whirlpool Corp., 93 Cal. App. 4th 363, 375, 113 Cal. Rptr. 2d 175 (2001)*; *Belton v. Comcast Cable Holdings, LLC, 151 Cal. App. 4th 1224, 1240, 60 Cal. Rptr. 3d 631 (2007)* (recognizing same).

Plaintiff appears to contend that Defendants' acts of telling "GreenCycle **[*32]** it would receive post-consumer paint" and leading "it through a lengthy and detailed 'audit process'" while never "intend[ing] to approve GreenCycle" violated the policy or spirit of a law as these acts "violated the stated goals of the Program, increase costs to consumers, increase emissions from additional transportation, result in more paint being dumped in landfills and create an unfair playing field in the post-consumer paint market." Opp'n at 15-16. Additionally, Plaintiff asserts that Defendants' actions "violate the spirit of free competition in the marketplace[,]" noting that "Defendants control the market for post-consumer paint and are not only excluding local recycling options, but are creating a lengthy and unnecessary burden on new business." *Id.* at 16. Plaintiff explains that "PaintCare is the only stewardship organization authorized to administer the used-paint recycling program in California and the other defendants are the only transport companies with which PaintCare contracts." *Id.* at 15. It asserts that PaintCare and the other Defendants' positions of control in the marketplace require specific consideration by the Court under *Cel-Tech. Id.* (citing *Cel-Tech Commc'ns, 20 Cal. 4th at 190*) ("Given L.A. Cellular's government-protected **[*33]** position . . . , the fairness of its below-cost sales of cellular equipment requires careful scrutiny.").

Having carefully reviewed Plaintiff's Complaint, the Court finds Plaintiff's allegations do not provide enough plausible facts to support Plaintiff's UCL claims at this time. First, to the extent Plaintiff's UCL claims overlap with its antitrust and fraud allegations, which the Court has found presently fail to state a claim, the Court agrees with Defendants that under *Chavez v. Whirlpool Corporation*, Plaintiff's UCL claims premised on the "unfair prong" also fail as a matter of law. *See Hicks, 2016 U.S. Dist. LEXIS 31597, 2016 WL 928728, at *7* ("Because the conduct the caddies assert is unfair under the UCL overlaps completely with the allegations the Court has held fails to state a claim for breach of contract, misappropriation of likeness, and antitrust violations, the caddies' UCL claim fails as a matter of law too." (citation omitted)).

Second, the only allegations Plaintiff presents that do not overlap with its antitrust claims are related to allegations that the Program was developed in part to "provide a uniform competitive business environment to all architectural paint manufacturers[,]" Compl. ¶¶ 10, 30 (citing *Cal. Code Regs. tit. 14, § 18950*), and that Defendants **[*34]** "failed to [] meet the statutory and regulatory requirements to promote the reuse of used paint and manage the end-of-life of unused paint in an environmentally sound fashion" by "increase[ing] truck travel and transportation of used latex paint" resulting in "increased emissions, adverse environmental impacts, increased costs for consumers, additional spillage and waste" and "land-based disposal of paint that is otherwise prohibited in California." *Id.* ¶ 31. The problem with these allegations, however, is that they are conclusory and do not clarify which Defendant did what. While Plaintiff has alleged facts showing that it had a difficult time procuring business under the Program, it has not alleged how Defendants' conduct failed to provide a uniform competitive business environment or how specifically they failed to meet the statutory and regulatory requirements. *See* *Scripps Clinic v. Superior Ct., 108 Cal. App. 4th 917, 940, 134 Cal. Rptr. 2d 101 (2003)* (UCL unfair prong claim "must be 'tethered' to specific constitutional, statutory or regulatory provisions." (citations omitted)). Finally, in its Opposition, Plaintiff asserts Defendants "are creating a lengthy and unnecessary burden on new business," Opp'n at 16, but it has alleged no facts demonstrating this to be the case. The **[*35]** only allegation supporting this contention is that Plaintiff dealt with a lengthy process navigating how to obtain business through the program. It appears, however, from judicially noticeable documents, that the Program added new paint recyclers between 2013 and 2014. RJN Exs. C & E. The fact that Plaintiff was not one of them is not enough to plausibly establish Defendants violated the policy or spirit of a law or otherwise harmed competition.

3. Fraudulent Prong

"To establish an unfair competition claim under the fraudulent prong, plaintiffs must show that [the defendant's] representations were false or were likely to have misled 'reasonable consumers.'" *Belton, 151 Cal. App. 4th at 1241* (quotation omitted)). "The standard for finding a likelihood of deception is that of a reasonable consumer who is neither the most vigilant and suspicious of advertising claims nor the most unwary and unsophisticated, but instead is 'the ordinary consumer within the target population.'" *Ehret v. Uber Techs., Inc., 68 F. Supp. 3d 1121, 1137 (N.D. Cal. 2014)* (quotations omitted). As PaintCare points out in its Reply, Plaintiff's fraud claims are primarily premised on alleged misrepresentations Defendants made specifically to Plaintiff—not to consumers. Those claims are not presently viable as addressed **[*36]** above. But Plaintiff also indicates Defendants' actions "misled the general public with regard to the costs and benefits of the Architectural Paint Recovery Program[.]" Compl. ¶ 32. Plaintiff is not clear about which Defendants made what misrepresentations to the public or how specifically they misled consumers regarding the costs of the Program or its benefits. *See* *Fed. R. Civ. P. 9(b)* ("a party must state with particularity the circumstances constituting fraud . . . ."). Without more, it cannot maintain its UCL claims under the fraud prong.

4. Standing

Finally, as to standing, since the passage of Proposition 64 in 2004, a private individual has standing to bring a UCL action only if he or she "has suffered injury in fact and has lost money or property as a result of the unfair competition." *Cal. Bus. & Prof. Code § 17204*. "The phrase 'as a result of' in its plain and ordinary sense means 'caused by' and requires a showing of a causal connection or reliance . . . ." *Kwikset Corp. v. Superior Court, 51 Cal. 4th 310, 326, 120 Cal. Rptr. 3d 741, 246 P.3d 877, 887 (2011)* (citation omitted). Clean Harbors has questioned Plaintiff's standing to bring a UCL claim if Plaintiff cannot show it lost money or property as a result of the Defendants' acts. Clean Harbors Mot. at 6-7. As the nature of Defendants' acts is currently unclear, it is **[*37]** premature to find that Plaintiff cannot allege facts to show how Defendants' conduct caused it to lose money or property. Nonetheless, in granting leave to amend on Plaintiff's UCL claim, the Court urges Plaintiff to plead factual content that allows it to draw the reasonable inference Plaintiff lost money or property as a result of Defendants' acts. *Iqbal, 556 U.S. at 678*; *Twombly, 550 U.S. at 555* ("Factual allegations must be enough to raise a right to relief above the speculative level.").

CONCLUSION

Based on the foregoing analysis, the Court **GRANTS** Defendants' Motions to Dismiss but **WITH LEAVE TO AMEND** on all claims. Plaintiff shall file an amended complaint **by May 6, 2016** or the Clerk of Court will close this case.

IT IS SO ORDERED.

Dated: April 8, 2016

/s/ Maria-Elena James

MARIA-ELENA JAMES

United States Magistrate Judge

Quest Integrity USA, LLC v. A.Hak Indus. Servs. US, LLC

United States District Court for the Western District of Washington

April 8, 2016, Decided; April 8, 2016, Filed

CASE NO. C14-1971RAJ

Reporter
2016 U.S. Dist. LEXIS 120241 *; 2016 WL 4533067

QUEST INTEGRITY USA, LLC, Plaintiff, v. A.HAK INDUSTRIAL SERVICES US, LLC, Defendant.

Prior History: Quest Integrity USA, LLC v. A.Hak Indus. Servs. US, LLC, 2015 U.S. Dist. LEXIS 96397 (W.D. Wash., July 23, 2015)

Core Terms

allegations, counterclaims, inequitable conduct, antitrust, patent, pleaded, amend, monopoly power, monopolization, inspection, furnace, leave to amend, argues, futile, tube

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Judges: Honorable Richard A. Jones, United States District Judge.

Opinion by: Richard A. Jones

Opinion

ORDER **[*2]**

I. INTRODUCTION

This matter comes before the Court on Defendant A.Hak Industrial Services US, LLC's ("Defendant") Motion for Leave to File Amended Answer and Counterclaim. Dkt. # 112. Plaintiff Quest Integrity USA, LLC ("Plaintiff") opposes the Motion and requests oral argument. *See* Dkt. # 120. The Court deems oral argument unnecessary for resolution of the Motion. For the reasons set forth below, the Court **GRANTS** Defendant's Motion.

II. BACKGROUND

The Court has detailed the background of the allegations in this case in other Orders. *See* Dkt. # 81; Dkt. # 123. In short, Plaintiff alleges that Defendant has infringed United States Patent 7,542,874 (the "'874 Patent"), which is entitled "2D and 3D Display System and Method for Furnace Tube Inspection." Compl. ¶ 6. The '874 Patent permits refinery stakeholders to quickly identify problems in furnace tubing without necessarily needing to turn to a trained engineer to interpret "inspection pig" spreadsheets. *See id.* ¶¶ 17, 19-20. Essentially, the '874 Patent permits refinery stakeholders to make actionable decisions on the spot, which was not necessarily possible before. *See id.* ¶ 20.

III. LEGAL STANDARD

Amendment to pleadings is governed by *Federal Rule of Civil Procedure 15(a)*. *Rule 15(a)* "provides that a party's right to amend as a matter of course **[*3]** terminates 21 days after service of a responsive pleading or 21 days after service of a motion under *Rule 12(b)*, *(e)*, or *(f)*, whichever is earlier." *Montz v. Pilgrim Films & Television, Inc., 606 F.3d 1153, 1159 n.1 (9th Cir. 2010)*; *Fed. R. Civ. P. 15(a)(1)(B)*. "In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." *Fed. R. Civ. P. 15(a)(2)*. "In exercising this discretion, a court must be guided by the underlying purpose of *Rule 15* to facilitate a decision on the merits, rather than on the pleadings or technicalities." *Roth v. Garcia Marquez, 942 F.2d 617, 628 (9th Cir. 1991)*; *United States v. Webb, 655 F.2d 977, 979 (9th Cir. 1981)*. Further, the policy of favoring amendments to pleadings should be applied with "extreme liberality." *DCD Programs, Ltd. v. Leighton, 833 F.2d 183, 186 (9th Cir. 1987)*.

Against this extremely liberal standard, the Court may deny leave to amend after considering "the presence of any of four factors: bad faith, undue delay, prejudice to the opposing party, and/or futility." *Owens v. Kaiser Foundation Health Plan, Inc., 244 F.3d 708, 712 (9th Cir. 2001)*. But "[n]ot all of the factors merit equal weight ... it is the consideration of prejudice to the opposing party that carries the greatest weight." *Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003)*. "Absent prejudice, or a strong showing of any of the remaining [] factors, there exists a presumption under *Rule 15(a)* in favor of granting leave to amend." *Id.* The party opposing amendment bears the heavy burden of overcoming this presumption. *DCD Programs, Ltd. v. Leighton, 833 F.2d at 187*.

IV. ANALYSIS [*4]

Defendant seeks leave to amend its Answer to include three counterclaims: (1) a claim for inequitable conduct, (2) a *Walker Process* claim for monopolization under the Sherman Act, and (3) a *Walker Process* claim for attempted monopolization under the Sherman Act. *See* Dkt. # 112 at 2. Plaintiff does not argue that Defendant is seeking to amend in bad faith, has delayed in seeking amendment (though Plaintiff alludes to that possibility), or that amendment would result in prejudice. Instead, Plaintiff argues that Defendant's proposed counterclaims do not satisfy the pleading requirements for those claims — i.e., that they are futile. *See* Dkt. # 120 at 3.

In determining whether leave to amend should be given, a proposed amendment is futile only if the complaint cannot be saved by further amendment. *See* *United States v. Corinthian Colleges, 655 F.3d 984, 995 (9th Cir. 2011)* (quoting *Krainski v. Nev. ex rel. Bd. of Regents of Nev. System of Higher Educ., 616 F.3d 963, 972 (9th Cir. 2010))*. Accordingly, "[l]eave to amend is warranted if the deficiencies can be cured with additional allegations that are 'consistent with the challenged pleading' and that do not contradict the allegations in the original complaint." *Id.* (quoting *Reddy v. Litton Indus., 912 F.2d 291, 296-97 (9th Cir. 1990))*. "A party should be afforded an opportunity to test his claim on the merits rather than on a motion to amend unless it appears beyond doubt that the **[*5]** proposed amended pleading would be subject to dismissal." *Wizards of the Coast LLC v. Cryptozoic Entm't LLC, 309 F.R.D. 645, 654 (W.D. Wash. 2015)* (quoting *Mahone v. Pierce Cty., No. C10-5847 RBL KLS, 2011 U.S. Dist. LEXIS 56115, 2011 WL 2009740, at *2 (W.D. Wash. May 23, 2011)*).

a. Defendant's Proposed Inequitable Conduct Counterclaim

Defendant seeks to amend its Answer to include a counterclaim for inequitable conduct pertaining to the prosecution of the '874 Patent. *See* Dkt. # 112-1 Ex. A ("Prop. Countercl.") ¶¶ 13-49. The proposed counterclaim alleges that individuals before the United States Patent and Trademark Office ("USPTO") violated their duty of candor during the prosecution by failing to disclose certain information.

"Inequitable conduct is an equitable defense to patent infringement that, if proved, bars enforcement of a patent." *Therasense, Inc. v. Becton, Dickinson & Co., 649 F.3d 1276, 1285 (Fed. Cir. 2011)*. "The substantive elements of inequitable conduct are: (1) an individual associated with the filing and prosecution of a patent application made an affirmative misrepresentation of a material fact, failed to disclose material information, or submitted false material information; and (2) the individual did so with a specific intent to deceive the PTO." *Exergen Corp. v. Wal-Mart Stores, Inc., 575 F.3d 1312, 1327 n.3 (Fed. Cir. 2009)* (citing *Star Scientific, Inc. v. R.J. Reynolds Tobacco Co., 537 F.3d 1357, 1365 (Fed. Cir. 2008)*; *Molins PLC v. Textron, Inc., 48 F.3d 1172, 1178, 1181 (Fed. Cir. 1995)*; *37 C.F.R. § 1.56 (2008)*). Inequitable conduct must be pled with particularity under *Federal Rule of Civil Procedure 9(b)*. *Id. at 1326* (quoting *Ferguson Beauregard/Logic Controls, Div. of Dover Res., Inc. v. Mega Sys., LLC, 350 F.3d 1327, 1344 (Fed. Cir. 2003))*.

Plaintiff argues that Defendant **[*6]** has not pleaded these elements with particularity. *See* Dkt. # 120 at 5. The Court disagrees.

Defendant's proposed counterclaim identifies four specific acts of fraud that could constitute the "but-for materiality" required to show inequitable conduct. *See* *Therasense, 649 F.3d at 1291*. Specifically, Defendant alleges that Plaintiff failed to disclose a pre-critical date sale[1] (*see* Prop. Countercl. ¶¶ 19-27), misrepresented certain figures in the '874 Patent specification (*see id.* ¶¶ 28-33), failed to disclose a brochure containing prior art for furnace tube inspection systems ("FTIS") (*see id.* ¶¶ 34-42), and misrepresented the commercial success of the claimed invention (*see id.* ¶¶ 43-49). Defendant further alleges how each of these misrepresentations or omissions could have led the USPTO to disallow the claim. That is enough at this juncture, though Defendant likely will be required to show by clear and convincing evidence that the USPTO would have disallowed "the claim if it had been aware of the undisclosed reference" at some later point.[2] *Therasense, 649 F.3d at 1290-92*.

Plaintiff further argues that Defendant has insufficiently pleaded the scienter requirement of inequitable conduct. *See* Dkt. # 120 at 5. In order to prevail on the specific intent prong, "the accused infringer must prove by clear and convincing evidence that the applicant knew of the reference, knew that it was material, and made a deliberate decision to withhold it." *Therasense, 649 F.3d at 1290*. However, "[b]ecause direct evidence of deceptive intent is rare, a district court may infer intent from indirect and circumstantial evidence." *Id.* (citing *Larson Mfg. Co. of S.D., Inc. v. Aluminart Prods, Ltd., 559 F.3d 1317, 1340 (Fed. Cir. 2009))*.

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[1] The "critical date" refers to *35 U.S.C. § 102*'s on-sale bar. *See* *Hamilton Beach Brands, Inc. v. Sunbeam Prods., Inc., 726 F.3d 1370, 1374-75 (Fed. Cir. 2013)*.

[2] In fact, the allegations explain the "the who, what, when, where, and how" of the inequitable conduct. *See* *Exergen, 575 F.3d at 1329-30*; *see also* *Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003)* (quoting *Cooper v. Pickett, 137 F.3d 616, 627 (9th Cir. 1997))*. Defendant **[*7]** names the specific actors involved in the alleged inequitable conduct (*see* Prop. Countercl. ¶ 17), identifies which claims the withheld references are relevant to (*see* Prop. Countercl. ¶¶ 22-24, 28-29, 36, 40-42) and where the references to material information can be found (*see* Prop. Countercl. ¶¶ 19-21, 26, 32, 35). Moreover, the allegations "identify the particular claim limitations, or combination of claim limitations, that are supposedly absent from the information of record." *See* *Exergen, 575 F.3d at 1329*.

The Court finds that Defendant has sufficiently pleaded scienter. Taken as true, the allegations plausibly suggest that the inventors and others involved in prosecuting the '874 Patent specifically intended **[*8]** to defraud the USPTO by withholding material information regarding prior art and commercial sales. The allegations show how the inventors of the '874 Patent would be aware of the later misrepresentations — at least one of them prepared the Norco Report.[3] Prop. Countercl. ¶ 21. This allegation supports a reasonable inference that they knew of the material omission at the time of the patent application.

Accordingly, the Court finds that the proposed counterclaim for inequitable conduct is sufficiently pleaded.

b. Defendant's Proposed *Walker Process* Antitrust Claims

Defendant also seeks to amend its Answer to include counterclaims for *Walker Process* antitrust claims. Prop. Countercl. ¶¶ 50-66.

"*Walker Process* claims reside at the junction of patent and ***antitrust law***, allowing plaintiffs to 'strip [a patent-holder] of [his] exemption from the antitrust laws' if his patent has been procured by fraud." *Ritz Camera & Image, LLC v. SanDisk Corp., 772 F. Supp. 2d 1100, 1103 (N.D. Cal. 2011)* (quoting *Walker Process Equip., Inc. v. Food Machinery & Chem. Corp., 382 U.S. 172, 177, 86 S. Ct. 347, 15 L. Ed. 2d 247 (1965))*.

To succeed on a claim for *Walker Process* fraud, the antitrust claimant must show:

(1) **[*9]** that the asserted patent was obtained by knowingly and willfully misrepresenting the facts to the PTO;
(2) that the party enforcing the patent was aware of the fraud when bringing suit;
(3) independent and clear evidence of deceptive intent;

(4) a clear showing of reliance, *i.e.*, that the patent would not have issued but for the misrepresentation or omission; and
(5) the necessary additional elements of an underlying violation of the antitrust laws.

In re Netflix Antitrust Litig., 506 F. Supp. 2d 308, 314 (N.D. Cal. 2007) (citing *Nobelpharma AB v. Implant Innovations, Inc., 141 F.3d 1059, 1068-71 (Fed. Cir. 1998))*.

"There are three essential elements to a successful claim of *Section 2* monopolization: (a) the possession of monopoly power in the relevant market; (b) the willful acquisition or maintenance of that power; and (c) causal antitrust injury." *Name.Space, Inc. v. Internet Corp. for Assigned Names & Numbers, 795 F.3d 1124, 1131 (9th Cir. 2015)* (quoting *Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp. LP, 592 F.3d 991, 998 (9th Cir. 2010))*. "[T]o state a claim for attempted monopolization, the plaintiff must allege facts that, if true, will prove: '(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power.'" *Coalition for ICANN Transparency, Inc. v. VeriSign, Inc., 611 F.3d 495, 506 (9th Cir. 2009)* (quoting *Cascade Health Solutions v. PeaceHealth, 515 F.3d 883, 893 (9th Cir. 2008))*.

Plaintiff raises several issues with Defendant's Sherman Act allegations.[4] Plaintiff argues that Defendant has not provided sufficient factual support for its assertion that Plaintiff has monopoly power **[*10]** and maintains a monopoly for furnace inspection services. *See* Dkt. # 120 at 7. Plaintiff further argues that Defendant has not

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[3] The "Norco Report" is a more elegant name for a report describing FTIS tool and software used on March 3-7, 2003 to prepare a report on an examination of a refinery in Norco, Louisiana. *See* Prop. Countercl. ¶ 20.

[4] It is not entirely clear whether Plaintiff contests Defendant's definition of the relevant market. *See* Dkt. # 120 at 9. Although "the validity of the 'relevant market' is typically a factual element rather than a legal element," a complaint may still be dismissed for alleging a facially unsustainable definition for the relevant market. *Newcal Indus., 513 F.3d at 1045*. As Plaintiff rightly notes, Defendant makes little effort to define the relevant market in its allegations. *See* Dkt. # 120 at 9; Prop. Countercl. ¶¶ 52, 60. But Plaintiff also does not present any reason the Court should find this market facially unsustainable. At this juncture, although the relevant market could be better defined (and may yet raise further issues), it is not so insufficient as to deny leave to amend.

provided sufficient factual support for allegations that Plaintiff willfully acquired or maintained the market power in a fraudulent manner. *See id.*

The Court disagrees with Plaintiff's apparent application of the heightened pleading standard under *Federal Rule of Civil Procedure 9(b)* to the non-fraud based *Walker Process* claim elements. Other courts **[*11]** assessing such claims simply apply ordinary pleading standards. *See Ritz Camera, 772 F. Supp. 2d at 1106-1110*; *see also Nalco Co. v. Turner Designs, Inc., No. 13-CV-02727 NC, 2014 U.S. Dist. LEXIS 21362, 2014 WL 645365, at *8-9 (N.D. Cal. Feb. 19, 2014)*. This makes sense as "[t]here is no requirement that these elements of the antitrust claim be pled with specificity." *Newcal Indus., Inc. v. Ikon Office Solution, 513 F.3d 1038, 1045 (9th Cir. 2008)* (citing *Cost Mgmt. Servs., Inc. v. Wash. Nat. Gas Co., 99 F.3d 937, 950 (9th Cir. 1996))*.

Still, Defendant's allegations scarcely go beyond the elements for Sherman Act monopolization. And accordingly, the Court agrees that Defendant's allegations are somewhat insufficient. For example, Defendant summarily alleges that "[Plaintiff] has monopoly power and maintains a monopoly in the market for furnace tube inspection services in the United States." Prop. Countercl. ¶ 54. Similarly, for its attempted *Walker Process* claim, Defendant simply alleges that "[Plaintiff] possesses substantial market power in the market for furnace tube inspection services in the United States, and there is a high likelihood and a dangerous probability that [Plaintiff] will be successful in achieving and maintaining monopoly power in that market." *Id.* ¶ 62. Neither allegation provides the Court with any real basis — such as market share — for finding monopoly power or a dangerous probability that Plaintiff will obtain monopoly power. *See Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1438 (9th Cir. 1995)* (expressing reluctance to apply bright line rule regarding market **[*12]** share, but finding 44 percent share sufficient to support market power in attempted monopolization case); *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc., 627 F.2d 919, 924-25 (9th Cir. 1980)* (suggesting that market share above 65 percent could support a finding of market power and survive motion to dismiss).

With respect to Defendant's allegations of exclusionary conduct, the Court simply notes that "[t]o demonstrate *Walker Process* fraud, a claimant must make higher threshold showings of both materiality and intent than are required to show inequitable conduct." *Dippin' Dots, Inc. v. Mosey, 476 F.3d 1337, 1346-47 (Fed. Cir. 2007)* (citing *Nobelpharma, 141 F.3d at 1070-71*; *C.R. Bard, Inc. v. M3 Sys., Inc., 157 F.3d 1340, 1364 (Fed. Cir. 1988))*. Defendant rests upon the same factual allegations supporting its claim for inequitable conduct for its *Walker Process* claims. That may be problematic beyond the pleading stage, but it suffices to sustain their *Walker Process* claims at this juncture. Furthermore, Defendant's allegations regarding the only other form of exclusionary conduct — using "influence" to revise an industry standard — lack any real specificity. *See* Prop. Countercl. ¶¶ 55, 63. Nevertheless any deficiencies in these allegations could be cured by further amendment.

Finally, it appears that Plaintiff takes issue with Defendant's allegations of antitrust injury. *See* Dkt. # 120 at 9. The Court agrees that as written, **[*13]** Defendant's antitrust injury is vague at best. *See* Prop. Countercl. ¶¶ 57, 66. In any event, however, the Federal Circuit has recently suggested that attorneys' fees may form the basis for antitrust injury and injury-in-fact on a *Walker Process* claim. *See TransWeb, LLC v. 3M Innovative Props. Co., 812 F.3d 1295, 1310 (Fed. Cir. 2016)*. That may be enough to sustain Defendant's claim.

The Court therefore finds that although the proposed *Walker Process* counterclaims are not particularly well pleaded, they are not futile because they could potentially be saved by further amendment.

V. CONCLUSION

The Court finds that Defendant's proposed amendments are not futile, it will permit Defendant leave to amend its Answer to add these new allegations. However, the Court notes that Defendant's proposed *Walker Process* counterclaims face some hurdles and require additional factual support.

Accordingly, the Court **GRANTS** Defendant's Motion for Leave to Amend (Dkt. # 112) and will permit Defendant to file an amended Answer containing the newly proposed counterclaims within **fourteen (14) days of this Order**.

DATED this 8th day of April, 2016.

/s/ Richard A. Jones

The Honorable Richard A. Jones

United States District Court

State v. Au Optronics Corp.

Circuit Court of Cook County, Illinois, County Department, Chancery Division

April 18, 2016, Decided; April 18, 2016, Filed

Case No. 10-CH-34472

Reporter

2016 Ill. Cir. LEXIS 13875 *

THE STATE OF ILLINOIS, by its Attorney General, Lisa Madigan, Plaintiff, v. AU OPTRONICS CORPORATION; AU OPTRONICS CORP. AMERICA, INC.; CHI MEI INNOLUX CORP.; CHI MEI OPTOELECTRONICS CORP. USA, INC.; CMO JAPAN COMPANY, LTD.; EPSON IMAGING DEVICES CORP.; EPSON ELECTRONICS AMERICA, INC.; HITACHI, LTD.; HITACHI DISPLAYS LTD.; HITACHI AMERICA, LTD.; HITACHI ELECTRONIC DEVICES USA, INC.; LG DISPLAY CO., LTD.; LG DISPLAY AMERICA, INC.; SAMSUNG ELECTRONICS CO., LTD.; SAMSUNG SEMICONDUCTOR, INC.; SAMSUNG ELECTRONICS AMERICA INC.; SHARP CORP.; SHARP ELECTRONICS CORP.; TOSHIBA CORP.; TOSHIBA AMERICA ELECTRONIC COMPONENTS, INC.; TOSHIBA MOBILE DISPLAY CO.; and TOSHIBA AMERICA INFORMATION SYSTEMS, INC., Defendants.

Core Terms

purchasers, Defendants', commerce, import, indirect, consumers, domestic, products, direct effect, antitrust, panels, prices, multidistrict litigation, reasonably foreseeable, price-fixing, domestic commerce, overcharges, anti trust law, manufacturers, transactions, instant suit, consumer product, allegations, conspiracy, effects, anticompetitive conduct, foreign commerce, customers, entities, damages

Judges: [*1] Moshe Jacobius, Judge.

Opinion by: Moshe Jacobius

Opinion

MEMORANDUM OPINION AND ORDER

This matter comes before the Court on Defendants' Joint Motion for Partial Summary Judgment on the Attorney General's Foreign Commerce Claims and on the State of Illinois' Motion for Partial Summary Judgment on ***Antitrust Law***'s Domestic-Injury Exception. The Court has reviewed the foregoing motions and the parties' respective memoranda in support thereof ("Df. MSJ" and "Pl. MSJ"), as well as Defendants' Reply in Support of their Motion for Partial Summary Judgment on the Attorney General's Foreign Commerce Claims and Opposition to the Attorney General's Cross Motion ("Df. Reply"), the State of Illinois' Reply for Partial Summary Judgment on ***Antitrust Law***'s Domestic-Injury Exception ("Pl. Reply"), and all accompanying exhibits to the preceding briefs. The Court has also considered the oral arguments of counsels and relevant legal authorities.

Background

The facts of the instant suit recounted here are drawn from prior written opinions of this Court,[1] and from the parties' briefs on the instant motions where specifically cited. In late 2006, the public learned of a price-fixing investigation being conducted by the United States **[*2]** Department of Justice. The investigation centered on allegations that manufacturers of thin-film transistor liquid crystal display ("LCD") panels had held unlawful meetings for the purpose of fixing the prices and output of LCD panels throughout the United States, including in Illinois. The price fixing allegedly occurred between November 30, 1998, and December 11, 2006, during which time the State of Illinois and Illinois consumers purportedly paid artificially inflated prices for LCD panels.

After the investigation became public, a torrent of litigation ensued, with hundreds of civil actions filed in United States district courts throughout the country. To promote the efficient adjudication of those cases, the federal matters were consolidated in the United States District Court for the Northern District of California under the caption *In re: TFT-LCD (Flat Panel) Antitrust Litigation*, Case No. 3:07-MD-1827 SI, MDL No. 1827 (N.D. Gal.) (the "multidistrict litigation"). The Honorable Judge Susan Illston has presided over the multidistrict litigation since 2006, and ultimately certified two class actions therein. The first class consisted of entities that were direct purchasers of **[*3]** LCD panels (e.g., entities that utilize LCD panels as components of other products). The second class consisted of indirect purchasers of LCD panels, specifically individuals and entities that purchased consumer products containing LCD panels (e.g., cellular phones. computer monitors, televisions, and numerous other items). Additionally, various plaintiffs opted out of the two classes and brought cases of their own.

Though many states elected to participate in the multidistrict litigation, the State of Illinois opted to pursue its own action. On August 10, 2010, the Illinois Attorney General (the "Attorney General" or "the State") filed the instant case on behalf of Illinois indirect purchasers of products containing LCD panels.[2] Defendants in the instant suit currently include the AU Optronics Defendants,[3] the Samsung Defendants,[4] and the Toshiba Defendants[5] (collectively, the "Defendants").[6] The Complaint alleges that Defendants violated section 3(1) of the Illinois Antitrust Act (the "IAA") by conspiring to fix prices on LCD panels. The Complaint asserts claims for monetary relief (including treble damages) for injuries allegedly suffered by the State of Illinois, its state agencies, **[*4]** and, in the State's *parens patriae* capacity, Illinois residents (both individuals and businesses) who purchased products containing LCD panels during the period in question. Additionally, the Complaint seeks injunctive relief to undo the effects of Defendants' alleged unlawful conduct.

The Defendants and other alleged co-conspirators who have already settled with the State are variously headquartered in Japan, Korea, or Taiwan. Pl. MSJ at 2. The price-fixing allegations describe a variety of conduct, including price negotiations, price monitoring, and meetings at which prices were coordinated amongst Defendants. Pl. MSJ at 3-8. Some of the conduct is alleged to have taken place in different locations across the United States, and some overseas. Pl. MSJ at 3-8. During the time frame of the alleged conspiracy, approximately 80% of LCDs in

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[1] *See*, e.g., this Court's previously entered May 30, 2012, and November 26, 2013, Orders.

[2] Indirect purchasers include entities that sell products containing LCD panels and the consumers that ultimately buy the products.

[3] Consisting of AU Optronics Corp. and AU Optronics Corp. America, Inc.. The Court notes that both Defendants' Joint Motion for Partial Summary Judgment and the State's Motion for Partial Summary Judgment are *withdrawn as to the AU Optronics Defendants only*, as indicated in the Agreed Order and Stipulation Between the State of Illinois and the AUO Defendants entered by this Court on February 19, 2016.

[4] Consisting of Samsung Electronics Co., Ltd., Samsung Electronics America, Inc., and Samsung Semiconductor, Inc.

[5] Consisting of Toshiba Corp., Toshiba America Electronic Components, Inc., Toshiba Mobile Display Co., and Toshiba America Information Systems, Inc.

[6] Defendants who are named in the State's Complaint but have subsequently settled include the Chi Mei Defendants (Chimei Innolux Corp., Chimei Optoelectronics USA, Inc., and CMO Japan Co., Ltd.), the Epson Defendants (Epson Imaging Devices Corp., and Epson Electronics America, Inc.), the Hitachi Defendants (Hitachi, Ltd., Hitachi Displays, Ltd., Hitachi America, Ltd., and Hitachi Electronic Devices USA, Inc.), the LG Defendants (LG Display Co., Ltd., LG Display American, Inc.), and the Sharp Defendants (Sharp Corp., and Sharp Electronics Corp.).

the global market were produced by Defendants, according to estimates of experts for both the State and Defendants. Pl. MSJ at 2. The LCDs in question were incorporated into consumer products such as televisions, laptops, monitors, and cellular phones. Pl. MSJ at 2. The United States is one of the largest **[*5]** markets for products containing LCDs, a fact well-known to Defendants, whose sales volume for LCDs to the United States exceeded $44 billion between 1998 and 2006. Pl. MSJ at 9-10.

The portion of the cost of a consumer product containing an LCD for which the LCD component accounts varies based on the product type (i.e. laptop or cellphone, etc.). Pl. MSJ at 10. For example, while an LCD accounts for approximately 56% of the cost of a monitor, it accounts for only 9% of the cost of a cellular phone. Pl. MSJ at 10. The State has used pricing and sales figures generated by their experts and Defendants' experts to estimate that the effect of the alleged LCD price-fixing in the United States was about $179 million in overcharges to business and consumers. Pl. MSJ at 10. The State seeks recovery for the portion of such overcharges incurred by it and by residents of the State of Illinois. PL MSJ at 11.

The question presented to the Court in the instant motions for summary judgment is whether the State's claim for such damages can be brought pursuant to *section 5(14) of the IAA*, which provides as follows:

> No provisions of this Act shall be construed to make illegal:
> * * * *
>
> (14) Conduct involving trade or commerce (other **[*6]** than import trade or import commerce) with foreign nations unless:
>
> (a) such conduct has a direct, substantial, and reasonably foreseeable effect:
>
> (i) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
>
> (ii) on export trade or export commerce with foreign nations of a person engaged in such trade or commerce in the United States: and
>
> (b) such effect gives rise to a claim under the provisions of this Act, other than this subsection (14).
>
> (c) If this Act applies to conduct referred to in this subsection (14) only because of the provisions of paragraph (a)(ii), then this Act shall apply to such conduct only for injury to export business in the United States which affects this State[.]

740 ILCS 10/5. The language of the IAA at *section 5(14)* mirrors the language of section 6a of the United States Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA"). *15 U.S.C. § 6a*.[7] As the United States Supreme Court explained in a case called *F. Hoffmann-La Roche Ltd. V. Empagran S.A.*, this provision "excludes from the Sherman Act's reach much anticompetitive conduct that causes only foreign injury . . . by setting forth a general rule [that the Act] 'shall not apply to conduct involving trade or commerce . . . with **[*7]** foreign nations,'" and then creating an exception, "applicable where (roughly speaking) that conduct significantly harms imports, domestic commerce, or American exporters." *542 U.S. 155, 158 (2004)*.

Defendants argue that because the "vast majority" of the State's claims relate to LCDs Defendants sold to foreign purchasers, rather than customers in the United States, those claims "do not arise from restraints on import commerce . . . nor do they arise from a 'direct' effect on [United States] commerce." Df. MSJ at 1-2. Therefore, Defendants say, *section 5(14) of the IAA* does not reach the allegations in the instant suit. On this basis Defendants request the Court to grant summary judgment in their favor on all claims which do not involve direct sales of LCDs by Defendants to customers in the United States.

The State argues that *section 5(14) of the IAA* is identical to FTAIA, and that FTAIA has been interpreted to "reach foreign conduct that has a 'direct, substantial, and reasonably foreseeable effect' on [United States] commerce if that effect gives rise to the plaintiff's claim." Pl. MSJ at 1. The State's claims are based on inflated prices in the United States, which were allegedly caused by Defendants' price-fixing conspiracy, and paid by the State **[*8]** and

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[7] *740 ILCS 10/11* expressly directs Illinois courts to look to federal law for guidance where the wording of the IAA is "identical or similar to that of a federal ***antitrust law***." See discussion on page 9, *infra*.

its residents who purchased products containing LCDs. Pl. MSJ at 1. Therefore, the State says, their claims meet the elements required by section 5(14) of the IAA. On this basis the State requests the Court to find, as a matter of law, that section 5(14) of the IAA is applicable to the allegations against Defendants, and to strike defenses asserted by Defendants based on the same provision.[8]

For reasons fully explained *infra*, the Court finds in favor of the State, and against the Defendants, that section 5(14) of the IAA is applicable to the claims put forth by the State on behalf of itself and its residents. In so finding, the Court makes no determination as to whether the State has ultimately met its burden of proof as to the ultimate merits of the case. The Court instead reaches only the issue raised in the instant cross motions for partial summary judgment: whether the State has successfully plead facts that, if proven, meet the elements required for relief pursuant to section 5(14) of the IAA. In other words, the Court finds that the State has plead facts that, as a matter of law, constitute allegations of an injury to the State and its residents arising out of a direct, substantial and reasonably foreseeable effect of Defendants' conduct on domestic commerce **[*9]** in the United States, and that the State has also alleged such conduct is in violation of section 3(1) of the IAA.

Defendants have also argued in then briefs that the State's claims are barred by the Commerce Clause of the United States Constitution, but this argument has already been addressed in this Court's Memorandum Opinion and Order of January 20, 2016, which granted the State's Motion for Partial Summary Judgment Against the Defendants' Foreign-Conduct Defenses.[9] That argument is therefore moot and will not be further addressed in the instant opinion.

Discussion

Summary judgment is appropriate "if the pleadings, depositions, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c). For the purposes of summary judgment, the court should construe the facts strictly against the movant and liberally in favor of the opponent. Adams v. N. Ill. Gas Co., 211 Ill.2d 32, 43 (2004). A summary judgment proceeding is not used to try an issue of fact, but to determine whether any genuine issue of material fact exists. Happel v. Wal-Mart Stores, 199 Ill.2d 179, 186 (2002). Summary judgment should not be granted unless the right of the moving party is clear and free from doubt. Horwitz v. Holabird & Root, 212 Ill.2d 1, 8 (2004). Partial summary judgment may also be appropriate on discrete **[*10]** issues where "a party moves for a summary determination of one or more, but less than all, of the major issues in the case, and the court finds that there is no genuine issue of material fact as to that issue or those issues," in which case "the court shall thereupon draw an order specifying the major issue or issues that appear without substantial controversy, and directing such further proceedings upon the remaining undetermined issues as are just." 735 ILCS 5/2-1005(d).

The instant cross motions call upon this Court to interpret the meaning of section 5(14) of the IAA. "The cardinal rule of statutory interpretation is to ascertain and give effect to the intent of the legislature." Wolf v. Toolie, 2014 IL App (1st) 132243, ¶ 21 (quoting Krautsack v. Anderson, 223 Ill. 2d 541, 552 (2006)). The language of the statute is the best indication of the legislature's intent and therefore must be given its plain and ordinary meaning. Wolf, 2014 IL App (1st) 132243, ¶ 21 (internal citation omitted). A court should not consider words and phrases in isolation, but instead should interpret each word and phrase in light of the statute as a whole. *Id.* "Each word, clause and sentence of a statute must be given reasonable meaning, if possible, and should not be rendered superfluous." *Id.* (quoting Standard Mutual Insurance Co. v. Lay, 2013 IL 114617, ¶ 26). Statutes should be interpreted as a whole,

[8] Defendants seem to argue in their Reply brief against granting summary judgment in favor of the State on the entire case. Df. Reply at 20-21. The cross-motion by the State presently before the Court requests only partial summary judgment on the issue of whether section 5(14) of the IAA is applicable to the claims alleged *if proven*; it does not ask for summary judgment that they in fact have been proven, and the Court makes no finding at this time on the latter question.

[9] The Defendants' Motion for Partial Summary Judgment that is currently before the Court was filed prior to the Court's ruling on whether the Commerce Clause barred any of the State's claims against Defendants.

"meaning different sections **[*11]** of the same statute should be considered in reference to one another so that they are given harmonious effect." *Wolf, 2014 IL App (1st) 132243, ¶ 21* (quoting *Jayko v. Fraczek, 2012 IL App (1st) 103665, ¶ 14*).

Interpretation of *section 5(14) of the IAA* is a matter of first impression in Illinois. However, ample guidance exists for this Court in the form of federal case law, to which this Court has been instructed by the Illinois General Assembly to look in its interpretation and application of the IAA when a provision of the IAA follows the language of its federal ***antitrust law*** counterpart. *See* *740 ILCS 10/11* (expressly directing Illinois courts to look to federal law for guidance where the wording of the IAA is "identical or similar to that of a federal ***antitrust law***"). As explained *supra*, *section 5(14) of the IAA* is nearly identical to *section 6a of the FTAIA*. *15 U.S.C. § 6a*. Therefore this Court looks to federal case law applying that statute to guide its interpretation of *section 5(14) of the IAA*.

Defendants argue in their brief that FTAIA represents a policy judgment on the part of Congress that United States ***antitrust law*** should not be applied to "foreign commerce" absent specific effects on United States import or domestic commerce. Df. MSJ at 10. Import commerce, Defendants argue, is limited to transactions between foreign sellers and domestic buyers, and thus does not encompass **[*12]** the State's allegations of claims arising from the effect of the Defendants' alleged conduct on the domestic commerce of the United States. Df. MSJ at 11. The State has not alleged that Defendants fixed the prices of consumer products sold in the United States, such as laptops; instead, the State has alleged that Defendants fixed the prices of LCDs that were almost all sold to foreign purchasers, who then integrated those LCDs into consumer products, many of which were eventually purchased in the United States. Df. MSJ at 12.

Such transactions do not constitute import commerce, say Defendants, and neither did the States' purported injury arise out of a "direct, substantial, and reasonably foreseeable effect" of Defendants' alleged conduct on domestic commerce. Df. MSJ at 12. Rather, the LCD panels sold by Defendants to foreign purchasers had a downstream effect on consumers in Illinois that was *indirect*. Df. MSJ at 14. The LCDs in question were "transformed" into components of other products after Defendants sold them to foreign purchasers, and after they passed through multiple intermediaries in the manufacturing and distribution chain, before finally reaching consumers in Illinois. **[*13]** Df. MSJ at 15-18. Defendants insist this is not the type of "direct effect" required by the FTAIA in order for federal ***antitrust law*** to reach conduct involving foreign commerce; therefore the requirements of *section 5(14) of the IAA* are also not met by the State's allegations in the instant suit. Df. MSJ at 19-21.

The State argues that their claims meet all the necessary requirements to pass muster under FTAIA's — and thus the IAA's — standards for conduct involving foreign commerce. Pl. MSJ at 12. They argue that "the undisputed facts show that the Defendants' price-fixing proximately caused higher prices for LCD products in the United States." Pl. MSJ at 13. The fact that there were intermediary purchasers and sellers between Defendants and Illinois consumers, says the State, does not render the effect of the Defendants' alleged conduct on domestic commerce "indirect" Pl. MSJ at 18. The State points to two federal courts that have already determined that the exact same conduct by some of the same entities who are Defendants in the instant suit had a direct effect on consumer prices in the United States. *In re TFT-LCD (Flat Panel) Antitrust Litig., 822 F. Supp. 2d 953, 966 (N.D. Cal. 2011)*; *United States v. Hsiung, 778 F.3d 738 (9th Cir. 2015)*; Pl. MSJ at 18-19. The State argues these cases bar Defendants from re-litigating the issue in the **[*14]** instant suit. Pl. MSJ at 22-24.

In addition to being direct, the State argues that the effect of the Defendants' alleged conduct on domestic commerce was substantial where damages to consumers in the United States exceeded $179 million, and that the effect was reasonably foreseeable where Defendants targeted the United States' market. Pl. MSJ at 25-26. Finally, the State argues that the effect out of which its claims arise is the effect on the United States" market for consumer products containing LCDs — not the foreign market for the LCD components — and that therefore the alleged injury arises out of an effect that was direct, substantial, and reasonably foreseeable, *on domestic commerce*, and not, as Defendants argue, out of a separate effect on foreign commerce. Pl. MSJ at 27-29.

I. Federal Case Law

In order to best comprehend the current interpretation of FTAIA by federal courts, a discussion of the most relevant case law cited by both parties is provided here in chronological order, beginning with a Seventh Circuit case called *Loeb Industries v. Sumitomo Corporation, 306 F.3d 469 (7th Cir. 2002)*. *Loeb* did not deal specifically with FTAIA, but addressed questions of "directness" in the context of an alleged conspiracy to fix prices of copper futures **[*15]** on international exchange markets. *Id. at 474*. Plaintiffs in that case were buyers of actual physical copper, in various forms, who brought claims under federal and state antitrust laws. *Id. at 475*. They alleged that defendants conduct — a series of transactions designed to artificially inflate the prices of copper as a commodity in the futures market — had caused comparable inflation of the price of physical copper; plaintiffs sought damages for the difference in the inflated price of actual copper they had purchased. *Id. at 477-78*.

The claims were dismissed by a federal district court pursuant to the rule from *Illinois Brick*, which states that only direct purchasers from an alleged antitrust violator have a cause of action, and that "those further removed" are not the proper plaintiffs to bring suit. *Id. at 481* (citing *Illinois Brick Co. v. Illinois, 431 U.S. 720, 729 (1977)*). The Seventh Circuit reversed, explaining that "different injuries in distinct markets may be inflicted by a single antitrust conspiracy," and thus more than one set of "differently situated" plaintiffs might be able to raise claims. *Id.* (citing *Blue Shield of Va. V. McCready, 457 U.S. 465, 477 (1982)*). The court explained that plaintiffs were not "indirect purchasers along a supply chain," as in *Illinois Brick*, but instead were operators in a "separate but related" **[*16]** market that was directly impacted by defendants' conduct in the futures market. *Id. at 482*. The harms incurred in the physical copper market by plaintiffs therefore formed "a separate and compensable injury." *Id. at 483* (citing *Sanner v. Board of Trade, 62 F.3d 918, 929 (7th Cir. 1995)*). As a result of *Loeb*, it became clear that *Illinois Brick* is not a total bar to all federal antitrust claims by plaintiffs who did not make a purchase directly from a defendant in an antitrust suit.

In 2004 the United States Supreme Court directly addressed the application of FTAIA for the first time in *F. Hoffmann-La Roche Ltd. V. Empagran S.A. 542 U.S. 155, 158 (2004)*. Plaintiff class members in *Empagran* brought suit against foreign and domestic manufacturers and distributors of vitamins under federal ***antitrust law***, alleging that they had been damaged by a price-fixing conspiracy conducted by defendants. *Id. at 159-60*. Defendants moved for dismissal of claims by foreign purchasers for transactions that occurred entirely outside of the United States; a federal district court granted dismissal and the D.C. Circuit then reversed. *Id. at 160*. The Supreme Court addressed two questions: (1) whether "anticompetitive price-fixing activity that is in significant part foreign, that causes some domestic antitrust injury, and independently causes separate foreign injury," constitutes **[*17]** conduct involving trade or commerce with foreign nations, and thus falls within the FTAIA's general exclusion; and (2) "whether the conduct nonetheless falls within a domestic-injury exception" making the Sherman Act applicable "where the conduct has a 'direct, substantial, and reasonably foreseeable effect' on domestic commerce' [and] 'such effect gives rise to a Sherman Act claim.'" *Id. at 159*.

The Court answered the first question in the affirmative, finding that "the FTAIA's general rule applies where the anticompetitive conduct at issue is foreign." *Id. at 163*. This general rule, the Court explained, places "*all* (nonimport) activity involving foreign commerce outside the Sherman Act's reach." *Id. at 162* (emphasis in original). The Court then answered the second question in the negative, finding that the FTAIA exception, designed to bring certain conduct "back within the Sherman Act's reach *provided that* the conduct *both* . . . sufficiently affects American commerce . . . *and* . . . has an effect of a kind that antitrust taw considers harmful," did not apply. *Id. at 162, 164* (emphasis in original).

The Court reached this conclusion based on the fact that, although the alleged conduct "significantly and adversely affect[ed] both customers outside the United States and customers **[*18]** within the United States . . . the adverse foreign effect [was] independent of any adverse domestic effect." *Id. at 164*. In other words, the specific antitrust injury at issue in the motion to dismiss arose only out of the adverse foreign effect of defendants' alleged conduct. *Id. at 165-66*. The Court specifically acknowledged that "application of our antitrust laws to foreign anticompetitive conduct is . . . reasonable, and . . . consistent with principles of prescriptive comity, insofar as [the antitrust laws] reflect a legislative effort to redress *domestic* antitrust injury that foreign anticompetitive conduct has caused." *Id. at 165* (emphasis in original). *Empagran* thus clarified that the key question with respect to the territorial reach of

FTAIA is not where the alleged anti-competitive conduct of defendants occurred, but whether plaintiff's injury arose from a domestic effect specifically, as opposed to any separate foreign effects.

Application of FTAIA in the specific context of electronic components was addressed in a 2010 multidistrict class action against some of the same defendants to the instant suit regarding different products and separate alleged price-fixing activities. *In re Status Random Access Memory (SRAM) Antitrust Litigation, 2010 U.S. Dist. LEXIS 141968 (N.D. Cal.)* ("*SRAM*"). In *SRAM*, classes **[*19]** of direct and indirect purchasers of certain types of electronic data memory chips, and of electronic devices in which such memory was a component, brought suit against a group of manufacturers pursuant to federal ***antitrust law***. *Id.* at *29. Defendants brought a, motion to dismiss for lack of subject matter jurisdiction, arguing that FTAIA is a jurisdiction-stripping statute and plaintiffs' claims did not fall within the exception. *Id.* at *29, 33. The federal district court was faced with the question of whether the Supreme Court's ruling in *Empagran* had any effect on the Ninth Circuit's previous treatment of FTAIA as a jurisdictional requirement. *Id.* at *34. The Honorable Judge Claudia Wilken decided it did not, and treated FTAIA as jurisdictional.[10] *Id.* at *36.

Judge Wilken found that direct purchaser claims within the class definition met the first prong of FTAIA because "evidence that the SRAM purchases were billed to the United States, and Defendants' targeting of the United States market for SRAM, taken together, establish[ed] a direct, substantial and foreseeable effect on domestic commerce." *Id.* at *43. The second prong was satisfied where overcharges to those direct purchasers **[*20]** "as a result of the alleged conspiracy" specifically gave rise to the antitrust claim. *Id.* at *45. With respect to indirect purchaser claims, the court was not convinced the FTAIA requirements were met, but nevertheless allowed the claims to proceed. *Id.* at *47-48.

The indirect purchaser claims arose out of SRAM, or consumer products containing SRAM, originally sold by defendants to customers in a foreign country and then incorporated into products that were imported into the United States by third parties who subsequently sold such products to indirect purchaser plaintiffs. *Id.* at *46. Plaintiffs argued that their indirect purchases also arose out of a direct domestic effect because defendants had targeted the United States. *Id.* The court stated that their indirect claims would be analyzed under the targeting theory as follows:

> Mere argument that Defendants must have harbored an inchoate hope or intention that their SRAM would reach the United States is insufficient. However, [indirect purchaser plaintiffs] have proffered some evidence from which it could be inferred that Defendants produced certain types of SRAM products specifically designed to be sold to a particular manufacturer, **[*21]** to be incorporated into a product in turn specifically designed for the United States market, and actually sold in the United States. Supra-competitive pricing of that SRAM could have had a domestic effect in the United States which could have given rise to antitrust injury.

Id. at *47. Although neither party had produced sufficient evidence at that point for the court to determine whether the SRAM sold abroad and then imported met the above test, Judge Waken decided to allow the parties to present their evidence during trial. *Id.* at *48. The court stated that if the indirect purchaser plaintiffs were unable to present sufficient evidence, and were unable to segregate domestic transactions — which the court had already determined met the FTAIA requirements — from foreign transactions that might not meet those requirements, "all of their damage claims would fail." *Id.*

Less than a year later, the Honorable Judge Susan Illston entered an opinion in the multidistrict litigation with which the instant case is connected that addressed the very same issues. *In re TFT-LCD Antitrust Litigation. 822 F. Supp. 2d 953 (N.D. Cal. 2011)*. Defendants in the multidistrict litigation brought a dispositive motion on claims by indirect purchasers, who purchased products containing **[*22]** the same LCDs at issue in the instant case in the United States after third-parties had purchased the LCDs from defendants overseas and incorporated them into products

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[10] The distinction, for the federal courts, "affects how disputed facts are handled, and it determines when a party may raise the point," since "subject-matter jurisdiction must be secured at all times, regardless of whether the parties raise the issue, and no matter how much has been invested in a case." *Minn-Chem, Inc. v. Agrium Inc., 683 F.3d 845, 852-53 (7th Cir. 2012)* (internal quotations omitted).

destined for the United States and other countries. *Id. at 955*. Defendants argued, just as defendants in *SRAM* had argued, that "to the extent they did not sell their LCD panels directly to United States consumers or companies, they may not be held liable under either federal or state law." *Id. at 955-56*. Judge Illston did not analyze FTAIA as a jurisdictional requirement; instead, she adopted an approach taken by the Third Circuit, which determined that FTAIA "delineates the *elements* of a successful antitrust claim." *Id. at 958* (quoting *Animal Science Products, Inc. v. China Minmetals Corp., 654 F.3d 462 (3d Cir. 2011)* (emphasis added)).

Because the dispositive motion in the multidistrict litigation involved *only* indirect purchaser claims, unlike the motion to dismiss in *SRAM* involving both direct and indirect purchaser claims, the sole question before the court was "the degree to which defendants' foreign price-fixing activities fall within [the] 'domestic injury' exception" of FTAIA. *Id. at 959*. The challenge specifically focused on the "directness" element and "whether the effect of price fixing of LCD panels that are manufactured and sold **[*23]** abroad before they enter the United States can be considered a direct effect on United States commerce." *Id. at note 2*. Defendants argued, just as they do in the instant case, that "the only 'direct' effects of the conspiracy occurred overseas, and that the effects on the U.S. economy are at most 'ripple effects' radiating outward from the initial overcharge," and thus not actionable by indirect purchasers under FTAIA. *Id. at 962*. The indirect purchaser plaintiffs argued, similarly to the State in the instant case, that the United States is the largest market for products containing LCDs and that defendants' conduct had a direct effect on the United States "because the conspiracy was deliberately targeted at the United States." *Id. at 963*. Furthermore, plaintiffs argued that the inflated prices of the LCDs were "passed through" to them, creating the "direct effect" required under FTAIA. *Id.*

The court in the multidistrict litigation agreed with the indirect purchaser plaintiffs, and rejected defendants' argument that the "direct effect" of FTAIA was limited to the first sale of a price-fixed product. *Id.* Reading FTAIA so narrowly, the court explained, "would all but eviscerate the distinction between the 'domestic injury' **[*24]** exception and 'import commerce,' which is not subject to the FTAIA." *Id.* (internal citation omitted). The court considered language from the Ninth Circuit that "anticompetitive conduct has a 'direct effect' on U.S. commerce only when the effect of the conduct 'proceeds from one point to another in time or space without deviation or interruption'" and that such effect "must 'follow as an immediate consequence of the defendant's activity.'" *Id.* (quoting *United States v. LSL Biotechnologies, 379 F.3d 672, 680 (9th Cir. 2004)*; *Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 618 (1992)*). Judge Illston then explained:

> Where, as here, the nature of the effect does not change in any substantial way before it reaches the United States consumer, the effect is an 'immediate consequence' of the defendant's anticompetitive behavior. In other words, because the effect of defendants' anticompetitive conduct did not change significantly between the beginning of the process (overcharges for LCD panels) and the end (overcharges for televisions, monitors, and notebook computers), the effect 'proceeded without deviation or interruption' from the LCD manufacturer to the American retail store. No intervening events interrupted its journey.

Id. at 964. Judge Illston distinguished cases relied upon by defendants where plaintiffs' injuries had **[*25]** occurred overseas and courts had "rightfully rejected those plaintiffs' convoluted attempts to convert their foreign injuries into some nebulous effect on American commerce," *Id.* In the multidistrict litigation, indirect purchaser plaintiffs, who were presenting substantially the same facts as the instant suit, were found to have "identified domestic injury that is concrete and quantifiable," and "[m]ore importantly . . . directly traceable back to the defendants' anticompetitive conduct." *Id. at 967*. Like Judge Wilkin in the *SRAM* case, Judge Illston concluded that a material question of fact existed in the multidistrict litigation as to whether defendants' alleged conduct had a direct effect on United States commerce. *Id.* This was "sufficient to invoke the domestic effect exception to the FTAIA." *Id.*

At the time Judge Illston authored her opinion in the multidistrict litigation, one case potentially presenting an obstacle to the indirect purchaser claims that the court distinguished was *Minn-Chem, Inc. v. Agrium Inc.*, a Seventh Circuit multidistrict antitrust decision reversing a federal district court's denial of a motion to dismiss based upon FTAIA. *Id. at 965* (citing *Minn-Chem, Inc. v. Agrium Inc., 657 F.3d 650 (7th Cir. 2011)* (reversed on rehearing by *Minn-Chem, Inc. v. Agrium Inc., 683 F.3d 845 (2012)*). ***[*26]*** *Minn-Chem* involved alleged price-fixing of potash, a mineral used in fertilizer. *Minn-Chem, Inc., 683 F.3d at 848*. Plaintiffs were companies based in the United States who were both direct and indirect purchasers of potash from defendants, who produced approximately 71% of the world's potash, of which the United States was the world's second largest consumer. Id. at 849. Defendants allegedly directed their price-fixing conduct at other countries, including Brazil, India, and China, but with the ultimate aim of driving up prices worldwide, including in the United States. *Id.* The initial decision by the Seventh Circuit found that "generalized allegations" of price fixing in other countries causing similar price inflation in the United States were insufficient to support a claim that defendants foreign conduct had a "direct, substantial and reasonably foreseeable effect" on domestic or import commerce in the United States. Minn-Chem, Inc., 657 F.3d at 662.

However, after a rehearing *en banc*, the Seventh Circuit changed course and affirmed the district court's finding that plaintiffs had stated a claim under FTAIA. Minn-Chem, Inc., 683 F.3d at 848. Like Judge Illston in the multidistrict litigation, the Seventh Circuit found that FTAIA "spells out an element" of a claim under federal ***antitrust*** **[*27]** ***law***, not a "jurisdictional limit." Id. at 852. Before addressing the merits of the complaint, the court addressed "two distinct questions of statutory interpretation" regarding FTAIA: (1) what is the definition of "import commerce" contemplated by FTAIA, and (2) what is required "to show that foreign conduct has a direct, substantial, and reasonably foreseeable effect on U.S. domestic or import commerce." Id. at 855.

The court answered the first question thusly:

> [T]ransactions that are directly between the plaintiff purchasers and the defendant [potash producers] *are* the import commerce of the United States in this sector. The FTAIA does not require any special showing in order to bring these transactions back into the Sherman Act . . . because they were never removed from the statute.

Id. at 855. The only applicable rules to such transactions are the rules governing import commerce, which is covered by the Sherman Act whenever "foreign conduct produc[es] a substantial intended effect in the United States." *Id.* (citing Hartford Fire Ins. Co. v. Cal., 509 U.S. 764, 797 (1993)). Some of the alleged conduct of defendants in *Minn-Chem* satisfied the standard for "import commerce," but other defendants were not alleged to have made any sales directly to customers in the United States. *Id.* Plaintiffs **[*28]** had nevertheless argued that those defendants' sales to other countries were an important part of the overall conspiracy. *Id.* Those claims, the court explained, must meet the FTAIA elements to be actionable. Id. at 856.

The court first asked whether defendants alleged conduct "involves foreign commerce," and found that it plainly did, and was therefore excluded under the general rule. *Id.* The court next applied the elements of the FTAIA exception *seriatim*, asking whether plaintiffs had alleged a substantial effect on domestic commerce, and finding they had where the complaint alleged that 5.3 million tons of potash had been imported into the United States in 2008, the "vast majority" of which was from defendants, and that the price of potash had increased 600% between 2003 and 2008. *Id.* The court next asked whether plaintiffs had alleged a reasonably foreseeable effect on domestic commerce, and found that it was "objectively foreseeable that an international cartel with a grip on 71% of the world's supply of a homogeneous commodity will charge supracompetitive prices," and that after accounting for shipping costs, such prices "will be uniform throughout the world" so long as arbitrage was possible. **[*29]** *Id.*

Finally, the *Minn-Chem* court turned to the question of "what it takes to show 'direct' effects" under FTAIA. *Id.* The court considered one definition applied to the Foreign Sovereign Immunities Act: "that an effect is 'direct' if it 'follows as an immediate consequence of the defendant's . . . activity.'" *Id.* (quoting Republic of Argentina v. Weltover, Inc., 504 U.S. 607 (1992)). This had been the definition used by Judge Illston in the multidistrict litigation a well. In re TFT-LCD Antitrust Litigation, 822 F. Supp. 2d 953, 963 (N.D. Cal. 2011). An *amicus* brief filed by the U.S. Department of Justice encouraged the Seventh Circuit to adopt a less stringent definition, finding that "for FTAIA purposes, the term 'direct' means only 'a reasonably proximate causal nexus.'" Minn-Chem, Inc., 683 F.3d at 857 (internal citations omitted).

The Seventh Circuit adopted the less stringent definition advocated by the U.S. Department of Justice, finding their approach was "more consistent with the language" of FTAIA. *Id.* Having decided on the interpretation, the court applied this test to the allegations of the complaint, and found that direct effects were alleged where plaintiffs asserted that defendants had fixed prices in other countries that "showed up almost immediately in the prices of U.S. imports," and that the potash production cartel "established benchmark **[*30]** prices in markets where it was relatively free to operate, and then applied those prices to its U.S. sales." *Id. at 859*. "It is no stretch," the court held, "to say that the foreign supply restrictions, and the concomitant price increases forced upon the Chinese purchasers, were a direct — that is, proximate — cause of the subsequent price increases in the United States." *Id.*

The court contrasted these facts with the facts of *Empagran*, where plaintiffs were foreign consumers injured by effects on a foreign market. *Id. at 860*. "It is the U.S. authorities or private plaintiffs who have the incentive — and the right — to complain about overcharges paid as a result of the potash cartel." *Id.* It was not, the court opined, a "situation in which action in a foreign country filters through many layers and finally causes a few ripples in the United States." *Id.* The *Minn Chem* court, like the federal district courts in *SRAM* and the multidistrict litigation, found FTAIA applicable to the allegations, giving plaintiffs an opportunity to meet their burden of proof at a later date. More importantly, it provided clarity on what constitutes a "direct effect," adopting an even lower threshold than that applied by Judge **[*31]** Illston in the multidistrict litigation in one of the most thorough analyses of FTAIA post-*Empagran*.

In 2014 the Second Circuit also addressed the question of what constitutes a "direct" effect in another case involving components of consumer electronics called *Lotes Company, Ltd. v. Hon Hai Precision Industry Company, Ltd. 753 F.3d 395 (2d Cir. 2014)*. The *Lotes* plaintiff was a Taiwanese manufacturer of USB connectors who alleged that other dominant manufacturers in the USB market were involved in an anticompetitive monopolization scheme to exclude it from the market for products, such as laptops, in which its USB connectors were typically incorporated. *Id. at 399*. Although the transactions between plaintiff and defendants occurred in China, plaintiff alleged that the monopolization of the USB market by its competitors would cause a rise in prices that would be passed through directly to consumers, including consumers in the United States. *Id. at 402*.

Defendants in *Lotes* filed a motion to dismiss for lack of subject matter jurisdiction (believing FTAIA to be a jurisdictional bar) and also for failure to plausibly allege a direct, substantial and reasonably foreseeable effect on any market in the United States. *Id. at 403*. The federal district court, applying the same standard of directness embraced by **[*32]** Judge Illston in the multidistict litigation, granted the motion to dismiss and plaintiff appealed. *Id.* On appeal, the Second Circuit held, just as the *Minn-Chem* court had, that FTAIA is not a jurisdictional bar and instead sets forth the elements of an antitrust claim. *Id. at 405*. However, the appellate court rejected the district court's application of the directness standard - requiring the effect to be "immediate" - and opted instead for the standard applied by the Seventh Circuit in *Minn-Chem*, which required only "proximate causation." *Id. at 411-12*.

The *Lotes* court opined at length that the fact that the USB connectors were sold abroad and then integrated into consumer products that later were imported and sold in the United States did not necessarily render the effect of defendants' conduct "indirect." *Id. at 412-13*. The court explained:

> There is nothing inherent in the nature of outsourcing or international supply chains that necessarily prevents the transmission of anticompetitive harms or renders any and all domestic effects impermissibly remote and indirect. Indeed, given the important role that American firms and consumers play in the global economy, we expect that some perpetrators will design foreign anticompetitive **[*33]** schemes for the very purpose of causing harmful downstream effects in the United States. Whether the causal nexus between foreign conduct and a domestic effect is sufficiently "direct" under the FTAIA in a particular case will depend on many factors, including the structure of the market and the nature of the commercial relationships at each link in the causal chain. Courts confronting claims under the FTAIA will have to consider all of the relevant facts, using all of the traditional tools courts have used to analyze questions of proximate causation.

Id. at 413. Nevertheless, the court failed to actually reach the question of whether defendants' conduct was in fact direct, because it found that, even if the effect on the United States had been direct, the injury to plaintiff did not arise from that effect where plaintiff was a foreign entity transacting with defendants overseas, just like the plaintiffs in *Empagran. Id. at 414-15* (citing *F. Hoffmann-La Roche Ltd. V. Empagran S.A. 542 U.S. 155, 173 (2004)*). *Lotes* therefore adds weight to the standard of directness adopted by the Seventh Circuit *Minn-Chem*, and supports the proposition that a component sold overseas might have a direct effect on the domestic market for a consumer product in the United States. *Lotes* also offers **[*34]** a consistent application of the Supreme Court's rule from

Empagran that any claim of damages resulting from a price increase must arise specifically from such domestic effect.

The Seventh Circuit addressed the requirements of FTAIA in another 2014 case called *Motorola Mobility LLC v. AU Optronics Corporation. 775 F.3d 816 (7th Cir. 2014)*. *Motorola* also arose out of the same alleged LCD price-fixing conspiracy at issue in the instant suit, but the claim was brought by Motorola and its ten foreign subsidiaries rather than an indirect purchaser class, as in the multidistrict litigation, or a government entity, as here. *Id. at 817*. The federal district court granted summary judgment in favor of defendants on the question of whether LCDs bought by foreign subsidiaries of Motorola and then shipped to Motorola for sale in the United States could give rise to a claim of damages to Motorola under the Sherman Act. *Id.* The court affirmed the judgment in favor of defendants because "the victims of the price fixing of LCD panels were Motorola's foreign subsidiaries," while "Motorola itself, along with U.S. purchasers of cellphones incorporating those panels, were at most derivative victims." *Id. 818*.

The court acknowledged that Motorola had a claim for the small percentage of sales made by defendants directly **[*35]** to Motorola or its subsidiaries in the United States, since those direct sales constituted import commerce not excluded from federal ***antitrust law*** by FTAIA. *Id. at 817*. However, sales to Motorola's foreign subsidiaries occurred prior to importation, therefore the court examined claims based on those sales to determine whether any overcharge arose from a "direct, substantial, and reasonably foreseeable" effect on domestic commerce in the United States. *Id. at 819*. The court had no trouble perceiving that there was an effect on domestic commerce, or with finding that the effect would be reasonably foreseeable where defendants knew some of the LCDs would be incorporated into products bound for the United States. *Id.*

With respect to directness, the court concluded that the effect was "less direct than the conduct in *Minn-Chem*," where all defendants had allegedly conspired to drive up global prices and most defendants had sold directly to customers in the United States, but did not rule out the possibility that the effect in the case before it might still be "direct rather than 'remote.'" *Id.* The court speculated that sale of LCDs by defendants to foreign subsidiaries who "incorporated them into the finished **[*36]** product and sold the finished product to Motorola for resale in the United States . . . doesn't seem like 'many layers,' resulting in just 'a few ripples' in the United States cellphone market." *Id. at 819*. The court therefore assumed that the effect could have been both direct and substantial as well. *Id.*

The problem for the *Motorola* court was that "the immediate victims of the price fixing were [Motorola's] foreign subsidiaries," *not* Motorola itself. *Id. at 820*. Those subsidiaries were governed by and had to seek relief under the law of the countries in which either they or the defendants were incorporated and conducted their transactions; Motorola, as a parent company, had no right to seek relief on their behalf. *Id.* Motorola argued that it was the target of the alleged price-fixing, and was the "real buyer" of the LCD panels through its subsidiaries, but the court pointed out that Motorola's expert had only provided overcharge estimates for foreign subsidiaries, not Motorola. *Id. at 821-22*. The court explained that "having chosen to conduct its LCD purchases through legally distinct entities organized under foreign law, [Motorola] cannot now impute to itself the harm suffered by them." *Id. at 822*.

The court further found that Motorola **[*37]** ran up against the indirect purchaser or "first sale" doctrine of *Illinois Brick. Id. at 821* (citing *Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977)*). This was the case distinguished by the *Loeb* court as only barring "derivative" injuries — that is, injuries incurred by subsequent purchasers of the same product — but not "separate and compensable injuries" resulting from anti-competitive conduct in a different market. *Loeb Indus. v. Sumitomo Corp., 306 F.3d 469, 483 (7th Cir. 2002)*. Motorola, however, had based all its damages on the allegedly inflated prices of LCDs sold to foreign subsidiaries; it *waived* arguments that it was damaged by "the cost to Motorola of cellphones incorporating those [LCDs as components]," specifically admitting that "Motorola is not basing its claims on the purchase of finished LCD Products." *Motorola Mobility LLC, 775 F.3d at 823-24*.

Although the court rejected Motorola's claims against defendants based on sales to its foreign subsidiaries, the Seventh Circuit also addressed concerns, raised by the U.S. Justice Department in an *amicus* brief, that the court's ruling against Motorola would interfere with prosecution by government entities of antitrust violations by foreign companies. *Id. at 825*. The court distinguished actions by the government from actions by private entities, which raise concerns over comity and interference **[*38]** with foreign nation's enforcement of their own antitrust laws. *Id. at 824-25*. "Motorola's inability to mount the kind of private antitrust suit that it is attempting in this case does not foredoom the use of ***antitrust law*** to prevent and punish the kind of foreign cartelization harmful to Motorola's subsidiaries." *Id. at 826*. *Motorola* thus again confirmed that it is not enough under FTAIA that plaintiff has been damaged somewhere down the line as a result of defendant's anticompetitive conduct. The conduct must have a direct, substantial, and reasonably foreseeable effect on domestic commerce *and* plaintiff's injury *must arise out of that effect*, not out of some independent effect on foreign commerce. *Motorola* also suggests that concerns about application of antitrust laws to foreign conduct are greater when a private plaintiff is bringing the suit than when a government entity brings suit.

Finally, the Ninth Circuit addressed the directness element of an FTAIA analysis in a criminal antitrust case against the AU Optronics Defendants and two of the company's officers based upon the same alleged price-fixing conduct at issue in the instant civil suit. *United States v. Hui Hsiung, 778 F.3d 738 (9th Cir. 2015)*. The criminal defendants, after conviction and sentencing, raised a number **[*39]** of issues on appeal, including whether the indictment and evidence at trial satisfied the requirements of FTAIA with respect to the effects of their activity on the domestic market being "direct." *Id. at 750*. The Ninth Circuit agreed with *Minn-Chem* and other prior case law that the FTAIA elements are not a jurisdictional bar, but rather "a component of the merits of a Sherman Act claim involving nonimport trade or commerce with foreign nations." *Id. at 751* (internal citations omitted). Defendants in *Hsiung* acknowledged that the domestic effects of their conduct were substantial and reasonably foreseeable, but argued that their conduct had no direct effect on domestic commerce because much of the conduct occurred overseas and was thus "too attenuated from the United States," and that "the intervening development, manufacture, and sale of the [finished products containing defendants' LCDs] worldwide" resulted in only a "diffuse effect." *Id. at 758*.

The Ninth Circuit utilized the same language to analyze "directness" that had been applied by Judge Illston in the multidistrict litigation, but which had been expanded in favor of broader language by the *Minn-Chem* and *Lotes* courts, holding that "conduct has a 'direct' effect for **[*40]** purposes of the domestic effects exception to the FTAIA if it follows as an immediate consequence of the defendants' activity." *Id. at 758* (quoting *United States v. LSL Biotechnologies, 379 F.3d 672, 680-81 (9th Cir. 2004)*); *In re TFT-LCD Antitrust Litigation, 822 F. Supp. 2d 953, 963 (N.D. Cal. 2011)*; *Minn-Chem, Inc. v. Agrium Inc., 683 F.3d 845, 857 (2012)* (internal citations omitted); *Lotes Co., Ltd. v. Hon Hai Precision Indus. Co., Ltd. 753 F.3d 395, 411-12 (2d Cir. 2014)*. The *Hsiung* court found that the indictment sufficiently alleged directness, and that there was sufficient evidence at trial to support such finding in a criminal law context as well. *Hui Hsiung, 778 F.3d at 756*.

This direct connection was "neither speculative nor insulated by multiple disconnected layers of transactions" where the impact on the United States market "was direct and followed 'as an immediate consequence' of the price fixing." *Id. at 759*. Facts on which the court based its finding included that the LCDs were a "substantial cost component of the finished products," that certain meetings at which the price fixing initially occurred "led to direct negotiations with United States companies, both domestically and overseas, on pricing decisions," and that "it was well understood that substantial numbers of finished products were destined for the United States and that the practical upshot of the conspiracy would be and was increased prices to customers in the United States." *Id.*

The court specifically distinguished *Motorola*, which involved the same **[*41]** underlying conduct, because the Seventh Circuit in that case — while not making an express finding on directness — had explained that its interpretation of the FTAIA would not block the government from bringing criminal or civil actions, as was the case in *Hsiung. Id. at 760* (citing *Motorola Mobility LLC, 775 F.3d at 816*). *Hsiung* involved a post-conviction appeal in a criminal matter, and therefore had the benefit of reviewing evidence already presented as opposed to deciding whether a claim had been sufficiently stated. Nevertheless, *Hsiung* provides examples of the types of facts that are relevant to questions of directness and provides further support for the *Motorola* court's suggestion that *Illinois Brick* is not meant to serve as a bar to government enforcement of antitrust laws.

II. Interpretation and Application of the Illinois Antitrust Act

Applying this body of case law to the allegations of the instant suit, there is no question that the LCD panels delivered and billed by Defendants to buyers overseas (approximately 97% of the alleged transactions) are not "import commerce" because those were not transactions "directly between the plaintiff purchasers and the defendant[s]." Minn-Chem, Inc., 683 F.3d at 855; *Hui Hsiung, 778 F.3d at 755*. It is equally clear that most of the alleged price-fixing **[*42]** activity by Defendants was conducted abroad, and is thus removed from the IAA's reach by section 5(14)'s general rule placing non-import foreign commerce outside the scope of the statute. F. Hoffmann-La Roche Ltd. V. Empagran S.A. 542 U.S. 155, 161 (2004).

The Court therefore turns to the elements of the domestic effects exception to see whether I Defendants' alleged overseas conduct is nevertheless brought back within the scope of the IAA through a direct, substantial, and reasonably foreseeable effect on domestic commerce that gives rise to the State's claims. Id. at 162, 164. This Court finds that the eel et on domestic commerce in the instant case was substantial where the State has alleged it resulted in $179 million in overcharges to businesses and consumers. P1. MSJ at 10. Furthermore. thi, effect was reasonably foreseeable where the I CD:, in question accounted for anywhere from a tenth to over half the cost of the consumer products in which they were installed, and where Defendants produced approximately 80% of the world's LCDs during the time period in question, many of which were certain to end up in the United States, the second biggest importer of LCD products. Pl. MSJ at 2, 9-10.

With respect to whether the effect was direct, the State argues that Defendants are **[*43]** precluded from re-litigating this issue because it was already decided by Judge Illston in the multidistrict case. TFT-LCD, 822 F. Supp. 2d at 962; Pl. MSJ at 22. Issue preclusion, also referred to as collateral estoppel, *may* be applied "when the issue decided in the prior adjudication is identical with the one presented in the current action, there was a final judgment on the merits in the prior adjudication, and the party against whom estoppel is asserted was a party to, or in privity with a party to, the prior adjudication." DuPage Forklift Serv., Inc. v. Material Handling Servs., Inc., 195 Ill.2d 71, 80 2001. This doctrine is not limited to fact determinations; it reaches issues of law as well, including where one action was in federal court and another in state court. *Id.* However, the DuPage case only concerned issues 01 state law decided in different courts. *Id.* In the instant case, the State argues that a decision by a federal court as to whether Defendants' conduct had a "direct effect" under FTAIA should preclude Defendants from litigating whether their conduct had a "direct effect" under section 5(14) of the IAA.

The Court is convinced by federal case law interpreting FTAIA, including the multidistrict litigation involving the same facts at issue here, that the "direct effect" element of the IAA is also met by the State's **[*44]** allegations in the instant suit. The precedential nature of those cases, to which the General Assembly has instructed this Court to look for guidance, is nevertheless only persuasive. It remains possible for Illinois courts to interpret the IAA differently than federal courts have interpreted FTAIA, particularly where there is not a completely unified federal approach, as indicated with the varying language applied by different circuits to define directness. This Court therefore looks to such federal cases as the basis for its reasoning, but does not consider the question before it precluded by any of them.

Turning to the substance of those federal cases, the Court finds particularly persuasive guidance from the *SRAM* and *TFT-LCD* decisions on this same issue, relating to the exact same or very similar facts, and at the same procedural posture as the instant suit. In the *SRAM* case the allegedly price-fixed memory was a component sold by defendants overseas and then integrated into consumer products that were later sold in the United States at inflated pi lees. In re Status Random Access Memory (SRAM) Antitrust Litigation, 2010 U.S. Dist. LEXIS 141968 (N.D. Cal.), *46. Judge Wilken found that defendants' targeting of the United States by producing certain price-fixed memory specifically designed **[*45]** to be sold to particular manufacturers and incorporated into products designed for the United States market was sufficient to allow indirect purchaser claims to continue to trial. *Id.* at *47. In the instant suit, the State alleges that Defendants visited customers in the United States and -sent engineers to those customers because their LCDs' specifications had to meet U.S. customers' needs." Pl. MSJ at 3. The State provides examples of four specific products, sold by companies based in the United States (Hewlett Packard, Motorola, Dell, and Apple) to domestic consumers, which were the subject of meetings or communications between Defendants and those companies to determine prices of LCDs specifically for those products. Pl. MSJ at 6-7. Just as in the *SRAM* case, these are examples of specific targeting of the market for consumer products containing Defendants' component LCDs in the United States.

In the multidistrict litigation, defendants summarized the process by which their LCD panels eventually made their way into the hands of indirect purchaser plaintiffs as follows:

> 1. Foreign LCD manufacturers — primarily Korean, Taiwanese or Japanese companies such as Defendants — manufactured **[*46]** LCD panels in their overseas facilities;
> 2. The foreign LCD manufacturers sold LCD panels to foreign [original design manufacturers or "ODMs"] or [foreign system integrators or "SIs"] (such as TPV, Compal or Wistron), either directly or via an intermediate sale, e.g. to a foreign [foreign original equipment manufacturers or "OEMs"] (such as a Dell or HP foreign affiliate);
> 3. The foreign ODMs or SIs assembled finished products (such as televisions, monitors or notebook computers) in overseas facilities using the LCD panels they purchased from the foreign LCD panel manufacturers;
> 4. The foreign ODMs or SIs sold the finished products to brand-name electronics companies, including foreign OEMs such as Acer, Asus and Proview and historically U.S.-based OEMs, such as Dell or HP, or their foreign affiliates;
> 5. These domestic or foreign OEMs imported the finished products into various countries around the world, including the United States;
> 6. The OEMs sold the LCD televisions, computer monitors, and notebook computers to distributors, to retailers such as Best Buy or Walmart, or directly to end consumers, e.g., via the Internet;
>
> 7. The retailers sold the finished LCD products to end consumers **[*47]** in the individual states, including presumably the [indirect purchaser plaintiffs] (or the distributors [962] sold to retailers, that in turn sold to the end consumers).

TFT-LCD, 822 F. Supp. 2d at 961-62. This description is nearly word-for-word the same as Defendants' description of the process by which LCDs made their way to consumers in the instant suit, which of course makes sense given that the multidistrict litigation arises from the same set of facts. Df. MSJ at 7-8.

Indirect purchaser plaintiffs in the multidistrict litigation did not dispute defendants' account of the LCDs' journey, but argued that the effect of defendants' conspiracy was "passed through" directly to consumers in the United States. *TFT-LCD, 822 F. Supp. 2d at 962*. Plaintiffs argued the facts were sufficient to support a claim of a direct effect because defendants' alleged conspiracy was deliberately targeted at the United States, which was one of the largest markets for products containing LCDs. *Id.* Defendants specifically utilized their subsidiaries and employees in the United States to market directly to American companies. *Id.* Furthermore, defendants' pricing strategies were "informed" by monitoring of "street prices" in the United States. *Id.*

A number of depositions and **[*48]** declarations cited by the multidistric court as supporting the indirect purchaser plaintiffs' theory are also offered by the State in support of their motion in the instant suit, including documents "illustrat[ing] the degree to which the conspiracy was focused on American OEMs." *Id.*; Pl. MSJ Ex. 31; *see also* Pl. MSJ Ex. 9 (deposition of Po-Chang "Edward" Hung); Pl. MSJ Ex. 40 (deposition of Heon Seong Kim). The Court need not even analogize to the multidistrict litigation because the facts which are before this Court now were exactly the same as those which informed Judge Illston's determination that a direct effect had been articulated by the indirect purchaser plaintiffs. *TFT-LCD, 822 F. Supp. 2d at 964*.

One aspect of Judge Illston's reasoning which this Court finds particularly persuasive is her observation that limiting the interpretation of "direct effects" to only the harm caused by the first sale of a price-fixed product would "all but eviscerate the distinction between the 'domestic injury' exception and 'import commerce,' which is not subject to the FTAIA." *Id. at 963*. This same reasoning was also noted by the Second Circuit in *Lotes. Lotes Co., Ltd, 753 F.3d at 411* ("to demand that any domestic effect must follow as an immediate consequence of a defendant's **[*49]** foreign anticompetitive conduct would all but collapse the FTAIA's domestic effects exception into its separate import exclusion"). Judge Illston and the Second Circuit recognized that foreign conduct can have a direct effect on more than just the *first* sale of a price-fixed item to the United States. This is because the term "import commerce" in the first sentence of FTAIA already contemplates directness; therefore the directness element in subpart (1) of that statute would be rendered superfluous if it did not address a different set of circumstances from "import commerce." *See* Minn-Chem, Inc., 683 F.3d at 855 (clarifying when import commerce is covered by the Sherman Act).

Put another way, the first sale to a domestic purchaser of an item price-fixed overseas is "import commerce," *See id.; see also Hui Hsiung, 778 F.3d at 755*. The first sentence of FTAIA makes clear that the elements of subpart (1) ("direct, substantial, reasonably foreseeable") only apply to conduct involving foreign commerce *other than import commerce*. Therefore, in order for this Court's interpretation of FTAIA and Section 5(14) of the IAA to have a harmonious result, the Court is obligated to read subpart (1) of FTAIA and Section 5(14)(a)(i) of the IAA as contemplating something other than "import commerce." *See* Wolf v. Toolie, 2014 IL App (1st) 132243, ¶ 21 ("different sections **[*50]** of the same statute should be considered in reference to one another so that they are given harmonious effect." (internal citation omitted)). Such analysis leads to the ineluctable result that "direct, substantial, and reasonably foreseeable" encompasses one or more transactions aside from the first sale by an overseas entity to a buyer in the United States.

Defendants themselves acknowledge the logic in this where they state in their brief that "if the import commerce exclusion applied to foreign restraints that merely had *effects* on import commerce, then there would be no work left to be done by the domestic effects exception[.]" Df. MSJ at 12 (emphasis in original). Defendants should thus have no trouble seeing that the direct, substantial, and reasonably foreseeable effect with which the legislators who crafted FTAIA and the IAA were concerned was distinct from any effect on the overseas market, or even on the first sale to a customer based in the United States.[11]

Having rejected Defendants' argument that only the first sale of a price-fixed product can have the requisite direct effect, the Court examines the varying standards of directness applied by the **[*51]** courts in the multidistrict litigation and in Minn-Chem. TFT-LCD, 822 F. Supp. 2d at 963 (a direct effect "proceeds from one point to another . . . without deviation or interruption [and] must follow as an immediate consequence of the defendant's activity"); Minn-Chem, Inc., 683 F.3d at 857 (a direct effect requires "only a reasonable proximate causal nexus"). The standard described by the Seventh Circuit in *Minn-Chem* is without question easier to meet than the standard described by Judge Illston in the multidistrict litigation. This Court need not choose between them, however, since the allegations in the instant case meet either standard.

If directness is, as the Seventh Circuit held, merely a "reasonably proximate causal nexus," then such nexus is certainly found if the State's allegations are proven that Defendants conspired to fix prices of LCDs, for which they produced approximately 80% of the world's supply, and for which the United States was one of the largest markets, which Defendants specifically targeted through customized designs and marketing. Pl. MSJ at 2-3, 6-7, 9-10.

If, alternatively, directness is an effect proceeding from one point to the next "without deviation or interruption," which "must follow as an immediate consequence" of Defendant's **[*52]** alleged price-fixing abroad, the State has argued that the inflated prices were not absorbed by intermediaries who assembled or distributed consumer products containing the LCDs, but were instead passed on directly to businesses and consumers in the United States, including in Illinois. Pl. MSJ at 10. The "nature of the effect," in such circumstances, did not 'change in any substantial way before [reaching] the United States consumer," and can thus be considered an "'immediate consequence' of the defendant's anticompetitive behavior." TFT-LCD, 822 F.Supp. 2d at 964. This was the

[11] Defendants argue that Judge Illston's reasoning was incorrect, and that the domestic effects exception would not be rendered inoperative next to the exclusion of import commerce from FTAIA, even if it were held not to cover more than the first sale of a price-inflated product. Df. Reply at 29-30. Defendants argue it would still reach harm to exports, price-tying between foreign and domestic products, and monopolization harming domestic commerce. Df. Reply at 30. However, Defendants' reference to other types of *conduct* potentially addressed by FTAIA is a red herring. FTAIA does not address any specific underlying antitrust conduct that is embedded in other substantive antitrust statutes. FTAIA speaks to the *nature of the effect* (i.e., "direct, substantial, reasonably foreseeable") of the alleged conduct. TFT-LCD, 822 F. Supp. 2d at 963; Lotes Co., Ltd., 753 F.3d at 411. Defendants' attempt to address FTAIA with particular types of antitrust conduct thus fails where only the effects of that conduct are at issue.

standard which Judge Elston found these same facts had satisfied in the multidistrict litigation, and this Court agrees with her sagacious determination.

Having found that the effect at issue here was substantial, reasonably foreseeable, and direct, the Court turns to the final prong of analysis: whether that effect gives rise to the State's claims of injury. Defendants argue that it did not, and that the instant suit is like *Motorola*, where the only damages alleged were incurred by foreign entities, and thus arose from a separate effect on a foreign market. Df. MSJ at 20. *Motorola* is clearly distinguishable since the State of Illinois is not asserting **[*53]** a claim for damages incurred by any person or entity that made purchases overseas the way Motorola attempted to make a claim based on damages incurred by its foreign subsidiaries. Here the State is asserting claims for itself and residents of Illinois, all of whose purchases occurred in the United States and could thus only have arisen out of an effect on the *domestic* market.[12]

As the United States Supreme Court noted in *Empagran*, "the application of our antitrust laws to foreign anticompetitive conduct is . . . reasonable . . . insofar as [the antitrust laws] reflect a legislative effort to redress *domestic* antitrust injury that foreign anticompetitive conduct has caused." *F. Hoffmann-La Roche Ltd. V. Empagran S.A. 542 U.S. 155, 165 (2004)* (emphasis in original). That is precisely the circumstance here, where the General Assembly has made clear that "no action under [the IAA] shall be barred on the grounds that the activities or conduct complained of in any way affects or involves . . . foreign commerce," and adopted FTAIA's specifications as to how causation of harm by foreign anticompetitive conduct could be demonstrated. *740 ILCS 10/7.9*; *740 ILCS 10/5*.

Defendants argue that the effect on the domestic market for consumer products containing LCDs in the **[*54]** United States is "separated by a long and winding distribution chain" from the overseas market into which they sold their LCD panels. Df. MSJ at 15. In particular, they argue that the LCDs were transformed into "complex products containing many other components," and that "an injury in a different market from the market in which the [anticompetitive conduct] occurs is an indirect effect, not a direct one." Df. MSJ at 15; Df. Reply at 9-10. Defendants cite a number of cases in support of this position, none of which deal specifically with FTAIA or foreign transactions. *See* *Am. Ad Mgmt. v. Gen. Tel. Co., 190 F.3d 1051, 1057 (9th Cir. 1999)*; *Bhan v. NME Hosps., Inc., 772 F.2d 1467, 1470 (9th Cir. 1985)*; *Assoc. Gen Contractors v. Cal. State Council of Carpenters, 459 U.S. 519, 538 (1983)*; *Philip Morris, 353 Ill. App. 3d 55, 62 (1st Dist. 2004)*. The one case cited by Defendants which does deal with foreign conduct (though not FTAIA) does not support their position: the *Loeb* court, in the first antitrust decision discussed *supra*, held that where an antitrust conspiracy gives rise to "different injuries in distinct markets," those injuries may nonetheless be actionable under federal ***antitrust law***. *Loeb Indus. v. Sumitomo Corp., 306 F.3d 469, 482-83 (7th Cir. 2002)*.

Defendants also argue that there are too many intermediaries separating them from consumers in Illinois for those consumers' injury to arise out of any effect caused by Defendants, particularly where some of the overcharges were "dissipated" along the way **[*55]** rather than passed directly through to consumers. Df. MSJ at 15, 18; Df. Reply at 11. Defendants cite the *Minn-Chem, Loeb*, and *Motorola* cases in support, but again cherry-pick language while ignoring the actual holdings of those cases. Df. MSJ at 18. As discussed *supra*, the *Minn-Chem* court adopted an even lower standard of "directness" than previous courts had applied, finding sufficient proximate causation where price-fixing overseas had affected prices in the United States. *Minn-Chem, Inc., 683 F.3d at 859*. The *Loeb* court found injury in an entirely separate market actionable, and the court in *Motorola* commented that the effect did *not* seem indirect, but that the only overcharges alleged were incurred by foreign subsidiaries, not Motorola itself, distinguishing *Motorola* from cases where overcharges are passed through to consumers. *Loeb Indus., 306 F.3d at 482-83*; *Motorola Mobility LLC, 775 F.3d at 819, 823*.

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[12] Defendants also insist that the State must segregate claims based on the FIAIA exception from claims based on import commerce in accordance with the *SRAM* case, else "all of their damage claims fail." Df. Reply at 4; *SRAM, 2010 U.S. Dist. LEXIS 141968, *48*. Even assuming *arguendo* that *SRAM* would command such result, the court in *SRAM* allowed all of the claims in that case to proceed to trial, where sufficient evidence supporting each type of claim would be presented. *SRAM, 2010 U.S. Dist. LEXIS 141968, *48*. The *SRAM* determination thus does not support dismissal of such claims as a matter of law at this procedural juncture.

Defendants point to one estimate that approximately 60% of the overcharge stemming from LCD panels incorporated into cellular phones was dissipated by intermediaries. Df. MSJ at 18. The Court notes that, of the many consumer products involved in the instant suit, the LCD component in cellular phones represented the lowest cost-percentage in the overall price when compared with LCD components in any other **[*56]** type of product. *See* Pl. MSJ at 2, 9-10. It is therefore reasonable to infer, at this stage of the proceeding, that dissipation of overcharges would also be greatest in cellular phones, and less in other types of products. In fact Defendants' own expert has concluded that, depending on the product type, between 50-100% of overcharges for the LCD panels were passed through to the sale price for the final consumer product. Pl. MSJ at 28. The Court declines to designate a bright-line percentage of cost at which an effect can no longer be considered "direct" under any circumstances. The Court finds the allegation that around half the overcharge, at a minimum, was passed on to consumers, and as much as 100% in some instances, could be sufficient, when viewed in conjunction with all of the relevant factors, to support a finding of a direct effect.[13]

Finally, Defendants have raised the rather alarmist argument that if this Court holds that *section 5(14) of the IAA* applies to the State's claims in the instant case nothing will prevent future plaintiffs from applying Illinois law to foreign transactions far removed from Illinois consumers. Df. MSJ at 22. They hypothesize that "an Egyptian cotton farmer's sales to **[*57]** an Egyptian cotton merchant" will be actionable under the IAA "if the merchant paid an anticompetitive price that eventually filtered into the price of clothing sold at a Chicago retail outlet." Df. MSJ at 22. While this may be a hypothetical possibility in a technical sense, it is highly unlikely to ever be a reality given that, in order to be actionable under the IAA, an effect on the domestic market needs to be direct *and* substantial *and* reasonably foreseeable. 780 ILCS 10/5. Likewise, Defendants proposition that the Attorney General could use the IAA to halt a merger of "foreign companies that produce a two percent component of a product that passes through a ten-step foreign manufacturing and distribution chain before it reaches the United States," is highly distinguishable from the facts of the instant case, where the components at issue represented at minimum *four to five times* that percentage of the ultimate consumer product price. Df. MSJ at 22; Df. Reply at 3, 14; Pl. MSJ at 2, 9-10. The Court is thus not dissuaded by these highly unlikely speculations as to the purportedly far-reaching implications of its ruling.

In the course of oral argument, the State clarified its Motion for Partial **[*58]** Summary Judgment. The State explained that since experts for both the State and Defendants concluded that 50% to 100% of the original LCD price overcharge was passed through to the ultimate purchasers, the State had shown that Defendants conduct was "direct, substantial and reasonably foreseeable" as a matter of law and was entitled to such a finding from this Court. As the Court has already explained, the underlying dispute between the parties involves multiple types of products which contained the LCD panels, such as cell phones, computers, notebooks, and tablets, as well as other electronic products. Pl. MSJ at 10. The LCD components within these products manifested varying percentages of the overall price of the final product. Thus the LCD component in a cell phone constituted approximately 9% of the total price while the LCD component in a monitor was approximately 56% of the total price. Pl. MSJ at 10. The Defendants have argued that some of the overcharges were dissipated in the transactions between companies in the distribution chain. Df. MSJ at 18.

In the event that this Court accedes to the State's request, it would make a blanket finding as to all products, notwithstanding **[*59]** the fact that substantial differences may have existed between products devolving on the issue of the "directness" of the Defendants" conduct. Furthermore, a finding in favor of the State on the issue of "directness" at the Summary Judgment stage would prejudice Defendants and deprive them from the opportunity of positing a defense based on the structure of the market and the nature of the commercial relationships at each link of the causal chain. The Court therefore declines the State's request to find that it has established "directness" as a matter of law based solely on the experts' price pass through conclusions. Still, the Court's conclusion should not be

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[13] As the Second Circuit explained in *Lotes*, directness depends on "many factors, including the structure of the market and the nature of the commercial relationships at each link in the causal chain." *Lotes Company, Ltd. v. Hon Hai Precision Industry Company, Ltd. 753 F.3d 395, 413 (2d Cir. 2014)*.

construed as a specific finding regarding to the nature of the State's evidentiary burden at trial, or what quantum of proof is necessary to establish a *prima ficie* showing of "directness." That determination must await the trial.

For all the foregoing reasons, the Court finds that section 5(14) of the IAA is applicable to the Complaint by the State on behalf of itself and its residents, which alleges an injury arising out of a direct, substantial and reasonably foreseeable effect of Defendants' conduct on domestic commerce in the United States, which **[*60]** conduct is also alleged to be in violation of section 3(1) of the IAA.

IT IS, THEREFORE, HEREBY ORDERED that:

1. Defendants' Joint Motion for Partial Summary Judgment on the Attorney General's Foreign Commerce Claims is DENIED;

2. The State of Illinois' Motion for Partial Summary Judgment on ***Antitrust Law***'s Domestic-Injury Exception is GRANTED to the extent that the State is permitted to propound proof of the domestic injury exception, however the Court reserves the question of whether the State has met its burden on this issue pending trial;
3. This matter is continued for status on June 14 at 10:30 am without further notice.

ENTERED

Judge Moshe Jacobius

April 18, 2016

In re Cathode Ray Tube (CRT) Antitrust Litig.

United States District Court for the Northern District of California

April 19, 2016, Decided; July 28, 2016, Filed

MDL No. 1917; Case No. C-07-5944 JST

Reporter

2016 U.S. Dist. LEXIS 99365 *; 2016-2 Trade Cas. (CCH) P79,710; 2016 WL 4036042

IN RE: CATHODE RAY TUBE (CRT) ANTITRUST LITIGATION. This Order Relates To: ALL DIRECT ACTION PLAINTIFFS

Prior History: Crago, Inc. v. Chunghwa Picture Tubes, Ltd. (In re Cathode Ray Tube (CRT) Antitrust Litig.), 536 F. Supp. 2d 1364, 2008 U.S. Dist. LEXIS 12204 (J.P.M.L., Feb. 15, 2008)

Core Terms

Products, choice-of-law, parties, headquarters, Conspiracy, purchases, summary judgment, contacts, due process, non-moving, genuine, place of injury, conspiratorial, centered, motions

Counsel: **[*1]** For Crago, Inc., on behalf of itself and others similarly situated dba Dash Computers, Inc. a Kansas City corporation, Plaintiff: Bruce Lee Simon, LEAD ATTORNEY, Pearson Simon & Warshaw, LLP, San Francisco, CA; Guido Saveri, LEAD ATTORNEY, Saveri & Saveri, Inc., San Francisco, CA; Ashlei Melissa Vargas, Pearson, Simon & Warshaw LLP, San Francisco, CA; Christopher Wilson, Polsinelli Shughart PC, Kansas City, MO; Clifford H. Pearson, Pearson, Simon & Warshaw LLP, Sherman Oaks, CA; Daniel D. Owen, Shughart Thomson & Kilroy, P.C., Kansas City, MO; Daniel L. Warshaw, Pearson, Simon & Warshaw, LLP, Sherman Oaks, CA; Esther L Klisura, SL Environmental Law Group PC, San Francisco, CA; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica L. Grant, Coblentz Patch Duffy & Bass LLP, San Francisco, CA; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Jonathan Mark Watkins, Pearson Simon Warshaw & Penny LLP, San Francisco, CA; Kelly Laudon, Lindquist **[*2]** Vennum, PLLP, Minneapolis, MN; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Patrick John Brady, Polsinelli PC, Kansas City, MO; Shpetim Ademi, Cudahy, WI; Aaron M. Sheanin, Pearson, Simon & Warshaw, LLP, San Francisco, CA; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James P. McCarthy, Lindquist & Vennum.

For Hawel A. Hawel d/b/a City Electronics, a California business, Plaintiff: Betty Lisa Julian, Modesto, CA; Cadio R. Zirpoli, Saveri & Saveri, Inc., San Francisco, CA; Clinton Paul Walker, Damrell, Nelson, Schrimp, Pallios, Pache & Silva, Modesto, CA; Fred A. Silva, Damrell Nelson Schrimp Pallios, Pacher & Silva, Modesto, CA; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Geoffrey Conrad Rushing, Saveri & Saveri Inc., San Francisco, CA; Gianna Christa Gruenwald, Saveri & Saveri, San Francisco, CA; Guido Saveri, Saveri & Saveri, Inc., San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Kathy Lee Monday, Damrell, Nelson, Schrimp, **[*3]** Pallios, Pacher & Silva, Modesto, CA; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Richard Alexander Saveri, Saveri & Saveri, Inc., San Francisco, CA; Roger Martin Schrimp, Damrell Nelson Schrimp Pallios Pacher & Silva, Modesto, CA; Shpetim Ademi, Cudahy, WI; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY.

For Michael Juetten, Plaintiff: Craig C. Corbitt, LEAD ATTORNEY, Zelle LLP, San Francisco, CA; Andrus Star Liberty, Andrus Anderson LLP, San Francisco, CA; Christopher Thomas Micheletti, Zelle LLP, San Francisco, CA; Francis Onofrei Scarpulla, Law Offices of Francis O. Scarpulla, San Francisco, CA; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Jennie Lee Anderson, Andrus Anderson LLP, San Francisco, CA; Judith A. Zahid, Zelle LLP, San Francisco, CA; Lori Erin Andrus, Andrus Anderson LLP, San Francisco, CA; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Matthew Rutledge Schultz, Diamond McCarthy LLP, San Francisco, **[*4]** CA; Michael Jocobs, Zelle Hofmann Voelbel Mason & Gette LLP, Minneapolis, MN; Patrick Bradford Clayton, Law Offices of Francis O. Scarpulla, San Francisco, CA; Qianwei Fu, Zelle LLP, San Francisco, CA; Richard Michael Hagstrom, Hellmuth & Johnson, Edina, MN; Shpetim Ademi, Cudahy, WI.

For Art's TV & Appliance, Plaintiff: Douglas A. Millen, LEAD ATTORNEY, PRO HAC VICE, Freed Kanner London & Millen LLC, Bannockburn, IL; Steven A. Kanner, LEAD ATTORNEY, Freed Kanner London & Millen LLC, Bannockburn, IL; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; Harry Shulman, Shulman Law, San Francisco, CA; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Shpetim Ademi, Cudahy, WI.

For Orion Home Systems, LLC, Plaintiff: Cadio R. Zirpoli, Saveri & Saveri, Inc., San Francisco, CA; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Geoffrey Conrad Rushing, Saveri & Saveri Inc., San Francisco, CA; Guido Saveri, Saveri & Saveri, Inc., San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; James M. Lockhart, **[*5]** Lindquist & Vennum, P.L.L.P.; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Joseph W. Cotchett, Cotchett Pitre & McCarthy LLP, Burlingame, CA; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Neil Swartzberg, Cotchett Pitre & McCarthy, Burlingame, CA; Niki B. Okcu, AT&T Services, Inc. Legal Dept., San Francisco, CA; Randy R. Renick, Hadsell Stormer & Renick LLP, Los Angeles, CA; Richard Alexander Saveri, Saveri & Saveri, Inc., San Francisco, CA; Shpetim Ademi, Cudahy, WI; Terry Gross, Gross Belsky Alonso LLP, San Francisco, CA; Adam C. Belsky, Gross Belsky Alonso LLP; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James P. McCarthy, Lindquist & Vennum; Monique Alonso, Gross & Belsky LLP; Sarah Crowley, Gross Belsky Alonso LLP; Steven Noel Williams, Cotchett Pitre & McCarthy LLP, Burlingame, CA.

For Univisions-Crimson Holding Inc., Plaintiff: Christopher T. Heffelfinger, LEAD ATTORNEY, Berman DeValerio, San Francisco, CA; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guri Ademi, **[*6]** Ademi & O'Reilly LLP, Cudahy, WI; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Joseph J. Tabacco, Jr., Berman DeValerio, San Francisco, CA; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Manuel Juan Dominguez, Cohen Milstein Sellers & Toll, Palm Beach Gardens, FL; Marc Jeffrey Greenspon, Berman DeValerio, Palm Beach Gardens, FL; Matthew David-Craig Pearson, Berman DeValerio, San Francisco, CA; Shpetim Ademi, Cudahy, WI.

For Carroll Cut-Rate Furniture, on behalf of itself and all others similarly situated, Plaintiff: Ronnie Seidel Spiegel, LEAD ATTORNEY, PRO HAC VICE, Hagens Berman Sobol Shapiro, Seattle, WA; Anthony D. Shapiro, Hagens Berman Sobol Shapiro LLP, Seattle, WA; Douglas A. Millen, Freed Kanner London & Millen LLC, Bannockburn, IL; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Jeff D Friedman, Hagens Berman Sobol Shapiro LLP, Berkeley, CA; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Shpetim Ademi, Cudahy, WI; Steven A. Kanner, Freed Kanner London & Millen LLC, Bannockburn, IL; William Henry London, Freed Kanner London & Millen LLC, **[*7]** Bannockburn, IL.

For Monikraft, Inc, individually and on behalf of a class of all those similarly situated, Plaintiff: Christopher L. Lebsock, LEAD ATTORNEY, Hausfeld LLP, San Francisco, CA; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Michael Paul Lehmann, Hausfeld LLP, San Francisco, CA; Shpetim Ademi, Cudahy, WI.

For Nathan Muchnick, Inc., Plaintiff: Brendan Patrick Glackin, Lieff, Cabraser, Heimann & Bernstein LLP, San Francisco, CA; Candice J. Enders, Berger & Montague, P.C., Philadelphia, PA; Eric B. Fastiff, Lieff Cabraser Heimann & Bernstein LLP, San Francisco, CA; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; H. Laddie Montague, Jr., Berger & Montague, P.C., Philadelphia, PA; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Joseph R. Saveri, Joseph Saveri Law Firm, Inc., San Francisco, CA; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Marc Howard **[*8]** Edelson, Edelson & Associates, LLC, Doylestown, PA; Michele Chickerell Jackson, Lieff Cabraser Heimann & Bernstein, LLP, San Francisco, CA; Richard Martin Heimann, Lieff Cabraser Heimann & Bernstein, San Francisco, CA; Ruthanne Gordon, Berger & Montague PC, Philadelphia, PA; Shpetim Ademi, Cudahy, WI.

For Barbara Caldwell, on behalf of herself and all others similarly situated, Plaintiff: Christopher L. Lebsock, Hausfeld LLP, San Francisco, CA; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; Henry A. Cirillo, Smith Dollar PC, Santa Rosa, CA; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Jon T. King, Hagens Berman Sobol Shapiro LLP, Berkeley, CA; Kathleen Styles Rogers, The Kralowec Law Group, San Francisco, CA; Lori A. Fanning, Miller Law LLC, Chicago, IL; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Mario Nunzio Alioto, Trump Alioto Trump & Prescott LLP, San Francisco, CA; Marvin A. Miller, Miller Law LLC, Chicago, IL; Matthew E. Van Tine, Miller Law LLC, Chicago, IL; Michael S. Christian, Zelle LLP, San Francisco, CA; Shpetim Ademi, Cudahy, WI; Thomas Patrick Dove, **[*9]** The Furth Firm LLP, San Francisco, CA; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY.

For Jeffrey Figone, a California resident, on behalf of himself and all others similarly situated, Plaintiff: Brian Joseph Barry, Law Offices of Brian Barry, Los Angeles, CA; Dennis Stewart, Hulett Harper Stewart LLP, San Diego, CA; Donald L. Perelman, Fine Kaplan & Black RPC, Philadelphia, PA; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Gerard A Dever, Fine Kaplan and Black, RPC, Philadelphia, PA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Joseph Goldberg, Freedman Boyd Hollander Goldberg Urias & Ward PA, Albuquerque, NM; Joseph Mario Patane, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Josh Ewing, Freedman Boyd Hollander Goldberg Urias & Ward PA, Albuquerque, NM; Julie A. Kearns, Hulett Harper Stewart LLP, San Diego, CA; Lauren Clare Capurro, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Mario N. Alioto, Trump Alioto Trump & Prescott, LLP, San Francisco, CA; Mario Nunzio Alioto, Trump Alioto **[*10]** Trump & Prescott LLP, San Francisco, CA; Matthew Duncan, Fine, Kaplan and Black, RPC, Philadelphia, PA; Shpetim Ademi, Cudahy, WI; Veronica Besmer, Besmer Law Firm, Los Angeles, CA; Vincent J. Ward, Freedman Boyd Hollander Goldberg Urias & Ward PA, Albuquerque, NM.

For Chad Klebs, a Minnesota resident, on behalf of themselves and all others similarly situated, Plaintiff: Craig C. Corbitt, LEAD ATTORNEY, Zelle LLP, San Francisco, CA; Andrus Star Liberty, Andrus Anderson LLP, San Francisco, CA; Christopher Thomas Micheletti, Zelle LLP, San Francisco, CA; Francis Onofrei Scarpulla, Law Offices of Francis O. Scarpulla, San Francisco, CA; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Jennie Lee Anderson, Andrus Anderson LLP, San Francisco, CA; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Judith A. Zahid, Zelle LLP, San Francisco, CA; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Lori Erin Andrus, Andrus Anderson LLP, San Francisco, **[*11]** CA; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Mario Nunzio Alioto, Trump Alioto Trump & Prescott LLP, San Francisco, CA; Matthew Rutledge Schultz, Diamond McCarthy LLP, San Francisco, CA; Michael Jacobs, Zelle Hofmann Voelbel Mason & Gette LLP, Minneapolis, MN; Patrick Bradford Clayton, Law Offices of Francis O. Scarpulla, San Francisco, CA; Qianwei Fu, Zelle LLP, San Francisco, CA; Richard Michael Hagstrom, Hellmuth & Johnson, Edina, MN; Shpetim Ademi, Cudahy, WI; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James P. McCarthy, Lindquist & Vennum.

For Central New York Univision Video Systems, Inc., Plaintiff: Christopher T. Heffelfinger, Berman DeValerio, San Francisco, CA; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Joseph J. Tabacco, Jr., Berman DeValerio, San Francisco, CA; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Manuel Juan Dominguez, Cohen Milstein Sellers & Toll, Palm Beach Gardens, FL; Marc Jeffrey Greenspon, Berman DeValerio, Palm Beach Gardens, **[*12]** FL; Matthew David-Craig Pearson, Berman DeValerio Pease Tabacco et al, San Francisco, CA; Shpetim Ademi, Cudahy, WI.

For Crimson Tech, Inc., Plaintiff: Christopher T. Heffelfinger, Berman DeValerio, San Francisco, CA; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Joseph J. Tabacco, Jr., Berman DeValerio, San Francisco, CA; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Manuel Juan Dominguez, Cohen Milstein Sellers & Toll, Palm Beach Gardens, FL; Marc Jeffrey Greenspon, Berman DeValerio, Palm Beach Gardens, FL; Matthew David-Craig Pearson, Berman DeValerio Pease Tabacco et al, San Francisco, CA; Shpetim Ademi, Cudahy, WI.

For The Stroud Group, Inc., Plaintiff: Eric B. Fastiff, LEAD ATTORNEY, Lieff Cabraser Heimann & Bernstein LLP, San Francisco, CA; Brendan Patrick Glackin, Lieff, Cabraser, Heimann & Bernstein LLP, San Francisco, CA; Daniel Bruce Allanoff, Meredith Cohen Greenfogel & Skirnick, P.C., Philadelphia, PA; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guri Ademi, Ademi & O'Reilly **[*13]** LLP, Cudahy, WI; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Joel Cary Meredith, Meredith & Associates, Philadelphia, PA; Joseph R. Saveri, Joseph Saveri Law Firm, Inc., San Francisco, CA; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Martin E. Grossman, Law Offices of Martin E. Grossman, Villanova, PA; Michele Chickerell Jackson, Lieff Cabraser Heimann & Bernstein, LLP, San Francisco, CA; Richard Martin Heimann, Lieff Cabraser Heimann & Bernstein, San Francisco, CA; Shpetim Ademi, Cudahy, WI; Steven J. Greenfogel, Lite DePalma Greenberg, LLC, Philadelphia, PA.

For Paula Call, dba Poway-Rancho Beranrdo TV a California business, Plaintiff: Cadio R. Zirpoli, Saveri & Saveri, Inc., San Francisco, CA; Christopher D. Jennings, Emerson Poynter LLP, Little Rock, AR; Corey D. McGaha, Crowder McGaha LLP, Little Rock, AR; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guido Saveri, Saveri & Saveri, Inc., San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Jennifer Milici, Boies Schiller and Flexner LLP, **[*14]** Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; John G. Emerson, Emerson Scott LLP, Houston, TX; John G. Emerson, PRO HAC VICE, Emerson Scott LLP, Houston, TX; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Lawrence D. McCabe, Murray Frank & Sailer LLP, New York, NY; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Richard Alexander Saveri, Saveri & Saveri, Inc., San Francisco, CA; Scott E. Poynter, Steel, Wright & Collier, PLLC, Little Rock, AR; Shpetim Ademi, Cudahy, WI; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James P. McCarthy, Lindquist & Vennum.

For Mark Pierce, Plaintiff: Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; Henry A. Cirillo, Smith Dollar PC, Santa Rosa, CA; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Jonathan Mark Watkins, Pearson Simon Warshaw & Penny LLP, San Francisco, CA; Joseph M. Alioto, Sr., Alioto Law Firm, San Francisco, CA; Lori A. Fanning, Miller Law LLC, Chicago, IL; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Matthew E. Van Tine, Miller Law **[*15]** LLC, Chicago, IL; Michael S. Christian, Zelle LLP, San Francisco, CA; Shpetim Ademi, Cudahy, WI; Thomas Patrick Dove, The Furth Firm LLP, San Francisco, CA.

For Princeton Display Technologies, Inc., on behalf of itself and all others similarly situated, a New Jersey corporation, Plaintiff: Bryan L. Clobes, LEAD ATTORNEY, Cafferty Clobes Meriwether & Sprengel LLP, Philadelphia, PA; Lee Albert, LEAD ATTORNEY, Glancy Prongay & Murray LLP, New York, NY; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; James E. Cecchi, Carella Byrne Cecchi Olstein Brody & Agnello, P.C., Roseland, NJ; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Jayne Arnold Goldstein, PRO HAC VICE, Pomerantz LLP, Weston, FL; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Lindsey H. Taylor, Carella Byrne, Roseland, NJ; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Marisa C. Livesay, San Diego, CA; Shpetim Ademi, Cudahy, WI; Susan **[*16]** Gilah Kupfer, Glancy

Prongay & Murray LLP, Berkeley, CA; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; Betsy Carol Manifold, Wolf Haldenstein Adler Freeman & Herz; Francis M. Gregorek, Wolf Haldenstein Adler Freeman & Herz LLP; James P. McCarthy, Lindquist & Vennum; Mary Jane Edelstein Fait, Chicago, IL; Rachele R. Rickert, Wolf Haldenstein Adler Freeman & Herz LLP.

For Greg A Glanz, on behalf of himself and all others similarly situated, Plaintiff: John Gressette Felder, Jr., LEAD ATTORNEY, McGowan Hood Felder and Johnson, Columbia, SC; Steven Randall Hood, LEAD ATTORNEY, Rock Hill, SC; William Angus McKinnon, LEAD ATTORNEY, McGowan, Hood & Felder, Rock Hill, SC; Derek G. Howard, Howard Law Firm, Mill Valley, CA; Fernando Xaxier Starkes, Starkes Law Firm, Columbia, SC; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Shpetim Ademi, Cudahy, WI.

For Carmen Gonzalez, a California resident, on behalf of herself and others similarly situated, Plaintiff: Gary L. Halling, **[*17]** Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; James McManis, McManis Faulkner, San Jose, CA; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Mario Nunzio Alioto, Trump Alioto Trump & Prescott LLP, San Francisco, CA; Marwa Elzankaly, McManis, Faulkner, San Jose, CA; Shpetim Ademi, Cudahy, WI; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James P. McCarthy, Lindquist & Vennum.

For William E. Stack, a Tennessee resident, on behalf of himself and all others similarly situated, Plaintiff: Craig C. Corbitt, LEAD ATTORNEY, Zelle LLP, San Francisco, CA; Terry Rose Saunders, LEAD ATTORNEY, The Saunders Law Firm, Chicago, IL; Thomas Arthur Doyle, LEAD ATTORNEY, Thomas A. Doyle, Ltd., La Grange, IL; Christopher Lovell, Lovell Stewart Halebian LLP, New York, NY; Francis Onofrei Scarpulla, Law Offices of Francis **[*18]** O. Scarpulla, San Francisco, CA; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; Imtiaz A. Siddiqui, Cotchett Pitre & McCarthy, New York, NY; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Judith A. Zahid, Zelle LLP, San Francisco, CA; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Matthew Rutledge Schultz, Diamond McCarthy LLP, San Francisco, CA; Patrick Bradford Clayton, Law Offices of Francis O. Scarpulla, San Francisco, CA; Shpetim Ademi, Cudahy, WI; Traviss Levine Galloway, Zelle Hofmann Voelbel Mason & Gette, San Francisco, CA.

For Margo Stack, a Tennessee resident, on behalf of herself and all others similarly situated, Plaintiff: Craig C. Corbitt, LEAD ATTORNEY, Zelle LLP, San Francisco, CA; Terry Rose Saunders, LEAD ATTORNEY, The Saunders Law Firm, Chicago, IL; Thomas Arthur Doyle, LEAD ATTORNEY, Thomas A. Doyle, Ltd., La Grange, IL; Christopher Lovell, Lovell Stewart Halebian LLP, New York, NY; Francis Onofrei Scarpulla, Law Offices of Francis O. Scarpulla, San Francisco, CA; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guri Ademi, **[*19]** Ademi & O'Reilly LLP, Cudahy, WI; Imtiaz A. Siddiqui, Cotchett Pitre & McCarthy, New York, NY; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Judith A. Zahid, Zelle LLP, San Francisco, CA; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Matthew Rutledge Schultz, Diamond McCarthy LLP, San Francisco, CA; Patrick Bradford Clayton, Law Offices of Francis O. Scarpulla, San Francisco, CA; Shpetim Ademi, Cudahy, WI; Traviss Levine Galloway, Zelle Hofmann Voelbel Mason & Gette, San Francisco, CA.

For Donna Ellingson, Plaintiff: Alan Roth Plutzik, Bramson Plutzik Mahler & Birkhaeuser, LLP, Walnut Creek, CA; Christopher Le, Straus & Boies, LLP, Fairfax, VA; Daniel Edward Birkhaeuser, Bramson, Plutzik, Mahler & Birkhaeuser, Walnut Creek, CA; David Boies, III, Straus & Boies, LLP, Fairfax, VA; Eric James Pickar, Bangs, McCullen, Butler, Foye & Simmons, L.L.P., Rapid City, SD; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Jennifer Susan Rosenberg, Bramson, Plutzik, Mahler & Birkhaeuser, Walnut Creek, CA; Manfred Patrick Muecke, **[*20]** Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Mario Nunzio Alioto, Trump

Alioto Trump & Prescott LLP, San Francisco, CA; Shpetim Ademi, Cudahy, WI; Timothy D. Battin, Straus & Boies LLP, Fairfax, VA.

For Samuel J. Nasto, a Nevada resident, Plaintiff: Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Joel Flom, Jeffries Olson & Flom PA, Fargo, ND; Joseph Mario Patane, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Kenneth Leo Valinoti, Valinoti & Dito LLP, San Francisco, CA; Lauren Clare Capurro, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Lawrence Genaro Papale, Law Offices of Lawrence G. Papale, St. Helena, CA; M. Eric Frankovitch, Frankovitch Anetakis Colantonio & Simon, Weirton, WV; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Mario Nunzio Alioto, Trump Alioto **[*21]** Trump & Prescott LLP, San Francisco, CA; Michael G. Simon, Frankovitch Anetakis Colantonio & Simon - Weirton, Weirton, WV; Robert B. Gerard, Gerard Selden & Osuch, San Diego, CA; Seymour J. Mansfield, Foley & Mansfield, PLLP, Minneapolis, MN; Sherman Kassof, Law Offices of Sherman Kassof, Lafayette, CA; Shpetim Ademi, Cudahy, WI; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James P. McCarthy, Lindquist & Vennum.

For Patrick Piper, Plaintiff: Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Joel Flom, Jeffries Olson & Flom PA, Fargo, ND; Joseph Mario Patane, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Kenneth Leo Valinoti, Valinoti & Dito LLP, San Francisco, CA; Lauren Clare Capurro, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Lawrence Genaro Papale, Law Offices of Lawrence G. Papale, St. Helena, CA; M. Eric Frankovitch, Frankovitch Anetakis Colantonio & Simon, Weirton, WV; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Mario Nunzio Alioto, Trump Alioto Trump & Prescott LLP, San **[*22]** Francisco, CA; Michael G. Simon, Frankovitch Anetakis Colantonio & Simon - Weirton, Weirton, WV; Robert B. Gerard, Gerard Selden & Osuch, San Diego, CA; Seymour J. Mansfield, Foley & Mansfield, PLLP, Minneapolis, MN; Sherman Kassof, Law Offices of Sherman Kassof, Lafayette, CA; Shpetim Ademi, Cudahy, WI.

For Craig Stephenson, a New Mexico resident, Plaintiff: Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Joel Flom, Jeffries Olson & Flom PA, Fargo, ND; Joseph Mario Patane, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Kenneth Leo Valinoti, Valinoti & Dito LLP, San Francisco, CA; Lauren Clare Capurro, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Lawrence Genaro Papale, Law Offices of Lawrence G. Papale, St. Helena, CA; M. Eric Frankovitch, Frankovitch Anetakis Colantonio & Simon, Weirton, WV; Manfred Patrick Muecke, **[*23]** Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Mario Nunzio Alioto, Trump Alioto Trump & Prescott LLP, San Francisco, CA; Michael G. Simon, Frankovitch Anetakis Colantonio & Simon - Weirton, Weirton, WV; Robert B. Gerard, Gerard Selden & Osuch, San Diego, CA; Seymour J. Mansfield, Foley & Mansfield, PLLP, Minneapolis, MN; Sherman Kassof, Law Offices of Sherman Kassof, Lafayette, CA; Shpetim Ademi, Cudahy, WI; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James P. McCarthy, Lindquist & Vennum.

For David G. Norby, a Minnesota resident, Plaintiff: Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Joel Flom, Jeffries Olson & Flom PA, Fargo, ND; Joseph Mario Patane, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Kenneth Leo Valinoti, Valinoti & Dito LLP, San Francisco, CA; Lauren Clare Capurro, Trump, Alioto, **[*24]** Trump & Prescott, LLP, San Francisco, CA; Lawrence Genaro Papale, Law Offices of Lawrence G. Papale, St. Helena, CA; M. Eric Frankovitch, Frankovitch Anetakis Colantonio & Simon, Weirton, WV; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Mario Nunzio Alioto, Trump Alioto Trump & Prescott LLP, San Francisco, CA; Michael G. Simon, Frankovitch Anetakis Colantonio & Simon - Weirton, Weirton, WV; Robert B. Gerard, Gerard Selden & Osuch, San Diego, CA; Seymour J.

Mansfield, Foley & Mansfield, PLLP, Minneapolis, MN; Sherman Kassof, Law Offices of Sherman Kassof, Lafayette, CA; Shpetim Ademi, Cudahy, WI; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James P. McCarthy, Lindquist & Vennum.

For John Larch, a West Virginia resident, Plaintiff: Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Joel Flom, Jeffries Olson & Flom PA, Fargo, ND; Joseph Mario **[*25]** Patane, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Kenneth Leo Valinoti, Valinoti & Dito LLP, San Francisco, CA; Lauren Clare Capurro, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Lawrence Genaro Papale, Law Offices of Lawrence G. Papale, St. Helena, CA; M. Eric Frankovitch, Frankovitch Anetakis Colantonio & Simon, Weirton, WV; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Mario Nunzio Alioto, Trump Alioto Trump & Prescott LLP, San Francisco, CA; Michael G. Simon, Frankovitch Anetakis Colantonio & Simon - Weirton, Weirton, WV; Robert B. Gerard, Gerard Selden & Osuch, San Diego, CA; Seymour J. Mansfield, Foley & Mansfield, PLLP, Minneapolis, MN; Sherman Kassof, Law Offices of Sherman Kassof, Lafayette, CA; Shpetim Ademi, Cudahy, WI; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James P. McCarthy, Lindquist & Vennum.

For Constance Hare, Plaintiff: Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Joel Flom, Jeffries Olson & Flom **[*26]** PA, Fargo, ND; Joseph Mario Patane, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Kenneth Leo Valinoti, Valinoti & Dito LLP, San Francisco, CA; Lauren Clare Capurro, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Lawrence Genaro Papale, Law Offices of Lawrence G. Papale, St. Helena, CA; M. Eric Frankovitch, Frankovitch Anetakis Colantonio & Simon, Weirton, WV; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Mario Nunzio Alioto, Trump Alioto Trump & Prescott LLP, San Francisco, CA; Michael G. Simon, Frankovitch Anetakis Colantonio & Simon - Weirton, Weirton, WV; Robert B. Gerard, Gerard Selden & Osuch, San Diego, CA; Seymour J. Mansfield, Foley & Mansfield, PLLP, Minneapolis, MN; Sherman Kassof, Law Offices of Sherman Kassof, Lafayette, CA; Shpetim Ademi, Cudahy, WI.

For James Stringwell, Plaintiff: Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Joel Flom, Jeffries Olson & Flom PA, Fargo, ND; Joseph Mario Patane, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Kenneth Leo Valinoti, Valinoti **[*27]** & Dito LLP, San Francisco, CA; Lauren Clare Capurro, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Lawrence Genaro Papale, Law Offices of Lawrence G. Papale, St. Helena, CA; M. Eric Frankovitch, Frankovitch Anetakis Colantonio & Simon, Weirton, WV; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Mario Nunzio Alioto, Trump Alioto Trump & Prescott LLP, San Francisco, CA; Michael G. Simon, Frankovitch Anetakis Colantonio & Simon - Weirton, Weirton, WV; Robert B. Gerard, Gerard Selden & Osuch, San Diego, CA; Seymour J. Mansfield, Foley & Mansfield, PLLP, Minneapolis, MN; Sherman Kassof, Law Offices of Sherman Kassof, Lafayette, CA; Shpetim Ademi, Cudahy, WI.

For Gary Hanson, a North Dakota resident, on behalf of themselves and all others similarly situated, Plaintiff: Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Joel Flom, Jeffries Olson & Flom **[*28]** PA, Fargo, ND; Joseph Mario Patane, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Kenneth Leo Valinoti, Valinoti & Dito LLP, San Francisco, CA; Lauren Clare Capurro, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Lawrence Genaro Papale, Law Offices of Lawrence G. Papale, St. Helena, CA; M. Eric Frankovitch, Frankovitch Anetakis Colantonio & Simon, Weirton, WV; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Mario Nunzio Alioto, Trump Alioto Trump & Prescott LLP, San Francisco, CA; Michael G. Simon, Frankovitch Anetakis Colantonio & Simon - Weirton, Weirton, WV; Robert B. Gerard, Gerard Selden & Osuch, San Diego, CA; Seymour J. Mansfield, Foley & Mansfield, PLLP, Minneapolis, MN; Sherman Kassof, Law Offices of Sherman Kassof, Lafayette, CA; Shpetim Ademi, Cudahy, WI; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James P. McCarthy, Lindquist & Vennum.

For Margaret Slagle, a Vermont resident, on behalf of herself and all others similarly situated, Plaintiff: Daniel R. Karon, LEAD ATTORNEY, Karon LLC, Cleveland, OH; Joseph M. Alioto, Sr., LEAD ATTORNEY, Alioto **[*29]** Law Firm, San Francisco, CA; Angelina Alioto-Grace, Alioto Law Firm, San Francisco, Ca; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Joseph Michelangelo Alioto, Jr, Alioto Law Firm, San Francisco, CA; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Mario Nunzio Alioto, Trump Alioto Trump & Prescott LLP, San Francisco, CA; Mary Gilmore Kirkpatrick, Kirkpatrick & Goldborough PLLC, South Burlington, VT; Shpetim Ademi, Cudahy, WI; Theresa Driscoll Moore, Alioto Law Firm, San Francisco, CA; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James P. McCarthy, Lindquist & Vennum.

For Barry Kushner, on behalf of themselves and all others similarly situated, Plaintiff: Joseph M. Alioto, Sr., LEAD ATTORNEY, Alioto Law Firm, San Francisco, CA; Angelina Alioto-Grace, Alioto Law Firm, San Francisco, **[*30]** Ca; Daniel R. Karon, Karon LLC, Cleveland, OH; Daniel Joseph Mulligan, St. James Recovery Services, P.C., San Francisco, CA; Derek G. Howard, Howard Law Firm, Mill Valley, CA; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Jeffrey D. Bores, Chestnut & Cambronne, Minneapolis, MN; Joseph Michelangelo Alioto, Jr, Alioto Law Firm, San Francisco, CA; Karl L. Cambronne, Chestnut & Cambronne, Minneapolis, MN; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Shpetim Ademi, Cudahy, WI; Theresa Driscoll Moore, Alioto Law Firm, San Francisco, CA.

For Jerry Cook, on behalf of himself and all others similarly situated, Plaintiff: Joseph M. Alioto, Sr., LEAD ATTORNEY, Alioto Law Firm, San Francisco, CA; Angelina Alioto-Grace, Alioto Law Firm, San Francisco, Ca; Bruce L. Mulkey, The Mulkey Attorneys Group P.A., Rogers, AR; Charles M. Kester, The Kester Law Firm, Fayetteville, AR; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; Jayne A. Goldstein, Mager & Goldstein **[*31]** LLP, Weston, FL; Joseph Michelangelo Alioto, Jr, Alioto Law Firm, San Francisco, CA; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Shpetim Ademi, Cudahy, WI; Theresa Driscoll Moore, Alioto Law Firm, San Francisco, CA.

For Brian A. Luscher, a Arizona resident, on behalf of himself and all others similarly situated, Plaintiff: Angelina Alioto-Grace, Alioto Law Firm, San Francisco, Ca; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Joseph Michelangelo Alioto, Jr, Alioto Law Firm, San Francisco, CA; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Mario Nunzio Alioto, Trump Alioto Trump & Prescott LLP, San Francisco, CA; Robert James Pohlman, Ryley Carlock & Applewhite PC, Phoenix, AZ; Shpetim Ademi, Cudahy, WI; Theresa Driscoll Moore, Alioto Law Firm, San Francisco, **[*32]** CA; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James P. McCarthy, Lindquist & Vennum.

For Scott Friedson, on behalf of himself and all others similarly situated, Plaintiff: Joseph M. Alioto, Sr., LEAD ATTORNEY, Alioto Law Firm, San Francisco, CA; Angelina Alioto-Grace, Alioto Law Firm, San Francisco, Ca; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Joseph Michelangelo Alioto, Jr, Alioto Law Firm, San Francisco, CA; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Robert James Pohlman, Ryley Carlock & Applewhite PC, Phoenix, AZ; Shpetim Ademi, Cudahy, WI; Theresa Driscoll Moore, Alioto Law Firm, San Francisco, CA.

For Wettstein and Sons, Inc, on behalf of itself and all others similarly situated, is a corporation of Wisconsin, doing business as Wettstein's, Plaintiff: Katherine T. Kelly, LEAD ATTORNEY, Heins Mills & Olson PLC, Mpls, MN; Ranae D. Steiner, LEAD ATTORNEY, Heins Mills & Olson PLC, Minneapolis, MN; Samuel D. Heins, LEAD ATTORNEY, Heins Mills & Olson, P.L.C., Minneapolis, MN; Troy J. Hutchinson, **[*33]** LEAD ATTORNEY, Heins Mills & Olson PLC, Mpls, MN; Vincent J. Esades, LEAD ATTORNEY, Heins Mills & Olson, P.L.C., Minneapolis, MN;

Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guido Saveri, Saveri & Saveri, Inc., San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Joel Cary Meredith, Meredith & Associates, Philadelphia, PA; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Scott W. Carlson, Heins Mills & Olson PLC, Minneapolis, MN; Shpetim Ademi, Cudahy, WI.

For Industrial Computing, Inc., on behalf of Itself and all others similarly situated, Plaintiff: Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Jeffrey Alan Klafter, Klafter & Olsen LLP, White Plains, NY; Joseph M. Barton, Law Offices of Joseph M. Barton, Corte Madera, CA.

For Steven Ganz, a California resident, Plaintiff: Terry Gross, LEAD ATTORNEY, Gross Belsky Alonso LLP, San Francisco, CA; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jayne A. Goldstein, **[*34]** Mager & Goldstein LLP, Weston, FL; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; John Dmitry Bogdanov, Cooper & Kirkham, P.C., San Francisco, CA; Josef Deen Cooper, Cooper & Kirkham, P.C., San Francisco, CA; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Mario Nunzio Alioto, Trump Alioto Trump & Prescott LLP, San Francisco, CA; Shpetim Ademi, Cudahy, WI; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James P. McCarthy, Lindquist & Vennum; Tracy R. Kirkman, Cooper & Kirkham PC.

For Dennis Patrick, Plaintiff: Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Reginald Von Terrell, The Terrell Law Group, Oakland, CA; Shpetim Ademi, Cudahy, WI.

For Dana Ross, a California resident, Plaintiff: Kathleen Styles Rogers, LEAD ATTORNEY, The Kralowec Law Group, San Francisco, CA; Susan Gilah Kupfer, LEAD ATTORNEY, **[*35]** Glancy Prongay & Murray LLP, Berkeley, CA; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Mario Nunzio Alioto, Trump Alioto Trump & Prescott LLP, San Francisco, CA; Shpetim Ademi, Cudahy, WI; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James P. McCarthy, Lindquist & Vennum.

For Electronic Design Company, Plaintiff: Charles H. Johnson, LEAD ATTORNEY, Charles H Johnson & Associates PA, New Brighton, MN; Eugene A. Spector, LEAD ATTORNEY, Spector Roseman Kodroff & Willis, PC, Philadelphia, PA; Garrett D. Blanchfield, Jr., LEAD ATTORNEY, Reinhardt Wendorf & Blanchfield, St. Paul, MN; Mark Reinhardt, LEAD ATTORNEY, Reinhardt Wendorf & Blanchfield, St. Paul, MN; Neal A Eisenbraun, LEAD ATTORNEY, Neal A Eisenbraun, Chartered, New Brighton, MN; **[*36]** William G. Caldes, LEAD ATTORNEY, Spector, Roseman, Kodroff & Willis, P.C., Philadelphia, PA; Cadio R. Zirpoli, Saveri & Saveri, Inc., San Francisco, CA; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guido Saveri, Saveri & Saveri, Inc., San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Richard Alexander Saveri, Saveri & Saveri, Inc., San Francisco, CA; Shpetim Ademi, Cudahy, WI; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James P. McCarthy, Lindquist & Vennum.

For Brigid Terry, a Wisconsin resident, on behalf of herself and all others similarly situated, Plaintiff: Jean B. Roth, LEAD ATTORNEY, Mansfield Tanick & Cohen, Minneapolis, MN; Joseph Mario Patane, LEAD ATTORNEY, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Kenneth Leo Valinoti, LEAD ATTORNEY, **[*37]** Valinoti & Dito LLP, San Francisco, CA; Lauren Clare Capurro, LEAD ATTORNEY, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Lawrence Genaro Papale, LEAD ATTORNEY, Law Offices of Lawrence G. Papale, St. Helena, CA; Lawrence P. Schaefer, LEAD ATTORNEY, Mansfield Tanick & Cohen, Minneapolis, MN; Mario Nunzio Alioto, LEAD ATTORNEY, Trump Alioto Trump & Prescott LLP, San Francisco, CA; Robert J. Bonsignore, LEAD ATTORNEY, Bonsignore Trial Lawyers, PLLC, Las Vegas, NV; Seymour J. Mansfield, LEAD ATTORNEY, Foley & Mansfield, PLLP, Minneapolis, MN; Sherman Kassof, LEAD ATTORNEY, Law Offices of Sherman Kassof, Lafayette, CA; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Shpetim Ademi, Cudahy, WI; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, **[*38]** NY; James P. McCarthy, Lindquist & Vennum.

For Anthony Gianasca, on behalf of himself and all others similarly situated, Plaintiff: Jean B. Roth, LEAD ATTORNEY, Mansfield Tanick & Cohen, Minneapolis, MN; Joseph Mario Patane, LEAD ATTORNEY, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Kenneth Leo Valinoti, LEAD ATTORNEY, Valinoti & Dito LLP, San Francisco, CA; Lauren Clare Capurro, LEAD ATTORNEY, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Lawrence Genaro Papale, LEAD ATTORNEY, Law Offices of Lawrence G. Papale, St. Helena, CA; Lawrence P. Schaefer, LEAD ATTORNEY, Mansfield Tanick & Cohen, Minneapolis, MN; Mario Nunzio Alioto, LEAD ATTORNEY, Trump Alioto Trump & Prescott LLP, San Francisco, CA; Robert J. Bonsignore, LEAD ATTORNEY, Bonsignore Trial Lawyers, PLLC, Las Vegas, NV; Seymour J. Mansfield, LEAD ATTORNEY, Foley & Mansfield, PLLP, Minneapolis, MN; Sherman Kassof, LEAD ATTORNEY, Law Offices of Sherman Kassof, Lafayette, CA; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, **[*39]** P.C., San Diego, CA; Shpetim Ademi, Cudahy, WI.

For Brighid Flaherty, on behalf of herself and all others similarly situated, Plaintiff: Jean B. Roth, LEAD ATTORNEY, Mansfield Tanick & Cohen, Minneapolis, MN; Joseph Mario Patane, LEAD ATTORNEY, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Kenneth Leo Valinoti, LEAD ATTORNEY, Valinoti & Dito LLP, San Francisco, CA; Lauren Clare Capurro, LEAD ATTORNEY, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Lawrence Genaro Papale, LEAD ATTORNEY, Law Offices of Lawrence G. Papale, St. Helena, CA; Lawrence P. Schaefer, LEAD ATTORNEY, Mansfield Tanick & Cohen, Minneapolis, MN; Mario Nunzio Alioto, LEAD ATTORNEY, Trump Alioto Trump & Prescott LLP, San Francisco, CA; Robert J. Bonsignore, LEAD ATTORNEY, Bonsignore Trial Lawyers, PLLC, Las Vegas, NV; Seymour J. Mansfield, LEAD ATTORNEY, Foley & Mansfield, PLLP, Minneapolis, MN; Sherman Kassof, LEAD ATTORNEY, Law Offices of Sherman Kassof, Lafayette, CA; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, **[*40]** & Balint, P.C., San Diego, CA; Shpetim Ademi, Cudahy, WI.

For Bridget Ten Eyck, on behalf of herself and all others similarly situated, Plaintiff: Jean B. Roth, LEAD ATTORNEY, Mansfield Tanick & Cohen, Minneapolis, MN; Joseph Mario Patane, LEAD ATTORNEY, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Kenneth Leo Valinoti, LEAD ATTORNEY, Valinoti & Dito LLP, San Francisco, CA; Lauren Clare Capurro, LEAD ATTORNEY, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Lawrence Genaro Papale, LEAD ATTORNEY, Law Offices of Lawrence G. Papale, St. Helena, CA; Lawrence P. Schaefer, LEAD ATTORNEY, Mansfield Tanick & Cohen, Minneapolis, MN; Mario Nunzio Alioto, LEAD ATTORNEY, Trump Alioto Trump & Prescott LLP, San Francisco, CA; Robert J. Bonsignore, LEAD ATTORNEY, Bonsignore Trial Lawyers, PLLC, Las Vegas, NV; Seymour J. Mansfield, LEAD ATTORNEY, Foley & Mansfield, PLLP, Minneapolis, MN; Sherman Kassof, LEAD ATTORNEY, Law Offices of Sherman Kassof, Lafayette, CA; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Manfred Patrick Muecke, Bonnett, Fairbourn, **[*41]** Friedman, & Balint, P.C., San Diego, CA; Shpetim Ademi, Cudahy, WI.

For Southern Office Supply, Inc, on behalf of itself and all others similarly situated, Plaintiff: Gilmur Roderick Murray, LEAD ATTORNEY, Murray & Howard, LLP, San Francisco, CA; Daniel R. Karon, Karon LLC, Cleveland, OH; Donna F Solen, Lexington Law Group, San Francisco, CA; Drew A. Carson, Miller Goler Faeges, Cleveland, OH; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; Issac L. Diel, Sharp McQueen, Overland Park, KS; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Krishna Brian Narine, Meredith Narine, Philadelphia, PA; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Mario Nunzio Alioto, Trump Alioto Trump & Prescott LLP, San Francisco, CA; Shpetim Ademi, Cudahy, WI; Steven J. Miller, Miller Goler Faeges, Cleveland, OH; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, **[*42]** NY; James P. McCarthy, Lindquist & Vennum.

For OK TV & Appliances, LLC, on behalf of itself and all others similarly situated, Plaintiff: Elizabeth R. Odette, LEAD ATTORNEY, Lockridge Grindal Nauen P.L.L.P., Minneapolis, MN; Lisa J. Rodriguez, LEAD ATTORNEY, Trujillo Rodriguez & Richards LLP, Haddonfield, NJ; W. Joseph Bruckner, LEAD ATTORNEY, Lockridge Grindal Nauen P.L.L.P, Minneapolis, MN; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Shpetim Ademi, Cudahy, WI.

For Charles Benson, on behalf of himself and all others similarly situated, Plaintiff: Gordon Ball, LEAD ATTORNEY, Law Office Gordon Ball, Knoxville, TN; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Robert Gordon Methvin, Jr, McCallum, Methvin **[*43]** & Terrell, P.C., Birmingham, AL; Shpetim Ademi, Cudahy, WI.

For Meijer, Inc., On behalf of themselves and all others similarly situated, Plaintiff: Gregory K Arenson, LEAD ATTORNEY, Kaplan Fox and Kilsheimer LLP, New York, NY; Robert N. Kaplan, LEAD ATTORNEY, Kaplan Kilsheimer & Fox LLP, New York, NY; David Paul Germaine, PRO HAC VICE, Chicago, IL; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Gary Laurence Specks, Kaplan Fox & Kilsheimer LLP, Highland Park, IL; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Joseph Michael Vanek, PRO HAC VICE, Vanek Vickers & Masini PC, Chicago, IL; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Linda P. Nussbaum, PRO HAC VICE, Nussbaum Law Group PC, New York, NY; Linda Phyllis Nussbaum, Nussbaum Law Group, P.C., New York, NY; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Shpetim Ademi, Cudahy, WI; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, **[*44]** NY; James P. McCarthy, Lindquist & Vennum.

For Meijer Distribution, Inc., on behalf of themselves and all others similarly situated, Plaintiff: Gregory K Arenson, LEAD ATTORNEY, Kaplan Fox and Kilsheimer LLP, New York, NY; Robert N. Kaplan, LEAD ATTORNEY, Kaplan Kilsheimer & Fox LLP, New York, NY; David Paul Germaine, PRO HAC VICE, Chicago, IL; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Gary Laurence Specks, Kaplan Fox & Kilsheimer LLP, Highland Park, IL; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Joseph Michael Vanek, PRO HAC VICE, Vanek Vickers & Masini PC, Chicago, IL; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Linda P. Nussbaum, PRO HAC VICE, Nussbaum LLP, Scarsdale, NY; Linda Phyllis Nussbaum, Nussbaum Law Group, P.C., New York, NY; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Shpetim Ademi, Cudahy, WI; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James **[*45]** P. McCarthy, Lindquist & Vennum.

For Arch Electronics, Inc, Plaintiff: Anthony J. Bolognese, LEAD ATTORNEY, Bolognese & Associates LLC, Philadelphia, PA; Gregory K Arenson, LEAD ATTORNEY, Kaplan Fox and Kilsheimer LLP, New York, NY; Linda P. Nussbaum, LEAD ATTORNEY, PRO HAC VICE, Kaplan Fox & Kilsheimer, LLP, New York, NY; Robert N. Kaplan, LEAD ATTORNEY, Kaplan Fox & Kilsheimer, LLP, New York, NY; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Joshua H. Grabar, Bolognese & Associates, LLC, Philadelphia, PA; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Kevin Bruce Love, PRO HAC VICE, Hanzman Criden & Love, P.A., South Miami, FL; Linda Phyllis Nussbaum, Nussbaum

Law Group, P.C., New York, NY; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Shpetim Ademi, Cudahy, WI; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James P. McCarthy, **[*46]** Lindquist & Vennum.

For Royal Data Services, Inc., on behalf of itself and all others similarly situated, is a Hawaii corporation, Plaintiff: Lisa J. Rodriguez, LEAD ATTORNEY, Trujillo Rodriguez & Richards LLP, Haddonfield, NJ; Elizabeth R. Odette, Lockridge Grindal Nauen P.L.L.P., Minneapolis, MN; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Shpetim Ademi, Cudahy, WI; W. Joseph Bruckner, Lockridge Grindal Nauen P.L.L.P, Minneapolis, MN.

For Dennis Patrick, Plaintiff: Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Reginald Von Terrell, The Terrell Law Group, Oakland, CA; Shpetim Ademi, Cudahy, WI.

For Studio Spectrum, Inc., is a California business, Plaintiff: Steven F. Benz, LEAD ATTORNEY, Kellogg, Huber, Hansen, Todd, Washington, DC; David Nathan-Allen Sims, Saveri **[*47]** & Saveri, Inc., San Francisco, CA; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Guido Saveri, Saveri & Saveri, Inc., San Francisco, CA; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Shpetim Ademi, Cudahy, WI; James P. McCarthy, Lindquist & Vennum.

For James E. Allee, Plaintiff: Jeff S. Westerman, LEAD ATTORNEY, Westerman Law Corp, Los Angeles, CA; Andrew J. Morganti, Milberg LLP, New York, NY; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Peter G.A. Safirstein, Morgan & Morgan, New York, NY; Shpetim Ademi, Cudahy, WI.

For Kory Pentland, a Michigan resident, Plaintiff: Elizabeth Anne McKenna, LEAD ATTORNEY, Milberg LLP, NY, NY; Jeff S. Westerman, LEAD ATTORNEY, Westerman Law Corp, Los Angeles, CA; Paul F. Novak, **[*48]** LEAD ATTORNEY, PRO HAC VICE, Milberg LLP, Detroit, MI; Andrew J. Morganti, Milberg LLP, New York, NY; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Mario Nunzio Alioto, Trump Alioto Trump & Prescott LLP, San Francisco, CA; Peter G.A. Safirstein, Morgan & Morgan, New York, NY; Shpetim Ademi, Cudahy, WI; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James P. McCarthy, Lindquist & Vennum.

For Jim Brown, on behalf of themselves & others similarly situated, Plaintiff: Jeff S. Westerman, LEAD ATTORNEY, Westerman Law Corp, Los Angeles, CA; Andrew J. Morganti, Milberg LLP, New York, NY; Guri Ademi, Ademi & O'Reilly LLP, Cudahy, WI; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Mario Nunzio Alioto, Trump Alioto Trump & Prescott LLP, San Francisco, CA; Peter G.A. Safirstein, Morgan & Morgan, **[*49]** New York, NY; Shpetim Ademi, Cudahy, WI.

For Radio & TV Equipment, Inc, is a business headquartered in Fargo, North Dakota, Plaintiff: Lisa J. Rodriguez, LEAD ATTORNEY, Trujillo Rodriguez & Richards LLP, Haddonfield, NJ; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jason Kilene, Gustafson Gluek PLLC, Minneapolis, MN; Jayne A. Goldstein, Mager & Goldstein LLP, Weston, FL; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James P. McCarthy, Lindquist & Vennum.

For SOUND INVESTMENTS CORPORATION, doing business as EGGERS AUDIO-VIDEO, Plaintiff: Lisa J. Rodriguez, LEAD ATTORNEY, Trujillo Rodriguez & Richards LLP, Haddonfield, NJ; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; James P. McCarthy, Lindquist & Vennum.

For Brady Lane Cotton, a Florida resident, Plaintiff: Mario Nunzio Alioto, LEAD ATTORNEY, Trump Alioto Trump & Prescott LLP, San Francisco, CA; Christina Diane Crow, Jinks, **[*50]** Crow & Dickson P.C., Union Springs, AL; J. Matthew Stephens, McCallum Methvin & Terrell PC, Birmingham, AL; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; James Michael Terrell, McCallum, Methvin & Terrell, P.C., Birmingham, AL; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Lauren Clare Capurro, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Robert G. Methvin, McCallum Methvin & Terrell PC, Birmingham, AL; Robert Gordon Methvin, Jr, McCallum, Methvin & Terrell, P.C., Birmingham, AL; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James P. McCarthy, Lindquist & Vennum; Lynn W. Jinks, Jinks Crow & Dickson PC; Nathan A. Dickson, Jinks Crow & Dickson PC.

For Colleen Sobotka, a Florida resident, Plaintiff: Mario Nunzio Alioto, LEAD ATTORNEY, Trump Alioto Trump & Prescott LLP, San Francisco, CA; Christopher William Cantrell, Birmingham, AL; J. Matthew Stephens, McCallum Methvin & Terrell PC, Birmingham, AL; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; **[*51]** James Michael Terrell, McCallum, Methvin & Terrell, P.C., Birmingham, AL; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Keith Thomson Belt, Jr., Belt Law Firm, P.C., Birmingham, AL; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Lauren Clare Capurro, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Robert Page Bruner, Belt Law Firm, P.C., Birmingham, AL; Robert G. Methvin, McCallum Methvin & Terrell PC, Birmingham, AL; Robert Gordon Methvin, Jr, McCallum, Methvin & Terrell, P.C., Birmingham, AL; William Tipton Johnson, III, Belt Law Firm, P.C, Birmingham, AL; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James P. McCarthy, Lindquist & Vennum; Lynn W. Jinks, Jinks Crow & Dickson PC; Nathan A. Dickson, Jinks Crow & Dickson PC.

For Daniel Riebow, a Hawaii resident, Plaintiff: Mario Nunzio Alioto, LEAD ATTORNEY, Trump Alioto Trump & Prescott LLP, San Francisco, CA; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, **[*52]** Lindquist & Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Lauren Clare Capurro, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James P. McCarthy, Lindquist & Vennum.

For Travis Burau, a Iowa resident, Plaintiff: Elizabeth Anne McKenna, LEAD ATTORNEY, Milberg LLP, NY, NY; Mario Nunzio Alioto, LEAD ATTORNEY, Trump Alioto Trump & Prescott LLP, San Francisco, CA; Paul F. Novak, LEAD ATTORNEY, PRO HAC VICE, Milberg LLP, Detroit, MI; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Lauren Clare Capurro, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James P. McCarthy, Lindquist & Vennum.

For Andrew Kindt, a Michigan resident, Plaintiff: James P. McCarthy, LEAD ATTORNEY, Lindquist **[*53]** & Vennum; Mario Nunzio Alioto, LEAD ATTORNEY, Trump Alioto Trump & Prescott LLP, San Francisco, CA; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Lauren Clare Capurro, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY.

For James Brown, a Michigan resident, Plaintiff: Elizabeth Anne McKenna, LEAD ATTORNEY, Milberg LLP, NY, NY; Mario Nunzio Alioto, LEAD ATTORNEY, Trump Alioto Trump & Prescott LLP, San Francisco, CA; Paul F. Novak, LEAD ATTORNEY, PRO HAC VICE, Milberg LLP, Detroit, MI; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist &

Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Lauren Clare Capurro, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, **[*54]** CA; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James P. McCarthy, Lindquist & Vennum.

For Alan Rotman, a Minnesota resident, Plaintiff: Mario Nunzio Alioto, LEAD ATTORNEY, Trump Alioto Trump & Prescott LLP, San Francisco, CA; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Lauren Clare Capurro, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James P. McCarthy, Lindquist & Vennum.

For Ryan Rizzo, a Minnesota resident, Plaintiff: Elizabeth Anne McKenna, LEAD ATTORNEY, Milberg LLP, NY, NY; Mario Nunzio Alioto, LEAD ATTORNEY, Trump Alioto Trump & Prescott LLP, San Francisco, CA; Paul F. Novak, LEAD ATTORNEY, PRO HAC VICE, Milberg LLP, Detroit, MI; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, **[*55]** PLLP, Minneapolis, MN; Lauren Clare Capurro, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James P. McCarthy, Lindquist & Vennum.

For Charles Jenkins, a Mississippi resident, Plaintiff: Mario Nunzio Alioto, LEAD ATTORNEY, Trump Alioto Trump & Prescott LLP, San Francisco, CA; J. Matthew Stephens, McCallum Methvin & Terrell PC, Birmingham, AL; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; James Michael Terrell, McCallum, Methvin & Terrell, P.C., Birmingham, AL; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Lauren Clare Capurro, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Robert G. Methvin, McCallum Methvin & Terrell PC, Birmingham, AL; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James P. McCarthy, Lindquist & Vennum; Lynn W. Jinks, Jinks Crow & Dickson PC; Nathan A. Dickson, Jinks Crow & Dickson PC.

For Daniel R. Hergert, a Nebraska resident, Plaintiff: Mario Nunzio Alioto, **[*56]** LEAD ATTORNEY, Trump Alioto Trump & Prescott LLP, San Francisco, CA; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Lauren Clare Capurro, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James P. McCarthy, Lindquist & Vennum.

For Adrienne Belai, a New York resident, Plaintiff: Mario Nunzio Alioto, LEAD ATTORNEY, Trump Alioto Trump & Prescott LLP, San Francisco, CA; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Lauren Clare Capurro, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James P. McCarthy, Lindquist & Vennum.

For Joshua **[*57]** Maida, a North Carolina resident, Plaintiff: Elizabeth Anne McKenna, LEAD ATTORNEY, Milberg LLP, NY, NY; Mario Nunzio Alioto, LEAD ATTORNEY, Trump Alioto Trump & Prescott LLP, San Francisco, CA; Paul F. Novak, LEAD ATTORNEY, PRO HAC VICE, Milberg LLP, Detroit, MI; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Lauren Clare Capurro, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James P. McCarthy, Lindquist & Vennum.

For Rosemary Ciccone, a Rhode Island resident, Plaintiff: Mario Nunzio Alioto, LEAD ATTORNEY, Trump Alioto Trump & Prescott LLP, San Francisco, CA; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Kelly

Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Lauren Clare Capurro, Trump, Alioto, Trump & Prescott, LLP, San Francisco, **[*58]** CA; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Robert J. Bonsignore, Bonsignore Trial Lawyers, PLLC, Las Vegas, NV; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James P. McCarthy, Lindquist & Vennum.

For Donna Marie Ellington, a South Dakota resident, Plaintiff: Mario Nunzio Alioto, LEAD ATTORNEY, Trump Alioto Trump & Prescott LLP, San Francisco, CA; Lauren Clare Capurro, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA.

For Frank Warner, a Tennessee resident, Plaintiff: Mario Nunzio Alioto, LEAD ATTORNEY, Trump Alioto Trump & Prescott LLP, San Francisco, CA; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Lauren Clare Capurro, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James P. McCarthy, Lindquist & Vennum. **[*59]**

For Albert Sidney Crigler, a Tennessee resident, Plaintiff: Mario Nunzio Alioto, LEAD ATTORNEY, Trump Alioto Trump & Prescott LLP, San Francisco, CA; Robert Brent Irby, LEAD ATTORNEY, McCallum, Hoaguland Cook & Irby LLP, Vestavia Hills, AL; Eric D. Hoaglund, McCallum Hoaglund Cook & Irby LLP, Vestavia Hills, AL; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Lauren Clare Capurro, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Richard Freeman Horsley, King, Horsley & Lyons, Birmingham, AL; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James P. McCarthy, Lindquist & Vennum.

For Direct Purchaser Plaintiffs, Plaintiff: Richard Alexander Saveri, LEAD ATTORNEY, Saveri & Saveri, Inc., San Francisco, CA; Aaron M. Sheanin, Pearson, Simon & Warshaw, LLP, San Francisco, CA; Allan Steyer, Steyer Lowenthal Boodrookas Alvarez & Smith LLP, San Francisco, CA; Christopher L. Lebsock, Hausfeld LLP, San Francisco, CA; **[*60]** Donald Scott Macrae, Steyer Lowenthal Boodrookas Alvarez & Smith LLP, San Francisco, CA; Guido Saveri, Saveri & Saveri, Inc., San Francisco, CA; Henry A. Cirillo, Smith Dollar PC, Santa Rosa, CA; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jayne Ann Peeters, Steyer Lowenthal Boodrookas Alvarez & Smith LLP, San Francisco, CA; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Jill Michelle Manning, Steyer Lowenthal Boodrookas Alvarez & Smith LLP, San Francisco, CA; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA; Michael Paul Lehmann, Hausfeld LLP, San Francisco, CA; Stephanie Yunjin Cho, Hausfeld LLP, San Francisco, CA; Travis Luke Manfredi, Saveri and Saveri Inc, San Francisco, CA; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; Bruce Lee Simon, Pearson Simon & Warshaw, LLP, San Francisco, CA; Daniel D. Cowen, Shughart Thomson & Kilroy PC; James P. McCarthy, Lindquist & Vennum; P. John Brady, Shughart Thomson & Kilroy PC.

For Indirect Purchaser Plaintiffs, Plaintiff: Lingel Hart Winters, LEAD ATTORNEY, Law **[*61]** Offices of Lingel H. Winters, San Francisco, CA; Robert J. Gralewski, Jr., LEAD ATTORNEY, Kirby McInerney LLP, San Diego, CA; Charles Matthew Thompson, Charles M. Thompson, P.C., Birmingham, AL; Craig C. Corbitt, Zelle LLP, San Francisco, CA; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jennie Lee Anderson, Andrus Anderson LLP, San Francisco, CA; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jennifer Susan Rosenberg, Bramson, Plutzik, Mahler & Birkhaeuser, Walnut Creek, CA; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; John Dmitry Bogdanov, Cooper & Kirkham, P.C., San Francisco, CA; Josef Deen Cooper, Cooper & Kirkham, P.C., San Francisco, CA; Joseph Mario Patane, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Judith A. Zahid, Zelle LLP, San Francisco, CA; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Lauren Clare Capurro, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Mario Nunzio Alioto, Trump Alioto Trump & Prescott LLP, San Francisco, CA; Sylvie K. Kern, KAG Law Group, San Francisco, CA; Tracy R. Kirkham, Cooper & Kirkham, P.C., San Francisco, CA; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James P. **[*62]** McCarthy, Lindquist & Vennum.

For Indirect Purchaser Plaintiffs, Plaintiff: Mario Nunzio Alioto, LEAD ATTORNEY, Trump Alioto Trump & Prescott LLP, San Francisco, CA; Robert J. Gralewski, Jr., LEAD ATTORNEY, Kirby McInerney LLP, San Diego, CA; Charles Matthew Thompson, Charles M. Thompson, P.C., Birmingham, AL; Christopher Thomas Micheletti, Zelle LLP, San Francisco, CA; Craig C. Corbitt, Zelle LLP, San Francisco, CA; David Nathan Lake, Law Offices of David N. Lake, Encino, CA; Francis Onofrei Scarpulla, Law Offices of Francis O. Scarpulla, San Francisco, CA; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jennie Lee Anderson, Andrus Anderson LLP, San Francisco, CA; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Josef Deen Cooper, Cooper & Kirkham, P.C., San Francisco, CA; Joseph Mario Patane, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Judith A. Zahid, Zelle LLP, San Francisco, CA; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Lauren Clare Capurro, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Theresa Driscoll Moore, Alioto Law Firm, San Francisco, CA; Anne M. Nardacci, Boies, **[*63]** Schiller & Flexner, LLP, Albany, NY; James P. McCarthy, Lindquist & Vennum.

For State of Washington, Plaintiff: David Michael Kerwin, LEAD ATTORNEY, Washington State Attorney General's Office, Seattle, WA; Jonathan A Mark, LEAD ATTORNEY, Attorney General of Washington, Seattle, WA; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James P. McCarthy, Lindquist & Vennum.

For Electrograph Systems, Inc, Plaintiff: Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; Benjamin Daniel Battles, Boies, Schiller & Flexner LLP, Albany, NY; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Philip J Iovieno, Boies, Schiller & Flexner LLP, Albany, NY; Philip J. Iovieno, PRO HAC VICE, Boies Schiller & Flexner LLP, Albany, NY; William A. Isaacson, Boies Schiller & Flexner, Washington, **[*64]** DC; James P. McCarthy, Lindquist & Vennum.

For Electrograph Technologies Corp., Plaintiff: Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; Benjamin Daniel Battles, Boies, Schiller & Flexner LLP, Albany, NY; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Philip J Iovieno, Boies, Schiller & Flexner LLP, Albany, NY; Philip J. Iovieno, PRO HAC VICE, Boies Schiller & Flexner LLP, Albany, NY; William A. Isaacson, Boies Schiller & Flexner, Washington, DC; James P. McCarthy, Lindquist & Vennum.

For Interbond Corporation of America, Plaintiff: Stuart Harold Singer, LEAD ATTORNEY, Boies Schiller & Flexner, Fort Lauderdale, FL; William A. Isaacson, LEAD ATTORNEY, Boies Schiller & Flexner, Washington, DC; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Philip J Iovieno, **[*65]** Boies, Schiller & Flexner LLP, Albany, NY; James P. McCarthy, Lindquist & Vennum.

For Office Depot, Inc., Plaintiff: Stuart Harold Singer, LEAD ATTORNEY, Boies Schiller & Flexner, Fort Lauderdale, FL; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Philip J Iovieno, Boies, Schiller & Flexner LLP, Albany, NY; William A. Isaacson, Boies Schiller & Flexner, Washington, DC; James P. McCarthy, Lindquist & Vennum.

For Compucom Systems Inc, Plaintiff: Lewis Titus LeClair, LEAD ATTORNEY, McKool Smith, P.C., Dallas, TX; William A. Isaacson, LEAD ATTORNEY, Boies Schiller & Flexner, Washington, DC; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Mike McKool, McKool Smith, P.C., Dallas, TX; Philip J Iovieno, Boies, Schiller **[*66]** & Flexner LLP, Albany, NY; Scott R. Jacobs, McKool Smith, Dallas, TX; James P. McCarthy, Lindquist & Vennum.

For Costco Wholesale Corporation, Plaintiff: Cori Gordon Moore, Perkins Coie LLP, Seattle, WA; David Burman, PRO HAC VICE, Perkins Coie LLP, Seattle, WA; David P. Chiappetta, Perkins Coie LLP, San Francisco, CA; Eric J. Weiss, PERKINS COIE LLP, Seattle, WA; Euphemia Nikki Thomopulos, Hirschfeld Kraemer LLP, San Francisco, CA; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Joren Surya Ayala-Bass, The Law Office of Philip A. Leider, Berkeley, CA; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Nicholas H. Hesterberg, PRO HAC VICE, Perkins Coie LLP, Seattle, WA; Noah Guzzo Purcell, Seattle, Seattle, WA; Philip J Iovieno, Boies, Schiller & Flexner LLP, Albany, NY; Steven Douglas Merriman, Perkins Coie LLP, Seattle, WA; William A. Isaacson, Boies Schiller & Flexner, Washington, DC; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James P. McCarthy, Lindquist & Vennum.

For Alfred H. Siegel, Plaintiff: Brian Gillett, Susman Godfrey L.L.P., Houston, **[*67]** TX; David M. Peterson, Susman Godfrey LLP, Houston, TX; H. Lee Godfrey, Susman Godfrey LLP, Houston, TX; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; John Pierre Lahad, Susman Godfrey LLP, Houston, TX; Johnny William Carter, Susman Godfrey LLP, Houston, TX; Jonathan Jeffrey Ross, N/A, Susman Godfrey L.L.P., Houston, TX; Jonathan Mark Weiss, Klee Tuchin Bogdanoff Stern LLP, Los Angeles, CA; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Matthew C. Behncke, Susman Godfrey LLP, Houston, TX; Michael Lloyd Tuchin, Klee Tuchin Bogdanoff Stern LLP, Los Angeles, CA; Philip J Iovieno, Boies, Schiller & Flexner LLP, Albany, NY; Robert J. Pfister, Klee, Tuchin, Bogdanoff & Stern LLP, Los Angeles, CA; Robert Sabre Safi, Susman Godfrey L.L.P., Houston, TX; Samuel J Randall, Kenny Nachwalter PA, Miami, FL; William A. Isaacson, Boies Schiller & Flexner, Washington, DC; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James P. McCarthy, Lindquist & Vennum; Kenneth S. Marks, Susman Godfrey LLP.

For Department of Legal Affairs, Plaintiff: Eli Andrew Friedman, **[*68]** LEAD ATTORNEY, Office of the Attorney General, Antitrust Division, Tallahassee, FL; Patricia A. Conners, LEAD ATTORNEY, Attorney General's Office, Department of Legal Affairs, Antitrust Section, Tallahassee, FL; R. Scott Palmer, LEAD ATTORNEY, Office of the Attorney General, State of Florida, Tallahassee, FL; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Liz Ann Brady, Office of the Attorney General, Antitrust Division, Tallahassee, FL; Nicholas J. Weilhammer, Office of the Attorney General, State of Florida, Tallahassee, FL; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James P. McCarthy, Lindquist & Vennum.

For Office of the Attorney General, Plaintiff: Eli Andrew Friedman, LEAD ATTORNEY, Office of the Attorney General, Antitrust Division, Tallahassee, FL; Patricia A. Conners, LEAD ATTORNEY, Attorney General's Office, Department of Legal Affairs, Antitrust Section, Tallahassee, FL; R. Scott Palmer, LEAD ATTORNEY, Office of the Attorney General, State of Florida, Tallahassee, FL; James M. **[*69]** Lockhart, Lindquist & Vennum, P.L.L.P.; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, MN; Liz Ann Brady, Office of the Attorney General, Antitrust Division, Tallahassee, FL; Nicholas J. Weilhammer, Office of the Attorney General, State of Florida, Tallahassee, FL; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; James P. McCarthy, Lindquist & Vennum.

For State of Florida, Plaintiff: Anne M. Nardacci, LEAD ATTORNEY, Boies, Schiller & Flexner, LLP, Albany, NY; Eli Andrew Friedman, LEAD ATTORNEY, Office of the Attorney General, Antitrust Division, Tallahassee, FL; James P. McCarthy, LEAD ATTORNEY, Lindquist & Vennum; Patricia A. Conners, LEAD ATTORNEY, Attorney General's Office, Department of Legal Affairs, Antitrust Section, Tallahassee, FL; R. Scott Palmer, LEAD ATTORNEY, Office of the Attorney General, State of Florida, Tallahassee, FL; James M. Lockhart, Lindquist & Vennum, P.L.L.P.; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jessica Lynn Meyer, Lindquist & Vennum, Minneapolis, MN; Kelly Laudon, Lindquist Vennum, PLLP, Minneapolis, **[*70]** MN; Liz Ann Brady, Office of the Attorney General, Antitrust Division, Tallahassee, FL; Nicholas J. Weilhammer, Office of the Attorney General, State of Florida, Tallahassee, FL; Satu A Correa, Florida Office of the Attorney General, Tallahassee, FL.

For Best Buy Co., Inc., Plaintiff: Bernice Conn, LEAD ATTORNEY, Robins Kaplan L.L.P., Los Angeles, CA; David Martinez, LEAD ATTORNEY, Robins Kaplan LLP, Los Angeles, CA; Elizabeth Diemphuc Le, LEAD ATTORNEY, Robins, Kaplan, Miller & Ciresi L.L.P., Los Angeles, CA; Jordan Samuel Paul, LEAD ATTORNEY, Robins Kaplan Miller Ciresi LLP, Los Angeles, CA; Laura Elizabeth Nelson, LEAD ATTORNEY, Robins Kaplan Miller and Ciresi, Minneapolis, MN; Lauren Elizabeth Wood, LEAD ATTORNEY, Glynn & Finley LLP, Walnut Creek, CA; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jill Sharon Casselman, Robins, Kaplan, Miller and Ciresi L.L.P., Los Angeles, CA; Kenneth S. Marks, Susman Godfrey LLP, Houston, TX; Philip J Iovieno, Boies, Schiller & Flexner LLP, Albany, NY; Samuel J Randall, Kenny Nachwalter PA, Miami, FL; William A. Isaacson, Boies Schiller & Flexner, Washington, DC; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; Elliot **[*71]** S. Kaplan, Robins Kaplan Miller & Ciresi; K. Craig Wildfang, Attorney at Law, Minneapolis, MN; Roman M. Silberfeld, Robins Kaplan L.L.P., Los Angeles, CA.

For Best Buy Enterprise Services, Inc., Plaintiff: Bernice Conn, LEAD ATTORNEY, Robins Kaplan L.L.P., Los Angeles, CA; David Martinez, LEAD ATTORNEY, Robins Kaplan LLP, Los Angeles, CA; Elizabeth Diemphuc Le, LEAD ATTORNEY, Robins, Kaplan, Miller & Ciresi L.L.P., Los Angeles, CA; Jordan Samuel Paul, LEAD ATTORNEY, Robins Kaplan Miller Ciresi LLP, Los Angeles, CA; Laura Elizabeth Nelson, LEAD ATTORNEY, Robins Kaplan Miller and Ciresi, Minneapolis, MN; Lauren Elizabeth Wood, LEAD ATTORNEY, Glynn & Finley LLP, Walnut Creek, CA; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jill Sharon Casselman, Robins, Kaplan, Miller and Ciresi L.L.P., Los Angeles, CA; Kenneth S. Marks, Susman Godfrey LLP, Houston, TX; Philip J Iovieno, Boies, Schiller & Flexner LLP, Albany, NY; Samuel J Randall, Kenny Nachwalter PA, Miami, FL; William A. Isaacson, Boies Schiller & Flexner, Washington, DC; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; Elliot S. Kaplan, Robins Kaplan Miller & Ciresi; K. Craig Wildfang, Attorney at Law, **[*72]** Minneapolis, MN; Roman M. Silberfeld, Robins Kaplan L.L.P., Los Angeles, CA.

For Best Buy Purchasing LLC, Plaintiff: Bernice Conn, LEAD ATTORNEY, Robins Kaplan L.L.P., Los Angeles, CA; David Martinez, LEAD ATTORNEY, Robins Kaplan LLP, Los Angeles, CA; Elizabeth Diemphuc Le, LEAD ATTORNEY, Robins, Kaplan, Miller & Ciresi L.L.P., Los Angeles, CA; Jordan Samuel Paul, LEAD ATTORNEY, Robins Kaplan Miller Ciresi LLP, Los Angeles, CA; Laura Elizabeth Nelson, LEAD ATTORNEY, Robins Kaplan Miller and Ciresi, Minneapolis, MN; Lauren Elizabeth Wood, LEAD ATTORNEY, Glynn & Finley LLP, Walnut Creek, CA; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jill Sharon Casselman, Robins, Kaplan, Miller and Ciresi L.L.P., Los Angeles, CA; Kenneth S. Marks, Susman Godfrey LLP, Houston, TX; Philip J Iovieno, Boies, Schiller & Flexner LLP, Albany, NY; Samuel J Randall, Kenny Nachwalter PA, Miami, FL; William A. Isaacson, Boies Schiller & Flexner, Washington, DC; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; Elliot S. Kaplan, Robins Kaplan Miller & Ciresi; K. Craig Wildfang, Attorney at Law, Minneapolis, MN; Roman M. Silberfeld, Robins Kaplan L.L.P., Los Angeles, CA.

For Best **[*73]** Buy Stores, L.P., Plaintiff: Bernice Conn, LEAD ATTORNEY, Robins Kaplan L.L.P., Los Angeles, CA; David Martinez, LEAD ATTORNEY, Robins Kaplan LLP, Los Angeles, CA; Elizabeth Diemphuc Le, LEAD ATTORNEY, Robins, Kaplan, Miller & Ciresi L.L.P., Los Angeles, CA; Jordan Samuel Paul, LEAD ATTORNEY, Robins Kaplan Miller Ciresi LLP, Los Angeles, CA; Laura Elizabeth Nelson, LEAD ATTORNEY, Robins Kaplan Miller and Ciresi, Minneapolis, MN; Lauren Elizabeth Wood, LEAD ATTORNEY, Glynn & Finley LLP, Walnut Creek, CA; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jill Sharon Casselman, Robins, Kaplan, Miller and Ciresi L.L.P., Los Angeles, CA; Kenneth S. Marks, Susman Godfrey LLP, Houston, TX; Philip J Iovieno, Boies, Schiller & Flexner LLP, Albany, NY; Samuel J Randall, Kenny Nachwalter PA, Miami, FL; William A. Isaacson, Boies Schiller & Flexner, Washington, DC; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; Elliot S. Kaplan, Robins Kaplan Miller & Ciresi; K. Craig Wildfang, Attorney at Law, Minneapolis, MN; Roman M. Silberfeld, Robins Kaplan L.L.P., Los Angeles, CA.

For Best Buy.com LLC, Plaintiff: Bernice Conn, LEAD ATTORNEY, Robins Kaplan L.L.P., Los Angeles, **[*74]** CA; David Martinez, LEAD ATTORNEY, Robins Kaplan LLP, Los Angeles, CA; Elizabeth Diemphuc Le, LEAD ATTORNEY, Robins, Kaplan, Miller & Ciresi L.L.P., Los Angeles, CA; Jordan Samuel Paul, LEAD ATTORNEY, Robins Kaplan Miller Ciresi LLP, Los Angeles, CA; Laura Elizabeth Nelson, LEAD ATTORNEY, Robins Kaplan Miller and Ciresi, Minneapolis, MN; Lauren Elizabeth Wood, LEAD ATTORNEY, Glynn & Finley LLP, Walnut Creek, CA; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Jill Sharon Casselman, Robins, Kaplan, Miller and Ciresi L.L.P., Los Angeles, CA; Kenneth S. Marks, Susman Godfrey LLP, Houston, TX; Philip J Iovieno, Boies, Schiller & Flexner LLP, Albany, NY; Samuel J Randall, Kenny Nachwalter PA, Miami, FL; William A. Isaacson, Boies Schiller & Flexner, Washington, DC; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; Elliot S. Kaplan, Robins Kaplan Miller & Ciresi; K. Craig Wildfang, Attorney at Law, Minneapolis, MN; Roman M. Silberfeld, Robins Kaplan L.L.P., Los Angeles, CA.

For Magnolia Hi-Fi, Inc., Plaintiff: David Martinez, LEAD ATTORNEY, Robins Kaplan LLP, Los Angeles, CA; Elizabeth Diemphuc Le, LEAD ATTORNEY, Robins, Kaplan, Miller & Ciresi L.L.P., Los Angeles, **[*75]** CA; Jordan Samuel Paul, LEAD ATTORNEY, Robins Kaplan Miller Ciresi LLP, Los Angeles, CA; Laura Elizabeth Nelson, LEAD ATTORNEY, Robins Kaplan Miller and Ciresi, Minneapolis, MN; Lauren Elizabeth Wood, LEAD ATTORNEY, Glynn & Finley LLP, Walnut Creek, CA; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Kenneth S. Marks, Susman Godfrey LLP, Houston, TX; Philip J Iovieno, Boies, Schiller & Flexner LLP, Albany, NY; William A. Isaacson, Boies Schiller & Flexner, Washington, DC; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; Elliot S. Kaplan, Robins Kaplan Miller & Ciresi; Jill Sharon Casselman, Robins, Kaplan, Miller and Ciresi L.L.P.; K. Craig Wildfang, Attorney at Law, Minneapolis, MN; Roman M. Silberfeld, Robins Kaplan L.L.P., Los Angeles, CA.

For Good Guys, Inc., Plaintiff: Jason C. Murray, LEAD ATTORNEY, Crowell & Moring LLP, Los Angeles, CA; Philip J Iovieno, Boies, Schiller & Flexner LLP, Albany, NY; William A. Isaacson, Boies Schiller & Flexner, Washington, DC.

For KMart Corporation, Plaintiff: Jason C. Murray, LEAD ATTORNEY, Crowell & Moring LLP, Los Angeles, CA; William J. Blechman, LEAD ATTORNEY, Kenny Nachwalter PA, Miami, FL; Gavin David Whitis, **[*76]** Pond North LLP, Los Angeles, CA; Jalaine Garcia, Miami, FL; James T Almon, Kenny Nachwalter, PA, Miami, FL; Kenneth S. Marks, Susman Godfrey LLP, Houston, TX; Kevin J. Murray, Kenny Nachwalter PA, Miami, FL; Philip J Iovieno, Boies, Schiller & Flexner LLP, Albany, NY; Richard A. Arnold, Kenny Nachwalter, Miami, FL; Ryan C Zagare, Kenny Nachwalter, PA, Miami, Fl; Samuel J Randall, Kenny Nachwalter PA, Miami, FL; William A. Isaacson, Boies Schiller & Flexner, Washington, DC.

For Old Comp Inc., Plaintiff: Jason C. Murray, LEAD ATTORNEY, Crowell & Moring LLP, Los Angeles, CA; Daniel Allen Sasse, Crowell & Moring LLP, Irvine, CA; Deborah Ellen Arbabi, Crowell and Moring LLP, Irvine, CA; Philip J Iovieno, Boies, Schiller & Flexner LLP, Albany, NY; William A. Isaacson, Boies Schiller & Flexner, Washington, DC.

For Radioshack Corp., Plaintiff: Jason C. Murray, LEAD ATTORNEY, Crowell & Moring LLP, Los Angeles, CA; Daniel Allen Sasse, Crowell & Moring LLP, Irvine, CA; Deborah Ellen Arbabi, Crowell and Moring LLP, Irvine, CA; Philip J Iovieno, Boies, Schiller & Flexner LLP, Albany, NY; William A. Isaacson, Boies Schiller & Flexner, Washington, DC.

For Sears, Roebuck and Co., Plaintiff: Jason C. **[*77]** Murray, LEAD ATTORNEY, Crowell & Moring LLP, Los Angeles, CA; William J. Blechman, LEAD ATTORNEY, Kenny Nachwalter PA, Miami, FL; Gavin David Whitis, Pond North LLP, Los Angeles, CA; Jalaine Garcia, Miami, FL; James T Almon, Kenny Nachwalter, PA, Miami, FL; Kenneth S. Marks, Susman Godfrey LLP, Houston, TX; Philip J Iovieno, Boies, Schiller & Flexner LLP, Albany, NY; Richard A. Arnold, Kenny Nachwalter, Miami, FL; Ryan C Zagare, Kenny Nachwalter, PA, Miami, Fl; Samuel J Randall, Kenny Nachwalter PA, Miami, FL; William A. Isaacson, Boies Schiller & Flexner, Washington, DC; Kevin J. Murray, Kenny Nachwalter PA, Miami, FL.

For Target Corp., Plaintiff: Jason C. Murray, LEAD ATTORNEY, Crowell & Moring LLP, Los Angeles, CA; Astor Henry Lloyd Heaven, III, Crowell and Moring LLP, Washington, DC; Jerome A. Murphy, Crowell & Moring LLP, Washington, DC; Kenneth S. Marks, Susman Godfrey LLP, Houston, TX; Matthew J. McBurney, Crowell & Moring LLP, Washington, DC; Philip J Iovieno, Boies, Schiller & Flexner LLP, Albany, NY; Robert Brian McNary, Crowell & Moring LLP, Los Angeles, CA; Samuel J Randall, Kenny Nachwalter PA, Miami, FL; William A. Isaacson, Boies Schiller & Flexner, Washington, DC.

For **[*78]** Giovanni Constabile, On behalf of themselves and all others similarly situated, Plaintiff: Lingel Hart Winters, LEAD ATTORNEY, Law Offices of Lingel H. Winters, San Francisco, CA.

For Gio's Inc, a California corporation, Plaintiff: Lingel Hart Winters, LEAD ATTORNEY, Law Offices of Lingel H. Winters, San Francisco, CA.

For Schultze Agency Services, LLC, on behalf of Tweeter Opco, LLC and Tweeter Newco, LLC, Plaintiff: William A. Isaacson, LEAD ATTORNEY, Boies Schiller & Flexner, Washington, DC; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; Christopher V. Fenlon, Boies, Schiller & Flexner, LLP, Albany, NY; Philip J Iovieno, Boies, Schiller & Flexner LLP, Albany, NY; Philip J. Iovieno, PRO HAC VICE, Boies, Schiller & Flexner LLP, Albany, NY.

For Tweeter Newco, LLC, Plaintiff: Anne M. Nardacci, LEAD ATTORNEY, Boies, Schiller & Flexner, LLP, Albany, NY; Philip J. Iovieno, LEAD ATTORNEY, Boies, Schiller & Flexner LLP, Albany, NY; William A. Isaacson, LEAD ATTORNEY, Boies Schiller & Flexner, Washington, DC; Christopher V. Fenlon, Boies, Schiller & Flexner, LLP, Albany, NY; Philip J Iovieno, Boies, Schiller & Flexner LLP, Albany, NY.

For ABC Appliance, Inc., Plaintiff: Christopher **[*79]** V. Fenlon, LEAD ATTORNEY, Boies, Schiller & Flexner, LLP, Albany, NY; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Philip J Iovieno, Boies, Schiller & Flexner LLP, Albany, NY; William A. Isaacson, Boies Schiller & Flexner, Washington, DC.

For Marta Cooperative of America, Inc., Plaintiff: Christopher V. Fenlon, LEAD ATTORNEY, Boies, Schiller & Flexner, LLP, Albany, NY; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; Philip J Iovieno, Boies, Schiller & Flexner LLP, Albany, NY; William A. Isaacson, Boies Schiller & Flexner, Washington, DC.

For P.C. Richard & Son Long Island Corporation, Plaintiff: Christopher V. Fenlon, LEAD ATTORNEY, Boies, Schiller & Flexner, LLP, Albany, NY; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; Philip J Iovieno, Boies, Schiller & Flexner LLP, Albany, NY; William A. Isaacson, Boies Schiller & Flexner, Washington, DC.

For Sharp Corporation, Plaintiff: Colin C. West, Morgan Lewis & Bockius LLP, San Francisco, CA; Jonathan Alan Patchen, Taylor & Company Law Offices, LLP, San Francisco, CA.

For -----Plaintiff, Plaintiff: Gloria Comeaux Robert J. Bonsignore, **[*80]** Bonsignore Trial Lawyers, PLLC, Las Vegas, NV.

For Kerry Lee Hall, Plaintiff: Robert J. Gralewski, Jr., LEAD ATTORNEY, Gergosian & Gralewski LLP, San Diego, CA; Daniel Hume, Kirby McInerney LLP, New York, NY.

For Jeff Speaect, Plaintiff: Robert J. Bonsignore, Bonsignore Trial Lawyers, PLLC, Las Vegas, NV.

For Tech Data Corporation, Plaintiff: Melissa Willett, LEAD ATTORNEY, Boies, Schiller & Flexner, Washington, DC; Mitchell E. Widom, LEAD ATTORNEY, Bilzin Sumberg Baena Price & Axelrod, LLP, Miami, FL; Robert Turken, LEAD ATTORNEY, Bilzin Sumberg Baena Price & Axelrod LLP, Miami, FL; Scott N. Wagner, LEAD ATTORNEY, PRO HAC VICE, Bilzin Sumberg Baena Price & Axelrod LLP, Miami, FL; Stuart Harold Singer, LEAD ATTORNEY, Boies Schiller & Flexner, Fort Lauderdale, FL; William A. Isaacson, LEAD ATTORNEY, Boies Schiller & Flexner, Washington, DC; Anne M. Nardacci, Boies, Schiller & Flexner, LLP, Albany, NY; Philip J Iovieno, Boies, Schiller & Flexner LLP, Albany, NY; Philip J. Iovieno, PRO HAC VICE, Boies Schiller & Flexner LLP, Albany, NY.

For Tech Data Product Management, Inc., Plaintiff: Robert Turken, LEAD ATTORNEY, Bilzin Sumberg Baena Price & Axelrod LLP, Miami, FL; Anne M. Nardacci, Boies, **[*81]** Schiller & Flexner, LLP, Albany, NY; Jennifer Milici, Boies Schiller and Flexner LLP, Washington, DC; Philip J Iovieno, Boies, Schiller & Flexner LLP, Albany, NY; Scott N. Wagner, Bilzin Sumberg Baena Price & Axelrod LLP, Miami, FL; William A. Isaacson, Boies Schiller & Flexner, Washington, DC.

For Sharp Electronics Corporation, Plaintiff: Cheryl Ann Galvin, Quinn Emmanuel Urquhart & Sullivan LLP, Redwood Shores, CA; Craig A Benson, Paul Weiss LLP, Washington, DC; Gary R Carney, PRO HAC VICE, Paul, Weiss, Rifkind, Wharton and Garrison LLP, New York, NY; Jonathan Alan Patchen, Taylor & Company Law Offices, LLP, San Francisco, CA; Joseph J Simons, Paul Weiss LLP, Washington, DC; Kenneth A. Gallo, Paul, Weiss, Rifkind, Wharton & Garrison LLP, Washington, DC; Kenneth S. Marks, Susman Godfrey LLP, Houston, TX; Kira A Davis, PRO HAC VICE, Paul, Weiss, Rifkind, Wharton and Garrison LLP, New York, NY; Stephen E. Taylor, Taylor & Company Law Offices, LLP.

For Sharp Electronics Manufacturing Company of America, Inc., Plaintiff: Cheryl Ann Galvin, Quinn Emmanuel Urquhart & Sullivan LLP, Redwood Shores, CA; Craig A Benson, Paul Weiss LLP, Washington, DC; Gary R

Carney, PRO HAC VICE, Paul, Weiss, **[*82]** Rifkind, Wharton and Garrison LLP, New York, NY; Jonathan Alan Patchen, Taylor & Company Law Offices, LLP, San Francisco, CA; Joseph J Simons, Paul Weiss LLP, Washington, DC; Kenneth A. Gallo, Paul, Weiss, Rifkind, Wharton & Garrison LLP, Washington, DC; Kenneth S. Marks, Susman Godfrey LLP, Houston, TX; Kira A Davis, PRO HAC VICE, Paul, Weiss, Rifkind, Wharton and Garrison LLP, New York, NY; Stephen E. Taylor, Taylor & Company Law Offices, LLP.

For Dell Inc., Plaintiff: Debra Dawn Bernstein, LEAD ATTORNEY, Alston & Bird LLP, Atlanta, GA; Elizabeth Helmer Jordan, LEAD ATTORNEY, Alston & Bird LLP, Atlanta, GA; Jon G. Shepherd, LEAD ATTORNEY, Gibson Dunn & Crutcher, Dallas, TX; Matthew David Kent, LEAD ATTORNEY, Alston + Bird LLP, Atlanta, GA; Melissa Mahurin Whitehead, LEAD ATTORNEY, Alston and Bird, Atlanta, GA; Michael P. Kenny, LEAD ATTORNEY, Alston & Bird LLP, Atlanta, GA; Rodney J Ganske, LEAD ATTORNEY, Alston & Bird LLP, Atlanta, GA; James Matthew Wagstaffe, Kerr & Wagstaffe LLP, San Francisco, CA; Michael John Newton, Alston & Bird, Dallas, TX.

For Dell Products L.P., Plaintiff: Debra Dawn Bernstein, LEAD ATTORNEY, Alston & Bird LLP, Atlanta, GA; Elizabeth Helmer Jordan, LEAD ATTORNEY, **[*83]** Alston & Bird LLP, Atlanta, GA; Jon G. Shepherd, LEAD ATTORNEY, Gibson Dunn & Crutcher, Dallas, TX; Matthew David Kent, LEAD ATTORNEY, Alston + Bird LLP, Atlanta, GA; Melissa Mahurin Whitehead, LEAD ATTORNEY, Alston and Bird, Atlanta, GA; Michael P. Kenny, LEAD ATTORNEY, Alston & Bird LLP, Atlanta, GA; Rodney J Ganske, LEAD ATTORNEY, Alston & Bird LLP, Atlanta, GA; James Matthew Wagstaffe, Kerr & Wagstaffe LLP, San Francisco, CA; Michael John Newton, Alston & Bird, Dallas, TX.

For Magnolia Hi-Fi, LLC, Plaintiff: David Martinez, LEAD ATTORNEY, Robins Kaplan LLP, Los Angeles, CA; Laura Elizabeth Nelson, LEAD ATTORNEY, Robins Kaplan Miller and Ciresi, Minneapolis, MN; Jill Sharon Casselman, Robins, Kaplan, Miller and Ciresi L.L.P., Los Angeles, CA; Elliot S. Kaplan, Robins Kaplan Miller & Ciresi; Roman M. Silberfeld, Robins Kaplan L.L.P., Los Angeles, CA.

For Viewsonic Corporation, Plaintiff: Jason C. Murray, LEAD ATTORNEY, Crowell & Moring LLP, Los Angeles, CA; Astor Henry Lloyd Heaven, III, Crowell and Moring LLP, Washington, DC; Daniel Allen Sasse, Crowell & Moring LLP, Irvine, CA; Deborah Ellen Arbabi, Crowell and Moring LLP, Irvine, CA; Jerome A. Murphy, Crowell & Moring LLP, Washington, **[*84]** DC; Kenneth S. Marks, Susman Godfrey LLP, Houston, TX; Matthew J. McBurney, Crowell & Moring LLP, Washington, DC; Robert Brian McNary, Crowell & Moring LLP, Los Angeles, CA; Samuel J Randall, Kenny Nachwalter PA, Miami, FL.

For YRC, INC., Creditor: Jeffrey M. Judd, Judd Law Group, San Francisco, CA.

For Chunghwa Picture Tubes, LTD. ("Chunghwa PT") is a Taiwanese company, Defendant: Joel Steven Sanders, LEAD ATTORNEY, Gibson, Dunn & Crutcher LLP, San Francisco, CA; Adam C. Hemlock, Weil Gotshal and Manges LLP, New York, NY; Austin Van Schwing, Gibson, Dunn & Crutcher LLP, San Francisco, CA; David C. Brownstein, Farmer Brownstein Jaeger LLP, San Francisco, CA; Jacob P. Alpren, Farmer Brownstein Jaeger LLP, San Francisco, CA; Joel Calcar Willard, Gibson, Dunn Crutcher LLP, San Francisco, CA; William S Farmer, Farmer Brownstein Jaeger LLP, San Francisco, CA; Rachel S. Brass, Gibson Dunn & Crutcher LLP.

For Chunghwa Picture Tubes (Malaysia) Sdn. Bhd. ("Chunghwa Malaysia") is a Malaysian company, Defendant: Joel Steven Sanders, LEAD ATTORNEY, Gibson, Dunn & Crutcher LLP, San Francisco, CA; Adam C. Hemlock, Weil Gotshal and Manges LLP, New York, NY; Austin Van Schwing, Gibson, Dunn & Crutcher **[*85]** LLP, San Francisco, CA; David C. Brownstein, Farmer Brownstein Jaeger LLP, San Francisco, CA; Jacob P. Alpren, Farmer Brownstein Jaeger LLP, San Francisco, CA; Rachel S. Brass, Gibson Dunn & Crutcher LLP, San Francisco, CA; William S Farmer, Farmer Brownstein Jaeger LLP, San Francisco, CA.

For Hitachi, Ltd., is a Japanese company, Defendant: Diane Leslie Webb, LEAD ATTORNEY, San Francisco, CA; Eliot A. Adelson, LEAD ATTORNEY, Kirkland & Ellis LLP, San Francisco, CA; John Clayton Everett, LEAD ATTORNEY, PRO HAC VICE, Jr., Morgan, Lewis & Bockius LLP, Washington, DC; Michelle Park Chiu, LEAD ATTORNEY, Morgan Lewis & Bockius LLP, San Francisco, CA; Scott A. Stempel, LEAD ATTORNEY, PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Christopher M. Curran, White & Case, Washington, DC; Douglas L Wald, Washington, DC; James Maxwell Cooper, Kessenick Gamma & Free LLP, San Francisco, CA; James Mutchnik, PRO HAC VICE, Chicago, IL; Jason Bruce Allen, Morgan, Lewis & Bockius LLP, San Francisco, CA; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Katherine Hamilton Wheaton, PRO **[*86]** HAC VICE, Chicago, IL; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY; Thomas R. Green, United States Attorney's Office, Northern District of California, Oakkland, CA.

For Hitachi America, Ltd. ("Hitachi America") is a New York company, Defendant: Diane Leslie Webb, LEAD ATTORNEY, San Francisco, CA; Eliot A. Adelson, LEAD ATTORNEY, Kirkland & Ellis LLP, San Francisco, CA; Kent Michael Roger, LEAD ATTORNEY, Morgan Lewis & Bockius LLP, San Francisco, CA; Michelle Park Chiu, LEAD ATTORNEY, Morgan Lewis & Bockius LLP, San Francisco, CA; Scott A. Stempel, LEAD ATTORNEY, PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Christine S. Safreno, Morgan Lewis & Bockius, LLP, San Francisco, CA; D. Eric Shapland, Heller Ehrman White & McAuliffe LLP; James Maxwell Cooper, Kessenick Gamma & Free LLP, San Francisco, CA; James Mutchnik, PRO HAC VICE, Chicago, IL; Jason Bruce Allen, Morgan, Lewis & Bockius LLP, San Francisco, CA; Jeffrey L. Kessler, Winston & Strawn LLP, New York, **[*87]** NY; Jonathan DeGooyer, Morgan Lewis & Bockius LLP, San Francisco, CA; Katherine Hamilton Wheaton, Chicago, IL; Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Rebecca Ann Falk, Morgan, Lewis & Bockius LLP, San Francisco, CA; Thomas R. Green, United States Attorney's Office, Northern District of California, Oakkland, CA.

For Hitachi Asia, Ltd. ("Hitachi Asia") is a Singaporean company, Defendant: Diane Leslie Webb, LEAD ATTORNEY, San Francisco, CA; Eliot A. Adelson, LEAD ATTORNEY, Kirkland & Ellis LLP, San Francisco, CA; John Clayton Everett, LEAD ATTORNEY, PRO HAC VICE, Jr., Morgan, Lewis & Bockius LLP, Washington, DC; Michelle Park Chiu, LEAD ATTORNEY, Morgan Lewis & Bockius LLP, San Francisco, CA; Scott A. Stempel, LEAD ATTORNEY, PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Adam C. Hemlock, Weil Gotshal and Manges LLP, New York, NY; Barack Shem Echols, PRO HAC VICE, Kirkland Ellis LLP, Chicago, IL; Christopher M. Curran, White & Case, Washington, DC; Douglas L Wald, Washington, DC; Ian T Simmons, O'Melveny & Myers LLP, Washington, DC; James Maxwell Cooper, Kessenick Gamma & Free LLP, San Francisco, CA; James Mutchnik, PRO HAC VICE, Chicago, **[*88]** IL; Jason Bruce Allen, Morgan, Lewis & Bockius LLP, San Francisco, CA; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Katherine Hamilton Wheaton, Chicago, IL; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Matthew J. Hertko, PRO HAC VICE, Jones Day, Chicago, IL; Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY; Thomas R. Green, United States Attorney's Office, Northern District of California, Oakkland, CA.

For Irico Group Corp. ("IGC") is a Chinese entity, Defendant: Joseph R. Tiffany, II, LEAD ATTORNEY, Pillsbury Winthrop Shaw Pittman LLP, Palo Alto, CA; Philip Andrew Simpkins, Littler Mendelson, Walnut Creek, CA; Terrence A. Callan, Pillsbury Winthrop Shaw Pittman LLP, San Francisco, CA.

For Irico Display Devices Co., Ltd. ("IDDC") is a Chinese entity, Defendant: Joseph R. Tiffany, II, LEAD ATTORNEY, Pillsbury Winthrop Shaw Pittman LLP, Palo Alto, CA; Philip Andrew Simpkins, Littler Mendelson, Walnut **[*89]** Creek, CA; Terrence A. Callan, Pillsbury Winthrop Shaw Pittman LLP, San Francisco, CA.

For LG Electronics, Inc. ("LGEI") is a South Korean entity, Defendant: Brad D. Brian, LEAD ATTORNEY, Munger Tolles & Olson LLP, Los Angeles, CA; Douglas L Wald, LEAD ATTORNEY, Washington, DC; Miriam Kim, LEAD ATTORNEY, Munger, Tolles & Olson, San Francisco, CA; Samuel R. Miller, LEAD ATTORNEY, Sidley Austin LLP, San Francisco, CA; Adam C. Hemlock, Weil Gotshal and Manges LLP, New York, NY; Benjamin Edward Waldin, PRO HAC VICE, Eimer Stahl LLP, Chicago, IL; Beth Harrison Parker, Arnold & Porter LLP, San Francisco, CA; Cathleen Hamel Hartge, Munger Tolles and Olson LLP, San Francisco, CA; Christopher M. Curran, White & Case, Washington, DC; D. Eric Shapland, Arnold & Porter LLP, Los Angeles, CA; Esteban Martin Estrada, Munger Tolles and Olson, Los Angeles, CA; Gregory J. Weingart, Munger, Tolles and Olson LLP, Los Angeles, CA; Hojoon Hwang, Munger Tolles & Olson LLP, San Francisco, CA; Ian T Simmons, O'Melveny & Myers LLP, Washington, DC; Jason Sheffield Angell, Freitas Angell & Weinberg LLP, Redwood Shores, CA; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; Jerome Cary Roth, Munger Tolles **[*90]** & Olson LLP, San Francisco, CA; Jessica Barclay-Strobel, Munger, Tolles and Olson LLP, Los Angeles, CA; Jessica Nicole Leal, Freitas Angell & Weinberg

LLP, Redwood Shores, CA; John Clayton Everett, Jr., PRO HAC VICE, Morgan, Lewis & Bockius LLP, Washington, DC; John David Lombardo, Arnold & Porter LLP, Los Angeles, CA; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Marie L. Fiala, Sidley Austin LLP, San Francisco, CA; Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Nana Little, Arnold Porter, Los Angeles, CA; Nathan P. Eimer, Eimer Stahl LLP, Chicago, IL; Paul Lionel Yanosy, Jr, Sidley Austin LLP, San Francisco, CA; Robert E. Freitas, Freitas Angell & Weinberg LLP, Redwood Shores, CA; Robert Brooks Martin, III, Sidley Austin LLP, San Francisco, CA; Ronald Charles Redcay, Arnold & Porter LLP, Los Angeles, CA; Ryan M. Sandrock, Sidley Austin, LLP, San Francisco, CA; Sarah Hargadon, PRO HAC VICE, Eimer Stahl LLP, Chicago, IL; Scott A. Stempel, PRO HAC VICE, Morgan, **[*91]** Lewis Bockius LLP, Washington, DC; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY; Susan Elizabeth Nash, Munger Tolles Olson LLP, Los Angeles, CA; Xiaochin Claire Yan, Munger Tolles and Olson, LLP, Los Angeles, CA; Bethany Woodard Kristovich, Munger Tolles and Olson LLP, Los Angeles, CA; Eric Daniel Mason, Arnold and Porter, Los Angeles, CA; James Cooper, Arnold & Porter; Jonathan Ellis Altman, Munger Tolles and Olson, Los Angeles, CA; Kim YoungSang, ARNOLD & PORTER LLP; Laura K Lin, Munger, Tolles and Olson LLP, San Francisco, CA; William David Temko, Munger, Tolles & Olson LLP, Los Angeles, CA; Wilson D. Mudge, Arnold and Porter LLP, Washington, DC; YongSang Kim.

For Matsushita Electric Industrial Co, Ltd., Defendant: Bambo Obaro, Weil, Gotshal and Manges, Redwood Shores, CA; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; Kris Hue Chau Man, Dewey & LeBoeuf LLP, San Francisco, CA.

For Panasonic Corporation of North America ("PCNA") is a Delaware corporation, Defendant: Alan Feigenbaum, LEAD ATTORNEY, Weil, Gotshal & Manges LLP, New York, NY; David L. Yohai, LEAD ATTORNEY, Weil, Gotshal, & Manges, LLP, New **[*92]** York, NY; Eva W. Cole, LEAD ATTORNEY, PRO HAC VICE, Winston & Strawn LLP, New York, NY; Kris Hue Chau Man, LEAD ATTORNEY, Dewey & LeBoeuf LLP, San Francisco, CA; Lucia Freda, LEAD ATTORNEY, Weil. Gotshal & Manges LLP; Michelle Lo, LEAD ATTORNEY, Dewey & LeBoeuf LLP, New York, NY; Richard H. Epstein, LEAD ATTORNEY, Sills Cummis Epstein & Gross PC, Newark, NJ; A. Paul Victor, Winston & Strawn LLP, New York, NY; Aldo A. Badini, Winston & Strawn LLP, New York, NY; Amy Lee Stewart, PRO HAC VICE, Rose Law Firm, Little Rock, AR; Andrew R. Tillman, Paine Tarwater Bickers & Tillman, Knoxville, TN; Bambo Obaro, Weil, Gotshal and Manges, Redwood Shores, CA; Christopher M. Curran, White & Case, Washington, DC; Craig Y. Allison, Bunsow, De Mory, Smith & Allison LLP, Redwood City, CA; David E. Yolkut, PRO HAC VICE, Weil, Gotshal and Manges LLP, New York, NY; Diana Arlen Aguilar, PRO HAC VICE, Weil, Gotshal and Manges, New York, NY; Douglas L Wald, Washington, DC; Gregory Hull, Law Offices of Steven A. Ellenberg, San Jose, CA; James F. Lerner, PRO HAC VICE, Winston & Strawn LLP, New York, NY; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; Jennifer Stewart, Winston and Strawn LLP, New York, **[*93]** NY; John Clayton Everett, PRO HAC VICE, Jr., Morgan, Lewis & Bockius LLP, Washington, DC; John M. Taladay, Baker Botts L.L.P., Washington, DC; John Selim Tschirgi, PRO HAC VICE, Winston and Strawn LLP, NYC, NY; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Joseph Richard Wetzel, King & Spalding, San Francisco, CA; Kajetan Rozga, PRO HAC VICE, New York, NY; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Kevin B. Goldstein, Weil, Gotshal and Manges LLP, Washington, DC; Lara Elvidge Veblen, PRO HAC VICE, Weil, Gotshal and Manges LLP, New York, NY; Margaret Anne Keane, DLA Piper LLP, San Francisco, CA; Marjan Hajibandeh, PRO HAC VICE, Weil, Gotshal and Manges LLP, New York, NY; Martin C. Geagan, PRO HAC VICE, Jr., Winston and Strawn LLP, New York, NY; Matthew Robert DalSanto, Winston and Strawn LLP, San Francisco, CA; Meaghan Parfitt Thomas-Kennedy, Weil Gotshal and Manges LLP, New York City, NY; Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Molly Donovan, Winston & Strawn LLP, New York, NY; Peter Edward Root, Kaye Scholer LLP, Palo Alto, CA; Ryan Michael Goodland, PRO HAC VICE, Weil, Gotshal and Manges LLP, New York, NY; Scott A. Stempel, **[*94]** PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Sofia Arguello, PRO HAC VICE, Winston and Strawn LLP, New York, NY; Steven A. Reiss, Weil Gotshal & Manges LLP, New York, NY; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY; Adam C. Hemlock, Weil Gotshal and Manges LLP, New York, NY; Molly M Donovan, Dewey & LeBoeuf LLP.

For Orion Electric Co., Ltd., Defendant: Anthony J. Viola, PRO HAC VICE, Edwards Angell Palmer & Dodge LLP, New York, NY; Barry J. Bendes, PRO HAC VICE, Edwards Angell Palmer & Dodge LLP, New York, PA; David W. Evans, Haight Brown & Bonesteel LLP, San Francisco, CA; Joseph Edward Czerniawski, PRO HAC VICE, Edwards Angell Palmer & Dodge LLP, New York, NY.

For Orion America, Inc., Defendant: Anthony J. Viola, PRO HAC VICE, Edwards Angell Palmer & Dodge LLP, New York, NY; Barry J Bendes, PRO HAC VICE, Edwards Angell Palmer & Dodge LLP, New York, NY; David W. Evans, Haight Brown & Bonesteel LLP, San Francisco, CA; Joseph Edward Czerniawski, PRO HAC VICE, Edwards Angell Palmer & Dodge LLP, New York, NY.

For Koninklijke Philips N.V. ("Royal Philips") is a Dutch entity, Defendant: Andreas Stargard, PRO **[*95]** HAC VICE, Baker Botts LLP, Washington, DC; Christopher M. Curran, White & Case, Washington, DC; David Michael Lisi, Reed Smith LLP, Palo Alto, CA; Douglas L Wald, Washington, DC; Emily L. Maxwell, Esq., HOWREY LLP, San Francisco, CA; Erik T. Koons, Baker Botts LLP, Washington, DC; Ethan E. Litwin, Hughes Hubbard & Reed LLP, New York, NY; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; John Clayton Everett, PRO HAC VICE, Jr., Morgan, Lewis & Bockius LLP, Washington, DC; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Scott A. Stempel, PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY; Richard A. Ripley, RuyakCherian LLP, Washington, DC.

For Philips Electronics North America ("Philips America") is a Delaware corporation, Defendant: Gregory Hull, LEAD ATTORNEY, Law Offices of Steven A. Ellenberg, San Jose, CA; David Michael Lisi, Reed Smith LLP, Palo Alto, CA; Jon Vensel **[*96]** Swenson, Baker Botts L.L.P., Palo Alto, CA.

For Samsung SDI Co., Ltd., formerly know as Samsung Display Device Co., Defendant: Bruce Cobath, PRO HAC VICE, Sheppard Mullin Richter & Hampton LLP, New York, NY; Christopher M. Curran, White & Case, Washington, DC; D. Eric Shapland, Arnold & Porter LLP, Los Angeles, CA; Douglas L Wald, Washington, DC; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; James Landon McGinnis, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; John Clayton Everett, PRO HAC VICE, Jr., Morgan, Lewis & Bockius LLP, Washington, DC; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Leo David Caseria, Sheppard Mullin Richter Hampton LLP, Los Angeles, CA; Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Scott A. Stempel, PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Steven Alan Reiss, Weil, Gotshal **[*97]** & Mangesl LLP, New York, NY; Tyler Mark Cunningham, Sheppard Mullin Richter & Hampton.

For Samsung SDI America, Inc. ("Samsung America") is a California corporation, Defendant: Adam C. Hemlock, Weil Gotshal and Manges LLP, New York, NY; Bruce Cobath, PRO HAC VICE, Sheppard Mullin Richter & Hampton LLP, New York, NY; Christopher M. Curran, White & Case, Washington, DC; Douglas L Wald, Washington, DC; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; James Landon McGinnis, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; John Clayton Everett, PRO HAC VICE, Jr., Morgan, Lewis & Bockius LLP, Washington, DC; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Mona Solouki, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Scott A. Stempel, PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Sharon D. Mayo, Arnold & Porter **[*98]** LLP, San Francisco, CA; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY; Tyler Mark Cunningham, Sheppard Mullin Richter & Hampton.

For Samtel Color, Ltd. ("Samtel") is a Indian company, Defendant: William Diaz, McDermott Will & Emery LLP, Irvine, CA.

For Toshiba Corporation ("TC") is a Japanese company, Defendant: Christopher M. Curran, LEAD ATTORNEY, White & Case, Washington, DC; Dana E. Foster, LEAD ATTORNEY, PRO HAC VICE, White and Case LLP, Washington, D.C., DC; Adam C. Hemlock, Weil Gotshal and Manges LLP, New York, NY; Aya Kobori, PRO HAC VICE, White and Case LLP, New York, NY; Bijal Vijay Vakil, White & Case LLP, Palo Alto, CA; Douglas L Wald, Washington, DC; George L. Paul, White & Case LLP, Washington, DC; Ian T Simmons, O'Melveny & Myers LLP, Washington, DC; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; Jeremy Kent Ostrander, White & Case LLP, Palo Alto, CA; John Clayton Everett, PRO HAC VICE, Jr., Morgan, Lewis & Bockius LLP, Washington, DC; John Mark Gidley, White & Case LLP, Washington, DC; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Kent Michael Roger, Morgan Lewis & Bockius LLP, San **[*99]** Francisco, CA; Lucius Bernard Lau, White & Case LLP, Washington, DC; Michael E. Hamburger, White & Case LLP, New York, NY; Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Samuel J. Sharp, PRO HAC VICE, Washington, DC; Samuel James Sharp, White and Case LLP, Washington, DC; Scott A. Stempel, PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY; Tsung-Hui (Danny) Wu, PRO HAC VICE, White and Case LLP, Washington, DC; William H. Bave, III, PRO HAC VICE, New York, NY; Charise Naifeh, White & Case LLP; Matthew Frutig, White & Case LLP.

For Beijing-Matsushita Color CRT Company, Ltd. ("BMCC") is a Chinese company, Defendant: Terry Calvani, LEAD ATTORNEY, Freshfields Bruckhaus Deringer US LLP, Washington, DC; Adam C. Hemlock, Weil Gotshal and Manges LLP, New York, NY; Bruce C. McCulloch, Freshfields Bruckhaus Deringer US LLP, Washington, DC; Christine A. Laciak, Freshfields Bruckhaus Deringer US LLP, Washington, DC; Craig D. Minerva, Freshfields Bruckhaus Deringer US LLP, Washington, **[*100]** DC; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; Kate S. McMillan, Washington, DC; Michael Lacovara, Freshfields Bruckhaus Deringer US LLP, New York, NY; Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Richard Sutton Snyder, Freshfields Bruckhaus Deringer US LLP, Washington, DC.

For Matsushita Toshiba Picture Display Co., Ltd., Defendant: David L. Yohai, LEAD ATTORNEY, Weil, Gotshal, & Manges, LLP, New York, NY; Eva W. Cole, Winston & Strawn LLP, New York, NY; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY.

For LP Displays International, Ltd., fka LG.Philips Displays ("LP Displays"), Defendant: Jeremy James Calsyn, LEAD ATTORNEY, Cleary Gottlieb Steen & Hamilton LLP, Washington, DC; Michael Robert Lazerwitz, LEAD ATTORNEY, Cleary Gottlieb Steen & Hamilton, Washington, DC.

For LG Electronics U.S.A., Inc. ("LGEUSA") is a Delaware corporation, Defendant: Miriam Kim, LEAD ATTORNEY, Munger, Tolles & Olson, San Francisco, CA; Samuel R. Miller, LEAD ATTORNEY, Sidley Austin LLP, San Francisco, CA; Cathleen Hamel Hartge, Munger Tolles and Olson LLP, San Francisco, CA; Christopher M. Curran, White & Case, Washington, DC; Douglas L Wald, Washington, **[*101]** DC; Esteban Martin Estrada, Munger Tolles and Olson, Los Angeles, CA; Hojoon Hwang, Munger Tolles & Olson LLP, San Francisco, CA; Jason Sheffield Angell, Freitas Angell & Weinberg LLP, Redwood Shores, CA; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; Jerome Cary Roth, Munger Tolles & Olson LLP, San Francisco, CA; Jessica Barclay-Strobel, Munger, Tolles and Olson LLP, Los Angeles, CA; Jessica Nicole Leal, Freitas Angell & Weinberg LLP, Redwood Shores, CA; John Clayton Everett, PRO HAC VICE, Jr., Morgan, Lewis & Bockius LLP, Washington, DC; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Laura K Lin, Munger, Tolles and Olson LLP, San Francisco, CA; Marie L. Fiala, Sidley Austin LLP, San Francisco, CA; Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Nana Little, Arnold Porter, Los Angeles, CA; Paul Lionel Yanosy, Jr, Sidley Austin LLP, San Francisco, CA; Robert E. Freitas, Freitas Angell & Weinberg LLP, Redwood Shores, CA; Robert Brooks Martin, III, Sidley **[*102]** Austin LLP, San Francisco, CA; Ryan M. Sandrock, Sidley Austin, LLP, San Francisco, CA; Scott A. Stempel, PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY; Xiaochin Claire Yan, Munger Tolles and Olson, LLP, Los Angeles, CA; Beth Harrison Parker, Bingham McCutchen LLP; D. Eric Shapland, Arnold & Porter LLP, Los Angeles, CA; Eric Daniel Mason, Arnold and Porter, Los Angeles, CA; John David Lombardo, Arnold & Porter LLP, Los

Angeles, CA; Ronald Charles Redcay, Arnold & Porter LLP; William David Temko, Munger, Tolles & Olson LLP, Los Angeles, CA.

For Tatung Company of America, Inc. ("Tatung America") is a California corporation, Defendant: Bruce H. Jackson, LEAD ATTORNEY, Baker & McKenzie, San Francisco, CA; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; Joel Steven Sanders, Gibson, Dunn & Crutcher LLP, San Francisco, CA; Karen Sewell, PRO HAC VICE, Baker & McKenzie LLP, Chicago, Il; Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Nancy Chung Allred, Baker & McKenzie LLP, San Francisco, CA; Patrick J. Ahern, PRO HAC VICE, **[*103]** Baker & McKenzie, Chicago, IL; Robert Walter Tarun, Baker & McKenzie LLP, San Francisco, CA; Roxane Busey, PRO HAC VICE, Baker & McKenzie LLP, Chicago, IL; Austin Van Schwing, Gibson, Dunn & Crutcher LLP; Joel Calcar Willard, Gibson, Dunn Crutcher LLP; Rachel S. Brass, Gibson Dunn & Crutcher LLP, San Francisco, CA.

For LG Philips Display USA, Inc., Defendant: Hojoon Hwang, Munger Tolles & Olson LLP, San Francisco, CA.

For Philips Electronics North America Corporation ("PENAC") is a Delaware corporation, Defendant: Charles M Malaise, LEAD ATTORNEY, Washington, DC; David T. Emanuelson, LEAD ATTORNEY, Baker Botts L.L.P.; Eric Berman, LEAD ATTORNEY, Baker Botts L.L.P., Washington, DC; Richard A. Ripley, LEAD ATTORNEY, PRO HAC VICE, RuyakCherian LLP, Washington, DC; Adam C. Hemlock, Weil Gotshal and Manges LLP, New York, NY; Christopher M. Curran, White & Case, Washington, DC; David Michael Lisi, Reed Smith LLP, Palo Alto, CA; Douglas L Wald, Washington, DC; Emily L. Maxwell, Esq., HOWREY LLP, San Francisco, CA; Ethan E. Litwin, Hughes Hubbard & Reed LLP, New York, NY; Gregg Aaron Myers, Piatnicia Law, San Jose, CA; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; John Clayton Everett, **[*104]** PRO HAC VICE, Jr., Morgan, Lewis & Bockius LLP, Washington, DC; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Joseph A. Ostoyich, Howrey LLP, Washington, DC; Joseph Song, Morgan, Lewis & Bockius LLP, San Francisco, CA; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Marc Howard Kallish, Roetzel & Andress LPA, Chicago, IL; Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Richard P. Sobiecki, PRO HAC VICE, Baker Botts LLP, Washington, DC; Scott A. Stempel, PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Stephen M. Ng, PRO HAC VICE, Baker Botts LLP, Washington, DC; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY; Tiffany Belle Gelott, PRO HAC VICE, Baker Botts LLP, Washington, DC; Van H. Beckwith, PRO HAC VICE, Baker Botts L.L.P., Dallas, TX; Andreas Stargard, PRO HAC VICE, Baker Botts LLP, Washington, DC; Erik T. Koons, Baker Botts LLP.

For Samsung Electronics Co Ltd ("SEC") is a South Korean company, Defendant: Ian T Simmons, LEAD **[*105]** ATTORNEY, O'Melveny & Myers LLP, Washington, DC; Michael Frederick Tubach, LEAD ATTORNEY, O'Melveny & Myers LLP, San Francisco, CA; Courtney C Byrd, PRO HAC VICE, Washington, DC; David Kendall Roberts, O'Melveny and Myers LLP, Washington, DC; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Kevin Douglas Feder, O'Melveny and Myers LLP, Washington, DC; Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Anton Metlitsky; David Roberts, O'Melveny & Myers LLP; Haidee L. Schwartz, O'Melveny & Myers LLP, Washington, DC.

For Samsung Electronics America, Inc. ("SEAI") is a New York corporation, Defendant: Ian T Simmons, LEAD ATTORNEY, O'Melveny & Myers LLP, Washington, DC; Michael Frederick Tubach, LEAD ATTORNEY, O'Melveny & Myers LLP, San Francisco, CA; Benjamin Gardner Bradshaw, O'Melveny & Meyers LLP, Washington, DC; Courtney C Byrd, PRO HAC VICE, Washington, DC; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Kevin Douglas Feder, O'Melveny and Myers LLP, Washington, DC; Michael W. Scarborough, Sheppard Mullin Richter **[*106]** & Hampton LLP, San Francisco, CA; Anton Metlitsky; David Roberts, O'Melveny & Myers LLP; Haidee L. Schwartz, O'Melveny & Myers LLP, Washington, DC; James Landon McGinnis, Sheppard Mullin Richter & Hampton LLP.

For Toshiba America Electronics Components, Inc ("TAEP") is headquartered in Irvine, California, Defendant: Bernadette Shawan Gillians, LEAD ATTORNEY, Buist Moore Smythe and McGee, Charleston, SC; Christopher M. Curran, LEAD ATTORNEY, White & Case, Washington, DC; George L. Paul, LEAD ATTORNEY, White & Case LLP, Washington, DC; Lucius Bernard Lau, LEAD ATTORNEY, White & Case LLP, Washington, DC; William C. Cleveland, LEAD ATTORNEY, Buist Moore Smythe and McGee, Charleston, SC; Adam C. Hemlock, Weil Gotshal and Manges LLP, New York, NY; Aya Kobori, PRO HAC VICE, White and Case LLP, New York, NY; Bijal Vijay Vakil, White & Case LLP, Palo Alto, CA; Douglas L Wald, Washington, DC; Ian T Simmons, O'Melveny & Myers LLP, Washington, DC; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; John Clayton Everett, PRO HAC VICE, Jr., Morgan, Lewis & Bockius LLP, Washington, DC; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Kent **[*107]** Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Samuel J. Sharp, PRO HAC VICE, Washington, DC; Samuel James Sharp, White and Case LLP, Washington, DC; Scott A. Stempel, PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY; William H. Bave, III, PRO HAC VICE, New York, NY; Charise Naifeh, White & Case LLP; Dana E. Foster, White and Case LLP, Washington, D.C., DC; Matthew Frutig, White & Case LLP.

For Toshiba America Information Systems, Inc. ("TAIP") is headquartered in Irvine, California, Defendant: Bernadette Shawan Gillians, LEAD ATTORNEY, Buist Moore Smythe and McGee, Charleston, SC; Christopher M. Curran, LEAD ATTORNEY, White & Case, Washington, DC; George L. Paul, LEAD ATTORNEY, White & Case LLP, Washington, DC; Lucius Bernard Lau, LEAD ATTORNEY, White & Case LLP, Washington, DC; William C. Cleveland, LEAD ATTORNEY, Buist Moore Smythe and McGee, Charleston, SC; Adam C. Hemlock, Weil Gotshal and Manges **[*108]** LLP, New York, NY; Aya Kobori, PRO HAC VICE, White and Case LLP, New York, NY; Bijal Vijay Vakil, White & Case LLP, Palo Alto, CA; Ian T Simmons, O'Melveny & Myers LLP, Washington, DC; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; Jeremy Kent Ostrander, White & Case LLP, Palo Alto, CA; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Michael E. Hamburger, White & Case LLP, New York, NY; Samuel J. Sharp, PRO HAC VICE, Washington, DC; Samuel James Sharp, White and Case LLP, Washington, DC; Tsung-Hui (Danny) Wu, PRO HAC VICE, White and Case LLP, Washington, DC; William H. Bave, III, PRO HAC VICE, New York, NY; Charise Naifeh, White & Case LLP; Dana E. Foster, White and Case LLP, Washington, D.C., DC; Matthew Frutig, White & Case LLP.

For Toshiba America, Inc ("Toshiba America") is a Delaware corporation, Defendant: Christopher M. Curran, LEAD ATTORNEY, White & Case, Washington, DC; George L. Paul, LEAD ATTORNEY, White & Case LLP, Washington, DC; Lucius Bernard Lau, LEAD ATTORNEY, White & Case LLP, Washington, DC; Adam C. Hemlock, Weil Gotshal and Manges LLP, New York, NY; Aya Kobori, PRO HAC VICE, White and Case LLP, New York, NY; Bijal Vijay Vakil, White & **[*109]** Case LLP, Palo Alto, CA; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; Jeremy Kent Ostrander, White & Case LLP, Palo Alto, CA; Michael E. Hamburger, White & Case LLP, New York, NY; Samuel J. Sharp, PRO HAC VICE, Washington, DC; Samuel James Sharp, White and Case LLP, Washington, DC; Tsung-Hui (Danny) Wu, PRO HAC VICE, White and Case LLP, Washington, DC; William H. Bave, III, PRO HAC VICE, New York, NY; Charise Naifeh, White & Case LLP; Dana E. Foster, White and Case LLP, Washington, D.C., DC.

For MT Picture Display Co., LTD, fka Matsushita Toshiba Picture Display Co., Ltd. ("MTPD") is a Japanese entity, Defendant: Lucia Freda, LEAD ATTORNEY, Weil. Gotshal & Manges LLP; A. Paul Victor, Winston & Strawn LLP, New York, NY; Aldo A. Badini, Winston & Strawn LLP, New York, NY; Bambo Obaro, Weil, Gotshal and Manges, Redwood Shores, CA; Christopher M. Curran, White & Case, Washington, DC; Craig Y. Allison, Bunsow, De Mory, Smith & Allison LLP, Redwood City, CA; David E. Yolkut, PRO HAC VICE, Weil, Gotshal and Manges LLP, New York, NY; Diana Arlen Aguilar, PRO HAC VICE, Weil, Gotshal and Manges, New York, NY; Douglas L Wald, Washington, DC; Eva W. Cole, Winston & Strawn LLP, New York, **[*110]** NY; Gregory Hull, Law Offices of Steven A. Ellenberg, San Jose, CA; Gregory Hull, Law Offices of Steven A. Ellenberg, San Jose, CA; James F. Lerner, PRO HAC VICE, Winston & Strawn LLP, New York, NY; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; Jennifer Stewart, Winston and Strawn LLP, New York, NY; John Clayton Everett, PRO HAC VICE, Jr., Morgan, Lewis & Bockius LLP, Washington, DC; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Kajetan Rozga, PRO HAC VICE, New York, NY; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Kris Hue Chau Man, Dewey & LeBoeuf LLP, San Francisco, CA; Lara Elvidge Veblen, PRO HAC VICE, Weil, Gotshal and Manges LLP, New York, NY; Margaret Anne Keane, DLA Piper LLP, San Francisco, CA; Martin C. Geagan, PRO HAC VICE, Jr., Winston and Strawn LLP, New York, NY; Matthew Robert DalSanto, Winston and Strawn LLP, San Francisco, CA; Meaghan Parfitt Thomas-Kennedy, Weil

Gotshal and Manges LLP, New York City, NY; Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Molly Donovan, Winston & Strawn LLP, New York, NY; Peter Edward Root, Kaye Scholer LLP, Palo Alto, CA; **[*111]** Scott A. Stempel, PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Sofia Arguello, PRO HAC VICE, Winston and Strawn LLP, New York, NY; Steven A. Reiss, Weil Gotshal & Manges LLP, New York, NY; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY; Adam C. Hemlock, Weil Gotshal and Manges LLP, New York, NY; David L. Yohai, Weil, Gotshal, & Manges, LLP.

For MT Picture Display Corporation of America (New York), Defendant: Gregory Hull, Law Offices of Steven A. Ellenberg, San Jose, CA; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; Kris Hue Chau Man, Dewey & LeBoeuf LLP, San Francisco, CA; Steven A. Reiss, Weil Gotshal & Manges LLP, New York, NY.

For Samsung SDI Co., Defendant: Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA.

For Thomson S.A., Defendant: Calvin Lee Litsey, LEAD ATTORNEY, Faegre Baker Daniels LLP, East Palo Alto, CA; Jason de Bretteville, LEAD ATTORNEY, Stradling Yocca Carlson & Rauth, Newport Beach, CA; Robert Andrew Sacks, LEAD ATTORNEY, Sullivan & Cromwell LLP, Los Angeles, CA; Brendan P. Cullen, Sullivan & Cromwell LLP, Palo Alto, CA; Kathy L. Osborn, Faegre **[*112]** Baker Daniels LLP, Indianapolis, IN; Laura Kabler Oswell, Sullivan & Cromwell LLP, Palo Alto, CA.

For Samsung SDI Co. Ltd, fka Samsung Display Device Company ("Samsung SDI") is a South Korean company, formerly known as Samsung Display Device Co., Defendant: Adam C. Hemlock, Weil Gotshal and Manges LLP, New York, NY; Bruce Cobath, PRO HAC VICE, Sheppard Mullin Richter & Hampton LLP, New York, NY; Christopher M. Curran, White & Case, Washington, DC; Douglas L Wald, Washington, DC; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Ian T Simmons, O'Melveny & Myers LLP, Washington, DC; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; John Clayton Everett, PRO HAC VICE, Jr., Morgan, Lewis & Bockius LLP, Washington, DC; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Scott A. Stempel, PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, **[*113]** CA; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY; James Landon McGinnis, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Tyler Mark Cunningham, Sheppard Mullin Richter & Hampton.

For Samsung SDI Co., Ltd., Defendant: Bruce Cobath, PRO HAC VICE, Sheppard Mullin Richter & Hampton LLP, New York, NY; Christopher M. Curran, White & Case, Washington, DC; Douglas L Wald, Washington, DC; Dylan Ian Ballard, San Francisco, CA; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Helen Cho Eckert, Sheppard Mullin Richter & Hampton LLP, Los Angeles, CA; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; John Clayton Everett, PRO HAC VICE, Jr., Morgan, Lewis & Bockius LLP, Washington, DC; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Leo David Caseria, Sheppard Mullin Richter Hampton LLP, Los Angeles, CA; Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Mona Solouki, Sheppard Mullin Richter & Hampton LLP, San Francisco, **[*114]** CA; Scott A. Stempel, PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY; James Landon McGinnis, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Tyler Mark Cunningham, Sheppard Mullin Richter & Hampton.

For Toshiba America Consumer Products, LLC ("TACP") is a limited liability company, is headquartered in Wayne, New Jersey, Defendant: Christopher M. Curran, LEAD ATTORNEY, White & Case, Washington, DC; George L. Paul, LEAD ATTORNEY, White & Case LLP, Washington, DC; Lucius Bernard Lau, LEAD ATTORNEY, White & Case LLP, Washington, DC; Adam C. Hemlock, Weil Gotshal and Manges LLP, New York, NY; Aya Kobori, PRO HAC VICE, White and Case LLP, New York, NY; Bijal Vijay Vakil, White & Case LLP, Palo Alto, CA; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Ian T Simmons, O'Melveny & Myers LLP, Washington, DC; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; Jeremy Kent Ostrander, White & Case

LLP, Palo Alto, CA; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Michael E. Hamburger, White & Case LLP, New York, **[*115]** NY; Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Samuel J. Sharp, PRO HAC VICE, Washington, DC; Samuel James Sharp, White and Case LLP, Washington, DC; Tsung-Hui (Danny) Wu, PRO HAC VICE, White and Case LLP, Washington, DC; William H. Bave, III, PRO HAC VICE, New York, NY; Charise Naifeh, White & Case LLP; Dana E. Foster, White and Case LLP, Washington, D.C., DC; Matthew Frutig, White & Case LLP.

For TVP International (USA), Inc, Defendant: Curt Holbreich, LEAD ATTORNEY, Sidley Austin LLP, San Francisco, CA; Mark D. Marino, LEAD ATTORNEY, Kirkpatrick & Lockhart Preston Gates Ellis, Newark, NJ.

For Koninklijke Philips N.V., aka Royal Philips Electronics N.V. ("Royal Philip") is a Dutch company, also known as Royal Philips Electronics N.V., Defendant: Andreas Stargard, LEAD ATTORNEY, PRO HAC VICE, Baker Botts LLP, Washington, DC; Charles M Malaise, Washington, DC; Christopher M. Curran, White & Case, Washington, DC; Douglas L Wald, Washington, DC; Emily L. Maxwell, Esq., HOWREY LLP, San Francisco, CA; Erik T. Koons, Baker Botts LLP; Ethan E. Litwin, Hughes Hubbard & Reed LLP, New York, NY; Gregg Aaron Myers, Piatnicia Law, San Jose, CA; Jeffrey L. Kessler, **[*116]** Winston & Strawn LLP, New York, NY; John Clayton Everett, PRO HAC VICE, Jr., Morgan, Lewis & Bockius LLP, Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Joseph Song, Morgan, Lewis & Bockius LLP, San Francisco, CA; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Scott A. Stempel, PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY; John M. Taladay, Baker Botts L.L.P., Washington, DC; Richard A. Ripley, RuyakCherian LLP, Washington, DC.

For Matsushita Toshiba Picture Display Co., Ltd., also known as MT Picture Display Co., Ltd., Defendant: Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY.

For MT Picture Display, Defendant: Adam C. Hemlock, Weil Gotshal and Manges LLP, New York, NY.

For Thomas S.A., Defendant: Calvin Lee Litsey, LEAD ATTORNEY, Faegre Baker Daniels LLP, East Palo Alto, CA; Jason de Bretteville, Stradling Yocca Carlson & Rauth, Newport Beach, CA.

For Panasonic Corporation, fka Matsushita Electric Industrial Co., Ltd. ("MEI"), is a Japanese **[*117]** entity, Defendant: David L. Yohai, LEAD ATTORNEY, Weil, Gotshal, & Manges, LLP, New York, NY; Gregory Hull, LEAD ATTORNEY, Law Offices of Steven A. Ellenberg, San Jose, CA; Lucia Freda, LEAD ATTORNEY, Weil. Gotshal & Manges LLP; A. Paul Victor, Winston & Strawn LLP, New York, NY; Aldo A. Badini, Winston & Strawn LLP, New York, NY; Amy Lee Stewart, PRO HAC VICE, Rose Law Firm, Little Rock, AR; Bambo Obaro, Weil, Gotshal and Manges, Redwood Shores, CA; Christopher M. Curran, White & Case, Washington, DC; Craig Y. Allison, Bunsow, De Mory, Smith & Allison LLP, Redwood City, CA; David E. Yolkut, PRO HAC VICE, Weil, Gotshal and Manges LLP, New York, NY; Diana Arlen Aguilar, PRO HAC VICE, Weil, Gotshal and Manges, New York, NY; Douglas L Wald, Washington, DC; Eva W. Cole, Winston & Strawn LLP, New York, NY; Gregory Hull, Law Offices of Steven A. Ellenberg, San Jose, CA; James F. Lerner, PRO HAC VICE, Winston & Strawn LLP, New York, NY; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; Jennifer Stewart, Winston and Strawn LLP, New York, NY; John Clayton Everett, PRO HAC VICE, Jr., Morgan, Lewis & Bockius LLP, Washington, DC; John M. Taladay, Baker Botts L.L.P., Washington, DC; John **[*118]** Selim Tschirgi, PRO HAC VICE, Winston and Strawn LLP, NYC, NY; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Kajetan Rozga, PRO HAC VICE, New York, NY; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Kevin B. Goldstein, Weil, Gotshal and Manges LLP, Washington, DC; Kris Hue Chau Man, Dewey & LeBoeuf LLP, San Francisco, CA; Lara Elvidge Veblen, PRO HAC VICE, Weil, Gotshal and Manges LLP, New York, NY; Margaret Anne Keane, DLA Piper LLP, San Francisco, CA; Marjan Hajibandeh, PRO HAC VICE, Weil, Gotshal and Manges LLP, New York, NY; Martin C. Geagan, PRO HAC VICE, Jr., Winston and Strawn LLP, New York, NY; Meaghan Parfitt Thomas-Kennedy, Weil Gotshal and Manges LLP, New York City, NY; Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Molly Donovan, Winston & Strawn LLP, New York, NY; Molly M Donovan, PRO HAC VICE, Winston & Strawn LLP, New York, NY; Peter Edward Root, Kaye Scholer LLP, Palo Alto, CA; Ryan Michael Goodland, PRO HAC VICE, Weil, Gotshal and Manges LLP, New York, NY; Scott A. Stempel, PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Sofia Arguello, PRO HAC VICE, Winston **[*119]** and Strawn LLP, New York, NY; Steven A. Reiss, PRO HAC VICE, Weil Gotshal & Manges LLP, New York, NY; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY; Adam C. Hemlock, Weil Gotshal and Manges LLP, New York, NY.

For Daewoo International Corporation ("Daewoo International") is a corporation organized under the laws of Korea, Defendant: Jane E. Willis, LEAD ATTORNEY, Ropes & Gray LLP, Boston, MA; Thad Alan Davis, LEAD ATTORNEY, Gibson, Dunn & Crutcher LLP, San Francisco, CA.

For Daewoo Electronics Corporation, fka Daewoo Electronics Company, Ltd. ("Daewoo Electronics") is a corporation organized under the laws of South Korea, formerly known as Daewoo Electronics Company Ltd., Defendant: Jeffrey Jay Lederman, Winston & Strawn LLP, San Francisco, CA.

For Hitachi Displays, Ltd. ("Hitachi Displays") is a Japanese company, also known as Japan Display Inc, Defendant: Diane Leslie Webb, LEAD ATTORNEY, San Francisco, CA; Eliot A. Adelson, LEAD ATTORNEY, Kirkland & Ellis LLP, San Francisco, CA; John Clayton Everett, LEAD ATTORNEY, PRO HAC VICE, Jr., Morgan, Lewis & Bockius LLP, Washington, DC; Scott A. Stempel, LEAD ATTORNEY, PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Christopher **[*120]** M. Curran, White & Case, Washington, DC; Douglas L Wald, Washington, DC; Ian T Simmons, O'Melveny & Myers LLP, Washington, DC; James Maxwell Cooper, Kessenick Gamma & Free LLP, San Francisco, CA; James Mutchnik, PRO HAC VICE, Chicago, IL; Jason Bruce Allen, Morgan, Lewis & Bockius LLP, San Francisco, CA; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Katherine Hamilton Wheaton, PRO HAC VICE, Chicago, IL; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY; Thomas R. Green, United States Attorney's Office, Northern District of California, Oakkland, CA.

For Hitachi Electronic Devices (USA) ("HEDUS") is a Delaware corporation, Defendant: Eliot A. Adelson, LEAD ATTORNEY, Kirkland & Ellis LLP, San Francisco, CA; John Clayton Everett, LEAD ATTORNEY, PRO HAC VICE, Jr., Morgan, Lewis & Bockius LLP, Washington, DC; Scott A. Stempel, LEAD ATTORNEY, PRO HAC VICE, Morgan, Lewis Bockius **[*121]** LLP, Washington, DC; Diane Leslie Webb, San Francisco, CA; James Maxwell Cooper, Kessenick Gamma & Free LLP, San Francisco, CA; James Mutchnik, Chicago, IL; Jason Bruce Allen, Shearman & Sterling LLP, San Francisco, CA; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; Katherine Hamilton Wheaton, Chicago, IL; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA.

For LG Electronics Taiwan Taipei Co., Ltd. ("LGETT") is a Taiwanese entity, Defendant: Beth Harrison Parker, LEAD ATTORNEY, Bingham McCutchen LLP; D. Eric Shapland, LEAD ATTORNEY, Arnold & Porter LLP, Los Angeles, CA; Eric Daniel Mason, LEAD ATTORNEY, Arnold and Porter, Los Angeles, CA; Hojoon Hwang, LEAD ATTORNEY, Munger Tolles & Olson LLP, San Francisco, CA; John David Lombardo, LEAD ATTORNEY, Arnold & Porter LLP, Los Angeles, CA; Miriam Kim, LEAD ATTORNEY, Munger, Tolles & Olson, San Francisco, CA; Ronald Charles Redcay, LEAD ATTORNEY, Arnold & Porter LLP; Ryan M. Sandrock, LEAD ATTORNEY, Sidley Austin, LLP; Cathleen Hamel Hartge, Munger Tolles and Olson LLP, San Francisco, CA; Esteban Martin Estrada, Munger Tolles and Olson, Los Angeles, CA; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; Jerome **[*122]** Cary Roth, Munger Tolles & Olson LLP, San Francisco, CA; Jessica Barclay-Strobel, Munger, Tolles and Olson LLP, Los Angeles, CA; Marie L. Fiala, Sidley Austin LLP, San Francisco, CA; Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Nana Little, Arnold Porter, Los Angeles, CA; Robert E. Freitas, Freitas Angell & Weinberg LLP, Redwood Shores, CA; Robert Brooks Martin, III, Sidley Austin LLP, San Francisco, CA; Samuel R. Miller, Sidley Austin LLP, San Francisco, CA; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Bethany Woodard Kristovich, Munger Tolles and Olson LLP, Los Angeles, CA; Jonathan Ellis Altman, Munger Tolles and Olson, Los Angeles, CA; Laura K Lin, Munger, Tolles and Olson LLP, San Francisco, CA; William David Temko, Munger, Tolles & Olson LLP, Los Angeles, CA.

For Philips Electronics Industries (Taiwan), Ltd. ("Philips Taiwan") is a Taiwanese company, Defendant: Ethan E. Litwin, Hughes Hubbard & Reed LLP, New York, NY; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA.

For Philips da Amazonia Industria Electronica Ltda. ("Philips Brazil") is a Brazilian company, Defendant: **[*123]** David Michael Lisi, Reed Smith LLP, Palo Alto, CA; Ethan E. Litwin, Hughes Hubbard & Reed LLP, New York, NY; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA.

For Samsung SDI (Malaysia) Sdn Bhd. ("Samsung Malaysia") is a Malaysian corporation, Defendant: Bruce Cobath, PRO HAC VICE, Sheppard Mullin Richter & Hampton LLP, New York, NY; Christopher M. Curran, White & Case, Washington, DC; Douglas L Wald, Washington, DC; Dylan Ian Ballard, San Francisco, CA; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Helen Cho Eckert, Sheppard Mullin Richter & Hampton LLP, Los Angeles, CA; Ian T Simmons, O'Melveny & Myers LLP, Washington, DC; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; John Clayton Everett, PRO HAC VICE, Jr., Morgan, Lewis & Bockius LLP, Washington, DC; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Leo David Caseria, Sheppard Mullin Richter Hampton LLP, Los Angeles, CA; Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Michelle **[*124]** Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Mona Solouki, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Scott A. Stempel, PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY; Tyler Mark Cunningham, Sheppard Mullin Richter & Hampton, San Francisco, CA; James Landon McGinnis, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA.

For Samsung SDI Mexico S.A. de C.V. ("Samsung SDI Mexico") is a Mexican company, Defendant: Adam C. Hemlock, Weil Gotshal and Manges LLP, New York, NY; Bruce Cobath, PRO HAC VICE, Sheppard Mullin Richter & Hampton LLP, New York, NY; Christopher M. Curran, White & Case, Washington, DC; Douglas L Wald, Washington, DC; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Ian T Simmons, O'Melveny & Myers LLP, Washington, DC; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; John Clayton Everett, PRO HAC VICE, Jr., Morgan, Lewis & Bockius LLP, Washington, DC; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Kent Michael Roger, Morgan **[*125]** Lewis & Bockius LLP, San Francisco, CA; Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Mona Solouki, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Scott A. Stempel, PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY; James Landon McGinnis, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Tyler Mark Cunningham, Sheppard Mullin Richter & Hampton.

For Samsung SDI Brasil Ltda. ("Samsung SDI Brazil") is a Brazilian company, Defendant: Bruce Cobath, PRO HAC VICE, Sheppard Mullin Richter & Hampton LLP, New York, NY; Christopher M. Curran, White & Case, Washington, DC; Douglas L Wald, Washington, DC; Dylan Ian Ballard, San Francisco, CA; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Helen Cho Eckert, Sheppard Mullin Richter & Hampton LLP, Los Angeles, CA; Ian T Simmons, O'Melveny & Myers LLP, Washington, DC; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; John Clayton Everett, PRO HAC VICE, Jr., Morgan, Lewis & Bockius **[*126]** LLP, Washington, DC; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Leo David Caseria, Sheppard Mullin Richter Hampton LLP, Los Angeles, CA; Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Mona Solouki, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Scott A. Stempel, PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY; James Landon McGinnis, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Tyler Mark Cunningham, Sheppard Mullin Richter & Hampton.

For Shenzhen Samsung SDI Co. Ltd ("Samsung SDI Shenzhen") is a Chinese company, Defendant: Adam C. Hemlock, Weil Gotshal and Manges LLP, New York, NY; Bruce Cobath, PRO HAC VICE, Sheppard Mullin Richter & Hampton LLP, New York, NY; Christopher M. Curran, White & Case, Washington, DC; Douglas L Wald, Washington, DC; Dylan Ian Ballard, San Francisco, CA; Gary L. Halling, Sheppard **[*127]** Mullin Richter & Hampton LLP, San Francisco, CA; Ian T Simmons, O'Melveny & Myers LLP, Washington, DC; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; John Clayton Everett, PRO HAC VICE, Jr., Morgan, Lewis & Bockius LLP, Washington, DC; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Leo David Caseria, Sheppard Mullin Richter Hampton LLP, Los Angeles, CA; Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Mona Solouki, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Scott A. Stempel, PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY; James Landon McGinnis, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Tyler Mark Cunningham, Sheppard Mullin Richter & Hampton.

For Tianjin Samsung SDI Co., Ltd. ("Samsung SDI Tianjin") is a Chinese company, Defendant: Bruce Cobath, PRO HAC VICE, Sheppard Mullin Richter & Hampton LLP, **[*128]** New York, NY; Christopher M. Curran, White & Case, Washington, DC; Douglas L Wald, Washington, DC; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; John Clayton Everett, PRO HAC VICE, Jr., Morgan, Lewis & Bockius LLP, Washington, DC; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Mona Solouki, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Scott A. Stempel, PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY; James Landon McGinnis, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Tyler Mark Cunningham, Sheppard Mullin Richter & Hampton.

For Toshiba America Consumer Products, Inc. ("TACPI") is a company that is headquartered in Lebanon, Tennessee, Defendant: John Mark Gidley, White & Case LLP, **[*129]** Washington, DC.

For Philips Electronics Industries (Taiwan), Ltd. ("Philips Electronics Taiwan") is a Taiwanese company, Defendant: David Michael Lisi, Reed Smith LLP, Palo Alto, CA; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA.

For Samsung SDI America, Inc. ("Samsung SDI America") is a California corporation, Defendant: Adam C. Hemlock, Weil Gotshal and Manges LLP, New York, NY; Christopher M. Curran, White & Case, Washington, DC; Douglas L Wald, Washington, DC; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; John Clayton Everett, PRO HAC VICE, Jr., Morgan, Lewis & Bockius LLP, Washington, DC; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Scott A. Stempel, PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY; Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP.

For Hitachi Electronic Devices (USA), Inc. ("HEDUS") is a Delaware corporation, Defendant: **[*130]** Diane Leslie Webb, LEAD ATTORNEY, San Francisco, CA; Michelle Park Chiu, LEAD ATTORNEY, Morgan Lewis & Bockius LLP, San Francisco, CA; Adam C. Hemlock, Weil Gotshal and Manges LLP, New York, NY; Barack Shem Echols, PRO HAC VICE, Kirkland Ellis LLP, Chicago, IL; Christopher M. Curran, White & Case, Washington, DC; Douglas L Wald, Washington, DC; Eliot A. Adelson, Kirkland & Ellis LLP, San Francisco, CA; James Maxwell Cooper, Kessenick Gamma & Free LLP, San Francisco, CA; James Mutchnik, Chicago, IL; Jason Bruce Allen, Morgan, Lewis & Bockius LLP, San Francisco, CA; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; John Clayton Everett, Jr., Morgan, Lewis & Bockius LLP, Washington, DC; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Katherine Hamilton Wheaton, Chicago, IL; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Scott A. Stempel, Morgan, Lewis Bockius LLP, Washington, DC; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY; Thomas R. Green, United States Attorney's Office, Northern District of California, Oakkland, CA.

For Samtel **[*131]** Color Ltd., Defendant: William Diaz, LEAD ATTORNEY, McDermott Will & Emery LLP, Irvine, CA.

For Beijing Matsushita Color Crt Company, LTD., Defendant: Adam C. Hemlock, Weil Gotshal and Manges LLP, New York, NY; Richard Sutton Snyder, Freshfields Bruckhaus Deringer US LLP, Washington, DC.

For Hitachi America, Ltd, Defendant: Eliot A. Adelson, LEAD ATTORNEY, Kirkland & Ellis LLP, San Francisco, CA; Adam C. Hemlock, Weil Gotshal and Manges LLP, New York, NY; Barack Shem Echols, PRO HAC VICE, Kirkland Ellis LLP, Chicago, IL; Ian T Simmons, O'Melveny & Myers LLP, Washington, DC; James Maxwell Cooper, Kessenick Gamma & Free LLP, San Francisco, CA; James Mutchnik, PRO HAC VICE, Chicago, IL; Jason Bruce Allen, Morgan, Lewis & Bockius LLP, San Francisco, CA; Katherine Hamilton Wheaton, Chicago, IL; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Matthew J. Hertko, PRO HAC VICE, Jones Day, Chicago, IL.

For Hitachi Asia, Ltd., Defendant: Eliot A. Adelson, LEAD ATTORNEY, Kirkland & Ellis LLP, San Francisco, CA; Adam C. Hemlock, Weil Gotshal and Manges LLP, New York, NY; Christopher M. Curran, White & Case, Washington, DC; Douglas L Wald, Washington, DC; Ian T Simmons, O'Melveny **[*132]** & Myers LLP, Washington, DC; James Maxwell Cooper, Kessenick Gamma & Free LLP, San Francisco, CA; Jason Bruce Allen, Morgan, Lewis & Bockius LLP, San Francisco, CA; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; John Clayton Everett, Jr., Morgan, Lewis & Bockius LLP, Washington, DC; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Scott A. Stempel, PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY.

For Hitachi Displays, Ltd., also known as Japan Display Inc, Defendant: Eliot A. Adelson, LEAD ATTORNEY, Kirkland & Ellis LLP, San Francisco, CA; Adam C. Hemlock, Weil Gotshal and Manges LLP, New York, NY; Barack Shem Echols, PRO HAC VICE, Kirkland Ellis LLP, Chicago, IL; Christopher M. Curran, White & Case, Washington, DC; Douglas L Wald, Washington, DC; Ian T Simmons, O'Melveny & Myers LLP, Washington, DC; James Maxwell Cooper, Kessenick Gamma & Free LLP, San Francisco, **[*133]** CA; James Mutchnik, Chicago, IL; Jason Bruce Allen, Morgan, Lewis & Bockius LLP, San Francisco, CA; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; John Clayton Everett, Jr., Morgan, Lewis & Bockius LLP, Washington, DC; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Katherine Hamilton Wheaton, Chicago, IL; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Matthew J. Hertko, PRO HAC VICE, Jones Day, Chicago, IL; Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Scott A. Stempel, PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY.

For Hitachi Electronic Devices (USA), Defendant: Eliot A. Adelson, LEAD ATTORNEY, Kirkland & Ellis LLP, San Francisco, CA; Ian T Simmons, O'Melveny & Myers LLP, Washington, DC; James Maxwell Cooper, Kessenick Gamma & Free LLP, San Francisco, CA; James Mutchnik, PRO HAC VICE, Chicago, IL; Jason Bruce Allen, Morgan, Lewis & Bockius LLP, San Francisco, CA; Jeffrey **[*134]** L. Kessler, Winston & Strawn LLP, New York, NY; Katherine Hamilton Wheaton, PRO HAC VICE, Chicago, IL; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Matthew J. Hertko, PRO HAC VICE, Jones Day, Chicago, IL; Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA.

For Hitachi Ltd., Defendant: Eliot A. Adelson, LEAD ATTORNEY, Kirkland & Ellis LLP, San Francisco, CA; Adam C. Hemlock, Weil Gotshal and Manges LLP, New York, NY; Barack Shem Echols, PRO HAC VICE, Kirkland Ellis LLP, Chicago, IL; Christopher M. Curran, White & Case, Washington, DC; Douglas L Wald, Washington, DC; Ian T Simmons, O'Melveny & Myers LLP, Washington, DC; James Maxwell Cooper, Kessenick Gamma & Free LLP, San Francisco, CA; James Mutchnik, PRO HAC VICE, Chicago, IL; Jason Bruce Allen, Morgan, Lewis & Bockius LLP, San Francisco, CA; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; John Clayton Everett, Jr., Morgan, Lewis & Bockius LLP, Washington, DC; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Katherine Hamilton Wheaton, PRO HAC VICE, **[*135]** Chicago, IL; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Matthew J. Hertko, PRO HAC VICE, Jones Day, Chicago, IL; Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Scott A. Stempel, PRO

HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY.

For Koninklijke Philips N.V., Defendant: "KPNV" Charles M Malaise, LEAD ATTORNEY, Washington, DC; David T. Emanuelson, LEAD ATTORNEY, Baker Botts L.L.P.; Eric Berman, LEAD ATTORNEY, Baker Botts L.L.P., Washington, DC; Adam C. Hemlock, Weil Gotshal and Manges LLP, New York, NY; Christopher M. Curran, White & Case, Washington, DC; Douglas L Wald, Washington, DC; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; John Clayton Everett, PRO HAC VICE, Jr., Morgan, Lewis & Bockius LLP, Washington, DC; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Joseph A. Ostoyich, Howrey LLP, Washington, DC; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Marc Howard Kallish, Roetzel & Andress LPA, Chicago, IL; Michael W. Scarborough, **[*136]** Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Richard P. Sobiecki, PRO HAC VICE, Baker Botts LLP, Washington, DC; Scott A. Stempel, PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Stephen M. Ng, PRO HAC VICE, Baker Botts LLP, Washington, DC; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY; Tiffany Belle Gelott, PRO HAC VICE, Baker Botts LLP, Washington, DC; Van H. Beckwith, PRO HAC VICE, Baker Botts L.L.P., Dallas, TX; Erik T. Koons, Baker Botts LLP.

For LG Electronics Taiwan Taipei Co., Ltd., Defendant: Beth Harrison Parker, LEAD ATTORNEY, Bingham McCutchen LLP; D. Eric Shapland, LEAD ATTORNEY, Heller Ehrman White & McAuliffe LLP, Los Angeles, CA; Douglas L Wald, LEAD ATTORNEY, Washington, DC; Eric Daniel Mason, LEAD ATTORNEY, Arnold and Porter, Los Angeles, CA; James Cooper, LEAD ATTORNEY, Arnold & Porter; John David Lombardo, LEAD ATTORNEY, Arnold & Porter LLP, Los Angeles, CA; Marie L. Fiala, LEAD ATTORNEY, Sidley Austin LLP; Miriam Kim, LEAD ATTORNEY, Munger, Tolles & Olson, San Francisco, CA; Robert Brooks Martin, LEAD ATTORNEY, **[*137]** III, Sidley Austin LLP; Ronald Charles Redcay, LEAD ATTORNEY, Arnold & Porter LLP; Ryan M. Sandrock, LEAD ATTORNEY, Sidley Austin, LLP, San Francisco, CA; Samuel R. Miller, LEAD ATTORNEY, Sidley Austin LLP; Sharon D. Mayo, LEAD ATTORNEY, Arnold & Porter LLP, San Francisco, CA; Wilson D. Mudge, LEAD ATTORNEY, Arnold and Porter LLP, Washington, DC; Adam C. Hemlock, Weil Gotshal and Manges LLP, New York, NY; Esteban Martin Estrada, Munger Tolles and Olson, Los Angeles, CA; Hojoon Hwang, Munger Tolles & Olson LLP, San Francisco, CA; Ian T Simmons, O'Melveny & Myers LLP, Washington, DC; Jerome Cary Roth, Munger Tolles & Olson LLP, San Francisco, CA; Jessica Barclay-Strobel, Munger, Tolles and Olson LLP, Los Angeles, CA; Kim YoungSang, ARNOLD & PORTER LLP; William David Temko, Munger, Tolles & Olson LLP, Los Angeles, CA.

For LG Electronics USA, Inc., Defendant: D. Eric Shapland, LEAD ATTORNEY, Arnold & Porter LLP, Los Angeles, CA; Douglas L Wald, LEAD ATTORNEY, Washington, DC; Eric Daniel Mason, LEAD ATTORNEY, Arnold and Porter, Los Angeles, CA; Miriam Kim, LEAD ATTORNEY, Munger, Tolles & Olson, San Francisco, CA; William David Temko, LEAD ATTORNEY, Munger, Tolles & Olson LLP, Los Angeles, **[*138]** CA; Adam C. Hemlock, Weil Gotshal and Manges LLP, New York, NY; Cathleen Hamel Hartge, Munger Tolles and Olson LLP, San Francisco, CA; Esteban Martin Estrada, Munger Tolles and Olson, Los Angeles, CA; Gregory J. Weingart, Munger, Tolles and Olson LLP, Los Angeles, CA; Hojoon Hwang, Munger Tolles & Olson LLP, San Francisco, CA; Ian T Simmons, O'Melveny & Myers LLP, Washington, DC; Jason Sheffield Angell, Freitas Angell & Weinberg LLP, Redwood Shores, CA; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; Jerome Cary Roth, Munger Tolles & Olson LLP, San Francisco, CA; Jessica Barclay-Strobel, Munger, Tolles and Olson LLP, Los Angeles, CA; Jessica Nicole Leal, Freitas Angell & Weinberg LLP, Redwood Shores, CA; Robert E. Freitas, Freitas Angell & Weinberg LLP, Redwood Shores, CA; Xiaochin Claire Yan, Munger Tolles and Olson, LLP, Los Angeles, CA; Beth Harrison Parker, Bingham McCutchen LLP; Bethany Woodard Kristovich, Munger Tolles and Olson LLP, Los Angeles, CA; James Cooper, Arnold & Porter; John David Lombardo, Arnold & Porter LLP, Los Angeles, CA; Jonathan Ellis Altman, Munger Tolles and Olson, Los Angeles, CA; Kim YoungSang, ARNOLD & PORTER LLP; Laura K Lin, Munger, Tolles and **[*139]** Olson LLP, San Francisco, CA; Marie L. Fiala, Sidley Austin LLP, San Francisco, CA; Robert Brooks Martin, III, Sidley Austin LLP, San Francisco, CA; Ronald Charles Redcay, Arnold & Porter LLP; Ryan M. Sandrock, Sidley Austin, LLP, San Francisco, CA; Samuel R. Miller, Sidley Austin LLP, San Francisco, CA; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Wilson D. Mudge, Arnold and Porter LLP, Washington, DC; YongSang Kim.

For MT Picture Display Co., LTD, Defendant: Adam C. Hemlock, LEAD ATTORNEY, Weil Gotshal and Manges LLP, New York, NY; David L. Yohai, LEAD ATTORNEY, Weil, Gotshal, & Manges, LLP, New York, NY; Lucia Freda, LEAD ATTORNEY, Weil. Gotshal & Manges LLP; A. Paul Victor, Winston & Strawn LLP, New York, NY; Aldo A. Badini, Winston & Strawn LLP, New York, NY; Amy Lee Stewart, PRO HAC VICE, Rose Law Firm, Little Rock, AR; Bambo Obaro, Weil, Gotshal and Manges, Redwood Shores, CA; Christopher M. Curran, White & Case, Washington, DC; Craig Y. Allison, Bunsow, De Mory, Smith & Allison LLP, Redwood City, CA; Diana Arlen Aguilar, PRO HAC VICE, Weil, Gotshal and Manges, New York, NY; Douglas L Wald, Washington, DC; Eva W. Cole, Winston & Strawn LLP, New York, NY; Gregory Hull, **[*140]** Law Offices of Steven A. Ellenberg, San Jose, CA; James F. Lerner, PRO HAC VICE, Winston & Strawn LLP, New York, NY; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; Jennifer Stewart, Winston and Strawn LLP, New York, NY; John Clayton Everett, PRO HAC VICE, Jr., Morgan, Lewis & Bockius LLP, Washington, DC; John M. Taladay, Baker Botts L.L.P., Washington, DC; John Selim Tschirgi, PRO HAC VICE, Winston and Strawn LLP, NYC, NY; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Kevin B. Goldstein, Weil, Gotshal and Manges LLP, Washington, DC; Lara Elvidge Veblen, PRO HAC VICE, Weil, Gotshal and Manges LLP, New York, NY; Marjan Hajibandeh, PRO HAC VICE, Weil, Gotshal and Manges LLP, New York, NY; Martin C. Geagan, PRO HAC VICE, Jr., Winston and Strawn LLP, New York, NY; Meaghan Parfitt Thomas-Kennedy, Weil Gotshal and Manges LLP, New York City, NY; Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Molly Donovan, Winston & Strawn LLP, New York, NY; Molly M Donovan, Dewey & LeBoeuf LLP; Ryan Michael Goodland, PRO **[*141]** HAC VICE, Weil, Gotshal and Manges LLP, New York, NY; Scott A. Stempel, PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Sofia Arguello, PRO HAC VICE, Winston and Strawn LLP, New York, NY; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY.

For Panasonic Corporation, Defendant: David L. Yohai, LEAD ATTORNEY, Weil, Gotshal, & Manges, LLP, New York, NY; Lucia Freda, LEAD ATTORNEY, Weil. Gotshal & Manges LLP; Adam C. Hemlock, Weil Gotshal and Manges LLP, New York, NY; Amy Lee Stewart, PRO HAC VICE, Rose Law Firm, Little Rock, AR; Bambo Obaro, Weil, Gotshal and Manges, Redwood Shores, CA; Christopher M. Curran, White & Case, Washington, DC; Craig Y. Allison, Bunsow, De Mory, Smith & Allison LLP, Redwood City, CA; Douglas L Wald, Washington, DC; Eva W. Cole, Winston & Strawn LLP, New York, NY; Gregory Hull, Law Offices of Steven A. Ellenberg, San Jose, CA; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; Jennifer Stewart, Winston and Strawn LLP, New York, NY; John Clayton Everett, PRO HAC VICE, Jr., Morgan, Lewis & Bockius LLP, Washington, DC; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, **[*142]** Baker Botts L.L.P., Palo Alto, CA; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Martin C. Geagan, PRO HAC VICE, Jr., Winston and Strawn LLP, New York, NY; Matthew Robert DalSanto, Winston and Strawn LLP, San Francisco, CA; Meaghan Parfitt Thomas-Kennedy, Weil Gotshal and Manges LLP, New York City, NY; Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Molly Donovan, Winston & Strawn LLP, New York, NY; Scott A. Stempel, PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Sofia Arguello, PRO HAC VICE, Winston and Strawn LLP, New York, NY; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY.

For Panasonic Corporation of North America, Defendant: David L. Yohai, LEAD ATTORNEY, Weil, Gotshal, & Manges, LLP, New York, NY; Lucia Freda, LEAD ATTORNEY, Weil. Gotshal & Manges LLP; Amy Lee Stewart, PRO HAC VICE, Rose Law Firm, Little Rock, AR; Bambo Obaro, Weil, Gotshal and Manges, Redwood Shores, CA; Christopher M. Curran, White & Case, Washington, DC; Craig Y. Allison, Bunsow, De Mory, Smith & Allison LLP, **[*143]** Redwood City, CA; Diana Arlen Aguilar, PRO HAC VICE, Weil, Gotshal and Manges, New York, NY; Douglas L Wald, Washington, DC; Gregory Hull, Law Offices of Steven A. Ellenberg, San Jose, CA; James F. Lerner, PRO HAC VICE, Winston & Strawn LLP, New York, NY; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; Jennifer Stewart, Winston and Strawn LLP, New York, NY; John Clayton Everett, PRO HAC VICE, Jr., Morgan, Lewis & Bockius LLP, Washington, DC; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Lara Elvidge Veblen, PRO HAC VICE, Weil, Gotshal and Manges LLP, New York, NY; Martin C. Geagan, PRO HAC VICE, Jr., Winston and Strawn LLP, New York, NY; Meaghan Parfitt Thomas-Kennedy, Weil Gotshal and

Manges LLP, New York City, NY; Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Scott A. Stempel, PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Sofia Arguello, PRO HAC VICE, Winston and Strawn LLP, New **[*144]** York, NY; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY.

For Philips Electronics Industries (Taiwan), Ltd., Defendant: David Michael Lisi, Reed Smith LLP, Palo Alto, CA; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA.

For Philips Electronics North America, Defendant: Charles M Malaise, LEAD ATTORNEY, Washington, DC; Jon Vensel Swenson, LEAD ATTORNEY, Baker Botts L.L.P., Palo Alto, CA; David Michael Lisi, Reed Smith LLP, Palo Alto, CA; John M. Taladay, Baker Botts L.L.P., Washington, DC; Joseph A. Ostoyich, Howrey LLP, Washington, DC; Erik T. Koons, Baker Botts LLP.

For Philips da Amazonia Industria Electronica Ltda., Defendant: Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA.

For Samsung Electronics America, Inc., Defendant: David Kendall Roberts, O'Melveny and Myers LLP, Washington, DC; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; James Landon McGinnis, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA.

For Samsung Electronics Co., Ltd, Defendant: Ian T Simmons, LEAD ATTORNEY, O'Melveny & Myers LLP, Washington, DC; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Michael W. Scarborough, Sheppard Mullin Richter & **[*145]** Hampton LLP, San Francisco, CA.

For Samsung SDI (Malaysia) SDN BHD, Defendant: Adam C. Hemlock, Weil Gotshal and Manges LLP, New York, NY; Bruce Cobath, PRO HAC VICE, Sheppard Mullin Richter & Hampton LLP, New York, NY; Christopher M. Curran, White & Case, Washington, DC; Douglas L Wald, Washington, DC; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Helen Cho Eckert, Sheppard Mullin Richter & Hampton LLP, Los Angeles, CA; Ian T Simmons, O'Melveny & Myers LLP, Washington, DC; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; John Clayton Everett, PRO HAC VICE, Jr., Morgan, Lewis & Bockius LLP, Washington, DC; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Leo David Caseria, Sheppard Mullin Richter Hampton LLP, Los Angeles, CA; Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Mona Solouki, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Scott A. Stempel, PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Sharon **[*146]** D. Mayo, Arnold & Porter LLP, San Francisco, CA; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY; Tyler Mark Cunningham, Sheppard Mullin Richter & Hampton; James Landon McGinnis, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA.

For Samsung SDI America, Inc., Defendant: Bruce Cobath, PRO HAC VICE, Sheppard Mullin Richter & Hampton LLP, New York, NY; Christopher M. Curran, White & Case, Washington, DC; Douglas L Wald, Washington, DC; Dylan Ian Ballard, San Francisco, CA; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Helen Cho Eckert, Sheppard Mullin Richter & Hampton LLP, Los Angeles, CA; Ian T Simmons, O'Melveny & Myers LLP, Washington, DC; James Landon McGinnis, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; John Clayton Everett, PRO HAC VICE, Jr., Morgan, Lewis & Bockius LLP, Washington, DC; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Leo David Caseria, Sheppard Mullin Richter Hampton LLP, Los Angeles, CA; Michael W. Scarborough, Sheppard **[*147]** Mullin Richter & Hampton LLP, San Francisco, CA; Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Mona Solouki, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Scott A. Stempel, PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY; Tyler Mark Cunningham, Sheppard Mullin Richter & Hampton.

For Samsung SDI Brasil LTDA, Defendant: Adam C. Hemlock, Weil Gotshal and Manges LLP, New York, NY; Bruce Cobath, PRO HAC VICE, Sheppard Mullin Richter & Hampton LLP, New York, NY; Christopher M. Curran, White & Case, Washington, DC; Douglas L Wald, Washington, DC; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Helen Cho Eckert, Sheppard Mullin Richter & Hampton LLP, Los Angeles, CA; Ian T Simmons, O'Melveny & Myers LLP, Washington, DC; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; John Clayton Everett, PRO HAC VICE, Jr., Morgan, Lewis & Bockius LLP, Washington, DC; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Kent Michael Roger, Morgan Lewis & Bockius **[*148]** LLP, San Francisco, CA; Leo David Caseria, Sheppard Mullin Richter Hampton LLP, Los Angeles, CA; Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Mona Solouki, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Scott A. Stempel, PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY; James Landon McGinnis, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Tyler Mark Cunningham, Sheppard Mullin Richter & Hampton.

For Samsung SDI Co., Ltd., Defendant: Bruce Cobath, PRO HAC VICE, Sheppard Mullin Richter & Hampton LLP, New York, NY; Christopher M. Curran, White & Case, Washington, DC; Douglas L Wald, Washington, DC; Dylan Ian Ballard, San Francisco, CA; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Helen Cho Eckert, Sheppard Mullin Richter & Hampton LLP, Los Angeles, CA; Ian T Simmons, O'Melveny & Myers LLP, Washington, DC; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; John Clayton Everett, PRO HAC VICE, Jr., Morgan, Lewis **[*149]** & Bockius LLP, Washington, DC; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Leo David Caseria, Sheppard Mullin Richter Hampton LLP, Los Angeles, CA; Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Mona Solouki, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Scott A. Stempel, PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY; James Landon McGinnis, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Tyler Mark Cunningham, Sheppard Mullin Richter & Hampton.

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For Samtel Color, Ltd., Defendant: William Diaz, McDermott Will & Emery LLP, Irvine, CA.

For Shenzhen Samsung SDI Co. LTD., Defendant: Adam C. Hemlock, Weil Gotshal and Manges **[*151]** LLP, New York, NY; Bruce Cobath, PRO HAC VICE, Sheppard Mullin Richter & Hampton LLP, New York, NY; Christopher M. Curran, White & Case, Washington, DC; Douglas L Wald, Washington, DC; Dylan Ian Ballard, San Francisco, CA; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Helen Cho Eckert, Sheppard Mullin Richter & Hampton LLP, Los Angeles, CA; Ian T Simmons, O'Melveny & Myers LLP, Washington, DC; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; John Clayton Everett, PRO HAC VICE, Jr., Morgan, Lewis & Bockius LLP, Washington, DC; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Leo David Caseria, Sheppard Mullin Richter Hampton LLP, Los Angeles, CA; Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Mona Solouki, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Scott A.

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For Tianjin Samsung SDI Co., Ltd., Defendant: Adam C. Hemlock, Weil Gotshal and Manges LLP, New York, NY; Bruce Cobath, PRO HAC VICE, Sheppard Mullin Richter & Hampton LLP, New York, NY; Christopher M. Curran, White & Case, Washington, DC; Douglas L Wald, Washington, DC; Dylan Ian Ballard, San Francisco, CA; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Helen Cho Eckert, Sheppard Mullin Richter & Hampton LLP, Los Angeles, CA; Ian T Simmons, O'Melveny & Myers LLP, Washington, DC; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; John Clayton Everett, PRO HAC VICE, Jr., Morgan, Lewis & Bockius LLP, Washington, DC; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Leo David Caseria, Sheppard Mullin Richter Hampton LLP, Los Angeles, CA; Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Michelle Park Chiu, Morgan Lewis & Bockius LLP, San **[*153]** Francisco, CA; Mona Solouki, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Scott A. Stempel, PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY; James Landon McGinnis, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Tyler Mark Cunningham, Sheppard Mullin Richter & Hampton.

For Toshiba America Consumer Products, Inc., Defendant: Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Samuel J. Sharp, PRO HAC VICE, Washington, DC; William H. Bave, III, PRO HAC VICE, New York, NY.

For Toshiba America Electronics Components, Inc, Defendant: Adam C. Hemlock, Weil Gotshal and Manges LLP, New York, NY; Aya Kobori, PRO HAC VICE, White and Case LLP, New York, NY; Christopher M. Curran, White & Case, Washington, DC; Dana E. Foster, White and Case LLP, Washington, D.C., DC; Douglas L Wald, Washington, DC; Ian T Simmons, O'Melveny & Myers LLP, Washington, DC; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; Jeremy Kent Ostrander, White & Case LLP, Palo Alto, CA; John Clayton Everett, PRO HAC VICE, Jr., Morgan, Lewis & Bockius LLP, Washington, **[*154]** DC; John Mark Gidley, White & Case LLP, Washington, DC; John M. Taladay, Baker Botts L.L.P., Washington, DC; Jon Vensel Swenson, Baker Botts L.L.P., Palo Alto, CA; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Lucius Bernard Lau, White & Case LLP, Washington, DC; Michael E. Hamburger, White & Case LLP, New York, NY; Michelle Park Chiu, Morgan Lewis & Bockius LLP, San Francisco, CA; Samuel J. Sharp, PRO HAC VICE, Washington, DC; Samuel James Sharp, White and Case LLP, Washington, DC; Scott A. Stempel, PRO HAC VICE, Morgan, Lewis Bockius LLP, Washington, DC; Sharon D. Mayo, Arnold & Porter LLP, San Francisco, CA; Steven Alan Reiss, Weil, Gotshal & Mangesl LLP, New York, NY; Tsung-Hui (Danny) Wu, PRO HAC VICE, White and Case LLP, Washington, DC; William H. Bave, III, PRO HAC VICE, New York, NY; Charise Naifeh, White & Case LLP; Matthew Frutig, White & Case LLP.

For Toshiba America Information Systems, Inc., Defendant: Aya Kobori, PRO HAC VICE, White and Case LLP, New York, NY; Christopher M. Curran, White & Case, Washington, DC; Dana E. Foster, White and Case LLP, Washington, D.C., DC; Ian T Simmons, O'Melveny & Myers LLP, Washington, DC; John Mark Gidley, White & **[*155]** Case LLP, Washington, DC; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Lucius Bernard Lau, White & Case LLP, Washington, DC; Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Samuel J. Sharp, PRO HAC VICE, Washington, DC; Samuel James Sharp, White and Case LLP, Washington, DC; William H. Bave, III, PRO HAC VICE, New York, NY; Charise Naifeh, White & Case LLP; Matthew Frutig, White & Case LLP.

For Toshiba America, Inc, Defendant: Aya Kobori, PRO HAC VICE, White and Case LLP, New York, NY; Christopher M. Curran, White & Case, Washington, DC; Dana E. Foster, White and Case LLP, Washington, D.C., DC; Ian T Simmons, O'Melveny & Myers LLP, Washington, DC; John Mark Gidley, White & Case LLP, Washington, DC; Lucius Bernard Lau, White & Case LLP, Washington, DC; Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Samuel J. Sharp, PRO HAC VICE, Washington, DC; Samuel James Sharp, White and Case LLP, Washington, DC; William H. Bave, III, PRO HAC VICE, New York, NY; Charise Naifeh, White & Case LLP.

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For Mitsubishi Electric Corporation, Defendant: Brent Caslin, LEAD ATTORNEY, Jenner & Block LLP, Los Angeles, CA; Terrence Joseph Truax, LEAD ATTORNEY, Jenner & Block LLC, Chicago, IL; Adam C. Hemlock, Weil Gotshal and Manges LLP, New York, NY; Charles B. Sklarsky, PRO HAC VICE, Jenner and Block, LLP, Chicago, IL; Gabriel **[*157]** A. Fuentes, Jenner & Block, LLP, Chicago, IL; Harold A. Barza, Quinn Emanuel Urquhart & Sullivan, LLP, Los Angeles, CA; Kevin Yoshiwo Teruya, Quinn Emanuel Urquhart and Sullivan LLP, Los Angeles, CA; Michael T. Brody, Jenner & Block LLP, Chicago, IL; Molly McGrail Powers, Jenner And Block LLP, Chicago, IL; Ryan Seth Goldstein, Quinn Emanuel Urquhart & Sullivan LLP, Tokyo Japan; Shaun M. Van Horn, Jenner And Block LLP, Chicago, IL.

For Thomson Consumer Electronics, Inc., also known as Technicolor USA, Inc., Defendant: Calvin Lee Litsey, LEAD ATTORNEY, PRO HAC VICE, Faegre Baker Daniels LLP, East Palo Alto, CA; Adam C. Hemlock, Weil Gotshal and Manges LLP, New York, NY; Anna Marie Konradi, PRO HAC VICE, Faegre Baker Daniels LLP, Indianapolis, IN; Emily E. Chow, PRO HAC VICE, Faegre Baker Daniels LLP, Minneapolis, MN; Jeffrey Scott Roberts, PRO HAC VICE, Faegre Baker Daniels, Denver, CO; Kathy L. Osborn, PRO HAC VICE, Faegre Baker Daniels LLP, Indianapolis, IN; Laura Kabler Oswell, Sullivan & Cromwell LLP, Palo Alto, CA; Ryan M Hurley, Indianapolis, IN; Stephen Michael Judge, Faegre Baker Daniels LLP, South Bend, IN; Robert Andrew Sacks, Sullivan & Cromwell LLP.

For Thomson S.A., also known **[*158]** as Technicolor SA, Defendant: Calvin Lee Litsey, LEAD ATTORNEY, Faegre Baker Daniels LLP, East Palo Alto, CA; Robert Andrew Sacks, LEAD ATTORNEY, Sullivan & Cromwell LLP, Los Angeles, CA; Adam C. Hemlock, Weil Gotshal and Manges LLP, New York, NY; Anna Marie Konradi, PRO HAC VICE, Faegre Baker Daniels LLP, Indianapolis, IN; Calvin L. Litsey, PRO HAC VICE, Faegre Baker Daniels LLP, East Palo Alto, CA; Emily E. Chow, PRO HAC VICE, Faegre Baker Daniels LLP, Minneapolis, MN; Jason de Bretteville, Stradling Yocca Carlson & Rauth, Newport Beach, CA; Jeffrey Scott Roberts, PRO HAC VICE, Faegre Baker Daniels, Denver, CO; Kathy L. Osborn, PRO HAC VICE, Faegre Baker Daniels LLP, Indianapolis, IN; Ryan M Hurley, Indianapolis, IN; Stephen Michael Judge, Faegre Baker Daniels LLP, South Bend, IN.

PT.MT Picture Display Indonesia, Defendant, Pro se.

For PT.MT Picture Display Indonesia, Defendant: Craig Y. Allison, Bunsow, De Mory, Smith & Allison LLP, Redwood City, CA.

For Technologies Displays Americas LLC, formerly known as Thomson Displays Americas LLC, Defendant: Arthur Slezak Gaus, LEAD ATTORNEY, Dillingham Murphy, LLP, San Francisco, CA; Adam C. Hemlock, Weil Gotshal and Manges LLP, New York, NY; **[*159]** Donald Arthur Wall, PRO HAC VICE, Squire Patton Boggs (US) LLP, Phoenix, AZ; Ellen Tobin, PRO HAC VICE, Curtis, Mallet-Provost, Colt Mosle LLP, New York, NY; Jeffrey Ira Zuckerman, PRO HAC VICE, Buris, Mallet Prevost, Colt Mosle LLP, Washington, DC; Mark C. Dosker, Squire Patton Boggs (US) LLP, San Francisco, CA; Nathan Lane, III, Belvedere, CA.

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For Donnie Clifton, **[*166]** Objector: Jan Leigh Westfall, LEAD ATTORNEY, Law Offices of Jan Westfall, Menifee, CA.

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Judges: JON S. TIGAR, United **[*167]** States District Judge.

Opinion by: JON S. TIGAR

Opinion

ORDER ON DEFENDANTS' MOTIONS FOR SUMMARY JUDGEMENT RELATING TO STATE LAW CLAIMS

I. INTRODUCTION

Now before the Court are two motions for summary judgment asking the Court to dismiss Direct Action Purchaser ("DAP") Costco's state law claims on due process, ECF Nos. 3029 ("DP Mot."), and choice-of-law grounds, ECF No. 2997 ("COL Mot."). The parties submitted a consolidated Opposition, ECF No. 3264 ("Opp'n"), and consolidated Reply, 3469 ("Reply"), to both motions. Due to various settlements and dismissals after the filing of these motions, Costco's California claims are the only remaining claims at issue. Oral argument was held on March 28, 2016. Defendants' choice-of-law motion is GRANTED, and their due process motion is DENIED as MOOT.[1]

II. FACTS

The history of this case is well known to parties. By way of summation, this case is predicated upon an alleged conspiracy to price-fix cathode ray tubes ("CRTs"), **[*168]** a core component of tube-style screens for common devices including televisions and computer monitors. This conspiracy ran from March 1, 1995 to November 25, 2007 (the "Conspiracy Period"), involved many of the major companies that produced CRTs, and allegedly resulted in overcharges of billions of U.S. dollars to domestic companies that purchased and sold CRTs or products containing CRTs ("CRT Finished Products") for purposes such as personal use. A civil suit was originally filed in 2007, ECF No. 1, consolidated by the Joint Panel on Multidistrict Litigation shortly thereafter, see ECF No. 122, assigned as a Multidistrict Litigation case ("MDL") to Judge Samuel Conti, see id., and ultimately transferred to the undersigned, see ECF No. 4162.

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[1] The Court previously filed this order provisionally under seal on April 19, 2016. ECF No. 4582. No party has filed a motion to seal any part of that order. Accordingly, pursuant to ECF No. 4477 ¶ 5, the Court now files the motion on the public docket.

In addition to two class actions, this MDL involves various direct actions from individual plaintiffs who have opted out of the class actions. Each DAP alleges that it bought at least one CRT Finished Product from a Defendant or an entity owned or controlled by a Defendant. The DAPs, despite their moniker, are classified as indirect purchasers under ***antitrust law*** -- not direct purchasers. Defendants bring the instant motions against DAP Costco. **[*169]**

Costco filed indirect purchaser claims under California law for CRT Finished Product purchases it made during the Conspiracy Period for its stores throughout the United States. Because Costco filed its lawsuit in Washington before the case was transferred to this Court, Washington's choice-of-law rules apply. *In re Nucorp Energy Sec. Litig., 772 F.2d 1486, 1492 (9th Cir. 1985)* (holding that courts apply the choice-of-law rules of each state where the individual actions of an MDL were originally filed). Defendants argue in their choice-of-law motion that Washington's choice-of-law rules dictate that Washington law should apply. Accordingly, they ask the Court to dismiss Costco's California claims. In their due process motion, Defendants argue that Costco's California claims should be dismissed for the independent reason that they violate due process. Insofar as Washington law applies, however, Defendants' due process motion is moot.

The instant motions turn on California's and Washington's respective contacts with the parties and the underlying transactions. In 1993, Costco merged with Price Club, a California company, and incorporated in Delaware. In 1999, however, Costco reincorporated in Washington. Costco's headquarters were located in Washington **[*170]** throughout the Conspiracy Period, though Costco states that some executive offices were also located in California for an unspecified amount of time after the merger with Price Club.

Costco's purchases of CRT Finished Products started with a buyer located in its Washington headquarters who chose vendors and negotiated price, quantity, and time of delivery. Purchase orders were then created in and issued directly to the vendor from either Costco's headquarters in Washington or Costco's regional offices throughout the country. Once a purchase order was issued, the product was delivered directly to Costco's depots or stores. Personnel at those locations signed the bill of lading or other shipping document and accepted delivery, at which point Costco's payment obligation arose and title transferred. Payment was then remitted from Costco's Washington headquarters.[2] Costco purchased and received more than four million CRT Finished Products for its California locations using this process, more than its stores in any other state.

Although Defendants allegedly engaged in conspiratorial **[*171]** conduct throughout the world, Costco presents evidence that some of this activity occurred in California. For example, on June 20, 2000, San Diego-based HED(US) employee Yuri Mitsumoto circulated an email containing future production capacity plans of competitor American Matsushita Electronics Company. See ECF No. 3265-8, Ex. 29. In addition, on July 24, 2001, Mitsumoto sent HED(US) employee Tom Heiser an email confirming that he "talked with Samsung Chunghwa sales manager on the phone" and reported to Heiser the CRT pricing plans he had obtained. See ECF No. 3265-8, Ex. 28. Finally, Hirokazu Nishimaya from Panasonic testified that he exchanged "production information and capacity" with Hitachi employees at a trade-association meeting in La Quinta, California. ECF No. 3265-8, Ex. 32 at 508:20-514:13.

III. LEGAL STANDARD

A. Summary Judgment

Summary judgment is proper when a "movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*; accord *Celotex Corp. v. Catrett, 477 U.S. 317, 323-24, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. "A party asserting that a fact cannot be or is genuinely disputed must support the assertion by" citing to depositions, documents, affidavits, or other materials. *Fed. R. Civ. P. 56(c)(1)(A)*. A party also **[*172]** may show that such materials "do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." *Fed. R. Civ. P.*

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[2] For a more detailed description of Costco's purchasing processes, see generally, ECF No. 3264-1 (Shavey Decl.).

56(c)(1)(B). An issue is "genuine" only if there is sufficient evidence for a reasonable fact-finder to find for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). A fact is "material" if the fact may affect the outcome of the case. Id. at 248. "In considering a motion for summary judgment, the court may not weigh the evidence or make credibility determinations, and is required to draw all inferences in a light most favorable to the non-moving party." Freeman v. Arpaio, 125 F.3d 732, 735 (9th Cir. 1997). However, unsupported conjecture or conclusory statements do not create a genuine dispute as to material fact and will not defeat summary judgment. Surrell v. Cal. Water Serv. Co., 518 F.3d 1097, 1103 (9th Cir. 2008).

For claims on which the defendant does not carry the ultimate burden of persuasion, defendant as the moving party has the burden of producing evidence that negates an essential element of each claim on which it seeks judgment or showing that the plaintiff cannot produce evidence sufficient to satisfy the burden of proof at trial. See Nissan Fire & Marine Ins. Co. v. Fritz Cos., 210 F.3d 1099, 1102 (9th Cir. 2000). If the moving party satisfies its initial burden of production, then the nonmoving party must produce admissible evidence to show **[*173]** that a genuine issue of material fact exists. Id. at 1102-1103. The non-moving party must "identify with reasonable particularity the evidence that precludes summary judgment." Keenan v. Allan, 91 F.3d 1275, 1279 (9th Cir. 1996). "Specific citations, not bulk references, are essential to pinpoint key facts and factual disputes. [A] district court [i]s not required to put the puzzle together from a boxful of facts, and . . . may permissibly decide the motion without mining [an] entire document for more substantiation" when a citation offers only a "breezy reference" to a part of an "82-page report" not otherwise cited or explained in briefing. Stanislaus Food Products Co. v. USS-POSCO Indus., 803 F.3d 1084, 1094-95 (9th Cir. Oct. 13, 2015). "A mere scintilla of evidence will not be sufficient to defeat a properly supported motion for summary judgment; rather, the nonmoving party must introduce some significant probative evidence tending to support the complaint." Summers v. Teichert & Son, Inc., 127 F.3d 1150, 1152 (9th Cir. 1997) (citation omitted). If the non-moving party fails to make this showing, the moving party is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

IV. DISCUSSION

For the reasons provided below, the Court will grant Defendants' choice-of-law motion. This ruling moots the due process motion, so the Court declines to address the merits thereof.

Where there is an actual conflict between the laws or interests **[*174]** of Washington and that of another state, Washington follows the "most significant relationship test" from the Restatement (Second) on Conflict of Laws. Johnson v. Spider Staging Corp., 87 Wash. 2d 577, 580, 555 P.2d 997 (1976) (citing Restatement (Second) of Conflict of Laws § 145 (1971)). Here, an actual conflict exists because California allows indirect purchaser suits, whereas Washington does not. Accordingly, the Court must determine which state -- California or Washington -- has the most significant relationship by comparing those states' contacts with the occurrence and the parties. Id. In performing that analysis, the goal "is not merely to count contacts, but rather to consider which contacts are most significant and to determine where these contacts are found." Id. at 581.

The "most relevant relationship test" requires a comparison of each state's contacts with (a) the place where the injury occurred; (b) the place where the conduct causing the injury occurred; (c) the domicile, residence, nationality, place of incorporation and place of business of the parties; and (d) the place where the relationship, if any, between the parties is centered. Id. at 580-81.

As a preliminary matter, Costco argues Defendants' California-based conspiratorial conduct is the most important contact to consider in the choice-of-law analysis. **[*175]** There is some support for its position. See id. § 145, cmt. c ("If the primary purpose of the tort rule involved is to deter or punish misconduct . . . the state where the conduct took place may be the state of dominant interest and thus that of most significant relationship"); id., cmt. e (stating that "the place where the conduct occurred is given particular weight" where there is "no one clearly demonstrable place of injury"). Here, however, Defendants did not focus their collusive activity in any particular state; rather, their conspiratorial conduct allegedly spanned the globe. Further,

> where the acts of the defendants take place in a different state than that where the plaintiff suffered injury, the local law of the state of injury will be applied unless some other state, which would usually be the state where the defendants acted, has a more significant relationship to the occurrence and the parties with respect to the particular issue.

Id., § 172, cmt. b (emphasis added). The place of injury is particularly important, moreover, because where, as here, "two or more persons are liable to a third person for the acts of each other . . . [t]he applicable law will usually be the local law of the state where **[*176]** the injury occurred." Id., § 172(2). The place of Costco's injury is therefore the most important contact in the choice-of-law analysis.

Plaintiffs bringing antitrust claims "are deemed to be injured in the states where they agreed to pay inflated prices for products." *In re TFT-LCD (Flat Panel) Antitrust Litig., MDL No. 1827, 2012 U.S. Dist. LEXIS 121757, 2012 WL 3727221, at *3 (N.D. Cal. Aug. 27, 2012)*. It is undisputed that Costco agreed to pay and paid inflated prices from its Washington headquarters. See COL Opp'n at 3; see also ECF No. 3264-1 ("Shavey Decl.") ¶ 12. Costco was therefore injured in Washington.

Costco argues that its place of injury was California because it bought and sold more CRT Finished Products in California than in any other state; because it issued purchase orders for these products, in part, from its California offices; because Costco purchased a significant amount of CRT Finished Products from California-based vendors, and because title transferred to Costco when the CRT Finished Products were delivered, many of which were delivered to California locations. These considerations, however, bear no legal weight. See also *In re TFT-LCD (Flat Panel) Antitrust Litig., No. C 11-0058 SI, 2011 U.S. Dist. LEXIS 96741, 2011 WL 3809767, at *3 (N.D. Cal. Aug. 29, 2011)* (citing *Pecover v. Electronics Arts Inc., 633 F. Supp. 2d 976, 984 (N.D.Cal.2009)*; *In re Graphics Processing Units Antitrust Litig. ("GPU"), 527 F. Supp. 2d 1011, 1027-29 (N.D. Cal.2007))* **[*177]** ("Thus, the ultimate destination of the panels does not have any part in Costco's antitrust injury or in its state-law claims."). Rather, as Judge Illston found in LCD, Washington is the place of injury because

> [a]lthough sales of . . . products in California may constitute a significant portion of Costco's business, those products were selected in Washington, the negotiation over the terms of purchase took place in Washington, the invoices were sent to Washington, and payment issued from Costco's Washington headquarters. . . . [T]hese events are all more significant to Costco's claims than the issuance of a purchase order.

In re TFT-LCD (Flat Panel) Antitrust Litig., No. C 11-0058 SI, 2011 WL 5922966, at *2 (N.D. Cal. Nov. 28, 2011). Accordingly, the "place of injury" factor weighs heavily in favor of granting Defendants' motion.

Next, the Court examines the place of Defendants' conduct. Costco claims that the conspiratorial conduct "was focused in California." Costco Opp'n at 19. Although there is evidence that some conspiratorial activity occurred in California, the vast majority of the conduct causing Costco's injury took place outside of California. This factor therefore does not weigh in favor of either side.

The Court next looks at the domicile, **[*178]** residence, nationality, place of incorporation, and place of business of the parties. Although Costco was incorporated in Delaware early on in the conspiracy, it was headquartered and incorporated in Washington for the vast majority of the Conspiracy Period. None of the Defendants were headquartered or incorporated in California or Washington.

Costco notes that where the interest affected "is a business or financial one, such as in the case of unfair competition, . . . the place of business is the more important contact." *Restatement (Second) of Conflict of Laws § 145, cmt. e* (1971). Costco, however, did business across the country. Moreover, even if "during the early years of the [Conspiracy] Period, Costco maintained executive functions in both California and Washington," Costco COL Opp'n at 20, Costco's Washington operation was much more substantial and continued throughout the Conspiracy Period. In addition, whereas Costco's contacts with California were limited only to those CRT product purchases destined for California stores, Washington directed the purchase of every CRT product that Costco made for its stores across the country. This factor therefore weighs in favor of granting Defendants' motion.

Finally, the Court looks to the **[*179]** place where the relationship between the parties was centered. The purchase of CRT Finished Products was controlled by Costco's headquarters in Washington, and payment was remitted from Washington. Thus, even though California offices were involved in the purchasing process for CRT Finished Products destined for California stores, Costco's relationship with Defendants was centered in Washington. See also *LCD, 2011 U.S. Dist. LEXIS 96741, 2011 WL 3809767, at *4* ("[T]he relationship between [Costco and the LCD defendants] was centered in Washington.").

While the parties' contacts with California were not insubstantial, "the facts that Costco is located in Washington, that Costco was injured in Washington, and that the relationship between the parties was centered in Washington lead the Court to conclude that Washington law governs Costco's claims." *2011 U.S. Dist. LEXIS 96741, [WL] at *4-5*.

V. CONCLUSION

Defendants' choice-of-law motion is GRANTED, and Costco's California claims are dismissed. Defendants' due process motion on Costco's California claims is DENIED as MOOT.

IT IS SO ORDERED.

Dated: April 19, 2016

/s/ Jon S. Tigar

JON S. TIGAR

United States District Judge

End of Document

Terry v. McNeil-PPC, Inc. (In re Tylenol (Acetaminophen) Mktg., Sales Practices & Prods. Liab. Litig.)

United States District Court for the Eastern District of Pennsylvania

April 19, 2016, Decided; April 19, 2016, Filed

MDL NO. 2436 2:13-md-02436; Civil Action No. 2:12-cv-07263

Reporter
181 F. Supp. 3d 278 *; 2016 U.S. Dist. LEXIS 52294 **

IN RE: TYLENOL (ACETAMINOPHEN) MARKETING, SALES PRACTICES AND PRODUCTS LIABILITY LITIGATION; This Document Relates to: Rana Terry, as Personal Representative and Administrator of the Estate of Denice Hayes, Deceased, Plaintiff, vs. McNEIL-PPC, Inc., McNeil Consumer Healthcare, and Johnson & Johnson, Inc., Defendants.

Prior History: *In re Tylenol (Acetaminophen) Mktg., Sales Practices & Prods. Liab. Litig., 2014 U.S. Dist. LEXIS 89981 (E.D. Pa., July 1, 2014)*

Core Terms

defendants', FDA, notice, hearsay, liver, marketing, label, state of mind, documents, exclude evidence, motion in limine, argues, acetaminophen, recommended, manufacturers, consumers, products, reasons, warning, risks, advertising, motive, dose, plaintiff's claim, regulations, wealth, design defect, press release, pharmacovigilance, prejudicial

Counsel: **[**1]** For RANA TERRY, AS PERSONAL REPRESENTATIVE AND ADMINISTRATOR OF THE ESTATE OF DENICE HAYES, DECEASED, Plaintiff (2:12-cv-07263-LS): LAURENCE S. BERMAN, LEAD ATTORNEY, MICHAEL M. WEINKOWITZ, LEVIN, FISHBEIN, SEDRAN & BERMAN, PHILADELPHIA, PA; WILLIAM G. GAINER, LEAD ATTORNEY, PRO HAC VICE, TOLIVER & GAINER, CONYERS, GA; ADAM WEINTRAUB, HERMAN HERMAN & KATZ LLC, NEW ORLEANS, LA.

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Judges: HON. LAWRENCE F. STENGEL, J.

Opinion by: LAWRENCE F. STENGEL

Opinion

MEMORANDUM

[*283] Stengel, [2] J.**

This case is part of a Multidistrict Litigation (MDL) involving claims of liver damage from the use of Tylenol at or just above the recommended dosage.[1] This is the first "bellwether" scheduled for trial.[2] **[*284]** The defendants have filed eighteen motions in limine. My rulings on each motion are explained below.

I. Evidentiary Standards

Several of the defendants' motions in limine involve arguments about the relevancy or prejudicial effect of certain evidence under *Federal Rules of Evidence 401* and *403*. "A district court is accorded a wide discretion in determining the admissibility of evidence under the Federal Rules." *Sprint v. Mendelsohn, 552 U.S. 379, 384, 128 S. Ct. 1140, 170 L. Ed. 2d 1 (2008)*(quoting **[**3]** *U.S. v. Abel, 469 U.S. 45, 54, 105 S. Ct. 465, 83 L. Ed. 2d 450 (1984))*. See also *Moyer v. United Dominion Indus., 473 F.3d 532, 542 (3d Cir. 2007)*(citation omitted). "Assessing the probative value of [the proffered evidence], and weighing any factors counseling against admissibility is a matter first for the district court's sound judgment under *Rules 401* and *403*...." Id.

Context is important to questions involving *Rules 401* and *403*. *Luce v. U.S., 469 U.S. 38, 41, 105 S. Ct. 460, 83 L. Ed. 2d 443 (1984)*("A reviewing court is handicapped in any effort to rule on subtle evidentiary questions outside a factual context."). To be admissible, evidence must be relevant. *Fed. R. Evid. 402*. Relevant evidence is evidence having any tendency to make a fact of consequence in determining the action more or less probable than it would be without the evidence. *Fed. R. Evid. 401*.

Under *Rule 403*, relevant evidence may be excluded "if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." *Fed. R. Evid. 403*.

1. Defendants' Motion In Limine to Exclude Evidence of, or Reference to, Adverse Event Reports (MIL 1)

The defendants move to exclude evidence of, or reference to, adverse event reports (AERs). The defendants claim they are "irrelevant, unreliable, and unsubstantiated anecdotes."

Under FDA regulations, manufacturers **[**4]** are required to create an AER in their safety surveillance database whenever they receive information that a person taking their drug has experienced an adverse event. *21 C.F.R. § 314.80*. AERs are created on a standard form and may be submitted alone or accompanied by few or dozens of pages of supporting medical records. See Office of Epidemiology and Biostatistics, Food and Drug Administration, Annual Adverse Drug Experience Report: 1996 (Oct. 30, 1997), at 2 (Doc. No. 61, Ex. A). AERs are prepared by an employee of a pharmaceutical manufacturer based either on telephone conversations with a third party or other correspondence received by the manufacturer. AERs are drawn from a variety of sources: patients, their family members, physicians, or even civil complaints. See, e.g., *In re Carter-Wallace, Inc. Sec. Litig., 220 F.3d 36, 40 (2d Cir. 2000)*("Drug manufacturers receive these reports from several sources, including treating physicians.").

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[1] See Master Compl., 13-md-2436, Doc. No. 32. There are close to two hundred other cases included in this MDL, along with several similar cases in New Jersey state court.

[2] A "bellwether" case is a test case. "Bellwether" trials should produce representative verdicts and settlements. The parties can use these verdicts and settlements to gauge the strength of the common MDL claims to determine if a global resolution of the MDL is possible. See FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX LITIGATION, FOURTH EDITION 360 (2004); DUKE LAW CENTER FOR JUDICIAL STUDIES, MDL STANDARDS AND BEST PRACTICES 16-21 (2014).

Both parties recognize that AERs have limitations in terms of their reliability. Because AERs are based on self-reported complaints of adverse events, they may not contain information which can make them a reliable source.[3] AERs are not considered **[*285]** to "necessarily reflect a conclusion by the applicant or FDA that the report or information **[**5]** constitutes an admission that the drug caused or contributed to an adverse effect." *21 C.F.R. § 314.80(l)*.

a. Hearsay

First, the defendants argue that AERs would be inadmissible as hearsay: out-of-court statements offered to prove the truth of the matter asserted. See *Fed. R. Evid. 801*. The defendants claim that they are not admissible under any of the hearsay exceptions or exemptions. The plaintiff counters that **[**6]** they would fall within the public records exception or the business records exception to hearsay. See *Fed. R. Evid. 803(8)(A)*; *Fed. R. Evid. 803(6)*. Whether an AER falls within an exception to the hearsay rule will require a more specific inquiry as to each document. It's entirely likely that an AER could be offered for a non-hearsay purpose. If offered for knowledge, or state of mind, and not for its inherent truth, the AER would not be hearsay as to each document. For this reason, I will defer any ruling on the hearsay objection to the AERs.[4]

b. Notice

Even if the AERs are hearsay, the plaintiff argues they are relevant to showing notice. The defendants argue that these AERs are not admissible to show "notice" because they are unreliable. This argument misses the point. An AER is notice of some event or problem. The "reliability" issue is more one of weight than of relevance. Reliable or not, they are notice of some event of significance to this case and that likely takes them out of the hearsay rule.

The purpose of recording AERs is to serve as a warning **[**7]** system or signaling system for drug manufacturers. See *Soldo v. Sandoz Pharms. Corp., 244 F. Supp. 2d 434, 463-64 (W.D. Pa. 2003)*(quoting Brief Description with Caveats of System, Surveillance and Data Processing Branch of the Division of Epidemiology and Surveillance, Division of Epidemiology & Surveillance, Dec. 1988, at p. 1). Drug manufacturers are expected to report AERs to the FDA, which compiles them into a database. See *http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/Surveillance/AdverseDrugEffects/ucm082193.htm* . AERs are often reviewed by the FDA and its subcommittees to determine if changes to a drug composition or its label need to be made.[5]

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[3] See *71 Fed. Reg. 77314, 77321 (Dec. 26, 2006)*("FDA noted that there are limitations to interpreting the AERS data. Dosing information may be unreliable. Acetaminophen products are generally taken on an as-needed basis, so the actual dose ingested can be difficult to ascertain. There is no certainty that all of the adult cases included in this analysis were unintentional. Stigma may be associated with reporting suicide, so cases may be reported as unintentional when they were intentional overdoses. In addition, spontaneous reporting systems cannot provide certainty that acetaminophen was the cause of any of the reported adverse event. Furthermore, incidence rates cannot be determined, because the numerator or denominator descriptors for the entire population are not available. Overall, spontaneous reports may be subject to significant underreporting.").

[4] The plaintiff also argues that the AERs could be considered party admissions. I will need to see the context and content of the AERs in order to make a ruling on this point.

[5] The 2002 Advisory Committee reviewed AERs to determine what risk of injury recommended dosing posed. See FDA Safety Analysis Power Point, Sept. 19, 2002 (Doc. No. 96, Ex. 7); FDA Memorandum Aug. 15, 2002 (Doc. No. 95, Ex. 17). The Acetaminophen Working Group of the FDA relied on AERs in making its recommendation to reduce the single caplet strength from 500 mg to 325 mg. See CDER Working Group Executive Summary and Recommendations, Feb. 26, 2008 (Doc. No. 96, Ex. 1). Other Committees Groups of the FDA use AERs as data for understanding further regulatory needs. See Characterization of Acetaminophen Overdose and Related Hepatotoxic Events, Joint Meeting of the Drug Safety and Risk Management, Nonprescription **[**8]** and Anesthetic and Life Support Drugs Advisory Committees of the FDA, Powerpoint, Jun. 29, 2009 (Doc. No. 95, Ex. 21).

[*286] Drug manufacturers are expected to take certain steps to ensure their products are safe for consumers. These steps are known as "pharmacovigilance." See Guidance for Industry: Good Pharmacovigilance Practices and Pharmacoepidemioliogic Assessment (2005)(Doc. No. 96, Ex. 3). Reporting AERs to regulatory authorities is at the heart of pharmacovigilance. See E. Kuffner Dep., Mar. 5, 2014 at 8 (Doc. No. 90, Ex. 3)("Reporting — reporting adverse event reports to the regulatory authorities would be my description of pharmacovigilance. I believe that's accurate."); E. Nelson Dep., Nov. 21, 2013 at 62-65, 98-101 (Doc. No. 96, Ex. 4)(confirming how AERs are used in the context of pharmacovigilance). Whether the defendants undertook the appropriate steps to carry out their duty of pharmacovigilance is important to the plaintiff's failure-to-warn and design defect claims.

With all this in mind, AERs would be admissible to show notice. See, e.g., *Benedi v. McNeil-P.P.C., Inc., 66 F.3d 1378, 1385-86 (4th Cir. 1995)*("[T]he district court did not abuse its discretion in admitting the DERs and case summaries, because the plaintiff offered the evidence solely **[**9]** to prove notice."); In re Gadolinium-Based Contrast Agents Products Liability, 956 F. Supp. 2d 809, 815 (N.D. Ohio Jul. 25, 2013), *affirmed by* *Decker v. GE Healthcare Inc., 770 F.3d 378 (6th Cir. 2014)*(citations omitted); *In re Fosamax Prods. Liab. Litig., No. 06 MD 1789(JFK), 2013 U.S. Dist. LEXIS 6631, 2013 WL 174416, at *4 (S.D.N.Y. Jan. 15, 2013)*("Adverse event reports received by Merck until the time of Plaintiff's injury are admissible if used as evidence that Merck was on notice of potentially serious jaw injuries."); *Wolfe v. McNeil—PPC, Inc., No. 07-348, 2012 U.S. Dist. LEXIS 2160, 2012 WL 38694, at *2 (E.D.Pa. Jan. 9, 2012)*("However, reports submitted to the FDA before plaintiff's alleged injury occurred would not be hearsay if offered on the issue of defendants' notice of potential safety risks from the use of Children's Motrin."); *Schedin v. Ortho—McNeil—Janssen Pharms., Inc., 808 F. Supp. 2d 1125, 1139 (D. Minn. 2011)*("The Court had denied its previously filed motion in limine regarding AERs, finding that the evidence was admissible to show notice and could also support a finding of causation."), *reversed in part on other grounds*, *In re Levaquin Products Liability Litigation, 700 F.3d 1161 (8th Cir. 2012)*; *Hogan v. Novartis Pharms. Corp., No. 06-civ-0260, 2011 U.S. Dist. LEXIS 43800, 2011 WL 1533467, at *13 (E.D.N.Y. Apr. 24, 2011)*("The motion to preclude admission of adverse drug experience reports is denied. Individual reports and the total number of ONJ reports before June, 2005 can establish notice regardless of whether Hogan's jaw condition was not similar to any of the patients described in the reports."); *In re Fosamax Prods. Liab. Litig., No. 1:06-MD-1789-JFK, 2010 U.S. Dist. LEXIS 114262, 2010 WL 4242708, at *3 (S.D.N.Y. Oct. 27, 2010)*("[A]dverse event reports are admissible **[**10]** only to prove when Merck had notice of the adverse events alleged therein."); *Bartlett v. Mutual Pharmaceutical Co., Inc., No. 08-cv-358-JL, 2010 U.S. Dist. LEXIS 111259, 2010 WL 3092649, at *1 (D. N.H. Aug. 2, 2010)*("The [adverse event] reports are not hearsay, though, if offered to prove that the FDA was on notice of Sulindac's safety risks, or that Mutual should have been on notice of such risks.").

If they are admitted for the purposes of "notice," the defendants ask that the AERs admitted be limited only to those involving similar circumstances to those surrounding the decedent's death. I agree that the AERs presented for the purpose **[*287]** of notice should be ones that would be similar to the circumstances of this case (i.e., persons who developed acute liver failure/damage at or just above 4 g, persons who were fasting/malnourished). Other AERs would likely be irrelevant to the case.

The defendants claim that the admission of only one AER which is substantially similar is necessary; admission of other AERs would be redundant. I disagree. The extent to which the defendants were on notice of the potentially adverse effects of Tylenol would be relevant to showing how intentional their behavior was in not addressing a potential problem or safety signal. The number **[**11]** of AERs will not necessarily be limited. However, the defendants can raise objections to relevance and prejudicial effect at the time of trial for specific AERs.

c. Design Defect

The defendants claim the AERs cannot serve as substantially similar prior incidents to show a design defect. "In the appropriate circumstances, evidence of prior occurrences and accidents involving a product which is identical or substantially similar to the product which has allegedly caused an injury has generally been held to be admissible at trial." *Barker v. Deere & Co., 60 F.3d 158, 162 (3d Cir. 1995)*(quoting 2A Louis Frumer & Melvin Friedman, Products Liability § 18.02[1], at 18-14 to 18-17 (1995)). In order to be considered "substantially similar," a district court "must be apprised of the specific facts of previous accidents." Barker, 60 F.3d at 163. "Absent such a foundation, it is impossible for the district court in the first instance, and for this court on appeal, to review the facts in order to make a determination as to similarity." Id. In order to determine whether AERs are substantially similar enough to serve as evidence of a design defect, I will need factual context. I decline to make a ruling on this point until trial. The parties can raise their arguments at that time.

d. Reliance by Experts

The defendants claim that because **[**12]** AERs are unreliable sources of data, experts cannot use them in forming their opinions. The plaintiff recognizes that AERs may have limitations but argues that they may be used by experts to corroborate other information or research.

"If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted." Fed. R. Evid. 703. Though AERs do not have the same controls as other sources of data, courts have found that they can be relied upon by experts, along with other data or research, in forming opinions about causation.[6] See *Wolfe v. McNeil-PPC, Inc., No. 07-348, 2011 U.S. Dist. LEXIS 47710, 2011 WL 1673805, at *5 (E.D. Pa. May 4, 2011)*("In this case, the three doctors did not solely rely on case reports in forming their opinions on causation but used them to supplement their extensive review of plaintiff's medical records and deposition testimony of plaintiff's treating physicians. As with defendants' other objections, the three doctors' use of case studies in reaching their conclusion affects only the weight to be given their testimony, not its admissibility. Thus, the proposed testimony of the three doctors is based on sufficiently reliable methods."); *Deutsch v. Novartis Pharmaceuticals Corp., 768 F.Supp.2d 420, 431 (E.D.N.Y. 2011)*("Accordingly, the fact that **[*288]** a particular opinion **[**13]** is not based on a randomized controlled clinical trial, while certainly an area for cross-examination, will not affect its admissibility.").[7] In addition, an expert opining about a drug companies' pharmacovigilance duties may need to rely on AERs to explain what tasks drug companies may need to take to monitor the safety of their products. See *Decker v. GE Healthcare Inc., 770 F.3d 378, 394 (6th Cir. 2014)*("[Plaintiff's expert] was qualified to reliably testify as to the significance of the AERs.").

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[6] See Reference Manual on Scientific Evidence (2d Edition, Federal Judicial Center, 2000), at 469.

[7] See also *Tyler v. Sterling Drug, Inc., 19 F. Supp. 2d 1239, 1241 (N.D. Okla. 1998)*("[A]necdotal reports may be relevant to the issue of causation to the extent that plaintiffs rely on the reports to show the evolution of the scientific literature.")(citations omitted); *Schedin v. Ortho—McNeil—Janssen Pharms., Inc., 808 F. Supp. 2d 1125, 1139 (D.Minn. 2011)*(explaining that AERs are admissible because are commonly used by experts to determine causation in conjunction with other evidence), *rev'd in part on other grounds*, *In re Levaquin Prods. Liab. Litig., 700 F.3d 1161 (8th Cir. 2012)*; *In re Neurontin Marketing, Sales Practices, and Prods. Liab. Litig., 612 F. Supp. 2d 116, 153 (D. Mass. 2009)*("Courts may, and often do, rely on other lines of causation evidence such as adverse event data."); *id. at 157* ("In sum, Plaintiffs' experts point to the adverse event and case report data as real-world evidence to back up their theory that Neurontin increases the risk of suicidality in its patients."); **[**14]** *In re Phenylpropanolamine (PPA) Prods. Liab. Litig., 289 F. Supp. 2d 1230, 1242 (W.D. Wash. 2003)*("Non-epidemiological sources [such as AERs] are frequently utilized by experts in rendering scientific opinions...."); *Crawford v. Muscletech Research & Dev., Inc., No. Civ.-01-1298-C, 2002 U.S. Dist. LEXIS 28408, 2002 WL 31852828, at *1 (W.D. Okla. 2002)*(holding that expert opinion testimony based in part on AERs and case reports were admissible under Daubert).

But see ***Soldo v. Sandoz Pharms. Corp., 244 F. Supp. 2d 434, 537-44 (W.D. Pa. 2003)***(finding case reports to be unreliable and "unscientific" sources that plaintiff's experts could not rely on for causation); *McClain v. Metabolife Int'l, Inc., 401 F.3d 1233, 1250 (11th Cir. 2005)*(AERs "reflect complaints called in by product consumers without any medical controls or scientific assessment."); *Hollander v. Sandoz Pharms. Corp., 289 F.3d 1193, 1211 (10th Cir. 2002)*("[I]t was not unreasonable for the district court to characterize the reports as unreliable evidence of causation."); *Rhodes v. Bayer Healthcare Pharms., Inc., No. 10-1695, 2013 U.S. Dist. LEXIS 44670, 2013 WL 1289050, at *5 (W.D. La. Mar. 26, 2013)*("Dr. Hamilton's reliance on adverse event reports is also unimpressive, as such reports do not demonstrate the requisite degree of reliability demanded by Daubert.").

For these reasons, an expert's reliance on AERs may, in and of itself, be appropriate. Whether the expert used those AERs in a reliable manner is a different question, best addressed by a Daubert motion.[8]

e. *Rule 401* and *Rule 403* Arguments

Lastly, the defendants argue that AERs are not relevant under *Rule 401* and/or any probative value **[**15]** they may have would be substantially outweighed by the risk of prejudice under *Rule 403*. AERs may be relevant to this case. Whether *Rule 403* would bar their admission is better determined at trial.

For these reasons, I will **DENY** this motion **without prejudice**. The plaintiff may offer AERs to show notice. The question of whether an expert opinion appropriately relies on AERs will be discussed in rulings on the parties' Daubert motions. If the plaintiff plans to introduce specific AERs for any reason other than notice (i.e., causation or to show design defect), the defendants may object as appropriate at trial.

2. Defendants' Motion In Limine to Exclude Evidence or Argument Relating to Fraud on the FDA (MIL 2)

The defendants move to exclude all evidence meant to show that the defendants **[*289]** committed a "fraud on the FDA." Specifically, they claim the following evidence is inadmissible: evidence showing that the defendants misled the Food and Drug Administration (FDA), withheld information from the FDA, violated FDA disclosure requirements, otherwise violated the *Food, Drug, and Cosmetic Act* (FDCA), or did not cooperate with the FDA regarding Extra Strength Tylenol. They argue this evidence is preempted by the **[**16]** United States Supreme Court's decision in Buckman Co. v. Plaintiffs' Legal Committee, which held that "state-law fraud-on-the-FDA claims conflict with, and are therefore impliedly pre-empted by federal law." *531 U.S. 341, 348, 121 S. Ct. 1012, 148 L. Ed. 2d 854 (2001)*.

In Buckman, the liability for fraud was based solely on alleged non-disclosure of information to the FDA. *Id. at 353*. The Court held that fraud-on-the-FDA claims were impliedly preempted because these types of state law tort claims conflicted with the FDCA. *Id. at 348*. "The conflict stems from the fact that the federal statutory scheme amply empowers the FDA to punish and deter fraud against the [FDA], and that this authority is used by the Administration to achieve a somewhat delicate balance of statutory objectives." *Id*. Allowing fraud-on-the-FDA claims, the Court reasoned, could skew that balance. *Id*. See also *Farina v. Nokia Inc., 625 F.3d 97, 123 (3d Cir. 2010)*.

I previously found that the plaintiff's fraud and fraudulent concealment claims were not impliedly preempted by Buckman. See Memorandum Denying Motion for Summary Judgment on Plaintiff's Short Form Complaint Claims, Nov. 13, 2015 at 14-17 (Doc. No. 177). I did not view them as fraud-on-the-FDA claims, which are preempted under Buckman. Id. at 15. If the evidence in question were being used to establish the **[**17]** defendants' liability solely based on concealment of information to the FDA or violations of FDA regulations, that evidence would not be permitted under Buckman.[9] See *Buckman, 531 U.S. at 352-53* ("[T]he Medtronic claims arose from the manufacturer's alleged failure to use reasonable care in the production of the product, not solely from the violation of FDCA requirements. In the present case, however, the fraud claims exist solely by virtue of the FDCA disclosure requirements."). The defendants' breach of duty cannot be premised solely on their interactions with the FDA.

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[8] Daubert motions filed by the parties on this issue are still pending.

[9] To support their motion, the defendants cite cases where courts found that claims were impliedly preempted under Buckman. See, e.g., *Farina v. Nokia Inc., 625 F.3d 97, 123 (3d Cir. 2010)*; *In re Fosamax (Alendronate Sodium) Prods. Liab. Litig. (No. II), 751 F.3d 150, 164 (3d Cir. 2014)*; *Henderson v. Merck & Co., No. 04-CV-05987-LDD, 2005 U.S. Dist. LEXIS 45106, 2005 WL 2600220, at *11 (E.D. Pa. Oct. 11, 2005)*. These cases are not helpful. Whether the plaintiff's claims were preempted was an issue discussed in the defendants' motion for summary judgment. At issue here is whether the evidence related to the defendants' interactions with the FDA is admissible for purposes other than establishing liability or breach of duty. That is a different inquiry than whether the plaintiff's claims are preempted.

However, evidence that the defendants attempted to manipulate the regulatory process, **[**18]** failed to comply with regulatory duties, or adhere to guidance provided by the FDA can be used to show other elements of the plaintiff's claims. See *Eve v. Sandoz Pharmaceutical Corp., No. IP 98-1429-C-Y/S, 2002 U.S. Dist. LEXIS 23965, 2002 WL 181972, at *3 (S.D. Ind. Jan. 28, 2002)*("Thus, evidence of NPC/SPC's interaction with the FDA may be pertinent to proving the Eves' claim, but it is not the basis for the claim itself.").[10] For example, how the defendants **[*290]** responded to FDA requests for information, what they did to comply with FDA regulations, and what information they presented to the FDA is all relevant to plaintiff's failure-to-warn and design defect claims.[11] See *In re Yasmin & YAZ (Drospirenone) Mktg., Sales Practices & Products Liab. Litig., 3:09-MD-02100-DRH, 2011 U.S. Dist. LEXIS 145593, 2011 WL 6302287, at *11 (S.D. Ill. Dec. 16, 2011)*("Buckman does not pre-empt evidence of when Bayer informed the FDA of information relating to Yasmin and YAZ. Buckman is a claim preemption case focusing on fraud-on-the-FDA claims, not an evidence preemption case....The Supreme Court made clear in Wyeth that federal law does not prevent judges and juries in failure to warn cases from considering a drug companies compliance with FDA regulations. *Wyeth, 555 U.S. at 568-73*."). This evidence would be highly probative of the defendants' state of mind, motive, or knowledge of a defect. **[**19]** [12]

It also would be relevant to the plaintiff's fraud claims if the information the defendants sent to or received from the FDA was different from what the defendants were communicating to consumers, such as the decedent. See *Globetti v. Sandoz Pharm. Corp., No. CV98-TMP-2649-S, 2001 U.S. Dist. LEXIS 2391, 2001 WL 419160, at *2 (N.D. Ala. Mar. 5, 2001)*("Notwithstanding that information may have been misrepresented to or concealed from the FDA, once defendant undertook **[*291]** to misrepresent those facts *to plaintiff*, or to conceal *from plaintiff* facts it was bound to disclose, the plaintiff's claim no longer rests simply on the assertion that the agency was defrauded but on the additional fact that *she* was defrauded.")(emphasis in original).

For these reasons, I will **DENY** the defendants' motion.[13]

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[10] See also *In re Vioxx Products Liab. Litig., MDL No. 1657, 2005 U.S. Dist. LEXIS 47827, 132005 WL 3164254, at *1 (E.D. La. Nov. 21, 2005)*(denying similar motion in limine based on Buckman preemption); *In re Medtronic, Inc., Implantable Defibrillators Litigation, 465 F.Supp.2d 886, 900 (D. Minn. 2006)*("Thus, plaintiffs may use evidence—if they are able to produce it—of Medtronic's efforts to manipulate the regulatory process in order to prove their negligence and strict liability claims, but they may not bring an independent claim for relief based on fraud-on-the-FDA.").

[11] The plaintiff argues that this evidence also may be relevant if the defendants "open the door" and claim they are absolved from liability by complying with FDA regulations. These sorts of arguments will likely be precluded under *Wyeth v. Levine, 555 U.S. 555, 129 S. Ct. 1187, 173 L. Ed. 2d 51 (2008)*. The defendants also cannot argue that the use of Extra Strength Tylenol in all circumstances was fully "approved" by the FDA because no Final Monograph has ever been issued. However, if the defendants offer such an affirmative defense, and I find it is permissible, evidence of their non-compliance with FDA regulations will be relevant to rebutting their defense.

[12] See *In re Yasmin & Yaz (Drospirenone) Mktg., Sales Practices & PMF Products Liab. Litig., 3:09-CV-10012-DRH, 2011 U.S. Dist. LEXIS 147935, 2011 WL 6740391, at *2 (S.D. Ill. Dec. 22, 2011)*("The Court finds, as it has in the past, that Buckman is **[**20]** inapposite and Bayer's reliance thereon is misplaced (as it has been throughout this litigation). *Wyeth v. Levine, 555 U.S. 555 129 S.Ct. 1187, 173 L. Ed. 2d 51 (2009)* is a far better guidepost for this Court and for this litigation. Bayer's knowledge and notice of the adverse effects of the subject drugs are of paramount relevance in this litigation. It will ultimately be an intertwined decision of the jury on the issue of proper warning whether Bayer complied with the FDAs [sic] policies. But, it is clear that the FDA is, for all practical purposes, wholly dependent upon the honesty of the pharmaceutical proponent of a drug when engaged in the approval process. In a case such as this, the jury must be fully informed of any information withheld from the FDA that could have effected decisions regarding the label."); *Globetti v. Sandoz Pharm. Corp., No. CV98-TMP-2649-S, 2001 U.S. Dist. LEXIS 2391, 2001 WL 419160, at *3 (N.D. Ala. Mar. 5, 2001)*("The defendant's motion in *limine* based on Buckman is due to be and hereby DENIED. While plaintiff may not offer evidence simply to show misrepresentations to or concealment from the FDA, such evidence may be relevant to showing the defendant's knowledge relating to the adequacy of the warning or the truth of information represented to or concealed from plaintiff or her physician. *FRE 403* may **[**21]** dictate that some such evidence be excluded to avoid confusing the jury about the exact nature of plaintiff's claims. Defendant remains free to raise appropriate objections during the course of trial.").

3. Defendants' Motion In Limine to Exclude Evidence and Argument Relating to the September 2002 and June 2009 Advisory Committee Meeting (MIL 3)

The defendants move to exclude certain evidence and argument concerning the September 2002 and the June 2009 Advisory Committee Meetings of the FDA discussing acetaminophen-related liver issues. In September 2002, an Advisory Committee of the FDA met to discuss ways to prevent liver injury caused by unintentional acetaminophen overdose.[14] During the Committee Meeting, the FDA presented findings from medical literature: 1) that hepatotoxicity may occur "at recommended doses of APAP [or acetaminophen]," 2) that such cases were linked to risk factors such as alcohol use and/or fasting, and 3) that some cases of unintentional overdose led to death.[15] The Committee noted findings of hepatotoxicity (i.e., liver damage) in persons who have ingested less than 4 grams/day of acetaminophen and/or had risk factors like "poor nutritional status."[16]

In June 2009, several advisory committees within the FDA held a joint meeting to discuss the issue of liver injury related to acetaminophen use.[17] McNeil representatives were present at the meeting and offered presentations to the committee members.[18] At that meeting, the committee members voted to recommend that the current maximum single dose of OTC acetaminophen (i.e., 2 x 500 mg) be made available only by prescription.[19] If that recommendation were put into effect, Extra Strength Tylenol could only be sold by prescription according to its current dosing. The majority of committee members recommended that the maximum single dose of acetaminophen be lowered to 650 **[*292]** mg (i.e., two tablets of Regular Strength Tylenol).[20]

The FDA has over thirty advisory committees which focus on different aspects of its mission. See FDA website, About Advisory Committees, *http://www.fda.gov/AdvisoryCommittees/CommitteesMeetingMaterials/default.htm* . As one might deduce from their title, these committees are meant to be advisory in nature. Their decisions or discussions are not considered binding actions by the FDA. The materials prepared by committees are meant to be recommendations which the FDA can adopt or reject.[21]

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[13] The defendants only argued that this evidence should be precluded under Buckman. They did not argue that that it should be precluded under other Federal Rules of the Evidence (i.e., *Rule 403*, etc.). Any objections or arguments regarding admissibility for other reasons may still be raised **[**22]** at trial.

[14] See FDA Safety Analysis Power Point, Sept. 19, 2002 (Doc. No. 95, Ex. 11); FDA Memorandum, Aug. 15, 2002 (Doc. No. 95, Ex. 17).

[15] See FDA Safety Analysis (Doc. No. 95, Ex. 11). See also Larson, et al., Acetaminophen-Induced **[**23]** Acute Liver Failure: Results of a United States Multicenter, Prospective Study, Hepatology 2005; 42(6):1364-1372 (Doc. No. 95, Ex. 7)(explaining how fasting may enhance toxicity and how unintentional "overdose" seemed possible at recommended dosing levels).

[16] See FDA Safety Analysis at Slide 44 (Doc. No. 95, Ex. 11). This data was later published in the Federal Register as part of FDA's Proposed Rule for the 2009 Label Change, discussed below. See *71 Fed. Reg. 77314 (Dec. 26, 2006)*(Doc. No. 95, Ex. 10).

[17] See FDA, **[**24]** CDER, Joint Meeting of the Drug Safety and Risk Management Advisory Committee, NDAC, and the Anesthetic and Life Support Drugs Advisory Committee, Questionnaire (Doc. No. 90, Ex. 14).

[18] See McNeil Briefing packet for June 2009 Meeting (Pl. Ex. 9 attached to Response for MIL 3, filed under seal).

[19] See FDA, CDER, Joint Meeting of the Drug Safety and Risk Management Advisory Committee, NDAC, and the Anesthetic and Life Support Drugs Advisory Committee, Questionnaire (Doc. No. 90, Ex. 14).

[20] See FDA, CDER, Joint Meeting of the Drug Safety and Risk Management Advisory Committee, NDAC, and the Anesthetic and Life Support Drugs Advisory Committee, Questionnaire (Doc. No. 90, Ex. 14).

[21] As I've explained in earlier decisions, the fact that the FDA does not adopt a recommendation by the advisory committee **[**25]** does not necessarily absolve the defendants of their duty to warn or design a safe product. FDA regulations

a. Hearsay

The defendants argue that materials from these two meetings would be inadmissible hearsay. The plaintiff argues that the documents would be considered a "public record" which would not be hearsay. "A record or statement of a public office" is not excluded as hearsay "if...it sets out...the office's activities [or] a matter observed while under a legal duty to report...or...in a civil case...factual findings from a legally authorized investigation" and "the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness." *Fed. R. Evid. 803(8)*(2014). "Public records have justifiably carried a presumption of reliability..." *Fed. R. Evid. 803(8)*, 2014 Amendment Advisory Committee Notes. The party wishing to admit evidence under this exception simply needs to meet the definition **[**26]** of a "public record" under the Rule. Id. The burden then shifts to the opposing party to show that "the source of information or other circumstances indicate a lack of trustworthiness." Id.; *Fed. R. Evid. 803(8)*. Both facts and opinions contained in documents meeting the requirements of the public records exception are considered to be admissible.[22]

The plaintiff also argues that documents related to these meetings are "business records," which are not precluded as hearsay. A record of an act, event, condition, opinion, or diagnosis if:

> (A) the record was made at or near the time by--or from information transmitted by--someone with knowledge;
> (B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;
> (C) making the record was a regular practice of that activity;
>
> (D) all these conditions **[**27]** are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with *Rule 902(11)* or *(12)* **[*293]** or with a statute permitting certification; and
> (E) the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

Fed. R. Evid. 803(6)(2015).

To determine whether specific advisory committee documents related to these meetings are "public records" or "business records," I will need to see the context and content of each document. I will defer ruling on whether specific documents are admissible until trial. At that time, the parties may raise their hearsay arguments with a focus on specific documents.

b. Notice or Knowledge

If offered to prove notice to the defendants of certain risks or to prove the state of mind of the defendants, these documents would not be hearsay. It may not be necessary to determine if these documents are public records or business records. The defendants were involved in these meetings and were well-aware of the information shared at these meetings. This information would be important to showing whether they had notice or knowledge of the potential link between Extra Strength Tylenol and **[**28]** acute liver failure at or just above recommended doses.[23] What was discussed at these meetings may show defendants' state of mind. There is evidence that the defendants

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are a floor and not a ceiling. For a further explanation, see Memorandum Denying Defendants' Motion for Summary Judgment on Failure-to-Warn Claim, Nov. 13, 2015 (Doc. No. 182); Memorandum Denying Defendants' Motion for Summary Judgment on Design Defect Claim, Nov. 13, 2015 (Doc. No. 184). See also ***Wyeth v. Levine*, 555 U.S. 806, 129 S. Ct. 337, 172 L. Ed. 2d 14 (2008)**.

[22] *Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 170, 109 S. Ct. 439, 102 L. Ed. 2d 445 (1988)*("We hold, therefore, that portions of investigatory reports otherwise admissible under *Rule 803(8)(C)* are not inadmissible merely because they state a conclusion or opinion. As long as the conclusion is based on a factual investigation and satisfies the Rule's trustworthiness requirement, it should be admissible along with other portions of the report.").

[23] The documents at issue were ones produced by the defendants, indicating they were in their possession.

took specific actions in preparation for the meetings and as a result of what happened at them.[24] The jury is entitled to hear this evidence and draw appropriate inferences about why the defendants acted as they did before and after these meetings.[25]

c. *Rule 403*

The defendants also argue that this evidence should be excluded under *Federal Rule of Evidence 403* as confusing to the jury, unfairly prejudicial to the defendants, and/or a waste of time. The fact that the Advisory Committee was not a final rulemaking body of the FDA, the defendants claim, could make the materials confusing to a jury. There is nothing inherently confusing about the Advisory Committee process. With an adequate foundation, there should be minimal risk of jury confusion.

For these reasons, I will **DENY** MIL 3 **without prejudice**. The plaintiff will, in the least, be permitted to offer information about the 2002 and 2009 meetings as evidence of notice, knowledge, and/or motive of the defendants.

[*294] 4. Defendants' Motion In Limine to Exclude Evidence or Argument Relating to Employee Compensation (MIL 4)

The defendants move to exclude **[**30]** any evidence or argument relating to employee compensation under *Rule 401* or *403*. The plaintiff argues that this information is relevant to show bias or conflict of interest. I agree.[26]

If employee compensation evidence is admitted to show bias, the defendants argue that proof of employment alone is enough to show bias. I disagree. For example, an employee's bonus structure may further implicate a particular bias towards a profit motive. The various ways in which an employee was compensated may be relevant.

The defendants contend that evidence **[**31]** of compensation should only apply to current employees of the defendants. There is no good reason to narrow the focus of this evidence. A witness's possible bias created by certain compensation structures would relate to actions taken while the witness was employed with the defendants. While his or her current compensation at a different job may not be relevant, previous compensation while working for the defendants may be relevant to their motivation for making certain decisions on behalf of the defendant corporations. This information appears relevant.

At this time, I see no reason why all employee compensation evidence should be precluded based on "unfair prejudice" under *Rule 403*.

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[24] See, e.g., E. Kuffner Dep., Mar. 31, 2011at 92 (Pl. Ex. 17 to Response for MIL 3, filed under seal); E. Kuffner Dep., Apr. 30, 2014 at 32, 201 (Pl. Ex. 13 to Response for MIL 3, filed under seal); L. Pawelski Dep., Feb. 28, 2014 at 85-86 (Pl. Ex. 14 to Response for MIL 3, filed under seal); A. Temple Dep., Mar. 20, 2014 at 158 (Pl. Ex. 15 to Response for MIL 3, filed under seal); Email to C. Goggins re: meeting recommendations, May 27, 2009 (Pl. Ex. 7 to Response for MIL 3, filed under seal); Letter to the FDA about "Risk Mitigation Plan," Jul. 29, 2009 (Pl. Ex. 11 to Response for MIL 3, filed under seal).

[25] The defendants argue that the information presented at these meetings still **[**29]** has to be "substantially similar" to the injuries presented in this case. It is clear that the purpose of these meetings was to address the very concern at issue in this case—what risk was there to consumers of liver injury from taking Extra Strength Tylenol for therapeutic reasons. These meetings were on point with the issues presented in this case. This argument is not helpful.

[26] I made a previous ruling in this regard during the deposition of Ashley McEvoy. The parties could not agree about whether the evidence of employee compensation was relevant. They contacted me during the deposition to decide the issue. I ruled that the financial stake or interest in the corporation was relevant to bias. I confirmed this ruling in an Order dated February 26, 2014. See 13-md-2436, Doc. No. 123. While this Order pertained to the ability of the MDL plaintiffs to discover evidence related to employee compensation, the parameters set out in that Order offer good guidance on what types of employee compensation evidence would be relevant to show bias.

For these reasons, I will **DENY** the defendants' motion.

5. Defendants' Motion In Limine to Exclude Expert Testimony Regarding Corporate State of Mind (MIL 5)

The defendants move to exclude expert testimony about the defendants' "corporate state of mind." They argue that this sort of testimony invades the province of the jury and/or offers inappropriate legal conclusions. Juries can draw inferences from the evidence without the benefit of expert testimony. See *In re Viagra Prods. Liab. Litig., 658 F. Supp. 2d 950, 964-965 (D. Minn. 2009)*("There is no indication in the record that the jury here **[**32]** would require special assistance to interpret the documents on which [the expert] bases her opinion that Pfizer was more worried about bad publicity than safety. Because the jury is equally capable of evaluating this particular evidence, Dr. Blume's opinion on this matter must be excluded.").

Expert testimony, which draws a legal conclusion about corporate state of mind, is not admissible. See, e.g., *Berckeley Inv. Grp., Ltd.v. Colkitt, 455 F.3d 195, 217 (3d Cir. 2006)*("[T]he District Court must ensure that an expert does not testify as to the governing law of the case. Although *Federal Rule of Evidence 704* permits an expert witness to give expert testimony that 'embraces an ultimate issue to be decided by the trier of fact,' an expert witness is prohibited from rendering a legal opinion. *United States v. Leo, 941 F.2d 181, 195-96 (3d Cir.1991)*. Such testimony is prohibited because it would usurp the District Court's pivotal role in explaining the law to the jury. *First National State **[*295]** Bank v. Reliance Elec. Co., 668 F.2d 725, 731 (3d Cir.1981)*(per curiam).").[27]

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[27] See also *Wolfe v. McNeil-PPC, Inc., No. 07-348, 2011 U.S. Dist. LEXIS 47710, 2011 WL 1673805, at *8 (E.D. Pa. May 4, 2011)*("[T]he extent Dr. Goldberg plans to testify that McNeil behaved negligently in the conduct of its business, such testimony constitutes an improper legal opinion....It will be the role of the jury, not Dr. Goldberg, to determine if McNeil acted negligently." (citing *Berckeley, 455 F.3d at 217*)); *Wolfe v. McNeil-PPC, Inc., 881 F. Supp. 2d 650, 662 (E.D. Pa. 2012)*(citing its prior ruling and reiterating that plaintiff's experts "will not be permitted **[**33]** to testify at trial with respect to the state of mind of defendants or the FDA") and at 661 ("The Court rules that expert testimony regarding the state of mind of defendants and the FDA, and expert testimony that constitutes a legal opinion, is inadmissible."); *Heineman v. American Home Products Corp., No. 13-cv-02070-MSK-CBS, 2015 U.S. Dist. LEXIS 30445, 2015 WL 1186777, at *12 (D. Colo. Mar. 12, 2015)*(excluding opinions about defendants' state of mind)("[I]t may be necessary for [expert] to explain the meaning or significance of certain words or concepts that might appear in such records—she may have to explain what a safety surveillance employee does, the hierarchy that oversees such employees, or the typical consequences of the event the record reflects—but the Plaintiffs have not shown that, armed with such records and [the expert's] explanations thereof, the trier of fact would be unable to reach a conclusion about the Defendants' knowledge of any labeling deficiencies without [the expert's] say-so."); *Chandler v. Greenstone Ltd., No. C04-1300RSL, 2012 U.S. Dist. LEXIS 35396, 2012 WL 882756, at *1 (W.D.Wash. Mar. 14, 2012)*(excluding expert's opinions on defendants' state of mind, intent, or knowledge); *Johnson v. Wyeth LLC, No. CV 10-02690-PHX-FJM, 2012 U.S. Dist. LEXIS 50645, 2012 WL 1204081, at *3 (D.Ariz. Apr. 11, 2012)*(excluding expert's opinions on defendants' motive, intent, knowledge, or other state of mind); *In re Rezulin Prods. Liab. Litig., 309 F. Supp. 2d 531, 547 (S.D. N.Y. 2004)*("Inferences **[**34]** about the intent or motive of parties or others lie outside the bounds of expert testimony. As the Diet Drugs court stated in excluding testimony that the pharmaceutical defendant's conduct with respect to labeling was motivated by its desire to increase profits, '[t]he question of intent is a classic jury question and not one for the experts.'")(quoting *In re Diet Drugs, No. MDL 1203, 2000 U.S. Dist. LEXIS 9037, 2000 WL 876900, at *9 (E.D. Pa. June 20, 2000))*; *In re Trasylol Prods. Liab. Litig., No. 08-MD-01928, 2010 U.S. Dist. LEXIS 142228, 2010 WL 1489793, at * 8 (S.D. Fla. Feb. 22, 2010)*(quoting/citing Rezulin ruling on issue); *In re Baycol Prods. Litig., 532 F. Supp. 2d 1029, 1067 (D. Minn. 2007)*("The Court finds that Dr. Smith's opinion criticizing Bayer for inadequately evaluating the potential toxicity of Baycol, and asserting that Bayer ignored warnings is legal argument that does not qualify as expert testimony under *Rule 702*."); *In re Fosamax Prods. Liab. Litig., 645 F. Supp. 2d 164, 192 (S.D. N.Y. 2009)*(precluding testimony as to "the knowledge, motivations, intent, state of mind, or purposes of" a company and its employees because it "is not a proper subject for expert or even lay testimony"); *Tyree v. Boston Scientific Corp., 54 F. Supp. 3d 501, 564 (S.D.W.Va. 2014)*("[T]he defendant's 'knowledge, state of mind, alleged bad acts, failures to act, or other matters related to corporate conduct and ethics are not appropriate subjects of expert testimony because opinions on these matters will not assist the jury.'...The reasonableness of conduct and a party's then-existing state of mind **[**35]** 'are the sort of questions that lay jurors have been answering without expert assistance from time immemorial.'...While internal corporate documents and executives' testimony are certainly relevant in this case, such evidence 'should be presented directly to the jury, not through an expert.'" (quoting ***In re C.R. Bard, Inc., 948 F. Supp. 2d 589, 628 (S.D.W.Va. 2013))***.

The plaintiff argues that this motion is overly broad.[28] While I agree that every context in which an expert might discuss information about corporate state of mind may not overstep boundaries into the jury's role, it is clear that experts cannot render opinions on the defendants' corporate state of mind. See *Berckeley Inv. Grp., Ltd. v. Colkitt, 455 F.3d 195, 217-18 (3d Cir. 2006)*(explaining how expert testimony **[*296]** on industry standards and customs is appropriate but expert conclusions about whether a defendant fell below those standards or complied with federal regulations was inadmissible). That is for the jury.

For these reasons, I will **GRANT** the defendants' motion **without prejudice**. Experts cannot opine about **[**36]** the defendants' corporate state of mind.[29]

6. Defendants' Motion In Limine to Exclude Evidence and Argument Regarding Defendants' Draft Company Documents and Internal Reports that were not Disseminated (MIL 6)

The defendants move to exclude draft company documents and internal reports because the plaintiff cannot show that decedent, plaintiff, decedent's physicians, or any other "relevant" person ever saw and relied on the internal drafts and non-disseminated materials. For this reason, the defendants argue that these documents are irrelevant as they have no probative value. The plaintiff counters that these documents are relevant to what the defendants knew or should have known about risks of liver damage caused by acetaminophen and to the defendants' **[**37]** state of mind, motive, and intent.[30]

Even if the plaintiff, decedent, or decedent's physician did not see the defendants' draft or internal documents at issue, these documents may still be relevant to show the defendants' knowledge, state of mind, motive, and/or intent.

The defendants make an argument based on *Rule 403* that any probative value would be substantially outweighed by prejudice to them. I cannot make a determination under *Rule 403* without context.

For these reasons, I will **DENY** the defendants' motion **without prejudice**.

7. Defendants' Motion In Limine to Exclude Evidence of Manufacturing, Quality Control, and Production Matters Involving McNeil's Facilities; Related Government Investigations; Regulatory Matters, Including FDA Form 483s and CAPAs; Recalls; Testimony Before Congress; the 2011 Consent Decree; and the 2015 Plea Agreement (MIL 7)

The defendants move to exclude evidence of or references to the **[**38]** following, as irrelevant, impermissible character evidence, and/or unduly prejudicial under *Rule 403*: manufacturing, quality control, or production issues at McNeil's facilities, along with all related government investigations, regulatory matters (including Form 483s and corrective actions plans or CAPAs), product recalls, testimony before Congress by William Weldon and Colleen Goggins, the 2011 Consent Decree, and any evidence regarding the 2015 Plea Agreement. The plaintiff counters

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[28] Much of the plaintiff's response revolves around their expert testimony for Dr. Marvin Goldberg. Whether his testimony is appropriate has been addressed in my ruling on the Daubert motion challenging his expert testimony. See Doc. No. 315 (Mar. 2, 2016).

[29] This does not mean, however, that the plaintiff's experts cannot offer evidence that could allow a jury to infer what the defendants' corporate state of mind would be. That is entirely appropriate. The specifics of what evidence experts can discuss (as opposed to opinions they may render) is better addressed in the context of Daubert motions, deposition designations, and/or at trial. My ruling on Motion in Limine #5 is meant to be narrow.

[30] The plaintiff's response centers on the expert report of Dr. Marvin Goldberg, the plaintiff's marketing expert. Whether these documents can be used by Dr. Goldberg is a different question. I addressed what testimony Dr. Goldberg could offer in my Daubert ruling. See Doc. No. 315 (Mar. 2, 2016).

that the evidence is relevant to the defendants' motive, state of mind, and/or knowledge, to show the defendants' character for untruthfulness, or for impeachment purposes. **[*297]** The plaintiff argues that evidence showing the defendants acted contrary to their marketing message of "trust" and "safety" would be probative of the reasonableness of their conduct. They claim the evidence at issue is illustrative of the defendants' motive to maximize profits at the expense of consumer safety.

i. The 483 Forms

The FDA regularly conducts on-site inspections of the facilities of manufacturers of products subject to FDA regulation.[31] At the end of the inspection, the FDA issues a Form 483, outlining observations of any conditions **[**39]** the FDA investigator believes constitute violations of relevant laws and regulations.[32] "Companies are encouraged to respond to the FDA Form 483 in writing with their corrective action plan and then implement that corrective action plan expeditiously."[33] The Form 483 is not considered a final corrective action by the agency but instead is meant to alert the company to harmful conditions.[34]

One area that FDA investigates when it makes its site visits is whether the company had in place appropriate reporting systems of adverse events. On October 19, 1999, the FDA issued a 483 Form for a period of inspection for October 5, 6, 13, and 19, 1999 for a McNeil facility.[35] One noted violation was a failure to establish an audit trail to track changes or deletions made to the Consumer Response System (CRS) containing 15 day and periodic adverse events reports.[36] The Form 483 noted that the Medical Affairs department personnel were allowed to make changes to information entered on MedWatch Forms. **[**40]** [37] The second violation reported a failure of McNeil/J&J's legal department to report two recent adverse drug events they received through litigation.[38]

On December 9, 2010, the FDA issued a second 483 Form for a period of inspection from October 27, 2010 through December 9, 2010.[39] Again, the defendants were cited for having inadequate procedures in handling written and oral complaints.[40]

On April 14, 2011, a third 483 Form was issued for an inspection period of March 21, 2011 to April 14, 2011.[41] The form noted two violations: 1) that procedures for handling written and oral complaints related to drug products were

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[31] See Investigations Operations Manual, 5.5, *available at* http://www.fda.gov/ICECI/Inspections/IOM/ucm122533.htm .

[32] Id. See also K. Kwong Dep. at 24-25 (Pl. Ex. 11)(calling a 483 Form a "[c]itation of significant finding").

[33] See Investigations Operations Manual, 5.5, *available at* http://www.fda.gov/ICECI/Inspections/IOM/ucm122533.htm .

[34] Id.

[35] See FDA Form 483, Oct. 19, 1999 (Pl. Ex. 12); K. Kwong Dep. at 269 (Pl. Ex. 11).

[36] FDA Form 483, Oct. 19, 1999 (Pl. Ex. 12).

[37] FDA Form 483, Oct. 19, 1999 (Pl. Ex. 12).

[38] FDA Form 483, Oct. 19, 1999 (Pl. Ex. 12). During the same timeframe, the defendants also conducted internal audits showing similar deficiencies about adverse event reporting. See Quintiles Memorandum, May 2, 2003 (Pl. Ex. 13). I do not consider those internal audits to be at issue in this motion.

[39] FDA Form 483, Dec. 9, 2010 (Pl. Ex. 14).

[40] FDA Form 483, Dec. 9, 2010 (Pl. Ex. 14). The Form specifically noted deficiencies in how the defendants' pharmacovigilance department inappropriately handled complaints of stomach pain, diarrhea, and vomiting. This information may be relevant to notice, given that the reported conditions not appropriately handled were **[**41]** those experienced by the decedent.

[41] FDA Form 483, Apr. 14, 2011 (Pl. Ex. 15).

again deficiently written/followed and were not appropriately followed up on; and 2) a failure to report **[*298]** adverse drug experience information to the FDA.[42]

While information in the 483 forms about the actual quality control of the defendants' products would not be relevant to the plaintiff's claims, the reports of pharmacovigilance deficiencies would definitely be relevant to show defendants' breach of duty.[43] From this evidence, a jury may infer that the defendants were careless about and/or willfully blind to potential risks of consumer safety.

Additionally, this information may be relevant to rebut any argument by the defendants that they have been in compliance with FDA regulations. In the **[**42]** same way, it would be appropriate for impeachment purposes.

ii. Recall Evidence

In 2007, the defendants voluntarily withdrew liquid Infant Tylenol products from the market. The recall was presented in internal memos as a way to remove the risk of overdose from foreseeable misuse.[44] The plaintiff claims that Infant Tylenol, compared to Extra Strength Tylenol, was a small share of profits. This evidence would most certainly be relevant to the defendants' state of mind and/or knowledge of a design defect in this case.

In 2008, the defendants discovered that certain lots of Motrin were not in compliance with FDA regulations. Instead of issuing a formal recall of the product, the defendants allegedly retained a contractor to go to all retail stores where Motrin was sold nationwide, act as regular customers, and buy all of the product on the shelves. The defendants then indicated to the FDA that a formal recall was not necessary because the product was no longer available on the shelves.

The plaintiff argues that this evidence points to the defendants' **[**43]** character for untruthfulness because the corporate character is imputed to the defendants' witnesses, acting on behalf of the company. Testimony given at a formal hearing of the House Committee on Oversight and Government Reform raised questions about how forthright the defendants were during the above "recall." See Transcript of Hearing of the House Committee on Oversight and Government Reform, 09/30/10, at 33-34, 37, 39, 43 (Pl. Ex. 7).

The plaintiff claims that this motion may encompass evidence showing that the defendants' were not cooperative with the FDA during the investigations into their manufacturing concerns and were, at times, trying to "influence" the FDA.[45] They claim this evidence can be used as impeachment material, to attack the defendants' reputation for truthfulness. See *Fed. R. Evid. 608(a)*. I agree that this information may be used for impeachment purposes. However, the information would not necessarily be used as character evidence if the defendants don't open the door to it.

iii. The 2011 Consent Decree, 2015 Plea Agreement, and Related Congressional testimony

From 2008 through **[**44]** 2015, McNeil was involved in several matters related to the contamination of some of its over-the-counter drug products. Some of these issues regarding production were noted in **[*299]** the above-mentioned 483 Forms and "phantom recalls." In 2010, Johnson & Johnson executives Colleen Goggins and William

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[42] Id.

[43] Even if the information about deficiencies in manufacturing were relevant, its probative value would be substantially outweighed by the risk of unfair prejudice. See *Fed. R. Evid. 403*. That evidence will be excluded.

[44] See C. Goggins Email with Internal Memo, Oct. 10, 2007 (Pl. Ex. 5). See also 2003 Consumer OTC Medication Use Survey, Executive Summary (Pl. Ex. 6).

[45] See C. Goggins Email, Jul. 3, 2009, "Stakeholder plans" (Pl. Ex. 1); McNeil Powerpoint, Jul. 20, 2009 (Pl. Ex. 4).

Weldon appeared before Congress to discuss ongoing manufacturing, quality control, and production issues at McNeil facilities. In 2011, McNeil entered a Consent Decree of Permanent Injunction with the U.S. Department of Justice (DOJ), without admission of fault, in relation to those manufacturing, quality control, and production issues.[46] In 2015, McNeil entered into a Plea Agreement on the same issues with the DOJ because they were not rectified.[47]

The plaintiff asserts a design defect claim, not a manufacturing defect claim. Her claims do not involve injury from a contaminated Tylenol product. For this reason, I see little to no relevance in admitting evidence regarding manufacturing defects. Any probative value this evidence might have would be substantially outweighed by the risk of unfair prejudice or confusion **[**45]** by the jury.[48] See *Fed. R. Evid. 403*. However, if the defendants "open the door" to such evidence (i.e., offering compliance with FDA regulations, etc.), I may reconsider this ruling. Congressional testimony, of course, will be available for impeachment purposes if the defendants' witnesses provide inconsistent testimony at trial. This testimony also may include discussions of the defendants' treatment of AERs and other pharmacovigilance actions, which I've noted would be relevant to the plaintiff's claims.

iv. Character Evidence

The defendants **[**46]** also argue that this evidence should be excluded under *Rule 404*, as impermissible character evidence. *Rule 404(a)(1)* provides that, "Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait." *Rule 404(a)(2)* provides exceptions to this rule but only in criminal proceedings. Under *Rule 404(a)*, evidence showing the defendants' character for "untruthfulness" would be excluded to prove the plaintiff's claims.

Rule 404(b)(1) states that: "Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." However, *Rule 404(b)(2)* provides that evidence of crimes or "prior bad acts" "may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Given that the plaintiff may be offering this evidence to show motive/state of mind or knowledge, I cannot exclude this evidence outright. This evidence has the potential to be very prejudicial. A specific offer of proof is necessary for each item of possible *404(b)* evidence.

The plaintiff also argues **[**47]** that the evidence of the Congressional testimony, Plea Agreement, and Consent Decree also show **[*300]** the defendants' character for being untruthful. This likely will not come in during the plaintiff's case-in-chief. However, if the defendants claim they have been forthright with the FDA and the Government, this information may be allowed for impeachment.

v. Hearsay Argument

Lastly, the defendants argue that regulatory documents and communications, including recall announcements, Forms 483s, are inadmissible hearsay under *Rule 801* because they are out-of-court statements offered for the

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[46] See 2011 Consent Decree (Doc. No. 69, Ex. B).

[47] See 2015 Plea Agreement (Doc. No. 69, Ex. A).

[48] The plaintiff argues that these are "prior bad acts" which can show "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake." See *Fed. R. Evid. 404(b)*. If the plaintiff had a manufacturing defect claim, this argument would have merit. However, I do not see this act as being similar enough to count as "prior bad acts" under *Rule 404*.

The plaintiff also claims this evidence is relevant to the punitive damages claim, because it reflects "a pattern and practice of evading federal marketing regulations and federal obligations." I disagree. Again, the Consent Decree and Plea Agreement involved manufacturing defect issues. This is not a manufacturing defect case.

truth of the matter. The defendants do not address whether any of these documents are exempted or excepted under hearsay rules. If these documents are being used to show motive, state of mind, or knowledge, they would not be hearsay. If they are being used for the truth of the matter, I will determine at trial whether they are hearsay or whether they fall within an exception or exemption.[49]

For these reasons, I will **GRANT** MIL 7 **in part** and **DENY** it **in part without prejudice**. The 2011 Consent Decree and 2015 Plea Agreement shall be excluded. 483 Form evidence will be limited to deficiencies regarding pharmacovigilance (i.e., AERs, complaint reporting, etc.). The admissibility of all other evidence will be considered at trial, in context.

8. Defendants' Motion In Limine to Exclude Evidence of Other Lawsuits, Settlements, Government Investigations, and Unrelated Actions (MIL 8)

The defendants move to exclude evidence of or references to any other pending or former lawsuits, claims, or settlements of non-parties who allegedly experienced adverse reactions from ingesting any Tylenol product.[50] They argue such evidence is inadmissible as irrelevant under *Rules 401* and *402* and/or unduly prejudicial under *Rule 403*. The defendants also argue this information would be inadmissible hearsay and/or character evidence.

It is unclear what evidence to this **[**49]** effect might be presented or how it might be used. Evidence of past settlements is highly disfavored under *Rule 408*. However, evidence of past lawsuits may be probative of notice/knowledge of a possible defect and/or of the motive of the defendants. Information related to past lawsuits also may be relevant for impeachment purposes. Without more information about the content and context of the evidence at issue, I cannot make a blanket ruling on its exclusion. See *Luce v. U.S., 469 U.S. 38, 41, 105 S. Ct. 460, 83 L. Ed. 2d 443 (1984)*("A reviewing court is handicapped in any effort to rule on subtle evidentiary questions outside a factual context.").

For this reason, I will **DENY** MIL 8 **without prejudice**.

9. Defendants' Motion In Limine to Exclude Evidence or Argument Regarding Any Documents, Events, or Labeling that Post-Date Decedent's August 2010 Acute Liver Failure (MIL 9)

The defendants move to exclude evidence or argument regarding documents, **[*301]** events, and/or labeling changes that post-date Ms. Hayes's August 2010 acute liver failure.[51] The defendants argue, generally, that this

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[49] The plaintiff also argues that this evidence may be considered party admissions, which would not be hearsay. See *Fed. R. Evid. 801(d)*. This also may be a reason the evidence would not be considered hearsay. Context, again, is important to determine this. **[**48]**

[50] I do not consider a 2011 Consent Decree (i.e., settlement) or 2015 Plea Agreement with the federal government to be included in this evidence. Arguments about the admissibility of that evidence were raised in MIL 7 and are addressed in my ruling on that motion.

[51] Specifically, the defendants would like to exclude:

- Post-injury changes to the labeling for over-the-counter Extra Strength Tylenol® labeling (e.g., McNeil's voluntary reduction of the listed maximum daily dose on its OTC acetaminophen products that was made in conjunction with FDA input-namely a reduction from 4,000 mg to 3,000 mg in a 24 hour period);

- Post-injury changes to prescription acetaminophen labeling (see, *76 Fed. Reg. 2691 (Jan. 14, 2011))*;

- Post-injury FDA statements/pronouncements or regulations concerning prescription acetaminophen (see, e.g., FDA safety communications regarding limiting prescription acetaminophen products to 325 mg per dosage, and recommendations to health care professionals to stop dispensing prescription combination drug products with more than 325 mg of evidence is inadmissible under *Rule 401* or *Rule 403*. Without the context of this evidence, I cannot make such a ruling. For example, communications by the defendants' employees may have occurred after the **[**50]** decedent's death but may discuss what the defendants' knew about the risk of acute liver failure at the recommended dose *before* she died. That evidence would be highly relevant to this case.[52]

The defendants argue that changes to prescription acetaminophen labels are irrelevant. Unlike other OTC drugs, acetaminophen's maximum total daily limit is the same for both OTC and prescription products. Because one of the key issues in this case is whether the defendants should have recommended different dosing or warnings for Extra Strength Tylenol, there may be instances when changes to a prescription acetaminophen label may be relevant. Without more of a context, I cannot say for certain that this evidence would not have probative value.

They also argue the change of the dosing on Extra Strength Tylenol's label, after the decedent's **[**52]** death, would be inadmissible as a subsequent remedial measure under *Rule 407*. *Rule 407* prohibits the introduction of evidence of post-injury measures which "would have made an earlier injury or harm less likely to occur" (i.e., "subsequent remedial measures") to show negligence, a defendants' culpable conduct, a defect in a product or its design, or a need for a warning or instruction. However, "the court may admit this evidence for another purpose, such as impeachment or—if disputed—proving ownership, control, or the feasibility of precautionary measures." The defendants have already claimed that their making a label change prior to the decedent's death was not possible. Under *Rule 407*, the plaintiff would be allowed to rebut this argument offering the post-death label changes.[53] **[*302]** The post-injury label changes are also available for impeachment purposes. I see no reason, at this time, to exclude this evidence pre-trial.[54] More context will be **[*303]** needed to determine if this evidence is admissible.[55]

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acetaminophen, *http://www.fda.gov/drugs/drugsafety/informationbydrugclass/ucm165107.htm* ; and notice of public hearing on Over-The-Counter Drug Monograph System -*Past Present, and Future, 79 Fed. Reg. 10168 (Feb. 24, 2014))*;

• Post-injury MedWatch 3 500 forms, including that of Ms. Hayes, or other adverse event reports; and

• The notice of proposed rulemaking for acetaminophen **[**51]** currently on the unified agenda with a projected completion date of December 2015 (*79 Fed. Reg. 76718*-01 (Dec. 22, 2014)).

This is not an exhaustive list, however, of the types of evidence that might be covered by this motion.

[52] The plaintiff offers another example: evidence that the defendants neglected to follow up on adverse events after the decedent's death. This information will likely not be relevant. Punitive damages cannot be imposed on the defendants for conduct that occurred after the injury asserted. I note this example but decline to rule definitely on it until trial.

[53] See, e.g., *Kenny v. Southeastern Pennsylvania Transp., 581 F.2d 351, 356 (3d Cir.1978)*("As a general rule, evidence of remedial measures taken after the event is not admissible to prove culpable conduct. *Fed.R.Evid. 407*. The reason for the exclusion is to encourage post-accident repairs or safety precautions **[**53]** in the interest of public safety. See Saltzburg & Redden, Federal Rules of Evidence Manual 162 (2d ed. 1977). But when the defendant opens up the issue by claiming that all reasonable care was being exercised at the time, then the plaintiff may attack that contention by showing later repairs which are inconsistent with it. See 2 J. Weinstein & N. Berger, Weinstein's Evidence PP 407(03), (04) (1977).").

[54] The plaintiff also argues that the subsequent remedial measures were not voluntary and are, therefore, not covered by *Rule 407*. In January 2011, the FDA asked manufacturers of combination drugs containing acetaminophen, sold globally under trade names such as Tylenol and Panadol, to limit acetaminophen doses to no more than 325 mg in each tablet or capsule by January 14, 2014. For this reason, the plaintiff argues, the changes were not voluntary. The majority of Circuits agree that a subsequent remedial measure is not "voluntary" if it is not done by the defendants. See *Steele, Texas Emp. Ins. Ass'n, Intervenor v. Wiedemann Mach. Co., 280 F.2d 380, 382 (3d Cir. 1960)*(holding the rule excluding evidence of repairs made after an accident is not applicable where the person who made the repairs is not a party to the suit); *TLT—Babcock, Inc. v. Emerson Elec. Co., 33 F.3d 397, 400 (4th Cir.1994)*("In the case at bar, the remedial measures were not taken by defendant **[**54]** Emerson but rather were initiated by a third party, the Maryland Transit Authority. Under our reading of *Rule 407*, we conclude that the district court correctly admitted the disputed evidence."); *Lolie v. Ohio Brass Co., 502 F.2d 741, 744 (7th Cir. 1974)*(*Rule 407* has no applicability "when the evidence is offered against a party...which did not make the changes."); *O'Dell v. Hercules, Inc., 904 F.2d 1194, 1204 (8th Cir. 1990)*("An exception to *Rule 407* is recognized for evidence of remedial action mandated by superior governmental authority or undertaken by a third party because the policy goal of encouraging remediation would not necessarily

For these reasons, I will **DENY** the defendants' MIL 9 **without prejudice**. The parties may raise their arguments

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be furthered by exclusion of such evidence."); *In re Aircrash in Bali, Indonesia, 871 F.2d 812, 817 (9th Cir. 1989)*(per curiam)("The purpose of *Rule 407* is not implicated in cases involving subsequent measures in which the defendant did not voluntarily participate."); *Mehojah v. Drummond, 56 F.3d 1213, 1215 (10th Cir.1995)*("'*[R]ule 407* only applies to a *defendant's* voluntary actions;' it does not apply to subsequent remedial measures by non-defendants." (citation omitted)(emphasis in original)); *Millennium Partners, L.P. v. Colmar Storage, LLC, 494 F.3d 1293, 1302 (11th Cir. 2007)*("*Rule 407* does not apply to a remedial measure that was taken without the voluntary participation of the defendant.").

The more specific question presented here is whether a subsequent remedial measure is "voluntary" if it was undertaken at the request or authority of a regulatory agency, like the FDA. Several Circuits have held that a **[**55]** subsequent remedial change made at the bequest on a "superior authority" is not "voluntary" and, therefore, is not to be covered by *Rule 407*. See *O'Dell v. Hercules, Inc., 904 F.2d 1194, 1204 (8th Cir. 1990)*("An exception to *Rule 407* is recognized for evidence of remedial action mandated by superior governmental authority or undertaken by a third party because the policy goal of encouraging remediation would not necessarily be furthered by exclusion of such evidence."); *Herndon v. Seven Bar Flying Service, Inc., 716 F.2d 1322, 1331 (10th Cir. 1983)*("Where a superior authority requires a tort feasor to make post-accident repairs, the policy of encouraging voluntary repairs which underlies *Rule 407* has no force—a tort feasor cannot be discouraged from voluntarily making repairs if he *must* make repairs in any case." (emphasis in original)); *Rozier v. Ford Motor Co., 573 F.2d 1332, 1343 (5th Cir. 1978)*("Invoking this policy [of *Rule 407*] to justify exclusion here is particularly inappropriate since the estimate was prepared not out of a sense of social responsibility but because the remedial measure was to be required in any event by a superior authority, the National Highway Traffic Safety Administration."); *In re Aircrash in Bali, Indonesia, 871 F.2d 812, 817 (9th Cir. 1989)*(per curiam)("Where the defendant has not voluntarily participated in the subsequent measure at issue, the admission of that measure into evidence does not 'punish' the defendant for his efforts to remedy his **[**56]** safety problems. In this case, Pan Am's management, although to be commended for its cooperation, nonetheless was legally obligated to cooperate with the FAA's investigation. See *14 C.F.R. § 13.3*. Thus, the admission of the Hudson report did not penalize Pan Am for its voluntary participation in safety measures."). See generally Annot., Subsequent Remedial Measures, 158 A.L.R. Fed. 609 at § 5[a] (1999).

The Third Circuit has not ruled on this issue. See *Stecyk v. Bell Helicopter Textron, Inc., No. CIV. A. 94-CV-1818, 1998 U.S. Dist. LEXIS 16772, 1998 WL 744087, at *12 (E.D. Pa. Oct. 23, 1998)*("There is a conflict within the federal courts regarding the court's authority to admit certain government-ordered remedial measures under the 'superior authority' exception to *Fed.R.Evid. 407* cited by plaintiffs. See generally, E. Lee Reichert, Note, The Superior Authority Exception" to *Federal Rule of Evidence 407*: the Remedial Measure Required to Clarify a Confused State of Evidence, *1991 U. Ill. L. Rev. 843* (1991). In *O'Dell v. Hercules, 904 F.2d 1194 (8th Cir. 1990)*, the Eighth Circuit became the first to explicitly adopt an exception to *Rule 407* for evidence of remedial action mandated by a superior authority. Conversely, the Fourth Circuit explicitly rejected a superior authority exception to *Rule 407* in *Werner v. Upjohn, 628 F.2d 848 (4th Cir.1980)*, *cert denied*, ***449 U.S. 1080, 101 S. Ct. 862, 66 L. Ed. 2d 804 (1981)***. To date, the Third Circuit has not ruled on whether to recognize a superior authority exception to *Rule 407*.").

There is not enough evidence before **[**57]** the court to determine even if the possibly admissible subsequent remedial measure was "voluntary" or whether it was done at the behest of the FDA. For this reason, I will decline to make a ruling based on this "theory" of admissibility. When the plaintiff seeks to admit evidence of a post-death label change, the parties can then address the issue of whether *Rule 407* applies based on the "voluntariness" of the subsequent change.

[55] See, e.g., *Whitehead v. St. Joe Lead Co., Inc., 729 F.2d 238, 247 n. 6 (3d Cir. 1984)*(subsequent remedial measure of label change admissible under Rule to show the feasibility of providing warnings); *Siegle v. Sears, Roebuck and Co., 1990 U.S. Dist. LEXIS 17628, 1990 WL 250527, at *3-4 (E.D. Pa. Dec. 28, 1990)*(subsequent remedial change to a radial saw arm admissible because defendants disputed feasibility prior to injury), *judgment aff'd without opinion*, ***941 F.2d 1203 (3d Cir. 1991)***; *Bowman v. General Motors Corp., 64 F.R.D. 62, 70 (E.D. Pa. 1974)*("Evidence of subsequent design modifications and indeed even post-accident precautions are admissible: (1) to refute the position that the existing condition was incapable of improvement, or to demonstrate that precautions were feasible before the injury; or (2) to show that the defendant knew or should have known of a reasonably foreseeable danger yet failed to give notice thereof." (citations omitted)); *Sterner v. U.S. Plywood-Champion Paper, Inc., 519 F.2d 1352, 1354 (8th Cir. 1975)*("Evidence of such changes are, however, admissible for some purposes such as demonstration **[**58]** of knowledge of dangerous properties prior to the accident or the availability of better design or the feasibility of a more adequate warning of the risk involved.").

See also *Standridge v. Alabama Power Co., 418 So.2d 84, 87 (Ala. 1982)*("[Under Alabama law,] [t]here are several exceptions to the general rule of inadmissibility of evidence of subsequent repairs or remedial measures. A party may introduce such evidence to show the existence of a condition at the time of an accident; *Dixie Electric Co. v. Maggio, 294 Ala. 411, 318 So.2d 274 (1975)*; to show the feasibility of the use of safeguards or precautionary measures; *Werner v. Upjohn Co., 628 F.2d 848 (4th* under *Rules 401*, *403*, and *407* at trial.

10. Defendants' Motion In Limine to Exclude Evidence or Argument Regarding What the FDA May Do in the Future (MIL 10)

The defendants have indicated they are withdrawing this motion and that any rulings on this point can be made at trial. For **[*304]** this reason, I will **DENY** this motion **without prejudice**.

11. Defendants' Motion In Limine to Exclude Evidence or Argument Relating to the Alleged Inadequacy of the FDA's [59] Regulatory Process (MIL 11)**

The defendants move to exclude evidence and arguments related to the alleged inadequacy of the FDA's regulatory process. They claim this evidence and argument is preempted by *Buckman Co. v. Plaintiffs' Legal Committee, 531 U.S. 341, 121 S. Ct. 1012, 148 L. Ed. 2d 854 (2001)*. I previously found that Buckman did not preempt the plaintiff's claims. I see no reason why Buckman would preempt the admission of evidence about alleged flaws in the FDA's regulatory process.[56]

The defendants also argue that this evidence would be prejudicial, confusing, or a waste of time and should be excluded under *Rule 403*. Without more information, I cannot determine whether this will be the case. This information may be irrelevant or confusing to a jury if the plaintiff raises criticism of the FDA process in her case-in-chief. However, if the defendants claim they were compliant with their duties under FDA regulations and were not required to do more, the plaintiff could potentially offer evidence of the criticism of the FDA regulatory process to rebut these assertions.

For these reasons, I will **DENY** the defendants' motion **without prejudice**.

12. Defendants' Motion In Limine to Exclude Evidence and Argument Based on Defendants' Exercise of their Constitutionally Protected Right to Petition the Government (MIL 12)

The defendants move to exclude any evidence or argument regarding their lobbying efforts towards Congress or the FDA. They argue that this evidence is barred by the Noerr-Pennington doctrine and is violative of their *First Amendment* rights to petition the government.

The *First Amendment* provides the right to petition the government without fear of retribution or penalty. See *U.S. Const. amend. I* ("Congress shall make **[**61]** no law . . . abridging . . . the right of the people to petition the government for a redress of grievances."); see also *U.S. Const. amend. XIV*. "Under the Noerr—Pennington doctrine—established by *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 81*

Cir. 1980); to impeach a witness, *Norwood Clinic, Inc. v. Spann, 240 Ala. 427, 199 So. 840 (1941)*; or to give testimony which is part of the res gestae.") and *id. at 88* (acknowledging that proof of ownership is an additional exception to the rule).

[56] The defendants support this argument with *Horn v. Thoratec Corp., 376 F.3d 163, 178 (3d Cir. 2004)*. Horn did quote part of the FDA's amicus brief stating: "[I]t is inappropriate for a jury to second-guess FDA's scientific judgment on such a matter that is within FDA's particular expertise." The FDA has not offered any opinion on the outcome of this motion or case. That case also involved a medical device and different regulations than this one. Horn discussed whether preemption was appropriate, not whether evidence was admissible. I have already ruled that the plaintiff's claims are not preempted by Buckman. For these reasons, Horn is not helpful.

I also note that the FDA itself has questioned the efficacy of the monograph process. See FDA Is Seeking Ideas for a "New and Improved" Process for Regulating OTC Drugs under the OTC Drug Review, available at **[**60]** *http://blogs.fda.gov/fdavoice/index.php/2014/04/fda-is-seeking-ideas-for-a-new-and-improved-processfor-regulating-otc-drugs-under-the-otc-drug-review/* .

S.Ct. 523, 5 L.Ed.2d 464 (1961), and United Mine Workers v. Pennington, 381 U.S. 657, 85 S. Ct. 1585, 14 L.Ed.2d 626 (1965)—defendants are immune from antitrust liability for engaging in conduct (including litigation) aimed at influencing decisionmaking by the government." Octane Fitness, LLC v. ICON Health & Fitness, Inc., 134 S.Ct. 1749, 1757, **[*305]** 188 L. Ed. 2d 816 (2014)(citation omitted).[57] Essentially, businesses can't be held liable for antitrust violations for petitioning the government because their First Amendment rights supersede antitrust laws.

The defendants argue that Noerr-Pennington is applicable beyond just the antitrust context. While that is true, the Noerr-Pennington doctrine has no place here.[58] The plaintiff is not trying to restrain the defendants' speech or enjoin the **[**62]** defendants' conduct towards the government. See NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913-15, 102 S. Ct. 3409, 73 L. Ed. 2d 1215 (1982)(recognizing Noerr-Pennington protects right to boycott businesses for civil rights violations; reversing state court's issuance of an injunction and damages for lost profits). The plaintiff is not seeking civil liability for the defendants' petitioning efforts, based on a theory of conspiracy. See In re Asbestos School Litigation, 46 F.3d 1284, 1286, 1294 (3d Cir. 1994)(finding that a civil conspiracy claim could not withstand summary judgment when it was based primarily on evidence that the defendant company joined a lobbying organization that may have offered misleading information to governmental officials); Int'l Bhd of Teamsters, Local 734 Health & Welfare Trust Fund v. Philip Morris Inc., 196 F.3d 818, 826 (7th Cir. 1999)("To the extent the manufacturers' statements were designed to influence Congress—to get favorable laws and ward off unfavorable ones—they cannot be a source of liability directly under the Noerr—Pennington doctrine."); Evers v. County of Custer, 745 F.2d 1196, 1204 (9th Cir. 1984)(finding conspiracy claim unfounded based on petitioning activities).[59] Nor is the plaintiff trying to base her **[*306]** cause of action on the defendants' petitioning activities.

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[57] The doctrine also includes a "sham exception" which provides that "activity 'ostensibly directed toward influencing governmental action' does not qualify for Noerr immunity if it 'is a mere sham to cover...an attempt to interfere directly with the business relationships of a competitor.'" Octane Fitness, LLC v. ICON Health & Fitness, Inc., 134 S.Ct. 1749, 1757, 188 L. Ed. 2d 816 (2014)(citation omitted). Since the Noerr-Pennington doctrine does not apply here, I see no reason to consider argument about whether the sham exception applies to prevent immunity.

[58] See, e.g., We, Inc. v. City of Philadelphia, 174 F.3d 322, 327 (3d Cir. 1999)("Thus, the purpose of Noerr—Pennington as applied in areas outside the antitrust field is the protection of the right to petition. Immunity from liability is necessary so as not to chill the exercise of that right."); Congregation Anshei Roosevelt v. Planning and Zoning Bd. of the Borough of Roosevelt, No. 07-4109(GEB), 2008 U.S. Dist. LEXIS 63994, 2008 WL 4003483, at *6-9 (D. N.J. Aug. 21, 2008)("The Supreme Court as well as the Third Circuit Court of Appeals have since extended the Noerr—Pennington doctrine beyond the scope of antitrust to areas such as civil conspiracy and cases arising under § 1983 as well as other civil rights statutes.")(citations omitted); Falise v. Am. Tobacco Co., 94 F. Supp. 2d 316, 350-53 (E.D. N.Y. 2000); Video Intern. Production v. Warner-Amex Cable Com., 858 F.2d 1075, 1084 (5th Cir. 1998)("Although the Noerr—Pennington doctrine initially arose in the antitrust field, other circuits have expanded it to protect first amendment petitioning of the government from claims brought under federal and state laws, including section 1983 and common-law tortious interference with contractual relations. **[**64]** See, e.g., Evers v. County of Custer, 745 F.2d 1196, 1204 (9th Cir. 1984); Gorman Towers, Inc. v. Bogoslavsky, 626 F.2d 607, 614 (8th Cir.1980), and cases cited therein. We find it easy to agree that the same rationale under ***antitrust law*** that supports WAX's petitions to the City also serves to protect WAX from the tort claim. There is simply no reason that a common-law tort doctrine can any more permissibly abridge or chill the constitutional right of petition than can a statutory claim such as antitrust.").

[59] The Third Circuit in In re Asbestos School Litigation, 46 F.3d 1284 (3d Cir. 1994), relied on NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913-15, 102 S. Ct. 3409, 73 L. Ed. 2d 1215 (1982), in making its decision. However, the court's focus was more on a violation of Pfizer's First Amendment right to associate with a lobbying organization than it was Pfizer's right to petition the government. Id. at 1289-94. See also id. at 1294 ("In sum, then, the district court's decision was clearly wrong. Worse, it has implications that broadly threaten First Amendment rights. The district court's holding suggests that Pfizer-based solely on its limited and (as far as the record reflects) innocent association with the SBA-could be held liable, as the plaintiffs have urged, for all of the allegedly tortious acts committed by all of the defendants, whether before or after the SBA was formed. The implications of such a holding are far-reaching. Joining organizations that participate in public debate, making contributions to them, **[**65]** and attending their meetings are activities that enjoy substantial First Amendment protection....But the district court's holding, if generally accepted, would make these activities unjustifiably risky and would undoubtedly have an unwarranted inhibiting effect upon them." (citations omitted)). While the lobbying organization's communications with Congress would be protected, the Court noted that misleading communications by the lobbying organization to plaintiffs and potential members of the class may not be protected and could be evidence of fraudulent concealment. See id. at 1290 and 1290, n. 4.

See *Brownsville Golden Age Nursing Home, Inc. v. Wells, 839 F.2d 155, 160 (3d Cir. 1988)*("In numerous cases, the courts have rejected claims seeking damages for injuries allegedly caused by the defendants' actions directed to influencing government action."); *Structure Building Corp. v. Abella, 377 N.J. Super. 467, 471-73, 873 A.2d 601 (N.J. Super. 2005)* (applying **[**63]** Noerr-Pennington doctrine to bar malicious abuse of process, malicious use of process, and tortious interference with prospective economic advantage suit against homeowners who opposed zoning applications that affected their properties); *Caixa Geral De Depositos, S.A. v. Rodrigues, No. COV/A/03-746 MLC, 2005 U.S. Dist. LEXIS 24339, 2005 WL 1541055, at *10-11 (D.N.J. June 30, 2005)*(Noerr-Pennington doctrine barred defamation and injurious falsehood claims against defendants who had sent letters to federal regulators).

Instead, the plaintiff seeks to offer evidence about how the defendants attempted to influence, petition, or communicate with Congress and/or the FDA to show their knowledge, state of mind, or intent. It would be a stretch to say that Noerr-Pennington bars any use of any evidence of the defendants' petitioning of the government, and its agencies, or evidence of any communications with the FDA. See *Wolfe v. McNeil-PPC, Inc., No. 07-348, 2012 U.S. Dist. LEXIS 2160, 2012 WL 38694, at * 6 (E.D. Pa. Jan. 9, 2012)*(rejecting that argument that Noerr-Pennington allows exclusion of evidence to show state of mind/knowledge); *In re Brand Name Prescription Drugs Antitrust Litig., 186 F.3d 781, 789 (7th Cir.1999)*(finding that district judge "erred in treating the [Noerr—Pennington] doctrine as a rule of evidence").[60]

They also argue this evidence should be precluded under *Rule 401* and *403*. The context of this evidence is important to understanding its relevance and/or risk of undue prejudice. I will decline to rule based on *Rule 401* or *403* at this time.

For these reasons, I will **DENY** the defendants' motion **without prejudice**.

13. Defendants' Motion In Limine to Exclude Evidence and Argument Related to Foreign Labeling and Foreign Regulatory Actions (MIL 13)

The defendants argue that evidence related to labeling or regulatory actions **[*307]** taken in countries outside the U.S. should be excluded under *Rules 401*, *402*, or *403*. The defendants argue that foreign regulatory processes regarding labeling of OTC products are so different from the FDA's processes that information about foreign regulatory actions would be irrelevant. [61] The plaintiff counters that foreign labels on the defendants' products,

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[60] See also *In re Cardizem CD Antitrust Litigation, 105 F.Supp.2d 618, 645 (E.D. Mich. 2000)*(finding **[**66]** that district judge "erred in treating the [Noerr—Pennington] doctrine as a rule of evidence")(citing In re Brand Name Prescription Drugs); *Mason v. Texaco, Inc., 741 F.Supp. 1472, 1500-01 (D. Kan. 1990)*(explaining how Noerr-Pennington only bars cause of action based on solely on petitioning activities, not evidence of petitioning activities for other claims).

[61] The defendants cite In re Vioxx Litig., 2006 WL 2950622, at *5 (N.J. Super., Law Div. Oct. 2, 2006), and *395 N.J. Super. 358, 377, 928 A.2d 935 (App. Div. 2007)*, *cert. denied*, *193 N.J. 221, 936 A.2d 968 (2007)*, as support for this argument. These decisions focused on whether New Jersey was an appropriate forum, not whether foreign labels would be admissible evidence. I do not find these cases to be helpful.

They also cite to *Meridia Prods. Liab. Litig. v. Abbott Labs., 447 F.3d 861 (6th Cir. 2006)*. In Meridia, the Sixth Circuit reviewed whether the district court's grant of summary judgment was appropriate. ***Id. at 863***. The court considered whether a foreign label with different instructions created a "triable issue of fact," not whether admission **[**68]** of a foreign label was permissible. See ***id. at 867***. This case is not helpful.

The other cases offered by the defendants to support their relevance argument are also not on point or are not persuasive. See *Hurt v. Coyne Cylinder Co., 956 F.2d 1319, 1327 (6th Cir. 1991)*(discussing the use of foreign labels in the context of whether a jury instruction about alternative designs was appropriate); *Deviner v. Electrolux Motor, AB, 844 F.2d 769, 771 n.2 (11th Cir. 1988)*(noting simply that the district court excluded foreign instructions on a saw based on relevance, without offering much explanation of the rationale of that decision); *In re Trasylol Prods. Liab. Litig., 709 F. Supp. 2d 1323, 1336 (S.D. Fla.*

warning of the risk of "severe or possibly fatal liver **[**67]** damage" before the decedent's death are evidence of the defendants' knowledge of potential risks related to their products. See Pl. Ex. 1, Canadian Label (filed under seal). I agree. I recognize that the admission of foreign labels may require context of a foreign country's regulatory system in order to present them accurately, leading to a trial within a trial and undue delay. However, I believe it's possible for the plaintiff to offer evidence that foreign regulatory agencies raised concerns about acetaminophen dosing years before the decedent's death, to show notice and/or knowledge. A jury instruction can be given to ensure that jurors understand the limited nature of this evidence.

The plaintiff also argues that defendants' foreign labeling can be offered to show how the defendants fell below their standard of care. Here, I agree with the defendants. It would be unfair to allow evidence of foreign labeling in countries requiring different regulatory and/or statutory duties to **[**69]** show that the defendants breached their duties under United States laws. Use of foreign regulatory activities in this way would be inappropriate.

The plaintiff claims this evidence could also be used to show causation. It is unclear to me how this evidence would be probative of causation. I would need to see how it was used in context to determine whether its admission for this purpose would be appropriate.

In addition, I will decline to make rulings as to the admissibility of this evidence based on *Rule 403*. The context and content of the evidence regarding foreign labels and foreign regulatory actions will be important to my determining its probative value and any risk of prejudice, undue delay, or confusion to the jury.

[*308] The defendants also argue that foreign labels are inadmissible hearsay that do not fall within an exception.[62] The plaintiff counters that they are not hearsay because they are not being offered for the truth.[63] In order to address this argument, I would need more information about the labels and how the plaintiff plans to use them in order to rule on this point.

Lastly, the defendants claim that the plaintiff cannot authenticate foreign labeling evidence. The plaintiff argues that the evidence is self-authenticating under *Rule 902(3)*. Argument on this point is better addressed at trial.

For the foregoing reasons, I will **DENY** the defendants' MIL 13 **without prejudice**.[64]

14. Defendants' Motion In Limine to Exclude Marketing and Promotional Materials (MIL 14)

2010)(excluding expert testimony on foreign regulatory matters in a Daubert motion because expert was not qualified in this area of expertise, testimony included improper opinions, and/or information about foreign regulations should be excluded under *Rule 403*); *In re Seroquel Prods. Liab. Litig., 601 F. Supp. 2d 1313, 1318 (M.D. Fla. 2009)*(affirming exclusion of evidence of foreign regulatory activities under *Rule 403*); *In re Baycol Prods. Litig., 532 F. Supp. 2d 1029, 1054 (D. Minn. 2007)*(excluding evidence about foreign label based on *Rule 403* and the risk of confusion to the jury).

[62] The plaintiff counters that these labels are adoptive admissions under *Rule 801(d)(2)(A)*, *(B)*. I would need to see more information about **[**70]** the content and context of the labels in order to rule appropriately on this point.

[63] The plaintiff also argues that her experts may rely on the foreign labels and regulatory actions in rendering an opinion. This may be true. See *Fed. R. Evid. 703*. However, this argument is better addressed in the context of pending Daubert motions.

[64] See, e.g., *Tobin v. SmithKline Beecham Pharms., No. 00-CV-0025, 2001 U.S. Dist. LEXIS 26401, 2001 WL 36102165, at *1 (D. Wyo. May 18, 2001)*(denying motion in limine to exclude foreign labels because they may be relevant to knowledge or adequacy of warning); *In re: Yasmin and Yaz (Drospirenone) Marketing, Sales Practices and PMF Prods. Liab. Litig., 3:09-md-2100-DRH, MDL 2100, 2011 U.S. Dist. LEXIS 147935, at *5-6, 2011 WL 6740391, at *2 (S.D. Ill. Dec. 22, 2011)*(denied motion to exclude foreign regulatory action and labeling evidence on grounds it would assist jury in finding out what defendant knew and when); *In re Levaquin Prods. Liab. Litig., No. 08-5743, 2010 U.S. Dist. LEXIS 145282, at *13, 2010 WL 4676973, at *4-5 (D. Minn. Nov. 9, 2010)*(denied motion to exclude foreign regulatory action evidence on grounds it speaks to notice and motive).

The defendants **[**71]** move for the exclusion of any evidence related to marketing, public relations, and/or promotional materials for Tylenol products. They argue the information is irrelevant, would confuse the jury, or cause undue delay in the trial. The plaintiff argues that evidence regarding marketing and advertising decisions made by the defendants should be allowed to show knowledge, state of mind, and/or conscious disregard and is relevant to the plaintiff's failure-to-warn, design defect, and wrongful death claims.[65]

First, the defendants argue that the information is irrelevant because the plaintiff cannot assert a deceptive marketing claim under Alabama law.[66] The plaintiff concedes this point.[67] This argument is moot.

Next, the defendants claim that advertising is irrelevant because the plaintiff admits that the decedent read the label. The plaintiff notes that advertising, marketing, and public relations are other ways the defendants use to communicate with the public and physicians about Tylenol **[*309]** products and their risks; all of the varied ways the defendants communicated with consumers should be considered because Tylenol is an over-the-counter product.[68]

There is a question—to be answered by the jury—about whether the decedent took the recommended dose or accidentally took an overdose. The plaintiff argues that marketing and advertising affected consumers' perceptions of how strictly to adhere to the warnings, giving consumers the impression that Tylenol was "safe." Given that the jury will have to decide whether the decedent overdosed or misused the product and whether this misuse was foreseeable, marketing and advertising may be relevant to the plaintiff's theory that the defendants' branding of Extra Strength Tylenol "blunted" the warnings provided.

Third, the defendants **[**73]** argue that any advertising not actually seen or relied upon by the decedent should be excluded as irrelevant.[69] For example, the defendants argue that certain promotional materials involving Tylenol

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[65] See A. McEvoy Dep., Feb. 12, 2014 at 332-339 (Pl. Ex. 2)(discussing how negative press about liver damage side effects was shown to hurt sales of Tylenol); A. Vernon Dep., Aug. 5, 2014 at 128-129, 132 (Pl. Ex. 3)(discussing the lack of warning about serious side effects in advertising).

[66] The parties also discuss the relevant regulatory standards for over-the-counter drug marketing, as enforced by the Federal Trade Commission (FTC). Because there is no deceptive marketing claim, I do not **[**72]** see this information as relevant or helpful to the motion at hand.

[67] See *McClain v. Metabolife Int'l, Inc., 193 F.Supp.2d 1252, 1257 (N.D. Ala. 2002)*.

[68] See A. McEvoy Dep., Feb. 12, 2014 at 282-89 (Pl. Ex. 2).

[69] To support this point, the defendants point to other cases which have excluded marketing evidence: Zundel v. Johnson & Johnson, No. MID-L-6854-05, Hrg. Tr., at 60-62 (N.J. Super. Ct., Middlesex Cty. Jan. 13, 2009)(Doc. No. 76, Ex. E); *In re Norplant Contraceptive Prods. Liab. Litig., 165 F.3d 374, 379 (5th Cir. 1999)*; and *Appleby v. Glaxo Wellcome, Inc., 2005 U.S. Dist. LEXIS 32875, 2005 WL 3440440, at *4 n. 5 (D. N.J. Dec. 13, 2005)*. These cases are not helpful.

In Zundel, the judge excluded marketing evidence because it was not relevant to the plaintiff's failure-to-warn claim. See No. MID-L-6854-05, Hrg. Tr., at 60-62 (N.J. Super. Ct., Middlesex Cty. Jan. 13, 2009)(Doc. No. 76, Ex. E). However, it is not clear from that decision whether the plaintiff also had asserted a punitive damages claim. In this case, the marketing evidence may be relevant to state **[**74]** of mind, which is especially important to the plaintiff's punitive damages claim. For this reason, I cannot say that Zundel is helpful.

In re Norplant Contraceptive Prods. Liab. Litig., 165 F.3d 374, 379 (5th Cir. 1999), was an appeal of a summary judgment decision. The Fifth Circuit briefly discussed the appellant's argument that evidence of "aggressive" marketing should negate adequate warnings. The court found that this argument was "critically weakened by the absence of any evidence on the record that any of the five plaintiffs actually saw, let alone relied, on any marketing materials issued to them by [the defendant]." *Id.* The court went on to explain that even if there was evidence of the plaintiff relying on marketing, the learned-intermediary doctrine would make summary judgment appropriate. *Id.* Norplant, unlike this case, involved a prescription drug. Given Norplant's procedural and factual differences, it is distinguishable and not persuasive.

Cool Burst Caplets has no bearing on Ms. Hayes' case. They claim that the only evidence the plaintiff can offer on this topic comes from "vague and conclusory testimony" by Rebecca Hayes, the decedent's sister. This, the defendants argue, should not be enough to permit any and all advertising of about Tylenol into evidence at trial.[70]

[*310] It may very well be true that Ms. Hayes did not see all the advertising the plaintiff purports to put forth. It may also be true that information regarding these promotional materials could be relevant to show the defendants' state of mind. Decisions on whether specific pieces of evidence are relevant or irrelevant are best made in context, at trial, when the use of such materials is clearer.

Lastly, the defendants argue that financial information related to marketing should be excluded under *Rule 403* because it would be unfairly prejudicial or **[**76]** would cause undue delay in the trial. The defendants have filed a separate motion (MIL 17) seeking to exclude all financial information. I will address the admissibility of financial information in discussing that motion.

The plaintiff counters that sales of Tylenol were influenced by the defendants' branding of Tylenol products as safe and recommended most by doctors and hospitals. She also claims marketing evidence may show the defendants' breach of their pharmacovigilance duties. One of the plaintiff's main theories of the case is that the defendants put profits over safety. The plaintiff has offered evidence about how expenditures on marketing far exceeded those budgeted for research and development. This information would, in the least, be relevant to the plaintiff's theory about the defendants' state of mind and/or motive.[71]

The plaintiff argues that evidence related to marketing and advertising would be relevant to the plaintiff's failure-to-warn claim—to show that the danger of liver **[**77]** failure was not known and obvious under the circumstances, thereby imposing a duty to warn of such risks on the defendants. The marketing and promotional materials could establish the context in which the decedent perceived the risks associated with Extra Strength Tylenol.[72] Evidence explaining the backdrop of the product's marketing may be helpful in providing the details the jury would need to

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Appleby v. Glaxo Wellcome, Inc., 2005 U.S. Dist. LEXIS 32875, 2005 WL 3440440 (D. N.J. Dec. 13, 2005), also involved a prescription drug. In discussing whether a direct marketing exception of the learned intermediary doctrine existed, the court found that liability premised on this theory could not stand because the plaintiff had not presented evidence she was affected by marketing. *2005 U.S. Dist. LEXIS 32875, [WL] at *4-5*. This case is distinguishable. **[**75]**

[70] To support this theory, the defendants cite decisions in *Wolfe v. McNeil-PPC, Inc., 2011 U.S. Dist. LEXIS 47710, 2011 WL 1673805, at *8-9 (E.D. Pa. May 4, 2011)*, and Lyles v. McNeil-PPC, Inc., No. ATL-L-8655-11 (N.J. Super. Ct.). These decisions are not helpful. Both of those decisions discussed whether the expert testimony of Dr. Marvin Goldberg, the plaintiff's marketing expert, should be excluded under Daubert. The defendants filed a separate Daubert motion to exclude Dr. Goldberg's testimony. The plaintiff also makes arguments in this motion in limine about the admissibility of Dr. Goldberg's testimony. The extent to which Dr. Goldberg's testimony is admissible has been addressed in my decision on his Daubert motion. See Doc. No. 315 (Mar. 2, 2016).

[71] See *Forst v. Smithkline Beecham Corp., No. 07-CV-612, 2008 U.S. Dist. LEXIS 96557, 2008 WL 4951155, at *2 (E.D. Wis. Nov. 18, 2008)*("The more efforts and resources GSK expended to encourage use of its product, the more culpable its behavior in knowingly exposing users to an increased suicide risk without proper warnings.").

[72] See, e.g., *Strickland v. Royal Lubricant Co., 911 F.Supp. 1460, 1468 (M.D. Ala. 1995)*(explaining that warnings are "adequate" if it is "reasonable under the circumstances" and that the duty to warn is for non-obvious risks)(quoting *Gurley v. American Honda Motor Co., 505 So.2d 358, 361 (Ala. 1987))*; *Reynolds v. Bridgestone/Firestone, Inc., 989 F.2d 465, 471 (11th Cir. 1993)*("There is 'a duty to warn of those dangers which the user would not be aware of under the particular circumstances of his use of the product.'...The purpose in placing a duty to warn on the manufacturer is to familiarize the user with dangers of which he may be unaware....So if the user is aware of the dangers associated with the product, the manufacturer has no duty to warn.")(quoting and citing *Gurley, 505 So.2d at 361*).

determine whether the risk of acute liver failure was really one that was known and obvious to consumers of Extra Strength Tylenol.[73]

[*311] The plaintiff claims marketing evidence may also be relevant to the plaintiff's design defect claim by showing Extra Strength Tylenol was an "unreasonably dangerous product." Under Alabama law, "a defective product is one that is unreasonably dangerous, i.e., one that is not fit for its intended purpose or that does not meet the reasonable expectations of the ordinary consumer." *Beam v. Tramco, Inc., 655 So.2d 979, 981 (Ala.1995)*(citing *Casrell v. Altec Industries, Inc., 335 So.2d 128, 133 (Ala.1976)*; *Entrekin v. Atlantic Richfield Co., 519 So.2d 447 (Ala.1987))*. The plaintiff argues that marketing evidence would be relevant to showing "the reasonable expectations of the ordinary consumer."[74] I agree that marketing evidence may be relevant evidence in this respect.

Furthermore, the Tylenol label itself included the defendants' marketing message of "How Tylenol® Products are Different." This message, on the box of Tylenol products, stated how Tylenol is "[r]ecommended the most by doctors and used the most by hospitals" and is "[u]nlikely to cause the gastric irritation often associated with aspirin, naproxen sodium or even ibuprofen." This information most certainly would be relevant, given Rebecca Hayes' testimony that her sister took Extra Strength Tylenol—as opposed to another pain reliever—because she thought it was gentler on her stomach and was a safer **[*312]** product. A jury could conclude from this information that the decedent expected it to be a safe product—not one which might cause her irreparable harm and death.

The evidence may also help the plaintiff make out her fraud claims, by showing that the information communicated to the public through marketing, advertising, public relations, and the products' label did not fully inform the

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[73] See *Hon v. Stroh Brewery Co., 835 F.2d 510, 512, 514-15* & n. 4 (3d Cir. 1987)("In addition, we conclude that the story boards of Stroh's commercials provide additional **[**78]** evidence from which a jury could conclude that the general public is unaware of the hazard that allegedly led to Mr. Hon's death. If a jury finds that Stroh's marketing of its product has effectively taught the consuming public that consumption of beer on the order of eight to twelve cans of beer per week can be a part of the 'good life' and is properly associated with healthy, robust activities, this conclusion would be an important consideration for the jury in determining whether an express warning was necessary to make Old Milwaukee beer safe for its intended purpose. Cf. *Baldino v. Castagna, 505 Pa. 239, 478 A.2d 807, 810 (1984)*(jury may consider whether a manufacturer has nullified warning that has been given by its promotion of the product); ***Incollingo v. Ewing, 444 Pa. 263, 282 A.2d 206, 220 (1971)***("Action designed to stimulate the use of a potentially dangerous product must be considered in testing the adequacy of a warning as to when and how the product should not be used....")); *Salmon v. Parke, Davis & Co., 520 F.2d 1359, 1360, 1363 (4th Cir. 1975)*(explaining how advertising "with emphasis that was [not] commensurate with the risk [of injury]" may allow a jury to determine that a warning was not adequate in context). See also *McDarby v. Merck & Co., Inc., 401 N.J. Super. 10, 949 A.2d 223, 266-267 (N.J. Super. 2008)*(upholding admission of Vioxx marketing evidence—including identification of doctors to be neutralized by sales staff, video training **[**79]** sales staff to allay fears, and other risk-minimizing materials—because it bore on failure to adequately warn of known dangers and conduct in obscuring risk evidence); ***Incollingo v. Ewing, 444 Pa. 263, 282 A.2d 206, 220 (Pa. 1971)***("[W]hether or not the printed words of warning were in effect cancelled out and rendered meaningless in the light of the sales effort made by the detail men, were questions properly for the jury. Action designed to stimulate the use of a potentially dangerous product must be considered in testing the adequacy of a warning as to when and how the product should Not be used; if detail men are an effective means of selling a product and explaining its nature, a jury could find that they also afforded an effective medium of conveying a warning.")(citation omitted), *overruled on other grounds by*, *Kaczkowski v. Bolubasz, 491 Pa. 561, 421 A.2d 1027 (1980)*; *Bullock v. Philip Morris USA, Inc., 159 Cal. App. 4th 655, 71 Cal. Rptr. 3d 775, 791 (2008)*("Philip Morris contends the dangers of smoking cigarettes were known to the ordinary consumer before July 1, 1969, and thereafter, and the jury's finding to the contrary was not supported by substantial evidence. We disagree. The evidence of Philip Morris's extensive efforts, through various means, to mislead the public about the adverse health effects of smoking cigarettes and create a false controversy as to whether smoking caused lung **[**80]** cancer and other diseases, and evidence that smokers are particularly vulnerable to such manipulation, is sufficient to support the finding that the ordinary consumer was mislead and was unaware of the dangers of cigarette smoking.").

[74] See *Wilson Sporting Goods Co. v. Hickox, 59 A.3d 1267, 1276 (D.C. 2013)*("There was evidence that Wilson's representative told Mr. Hickox that the mask would disperse energy and protect against concussion, and that the mask was the best and safest technology. Mr. Hickox also testified that he believed that companies like Wilson tested new products and did not sell them unless they were safe to use. Jurors could consider such testimony **[**81]** in combination with their own reasonable inferences to determine an ordinary consumer's expectations.").

decedent of Extra Strength Tylenol's risks. The drug product in this case is sold over-the-counter (OTC). A consumer does not need **[**82]** the advice of a doctor to take it. From that vantage point, the label and any other information, i.e., marketing, advertising, and public relations, would be the primary means by which consumers learn about the product.[75] In this context especially, marketing and advertising may be more relevant because there is no "learned intermediary" who can educate consumers about an OTC product.[76] The plaintiff has offered evidence that Rebecca Hayes and the decedent relied upon the defendants' marketing and advertising messages for Tylenol in making their decisions to purchase/consume Extra Strength Tylenol. Marketing evidence would, therefore, be relevant to the plaintiff's fraud claims.

In the least, the plaintiff argues that marketing and sales documents should be admissible for impeachment purposes. I agree.

For these reasons, I will **DENY** the defendants' MIL 14 **without prejudice**. The parties may raise arguments regarding relevance and unfair prejudice at trial.

15. Defendants' Motion In Limine to Exclude Media Reports Relating to Tylenol (MIL 15)

The defendants move to preclude the plaintiff from introducing into evidence media reports concerning Tylenol "that are unrelated to Plaintiff's claims in this case." Specifically, the defendants take issue with admission of an April 1995 television program **[*313]** "Prime Time Live," a series of print and audio reports by ProPublica including a September 2013 program on the National Public Radio (NPR) podcast "This American Life," and a 2015 article published online at thebmj.com on the efficacy of acetaminophen for the **[**85]** treatment of spinal pain and related media coverage of that article. They argue this evidence is hearsay, is irrelevant, and is highly prejudicial under *Rule 403*.

The plaintiff counters that the defendants' motion is vague and overly broad. Further, she argues that media reports may be relevant because the defendants used aggressive public relations tactics as part of their marketing of Tylenol as safe. The plaintiff "acknowledges that, in general, media video and/or publications may fall under the hearsay rule." However, the plaintiff claims media reports may fall into hearsay exceptions or may be appropriate impeachment material. Media reports, the plaintiff claims, also may be offered for a purpose other than the truth of their content (i.e., notice, breach of duty, knowledge, state of mind, etc.).

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[75] See *Torsiello v. Whitehall Labs., Div. of Home Prods. Corp., 165 N.J. Super. 311, 326, 398 A.2d 132 (App. Div. 1979)*("A consumer of over-the-counter drugs is, as it were, self-prescribing and is intended, expected, and indeed encouraged by the drug industry to do so. He must, therefore, also be given such information by the manufacturer as will permit him to self-prescribe with a minimum of risk.").

[76] See *id. at 322-23* ("It was clearly for the jury to determine whether in fact that danger is, in Restatement verbiage, as 'generally known and understood' among lay consumers as it apparently is in medical and pharmaceutical circles. In our **[**83]** view, the duty of the manufacturer explicitly to warn consumers of the specific risks of over-the-counter drug use derives from the basic marketing predicate of the over-the-counter drug industry, namely, that nonprescription drugs are purchased by consumers for the purpose of self-medication typically without any intended or actual intervention by a physician. The consuming public may well appreciate that an inherent risk of self-medication is delay or failure in obtaining professional attention for an ailment requiring more than simple symptomatic relief. But it has also been led to believe that while the over-the-counter product may not prove ultimately helpful, neither will it harm if taken as directed. Indeed, a jury would be justified in concluding that the advertising and mass marketing techniques involved in selling aspirin to the consumer are calculated to assure the public of its essential innocuousness and inherent safety. It is indeed this actual and intended direct relationship between the manufacturer and the consumer of over-the-counter drugs, in contradistinction to the interposition between them of the physician where prescription drugs are involved, which accounts **[**84]** for what has become a well-recognized dichotomy in respect of the required recipient of the manufacturer's warning, namely, that while it is the consumer who is entitled to the warning in respect of nonprescription drugs, only the prescribing physician need be warned as to the risks involved in a prescription drug.").

The defendants have not provided these specific pieces of evidence. It is not entirely clear what they discuss or include. The lack of information about this evidence makes it difficult for me to assess their admissibility. See *Luce v. U.S., 469 U.S. 38, 41, 105 S. Ct. 460, 83 L. Ed. 2d 443 (1984)*("A reviewing court is handicapped in any effort to rule on subtle evidentiary questions outside a factual context."). Without the context of this evidence or any other **[**86]** media reports the plaintiff might introduce, I cannot rule on this motion based on the defendants' *Rule 401*, *402*, and *403* arguments. In addition, the purpose for which these materials may be offered will help determine whether they are hearsay.

For these reasons, I will **DENY** the defendants' MIL 15 **without prejudice**.

16. Defendants' Motion In Limine to Exclude Evidence or Argument Related to Statements Submitted to the American Association for the Study of Liver Diseases to the FDA and the 2006 Press Release Issued by the American Liver Foundation (MIL 16)

The defendants move to exclude evidence and argument concerning two related pieces of evidence created by third-parties: 1) the July 2006 press release issued by the American Liver Foundation (ALF) regarding the dangers of "excess acetaminophen," and 2) the April 27, 2007 memorandum prepared by the American Association for the Study of Liver Diseases (AASLD) that was submitted to the FDA. See Doc. No. 79, Ex. C and D. They argue that this evidence is inadmissible hearsay or is barred by *Rule 403*.

a. AASLD and ALF

The AASLD "was founded in 1950 by a small group of leading liver specialists... to bring together those who had contributed to the field of hepatology." **[**87]** See *http://www.aasld.org/aboutus/Pages/default.aspx* ; see also Doc. No. 79, Ex. A: "About Us," from *http://www.aasld.org/aboutus/Pages/default.aspx* . The AASLD's stated mission is "[t]o advance and disseminate the science and practice of hepatology, and to promote liver health and quality patient care." Id. The American Liver Foundation is a non-profit organization created by the AASLD in 1976 with a mission of "facilitat[ing], advocat[ing], and promot[ing] education, support and research for the prevention, treatment and cure of liver disease." See *http://www.liverfoundation.org/about*/ ; see also Doc. No. 79, Ex. B: "About Us," from *http://www.liverfoundation.org/about*/ .

[*314] b. July 2006 ALF Press Release

In July 2006, the American Liver Foundation (ALF) issued a press release to warn of the "dangers of excess acetaminophen." See ALF press release, Jul. 18, 2006 (Doc. No. 79, Ex. C). The press release discussed a recently published study in the Journal of the American Medical Association (JAMA) that "showed that healthy adults who took the maximum recommended dose of acetaminophen for two weeks had drastically increased liver enzyme levels which could lead to liver damage." Id.[77]

In response to the article, the ALF recommended "that people not exceed three grams of acetaminophen a day for any prolonged period of time." Id. The press release explained that the recommendation concerned persons taking "the equivalent of six 'extra-strength' tablets a day for several weeks" not those taking acetaminophen for "[r]egular, short-term use." Id.

c. The AASLD's Public Comment on FDA's December 2006 Rulemaking

[77] The article in question was Paul B. Watkins, Aminotransferase Elevations in Healthy Adults Receiving 4 Grams of Acetaminophen Daily, 296 JAMA 87, 91 (Jul. 5, 2006)("An association between therapeutic dosing of acetaminophen and elevations **[**88]** in ALT has not been previously reported.").

In December 2006, the FDA proposed certain amendments to its OTC labeling regulations and the tentative final monograph for OTC internal analgesic, antipyretic, and antirheumatic (IAAA) drug products to include new warnings and other labeling requirements. See *71 Fed. Reg. 77314*-01 (Dec. 26, 2006). Proposed changes included removing the prior-enacted alcohol warning and adding a new liver warning that also included an alcohol warning. See *id. at 77333*. The FDA requested comments and data from interested persons. See *id. at 77346*.

The AASLD submitted a public comment in April 2007, which recommended, *inter alia*, that the FDA add: 1) a warning that using acetaminophen at the maximum recommended dose (4 grams/day) for 5 or more consecutive days increases the chance for severe **[**89]** or fatal injury; and 2) a warning that using acetaminophen at the maximum recommended dose (4 grams/day) when food intake is restricted or prohibited increases the chance for severe or fatal injury. See Doc. No. 79, Ex. D. The FDA did not adopt these recommendations because the FDA did not have sufficient data to support the warnings. See *74 Fed. Reg. 19385*-01, 19391, 19397 (Apr. 29, 2009).[78]

d. Hearsay

The defendants argue that the press release and public comment are inadmissible hearsay. The plaintiff counters that she plans to use the evidence not for its truth, but instead to show notice, knowledge, standard of care, or state of mind.[79] This would not be for a hearsay purpose.

[*315] e. Notice, Knowledge, State of Mind

The defendants argue that these documents cannot be admitted to show "notice" because the risks they discuss are not substantially similar to those experienced by the decedent.

"In products liability cases evidence of prior accidents involving the same product under similar circumstances is admissible to show notice to the defendant of the danger, to show existence of the danger, and to show the cause of the accident." *Gumbs v. International Harvester, Inc., 718 F.2d 88, 97, 19 V.I. 642 (3d Cir. 1983)*. The idea that prior incidents be "substantially similar" is especially important in cases "where the evidence is proffered to show the existence of a design defect." *Barker v. Deere and Co., 60 F.3d 158, 162-63 (3d Cir. 1995)*. In determining whether the prior incidents are "substantially similar," a court must look to the facts and circumstances of the prior incidents in weighing their potential relevance and potential prejudice. See *Tait v. Armor Elevator Co., 958 F.2d 563, 568-69 (3d Cir. 1992)*(explaining how district courts should use *Rules 402* and *403* to determine similarity of prior accidents); *Stecyk v. Bell Helicopter Textron, Inc., No. CIV. A. 94-CV-1818, 1998 U.S. Dist. LEXIS 16772, 1998 WL 744087, at *4 (E.D. Pa. Oct. 23, 1998)* **[**91]** (same).

From the information provided, the ALF press release and the AASLD public comment offer information that is highly probative of the risks later experienced by the decedent (i.e., plaintiff was fasting and/or taking recommended daily dose of Extra Strength Tylenol for more than five days). The evidence in question involves risks related to taking acetaminophen for long periods and/or while fasting. The information is similar enough that I do not see a substantial risk of undue prejudice in admitting it for the purpose of notice.[80] The defendants may explore any

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[78] I explained in a previous decision that the FDA's decision to not adopt these recommendations based on insufficient data did not preempt the plaintiff's claims under *Wyeth v. Levine*. See Memorandum Denying Motion for Summary Judgment regarding Failure-to-Warn Claim, Doc. No. 181 at 41-44.

[79] The plaintiff also plans to have their experts use these documents in forming opinions about post-marketing reporting and labeling. Evidence relied upon by experts need not be admissible so long "experts in the particular field would reasonably **[**90]** rely on those kinds of facts or data in forming an opinion on the subject." *Fed. R. Evid. 703*. Whether the press release or public comment can be relied upon by experts in rendering an opinion is a question more appropriately answered in Daubert motions pending before the court.

dissimilarity between this evidence and the circumstances of the decedent's death at trial; the jury can then determine how much weight to give them. See, e.g., *Benedi v. McNeil-P.P.C., Inc., 66 F.3d 1378, 1386 (4th Cir. 1995)*("McNeil explored these dissimilarities at length. Whether the dissimilarities were significant was for the jury to determine."); *Kehm v. Procter & Gamble Mfg. Co., 724 F.2d 613, 626 (8th Cir. 1983)*("It was up to the jury to decide what weight to give the complaints from other consumers.").

As the plaintiff argues, the press release, together with other evidence showing the defendants' reaction to this press release, can also be offered to show the defendants' knowledge of potential risks and state of mind. Additionally, the documents could be relevant to show how reasonable the defendants' conduct was or was not by comparing it to the actions other members of the scientific community took regarding information about potential risks.

f. *Rule 403* Generally

The defendants argue the evidence would be unduly prejudicial, confusing, or misleading as compared to their probative value. From what has been provided, I cannot say for certain. Context is key to rulings regarding *Rule 403*.

For these reasons, I will **DENY** the defendants' motion **without prejudice**.

[*316] 17. Defendants' Motion In Limine To Exclude Evidence Or Argument Relating To Defendants' Profit Margins, Wealth, And Other Financial Information (MIL 17)

The defendants move to exclude any evidence or argument relating to the defendants' profit margins, wealth, or other financial information. They argue this information is irrelevant or considered **[**93]** "highly prejudicial" under Alabama law. The plaintiff counters that this motion is overly broad and vague.

Both sides agree that the defendants' net worth is not admissible under Alabama law because it would be highly prejudicial. See *Southern Life Health Ins. Co. v. Whitman, 358 So.2d 1025, 1026-1027 (Ala. 1978)*("Our cases have long held that evidence of the defendant's wealth is highly prejudicial and, therefore, inadmissible."); *Industrial Chemical & Fiberglass Corp. v. Chandler, 547 So. 2d 812, 835-836 (Ala. 1989)*("Our cases have long held that evidence of the defendant's wealth, or lack of wealth, is highly prejudicial and, therefore, inadmissible (and our cases recognize no distinction between situations involving compensatory damages and those involving punitive damages)..."); *Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 19, 111 S. Ct. 1032, 113 L. Ed. 2d 1 (1991)*("Any evidence of Pacific Mutual's wealth was excluded from the trial in accord with Alabama law.").[81] However, the

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[80] See *Benedi v. McNeil-P.P.C., Inc., 66 F.3d 1378, 1386 (4th Cir. 1995)*("When prior incidents are admitted to prove notice, the required similarity of the prior incidents to the case at hand is more relaxed than when prior incidents are admitted to prove negligence. **[**92]** The incidents need only be sufficiently similar to make the defendant aware of the dangerous situation.").

[81] See also *Ex parte Hsu, 707 So.2d 223, 225 (Ala. 1997)*("Accordingly, we turn to long-standing Alabama law on the issue of admissibility of evidence of a defendant's wealth. Under that law, 'evidence of a defendant's wealth is **[**94]** highly prejudicial and, therefore, inadmissible [during trial].' *Southern Life & Health Ins. Co. v. Whitman, 358 So.2d 1025, 1026 (Ala. 1978)*, citing ***Alabama Fuel & Iron Co. v. Williams, 207 Ala. 99, 91 So. 879 (1921)***; *Long v. Seigel, 177 Ala. 338, 58 So. 380 (1912)*; *Southern Car & Foundry Co. v. Adams, 131 Ala. 147, 32 So. 503 (1902)*; *Ware v. Cartledge, 24 Ala. 622, 60 Am. Dec.489 (1854)*. See *Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991)*. However, evidence of a defendant's wealth is considered relevant and admissible in a post-verdict hearing on alleged excessiveness of a punitive damages award, held before the trial judge pursuant to the procedure this Court adopted in Hammond v. City of Gadsden, supra.").

This rule of exclusion has been considered substantive and not procedural by other federal courts. See *Wilson v. Gillis Adver. Co., 145 F.R.D. 578, 580 (N.D. Ala. 1993)*("Although an argument can be made that this is simply an Alabama rule of evidence, plaintiff argues that certain financial evidence, such as the defendants' substantially higher spending on marketing as compared to spending on research and development, is relevant to **[*317]** show motive.[82] I agree that this information would be relevant to the defendants' state of mind.

The plaintiff further argues that other monetary numbers, beyond the defendants' net worth, may be admissible to show the defendants' level of culpability: the amount of money spent on marketing and advertising to influence consumers to purchase Tylenol; the amount the defendants earned "as a result of that misleading marketing and advertising;" the amount the defendants saved because they did not conduct clinical trials and testing; the amount of revenue preserved because a warning was not added; and the amount donated to "influence" **[**97]** the American Liver Foundation to change its position on acute liver failure. Admission of these numbers might implicitly allow the jury to draw conclusions about the defendants' wealth. Implicit references to the defendants' net worth may also not be appropriate under Alabama law.[83] See, e.g., *Otis Elevator Co. v. Stallworth, 474 So. 2d 82, 84 (Ala. 1985)*("The language used by plaintiff's attorney implies that if Otis Elevator Company could afford to hire an expensive expert from New York to testify in over one hundred cases, then that same company could afford to pay a judgment in favor of the plaintiff. While the argument that Mr. McAuley had testified in over one hundred cases for Otis Elevator might have been proper to show his bias, the direct reference to the company's ability to hire that expert was an improper reference to the wealth or the supposed wealth of the defendant."); *Bennett v. Brewer, 682 So. 2d 448 (Ala. 1996)*(statements by plaintiff's counsel that defendant lived in a certain area, could afford a certain expert's fees, made "tremendous money," and drove a Mercedes-Benz automobile were improper comments on

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and is thus procedural rather than substantive, it is so fundamental to the resolution of the issue of punitive damages under the Alabama law theories as to be effectively substantive and as a practical matter binding on a federal trial court when it tries an Alabama tort claim seeking punitive damages."); *Carr v. City of Florence, 729 F. Supp. 783, 786 (N.D. Ala. 1990)*(applying wealth exclusionary rule), *aff'd*, ***934 F.2d 1264 (11th Cir. 1991)***.

The Alabama Supreme Court has indicated that arguments about what awards may be sufficient to punish the defendants are not proper, but such improper comments may not cause reversible errors if a curative instruction is offered. See *Daniel Construction Co. V. Pierce, 270 Ala. 522, 120 So.2d 381, 386-387 (Ala. 1960)*(discussing whether attorney arguing "if the jury brings out a verdict less than $50,000 it wouldn't **[**95]** be any more than a mosquito bite to this defendant" was reversible error; finding it was improper but cured by jury instruction); *Blount Bros. Construction Co. v. Rose, 274 Ala. 429, 149 So.2d 821, 831-833 (1963)*(explaining that argument "Why, a $25,000 verdict against Blount Brothers would not be a slap on the leg to them" was cured by jury instruction, citing Daniel Construction). But see *Young v. Bryan, 445 So.2d 234, 237-239 (Ala. 1984)*(plaintiff's counsel's argument in closing statement regarding size and contents of defendant deceased's estate held to be improper/highly prejudicial and warranted remand for new trial and reversal).

[82] The plaintiff also argues that financial wealth information may be admissible if the defendants "open the door" to such evidence. There is caselaw in Alabama supporting this point. See *Mutual Sav. Life Ins. Co. v. Smith, 765 So. 2d 652, 655-56 (Ala. Civ. App. 1998)*("The rule under discussion does not operate to exclude evidence of wealth or poverty if such is relevant to some issue, other than damages, properly in the case. One way for such an issue to be properly in a case is for one's opponent to have opened the door by commenting upon or asking questions concerning a party's financial standing. Whenever one addresses a particular subject, even if impermissibly so, this then permits the opponent to rebut such evidence under the doctrine of 'curative admissibility.' **[**96]** Some writers and courts have referred to this as 'retaliatory admissibility.'")(quoting 1 Charles W. Gamble, McElroy's Alabama Evidence, § 189.05(1)(5th ed. 1996)); ***City of Gulf Shores v. Harbert Int'l, 608 So. 2d 348, 353 (Ala. 1992)***("We acknowledge this Court's long-standing rule that evidence of a party's wealth, be it plaintiff's or defendant's, is inadmissible generally....However, we also recognize that an opposing party may inquire into the other party's wealth on cross-examination or in rebuttal if the other party 'opens the door.'")(citations omitted). However, the parties are expected to abide by Alabama's rule of precluding evidence of a party's wealth because unintentional admission of such evidence could result in a mistrial.

[83] The defendants are also precluded from implying that their net worth is the reason the plaintiff has brought suit against them. See *Baptist Med. Ctr. Montclair v. Whitfield, 950 So. 2d 1121, 1128 (Ala. 2006)*(finding arguments by defense counsel that plaintiff dismissed individual doctor so that she could "focus on recovering from BMC, a corporation, which had more money than Dr. Pennington's practice group" was improper argument; grant of a new trial was warranted); *Allison v. Acton-Etheridge Coal Co., Inc., 289 Ala. 443, 446-49, 268 So. 2d 725 (1972)*(finding that defense counsel's argument "It's a great thing, folks, to be a very wealthy man and to be able to go out here and hire two law firms with four lawyers" was improper and warranted a reversal).

defendant's wealth warranting a new trial); *Estis Trucking Co. v. Hammond, 387 So. 2d 768 **[*318]** (Ala. 1980)*(comments made by plaintiffs' attorney that defendant "could have afforded" and that defense counsel was not surprised by **[**98]** the amount of damages requested because "[h]e deals in these figures everyday. He tries lawsuits all over the State of Alabama" were improper). Argument or references to wealth which imply that the jury award damages simply because the defendant has the means to pay damages are not appropriate.[84] Whether the use of a financial number is prejudicial depends upon the context in which it is used. In order to determine whether other financial numbers are highly prejudicial, in line with Alabama's "exclusion of wealth rule," I will need to see them used in context.

The defendants also argue, with little explanation, that Johnson & Johnson cannot be liable because it is a holding company of McNeil and does not design, manufacture, market, or sell Extra Strength Tylenol. For this reason, they claim, no liability can attach to Johnson & Johnson. The plaintiff has offered evidence that Johnson & Johnson executives were involved in decision making about the **[**100]** day-to-day operations regarding Tylenol.[85] From what the defendants have provided, I do not find this argument to be persuasive.[86]

Lastly, the defendants argue that all financial information is unfairly prejudicial, can cause juror confusion, or cause undue delay. Under Alabama law, I agree that there is a risk of unfair prejudice in presenting financial information to the jury that could implicate defendants' net worth. However, I am not convinced that all financially-related evidence should be excluded. As the plaintiff argues, some of this information would be relevant to the plaintiff's theory that the defendants' decisions regarding Extra Strength Tylenol were driven by profits and not consumer **[**101]** safety. There are ways that this sort of information can be presented to the jury (i.e., graphs without numbers, use of percentages, jury instructions on appropriate use of information, etc.), which can reduce the risk of unfair prejudice.

For these reasons, I will **GRANT** the defendants' motion **in part** and **DENY** it in part **without prejudice**. Evidence of the defendants' net worth will be excluded. Argument about the admissibility of all other financial information will be reserved for trial.

[*319] 18. Defendants' Motion In Limine to Exclude Testimony Regarding Inapplicable "Risk Factors" (MIL 18)

The parties have agreed that any rulings on this motion should be deferred until trial. For this reason, I will **DENY** MIL 18 **without prejudice**.

II. Conclusion

For the foregoing reasons, I make the following rulings:

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[84] See *Southern Life and Health Ins. Co. v. Smith, 518 So.2d 77, 80-82 (Ala. 1987)*(finding that argument "'A corporation, **[**99]** like I said, is a legal entity..., but it's not a human being. It has no conscience. 'The only way you can punish a corporation is through monetary damages'" was improper); *Taylor v. Brownell—O'Hear Pontiac Co., 265 Ala. 468, 91 So. 2d 828, 828-29 (Ala. 1957)*(finding plaintiff's counsel's comment "We have also dismissed as to Mr. Ritchie. We don't want to penalize Mr. Ritchie. We are after somebody that can pay" was highly prejudicial); ***American R. E. Co. v. Reid, 216 Ala. 479, 113 So. 507, 510 (Ala. 1927)***(plaintiff's argument "We are asking simply for justice which this boy is entitled to. And we are going to insist that he is entitled to some good round sum. It doesn't make any difference to the American Express Company, this defendant. What difference does it make to them what your verdict in this case is?" was improper because they "were an appeal for a large verdict upon the assumed ability of the corporate defendant to pay").

[85] See Pl. Brief Opposing MIL 17 at 4-13 (outlining evidence that high-level J & J executives were involved in decisions regarding the marketing and sales of Tylenol products)(filed under seal) and attached exhibits.

[86] I note, as the plaintiff has, that Johnson & Johnson remains a named defendant in this case. No summary judgment motion or other motion has been filed asserting the theory stated above. If the defendants disagree with my ruling on this point, they may file a motion for reconsideration.

- MIL 1 is DENIED without prejudice;
- MIL 2 is DENIED;
- MIL 3 is DENIED without prejudice;
- MIL 4 is DENIED;
- MIL 5 is GRANTED without prejudice;
- MIL 6 is DENIED without prejudice;
- MIL 7 is GRANTED in part and DENIED in part;
- MIL 8 is DENIED without prejudice;
- MIL 9 is DENIED without prejudice;
- MIL 10 is DENIED without prejudice;
- MIL 11 is DENIED without prejudice;

- MIL 12 is DENIED without **[**102]** prejudice;
- MIL 13 is DENIED without prejudice;
- MIL 14 is DENIED without prejudice;
- MIL 15 is DENIED without prejudice;
- MIL 16 is DENIED without prejudice;
- MIL 17 is GRANTED in part and DENIED in part; and
- MIL 18 is DENIED without prejudice.

An appropriate Order follows.

ORDER

AND NOW, this 19th day of April, 2016, upon consideration of the defendants' motions in limine (Doc. No. 61-64, 66, 68-77, 79-81), all responses thereto, and after parties' oral argument, it is hereby **ORDERED** that:

- MIL 1 is DENIED without prejudice;
- MIL 2 is DENIED;
- MIL 3 is DENIED without prejudice;
- MIL 4 is DENIED;
- MIL 5 is GRANTED without prejudice;
- MIL 6 is DENIED without prejudice;
- MIL 7 is GRANTED in part and DENIED in part;
- MIL 8 is DENIED without prejudice;
- MIL 9 is DENIED without prejudice;
- MIL 10 is DENIED without prejudice;
- MIL 11 is DENIED without prejudice;
- MIL 12 is DENIED without prejudice;
- MIL 13 is DENIED without prejudice;
- MIL 14 is DENIED without prejudice;
- MIL 15 is DENIED without prejudice;
- MIL 16 is DENIED without prejudice;
- MIL 17 is GRANTED in part and DENIED in part; and
- MIL 18 is DENIED without prejudice, as explained in the accompanying memorandum.

BY THE COURT:

/s/ **[**103]** Lawrence F. Stengel

LAWRENCE F. STENGEL, J.

Lenhoff Enters. v. United Talent Agency, Inc.

United States District Court for the Central District of California

April 20, 2016, Decided; April 20, 2016, Filed

CV 15-01086-BRO (FFMx)

Reporter
2016 U.S. Dist. LEXIS 77958 *; 2016-1 Trade Reg. Rep. (CCH) P79,603

LENHOFF ENTERPRISES, INC. v. UNITED TALENT AGENCY, INC. ET AL.

Subsequent History: Reconsideration denied by *Lenhoff Enters. v. United Talent Agency, 2016 U.S. Dist. LEXIS 204745 (C.D. Cal., June 13, 2016)*

Affirmed by *Lenhoff Enters. v. United Talent Agency, Inc., 729 Fed. Appx. 528, 2018 U.S. App. LEXIS 8124, 2018 WL 1548221 (9th Cir. Cal., Mar. 30, 2018)*

Prior History: *Lenhoff Enters. v. United Talent Agency, Inc., 2015 U.S. Dist. LEXIS 77215 (C.D. Cal., June 15, 2015)*

Core Terms

Agencies, alleges, fails, conspiracy, Defendants', talent, intentional interference, competitor's, producers, networks, unfair, co-packaged, packaging, terminable, studios, Sherman Act, contracts, non-Big, judicial notice, quotation, marks, expiration, coerce, amended complaint, motion to dismiss, conspired, pleads, contractual relationship, anti-competitive, eliminating

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

Attorneys Present for Defendants: Not Present.

Judges: BEVERLY REID O'CONNELL, United States District Judge.

Opinion by: BEVERLY REID O'CONNELL

Opinion

CIVIL MINUTES — GENERAL

Proceedings: (IN CHAMBERS)

ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS PLAINTIFF'S THIRD AMENDED COMPLAINT [50, 52]

I. INTRODUCTION

Pending before the Court are two Motions to Dismiss filed by Defendants International Creative Management Partners, LLC ("ICM"), (Dkt. No. 50), and United Talent Agency, Inc. ("UTA"), (Dkt. No. 52), (collectively, "Defendants"). Defendants seek to dismiss all of the claims in Plaintiff Lenhoff Enterprises, Inc.'s ("Plaintiff") Third Amended Complaint ("TAC") pursuant to *Federal Rule of Civil Procedure 12(b)(6)*. (Dkt. Nos. 50, 52.) Plaintiff alleges four causes of action in its TAC: (1) conspiracy to unreasonably restrain trade in violation of § 1 of the Sherman Act, *15 U.S.C. § 1*; (2) unfair competition and unlawful and unfair business practices in violation of *California Business and Professions Code sections 16720 et seq.* (Cartwright Act) and *17200 et seq.* (Unfair Competition Law or "UCL"); (3) intentional interference with contract; and, (4) intentional interference with prospective economic advantage. (Dkt. No. 49.) After considering the papers filed in support of and in opposition to **[*2]** the instant Motions, the Court deems these matters appropriate for resolution without oral argument of counsel. *See* *Fed. R. Civ. P. 78*; *C.D. Cal. L.R. 7-15*. For the following reasons, the Court **GRANTS** Defendants' Motions.

II. LENT AGENCY, INC. ET AL. FACTUAL AND PROCEDURAL BACKGROUND

A. The Parties

Plaintiff and Defendants are talent agencies doing business in California, providing their agency services to individuals in the entertainment industry. (Pl.'s Third Am. Compl. ("TAC") ¶¶ 1-3, 7-9.) Plaintiff is a small boutique agency with two agents, (TAC ¶ 9), while Defendants are large agencies with significantly more agents and a larger clientele than Plaintiff, (TAC ¶¶ 11-12).

B. Sherman Act § 1 Claim

Plaintiff claims that beginning in the late 1990s and continuing to 2002, Defendants and other large talent agencies "conspired and agreed . . . that it was in their best interests to proceed without Rule 16(g)" of the franchise agreement between the Association of Talent Agents ("ATA")[1] and the Screen Actors' Guild ("SAG"). (TAC ¶ 25.) Rule 16(g) had two pertinent effects: (1) it precluded agencies from accepting investments from "outside/offshore investors, private equity hedge funds, ad agencies, advertisers[,] and independent producers," **[*3]** (TAC ¶ 28); and, (2) it prevented an agency from possessing "*any* financial interest in a production or distribution company," (TAC ¶ 24). With the expiration of Rule 16(g) imminent, in February 2002, ATA and SAG agreed to amend the rule's restrictions. (TAC ¶ 32.) The deal allegedly provided that agents would be allowed "to take up to a 20% stake in production and distribution companies," and that advertising firms and independent (non-studio) producers would be permitted to take up to 20% stakes in talent agencies. (*Id.*) However, upon submission to SAG members for approval, the Rule 16(g) agreement was rejected. (TAC ¶ 33.)

Plaintiff claims that the ATA—specifically, the ATA's Strategic Planning Committee, comprised of UTA's Jim Berkus, ICM's Jeff Berg, and representatives from the other large agencies—did not renegotiate the deal and instead awaited Rule 16(g)'s expiration. (TAC ¶¶ 22, 37.) Plaintiff alleges that Defendants' intent "in bringing about the demise of Rule 16(g) . . . was to destroy competition and to build a cartel of Uber Agencies." (TAC ¶ 27.) Without Rule 16(g)'s restrictions, Plaintiff alleges that Defendants and the two other large agencies, **[*4]** William Morris Endeavor Entertainment ("WME") and Creative Artists Agency ("CAA"), received significant increases in investments and business. (TAC ¶¶ 3, 38.) As a result, Plaintiff avers that the four "Uber Agencies"—comprised of ICM, UTA, WMA, and CAA (collectively, the "Big 4 Agencies")—now control 94% of the scripted series packaging market. (TAC ¶¶ 3, 45.)

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[1] All of the named parties in this action are members of the ATA. (TAC ¶¶ 8, 21.)

Plaintiff goes on to allege that the increase in the Big 4 Agencies' business is caused by their ability to provide exclusive "packaging" arrangements to clients, which allow larger agencies, like Defendants, not to charge the standard 10% commission typically charged by smaller agencies, such as Plaintiff. (TAC ¶ 54.) In lieu of the 10% fee, Plaintiff alleges that the Big 4 Agencies earn "packaging fee[s]" from studios or production companies, which compensate the Big 4 Agencies based on the underlying work's success. (TAC ¶ 53.) The rights are allegedly in perpetuity, and the total payments to the packaging agencies can, in some circumstances, exceed the total payments to the client. (TAC ¶¶ 53, 56.) Plaintiff contends that Defendants lure talent away from smaller firms, like Plaintiff, by eliminating the standard 10% commission **[*5]** and offering to package the individual in future deals with studios, networks, and producers. (TAC ¶¶ 52, 54.)

Plaintiff further avers that the Big 4 Agencies split packaging fees with each other, but they do not split with any other firms, thereby forming a "cartel" which controls the relevant market. (TAC ¶ 46.) Although Plaintiff claims that the Big 4 Agencies exclude all other talent agencies from participating in co-packaging agreements, (TAC ¶ 67), it states that in 2014/2015, two non-Big 4 Agencies co-packaged with Big 4 Agencies and that only 85 of 353 packaged scripted series were co-packaged together by and among Big 4 Agencies, (TAC ¶ 45, Exs. A, B). Plaintiff also contends that Defendants, along with the other Big 4 Agencies, conspired to coerce purchasers of talent services—studios, networks, and producers—to refuse deals with non-Big 4 Agencies and the individuals they represent. (TAC ¶ 68.) According to Plaintiff, the threatened consequence of dealing with non-Big 4 Agencies was loss of future packaging of the Big 4 Agencies' talent. (TAC ¶ 75.)

C. Client-Poaching Allegation

Plaintiff also alleges that around September or October 2014, one of Plaintiff's clients, Client **[*6]** #1, attended Defendant UTA's VIP screening of Client #1's show, during which Defendant "UTA began the process of encouraging and inducing Client #1 to break her contract with Plaintiff." (TAC ¶ 94.) On November 4, 2014, Client #1 allegedly informed Plaintiff that she was terminating Plaintiff's representation. (TAC ¶ 93.) Plaintiff similarly alleges that Defendant ICM invited another of Plaintiff's clients, Client #2, to a meeting to discuss representation/packaging, which Plaintiff alleges induced Client #2 to breach his contract with Plaintiff. (TAC ¶ 97.)

Plaintiff further contends that the agreements with Clients #1 and #2 were verbal contracts subject to "Rider D" of the agreement between the ATA and the Directors Guild of America ("DGA"). (TAC ¶¶ 91-92, 95.) Rider D provides as follows:

> If during any period of ninety (90) consecutive days immediately preceding the giving of notice of termination herein described, the Director (1) fails to be employed or (2) fails to receive a bona fide offer then either Director or Agent may terminate the employment of Agent hereunder by giving written notice of termination to the other party, subject to the following terms and provisions:
>
> C. Actual **[*7]** employment of or contracts or bona fide offers for the employment of the Director in any field whatever in which the Director is represented by the Agent shall be deemed to be employment. If the Director has been employed or has had contracts or bona fide offers for employment in any field in which Director is represented by Agent the Director may not terminate so long as Director is entitled to an amount equal to his last compensation at a pro rata equivalent to 3 weeks of services.

(TAC, Ex. C.)

D. Procedural Background

On February 13, 2015, Plaintiff filed its Original Complaint, (Dkt. No. 3), but never served it on Defendants. Instead, Plaintiff filed its First Amended Complaint ("FAC") on June 15, 2015, (Dkt. No. 8), and served it on UTA and ICM on June 16 and June 17, respectively, (Dkt. Nos. 12, 13). Defendants subsequently filed Motions to Dismiss on August 10, 2015, seeking to dismiss all claims in Plaintiff's FAC pursuant to *Federal Rule of Civil Procedure 12(b)(6)*. (Dkt. Nos. 16, 18, 21.) On September 18, 2015, the Court granted, in part, and denied, in part, Defendants' Motions. (Dkt. No. 28.) Namely, the Court dismissed Plaintiff's claim under *§ 2 of the Sherman Act* without prejudice. (*Id.* at 7.) The

Court did not address **[*8]** the merits of the Sherman Act claim, instead concluding that Plaintiff failed to allege any facts indicating that a conspiracy existed to create a monopoly in a single entity, as required under *§ 2*. (*Id.* at 6-7.) The Court also dismissed Plaintiff's intentional interference with contract and intentional interference with prospective economic damage claims without prejudice. (*Id.* at 9-10.) Finally, the Court dismissed Plaintiff's claims for declaratory relief and injunctive relief with prejudice, (*id.* at 11-12), but denied Defendants' Motions as to Plaintiff's UCL claim, (*id.* at 8).

On October 12, 2015, Plaintiff filed its Second Amended Complaint ("SAC"), alleging: (1) a *§ 1 Sherman Act* claim; (2) an unfair competition and unlawful and unfair business practices claim; (3) an intentional interference with contract claim; and, (4) an intentional interference with prospective economic advantage claim. (Dkt. No. 31.) Defendants subsequently filed their Motions to Dismiss on November 9, 2015. (Dkt. Nos. 34, 36.) The Court granted both Motions in their entirety without prejudice. (Dkt. No. 43.)

Plaintiff filed its TAC on January 22, 2016, alleging the same causes of action as its SAC. (Dkt. No. 49.) On February 12, 2016, Defendants moved **[*9]** to dismiss the TAC. (Dkt. Nos. 50 (hereinafter, "ICM Mot."), 52 (hereinafter "UTA Mot.").) Plaintiff timely filed its Oppositions, (Dkt. Nos. 56 (hereinafter, "Pl.'s ICM Opp'n"), 57 (hereinafter, "Pl.'s UTA Opp'n")), and Defendants timely replied, (Dkt. Nos. 61, 62).

III. REQUEST FOR JUDICIAL NOTICE

In support of its Motion, Defendant ICM filed a Request for Judicial Notice. (*See* Dkt. No. 51 (hereinafter, "RJN").) A court may properly take judicial notice of (1) material which is included as part of the complaint or relied upon by the complaint, and (2) matters in the public record. *See* *Marder v. Lopez, 450 F.3d 445, 448 (9th Cir. 2006)*; *Lee v. City of Los Angeles, 250 F.3d 668, 688-89 (9th Cir. 2001)*. A court may also take judicial notice pursuant to *Federal Rule of Evidence 201(b)*. Under the rule, a judicially noticed fact must be one that is "not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." *Fed. R. Evid. 201(b)*. A court "must take judicial notice if a party requests it and the court is supplied with the necessary information." *See* *Fed. R. Evid. 201(c)(2)*; *In re Icenhower, 755 F.3d 1130, 1142 (9th Cir. 2014)*.

Defendant ICM requests that the Court take judicial notice of the following: (1) the ATA/DGA Agreement incorporating Rider D, which is **[*10]** attached to Plaintiff's TAC, (*see* TAC, Ex. C); (2) a March 2014 email between Sony executives that Plaintiff refers to in its TAC, (*see* TAC ¶ 18); and, (3) a Deadline article referenced in the Sony email. (*See* RJN, Exs. A—C.) Here, Plaintiff relied upon the ATA/DGA Agreement and the Sony email in its TAC, and neither party has objected to their authenticity. (*See* TAC ¶ 18, Ex. C); *Marder, 450 F.3d at 448*. Additionally, the Deadline article "was in the public realm at the time" the Sony executive email allegedly sent the email. *Von Saher v. Norton Simon Museum of Art at Pasadena, 592 F.3d 954, 960 (9th Cir. 2009)* ("Courts may take judicial notice of publications introduced to 'indicate what was in the public realm at the time . . . .'" (quoting *Premier Growth Fund v. Alliance Capital Mgmt., 435 F.3d 396, 401 n.15 (3d Cir. 2006))*). The Court accordingly **GRANTS** Defendant ICM's request for judicial notice.[2] However, as to the Deadline article, the Court only takes judicial notice "to 'indicate what was in the public realm at the time, not whether the contents of those articles were in fact true.'" *Id.* (quoting *Premier Growth Fund, 435 F.3d at 401 n.15*).

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[2] Defendant ICM objects to the declarations of Ted P. Tatos and Charles Lenhoff in support of Plaintiff's Opposition. (*See* Dkt. No. 63.) The declarations purportedly establish "that the percentage of co-packaged shows between Uber Agencies is enormously out of proportion **[*11]** with the statistical likelihood of such co-packaging based on the number of agencies in the market." (Pl.'s ICM Opp'n at 24; Pl.'s UTA Opp'n at 23-24.) In ruling on a motion to dismiss, a court may not look beyond the pleadings except in limited circumstances, none of which apply here. *See* *United States v. Corinthian Colls., 655 F.3d 984, 998-99 (9th Cir. 2011)* (citations omitted). Accordingly, the Court considers these declarations in determining only whether to grant leave to amend. *See* *Acinelli v. Torres, No. ED CV 13-1371-AB (PLA), 2015 U.S. Dist. LEXIS 92759, 2015 WL 4380772, at *2 n.3 (C.D. Cal. July 16, 2015)* (citing *Orion Tire Corp. v. Goodyear Tire & Rubber Co., 268 F.3d 1133, 1137-38 (9th Cir. 2001))*.

IV. LEGAL STANDARD

Under *Rule 8(a)*, a complaint must contain a "short and plain statement of the claim showing that the [plaintiff] is entitled to relief." *Fed. R. Civ. P. 8(a)*. If a complaint fails to do this, the defendant may move to dismiss it under *Rule 12(b)(6)*. *Fed. R. Civ. P. 12(b)(6)*. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. A claim is plausible on its face "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "Factual allegations must be enough to raise a right to relief above the speculative level." *Twombly, 550 U.S. at 555*. Thus, there must be "more than a sheer **[*12]** possibility that a defendant has acted unlawfully." *Iqbal, 556 U.S. at 678*. "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility'" that the plaintiff is entitled to relief. *Id.* (quoting *Twombly, 550 U.S. at 557*).

Where a district court grants a motion to dismiss, it should provide leave to amend unless it is clear that the complaint could not be saved by any amendment. *Manzarek v. St. Paul Fire & Marine Ins. Co., 519 F.3d 1025, 1031 (9th Cir. 2008)* ("Dismissal without leave to amend is improper unless it is clear, upon de novo review, that the complaint could not be saved by any amendment."). Leave to amend, however, "is properly denied . . . if amendment would be futile." *Carrico v. City & County of San Francisco, 656 F.3d 1002, 1008 (9th Cir. 2011)*.

V. DISCUSSION

A. Sherman Act Claim

Plaintiff argues that it sufficiently pleads the existence of a *Sherman Act § 1* violation. (*See* Pl.'s ICM Opp'n at 8-19; Pl.'s UTA Opp'n at 8-19.) Plaintiff's Sherman Act allegations can best be summarized as follows: First, Defendants agreed amongst themselves that it was in their best interest to allow Rule 16(g) to expire, and to that end, conspired to cause that result by refusing to renegotiate with SAG regarding the Rule 16(g) amendments. (TAC ¶¶ 25, 36-37.) Next, given the lack of financial restrictions resulting from **[*13]** Rule 16(g)'s expiration, Defendants and the other Big 4 Agencies obtained significant capital investments from outside sources. (TAC ¶ 38.) The Big 4 Agencies then lured talent away from other agencies by eliminating the 10% commission in lieu of a packaging fee. (TAC ¶¶ 52-54, 56.) Given the influx of talent, the Big 4 Agencies were able to control the relevant market by conspiring to exclusively co-package with each other, thereby harming competition. (TAC ¶¶ 43, 75-76, 78.) Plaintiff also alleges that Defendants agreed to coerce studios, networks, and producers to refuse deals with non-Big 4 Agencies, threatening to withhold talent as a consequence of noncompliance. (TAC ¶ 63.) The resulting harm to competition, according to Plaintiff, is a lack of diversity among talent and a reduction of agencies in the scripted series market, thereby allowing the Big 4 Agencies to set the prices for talent. (TAC ¶¶ 17, 49, 78-79.) Moreover, Plaintiff alleges that it was harmed by the anti-competitive aspect of Defendants' practices—namely, the package-fee incentive—when Defendants "poached" two of Plaintiff's clients. (TAC ¶ 81.)

1. Per Se Analysis—Price-Fixing Allegation

As discussed in the Court's prior **[*14]** Order, claims under *§ 1 of the Sherman Act* are evaluated under either a per se analysis or the rule of reason. *In re WellPoint, Inc. Out-of-Network UCR Rates Litig., 865 F. Supp. 2d 1002, 1024-25 (C.D. Cal. 2011)* (citing *Thurman Indus., Inc. v. Pay 'N Pak Stores, Inc., 875 F.2d 1369, 1373 (9th Cir. 1989))*. To state a claim for a per se violation of the Sherman Act, Plaintiff must sufficiently plead that Defendants (1) entered into an agreement (2) to fix prices or divide the market. *Id.* Here, as in its SAC, Plaintiff alleges that the Big 4 Agencies are engaged in horizontal price-fixing. (*Compare* TAC ¶¶ 43, 78, *with* SAC ¶¶ 73, 84, 116.)

However, Plaintiff adds no factual details to support this conclusion. Accordingly, the Court finds that Plaintiff again fails to sufficiently plead a per se Sherman Act violation.

2. Rule of Reason Analysis—Unreasonable Restraint of Trade Allegations

To sufficiently state a *§ 1* claim under the rule of reason, Plaintiff must sufficiently plead each of the following elements: "(1) a contract, combination or conspiracy among two or more persons or distinct business entities; (2) by which the persons or entities intended to harm or restrain trade or commerce among the several States, or with foreign nations; (3) which actually injures competition." *Brantley v. NBC Universal, Inc., 675 F.3d 1192, 1197 (9th Cir. 2012)* (internal quotation marks omitted). In addition to these elements, Plaintiff must also plead "(4) **[*15]** that [it was] harmed by [Defendants'] anti-competitive contract, combination, or conspiracy, and that this harm flowed from an anti-competitive aspect of the practice under scrutiny." *Id.* (internal quotation marks omitted). "In its design and function the rule [of reason] distinguishes between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest." *Id.* (quoting *Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 886, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007))*.

a. Conspiracy

As discussed above, Plaintiff alleges that Defendants engaged in a conspiracy to (1) bring about the expiration of Rule 16(g), (2) exclude non-Big 4 Agencies from co-packaging contracts and not split packaging fees with anyone other than the Big 4 Agencies, and (3) coerce studios, networks, and producers to boycott non-Big 4 Agencies through threats of withholding the Big 4's talent from those who do not comply. Defendants compare Plaintiff's TAC to its SAC and argue that Plaintiff has again failed to plead these facts with the requisite specificity. (ICM Mot. at 6-16; UTA Mot. at 5-12.) Once again, the Court agrees with Defendants. (*See* Dkt. No. 43 at 8-11.)

To sufficiently "allege an agreement or conspiracy between antitrust co-conspirators, **[*16]** the complaint must allege facts such as a 'specific time, place, or person involved in the conspiracies' to give a defendant seeking to respond to allegations of a conspiracy an idea of where to begin." *Kendall v. Visa USA, Inc., 518 F.3d 1042, 1047 (9th Cir. 2008)* (quoting *Twombly, 550 U.S. at 565 n.10*). "[T]erms like 'conspiracy,' or even 'agreement,' are border-line: they might well be sufficient in conjunction with a more specific allegation—for example, identifying a written agreement or even a basis for inferring a tacit agreement," but such terms, alone, are insufficient to state claim of conspiracy. *Twombly, 550 U.S. at 557* (quoting *DM Research, Inc. v. Coll. of Am. Pathologists, 170 F.3d 53, 56 (1st Cir. 1999))*.

Like its SAC, Plaintiff's TAC relies upon circumstantial evidence, not direct evidence, to plead the existence of a conspiracy. (TAC ¶ 47; *see also* Dkt. No. 43 at 9 n.3.) When relying on circumstantial evidence to allege a conspiracy, the plaintiff may point to the defendants' parallel conduct to create the inference that the parties have entered into an agreement. *Twombly, 550 U.S. at 553* ("[A] showing of parallel business behavior is admissible circumstantial evidence from which the fact finder may infer agreement . . . ."). However, parallel conduct alone does not constitute a Sherman Act violation. *Id.* "'[T]he crucial question' is whether the challenged anticompetitive conduct 'stem[s] from independent **[*17]** decision or from an agreement, tacit or express.'" *Id.* (quoting *Theatre Enters., Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 540, 74 S. Ct. 257, 98 L. Ed. 273 (1954))*.

In the Ninth Circuit, courts distinguish "permissible parallel conduct from impermissible conspiracy by identifying certain 'plus factors,'" which are "economic actions and outcomes that are largely inconsistent with unilateral conduct but largely consistent with explicitly coordinated action." *In re Musical Instruments, 798 F.3d 1186, 1194 (9th Cir. 2015)* (citing *Twombly, 550 U.S. at 557 n.4*). "If pleaded, they can place parallel conduct in a context that raises a suggestion of preceding agreement," thereby distinguishing it from lawful independent action. *Id.* (internal quotation marks omitted).

As in the previous Order, the Court concludes that Plaintiff fails to allege sufficient facts regarding the purported conspiracies between Defendants and the other Big 4 Agencies. (*See* Dkt. No. 43 at 10.) Like the SAC, the only alleged conspiracy of which Plaintiff provides names of participating individuals is the alleged agreement "to eliminate Rule 16(g)." (TAC ¶¶ 22-23.) Plaintiff alleges that "the ATA's Strategic Planning Committee consisting of UTA's Jim Berkus, ICM's Jeff Berg, CAA's Bryan Lourd, William Morris' Walt Zifkin, Endeavor's Rick Rosen, and Broder/Kurland/Webb/ Uffner's Bob Broder" was created "with the specific **[*18]** goal and intent of eliminating the [Rule 16(g)] prohibitions on outside investments and funding." (TAC ¶ 75.) In sum, Plaintiff alleges that Defendants' agents on the ATA's Strategic Planning Committee "agreed amongst themselves that it was in their best interests to proceed without Rule 16(g)." (TAC ¶ 25.)

Defendants argue that their participation in the ATA meetings cannot be construed as an illegal conspiracy. (UTA Mot. at 8.) Further, Defendants contend that even assuming the ATA members thought it in their best interest to allow Rule 16(g) to expire, that is not "'inconsistent with unilateral conduct' or 'largely consistent with explicitly coordinated action.'" (ICM Mot. at 12 (quoting *In re Musical Instruments, 798 F.3d at 1194*).) Rather, according to Defendants, this allegation "suggest[s] rational, legal business behavior." (*Id.* (quoting *Kendall, 518 F.3d at 1049*).) Defendants also point to the Court's prior Order, in which the Court noted that it was SAG, not the ATA, which decided to reject the new Rule 16(g) terms, thereby allowing Rule 16(g) to expire. (UTA Mot. at 7 (citing Dkt. No. 43 at 11); ICM Mot. at 9 (citing Dkt. No. 43 at 11); *see also* TAC ¶¶ 32-34.)

First, "mere participation in trade-organization meetings where information is exchanged and strategies are advocated does not suggest an illegal **[*19]** agreement." *In re Musical Instruments, 798 F.3d at 1196*. Thus, merely stating—as the SAC did, (SAC ¶ 49)—that Defendants' agents served on the Strategic Planning Committee and "had ample opportunity" to plan to eliminate Rule 16(g) fails to sufficiently plead a conspiracy claim. (TAC ¶ 23; *see* Dkt. No. 43 at 11.) Adding dates of committee meetings and communications likewise does not cure this defect. (*See* TAC ¶ 23.) Further, as the Court concluded in its previous Order, the decision to permit Rule 16(g) to expire is as much evidence of a conspiracy as it is evidence that each individual agency acted for its own independent benefit. (Dkt. No. 43 at 11.) In sum, that the expiration of Rule 16(g) would ultimately benefit Big 4 Agencies does not demonstrate that Defendants conspired to bring about its demise, especially in light of the fact that SAG, not the ATA, rejected a new version of Rule 16(g).

As for the alleged conspiracy to exclusively co-package with Big 4 Agencies, Plaintiff's TAC relies on two sets of data[3] which purportedly show that "only 2 of 53 agencies" were able to co-package with Big 4 Agencies and that 85 of 353 packaged series were co-packaged amongst Big 4 Agencies. (TAC ¶ 45, Exs. A, B (emphasis omitted).) An "amended complaint may only allege 'other **[*20]** facts consistent with the challenged pleading.'" *Reddy v. Litton Indus., Inc., 912 F.2d 291, 297 (9th Cir. 1990)* (quoting *Schreiber Distrib. Co. v. Serv-Well Furniture Co., Inc., 806 F.2d 1393, 1401 (9th Cir. 1986))*. Here, in its SAC, Plaintiff alleged that in 2014/2015, sixteen co-packages included non-Big 4 Agencies, while Big 4 Agencies co-packaged exclusively with one another on eighty-nine occasions. (SAC ¶ 73.) However, Plaintiff's TAC includes a chart representing that Big 4 Agencies co-packaged exclusively amongst themselves eighty-five times and with smaller agencies only twelve times in 2014/2015. (TAC ¶ 45, Exs. A, B.)

Plaintiff attempts to account for these discrepancies by pointing to "[r]ecent information published by the FX Network and other sources." (TAC ¶ 45 n.2.) However, the Court need not accept the newly alleged, contradictory data as true. *Azadpour v. Sun Microsystems, Inc., No.C06-03272 MJJ, 2007 U.S. Dist. LEXIS 55502, 2007 WL 2141079, at *2 n.2 (N.D. Cal. July 23, 2007)* ("Where allegations in an amended complaint **[*21]** contradict those in a prior complaint, a district court need not accept the new alleged facts as true, and may, in fact, strike the challenged allegations as 'false and sham.'"). Even assuming the Court considered the data, it fails to establish that Defendants conspired to exclude non-Big 4 Agencies from co-packaging. Indeed, the data demonstrates that Big 4 Agencies co-packaged with smaller agencies on at least twelve occasions. (*See* TAC, Ex. A.) Accordingly, Plaintiff's own allegations contradict its claim that Defendants' co-packaging agreements are exclusive to the Big 4 Agencies.

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[3] Defendant UTA claims to have contacted Plaintiff regarding the "facial inaccuracies" of this data, (UTA Mot. at 3 n.1), and Plaintiff concedes the existence of "two minor errors," (Pl.'s UTA Opp'n at 13 n.5). Even assuming the exhibits were entirely accurate, the data still conflicts with Plaintiff's allegation that Defendants conspired to entirely exclude non-Big 4 Agencies from co-packaging with them.

Further, like its SAC, Plaintiff's TAC fails to provide the names of any individuals who allegedly conspired to coerce studios, networks, and producers to boycott smaller agencies. (*See* Dkt. No. 43 at 11.) Nor does the TAC include a reference to a specific time or place such agreements took place. Plaintiff also fails to plead a specific instance of a threat against a studio, network, or producer. Thus, Plaintiff fails to sufficiently plead a conspiracy based on the alleged coercion.

For the foregoing reasons, the Court concludes that Plaintiff has again failed to sufficiently plead a conspiracy. For this **[*22]** reason alone, the Court could grant Defendants' Motions as to Plaintiff's *§ 1 Sherman Act* claim. However, as discussed below, Plaintiff also fails to satisfy the injury to competition element.

b. Restraint of Trade—Injury to Competition

"In order to plead injury to competition, the third element of a Section 1 claim, sufficiently to withstand a motion to dismiss, 'a section one claimant may not merely recite the bare legal conclusion that competition has been restrained unreasonably.'" *Brantley, 675 F.3d at 1198* (quoting *Les Shockley Racing, Inc. v. Nat'l Hot Rod Ass'n, 884 F.2d 504, 507-08 (9th Cir. 1989))*. "Rather, a claimant must, at a minimum, sketch the outline of [the injury to competition] with allegations of supporting factual detail . . . [that] raise a reasonable expectation that discovery will reveal evidence of an injury to competition." *Id.* (internal quotation marks and citation omitted). The first element of a *§ 1 Sherman Act* claim is linked with the third element, in that to establish an injury to competition, "the claimant must identify a contract, combination or conspiracy that has an anticompetitive effect." *Id.* For example, a "horizontal agreement"—an agreement between competitors in the same market—"to set prices may injure competition because the result of such an agreement, if effective, **[*23]** is the elimination of one form of competition, namely price." *Id.* (internal quotation marks omitted). "Or a group of competitors may act in concert to harm another competitor or exclude that competitor from the market and thus 'protect . . . dealers from real or apparent price competition' from the targeted competitor." *Id.* (quoting *United States v. Gen. Motors Corp., 384 U.S. 127, 146-47, 86 S. Ct. 1321, 16 L. Ed. 2d 415 (1966))*.

Here, Plaintiff alleges that Defendants have entered into horizontal agreements that have effectively eliminated other agencies from the market, thereby facilitating horizontal price-fixing and restraining trade. (TAC ¶¶ 43, 78.) However, as was the case in Plaintiff's SAC, Plaintiff fails to sufficiently plead the predicate fact—an agreement or conspiracy. *See* discussion *supra* Section V.A.2.a. Thus, Plaintiff again fails to state a claim of injury to competition based on the alleged horizontal agreements.

Plaintiff also claims the existence of vertical agreements between Defendants and the studios, networks, and producers. Specifically, Plaintiff alleges that Defendants coerced the studios, networks, and producers to institute a boycott of non-Big 4 Agencies through threats of withholding the Big 4 Agencies' coveted talent from future package deals from **[*24]** noncompliant studios, networks, and producers. (TAC ¶¶ 63-64.) However, this allegation fails because Plaintiff fails to plead enough facts to "raise a reasonable expectation that discovery will reveal" the existence of such agreements. *Brantley, 675 F. 3d at 1198*. For example, Plaintiff provides no names, dates, or other facts to support this allegation.[4] Rather, it relies on a conclusory allegation that Defendants "coerce[d]" the studios, networks, and producers to boycott non-Big 4 Agencies. (TAC ¶ 62.) Such an allegation lacks the requisite specificity to state a claim for an agreement under *Twombly* and *Iqbal*.

Further, it is unclear based on the alleged facts **[*25]** whether Defendant unlawfully coerced or lawfully pressured the studios, networks, and producers to refrain from dealing with non-Big 4 Agencies. *See* *Filco v. Amana Refrigeration, Inc., 709 F.2d 1257, 1263 (9th Cir. 1983)* (stating that "[d]emands or threats, however, must be

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[4] In its TAC, Plaintiff adds a quote from an alleged 2014 email sent by the chairman of Sony Pictures. (*See* TAC ¶ 18 ("They [Uber Agencies] are demanding and getting fees now on these from the financiers (they call it a 'packaging fee') and are keeping as many emerging high[-]end filmmaker projects off the market until they have full control.") (emphasis omitted); RJN, Ex. B.) The email, however, is irrelevant to this matter, as it concerns a motion picture investment rather than a scripted television series package. (*See* ICM Mot. at 15, 15 n.6; RJN, Exs. B, C.)

distinguished from mere exposition, persuasion, argument, or pressure," and that the issue in that case was whether the statements at issue were "enough to raise an inference of coercion and thus create an inference of" illegality) (internal quotation marks omitted). Indeed, Plaintiff concedes that the Big 4 Agencies represent "top acting, writing, producing[,] and directing talent," and therefore are better suited to develop new series than smaller agencies. (TAC ¶ 14.) Accepting this as true, it is reasonable to infer that studios, networks, and producers would be drawn to work with Big 4 Agencies; no threats would be necessary.

Finally, Plaintiff references Defendants' alleged "tying agreements" in an effort to plead an injury to competition. (*See* TAC ¶¶ 42, 78.) "Tying is defined as an arrangement where a supplier agrees to sell a buyer a product (the tying product), but only on the condition that the buyer also purchases a different (or tied) product." *Brantley, 675 F.3d at 1199* (internal quotation marks and citation **[*26]** omitted). "The potential injury to competition threatened by this practice is that the tying arrangement will either harm existing competitors or create barriers to entry of new competitors in the market for the tied product . . . or will force buyers into giving up the purchase of substitutes for the tied product." *Id.* (internal quotation marks and citation omitted).

In its TAC, Plaintiff alleges three tying agreements whereby Defendants allegedly "coerc[ed]" or "cajol[ed]" a studio, network, or producer to accept tied talent along with the coveted talent. (*See* TAC ¶ 42 (discussing "UTA coercing AMC Network to renew their extremely low rated series 'Halt And Catch Fire' . . . in order to get a different and higher rated series, 'Better Call Saul,' or ICM cajoling ABC to renew the ratings[-]challenged 'Private Practice' series in order to keep their package of 'Grey's Anatomy' going").) Even assuming Defendants utilized tying agreements, Plaintiff fails to adequately allege how these assumed agreements "harm existing competitors or create barriers to entry of new competitors in the market for the tied product." *Brantley, 675 F.3d at 1199*. Plaintiff also fails to allege that the buyers were forced "into giving up the purchase **[*27]** of substitutes for the tied product." *Id.* As such, Plaintiff fails to establish restraint of trade through Defendants' alleged tying agreements.

For the foregoing reasons, Plaintiff again fails to sufficiently plead the conspiracy and harm-to-competition elements of its *§ 1 Sherman Act* claim.[5] Accordingly, Defendants' Motions are **GRANTED** as to that cause of action. Given that this is Plaintiff Third Amended Complaint, and because Plaintiff has failed to cure deficiencies as to its *Sherman Act § 1* claim in each of its previous pleadings, Plaintiff's Sherman Act claim is **DISMISSED with prejudice**. *See* *Zucco Partners, LLC v. Digimarc Corp., 552 F.3d 981, 1007 (9th Cir. 2009)* ("As here, where the plaintiff has previously been granted leave to amend and has subsequently failed to add the requisite particularity to its claims, the district court's discretion to deny leave to amend is particularly broad.") (internal quotation marks omitted).

B. Unfair Business Practices Claim

The UCL defines "unfair competition" as "any unlawful, unfair or fraudulent business act or practice." *Cal. Bus. & Prof. Code § 17200*. Plaintiff may therefore base its claim upon **[*28]** "acts or practices which are unlawful, or unfair, or fraudulent." *Podolsky v. First Healthcare Corp., 50 Cal. App. 4th 632, 647, 58 Cal. Rptr. 2d 89 (Cal. Ct. App. 1996)*. Here, Plaintiff alleges that Defendants violated the "unlawful" and "unfair" prongs of the UCL. (*See* Pl.'s ICM Opp'n at 20; Pl.'s UTA Opp'n at 20.)

In *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., 20 Cal. 4th 163, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (Cal. 1999)*, the California Supreme Court defined the meaning of an "unfair" act under the UCL as it applies in the antitrust context:

> When a plaintiff who claims to have suffered injury from a direct competitor's "unfair" act or practice invokes *section 17200*, the word "unfair" in that section means conduct that threatens an incipient violation of an

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[5] Given that Plaintiff again fails to satisfy these two elements, the Court need not discuss the remaining two elements of Plaintiff's *§ 1 Sherman Act* claim.

> ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.

Id. at 187. However, where, as here, (*see* TAC ¶¶ 83, 85, 87-88), "the same conduct is alleged to be both an antitrust violation and an 'unfair' business act or practice for the same reason—because it unreasonably restrains competition and harms consumers—the determination that the conduct is not an unreasonable restraint of trade necessarily implies that the conduct is not 'unfair.'"[6] *City of San Jose v. Office of the Comm'r of Baseball, 776 F.3d 686, 691-92 (9th Cir. 2015)* (citing *Chavez v. Whirlpool Corp., 93 Cal. App. 4th 363, 375, 113 Cal. Rptr. 2d 175 (Cal. Ct. App. 2001))*.

Like in its previous Order, (*see* Dkt. No. 43 at 15-16), the Court finds that because Plaintiff has not sufficiently pleaded an unreasonable restraint of trade under *§ 1 of the Sherman Act*, Plaintiff also necessarily fails to plead unfair or unlawful conduct under the UCL, *see* *Office of the Comm'r of Baseball, 776 F.3d at 691-92*; *Chavez, 93 Cal. App. 4th at 375*. Defendants' Motions are therefore **GRANTED** as to Plaintiff's UCL claim, and that claim is **DISMISSED with prejudice** for the same reasons as Plaintiff's *§ 1 Sherman Act* claim. *See* *Zucco, 552 F.3d at 1007*.

C. Intentional Interference with Contract

Plaintiff alleges that Defendants interfered with its contractual relationships with Clients #1 and #2[7] by inviting the clients to a private VIP screening or meeting, during which Defendants began persuading the clients to breach their contracts with Plaintiff. (TAC ¶¶ 94, 97.) Defendants argue that Plaintiff fails to plead intentional interference with contract given its failure to allege that the contracts were not terminable at will. (ICM Mot. at 22-25; UTA Mot. at 18-24.) Thus, according to Defendants, the competitor's privilege applies, **[*30]** and Plaintiff fails to aver an independently wrongful act to defeat the privilege.[8] (*Id.*)

To state a claim for intentional interference with contract, Plaintiff must sufficiently plead the following: "(1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage." *Pac. Gas & Elec. Co. v. Bear Stearns & Co., 50 Cal. 3d 1118, 1126, 270 Cal. Rptr. 1, 791 P.2d 587 (Cal. 1990)*. "'A plaintiff need not allege an actual or inevitable *breach* of contract in order to state a claim for disruption of contractual relations'; rather, unlike the tort of inducing breach of contract, intentional interference with contractual **[*31]** relations requires only proof of *interference*." *RealPage, Inc. v. Yardi Sys., Inc., 852 F. Supp. 2d 1215, 1230 (C.D. Cal. 2012)* (quoting *Pac. Gas & Electric Co., 50 Cal. 3d at 1129*) (emphasis in original). However, where contracts are terminable at will, the competitor's privilege applies. *See, e.g., Pac. Exp., Inc. v. United Airlines, Inc., 959 F.2d 814, 819 (9th Cir. 1992)*. If the privilege applies, "a plaintiff must also plead and prove that the defendant engaged in an independently wrongful act," which induced the party to leave the plaintiff. *Reeves v. Hanlon, 33 Cal. 4th 1140, 1152, 17 Cal. Rptr. 3d 289, 95 P.3d 513 (Cal. 2004)*. "[A]n act is independently wrongful if it is unlawful, that is, if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard." *Id.*

Here, as in the SAC, Plaintiff alleges that it had "valid and exclusive contracts" with Clients #1 and #2. (TAC ¶ 90.) However, Plaintiff alleges that its agreements with Clients #1 and #2 were "verbal contracts," (TAC ¶¶ 91, 95), and

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[6] Because "[t]he analysis under California's ***antitrust law*** mirror the **[*29]** analysis under federal law," *County of Tuolumne v. Sonora Cmty. Hosp., 236 F.3d 1148, 1160 (9th Cir. 2001)* (citing *Cal. Bus. & Prof. Code § 16700 et seq.*), Plaintiff's new allegation that Defendants violated the Cartwright Act does not alter the Court's conclusion, (*see* TAC ¶ 83).

[7] Plaintiff explains that Clients #1 and #2 are directors and members of the DGA. (TAC ¶¶ 91, 96.)

[8] As discussed below, the Court finds that Plaintiff fails to (1) sufficiently allege that Client #1's contract was not at will and (2) defeat the competitor's privilege. Thus, the Court need not address Defendant UTA's additional argument that Plaintiff fails to adequately allege knowledge or causation with respect to the Client #1 agreement. (*See* UTA Mot. at 24-25.)

Plaintiff fails to allege whether those contracts were for a specified term or terminable at will.[9] Thus, the competitor's privilege applies, which Plaintiff again cannot overcome because it fails to sufficiently allege a Sherman Act violation.

Plaintiff's principal argument is that Rider D in the ATA/DGA Agreement establishes that the contract was not terminable at will, and thus that the competitor's privilege does not apply. However, the Court need not determine whether this is true, as Plaintiff fails to demonstrate that the Rider D Agreement's termination restriction was triggered to preclude Clients #1 and #2 from terminating their agreements with Plaintiff.

The crux of the Rider D Agreement is that a director or agent may not terminate an agreement so long as (1) the director has been employed or received a bona fide offer of employment in a field in which the **[*33]** director is represented by the agent within ninety (90) days preceding the director's notice of termination, and (2) the director is entitled to an amount equal to his last compensation at a pro rata equivalent to three weeks of services. (*See* TAC ¶ 92, Ex. C at 2.) According to Plaintiff, Rider D applied to its relationships with Clients #1 and #2, thereby precluding them from leaving Plaintiff for another agency. (TAC ¶ 92.) However, as discussed in the Court's prior Order, it is clear based upon the agreement's language that there are two conditions that must be met before a director is restricted from terminating the relationship with his or her agent. The first is that within ninety (90) days preceding the notice of termination, the director must have obtained employment in his field, or at least received a bona fide offer of employment. (TAC ¶ 92.) The second is that the director must be "entitled to an amount equal to his last compensation at a pro rata equivalent of 3 weeks of services." (*Id.*)

Here, as in the SAC, Plaintiff alleges facts that, taken as true, establish the first condition—that Clients #1 and #2 obtained employment within the ninety days preceding their notices **[*34]** of termination. (*See* TAC ¶¶ 93, 95.) However, Plaintiff fails to allege the second condition, as it states no *facts* alleging whether the payment for Client #1's and Client #2's employment met Rider D's terms. Instead, Plaintiff states, in a conclusory fashion, that Clients #1 and #2 "received an amount equal to [their] last compensation at a pro rata rate equivalent to three (3) weeks of services." (TAC ¶¶ 93, 95.) Plaintiff does not allege the amount each client was compensated for their prior work, nor does it allege the amount each client received for their subsequent work. Merely reciting Rider D's terms is insufficient to state a claim under Twombly. Twombly, 550 U.S. at 555 ("[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.") (quoting Papasan v. Allain, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986)). Thus, even assuming that the ATA/DGA Agreement could elevate the contracts to term agreements, Plaintiff fails to sufficiently plead that Rider D's termination restriction would apply to Client #1's and Client #2's notices of termination.

Because Plaintiff again fails to plead that the agreements with Clients #1 and #2 were not at will, **[*35]** the competitor's privilege applies. As discussed above, Plaintiff again fails to sufficiently plead a Sherman Act violation, thus there is no "independently wrongful act" to defeat the competitor's privilege. Reeves, 33 Cal. 4th at 1152. Accordingly, Defendants' Motions are **GRANTED**. As to Plaintiff's claim against Defendant UTA for interference with Plaintiff's relationship with Client #1, that claim is **DISMISSED with prejudice**, as Plaintiff has failed multiple times to allege that agreement was not at-will, *see* Zucco, 552 F.3d at 1007, and amendment of that claim would be futile, Carrico, 656 F.3d at 1008. However, Plaintiff's intentional interference with contract claim against Defendant ICM relating to Client #2 is **DISMISSED with leave to amend**, as Plaintiff may avoid the competitor's privilege if it sufficiently pleads, in good faith, that at the time the alleged interference took place, Client #2 was under an agreement for a specified term.

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[9] Although Plaintiff alleges that its agreement with Client #2 "commenced on . . . February 10, 2009" and had an "initial term of years, with a 2-year renewal term, followed by 1-year **[*32]** terms," (*see* TAC ¶ 95), Plaintiff fails to allege whether the initial two-year agreement was ever renewed, thereby continuing the term contract. Further, the alleged acts of interference appear to have occurred shortly before Client #2 gave notice of termination of June 26, 2014, (*see* TAC ¶ 97), after the initial two-year term had expired. Thus, without any allegation as to whether the initial two-year agreement was renewed, Plaintiff fails to sufficiently plead that, at the time of the alleged interference, the agreement with Client #2 was for a specified term.

D. Intentional Interference with Prospective Economic Advantage

To plead a claim for intentional interference with prospective business advantage, Plaintiff must sufficiently allege the following:

> (1) [A]n economic relationship between the plaintiff and some third party, with the probability of future economic benefit to **[*36]** the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant.

Korea Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134, 1153, 131 Cal. Rptr. 2d 29, 63 P.3d 937 (Cal. 2003). Further, a plaintiff must plead and prove "that the defendant's interference was wrongful by some measure beyond the fact of the interference itself." *Della Penna v. Toyota Motor Sales, USA, Inc., 11 Cal. 4th 376, 392-93, 45 Cal. Rptr. 2d 436, 902 P.2d 740 (Cal. 1995)* (internal quotation marks omitted).

As in its SAC, Plaintiff relies on Defendants' acts allegedly violating the Sherman Act as the independent and wrongful acts to support this claim. (*Compare* TAC ¶ 104, *with* SAC ¶ 138.) However, as discussed above, Plaintiff fails to sufficiently plead a violation of the Sherman Act. *See supra* Section V.A. Thus, Plaintiff again fails to sufficiently allege that Defendants' conduct was "wrongful by some measure beyond the fact of the interference itself," as required under *Della Penna. See Della Penna, 11 Cal. 4th at 393*. Defendants' Motions are therefore **GRANTED** as to Plaintiff's intentional interference with prospective economic advantage claim, and that claim is **DISMISSED with prejudice**, as Plaintiff has again unsuccessfully amended this claim despite **[*37]** having filed three amended complaints. *See Zucco, 552 F.3d at 1007*.

E. The Court Declines to Exercise Supplemental Jurisdiction over the Remaining State Law Claim

"The decision whether to continue to exercise supplemental jurisdiction over state law claims after all federal claims have been dismissed lies within the district court's discretion." *Foster v. Wilson, 504 F.3d 1046, 1051 (9th Cir. 2007)*. "In *Gibbs*, the [United States Supreme] Court stated that 'if the federal claims are dismissed before trial . . . the state claims should be dismissed as well.'" *Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350 n.7, 108 S. Ct. 614, 98 L. Ed. 2d 720 (1988)* (quoting *United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 726, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966)*). Although this is not a per se rule, "in the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine—judicial economy, convenience, fairness, and comity—will point toward declining to exercise jurisdiction over the remaining state-law claims." *Id.* "When the balance of these factors indicates that a case properly belongs in state court, as when the federal-law claims have dropped out of the lawsuit in its early stages and only state-law claims remain, the federal court should decline the exercise of jurisdiction by dismissing the case without prejudice." *Id. at 350*.

Here, only Plaintiff's intentional interference **[*38]** with contract claim as to Client #2 remains—a state-law cause of action. *See* discussion *supra* Section V.C. Further, the Court has dismissed Plaintiff's sole federal-law claim with prejudice. *See* discussion *supra* Section V.A. Accordingly, there is no federal-law claim remaining. Given that this action is in its early stages, and because the federal-law claim has "dropped out of the lawsuit . . . and only [a] state-law claim[] remain[s]," the Court declines to exercise jurisdiction over the remaining state-law claim and **DISMISSES** the case **without prejudice**. *See Carnegie-Mellon, 484 U.S. at 350*.

VI. CONCLUSION

For the foregoing reasons, Defendants' Motions are **GRANTED with prejudice** as to Plaintiff's *Sherman Act § 1* claim, UCL claim, intentional inference with prospective economic advantage claim, and intentional interference with contract claim as to Client #1. Although, Defendants' Motions are **GRANTED without prejudice** as to Plaintiff's intentional interference with contractual relations claim with regard to Client #2, the Court declines to exercise supplemental jurisdiction over that claim given that the sole federal claim has "dropped out of the lawsuit . . . and only [a] state-law claim[] remain[s]." *Carnegie-Mellon, 484 U.S. at 350*. Accordingly, the case is **DISMISSED [*39] without prejudice** to the extent Plaintiff's intentional interference with contractual relations claim remains as to Client #2.

IT IS SO ORDERED.

Cave Consulting Grp., Inc. v. OptumInsight, Inc.

United States District Court for the Northern District of California

April 22, 2016, Decided; April 22, 2016, Filed

Case No. 15-cv-03424-JCS

Reporter

2016 U.S. Dist. LEXIS 54367 *; 2016-1 Trade Reg. Rep. (CCH) P79,608; 2016 WL 1643965

CAVE CONSULTING GROUP, INC., Plaintiff, v. OPTUMINSIGHT, INC., Defendant.

Subsequent History: Motion denied by *Cave Consulting Group v. Optuminsight, Inc., 2016 U.S. Dist. LEXIS 123382 (N.D. Cal., Sept. 12, 2016)*

Motion granted by, in part, Motion denied by, in part *Cave Consulting Grp. v. OptumInsight, Inc., 2016 U.S. Dist. LEXIS 147900 (N.D. Cal., Oct. 25, 2016)*

Motion denied by, Motion granted by, Stay granted by, in part *Cave Consulting Grp. v. OptumInsight, Inc., 2016 U.S. Dist. LEXIS 179944 (N.D. Cal., Dec. 29, 2016)*

Motion granted by, in part, Motion denied by, in part *Cave Consulting Grp., Inc. v. OptumInsight, Inc., 2017 U.S. Dist. LEXIS 211229 (N.D. Cal., Dec. 22, 2017)*

Later proceeding at *Cave Consulting Grp., Inc. v. Optuminsight, Inc., 2018 U.S. Dist. LEXIS 70132 (N.D. Cal., Apr. 25, 2018)*

Summary judgment granted by, in part, Summary judgment denied by, in part, Motion granted by, in part, Motion denied by, in part *Cave Consulting Grp., Inc. v. Optuminsight, Inc., 2019 U.S. Dist. LEXIS 161139 (N.D. Cal., Aug. 28, 2019)*

Motion granted by, in part, Motion denied by, in part *Cave Consulting Grp., Inc. v. OptumInsight, Inc., 2019 U.S. Dist. LEXIS 161113 (N.D. Cal., Sept. 18, 2019)*

Prior History: *Cave Consulting Group, Inc. v. Ingenix, Inc., 2013 U.S. Dist. LEXIS 80634 (N.D. Cal., June 7, 2013)*

Core Terms

patent, infringement, allegations, invalid, counterclaims, inequitable conduct, invention, antitrust, asserts, antitrust claim, unenforceable, claim preclusion, software, bad faith, amended complaint, compulsory counterclaim, lawsuit, sham, preclusion, conceived, patent infringement, monopolization, litigated, malicious, withheld, reasonable inference, infringement claim, issue preclusion, attorney's fees, reexamination

LexisNexis® Headnotes

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

HN1[] Motions to Dismiss, Failure to State Claim

Allegations are generally taken as true at the pleading stage.

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

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

HN2[] Motions to Dismiss, Failure to State Claim

A complaint may be dismissed for failure to state a claim on which relief can be granted under *Fed. R. Civ. P. 12(b)(6)*. The purpose of a motion to dismiss under *Rule 12(b)(6)* is to test the legal sufficiency of the complaint. Generally, a plaintiff's burden at the pleading stage is relatively light. *Fed. R. Civ. P. 8(a)* states that a pleading which sets forth a claim for relief shall contain a short and plain statement of the claim showing that the pleader is entitled to relief. *Fed. R. Civ. P. 8(a)*.

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

HN3[] Motions to Dismiss, Failure to State Claim

In ruling on a motion to dismiss under *Fed. R. Civ. P. 12(b)(6)*, the court analyzes the complaint and takes all allegations of material fact as true and construes them in the light most favorable to the non-moving party. Dismissal may be based on a lack of a cognizable legal theory or on the absence of facts that would support a valid theory. A complaint must contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory. A pleading that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do. Nor does a complaint suffice if it tenders "naked assertions" devoid of further factual enhancement. Rather, the claim must be "plausible on its face," meaning that the plaintiff must plead sufficient factual allegations to allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Inequitable Conduct

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

HN4[] Defenses, Inequitable Conduct

Fed. R. Civ. P. 9(b) sets a heightened pleading standard for claims based on fraud. In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. *Fed. R. Civ. P. 9(b)*. The Ninth Circuit has held that in order to meet this standard, a complaint must specify such facts as the times, dates, places, benefits received, and other details of the alleged fraudulent activity. The Federal Circuit has similarly held that in pleading inequitable conduct in patent cases, *Rule 9(b)* requires identification of the specific who, what, when, where, and how of the material misrepresentation or omission committed before the Patent and Trademark Office. The heightened standard does not apply to "malice, intent, knowledge, and other conditions of a person's mind." *Fed. R. Civ. P. 9(b)*.

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

HN5[] Preclusion of Judgments, Res Judicata

The general concept of claim preclusion also known as res judicata is that when a final judgment is rendered on the merits, another action may not be maintained between the parties on the same "claim," and defenses that were raised or could have been raised in that action are extinguished. Claim preclusion requires (1) an identity of parties or their privies, (2) a final judgment on the merits of the first suit, and (3) the later claim to be based on the same set of transactional facts as the first claim such that the later claim should have been litigated in the prior case.

Patent Law > Preclusion > Res Judicata

HN6[] **Preclusion, Res Judicata**

Where a claim preclusion issue is particular to patent law, courts analyze it under applicable Federal Circuit law.

Patent Law > Preclusion > Collateral Estoppel

Patent Law > Preclusion > Res Judicata

HN7[] **Preclusion, Collateral Estoppel**

As to both claim preclusion and issue preclusion, the law is well settled that the pendency of an appeal has no affect on the finality or binding effect of a trial court's holding.

Patent Law > Infringement Actions > Defenses > Patent Invalidity

Patent Law > Preclusion > Res Judicata

HN8[] **Defenses, Patent Invalidity**

This doctrine (claim preclusion) requires a close identity of claims. The Federal Circuit has held, for example, that where a prior judgment established "both that a patent was valid and that a party infringed," claim preclusion does not bar an invalidity defense when the same party is later sued for infringing the same patent with a different device unless the second allegedly infringing device is "essentially the same" as the earlier device found to infringe. Even if the invalidity defense would rest on the same basic facts in the second case as in the first, the defense is not precluded under this doctrine if the claims are not substantially the same. While defenses to a "claim" are extinguished by application of the doctrine of claim preclusion, the facts related to the defense do not in themselves constitute the transaction or "claim."

Antitrust & Trade Law > Procedural Matters

Civil Procedure > ... > Pleadings > Counterclaims > Compulsory Counterclaims

HN9[] **Antitrust & Trade Law, Procedural Matters**

Generally speaking, a counterclaim is compulsory if it (A) arises out of the transaction or occurrence that is the subject matter of the opposing party's claim; and (B) does not require adding another party over whom the court cannot acquire jurisdiction, subject to certain exceptions. Fed. R. Civ. P. 13(a). A counterclaim which is compulsory but is not brought is thereafter barred. The issue is complicated by the U.S. Supreme Court's decision in Mercoid, which some courts (including the Ninth Circuit) have construed as holding that antitrust claims are not compulsory counterclaims in patent cases, while other courts have disagreed.

Business & Corporate Compliance > ... > Infringement Actions > Patent Law > Infringement Actions

Civil Procedure > ... > Pleadings > Counterclaims > Compulsory Counterclaims

HN10[] Patent, Infringement Actions

The Federal Circuit has in fact suggested that whether a claim was a compulsory counterclaim in a previous action is an issue of regional circuit law. The Ninth Circuit has held that a claim that patent infringement litigation violated an antitrust statute is a permissive, not a mandatory, counterclaim in a patent infringement case, and is not barred in a subsequent suit by failure to raise it in the infringement suit.

Business & Corporate Compliance > ... > Infringement Actions > Patent Law > Infringement Actions

Civil Procedure > ... > Pleadings > Counterclaims > Compulsory Counterclaims

HN11[] Patent, Infringement Actions

The Fifth and Ninth Circuits have strictly followed Mercoid in refusing to hold any antitrust claim compulsory in the underlying patent infringement lawsuit.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

HN12[] Estoppel, Collateral Estoppel

The doctrine of issue preclusion prevents relitigation of all "issues of fact or law that were actually litigated and necessarily decided" in a prior proceeding. Or, as phrased in the Restatement of Judgment, the doctrine applies when an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment.

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

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

HN13[] Causes of Action Involving Trademarks, Infringement Actions

A, as owner of a trademark, brings an action against B for infringement. B denies the validity of the trademark and denies infringement. The court finds that the trademark is valid, but that B had not infringed it, and gives judgment for B. Thereafter A brings an action against B alleging that since the rendition of the judgment B infringed the trademark. B is not precluded from defending this action on the ground that the trademark is invalid. Restatement (Second) of Judgments § 27, comment h, illustration 14.

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

HN14[] Motions to Dismiss, Failure to State Claim

A well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely.

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

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Inequitable Conduct

HN15[] **Scope, Monopolization Offenses**

In 1965, the U.S. Supreme Court held in Walker Process that a patent obtained through fraud on the Patent Office can provide a basis for claims under the *Sherman Act*. The Federal Circuit more recently and succinctly summarized the standard for such a claim: Walker Process set forth two conditions for antitrust liability based on the fraudulent procurement of a patent. First, the plaintiff must show that the defendant procured the relevant patent by knowing and willful fraud on the Patent and Trademark Office or (in the case of an assignee) that the defendant maintained and enforced the patent with knowledge of the fraudulent manner in which it was obtained. Second, the plaintiff must prove all the elements otherwise necessary to establish a *Sherman Act* monopolization charge. With the first condition, the court made clear that the invalidity of the patent was not sufficient; a showing of intentional fraud in its procurement was required. With the second condition, the Court incorporated the rules of ***antitrust law*** generally. As Justice Harlan stated in his concurring opinion, as to this class of improper patent monopolies, antitrust remedies should be allowed room for full play. The Ninth Circuit recognized a related basis for liability in Handgards.

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

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Inequitable Conduct

HN16[] **Scope, Monopolization Offenses**

Inspired by Walker Process, the Ninth Circuit held in Handgards that a plaintiff could pursue antitrust remedies for bad faith infringement actions--even if not based on fraud on the patent office--so long as the jury is "instructed that a patentee's infringement suit is presumptively in good faith and that this presumption can be rebutted only by clear and convincing evidence." As illustrated in Handgards itself, not all Handgards claims are also Walker Process claims: a Handgards claim can be based on bad faith litigation to enforce a patent known to be invalid for reasons other than fraud on the Patent and Trademark Office. Conversely, not all Walker Process claims arise from bad faith litigation: enforcement actions are not a sine qua non of monopolizing by patent fraud.

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Inequitable Conduct

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

HN17[] **Defenses, Inequitable Conduct**

The heightened pleading standard of *Fed. R. Civ. P. 9(b)* applies to allegations of inequitable conduct, and Federal Circuit law governs the question of whether inequitable conduct has been pleaded with particularity under *Rule 9(b)*. In pleading inequitable conduct in patent cases, *Rule 9(b)* requires identification of the specific who, what, when, where, and how of the material misrepresentation or omission committed before the Patent and Trademark Office (PTO), rather than simply aver the substantive elements of inequitable conduct. Those elements are that an individual associated with prosecuting a patent application (1) made an affirmative misrepresentation of a material fact, failed to disclose material information, or submitted false material information; and (2) did so with a specific intent to deceive the PTO.

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Inequitable Conduct

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

Evidence > Inferences & Presumptions > Inferences

HN18[] **Defenses, Inequitable Conduct**

Although "knowledge" and "intent" may be averred generally, a pleading of inequitable conduct under *Fed. R. Civ. P. 9(b)* must include sufficient allegations of underlying facts from which a court may reasonably infer that a specific individual (1) knew of the withheld material information or of the falsity of the material misrepresentation, and (2) withheld or misrepresented this information with a specific intent to deceive the Patent and Trademark Office. A reasonable inference is one that is plausible and that flows logically from the facts alleged, including any objective indications of candor and good faith. At the pleading stage, it need not be "the single most reasonable inference able to be drawn"--unlike on the merits, where a "clear and convincing evidence" standard applies to inequitable conduct claims.

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Inequitable Conduct

Evidence > Burdens of Proof

HN19[] **Defenses, Inequitable Conduct**

In context, that standard (most reasonable inference) applies to evaluating "indirect and circumstantial evidence" of deception--i.e., a judgment on the merits. Although Therasense raised the bar for proving inequitable conduct on the merits, it did not change the Exergen standard for pleading inequitable conduct.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

HN20[] **Noerr-Pennington Doctrine, Sham Exception**

In PRE, the U.S. Supreme Court set forth the standard required for a plaintiff to establish sham litigation (stated here in part): The Court now outlines a two-part definition of "sham" litigation. First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under Noerr, and an antitrust claim premised on the sham exception must fail. Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation. Under this second part of the Court's definition of sham, the court should focus on whether the baseless lawsuit conceals an attempt to interfere directly with the business relationships of a competitor, through the use of the governmental process--as opposed to the outcome of that process--as an anticompetitive weapon.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

HN21[] **Noerr-Pennington Doctrine, Sham Exception**

In PRE, the U.S. Supreme Court set forth the standard required for a plaintiff to establish sham litigation (stated here in part): This two-tiered process requires the plaintiff to disprove the challenged lawsuit's legal viability before the court will entertain evidence of the suit's economic viability. Of course, even a plaintiff who defeats the defendant' s claim to Noerr immunity by demonstrating both the objective and the subjective components of a sham must still prove a substantive antitrust violation. Proof of a sham merely deprives the defendant of immunity; it does not relieve the plaintiff of the obligation to establish all other elements of his claim.

Antitrust & Trade Law > Exemptions & Immunities

HN22[] **Antitrust & Trade Law, Exemptions & Immunities**

According to the Federal Circuit: PRE and Walker Process provide alternative legal grounds on which a patentee may be stripped of its immunity from the antitrust laws; both legal theories may be applied to the same conduct. Moreover, the court need not find a way to merge these decisions. Each provides its own basis for depriving a patent owner of immunity from the antitrust laws; either or both may be applicable to a particular party's conduct in obtaining and enforcing a patent.

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

HN23[] **Scope, Monopolization Offenses**

A Walker Process plaintiff must (also) establish all the elements otherwise necessary to establish a *Sherman Act* monopolization charge, based on the rules of ***antitrust law*** generally.

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

HN24[] **False Advertising, Lanham Act**

Section 43(a) of the Lanham Act prohibits any false or misleading description or representation of fact, which in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of goods services, or commercial activities. *15 U.S.C.S. § 1125(a)*. Before a patentee may be held liable under *§ 43(a) of the Lanham Act* for marketplace activity in support of its patent, and thus be deprived of the right to make statements about potential infringement of its patent, the marketplace activity must have been undertaken in bad faith. Obviously, if the patentee knows that the patent is invalid, unenforceable, or not infringed, yet represents to the marketplace that a competitor is infringing the patent, a clear case of bad faith representations is made out.

Antitrust & Trade Law > Consumer Protection > False Advertising

HN25[] **Consumer Protection, False Advertising**

A mere claim that a product is "patented" is not false or misleading unless no patent covers the product.

Torts > Intentional Torts > Malicious Prosecution

HN26[] **Intentional Torts, Malicious Prosecution**

At least one California appellate court has held that a civil action for malicious prosecution will not lie while an appeal in the underlying action is pending.

Antitrust & Trade Law > Regulated Practices > Private Actions > Remedies

Civil Procedure > Remedies > Costs & Attorney Fees > Attorney Fees & Expenses

Civil Procedure > Pleading & Practice > Motion Practice

HN27[] **Private Actions, Remedies**

It is well established that antitrust plaintiffs bringing claims that previous litigation constituted unlawful anticompetitive conduct can recover the cost of their defense in that litigation as damages. Under such circumstances, attorneys' fees fall within the "substantive law exception" to *Fed. R. Civ. P. 54* because the prior litigation itself constituted prohibited conduct, and fees thus may be recovered as damages in a subsequent action.

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For OptumInsight, Inc., Defendant: J. Thomas Vitt, LEAD ATTORNEY, Shannon L Bjorklund, Dorsey & Whitney LLP, Minneapolis, MN; Forrest K Tahdooahnippah, Peter Lancaster, PRO HAC VICE, Dorsey Whitney LLP, Minneapolis, MN; Patricia Anne Welch, Dorsey & Whitney LLP, Palo Alto, CA.

Judges: JOSEPH C. SPERO, Chief United States Magistrate Judge.

Opinion by: JOSEPH C. SPERO

Opinion

ORDER GRANTING MOTION TO DISMISS WITH LEAVE TO AMEND

Re: Dkt. No. 56

I. INTRODUCTION

Plaintiff Cave Consulting Group, Inc. ("CCGroup") alleges that Defendant OptumInsight, Inc. wrongfully and in bad faith sought to enforce patents that it obtained through fraud on the United States Patent and Trademark Office ("USPTO"). CCGroup's First Amended Complaint asserts antitrust claims under the *Walker Process* and *Handgards* doctrines, a *Lanham Act* claim for false or misleading representations of patent status, and a malicious **[*2]** prosecution claim under California common law. OptumInsight moves to dismiss. The Court held a hearing on January 8, 2016, and thereafter took supplemental briefing on preclusion issues. The Court agrees with OptumInsight that CCGroup's allegations do not satisfy the pleading standard for inequitable conduct claims set forth in *Exergen Corp. v. Wal-Mart Stores, Inc., 575 F.3d 1312, 1326 (Fed. Cir. 2009)*, among other deficiencies discussed below. OptumInsight's Motion is therefore GRANTED, and the First Amended Complaint is DISMISSED with leave to amend. CCGroup may file a Second Amended Complaint no later than May 13, 2016.[1]

II. ALLEGATIONS OF THE FIRST AMENDED COMPLAINT

CCGroup's ***HN1***[] allegations are generally taken as true at the pleading stage. *Parks Sch. of Bus. v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995)*. This section summarizes the allegations but should not be construed as resolving any factual issues that might be disputed.

Both parties in this case are in the business of providing software, known as "episode of care groupers" or simply "groupers," used to group medical claims data based on discrete periods of treatment in order to better evaluate the quality and efficiency of medical care. 1st Am. Compl. ("FAC," **[*3]** dkt. 39) ¶¶ 21-28. From 2005 through 2014, only three groupers existed in the national market, including OptumInsight's "ETG" product, CCGroup's "Cave Grouper," and a product sold by non-party Truven Health Analytics, Inc., formerly known as MedStat Group, Inc. ("MedStat"). *Id.* ¶ 28. OptumInsight controlled eighty-five to ninety percent of the market during that period. *Id.* ¶ 30. OptumInsight (including its predecessors Ingenix, Inc. and Symmetry Health Data Systems Inc.) obtained its dominant market share through actual and threatened enforcement of a portfolio of patents, including two families: the "Dang Patents" and the "Seare Patents." *Id.* ¶¶ 31-33.[2]

A. Symmetry and the '897 Patent

Dennis Dang, among others, formed Symmetry Health Data Systems Inc. ("Symmetry") in 1993, and "[b]y early 1994 . . . had developed a software grouping methodology, which Symmetry began advertising for sale under the trade name 'Episode Treatment Groups' or 'ETGs.'" *Id.* ¶¶ 43-44. On June 12, 1994, Symmetry responded to a request for proposal from Aetna, **[*4]** a large insurance company, by offering to license the ETG software to Aetna and providing a description of the software, sample reports generated by the software, and pricing information. *Id.* ¶¶ 45-46. Symmetry's response constituted an offer of sale describing the invention, and therefore triggered a one-year period to file a patent application under the then-existing version of *35 U.S.C. § 102(b)*. *Id.* ¶ 47.[3]

More than one year after responding to Aetna's RFP, Symmetry filed a patent application for its grouping methodology. *Id.* ¶ 48. "When [Symmetry's patent counsel David Rosenbaum] and Dang filed the patent application, they deliberately withheld from the USPTO all of the information in their possession regarding Symmetry's early efforts to commercialize Dang's invention, including Dang's offer to sell his inventive methodology to Aetna." **[*5]** *Id.* ¶ 49. In response to that application, the USPTO issued the '897 patent in 1998. *Id.* ¶ 51. CCGroup asserts that disclosure of the offer to Aetna "would have rendered the claims of the '897 patent unpatentable," because those claims "read on Dang's grouping methodology and, by extension, the ETG grouping software Symmetry offered for sale to Aetna." *Id.* ¶¶ 50-51.

B. Symmetry-MedStat Litigation

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

[2] The Dang Patents include U.S. Patent Nos. 5,835,897; 6,370,511; 7,620,560; 7,725,333; 7,774,216; 7,979,290; 8,121,869; 8,296,165; and 8,700,433. The Seare Patents include U.S. Patent Nos. 7,222,079 and 7,774,252. This Order refers to these patents using the last three digits of each number (e.g., the '897 patent).

[3] At the time, that statute read as follows: "A person shall be entitled to a patent unless-- . . . (b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of the application for patent in the United States . . . ." *35 U.S.C. § 102* (prior to amendment in 2015).

Immediately after the '897 patent was issued, Symmetry sued MedStat for infringing that patent. *Id.* ¶ 47(2)[4] (citing *Symmetry Health Data Sys., Inc. v. The MedStat Grp. Inc.*, No. 2:98-CV-02032-EHC (D. Ariz.)). "Rosenbaum, Symmetry's patent prosecution counsel, served as litigation counsel in the MedStat litigation." *Id.* Symmetry stated in sworn interrogatory responses that Dang conceived of the invention "at least as early September 1993" and that, at that time, it was "sufficiently complete to enable one of ordinary skill in the art to reduce the claimed invention to practice." *Id.* ¶¶ 48(2)-49(2). Dang confirmed that position in sworn testimony in both the MedStat litigation and later litigation against Cave Group. *Id.* ¶ 51(2). According to Cave Group, Symmetry took the position that the invention occurred in 1993 "in order **[*6]** to predate prior art cited by MedStat," specifically a patent issued from a 1994 application by Jerry Seale. *Id.* ¶ 52(2). The MedStat litigation ultimately settled in 2000. *See id.* ¶ 56.

C. Reexamination of the '897 Patent

Earlier in 2000, before the MedStat case settled, Symmetry initiated a non-adversarial USPTO reexamination of the '897 patent and disclosed the sales offer to Aetna, in an attempt to cure the previous non-disclosure in its initial application. *Id.* ¶¶ 56-58. To avoid invalidating the patent under *§ 102(b)*, Dang, Rosenbaum, and others "worked together to contrive a story that would deceive the USPTO regarding the importance of the Aetna offer and the conception date for Dang's invention," with that plot being reflected in their contemporary communications. *Id.* ¶ 68. They "manufactured a later conception date of August 1994"—shortly after the June 1994 RFP response—"for purposes of their proceedings before the USPTO." *Id.* ¶ 61. Rosenbaum, Dang, and another Symmetry **[*7]** employee "executed sworn declarations stating that Dang's invention was not fully conceived and ready for patenting until August 1994," which CCGroup alleges is "false," and Rosenbaum submitted the declarations to the USPTO. *Id.* ¶¶ 62-64. Symmetry withheld from the USPTO the litigation materials in which Symmetry had asserted a 1993 conception date, which CCGroup alleges "were material to the patentability of the '897 patent and all of the other patents that ultimately issued from the original application for the '897 patent." *Id.* ¶ 67. By representing that the invention was conceived in 1994, the declarants "intentionally deceived the USPTO," and Symmetry was aware of their "false claims" and "deliberate non-disclosure." *Id.* ¶ 69, 72.

D. Ingenix-Symmetry Litigation

"In April of 2001, while the reexamination of the '897 patent was pending, OptumInsight (then known as Ingenix) sued Symmetry for infringement of Seare's U.S. Patent No. 6,223,164." *Id.* ¶ 73 (citing *Ingenix, Inc. v. Symmetry Health Data Systems, Inc.*, No. 0:01-cv-00704 (D. Minn.)). Rosenbaum again assisted as Symmetry's litigation counsel. *Id.* ¶ 74. OptumInsight's counsel included Peter Lancaster[5] of the Dorsey & Whitney firm, and Kevin McMahon and Steven Glazer of the Weil Gotshal **[*8]** firm. *Id.* ¶¶ 75-76.

Symmetry counterclaimed that Seare derived his invention from Dang's work. *Id.* ¶ 77. The Seare '164 patent's filing date was June 23, 1994, and Symmetry argued that Dang conceived the '897 patent in September of 1993—contradicting the position Symmetry took in the reexamination and reverting to the date it asserted in its litigation against MedStat. *Id.* ¶¶ 79-80. Symmetry disclosed dated source code to support the 1993 date, and asserted in a brief opposing summary judgment that "Mr. Dang's undisputed testimony is that he first conceived of the invention, which is now known as ETGs, in the summer of 1993." *Id.* ¶ 82 (quoting the brief) (emphasis omitted). Lancaster, McMahon, and Glazer received or knew of the source code and the brief, *id.* ¶ 83, and "were also provided with the interrogatory responses and other materials from the earlier MedStat litigation that identified September 1993 as the actual conception date for Dang's invention." *Id.* ¶ 90.

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[4] The First Amended Complaint includes two sets of paragraphs numbered 47 through 53. *See* FAC at 10-12. This Order, like OptumInsight's Motion, indicates citations to the second set of paragraphs with "(2)" after the paragraph number. *See* Mot. at 5 n.2.

[5] Lancaster also represents OptumInsight in the present action, in which he is OptumInsight's lead counsel. *See* Reply (dkt. 65) at 10.

Separate litigation between OptumInsight and Symmetry also occurred in the District of Arizona. *See id.* ¶ 93 (citing **[*9]** *Symmetry Health Data Systems, Inc. v. Ingenix, Inc.*, No. CIV 00-1411 (D. Ariz.)). Symmetry sued OptumInsight for infringing the '897 patent, and OptumInsight counterclaimed that the '897 patent was unenforceable on account of inequitable conduct. *Id.*

E. Interference Proceeding, Acquisition of Symmetry, and Subsequent Representations Regarding the Patents

In addition to its infringement lawsuit, OptumInsight also provoked a USPTO interference proceeding between the '897 Dang patent and the then-pending application for what became the '079 Seare patent, with OptumInsight asserting that Seare "first invented the episode grouping methodology claimed in those applications." *See id.* ¶ 92. OptumInsight's application for the '079 patent included, verbatim, the first claim of the '897 patent. *Id.* ¶ 94. "Through its attorneys McMahon and Glazer, OptumInsight represented to the USPTO that the ['897] Dang patent and the Seare application [resulting in the '079 patent] are directed to the same invention." *Id.*

In May of 2003, OptumInsight purchased all the outstanding stock of Symmetry, and thus acquired Symmetry's intellectual property. *Id.* ¶ 95. To resolve the interference, OptumInsight decided unilaterally that the Seare application for the '079 patent had priority **[*10]** over the '897 patent—now also owned by OptumInsight—without the issue being decided by a finder of fact. *Id.* ¶¶ 96-97. Later, in 2007, Symmetry merged into OptumInsight. *Id.* ¶ 100.

According to CCGroup, "Symmetry's corporate knowledge, including that of its agents Rosenbaum, Dang, and [co-founder Mitchell] Portnoy, was imputed to OptumInsight as the purchaser of all of Symmetry's outstanding stock." *Id.* Based on that knowledge, and OptumInsight's own knowledge obtained during litigation, CCGroup alleges that OptumInsight's and its agents' representations to the USPTO during the interference were knowingly false. *Id.* ¶¶ 99-105.

OptumInsight on multiple later occasions acknowledged to the public and a potential client "that Dang's ETG software was introduced to the market" and/or conceived in 1993, which, CCGroup alleges, contradicts the position OptumInsight took in the interference. *Id.* ¶ 98. Neither OptumInsight nor Symmetry has ever disclosed the 1993 conception date to the USPTO, including during prosecution of at least eight additional patents based on Dang's original application. *Id.* ¶¶ 107-11. CCGroup alleges that "[b]ecause all of the Dang patents rely on Dang's original application, and because **[*11]** the claims are all related, each of them is invalid and unenforceable in light of the material misrepresentations and omissions before the USPTO regarding Dang's conception date and related June 12, 1994 offer to sell the ETG software to Aetna." *Id.* ¶ 113. CCGroup also alleges that OptumInsight and its attorneys committed fraud on the USPTO by prosecuting the Seare patents, because they knew that Dang invented his methodology and software earlier, and that the USPTO would not have issued the Seare patents if OptumInsight had disclosed that prior art. *See id.* ¶¶ 114-22.

F. Minnesota OptumInsight-CCGroup Litigation

On January 11, 2011, OptumInsight filed a complaint against CCGroup in the District of Minnesota for infringement of two Seare patents and five Dang patents. *Id.* ¶ 123 (citing *Ingenix, Inc. v. Cave Consulting Grp., LLC*, No. 11-cv-00077-DWF-FLN (D. Minn.)). CCGroup alleges that OptumInsight and its attorneys, including Lancaster and Devan Padmanabhan of Dorsey & Whitney, knew that both patent families were invalid and unenforceable due to inequitable conduct. *Id.* ¶¶ 125-30.

OptumInsight did not serve the complaint on CCGroup, and ultimately dismissed the Minnesota lawsuit without **[*12]** prejudice on June 20, 2011. *Id.* ¶ 131. CCGroup nevertheless "received numerous inquiries from customers and potential customers regarding OptumInsight's allegations of infringement." *Id.* ¶ 134. CCGroup asked OptumInsight to dismiss its claims with prejudice "to ensure that OptumInsight's public allegations . . . would not tarnish CCGroup's reputation and ability to compete in the marketplace, but OptumInsight refused. *Id.* ¶¶ 132-33.

G. Declaratory Judgment Action

"To clear the pall that OptumInsight's allegations had cast over CCGroup's business, on July 11, 2011, CCGroup filed a declaratory judgment action in the Northern District of California to resolve OptumInsight's infringement claims." *Id.* ¶ 135 (citing *Cave Consulting Grp., Inc. v. OptumInsight, Inc.*, No. 5:11-cv-00469-EJD (N.D. Cal.) (hereinafter, "*Cave I*")).[6] OptumInsight, again represented by Dorsey & Whitney attorneys including Lancaster and Padmanabhan, filed counterclaims asserting that CCGroup infringed the patents at issue in the Minnesota complaint, as well as an additional Dang patent issued in the intervening period. *Id.* ¶¶ 136-37. Based on information obtained from earlier litigation, "Padmanabhan, Lancaster, OptumInsight, **[*13]** and Dorsey & Whitney knew before those counterclaims were filed that the Dang and Seare patents are invalid and unenforceable." *Id.* ¶ 138.

The *Cave I* litigation continued for three years, and required CCGroup "to undertake a costly claim construction, extensive fact discovery, and an in-depth review of the asserted patents and prior art." *Id.* ¶ 140. "Two years into the litigation . . . OptumInsight . . . produc[ed] over 25,000 pages of confidential documents from its prior litigations involving the Dang and Seare patent portfolios." *Id.* ¶ 146. Those documents form the basis for CCGroup's allegations summarized above regarding OptumInsight's alleged inequitable conduct, and CCGroup filed a second amended complaint in *Cave I* asserting that the Dang patents were invalid and unenforceable due to that conduct. *See id.* ¶¶ 147-50. Nearly one **[*14]** year later, OptumInsight dismissed its counterclaims based on the Dang patent family, although it continued to assert infringement of the Seare patents. *Id.* ¶¶ 152-53.

Judge Davila granted partial summary judgment for OptumInsight, holding that Symmetry's response to Aetna's RFP in 1994 was not prior invalidating art as to the Seare patents because it was not made public. *Cave I, 2015 U.S. Dist. LEXIS 21514, 2015 WL 740379, at *13 (N.D. Cal. Feb. 20, 2015)*. He declined to grant summary judgment for either party on other issues relating to the validity of the Seare patents because material facts remained disputed. *2015 U.S. Dist. LEXIS 21514, [WL] at *12-14*. There is no indication that CCGroup made any argument in *Cave I* regarding inequitable conduct related to the Seare patents.

OptumInsight withdrew the '252 Seare patent "[o]n the eve of trial." FAC ¶ 154. At trial, a jury determined that CCGroup did not infringe the remaining '079 Seare patent. *Id.* ¶ 157. Post-trial motions remain pending as of the date of this Order. *See* *Cave I* dkts. 379, 383.

H. Alleged Damages and Claims

CCGroup alleges that "OptumInsight's fraud on the USPTO, and its resulting possession and baseless assertion of the Dang and Seare patent families, has enabled OptumInsight to acquire and maintain monopoly power or, in the alternative, created **[*15]** a dangerous probability of OptumInsight obtaining monopoly power, in the Grouper Software Market." FAC ¶ 160. Since CCGroup introduced its competing software in 2005, it has lost customers due to the perceived strength of OptumInsight's patents, and has incurred litigation expenses as a result of OptumInsight's efforts to enforce the patents through alleged sham litigation. *See id.* ¶¶ 163, 165, 167.

The First Amended Complaint includes four claims. First, under the doctrine of *Walker Process Equipment Inc. v. Food Machinery and Chemical Corporation, 382 U.S. 172, 86 S. Ct. 347, 15 L. Ed. 2d 247 (1965)*, CCGroup alleges that OptumInsight violated *Section 2* of the Sherman Act by monopolizing or attempting to monopolize the market

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[6] The Court takes judicial notice that Cave Consulting initially filed a claim in January of 2011 alleging that OptumInsight infringed a patent owned Cave Consulting, and filed an amended complaint in July adding claims for declaratory judgment of non-infringement and invalidity of OptumInsight's patents. *See Cave I* dkts. 1 (Complaint), 23 (First Amended Complaint).

for grouper software through fraud on the USPTO in connection with prosecution of the Dang and Seare patents. FAC ¶¶ 179-85. Second, under the doctrine of *Handgards v. Ethicon, 601 F.2d 986 (9th Cir. 1979)*, CCGroup alleges that OptumInsight monopolized or attempted to monopolize the market through bad faith use of sham litigation to enforce Dang and Seare patents that OptumInsight knew were invalid or unenforceable. FAC ¶¶ 186-92. Third, CCGroup asserts that OptumInsight violated the *Lanham Act*, *15 U.S.C. § 1125(a)(1)(B)*, through false or misleading statements that its ETG software was "patented" or covered by specific Dang patents, despite OptumInsight's alleged knowledge **[*16]** that the patents were not enforceable. FAC ¶¶ 193-200. Finally, CCGroup brings a malicious prosecution claim under California law, asserting that OptumInsight acted without probable cause in bringing infringement counterclaims in the *Cave I* action when it allegedly knew that the patents at issue were invalid and unenforceable. *Id. ¶¶ 201-09*.

III. ANALYSIS

A. Legal Standard

HN2[] A complaint may be dismissed for failure to state a claim on which relief can be granted under *Rule 12(b)(6) of the Federal Rules of Civil Procedure*. "The purpose of a motion to dismiss under *Rule 12(b)(6)* is to test the legal sufficiency of the complaint." *N. Star Int'l v. Ariz. Corp. Comm'n, 720 F.2d 578, 581 (9th Cir. 1983)*. Generally, a plaintiff's burden at the pleading stage is relatively light. *Rule 8(a) of the Federal Rules of Civil Procedure* states that "[a] pleading which sets forth a claim for relief . . . shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief." *Fed. R. Civ. P. 8(a)*.

HN3[] In ruling on a motion to dismiss under *Rule 12(b)(6)*, the court analyzes the complaint and takes "all allegations of material fact as true and construe[s] them in the light most favorable to the non-moving party." *Parks Sch. of Bus. v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995)*. Dismissal may be based on a lack of a cognizable legal theory or on the absence of facts that would support a valid theory. *Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990)*. A complaint must "contain either direct or inferential allegations **[*17]** respecting all the material elements necessary to sustain recovery under some viable legal theory." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 562, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (citing *Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (7th Cir. 1984))*. "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Twombly, 550 U.S. at 555*). "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id.* (quoting *Twombly, 550 U.S. at 557*). Rather, the claim must be "'plausible on its face,'" meaning that the plaintiff must plead sufficient factual allegations to "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (quoting *Twombly, 550 U.S. at 570*).

HN4[] *Rule 9(b) of the Federal Rules of Civil Procedure* sets a heightened pleading standard for claims based on fraud. "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." *Fed. R. Civ. P. 9(b)*. The Ninth Circuit has held that in order to meet this standard, a "complaint must specify such facts as the times, dates, places, benefits received, and other details of the alleged fraudulent activity." *Neubronner v. Milken, 6 F.3d 666, 672 (9th Cir. 1993)*; *see also* *McMaster v. United States, 731 F.3d 881, 897 (9th Cir. 2013)*. The Federal Circuit has similarly held that "in pleading inequitable conduct in patent cases, *Rule 9(b)* requires identification of the specific who, what, when, where, and how of the material misrepresentation **[*18]** or omission committed before the PTO." *Exergen Corp. v. Wal-Mart Stores, Inc., 575 F.3d 1312, 1326 (Fed. Cir. 2009)*. The heightened standard does not apply to "[m]alice, intent, knowledge, and other conditions of a person's mind." *Fed.R.Civ.P. 9(b)*.

B. Effect of Non-Invalidity Determination in *Cave I*

One preliminary issue is whether CCGroup is precluded from asserting invalidity of the Seare patents based on its failure to successfully do so in the *Cave I* litigation. OptumInsight asserts that, in that litigation, "OptumInsight won the validity issue; Cave lost." Mot. at 27. CCGroup responds that inequitable conduct as to the Seare patents "has never been litigated by the parties." Opp'n at 29.

In its Motion and Reply, OptumInsight appears to make three distinct arguments: (1) that the doctrine of claim preclusion applies to defenses that CCGroup raised or could have raised in *Cave I*; (2) that the doctrine of issue preclusion applies to Judge Davila's determination that the Aetna RFP response does not constitute invalidating prior art; and (3) that regardless of formal preclusion doctrines, "[c]laims and issue on which OptumInsight *actually* achieved success cannot possibly be claims as to which no 'reasonable litigant could realistically expect success.'" *See* Reply at 14-17 (citation omitted); **[*19]** *see also* Mot. at 25-27.

Because OptumInsight's clearest articulation of its arguments was in its Reply, and the parties' briefing of these issues was therefore not as thorough as it might have been, the Court ordered the parties to file simultaneous supplemental briefs after the hearing to address questions of preclusion in more detail. OptumInsight's supplemental brief argues that: (1) "merger and claim-splitting" doctrines, also known as claim preclusion, bar CCGroup's antitrust claims, Def.'s Supp'l Br. (dkt. 73) at 4-9; (2) the doctrine of compulsory counterclaims bars the claims, *id.* At 9-15; (3) issue preclusion applies, *id.* at 15-16; and (4) OptumInsight "need not prove claim or issue preclusion to establish that [CCGroup's] antitrust claims lack merit, because [CCGroup's] burden in this antitrust case is far heavier than the burden of showing that it was entitled to win in *Cave I*," *id.* at 16. CCGroup contends that issue preclusion does not apply because: (1) Judge Davila's non-invalidity ruling was not necessary to the ultimate judgment of non-infringement, Pl.'s Supp'l Br. (dkt. 74) at 5-7; (2) the inquiry in *Cave I* concerned a different issue with a higher burden of proof, *id.* at 7-11; (3) CCGroup neither had **[*20]** nor will have any practical opportunity for appellate review of Judge Davila's non-invalidity decision, *id.* at 11-12; and (4) giving preclusive effect to that decision would be inequitable because Judge Davila applied an incorrect legal standard, *id.* at 12-14. CCGroup also argues that claim preclusion does not apply because the Supreme Court and Ninth Circuit have held that antitrust claims are not compulsory counterclaims in infringement cases. *Id.* at 14-15 (citing *Mercoid v. Mid-Continent Inv. Co., 320 U.S. 661, 671, 64 S. Ct. 268, 88 L. Ed. 376, 1944 Dec. Comm'r Pat. 641 (1944)*; *Hydranautics v. FilmTec Corp., 70 F.3d 533, 536 (9th Cir. 1995))*.

1. Claim Preclusion

HN5[] "The general concept of claim preclusion [also known as res judicata] is that when a final judgment is rendered on the merits, another action may not be maintained between the parties on the same 'claim,' and defenses that were raised or could have been raised in that action are extinguished." *Hallco Mfg. Co. v. Foster, 256 F.3d 1290, 1295 (Fed. Cir. 2001)* (citing *Restatement (Second) of Judgments §§ 18-19*).[7] "Claim preclusion requires (1) an identity of parties or their privies, (2) a final[8] judgment on the merits of the first suit, and (3) the later claim to be based on the same set of transactional facts as the first claim such that the later claim should have been litigated in the prior case." *Bowers Inv. Co., LLC v. United States, 695 F.3d 1380, 1384 (Fed. Cir. 2012)*.

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[7] ***HN6***[] Where a "claim preclusion issue is particular to patent law, [courts] analyze it under applicable Federal Circuit law." ***Hallco, 256 F.3d at 1294***.

[8] ***HN7***[] As to both claim preclusion **[*21]** and issue preclusion, "the law is well settled that the pendency of an appeal has no affect [sic] on the finality or binding effect of a trial court's holding." *SSIH Equip. S.A. v. U.S. Int'l Trade Comm'n, 718 F.2d 365, 370 (Fed. Cir. 1983)* (citing *Deposit Bank v. Frankfort, 191 U.S. 499, 24 S. Ct. 154, 48 L. Ed. 276 (1903)*; 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4433 (1981)); *see also, e.g., Pharmacia & Upjohn Co. v. Mylan Pharms., Inc., 170 F.3d 1373, 1381 (Fed. Cir. 1999)*; *Cygnus Telecoms. Tech., LLC v. Am. Int'l Telephonics, LLC, 569 F. Supp. 2d 1035, 1038 (N.D. Cal. 2008)*. The Court applies the same rule to the pending post-trial motions in *Cave I* and holds that the judgment in that case is sufficiently final for the purposes of either preclusion doctrine.

HN8[] This doctrine requires a close identity of *claims*. The Federal Circuit has held, for example, that where a prior judgment established "both that [a] patent was valid and that [a party] infringed," claim preclusion does not bar an invalidity defense when the same party is later sued for infringing the same patent with a different device unless the second allegedly infringing device is "essentially the same" as the earlier device found to infringe. *See Hallco, 256 F.3d at 1295-96* (summarizing *Foster v. Hallco Mfg. Co., 947 F.2d 469 (Fed. Cir. 1991))*. Even if the invalidity defense would rest on the same basic facts in the second case as in the first, the defense is not precluded under this doctrine if the *claims* are not substantially the same. "While defenses to a 'claim' are extinguished by application of the doctrine **[*22]** of claim preclusion, the facts related to the defense do not in themselves constitute the transaction or 'claim.'" *Foster, 947 F.2d at 479*.

While there is overlap on some issues, all of CCGroup's claims in this case—two antitrust claims, a false advertising claim, and a malicious prosecution claim—rely on key alleged facts that fall outside the scope of the claims in *Cave I*, such as OptumInsight's market dominance and its alleged efforts to enforce and advertise its patents. The cases cited in OptumInsight's Reply and supplemental brief do not fit the facts of this case. *See, e.g., Cummins, Inc. v. TAS Distrib. Co., Inc., 700 F.3d 1329, 1336 (Fed. Cir. 2012)* (applying principles of Illinois res judicata law not applicable to the present case, which has no connection to Illinois); *Roche Palo Alto LLC v. Apotex, Inc., 531 F.3d 1372, 1380 (Fed. Cir. 2008)* (applying claim preclusion in a second suit asserting infringement of the same patent by "essentially the same" product as in a previous infringement suit); *Crystal Imp. Corp. v. AVID Identification Sys., Inc., 582 F. Supp. 2d 1166 (D. Minn. 2008)* (holding that claim preclusion barred the second of two antitrust actions, with no suggestion that an earlier infringement action barred either of the antitrust actions). The Court concludes that claim preclusion does not apply here.

2. Compulsory Counterclaims

Although related to the doctrine of claim preclusion, OptumInsight distinctly raises for the **[*23]** first time in its supplemental brief the argument that CCGroup's present claims were compulsory counterclaims in *Cave I*. Def.'s Supp'l Br. at 9-15. **HN9**[] Generally speaking, a counterclaim is compulsory if it "(A) arises out of the transaction or occurrence that is the subject matter of the opposing party's claim; and (B) does not require adding another party over whom the court cannot acquire jurisdiction," subject to certain exceptions. *Fed. R. Civ. P. 13(a)*. "A counterclaim which is compulsory but is not brought is thereafter barred." *Baker v. Gold Seal Liquors, Inc., 417 U.S. 467, 469 n.1, 94 S. Ct. 2504, 41 L. Ed. 2d 243 (1974)*. The issue is complicated by the Supreme Court's decision in *Mercoid v. Mid-Continent Investment Company, 320 U.S. 661, 64 S. Ct. 268, 88 L. Ed. 376, 1944 Dec. Comm'r Pat. 641 (1944)*, which some courts (including the Ninth Circuit) have construed as holding that antitrust claims are not compulsory counterclaims in patent cases, while other courts have disagreed.

OptumInsight incorrectly asserts that "the Federal Circuit has noted, 'the majority of courts . . . have held that antitrust claims are compulsory counterclaims.'" *Id.* at 9 (quoting *Nobelpharma AB v. Implant Innovations, Inc., 141 F.3d 1059, 1067 n.4 (Fed. Cir. 1998)* (en banc)) (ellipsis in original). OptumInsight is correct that the quoted language appears in the Federal Circuit's opinion, and OptumInsight accurately notes that that the Circuit quotes a district court decision for that language. *See id.* What OptumInsight omits, **[*24]** however, is that the language at issue appears in a parenthetical phrase in a "*compare . . . with*" citation string intended to illustrate a split of authority. *See Nobelpharma, 141 F.3d at 1067 n.4*. The Federal Circuit itself noted only that antitrust claims based on patent prosecution are "*typically* raised as a counterclaim," *id. at 1067* (emphasis added)—but whether such counterclaims are compulsory was not before the court, and the footnote now quoted by OptumInsight references not only the Northern District of Illinois decision[9] that found treating antitrust counterclaims as compulsory to be the majority position, but also decisions of the Fifth and Ninth Circuits that reached the opposite result. The Federal Circuit's footnote reads, in full, as follows:

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[9] *USM Corp. v. SPS Techs., Inc., 102 F.R.D. 167, 169-70 (N.D. Ill. 1984)*.

> *Compare Tank Insulation Int'l, Inc. v. Insultherm, Inc., 104 F.3d 83, 88 & n. 5, 41 USPQ2d 1545, 1549 & n. 5 (5th Cir.), cert. denied, [522] U.S. [907], 118 S.Ct. 265, 139 L.Ed.2d 191 (1997), and Hydranautics v. FilmTec Corp., 70 F.3d 533, 536-37, 36 USPQ2d 1773, 1775 (9th Cir.1995)* ("A claim that patent infringement litigation violated an antitrust statute is a permissive, not a mandatory, counterclaim in a patent infringement case, and is not barred in a subsequent suit by failure to raise it in the infringement suit." (citing *Mercoid Corp. v. Mid-Continent Inv. Co., 320 U.S. 661, 669-71, 64 S.Ct. 268, 273-74, 88 L.Ed. 376, 1944 Dec. Comm'r Pat. 641, 60 USPQ 21, 26-27 (1944))) with Burlington Indus., Inc. v. Milliken & Co., 690 F.2d 380, 389, 217 USPQ 662, 668 (4th Cir.1982)* (stating that *Mercoid* "has been read narrowly in this respect, and its continuing validity is open to serious question." (citing *United States v. Eastport S.S. Corp., 255 F.2d 795, 805 (2d Cir.1958)*; *Martino v. McDonald's Sys., Inc., 432 F.Supp. 499, 505 (N.D.Ill.1977)*, *aff'd*, *598 F.2d 1079 (7th Cir.1979)))*, *and USM Corp. v. SPS Techs., Inc., 102 F.R.D. 167, 170-71, 225 USPQ 715, 717 (N.D.Ill.1984)* ("Notwithstanding **[*25]** *Mercoid*, **the majority of courts**, when faced with this issue, **have held that antitrust claims are compulsory counterclaims** under *Rule 13(a)* if the antitrust claim arises out of the same transaction or occurrence as the original claim. The Seventh Circuit has expressly refused to decide the issue." (citations omitted)).

Nobelpharma, 141 F.3d at 1067 n.4 (bold emphasis added to designate the portion quoted in OptumInsight's brief). It is not accurate to suggest that the Federal Circuit took a position one way or the other on whether OptumInsight's preferred treatment of these claims is the majority view.

HN10[] The Federal Circuit has in fact suggested that whether a claim was a compulsory counterclaim in a previous action is an issue of regional circuit law. *Genentech, Inc. v. Regents of the Univ. of Cal., 143 F.3d 1446, 1456 (Fed. Cir. 1998)* (applying Seventh Circuit law), *vacated on other grounds*, *527 U.S. 1031, 119 S. Ct. 2388, 144 L. Ed. 2d 789 (1991)*; *see also* Def.'s Supp'l Br. at 13 (discussing *Genentech)*. Accordingly, Ninth Circuit precedent applies to the case at hand. The Ninth Circuit—as noted in the *Nobelpharma* footnote set forth above—has held that a "claim that patent infringement litigation violated an antitrust statute is a permissive, not a mandatory, counterclaim in a patent infringement case, and is not barred in a subsequent suit by failure to raise it **[*26]** in the infringement suit." *Hydranautics, 70 F.3d at 536-37* (citing *Mercoid, 320 U.S. at 671*).

Although OptumInsight attempts to distinguish *Hydranautics* on its facts, Def.'s Supp'l Br. at 11, the rule in that case could not have been stated more clearly. *See also Destiny Tool v. SGS Tools Co., 344 F. App'x 320, 323 (9th Cir. 2009)* (***HN11***[] "The Fifth and Ninth Circuits have strictly followed *Mercoid* in refusing to hold *any antitrust claim* compulsory in the underlying patent infringement lawsuit." (emphasis added)). The only case that OptumInsight cites that was decided after *Hydranautics* within the Ninth Circuit was not a patent case, and held only that *Hydranautics* should not be extended outside the realm of patent law. *MGA Entm't, Inc. v. Mattel, Inc., No. SACV 11-01063 DOC (RNBx), 2012 U.S. Dist. LEXIS 22055, 2012 WL 569389, at *17-18 (C D. Cal. Feb. 21, 2012)*. As this Court is bound by Ninth Circuit precedent on the issue,[10] the Court holds that CCGroup's antitrust claims were not compulsory counterclaims to OptumInsight's infringement claims in *Cave I*.

3. Issue Preclusion

HN12[] "The doctrine of issue preclusion prevents relitigation of all 'issues of fact or law that were actually litigated and *necessarily* decided' in a prior proceeding.'" *Robi v. Five Platters, Inc., 838 F.2d 318, 322 (9th Cir.*

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[10] OptumInsight has cited no authority for the proposition that the determination of compulsory counterclaims is a matter of uniform Federal Circuit law, nor any decision in which the Federal Circuit actually decided the significance of the Supreme Court's *Mercoid* decision. OptumInsight suggests that the Ninth Circuit's approach in *Hydranautics* creates a special **[*27]** rule for patent cases, which would then bring the issue within the Federal Circuit's realm of authority. That approach would not change the outcome. If the question is one of Federal Circuit law, the Federal Circuit has not set forth a clear rule, and the Court finds the Ninth Circuit's interpretation of *Mercoid* persuasive absent more recent Supreme Court precedent altering the rule set forth in that case. The Court acknowledges, however, that there is a split of authority on the issue. *See* Def.'s Supp'l Br. at 13-14 (collecting cases from outside the Ninth Circuit holding that antitrust claims are or can be compulsory counterclaims in infringement actions).

1988) (emphasis added; citation omitted); *see also* Reply at 16 (quoting *Robi)*. Or, as phrased in the Restatement of Judgment, the doctrine applies "[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, *and the determination is essential to the judgment*." Restatement (Second) of Judgments § 27 (emphasis added).

The judgment in *Cave I* reads as follows:

> The **[*28]** issues in this action having been tried and the jury having rendered a verdict in favor of Plaintiff and against Defendant (Docket Item No. 366);
> IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment is entered in favor of Plaintiff. The Clerk shall close this file.

Cave I dkt. 370 (April 6, 2015). The jury's verdict form indicates that judgment was entered on the basis that OptumInsight infringed CCGroup's patent and CCGroup did not infringe OptumInsight's '079 patent. *Cave I* dkt. 366 (April 3, 2015).

There is no question that at least one question of the Seare patents' validity—whether the Aetna RFP response constituted invalidating prior art—was "actually litigated and determined" in *Cave I* by OptumInsight's motion for summary judgment and Judge Davila's order granting that motion. *See* *Cave I, 2015 U.S. Dist. LEXIS 21514, 2015 WL 740379, at *12-13*. That determination was not, however, necessary to the judgment, which was in CCGroup's favor because the jury determined that CCGroup did not infringe the only remaining Seare patent. A hypothetical illustration in an official comment to the Restatement is directly on point:

> ***HN13***[] A, as owner of a trademark, brings an action against B for infringement. B denies the validity of the trademark and denies infringement. **[*29]** The court finds that the trademark is valid, but that B had not infringed it, and gives judgment for B. Thereafter A brings an action against B alleging that since the rendition of the judgment B infringed the trademark. B is not precluded from defending this action on the ground that the trademark is invalid.

Restatement (Second) of Judgments § 27, comment h, illustration 14. One court has cited this example approvingly in the context of both trademark and patent infringement cases, although it reached the opposite result because, unlike in this case and the Restatement example, the same party had prevailed on both issues. *See* *Zip Dee, Inc. v. Dometic Corp., 905 F. Supp. 535, 538 (N.D. Ill. 1995)*. The Federal Circuit has similarly held in a case where it upheld a non-infringement verdict that "the district court's resolution of the issue of invalidity was not necessary to the judgment," and "[fjor that reason, the court's invalidity ruling will have no collateral estoppel effect in any possible future dispute between the parties." *Hill-Rom Co. v. Kinetic Concepts, Inc., 209 F.3d 1337, 1344 (Fed. Cir. 2000)*.[11]

Because the jury found no infringement, CCGroup—like "B" in the comment illustration—is not barred from litigating the issue of the Seare patents' invalidity. The Court need not determine the extent to which CCGroup's present assertion that the Seare patents were obtained through inequitable conduct overlaps with Judge Davila's decision regarding the Aetna RFP response, because that decision was ultimately not necessary to the judgment and thus lacks preclusive effect.[12]

[11] OptumInsight attempts to distinguish the trademark law at issue in the Restatement example from the patent law at issue here, but does not address *Zip Dee* or *Hill-Rom*, both of which involved patent claims. *See* Def.'s Supp'l Br. at 15. Moreover, the distinctions OptumInsight identifies between **[*30]** the two areas of law have no bearing on whether the non-invalidity of a patent is essential to a judgment of non-infringement.

[12] OptumInsight seeks to reserve its right to raise an issue preclusion defense if the non-infringement verdict in *Cave I* is altered as a result of post-judgment motions or an appeal. Def.'s Supp'l Br. at 16. The Court expresses no opinion on the potential effect of such a contingency at this time.

OptumInsight suggests for the first time in its supplemental brief that the determination was in fact relevant to the judgment, because CCGroup's prayer for relief in *Cave I* sought declarations of invalidity, and CCGroup received no such declaration in the judgment. Def.'s Supp'l Br. at 15-16. The judgment **[*31]** actually entered, however, is simply "in favor of Plaintiff'—CCGroup—with no reference to CCGroup's failure to prevail on its invalidity argument. *See Cave I* dkt. 370. OptumInsight cites no authority for the proposition that *Hill-Rom* and the Restatement example above do not apply if the non-infringing party's prayer for relief sought a declaration of invalidity. Because the judgment in *Cave I* includes no reference to the request for declaratory relief, the Court is not persuaded that the inclusion of that request in CCGroup's *Cave I* complaint alters the analysis above.

4. Reasonable Litigant Standard

As discussed in more detail below, certain claims in this case may require CCGroup to prove that "no reasonable litigant could realistically expect success on the merits." *See Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 60, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993)* (hereinafter, "PRE"). OptumInsight asserts that it need not establish any formal preclusion doctrine as to those claims, because the very fact that it litigated the '079 patent to trial without that patent being found invalid demonstrates the reasonableness of the claim.[13] This argument has appeal—if, as CCGroup now alleges, the inequitable conduct underlying the Seare patents was so clear that OptumInsight's attorneys must have **[*32]** known they could not succeed, it is odd that CCGroup would have declined to vigorously raise that argument in *Cave I*. Absent any formal preclusion doctrine, however, CCGroup was not required to do so. The Court cannot assume that the judge and jury in *Cave I* were made aware of all the facts OptumInsight's lawyers allegedly knew when they filed their infringement claims, and thus cannot now conclude at the pleading stage that OptumInsight's decision to bring those claims was reasonable as a matter of law. The Court declines to speculate as to CCGroup's litigation tactics in the previous case. *See Twombly, 550 U.S. at 556* ***HN14***[] ("[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." (citation and internal quotation marks omitted)).

* * *

Because the Court does not find that CCGroup's failure to demonstrate invalidity of the Seare patents in *Cave I* ***[*33]*** has any preclusive effect—whether through claim preclusion, through the compulsory counterclaim doctrine, through issue preclusion, or as an inherent bar to meeting PRE's "no reasonable litigant" standard—the Court does not reach the parties' arguments as to whether one or two definitively non-frivolous counterclaims in *Cave I* (according to OptumInsight, counterclaims based on the Seare patents) would bar CCGroup from recovery based on other allegedly unreasonable counterclaims (i.e., those based on the Dang patents). *See* Mot. at 25-27.

C. *Walker Process* and *Handgards* Claims

HN15[] In 1965, the Supreme Court held in *Walker Process* that a patent obtained through fraud on the Patent Office can provide a basis for claims under the *Sherman Act*. *See generally Walker Process, 382 U.S. 172, 86 S. Ct. 347, 15 L. Ed. 2d 247*. The Federal Circuit more recently and succinctly summarized the standard for such a claim:

> *Walker Process* set forth two conditions for antitrust liability based on the fraudulent procurement of a patent. First, the plaintiff must show that the defendant procured the relevant patent by knowing and willful fraud on the PTO or (in the case of an assignee) that the defendant maintained and enforced the patent with knowledge of the fraudulent **[*34]** manner in which it was obtained. Second, the plaintiff must prove all the elements

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[13] CCGroup's sham litigation argument is based solely on the validity and enforceability of OptumInsight's patents. CCGroup does not argue that, if the patents are valid and enforceable, OptumInsight could not make a good faith argument that CCGroup infringed the '079 patent.

> otherwise necessary to establish a *Sherman Act* monopolization charge. *Walker Process, 382 U.S. at 174, 176-77, 86 S. Ct. 347*; see also *id. at 179, 86 S. Ct. 347* (Harlan, J., concurring). With the first condition, the Court made clear that the invalidity of the patent was not sufficient; a showing of intentional fraud in its procurement was required. *Id. at 176-77, 86 S. Ct. 347*; *id. at 179, 86 S. Ct. 347* (Harlan, J., concurring). With the second condition, the Court incorporated the rules of ***antitrust law*** generally. As Justice Harlan stated in his concurring opinion, "as to this class of improper patent monopolies, antitrust remedies should be allowed room for full play." *Id. at 180, 86 S. Ct. 347* (Harlan, J., concurring).

Ritz Camera & Image, LLC v. SanDisk Corp., 700 F.3d 503, 506 (Fed. Cir. 2012).

The Ninth Circuit recognized a related basis for liability in *Handgards, 601 F.2d 986*. *Handgards* itself was "not a *Walker Process* case" because the plaintiff did "not contend that [the defendant] sought to enforce a fraudulently-procured patent," and instead argued that the defendant "prosecuted infringement actions in bad faith, that is, with knowledge that the patents, though lawfully-obtained, were invalid." *Id. at 994*. ***HN16***[] Inspired by *Walker Process*, the Ninth Circuit held that a plaintiff could pursue antitrust remedies for bad faith infringement actions—even if not **[*35]** based on fraud on the patent office—so long as the jury is "instructed that a patentee's infringement suit is presumptively in good faith and that this presumption can be rebutted only by clear and convincing evidence." *Id. at 996*.

As illustrated in *Handgards* itself, not all *Handgards* claims are also *Walker Process* claims: a *Handgards* claim can be based on bad faith litigation to enforce a patent known to be invalid for reasons other than fraud on the USPTO. Conversely, not all *Walker Process* claims arise from bad faith litigation: "enforcement actions are not a sine qua non of monopolizing by patent fraud." *Brunswick Corp. v. Riegel Textile Corp., 752 F.2d 261, 265 (7th Cir. 1984)*. Here, however, both parties' arguments address only a theory of monopolization through infringement actions brought in bad faith because OptumInsight allegedly knew that its patents were fraudulently obtained—thus basing both claims on the same operative facts. *See generally* Mot.; Opp'n; Reply. The Court follows the parties' lead and consolidates the two tests for the purpose of the present motion.

As discussed below, the Court holds that CCGroup's First Amended Complaint fails to adequately plead the specific claims of the patents at issue that are implicated by the alleged misconduct. **[*36]** Because it is possible for that defect to be cured by amendment, the Court DISMISSES both of CCGroup's antitrust claims with leave to amend.

1. Inequitable Conduct

HN17[] The heightened pleading standard of *Rule 9(b)* applies to allegations of inequitable conduct, and Federal Circuit law governs "the question of whether inequitable conduct has been pleaded with particularity under *Rule 9(b)*." *Exergen, 575 F.3d at 1326*. "[I]n pleading inequitable conduct in patent cases, *Rule 9(b)* requires identification of the specific who, what, when, where, and how of the material misrepresentation or omission committed before the PTO," rather than "simply aver[] the substantive elements of inequitable conduct." *Id. at 1326-27*. Those elements are that an individual associated with prosecuting a patent application (1) "made an affirmative misrepresentation of a material fact, failed to disclose material information, or submitted false material information; and (2) . . . did so with a specific intent to deceive the PTO." *Id. at 1327 n.3*.[14]

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[14] The Federal Circuit previously held that "inequitable conduct is a broader, more inclusive concept than the common law fraud needed to support a *Walker Process* counterclaim." *Nobelpharma AB v. Implant Innovations, Inc., 141 F.3d 1059, 1069 (Fed. Cir. 1998)*. Since then, the Federal Circuit has narrowed if not closed the gap between basic inequitable **[*37]** conduct and *Walker Process* fraud, by setting forth a stringent pleading standard for inequitable conduct in *Exergen* and a stringent standard for success on the merits in *Therasense, Inc. v. Becton, Dickinson & Co., 649 F.3d 1276 (Fed. Cir. 2011)* (en banc). Both parties appear to agree that *Exergen* and *Therasense* govern CCGroup's *Walker Process* claim. *See* Mot. at 16-17; Opp'n at 9-11. For the purpose of this Order, the Court assumes without deciding that *Exergen* and *Therasense* have effectively harmonized the standards for *Walker Process* fraud and other assertions of inequitable conduct. *See* *Cornucopia Prods., LLC v. Dyson, Inc., 881 F. Supp. 2d 1086, 1099 n.4 (D. Ariz. 2012)* ("*Therasense*, however, raised inequitable conduct to match the standard for Walker

"Moreover, **HN18**[] although 'knowledge' and 'intent' may be averred generally, a pleading of inequitable conduct under *Rule 9(b)* must include sufficient allegations of underlying facts from which a court may reasonably infer that a specific individual (1) knew of the withheld material information or of the falsity of the material misrepresentation, and (2) withheld or misrepresented **[*38]** this information with a specific intent to deceive the PTO." *Id. at 1328-29*. "A reasonable inference is one that is plausible and that flows logically from the facts alleged, including any objective indications of candor and good faith." *Id. at 1329 n.5*. At the pleading stage, it need *not* be "the *single most reasonable* inference able to be drawn"—unlike on the merits, where a "clear and convincing evidence" standard applies to inequitable conduct claims. *Id.* (citation and internal quotation marks omitted).

OptumInsight's Motion erroneously relies a "most reasonable inference" standard for intent to deceive the USPTO, based on the Federal Circuit's decision in *Therasense*. Mot. at 16. **HN19**[] In context, however, that standard applies to evaluating "indirect and circumstantial *evidence*' of deception—i.e., a judgment on the merits. *Therasense, Inc. v. Becton, Dickinson & Co., 649 F.3d 1276, 1290 (Fed. Cir. 2011)* (en banc) (emphasis added) (considering an appeal from a bench trial). "Although *Therasense* raised the bar for proving inequitable conduct on the merits, it did not change the *[Exergen]* standard for pleading inequitable conduct." *Nalco Co. v. Turner Designs, Inc., No. 13-CV-02727 NC, 2014 U.S. Dist. LEXIS 21362, 2014 WL 645365, at *3 (N.D. Cal. Feb. 19, 2014)* (citing, *e.g.*, *Delano Farms Co. v. Cal. Table Grape Comm 'n, 655 F.3d 1337, 1350 (Fed. Cir. 2011))*.

The only challenge that OptumInsight brings regarding CCGroup's *Rule 9(b)* "who, what, when, where, and how" pleading is that CCGroup has failed to allege which **[*39]** specific claims and limitations of the '897 patent were unpatentable due to having allegedly been conceived before the offer to sell to Aetna. *See* Mot. at 23. In *Exergen*, the Federal Circuit held insufficient a pleading which "fails to identify which claims, and which limitations in those claims, the withheld references are relevant to, and where in those references the material information is found—i.e., the "what" and "where" of the material omissions." *Exergen, 575 F.3d at 1329*. CCGroup's First Amended Complaint includes broad allegations that disclosing the RFP response during the initial application "would have rendered the claims of the '897 patent unpatentable," and that materials withheld during the reexamination "were material to the patentability of the '897 patent and all of the other patents that ultimately issued from the original application for the '897 patent." FAC ¶¶ 50-51, 67. Other than the conclusory assertion that "the claims are all related" and therefore all unenforceable, *see id.* ¶ 113, the First Amended Complaint does not specify which claims were implicated by the various materials withheld from the USPTO during the application, reexamination, and/or interference proceedings. CCGroup's Opposition lists a number of specific **[*40]** claims for several of the documents at issue, Opp'n at 12, but assertions in a brief cannot replace necessary allegations absent from pleading.[15] The Court therefore DISMISSES CCGroup's *Walker Process* and *Handgards* claims with leave to amend.

OptumInsight also argues that CCGroup has not adequately alleged intent to deceive the USPTO regarding the '897 patent because such intent is not the "single most reasonable inference" arising from the allegations. **[*41]** Mot. at 24. As previously discussed, that is not the correct standard at the pleading stage. CCGroup alleges that Dang and Rosenbaum failed to disclose to the USPTO an offer to sell the same invention that they sought to patent, which would have rendered their claims unpatentable. FAC ¶¶ 49-51. During the reexamination, they and others submitted false declarations asserting a later conception date, despite Dang's sworn litigation testimony that he conceived the invention in 1993. *Id.* ¶¶ 48(2)-51(2), 62-64. Their contemporary communications revealed that

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Process claims based on omission."); *but see* *Nalco Co. v. Turner Designs, Inc., No. 13-CV-02727 NC, 2014 U.S. Dist. LEXIS 21362, 2014 WL 645365, at *6 (N.D. Cal. Feb. 19, 2014)* (acknowledging that the *Therasense* inequitable conduct standard is "arguably" identical to *Walker Process* fraud, but nevertheless maintaining a formal distinction between the two).

[15] CCGroup suggests that it is excused from the requirement to plead specific patent claims and limitations because the false affidavits were allegedly *per se* material to the uSPTO's decision. Opp'n at 12-13. The case it cites for that proposition does not state such a rule, and in fact discusses the individual patent claim specifically cited in the pleading at issue. *See* *Spectrum Pharms., Inc., v. Sandoz Inc., No. 2:12-CV-00111-GMN, 2013 U.S. Dist. LEXIS 140783, 2013 WL 5492667, at *3 (D. Nev. Sept. 30, 2013)* ("Specifically, Defendant alleges that the prosecuting attorney routinely certified to the USPTO that the claim that ultimately issued as claim 13 was a dependent claim . . . ."). Absent authority to the contrary, the Court follows the requirements set by the Federal Circuit in *Exergen*, even where CCGroup asserts *per se* materiality.

they intended to deceive the USPTO regarding the conception date. *Id.* ¶ 68. Taking those and other factual allegations as true and drawing reasonable inferences in CCGroup's favor for the limited purpose of resolving a challenge to the pleadings, the Court finds that Dang's and Rosenbaum's specific intent to defraud the USPTO "is plausible and . . . flows logically from the facts alleged." *See* [Exergen, 575 F.3d at 1329 n.5].

2. Knowledge of Fraud During Enforcement of Patent

The parties dispute whether OptumInsight should be treated as an assignee, and thus whether CCGroup must plausibly allege that OptumInsight "maintained and enforced the patent with knowledge of **[*42]** the fraudulent manner in which it was [allegedly] obtained." *See* [Ritz Camera, 700 F.3d at 506]. CCGroup argues that because OptumInsight acquired Symmetry, OptumInsight should be treated as the original patent holder and not subject to that requirement. Opp'n at 14-18. Because CCGroup has not adequately alleged inequitable conduct, the present Order does not reach this issue.

3. *Noerr-Pennington*

To base liability on OptumInsight's infringement claims, CCGroup must establish that OptumInsight's claims fall outside the scope the *Noerr-Pennington* doctrine, which otherwise immunizes efforts to petition government—including the courts—based on the [First Amendment]. *Walker Process* is itself an exception to Noerr. [Nobelpharma, 141 F.3d at 1071].

A separate exception is the "sham litigation" rule. ***HN20***[] In *PRE*, the Supreme Court set forth the standard required for a plaintiff to establish sham litigation:

> We now outline a two-part definition of "sham" litigation. First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under *Noerr*, and an antitrust claim premised on the **[*43]** sham exception must fail.
>
> Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation. Under this second part of our definition of sham, the court should focus on whether the baseless lawsuit conceals "an attempt to interfere directly with the business relationships of a competitor," [[E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 144, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961)]] (emphasis added), through the "use [of] the governmental process—as opposed to the outcome of that process—as an anticompetitive weapon," *[[City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 380, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991)]]* (emphasis in original).
>
> ***HN21***[] This two-tiered process requires the plaintiff to disprove the challenged lawsuit's legal viability before the court will entertain evidence of the suit's economic viability. Of course, even a plaintiff who defeats the defendant' s claim to *Noerr* immunity by demonstrating both the objective and the subjective components of a sham must still prove a substantive antitrust violation. Proof of a sham merely deprives the defendant of immunity; it does not relieve the plaintiff of the obligation to establish all other elements of his claim.

[PRE, 508 U.S. at 60-61] (paragraph breaks added).

HN22[] According to the Federal Circuit:

> *PRE* and *Walker Process* provide alternative legal grounds on which a patentee may be stripped of its **[*44]** immunity from the antitrust laws; both legal theories may be applied to the same conduct. Moreover, we need not find a way to merge these decisions. Each provides its own basis for depriving a patent owner of immunity from the antitrust laws; either or both may be applicable to a particular party's conduct in obtaining and enforcing a patent.

Nobelpharma, 141 F.3d at 1071.

CCGroup alleges that attorneys representing OptumInsight in litigation and USPTO proceedings received or knew of "source code, briefing, sworn testimony, and interrogatory responses proving that Dang conceived of his ['897 patent] invention in September of 1993." *E.g.*, FAC ¶ 110. Without the missing allegations discussed above regarding which specific claims and limitations the allegedly incriminating documents pertained to, the Court cannot determine whether it is plausible that the patents were obtained through fraud, much less whether it is plausible that the attorneys knew of the fraud or knew that no reasonable litigant could expect success on their infringement claims. Pending amendment, the Court declines to further address whether CCGroup's knowledge allegations are sufficient to meet the *Walker Process* and/or *PRE* exceptions to *Noerr*.

4. Antitrust [*45] Elements

HN23[] A *Walker Process* plaintiff must also establish "all the elements otherwise necessary to establish a *Sherman Act* monopolization charge," based on "the rules of ***antitrust law*** generally." *Ritz Camera, 700 F.3d at 506*.

OptumInsight's only argument pertaining to ***antitrust law*** and not specific to patent doctrines or knowledge of sham litigation is that "[a]ntitrust liability is ordinarily based on the filing of an abusive *lawsuit* as a whole, not merely individual *claims*, much less claims asserted as counterclaims," and that CCGroup "must establish harm beyond that caused by assertion of the Seare patent already ruled to be valid." Mot. at 25 (capitalization altered; quoting in part from a heading). As discussed above, the Court holds that *Cave I* lacks preclusive effect as to the validity of either Seare patent. However, as also discussed above, the Court cannot determine which if any of OptumInsight's infringement claims were plausibly baseless unless and until CCGroup provides more specific allegations regarding the claims implicated by the allegedly incriminating materials withheld from the USPTO. The Court declines at this time to decide what effect one or more non-frivolous infringement counterclaims would have on **[*46]** CCGroup's ability to recover here.

OptumInsight suggests in a footnote that counterclaims, even those allegedly brought in bad faith, can never form a basis for antitrust liability. Mot. at 31 n.7. The case that it cites does not stand for that proposition. Instead, the Seventh Circuit held that "simply defending oneself in a proceeding brought by another"—in that case, a patent interference proceeding provoked by the antitrust plaintiff—is not actionable. *Brunswick Corp. v. Riegel Textile Corp., 752 F.2d 261, 271-72 (7th Cir. 1984)*. Here, OptumInsight did not "simply defend [it]self," but instead affirmatively asserted counterclaims for infringement. The Court declines to hold that, assuming all other *Walker Process* and *Handgards* elements are satisfied, a dominant market participant (OptumInsight) can assert allegedly frivolous counterclaims with impunity merely because a competitor (CCGroup) chose to file a non-frivolous lawsuit against it—particularly where, as here, the competitor's lawsuit has proven meritorious. Moreover, CCGroup plausibly alleges that OptumInsight's earlier filed-but-not-served Minnesota lawsuit caused CCGroup competitive harm by sowing doubt among its customers as to whether its products infringed OptumInsight's patents. *See* FAC ¶¶ 132-34.

D. [*47] ***Lanham Act*** Claim

HN24[] *Section 43(a) of the Lanham Act* prohibits any "false or misleading description [or] representation of fact, which . . . in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of . . . goods services, or commercial activities." *15 U.S.C. § 1125(a)*. "[B]efore a patentee may be held liable under *§ 43(a)* for marketplace activity in support of its patent, and thus be deprived of the right to make statements about potential infringement of its patent, the marketplace activity must have been undertaken in bad faith." *Zenith Electronics Corp. v. Exzec, Inc., 182 F.3d 1340, 1353 (Fed. Cir. 1999)*. "Obviously, if the patentee knows that the patent is invalid, unenforceable, or not infringed, yet represents to the marketplace that a competitor is infringing the patent, a clear case of bad faith representations is made out." *Id.* CCGroup asserts that OptumInsight engaged in such conduct by representing that its products were "patented," or in one instance by representing that they were covered by the '897 and '511 patents, when in fact OptumInsight allegedly knew "that the Dang and Seare patents are invalid and unenforceable." FAC ¶¶ 195-96.

OptumInsight correctly observes that ***HN25***[] a mere claim that a product is "patented" is not false or misleading unless *no* patent **[*48]** covers the product, which CCGroup has not explicitly alleged. Mot. at 28. Further, and also encompassing OptumInsight's more specific representation regarding the '897 and '511 patents, CCGroup must allege the claims and limitations rendered invalid or unenforceable to satisfy the *Exergen* pleading standard discussed above. Both of these deficiencies could be cured by amendment. The *Lanham Act* claim is therefore DISMISSED with leave to amend.[16]

E. Malicious Prosecution Claim

CCGroup's final claim asserts malicious **[*49]** prosecution under California common law, alleging that "OptumInsight knew or had reason to know that the patents at issue in the patent infringement litigation were invalid and unenforceable," and that OptumInsight therefore "acted without probable cause in initiating and/or continuing its claims for patent infringement against CCGroup." FAC ¶¶ 206-07. For the reasons discussed above, CCGroup has not adequately alleged which claims and limitations of the patents at issue were invalid and/or unenforceable under the *Exergen* standard. Further, ***HN26***[] at least one California appellate court has held "that a civil action for malicious prosecution will not lie while an appeal in the underlying action is pending." *Friedman v. Stadum, 171 Cal. App. 3d 775, 778-79, 217 Cal. Rptr. 585 (1985)*. The same reasoning applies to the post-judgment motions pending in *Cave I*. CCGroup is correct, however, that all of OptumInsight's infringement claims in that case were dismissed with prejudice except for the '079 patent.

The malicious prosecution claim is therefore DISMISSED for failure to plausibly allege bad faith based on patent invalidity and unenforceability. CCGroup may amend this claim if it can meet the pleading standard set forth in *Exergen* with respect to its underlying allegations of **[*50]** invalidity or unenforceability, except that CCGroup may not claim malicious prosecution of the '079 patent while post-judgment motions or any subsequent appeal remain pending in *Cave I*.

F. Attorneys' Fees as Damages

OptumInsight argues that CCGroup cannot seek attorneys' fees from *Cave I* as damages because it withdrew a motion for attorneys' fees in that case. Mot. at 29-30. OptumInsight cites the Ninth Circuit's decision in *Port of Stockton v. Western Bulk Carrier KS, 371 F.3d 1119, 1120 (9th Cir. 2004)* for the proposition that a party who fails to bring a timely motion for attorneys' fees in one case cannot bring a second case to recover fees from the first case. *See id.*

The *Port of Stockton* decision rests on *Rule 54 of the Federal Rules of Civil Procedure*, which provides that "'[c]laims for attorneys' fees and related nontaxable expenses shall be made by motion *unless the substantive law governing the action provides for the recovery of such fees as an element of damages to be proved at trial*.'" *Port of Stockton, 371 F.3d at 1120-21* (quoting *Fed. R. Civ. P. 54(d)(2)(A)*) (emphasis added; emphasis in original omitted). The Ninth Circuit specifically considered whether "*Rule 54*'s 'substantive law' exception" applied to the contract claims at issue, and held that it did not. *Id. at 1121*.

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[16] OptumInsight also argues for the first time in its Reply that *Zenith* only recognized *Lanham Act* liability for two categories of misrepresentations related to patents: "(1) that a specific party infringes specific patents, and (2) that a specific party cannot manufacture a noninfringing product." Reply at 18. Although those were the two types of statements specifically considered in *Zenith*, there is no indication that the holding was limited to only those categories, and OptumInsight does not identify any authority endorsing that narrow reading of the case. The Court concludes that *Zenith* does not restrict *Lanham Act* claims based on misrepresentation of patents except to require a showing of bad faith.

In contrast, ***HN27***[] it is well established that antitrust plaintiffs bringing claims that previous litigation constituted unlawful **[*51]** anticompetitive conduct can recover the cost of their defense in that litigation as damages. *See, e.g., Handgards, 601 F.2d at 997* ("In a suit alleging antitrust injury based upon a bad faith prosecution theory it is obvious that the costs incurred in defense of the prior patent infringement suit are an injury which 'flows' from the antitrust wrong."); *Hynix Semiconductor Inc. v. Rambus, Inc., 527 F. Supp. 2d 1084, 1088* ("The Manufacturers are entitled to a jury on their antitrust claim because their patent litigation attorneys' fees are cognizable damages where the patent litigation itself was part of an unlawful scheme."). Under such circumstances, attorneys' fees fall within the "substantive law exception" to *Rule 54* because the prior litigation itself constituted prohibited conduct, and fees thus may be recovered as damages in a subsequent action.

IV. CONCLUSION

For the reasons stated above, each claim of the First Amended Complaint is DISMISSED with leave to amend. CCGroup may file a Second Amended Complaint no later than May 13, 2016.

IT IS SO ORDERED.

Dated: April 22, 2016

/s/ Joseph C. Spero

JOSEPH C. SPERO

Chief Magistrate Judge

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Encana Oil & Gas (USA), Inc. v. Zaremba Family Farms, Inc.

United States District Court for the Western District of Michigan, Southern Division

April 22, 2016, Decided; April 22, 2016, Filed

No. 1:12-cv-369

Reporter
2016 U.S. Dist. LEXIS 180946 *

ENCANA OIL & GAS (USA), INC., Plaintiff, -v- ZAREMBA FAMILY FARMS, INC., ZAREMBA GROUP, L.L.C., and WALTER ZAREMBA, Defendants.

Prior History: *Encana Oil & Gas (USA), Inc. v. Zaremba Family Farms, Inc., 2012 U.S. Dist. LEXIS 54781 (W.D. Mich., Apr. 19, 2012)*

Core Terms

reconsideration, reconsideration motion, summary judgment, prior motion, summary judgment motion, deny a motion, new motion, counterclaim, Convinced, antitrust

Counsel: **[*1]** For Encana Oil § Gas (USA) Inc., a Delaware corporation, plaintiff, counter-defendant: Frederick R. Juckniess, Jessica Ann Sprovtsoff, Matthew Patrick Kennison, Robert J. Wierenga, LEAD ATTORNEYS, Gregory L. Curtner, Jacob K. Danziger, Schiff Hardin LLP (MI), Ann Arbor, MI.

For Zaremba Family Farms, Inc., a Michigan corporation, Zaremba Group, L.L.C., a Michigan limited liability company, Walter Zaremba, an individual, defendants, counter-claimant: Michael F. Wais, LEAD ATTORNEY, Michael J. Sheehan, Howard § Howard Attorneys PLLC (Royal Oak), Royal Oak, MI; Michelle M. Wezner, Howard § Howard Attorneys PC (Bloomfield Hills), Royal Oak, MI.

For Third Party Witness, third-party plaintiff: Gregory L. Curtner, Schiff Hardin LLP (MI), Ann Arbor, MI; Mark R. Rosman, Wilson Sonsini Goodrich § Rosati PC (DC), Washington, DC; Niall Edmund Lynch, Latham § Watkins LLP (CA), San Francisco, CA.

For O.I.L. Niagaran, LLC, objector: Gregory L. Curtner, Schiff Hardin LLP (MI), Ann Arbor, MI; Molly S. Boast, Wilmer Cutler Pickering Hale § Dorr LLP (NY), New York, NY.

Judges: HONORABLE PAUL L. MALONEY, United States District Judge.

Opinion by: Paul L. Maloney

Opinion

ORDER DENYING MOTION FOR RECONSIDERATION

Zaremba Family Farms, Zaremba **[*2]** Group, and Walter Zaremba (collectively Zarembas) filed this motion for reconsideration of the order denying their prior motion for reconsideration. (ECF No. 506.)

In their counterclaims, the Zarembas allege Encana and Chesapeake colluded with each other in violation of the Sherman Act. The Zarembas and Encana filed cross-motions for summary judgment on the antitrust counterclaim. On October 16, 2015, this Court granted Encana's motion and denied the Zarembas' motion, concluding that the evidence in the record established that the two companies were negotiating an agreement, that the two companies tried to reach an agreement, but ultimately did not reach any agreement, at least through mid-July 2010. (ECF No. 462.) Convinced that the Court did not properly interpret the evidence, and convinced that the Court erred in its application of ***antitrust law***, the Zarembas filed a motion for reconsideration of the denial of its motion for summary judgment. (ECF No. 486.) The Zarembas identified specific legal and factual conclusions in the opinion resolving the motions for summary judgment, and explained why they felt the Court erred. The Court carefully considered their arguments, but ultimately **[*3]** denied the motion for reconsideration. (ECF No. 503.)

In this new motion for reconsideration, the Zarembas are simply reasserting the same arguments and relying on the same evidence that the Court previously considered in the cross motions for summary judgment and in the prior motion for reconsideration. A motion for reconsideration will be denied where the issues raised by the moving party have already been raised and ruled upon by the court, either expressly or by reasonable implication. *Estate of Graham v. County of Washtenaw, 358 F.3d 377, 385 (6th Cir. 2004)*. To the extent this new motion for reconsideration identifies new alleged errors in the summary judgment opinion, the arguments are improper because they should have been raised in the prior motion for reconsideration. A motion for reconsideration is not an opportunity to present new arguments that could have been presented before the court issued its ruling, but an opportunity for the court to reconsider those arguments already presented. *Sault Ste. Marie Tribe of Chippewa Indians v. Engler, 146 F.3d 367, 374 (6th Cir. 1998)*.

For these reasons, the motion for reconsideration (ECF No. 506) is **DENIED. IT IS SO ORDERED**.

Date: April 22, 2016

/s/ Paul L. Maloney

Paul L. Maloney

United States District Judge

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[Silverhorse Racing, LLC v. Ford Motor Co.]

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

April 27, 2016, Decided; April 27, 2016, Filed

Case No: 6:16-cv-53-Orl-22KRS

Reporter
2016 U.S. Dist. LEXIS 185749 *

SILVERHORSE RACING, LLC, Plaintiff, v. FORD MOTOR COMPANY, Defendant.

Subsequent History: Partial summary judgment granted by, Dismissed by [Silverhorse Racing, LLC v. Ford Motor Co., 232 F. Supp. 3d 1206, 2017 U.S. Dist. LEXIS 12213 (M.D. Fla., Jan. 30, 2017)]

Core Terms

immunity, antitrust, tortious interference, right of petition, alleges, distributors, trademark, cease-and-desist, products, lawsuit, courts, sham, motion to dismiss, criminal prosecution, retailers, baseless, letters, sending, rights, cases

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Judges: ANNE C. CONWAY, United States District Judge.

Opinion by: ANNE C. CONWAY

Opinion

ORDER

This cause comes before the Court on Defendant Ford Motor Company's ("Ford") Motion to Dismiss (Doc. No. 9), to which Plaintiff SilverHorse Racing, LLC ("SHR") responded in opposition, (Doc. No. 12). For the reasons **[*2]** that follow, the Court will deny Ford's motion to dismiss.

I. BACKGROUND

SHR brings this single-count action against Ford for tortious interference with business relationships. (Doc. No. 2 at p. 7). In 2004, motivated by his passion for Ford Mustangs, Joseph Marcello Canitano ("Canitano") established SHR as a business that specializes in customizing and manufacturing Ford Mustang aftermarket parts. (*Id.* ¶¶ 13-14). Canitano is the sole owner of SHR. (*Id.* ¶ 5). In 2008, Canitano moved his expanding business to a new facility and began developing relationships with nationwide dealers in Ford Mustang aftermarket parts. (*Id.* ¶ 15). From 2007-2008, SHR alleges that Ford Racing began to use some of SHR's parts on Ford Racing vehicles.[1] (*Id.* ¶ 17-18). In February 2010, SHR and Ford had a close relationship and began negotiations for SHR to directly produce its parts as a factory-installed option for Ford Mustangs. (*Id.* ¶ 19). Unfortunately, SHR could not pursue the opportunity due to a lack of financial resources. (*Id.*) However, SHR continued to manufacture its aftermarket parts for Ford vehicles. (*Id.*)

SHR's ongoing relationship with Ford ended abruptly on April 3, 2013, when SHR received a cease-and-desist **[*3]** letter from Ford. (*Id.* ¶ 24). The cease-and-desist letter warned SHR that it was using Ford's trademarks on SHR's products and in SHR's advertisements without Ford's authorization. (*Id.* ¶ 25). Additionally, Ford demanded a royalty for all of SHR's products embellished with one of Ford's trademarks—a unique design utilizing the letters "GT," where the top of the G connects with the top of the T. (*Id.* ¶ 29, *see* Ex. B). SHR alleges that throughout 2014, Ford "embarked on a campaign to contact all retailers and distributors of SHR products and advise them that SHR products engraved with the initials GT were 'counterfeit goods' and subject to criminal forfeiture and/or criminal prosecution." (*Id.* ¶ 31). Many of SHR's dealers and distributors refused to accept additional products from SHR. (*Id.* ¶ 32). Thereafter, SHR brought this lawsuit alleging that Ford intentionally interfered with SHR's relationships with its retailers and distributors. (*Id.* ¶ 42). On January 25, 2016, Ford filed a *Federal Rule of Civil Procedure 12(b)(6)* motion to dismiss SHR's Complaint arguing that Ford is immune from liability under the *Noerr-Pennington* doctrine. (Doc. No. 9).

II. LEGAL STANDARD

For purposes of deciding a motion to dismiss for failure to **[*4]** state a claim under *Rule 12(b)(6)*, the Court accepts as true the factual allegations in the complaint and draws all reasonable inferences in the light most favorable to the plaintiff. *Randall v. Scott, 610 F.3d 701, 705 (11th Cir. 2010)*. "Generally, under the Federal Rules of Civil Procedure, a complaint need only contain 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" *Id.* (quoting *Fed. R. Civ. P. 8(a)(2)*). However, the plaintiff's complaint must provide "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (citing *Twombly, 550 U.S. at 556*). Thus, the Court is not required to accept as true a legal conclusion merely because it is labeled a "factual allegation" in the complaint; it must also meet the threshold inquiry of facial plausibility. *Id.*

III. ANALYSIS

Ford moves to dismiss SHR's Complaint on the grounds that Ford is entitled to immunity from suit under the *Noerr-Pennington* doctrine, which is in part derived from the *First Amendment* right to petition. (Doc. No. 9 at p. 2). SHR disputes the applicability of the *Noerr-Pennington* doctrine outside of the antitrust **[*5]** context where it was first developed. (Doc. No. 12 at p. 5). Even if the *Noerr-Pennington* doctrine is applicable, SHR argues that the "sham exception" applies and abrogates Ford's immunity. (*Id.* at p. 15).

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[1] The identity of Ford Racing and its relationship to Ford is unclear from the Complaint. Plaintiff begins mentioning Ford Racing without an introduction in Paragraph 17 of the Complaint and mentions it throughout.

The *Noerr-Pennington* doctrine was first recognized in the "context of concerted petitions for anti-competitive legislation." *Primetime 24 Joint Venture v. Nat'l Broad., Co., 219 F.3d 92, 99-100 (2d Cir. 2000)*. The landmark cases, *Eastern Railroad Presidents Conference v. Noerr-Motor Freight, Inc., 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961)* and *United Mine Workers v. Pennington, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965)*, establish that "[j]oint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition." *McGuire Oil Co. v. Mapco, Inc., 958 F.2d 1552, 1558 (11th Cir. 1992)*. The *Noerr-Pennington* doctrine was later "extended to immunize from antitrust liability attempts to influence adjudicative bodies." *Id.* (citing *Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1980)*). The Supreme Court has emphasized the *First Amendment* interests inherent in the doctrine, stating that "it would be destructive of rights of association and petition to hold that groups with common interests may not, without violating antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes . . . ." *Cal. Motor Transp. Co., 404 U.S. at 510-511*.

A number of court decisions expand the scope of *Noerr-Pennington* immunity by applying it in areas outside of ***antitrust law***. While the Eleventh Circuit Court of Appeals has not addressed the applicability of *Noerr-Pennington* in **[*6]** other contexts, the Supreme Court has applied the doctrine outside of the antitrust context in a few instances. *See N.A.A.C.P. v. Claiborne Hardware, 458 U.S. 886, 102 S. Ct. 3409, 73 L. Ed. 2d 1215 (1982)* (granting *first amendment* immunity to a nonviolent business boycott seeking to vindicate economic equal rights); *see also, Bill Johnson's Restaurants Inc v. N.L.R.B., 461 U.S. 731, 742-43, 103 S. Ct. 2161, 76 L. Ed. 2d 277 (1983)* (immunizing employer's lawsuit from NLRB injunction under the right to petition). In *BE & K Constr. Co. v. N.L.R.B.*, the Supreme Court reasoned that the principles of statutory construction embodied in the *Noerr-Pennington* doctrine apply in other statutory contexts, and the Court concluded that the National Labor Relations Act does not impose liability on an employer for unsuccessful prosecution of lawsuits that were brought for the purpose of retaliating against workers, but were not objectively baseless. *536 U.S. 516, 527, 122 S. Ct. 2390, 2397, 153 L. Ed. 2d 499 (2002)*.

There is a clear trend among the circuit courts to extend *Noerr-Pennington* immunity to other areas of law where the purposes of the *First Amendment* right to petition are implicated. *See Venetian Casino Resort, L.L.C. v. N.L.R.B., 793 F.3d 85, 87, 417 U.S. App. D.C. 85 (D.C. Cir. 2015)* (applying *Noerr-Pennington* to NLRA claim, stating "employer conduct that would otherwise be illegal may be 'protected by the *First Amendment* when it is part of a direct petition to government."); *see also, Content Extraction and Transmission LLC v. Wells Fargo Bank, N.A., 776 F.3d 1343 (Fed. Cir. 2014)* (applying *Noerr-Pennington* to claims for tortious interference and RICO violations)*;* *Sosa v. DIRECTV, Inc., 437 F.3d 923 (9th Cir. 2006)* ("In light **[*7]** of *BE & K*'s application of *Noerr-Pennington* to the NLRA, we conclude that the *Noerr-Pennington* doctrine stands for a generic rule of statutory construction, applicable to any statutory interpretation that could implicate the rights protected by the *Petition Clause*."); *IGEN Intern., Inc. v. Roche Diagnostics, GmbH, 335 F.3d 303 (4th Cir. 2003)* (applying *Noerr-Pennington* doctrine to claims for tortious unfair competition and breach of contract); *Cheminor Drugs, Ltd. v. Ethyl Corp., 168 F.3d 119, 128 (3d Cir. 1999)* (extending *Noerr-Pennington* immunity to state tort claims based on the same petitioning activity as federal antitrust claims); *Hufsmith v. Weaver, 817 F.2d 455 (8th Cir. 1987)* (applying *Noerr-Pennington* to a claim for tortious interference with contract); *Havoco of Am., Ltd. v. Hollobow, 702 F.2d 643, 649-650 (7th Cir. 1983)* (*Noerr-Pennington* "has been applied to protect the *First Amendment* right to petition against claims of tortious interference with business relationships.").

District courts in the Eleventh Circuit have rarely addressed *Noerr-Pennington* outside of the antitrust context. However, the majority of the district courts that have addressed the issue have applied *Noerr-Pennington* in non-antitrust cases. *See Rolex Watch U.S.A, Inc. v. Rainbow Jewelry, Inc., No. 12-21437-CIV, 2012 U.S. Dist. LEXIS 133791, 2012 WL 4138028, at *3 (S.D. Fla. Sept. 19, 2012)* (applying *Noerr-Pennington* to unfair trade practices claim); *Atico Int'l USA, Inc. v. Luv N' Care, Ltd., No. 09-60397-CIV, 2009 U.S. Dist. LEXIS 73540, 2009 WL 2589148, at *2 (S.D. Fla. Aug. 19, 2009)* (applying *Noerr-Pennington* to tortious interference claim); *Lynn v. Amoco*

Oil Co., 459 F. Supp. 2d 1175, 1189-90 (M.D. Ala. 2006) **[*8]** ("Although the *Noerr-Pennington* doctrine applies to antitrust conspiracies, the principles of law on which it is based are not restricted to the field of antitrust.").[2]

Not surprisingly, SHR relies on the lone circuit court decision not extending *Noerr-Pennington* immunity to matters outside of the antitrust context. In *Cardtoons, L.C. v. Major League Baseball Players Ass'n,* the Tenth Circuit held that it was not appropriate to apply *Noerr-Pennington* to a tortious interference claim because the doctrine was limited to the antitrust area. *208 F.3d 885, 892 (10th Cir. 2000)*. However, in a decision eight years later, the Tenth Circuit has been favorable to applying *Noerr-Pennington* immunity outside the realm of antitrust because of the doctrine's roots in the right to petition:

> Rather, in non-antitrust cases, immunity derives solely from the *First Amendment* right to petition. *Id.* Thus, as we determined in *Scott*, we apply *Noerr-Pennington* immunity to cases outside the antitrust context with caution. *Scott, 216 F.3d at 914*.Yet, as we acknowledged in *Cardtoons, L.C., 208 F.3d at 889*, and *Scott, 216 F.3d at 914*, numerous federal and state courts have applied *Noerr-Pennington*-like immunity to state tort claims. Imposing tortious interference liability pursuant to state law could very well impinge a defendant's *First Amendment* rights to petition the government for redress. *See* *Scott, 216 F.3d at 914* ("'[I]t is hard to see any reason **[*9]** why, as an abstract matter, . . . common law torts . . . might not in some of their applications be found to violate the *First Amendment*.'" (quoting *Whelan v. Abell, 48 F.3d 1247, 1254, 310 U.S. App. D.C. 396 (D.C. Cir. 1995)*)). Accordingly, ProLease was entitled to plead and prove that it was immune from liability under the *First Amendment* for its tortious interference.

Pers. Dep't, Inc. v. Prof'l Staff Leasing Corp., 297 Fed. Appx. 773, 778-79 (10th Cir. 2008).

This Court finds persuasive the decisions of the abovementioned majority of circuit courts extending *Noerr-Pennington* immunity outside of the antitrust context when the *First Amendment* right to petition is implicated. "[T]he distinction between antitrust and non-antitrust cases is not relevant to the *Noerr-Pennington* analysis, given the Supreme Court's focus on the *First Amendment* right to petition, rather than a statutory construction of the *Sherman Act*." *Select Comfort Corp. v. Sleep Better Store, LLC, 838 F. Supp. 2d 889, 898 (D. Minn. 2012)* (citing *Cal. Motor Transp. Co., 404 U.S. 508, 92 S. Ct. 609, 30 L. Ed. 2d 642*)). Therefore, upon a proper showing, Ford may be entitled to such immunity.

Now that the Court has determined that an analogous *Noerr-Pennington* immunity applies outside of the antitrust context, the Court must determine whether Ford's conduct, as alleged by SHR, is protected under it at the motion to dismiss stage. SHR's tortious interference claim is based on Ford's actions of sending a cease-and-desist letter to SHR due to SHR's use of Ford's registered trademarks, and Ford's advising and threatening **[*10]** SHR's retailers and distributors. (*See* Doc. No. 2). A number of circuit courts, including the Eleventh Circuit, have expressly extended *Noerr-Pennington* immunity to threats of litigation and pre-litigative activity, including sending cease-and-desist letters and publicity campaigns aimed at protecting intellectual property rights. *See* *McGuire Oil Co., 958 F.2d at 1560*; *see also,* *Coastal States Mktg., 694 F.2d at 1367* ("[I]t would be absurd to hold that it does not protect those acts reasonably and normally attendant upon effective litigation. The litigator should not be protected only when he strikes without warning."); *In re IBP Confidential Bus. Documents Litig., 755 F.2d 1300, 1310 (8th Cir.1985)* ("The right to petition means more than simply the right to communicate directly with the government, [therefore] protection under the doctrine necessarily includes those activities reasonably and normally attendant to effective petitioning.") (internal quotation marks omitted)); *PODS Enters. v. ABF Freight Sys., No. 8:11-cv-84-T-33MAP, 2011 U.S. Dist. LEXIS 119657, 2011 WL 4948397, at *5 (M.D. Fla. Oct. 17, 2011)* ("[P]re-litigative activity such as sending cease-and-desist letters is also immunized.").

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[2] SHR cites to one Southern District of Florida case holding that *Noerr-Pennington* does not apply outside of ***antitrust law***. *Slip-N-Slide Records, Inc. v. TVT Records, LLC, No. 05-21113-Civ-TORRES, 2007 U.S. Dist. LEXIS 9014, 2007 WL 473273, at *6 (S.D. Fla. Feb. 8, 2007)*. However, that decision does not discuss the circuit court decisions in the area. The Court finds the above-cited circuit court decisions to be more persuasive.

At this stage in the litigation, the Court does not have enough information to hold as a matter of law that Ford's conduct is immunized. Certainly, a registered trademark owner enjoys immunity for sending a cease-and-desist **[*11]** letter before commencing litigation to enforce its valid trademark rights. *See* *PODS Enters., 2011 U.S. Dist. LEXIS 119657, 2011 WL 4948397, at *5*. However, SHR alleges that Ford engaged in more than merely sending a cease-and-desist letter. SHR alleges that Ford contacted SHR's dealers and distributors and advised them that all SHR products engraved with Ford's "GT" trademark were counterfeit goods subject to criminal forfeiture and criminal prosecution. (Doc. No. 2 ¶ 31). It remains to be determined whether Ford's contact with SHR's dealers and distributors and perceived threats of criminal prosecution is conduct "reasonably and normally attendant" to effective petitioning. *See, Coastal States Mktg., 694 F.2d at 1367*. It is plausible that Ford's conduct falls outside the realm of activities reasonably taken in anticipation of litigation. If so, the right to petition would not be implicated by Ford's actions. This determination is better suited for summary judgment with a more fully-developed record.

Additionally, SHR argues that the sham exception applies because Ford is engaging in "sham litigation." (Doc. No. 12 at p. 15). To abrogate *Noerr-Pennington* immunity as conduct attendant to a sham litigation, a litigant must establish "(1) the lawsuit [is] objectively baseless in the sense **[*12]** that no reasonable litigant could realistically expect success on the merits; and (2) the party bringing the allegedly baseless suit did so with a subjective motivation . . . to interfere directly with the business relationships of a competitor." *Andrx Pharms., Inc. v. Elan Corp., PLC, 421 F.3d 1227, 1234 (11th Cir. 2005)*. Litigation is not "objectively baseless" if there was probable cause to bring a lawsuit. *Id.* Thus, the plaintiff must "prove that the defendant lacked probable cause to institute an unsuccessful civil lawsuit and that the defendant pressed the action for an improper, malicious purpose." *Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 62, 113 S. Ct. 1920, 1929, 123 L. Ed. 2d 611 (1993)*. However, whether or not a lawsuit is a "sham" does not depend on a plaintiff's success on the merits of its trademark infringement claims. *Select Comfort Corp. v. Sleep Better Store, LLC, 838 F. Supp. 2d 889, 894 (D. Minn. 2012)* (citing *BE & K Const. Co., 536 U.S. at 531-32* (stating that the doctrine "protect[s] petitioning whenever it is genuine, not simply when it triumphs.")).

As an initial matter, the Court need not determine whether the sham exception applies because it is unclear at this stage whether Ford's conduct constitutes pre-litigative activity necessary to invoke *Noerr-Pennington* immunity. Nonetheless, SHR alleges that Ford contacted and threatened SHR's retailers and distributors by misrepresenting to them that all of SHR's products bearing the letters "GT" are counterfeit, **[*13]** and Ford threatened them with criminal forfeiture and criminal prosecution. (Doc. No. 2 ¶¶ 31, 32, 42). However, Ford continued to purchase SHR's aftermarket parts even after issuing these warnings. (*Id.* ¶ 33). Additionally, SHR alleges that Ford's claims to the "GT" initials are "disingenuous and species" because Ford expressly disclaimed rights in the letters "GT" apart from Ford's unique design (how the mark is shown in the trademark application). (*Id.* ¶ 35, Ex. B). At this stage of the litigation, taking these allegations as true, the Court finds SHR's allegations sufficient under a notice pleading standard. Therefore, the Court concludes that, as alleged, Ford lacked an objective basis to threaten SHR's retailers and distributors with trading in counterfeit goods and criminal prosecution. This conduct could plausibly constitute "objectively baseless" threats sufficient for a tortious interference claim against Ford. Whether SHR can ultimately establish the application of the "sham litigation" exception to strip Ford of potential *Noerr-Pennington* immunity may be raised again at summary judgment or trial.

IV. CONCLUSION

Based on the foregoing, it is ordered as follows:

1. Defendant **[*14]** Ford Motor Company's Motion to Dismiss (Doc. No. 9), filed on January 25, 2016, is **DENIED**.

2. Defendant Ford Motor Company **SHALL FILE** an answer to Plaintiff's Complaint within fourteen days.

DONE and **ORDERED** in Chambers, in Orlando, Florida on April 27, 2016.

/s/ Anne C. Conway

ANNE C. CONWAY

United States District Judge

Dodge Data & Analytics LLC v. iSqFt, Inc.

United States District Court for the Southern District of Ohio, Western Division

April 28, 2016, Decided; April 28, 2016, Filed

Case No. 1:15-cv-698

Reporter

183 F. Supp. 3d 855 *; 2016 U.S. Dist. LEXIS 56550 **; 2016-1 Trade Cas. (CCH) P79,619

DODGE DATA & ANALYTICS LLC, Plaintiff, vs. iSqFt, INC., et al., Defendants.

Core Terms

pricing, customers, alleges, iSqFt, predatory, Defendants', antitrust, monopolize, costs, motion to dismiss, relevant market, anticompetitive conduct, restrictive covenant, customer information, conspiracy, competitors, business relationship, trademarks, entities, chattel, pleaded, merger, stolen, trademark infringement, anticompetitive, argues, market power, probability, rival, tortious interference

LexisNexis® Headnotes

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Civil Procedure > Pleading & Practice > Motion Practice

HN1[] Judges, Discretionary Powers

S.D. Ohio Civ. R. 7.1(b)(2) leaves the court with discretion to grant a request for oral argument.

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

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

HN2[] Motions to Dismiss, Failure to State Claim

A motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) operates to test the sufficiency of the complaint and permits dismissal of a complaint for failure to state a claim upon which relief can be granted. To show grounds for relief, Fed. R. Civ. P. 8(a) requires that the complaint contain a short and plain statement of the claim showing that the pleader is entitled to relief.

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

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

HN3[] Motions to Dismiss, Failure to State Claim

While *Fed. R. Civ. P. 8* does not require detailed factual allegations, it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. Pleadings offering mere labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. In fact, in determining a motion to dismiss, courts are not bound to accept as true a legal conclusion couched as a factual allegation. Further, factual allegations must be enough to raise a right to relief above the speculative level.

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

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

HN4[] Motions to Dismiss, Failure to State Claim

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim is plausible where the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. Plausibility is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not "shown"—that the pleader is entitled to relief, and the case shall be dismissed.

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

HN5[] Standing, Requirements

Antitrust standing is a threshold, pleading-stage inquiry and when a complaint by its terms fails to establish this requirement it must be dismissed. as a matter of law—lest the antitrust laws become a treble-damages sword rather than the shield against competition-destroying conduct that Congress meant them to be. A district court decides whether a plaintiff has adequately pleaded antitrust standing by balancing five factors: (1) the causal connection between the antitrust violation and harm to the plaintiff and whether that harm was intended to be caused; (2) the nature of the plaintiff's alleged injury including the status of the plaintiff as consumer or competitor in the relevant market; (3) the directness or indirectness of the injury, and the related inquiry of whether the damages are speculative; (4) the potential for duplicative recovery or complex apportionment of damages; and (5) the existence of more direct victims of the alleged antitrust violation.

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

Constitutional Law > ... > Case or Controversy > Standing > Particular Parties

HN6[] Standing, Requirements

Standing in an antitrust case is more onerous than the conventional U.S. Const. art. III inquiry.

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

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

HN7[] Market Definition, Relevant Market

An antitrust injury is an: (1) injury of the type the antitrust laws were intended to prevent and (2) injury that the flows from that which makes the defendants' acts unlawful. Because the purpose of the antitrust laws is to protect competition rather than competitors, a plaintiff must allege injury, not only to himself, but to a relevant market. Thus, failure to allege an anti-competitive impact on a relevant market amounts to a failure to allege an antitrust injury. This requirement means that one competitor may not use the antitrust laws to sue a rival merely for vigorous or intensified competition. Specifically, a plaintiff must put forth factual allegations plausibly suggesting that there has been an adverse effect on prices, output, or quality of good in the relevant market as a result of the challenged actions.

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

HN8[] Standing, Requirements

An antitrust plaintiff must show that (1) the alleged violation tended to reduce competition overall and (2) the plaintiff's injury was a consequence of the resulting diminished competition. This requires a demonstration, as a threshold matter, that the challenged action has had an actual adverse effect on competition as a whole in the relevant market.

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

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

HN9[] Standing, Clayton Act

Predatory pricing harms both competitors and competition, and is capable of inflicting antitrust injury. The U.S. Supreme Court has noted that a predatory pricing scheme creates antitrust injury: This does not necessarily mean that *§ 4 of the Clayton Act* plaintiffs must prove an actual lessening of competition in order to recover. The short-term effect of certain anticompetitive behavior—predatory below-cost pricing, for example—may be to stimulate price competition. But competitors may be able to prove antitrust injury before they actually are driven from the market and competition is thereby lessened. When the defendant effectively sells below its own costs, it puts pressure on its competitors to lower prices without actually lowering its own costs or otherwise creating a market efficiency. This is sufficient for competitors to have antitrust standing.

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

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

HN10[] Standing, Clayton Act

Antitrust injury does not arise for purposes of *§ 4 of the Clayton Act* until a private party is adversely affected by an anticompetitive aspect of the defendant's conduct; in the context of pricing practices, only predatory pricing has the requisite anticompetitive effect.

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

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

HN11[] **Anticompetitive & Predatory Practices, Predatory Pricing**

Losses a competitor suffers as a result of predatory pricing is a form of antitrust injury because predatory pricing has the requisite anticompetitive effect against competitors.

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

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

HN12[] **Attempts to Monopolize, Elements**

A claim for attempted monopolization in violation of *§ 2 of the Sherman Act*. *15 U.S.C.S. § 2*, requires: (1) a specific intent to monopolize; (2) anti-competitive conduct; and (3) a dangerous probability of success. Market strength that approaches monopoly power, meaning the ability to control prices and exclude competition, is a necessary element for showing a dangerous probability of achieving monopoly power. However, courts have not adopted a uniform standard regarding the threshold of what it takes to establish a monopoly power. Market share alone, however, is not enough to determine a firm's capacity to achieve monopoly; the real test is whether the defendants possessed sufficient market power to achieve its aims.

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

HN13[] **Attempts to Monopolize, Elements**

For the purposes of an attempted monopolization claim, specific intent to monopolize may be inferred from evidence of anticompetitive conduct, but not from legitimate business practices aimed only at succeeding in competition.

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

HN14[] **Attempts to Monopolize, Elements**

The relationship between act and intent in attempted monopolization claims is a close one, and evidence of anticompetitive conduct may be used to support a finding of intent where direct evidence of intent is unavailable. Conduct showing a desire to crush competitors shows a specific intent to monopolize.

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

HN15[] **Attempts to Monopolize, Elements**

For purposes of an attempted monopolization claim, anticompetitive conduct is any conduct that attempts to exclude rivals on some basis other than efficiency. Anticompetitive conduct can come in too many different forms, and is too dependent upon context, for any court or commentator ever to have enumerated all the varieties.

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

HN16[] **Attempts to Monopolize, Elements**

In determining whether an attempted monopolization plaintiff has alleged anticompetitive conduct, the fact finder should be permitted to consider the entire sum of unlawful exclusionary practices and their impact.

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

Evidence > Burdens of Proof > Burden Shifting

HN17[] **Anticompetitive & Predatory Practices, Predatory Pricing**

A plaintiff seeking to plead predatory pricing must plead that the prices complained of are below an appropriate measure of its rival's costs and that the defendant had a dangerous probability of recouping its investment in below-cost prices. To establish predatory pricing a plaintiff must prove that the anticipated benefits of the defendant's price depended on its tendency to discipline or eliminate competition and thereby enhance the firm's long-term ability to reap the benefits of monopoly power. If the defendant's prices were below average total cost but above average variable cost, the plaintiff bears the burden of showing defendant's pricing was predatory. If, however, the plaintiff proves that the defendant's prices were below average variable cost, the plaintiff has established a prima facie case of predatory pricing and the burden shifts to the defendant to prove that the prices were justified without regard to any anticipated destructive effect they might have on competitors.

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

HN18[] **Anticompetitive & Predatory Practices, Predatory Pricing**

Competitors are the best of predatory pricing plaintiffs because, although they do not have direct information about the defendant's costs, they usually know these costs better than anyone else. If a plaintiff were required to actually know a defendant's costs to even plead a predatory pricing claim, no predatory pricing case would progress beyond a motion to dismiss.

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

HN19[] **Attempts to Monopolize, Elements**

For purposes of an attempted monopolization claim, there is no requirement that the underlying anticompetitive acts give rise to an independent tort action. It is well settled that acts which are in themselves legal lose that character when they become part of an unlawful scheme.

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

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

HN20[] **Attempts to Monopolize, Elements**

For purposes of an attempted monopolization claim, anticompetitive conduct only requires that the conduct be designed to have an anticompetitive effect on the relevant market.

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

HN21[] **Attempts to Monopolize, Elements**

Specific intent for an attempted monopolization claim may be inferred from the existence of anticompetitive acts.

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

HN22[] **Attempts to Monopolize, Elements**

For purposes of an attempted monopolization claim, a dangerous probability of success requires market strength that approaches monopoly power and an examination of barriers to entry.

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

HN23[] **Anticompetitive & Predatory Practices, Predatory Pricing**

The final element of the predatory pricing analysis is whether there is a dangerous probability of recoupment, or whether the defendants could obtain enough market power to set higher than competitive prices, and then could sustain those prices long enough to earn in excess profits what they earlier gave up in below-cost prices. In conducting this analysis, a court should analyze the predatory pricing scheme to determine whether the scheme alleged could plausibly produce the intended effects on the firm's rivals by driving them from the market, and then analyze the structure and conditions of the relevant market in order to determine whether defendants could plausibly maintain supra-competitive prices after it has eliminated its rival from the market. Since this analysis is a particularly fact-intensive inquiry, courts typically should not resolve it at the pleading stage.

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

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

HN24[] **Attempts to Monopolize, Elements**

A lesser degree of market power may be sufficient to establish an attempted monopolization claim than that needed to establish a completed monopolization claim. Under this lesser standard, courts will generally find a dangerous probability for success where the defendant has a market share of fifty percent or more. On the other end of the spectrum, a market share of thirty percent is presumptively insufficient to establish a dangerous probability of success. Those with market shares between thirty and fifty percent may be found to have a dangerous probability of success if other factors are present.

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

HN25[] **Attempts to Monopolize, Elements**

There are dozens of cases stating that market shares of 50% are generally sufficient to support an attempted monopolization claim, and much lower market shares may support such a claim when there are strong barriers to entry.

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

HN26[] **Attempts to Monopolize, Elements**

For purposes of an attempted monopolization claim, a dangerous probability of achieving market power is more likely in a two-competitor market where each market participant has approximately an equal share, than in a market with numerous other players. In a two-player, 50%-50% market, the elimination of the plaintiff would leave the defendant with 100% of the market.

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

HN27[] **Attempts to Monopolize, Elements**

For purposes of an attempted monopolization claim, in determining whether there are barriers to entry in the market, the fact that it is difficult for a new firm to enter the industry, or that no new competitors have entered the market for a number of years, may be very important factors.

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

HN28[] **Attempts to Monopolize, Elements**

For purposes of an attempted monopolization claim, there is no requirement that substantial barriers to entry consist of more than high fixed costs. The ultimate question is whether new entry is easy.

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

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

HN29[] **Conspiracy to Monopolize, Elements**

To survive a motion to dismiss, an antitrust conspiracy plaintiff must allege that: (1) two or more entities engaged in a conspiracy, combination, or contract, (2) to effect a restraint or combination prohibited per se (wherein the anticompetitive effects within a relevant geographic and product market are implied), (3) that was the proximate cause of the plaintiff's antitrust injury.

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

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes

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

HN30[] **Conspiracy to Monopolize, Elements**

For purposes of an antitrust conspiracy claim, where the original purpose of a merger was to restrain trade or monopolize a market, the prohibition against intra-company conspiracies no longer applies. It has long been clear that a pattern of acquisitions may itself create a combination illegal under *§ 1 of the Sherman Act*, *15 U.S.C.S. § 1*, especially when an original anticompetitive purpose is evident from the affiliated corporations' subsequent conduct. The affiliation of the defendants is irrelevant if the original acquisitions were themselves illegal. An affiliation flowing from an illegal conspiracy will not avert sanctions. Common ownership and control are irrelevant if restraint of trade was the primary object of the combination. Even if the original purpose of the merger were not to unreasonably restrain trade or to monopolize a market, a merger does not insulate parties from joint actions taken before the merger.

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

Trademark Law > Likelihood of Confusion > Consumer Confusion

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

HN31[] **Infringement Actions, Determinations**

To state a claim of trademark infringement, a plaintiff must allege facts establishing that: (1) the plaintiff owns the registered trademark; (2) the defendant used the mark in commerce; and (3) the use was likely to cause confusion. The touchstone of liability for trademark infringement is whether the defendant's use of the disputed mark is likely to cause confusion among consumers regarding the origin of the goods offered by the parties. Generally, dismissal for failure to state a claim upon which relief can be granted is appropriate in only the most extreme trademark infringement cases, such as where goods are unrelated as a matter of law, since the likelihood of confusion is generally a question of fact.

Trademark Law > Subject Matter of Trademarks > Particular Subject Matter

HN32[] **Subject Matter of Trademarks, Particular Subject Matter**

A standard character trademark is not limited to a particular font, style, size, or color. Standard character marks are not limited to any particular presentation.

Trademark Law > Likelihood of Confusion > Factors for Determining Confusion

Trademark Law > Likelihood of Confusion > Factors for Determining Confusion > Similarity of Marks

HN33[] **Likelihood of Confusion, Factors for Determining Confusion**

An allegedly infringing trademark need not be identical; it need only cause a likelihood of confusion. While the lack of actual confusion is rarely significant, the existence of actual confusion is the best evidence of likelihood of confusion.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Choice of Law

HN34[] **Federal & State Interrelationships, Choice of Law**

When considering state-law claims, a federal court must first determine which state's law applies. A federal district court sitting in Ohio applies Ohio's choice-of-law rules.

Torts > Procedural Matters > Conflict of Law > Place of Injury

Torts > Procedural Matters > Conflict of Law > Significant Relationships

HN35[] **Conflict of Law, Place of Injury**

Under Ohio law, in making choice-of-law determinations in tort actions, a presumption is created that the law of the place of the injury controls unless another jurisdiction has a more significant relationship to the lawsuit. The burden of proving this conflict rests with the party disputing the application of local law. If, after applying the relevant factors, either state would be appropriate, the court should apply the law of the forum state.

Torts > Procedural Matters > Conflict of Law > Place of Injury

Torts > Procedural Matters > Conflict of Law > Significant Relationships

HN36[] **Conflict of Law, Place of Injury**

Within the context of tort actions, to determine the state with the most significant relationship to the cause of action, Ohio courts consider (1) the place of the injury; (2) the place where the conduct causing the injury occurred; (3) the domicile, residence, nationality, place of incorporation, and place of business of the parties; and (4) the place where the relationship between the parties, if any, is located. The place where the tortious conduct occurred is the place where the relationship, if any, between the parties centered.

Torts > ... > Business Relationships > Intentional Interference > Elements

HN37[] **Intentional Interference, Elements**

Under Ohio law, the tort of interference with a business relationship occurs when a person, without a privilege to do so, induces or otherwise purposely causes a third person not to enter into or continue a business relationship with another. To state a claim for tortious interference with business relations, a plaintiff must allege: (1) a business relationship; (2) the tortfeasor's knowledge of the relationship; (3) an intentional interference causing a breach or termination of the relationship; and (4) damages.

Torts > ... > Business Relationships > Intentional Interference > Elements

HN38[] **Intentional Interference, Elements**

Conduct that is in violation of antitrust provisions may be improper conduct sufficient to support tortious interference with business relationships.

Torts > Intentional Torts > Conversion

Torts > Intentional Torts

HN39[] **Intentional Torts, Conversion**

A trespass to chattel occurs when one intentionally disposes another of their personal property. One who commits a trespass to a chattel is subject to liability to the possessor of the chattel if, but only if, (a) he dispossesses the other of the chattel, or (b) the chattel is impaired as to its condition, quality, or value, or (c) the possessor is deprived of the use of the chattel for a substantial time, or (d) bodily harm is caused to the possessor, or harm is caused to some person or thing in which the possessor has a legally protected interest. While authority under Ohio law respecting an action for trespass to chattels is extremely meager, it appears to be an actionable tort. An unprivileged use or other intermeddling with a chattel which results in actual impairment of its physical condition, quality or value to the possessor makes the actor liable for the loss thus caused. The word "chattels" is ordinarily limited to visible, tangible, movable personable property, although it may be used in the broader sense. Trespass to chattels has been described as the little brother to conversion.

Torts > Intentional Torts

HN40[] **Torts, Intentional Torts**

For purposes of a trespass to chattel claim, physical damage is not required if the value of the chattel diminished.

Torts > Intentional Torts

HN41[] **Torts, Intentional Torts**

The interest of a possessor of a chattel in its inviolability, unlike the similar interest of a possessor of land, is not given legal protection by an action for nominal damages for harmless intermeddlings with the chattel. In order that an actor who interferes with another's chattel may be liable, his conduct must affect some other and more important interest of the possessor. Therefore, one who intentionally intermeddles with another's chattel is subject to liability only if his intermeddling is harmful or if the possessor is deprived of the use of the chattel for a substantial time, or some other legally protected interest of the possessor is affected Sufficient legal protection of the possessor's interest in the mere inviolability of his chattel is afforded by his privilege to use reasonable force to protect his possession against even harmless interference.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Covenants

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

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Noncompetition & Nondisclosure Agreements

HN42[] **Types of Contracts, Covenants**

Ohio, Florida, Georgia, and Illinois do not have a rule that restrictive covenants are always valid, instead each holds that only restrictions that are reasonable in scope are valid and enforceable. Under Ohio law, noncompetition and nonsolicitation agreements that are reasonable are enforced. A Florida statute permits the enforcement of contracts restricting or prohibiting competition during or after the term of the restrictive covenant so long as such contacts are reasonable in time, area, and line of business. *O.C.G.A. § 13-8-53 (2012)* permits restrictive covenants only when they meet certain conditions. For a restrictive covenant to be valid and enforceable in Illinois, the terms must be reasonable and necessary to protect a legitimate business interest of the employer. In determining whether restrictive covenants should be enforced, the facts of each case are paramount, and therefore it is inappropriate to decide these issues on a motion to dismiss.

Civil Procedure > Judgments > Declaratory Judgments > Federal Declaratory Judgments

HN43[] **Declaratory Judgments, Federal Declaratory Judgments**

The declaratory judgment standard is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

Civil Procedure > ... > Declaratory Judgments > Federal Declaratory Judgments > Scope of Declaratory Judgments

HN44[] **Federal Declaratory Judgments, Scope of Declaratory Judgments**

The dilemma created by putting the challenger to the choice between abandoning his rights or risking prosecution is a dilemma that it was the very purpose of the *Declaratory Judgment Act* to ameliorate.

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Judges: Timothy S. Black, United States District Judge.

Opinion by: Timothy S. Black

Opinion

[*861] ORDER DENYING DEFENDANTS' MOTION TO DISMISS (Doc. 29)

This civil action is before the Court on Defendants'[1] motion to dismiss the amended complaint (Doc. 29)[2] and the parties' responsive **[**2]** memoranda (Docs. 32, 33).[3]

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[1] Defendants include: iSqFt, Inc., Construction Market Data Group, LLC ("CMD"), Construction Data Corporation, LLC ("CDC"), and BidClerk, Inc. (collectively "Defendants"). iSqFt is a software-as-a-service company that licenses access to its construction software and databases to general contractors, subcontractors, manufacturers, and suppliers in the North American commercial construction industry. iSqFt acquired BidClerk in October 2014, CDC in April 2015, and CMD in August 2015. (Doc. 28 at ¶¶ 45-46).

[2] Also pending before the Court is a motion to dismiss (Doc. 26) that was filed before Plaintiff Dodge Data amended its complaint. (Doc. 28). The amended complaint rendered the motion to dismiss (Doc. 26) moot. *Computerease Software, Inc. v. Hemisphere Corp., No. 06cv247, 2007 U.S. Dist. LEXIS 64753, at *1 (S.D. Ohio Mar. 19, 2007)* ("Since the amended complaint replaces the original complaint, the motion to dismiss the original complaint is moot."). Accordingly, the first motion to dismiss (Doc. 26) is **DENIED** as **MOOT**.

[*862] I. FACTS AS ALLEGED BY THE PLAINTIFF

For purposes of this motion to dismiss, the Court must: (1) view the complaint in the light most favorable to Plaintiff Dodge Data; and (2) take all well-pleaded factual allegations as true. *Tackett v. M&G Polymers, 561 F.3d 478, 488 (6th Cir. 2009)*.

Dodge Data provides Construction Project Information ("CPI"). (Doc. 28 at ¶ 20). CPI consists of "construction project information, building product information, construction plans and specifications, industry news, market research, and industry trends and forecasts." (*Id.*) Dodge Data sells its nationwide CPI product to customers "through web-based programs accessed by those customers who pay a subscription fee to Dodge." (*Id. at ¶ 24*). The subscription "depend[s] upon the level of detail and geographical area in which the contractor [i]s interested, as well as the number of licenses purchased by the contractor." (*Id. at ¶ 26*).

Dodge Data claims that Defendants are attempting to monopolize the market for nationwide CPI in the United States and Canada (the relevant market), in violation of the Sherman Antitrust Act. Dodge Data alleges that **[**4]** Defendants' goal is to consolidate into one entity with market power, drive Dodge Data from the market, and acquire a 100% market share so that they can charge monopoly prices, reduce output, and stifle innovation to the detriment of consumers.

Dodge Data alleges that Defendants are attempting to achieve their goal through anticompetitive conduct, including a predatory pricing scheme in which they have offered prices to Dodge Data's customers (but not to their own customers), that are more than 85% below Dodge Data's prices and below any appropriate measure of Defendants' costs. Defendants have also allegedly stolen and used Dodge Data's confidential customer information, infringed Dodge Data's trademarks, abused restrictive covenants, and tortiously interfered with Dodge Data's business relationships.

Dodge Data alleges claims for: (1) attempt to monopolize in violation of *Section 2* of the Sherman Act; (2) conspiracy to monopolize in violation of *Section 2* of the Sherman Act; (3) conspiracy in restraint of trade in violation of *Section 1 of the Sherman Act*; (4) trademark infringement of the "S" (Sweets) mark; (5) unfair competition concerning the "S" (Sweets) mark; (6) dilution of the Sweets mark under Ohio law; **[**5]** (7) violation of the Ohio Deceptive Trade Practices Act relating to the "S" (Sweets) mark; (8) trademark infringement of the BidPro mark; (9) federal unfair competition concerning the BidPro mark; (10) violation of the Deceptive Trade Practices Act relating to the BidPro mark; (11) tortious interference with prospective business relationships; (12) trespass to chattels; and (13) declaratory judgment.

Defendants maintain that they have lawfully challenged Dodge Data's dominant market position, and so Dodge Data now seeks to undermine their competition.

II. STANDARD OF REVIEW

HN2[] A motion to dismiss pursuant to *Fed. R. Civ. P. 12(b)(6)* operates to test the sufficiency of the complaint and permits dismissal of a complaint for "failure to state a claim upon which relief can be granted." To show grounds for relief, *Fed. R. Civ. P. 8(a)* requires that the complaint contain a "short and plain statement of the claim **[*863]** showing that the pleader is entitled to relief."

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[3] The parties request oral argument. (Doc. 29 at 1 and Doc. 32 at 1). The Court finds that the pleadings are clear on their face, and that oral argument and/or an evidentiary hearing is not necessary. *See Whitescarver v. Sabin Robbins Paper Co., Case No. C-1-03-911, 2006 U.S. Dist. LEXIS 51524, at *7 (S.D. Ohio July 27, 2006)* **[**3]** (J. Dlott) (***HN1***[] "Local Rule 7.1(b)(2) leaves the court with discretion to grant a request for oral argument.").

HN3[] While Fed. R. Civ. P. 8 "does not require 'detailed factual allegations,' . . . it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). Pleadings offering mere "'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" **[**6]** *Id.* (citing Twombly, 550 U.S. at 555). In fact, in determining a motion to dismiss, "courts 'are not bound to accept as true a legal conclusion couched as a factual allegation[.]'" Twombly, 550 U.S. at 555 (citing Papasan v. Allain, 478 U.S. 265, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986)). Further, "[f]actual allegations must be enough to raise a right to relief above the speculative level[.]" *Id.*

Accordingly, HN4[] "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Iqbal, 556 U.S. at 678. A claim is plausible where "plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Plausibility "is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief,'" and the case shall be dismissed. *Id.* (*citing* Fed. Rule Civ. P. 8(a)(2)).

III. ANALYSIS

A. Antitrust Standing

HN5[] "[A]ntitrust standing is a threshold, pleading-stage inquiry and when a complaint by its terms fails to establish this requirement [it] must [be] dismiss[ed]... as a matter of law—lest **[**7]** the antitrust laws become a treble-damages sword rather than the shield against competition-destroying conduct that Congress meant them to be." NicSand, Inc. v. 3M Co., 507 F.3d 442, 450 (6th Cir. 2007) (*en banc*).[4] A district court decides whether a plaintiff has adequately pleaded antitrust standing by balancing five factors: "(1) the causal connection between the antitrust violation and harm to the plaintiff and whether that harm was intended to be caused; (2) the nature of the plaintiff's alleged injury including the status of the plaintiff as consumer or competitor in the relevant market; (3) the directness or indirectness of the injury, and the related inquiry of whether the damages are speculative; (4) the potential for duplicative recovery or complex apportionment of damages; and (5) the existence of more direct victims of the alleged antitrust violation." Southaven Land Co. v. Malone & Hyde, Inc., 715 F.2d 1079, 1085 (6th Cir. 1983).

Here, Defendants argue that Dodge Data does not have antitrust standing because it has not properly plead an antitrust injury. HN7[] An antitrust injury is an: (1) "injury of the type the antitrust laws were intended to prevent" and (2) injury that "the flows from that which makes defendants' **[**8]** acts unlawful." In re Cardizem CD Antitrust Litig., 332 F.3d 896, 909 (6th Cir. 2003). "[B]ecause the purpose of the antitrust laws is to protect competition **[*864]** rather than competitors, a plaintiff must allege injury, not only to himself, but to a relevant market. Thus, failure to allege an anti-competitive impact on a relevant market amounts to a failure to allege an antitrust injury." Brown Shoe Co. v. United States, 370 U.S. 294, 320, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962). This requirement means that "one competitor may not use the antitrust laws to sue a rival merely for vigorous or intensified competition." NicSand, Inc., 507 F.3d at 450. Specifically, "a plaintiff must put forth factual allegations plausibly suggesting that there has been an adverse effect on prices, output, or quality of good in the relevant market as a

[4] HN6[] "[S]tanding in an antitrust case is more onerous than the conventional Article III inquiry." Static Control Components, Inc. v. Lexmark Int'l, Inc., 697 F.3d 387, 402 (6th Cir. 2012).

result of the challenged actions." *Guinn v. Mount Carmel Health, No. 2:09cv226, 2012 U.S. Dist. LEXIS 24353, at *14 (S.D. Ohio Feb. 27, 2012)*.[5]

Here, Dodge Data not only alleges competition, it alleges that Defendants have engaged in illegal predatory pricing.***HN9***[] Predatory **[**9]** pricing "harms both competitors and competition," and is "capable of inflicting antitrust injury." *Cargill Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 117-118, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986)*. The Supreme Court has noted that a predatory pricing scheme creates antitrust injury:

> This does not necessarily mean, as the Court of Appeals feared, that *§ 4* plaintiffs must prove an actual lessening of competition in order to recover. The short-term effect of certain anticompetitive behavior—predatory below-cost pricing, for example—may be to stimulate price competition. But competitors may be able to prove antitrust injury before they actually are driven from the market and competition is thereby lessened.

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 n. 14, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977).[6] "When the defendant effectively sells below its own costs, it puts pressure on its competitors to lower prices without actually lowering its own costs or otherwise creating a market efficiency. This is sufficient for competitors to have antitrust standing." *Collins Inkjet Corp. v. Eastman Kodak Co., 781 F.3d 264, 275 (6th Cir. 2015)*.[7]

Competition between Dodge Data and CMD (and later iSqFt/CMD) over the years has necessitated that each company improve its product quality and increase innovation in order to keep up with its rival. Dodge Data argues that if it is forced from the market, Defendants would raise prices to *supra*-competitive levels and innovation and product quality would suffer. (Doc. 28 at ¶¶ 65-66).

Accordingly, Dodge Data has alleged antitrust injury sufficient to establish standing.

[*865] B. Attempted Monopolization

Dodge Data alleges ***HN12***[] a claim for attempted monopolization in violation of *Section 2* of the Sherman Act. *15 U.S.C. § 2*. A claim for attempted monopolization requires: "(1) a specific intent to monopolize; (2) anti-competitive conduct; and (3) a dangerous probability of success." *Tarrant Serv. Agency, Inc. v. Am. Standard, Inc., 12 F.3d 609, 615 (6th Cir. 1993)*. Market strength that approaches monopoly power, meaning the ability to control prices and exclude competition, is a necessary element for showing a dangerous probability of achieving monopoly power. *Id.* However, courts have not adopted a uniform standard regarding the threshold of what it takes to establish a monopoly **[**11]** power. "[M]arket share alone, however, is not enough to determine a firm's capacity to achieve monopoly . . . [t]he real test is whether [the defendants] possessed sufficient market power to achieve its aims." *Richter Concrete Corp. v. Hilltop Concrete Corp., 691 F.2d 818, 826 (6th Cir. 1982)*.

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[5] ***HN8***[] "[A]n antitrust plaintiff must show that (1) the alleged violation tended to reduce competition overall and (2) the plaintiff's injury was a consequence of the resulting diminished competition." *J.B.D.L. Corp. v. Wyeth-Ayerst Labs. Inc., 485 F.3d 880, 887 (6th Cir. 2007)*. This requires a demonstration, "as a threshold matter, 'that the challenged action has had an actual adverse effect on competition as a whole in the relevant market." *George Haug Co. v. Rolls Royce Motor Cars, Inc., 148 F.3d 136, 139 (2nd Cir. 1998)*.

[6] *See also* *Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 339-40, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)* (***HN10***[] "[a]ntitrust injury does not arise for purposes of *§ 4 of the Clayton Act* until a private party is adversely affected by an anticompetitive aspect of the defendant's conduct, in the context of pricing practices, only predatory pricing has the requisite anticompetitive effect").

[7] *See also* *Amarel v. Connell, 102 F.3d 1494, 1508 (9th Cir. 1996)* (***HN11***[] "[l]osses a competitor suffers as a result of predatory **[**10]** pricing is a form of antitrust injury because 'predatory pricing has the requisite anticompetitive effect' against competitors").

1. Specific intent to monopolize

HN13[] "Specific intent to monopolize may be inferred from evidence of anticompetitive conduct, but not from legitimate business practices aimed only at succeeding in competition." *Arthur S. Langenderfer, Inc. v. S.E. Johnson Co., 917 F.2d 1413, 1432 (6th Cir. 1990)*. Defendants argue that Dodge Data has pled nothing more than "heated competition."

Dodge Data alleges that Defendants: (i) began predatory pricing shortly after CMD's president instructed his sales staff to do "whatever it takes to disrupt Dodge Data's business"; (ii) provided its two leading sales people with a list of 50-70 Dodge Data customers and instructed those sales people to concentrate full-time on converting those customers to CMD; (iii) provided those employees with special bonuses that could equal $100,000 a year depending on their success in converting Dodge Data's customers; (iv) directed its inside sales force to specifically target Dodge Data customers and told those salespeople to convert those customers no matter what the price; (v) had prices approved by the top management **[**12]** of iSqFt/CMD that were well below iSDqFt/CMD's average total cost and average variable cost; and (vi) sold to Dodge Data's customers at a price which was well below (at times hundreds of thousands of dollars below) the price necessary to actually win the account (and below prices offered to iSqFt/CMD's own customers). (Doc. 28 at ¶¶ 58-61).

Accordingly, and as discussed in more detail *infra* at Section III.B.2, Dodge Data has pleaded specific intent to monopolize. *See, e.g., Tops Mkts., Inc. v. Quality Mkts., Inc., 142 F.3d 90, 101 (2d Cir. 1998)* ("defendants' intent can be derived from their words" and "their stated goal of preventing [the plaintiff] from entering the [] market").[8]

2. Anticompetitive conduct

HN15[] Anticompetitive conduct is any conduct that "attempt[s] to exclude rivals on some basis other than efficiency." *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 605, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985)*. "Anticompetitive conduct can come in too many different forms, and is too dependent upon context, for any court or commentator ever **[**13]** to have enumerated all the varieties." *Spirit Airlines, **[*866]** Inc. v. Nw. Airlines, Inc., 431 F.3d 917, 951 (6th Cir. 2005)*.

Dodge Data has alleged anticompetitive conduct consisting of: (i) predatory pricing; (ii) the use of the stolen customer information to compete; (iii) the intentional infringement of trademarks; (iv) the attempt to acquire market power through merger; and (v) restricting the availability of qualified employees by requiring them to sign invalid non-compete agreements. (Doc. 28 at ¶ 99). ***HN16***[] In determining whether Dodge Data has alleged anticompetitive conduct, "[t]he fact finder should be permitted to consider the entire sum of unlawful exclusionary practices and their impact." 2 Philip E. Areeda & Herbert Hovenkamp, ***Antitrust Law****: An Analysis of Antitrust Principles and Their Application* at ¶ 310c7 (Aspen Publishers 3d ed. (2008)).[9] The Court will consider each of these alleged acts of anticompetitive conduct in turn.

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[8] *See also D.E. Rogers Assocs., Inc. v. Gardner-Denver Co., 718 F.2d 1431, 1435 (6th Cir. 1983)* (***HN14***[] "the relationship between act and intent in attempted monopolization claims is a close one" and "evidence of anticompetitive conduct may be used to support a finding of intent where direct evidence of intent is unavailable"); *Scooter Store, Inc. v. Spinlife.com, 777 F. Supp.2d 1102, 1116 (S.D. Ohio Mar. 28, 2011)* (conduct showing a "desire to crush competitors" shows a specific intent to monopolize).

[9] "The evidence supported [plaintiff's] theory that [defendant's] interrelated practices successfully limited competition. [Defendant] once again attempts to divide the practices into discrete, distinct activities, each of which prior courts may have found to be lawful . . . Defendant argues that no one instance of improper conduct standing **[**14]** alone would lead to *§ 2* liability. However, taken together, they show a pattern of exclusionary behavior sufficient to support the jury verdict." *Conwood Co. v. U.S. Tobacco Co., No. 5:98-cv-108-R, 2000 U.S. Dist. LEXIS 12761, at *11 (W.D. Ky. Aug. 10, 2000)*.

a. Predatory pricing

HN17[] A plaintiff seeking to plead predatory pricing must plead that "the prices complained of are below an appropriate measure of its rival's costs" and that the defendant had a "dangerous probability...of recouping its investment in below-cost prices." *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222, 224, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993)*.

> [W]e hold that to establish predatory pricing a plaintiff must prove that the anticipated benefits of defendant's price depended on its tendency to discipline or eliminate competition and thereby enhance the firm's long-term ability to reap the benefits of monopoly power. If the defendant's prices were below average total cost but above average variable cost, the plaintiff bears the burden of showing defendant's pricing was predatory. If, however, the plaintiff proves that the defendant's prices were below average variable cost, the plaintiff has established a *prima facie* case of predatory pricing and the burden shifts to the defendant to prove that the prices were justified without regard to any anticipated destructive effect they **[**15]** might have on competitors.

Spirit Airlines, Inc., 431 F.3d at 938.[10]

Since Dodge Data does not yet have access to Defendants' costs, Dodge Data uses its knowledge of its own cost structure, its knowledge of the industry, and its knowledge of iSqFt/CMD's business, to plead, upon information and belief, that Defendants' costs are below their average variable and average total cost. Dodge Data's allegations are an extrapolation of iSqFt/CMD's cost structure based upon the information that Dodge Data has: Dodge Data, as iSqFt/CMD's only competitor in the relevant market, knows about the industry; the products iSqFt/CMD offers; the basic level of costs associated with gathering, organizing, and delivering the data to customers; the costs associated **[*867]** with hiring, training, and compensating sales people; and the hundreds of other costs and company seeking to offer a product that is competitive with Dodge Data's products must incur. **HN18**[] "[C]ompetitors are the best of predatory pricing plaintiffs [because], although they do not have direct information about the defendant's costs, . . . they usually know these costs better than anyone else." **[**16]** 3A Areeda & Hovenkamp at ¶ 723e. If a plaintiff were required to actually know a defendant's costs to even plead a predatory pricing claim, no predatory pricing case would progress beyond a motion to dismiss.

Dodge Data argues that Defendants' predatory pricing campaign began shortly after CMD's president instructed his sales staff to do "whatever it takes to disrupt Dodge's business." (Doc. 28 at ¶ 58). In support of this campaign, CMD provided its two leading sales people with a list of 50 to 70 of Dodge Data's customers (believed to have been obtained from the stolen customer information), and instructed those sales people to devote their full time to converting those customers to CMD. (*Id. at ¶¶ 58-59*). Dodge Data argues that top management at iSqFt/CMD specifically approved sales that were well below average total cost and average variable cost. (*Id. at ¶ 60*). Specifically, iSqFt/CMD offered prices that were, in some cases, more than 85% lower than the price offered by Dodge Data. (*Id. at ¶¶ 61-62*).[11]

These facts support Dodge Data's allegations that iSqFt/CMD's pricing structure was designed more to "discipline or eliminate competition" than to secure profits for iSqFt/CMD. *Spirit Airlines, 431 F.3d at 958*. Moreover, the price

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[10] *See also* *Superior Prod. P'ship v. Gordon Auto Body Parts Co., 784 F.3d 311, 326 (6th Cir. 2015)* (plaintiffs were allowed "the flexibility to apply a cost-based test other than average variable cost").

[11] iSqFt/CMD complains that Dodge Data has only set forth one example of a post-merger predatory price charged by iSqFt/CMM. Defendants, however, do not explain what the significance of **[**17]** the merger date is (or if it has in fact occurred). Even if the predatory pricing ceased entirely after the complaint was filed, that would not change Defendants' liability for any acts that they have allegedly already committed.

at which iSqFt/CMD ultimately secured the business of Dodge Data's customers was well below the price necessary to actually win the account.[12]

b. Use of stolen customer information

Next, Dodge Data alleges that iSqFt/CMD is currently using stolen customer information to compete against Dodge Data. (Doc. 28 at ¶¶ 39, 58, 174). Defendants contend that its receipt of the alleged stolen **[**18]** customer information was already litigated and is therefore barred by *res judicata*. However, claims based upon Defendants' use of the information in 2014 through the present were not litigated in the 2009 litigation and therefore are not barred by *res judicata*. Defendants' continued use of the customer information constitutes an anticompetitive act, because this usage is allegedly part of a scheme to exclude rivals on some basis other than efficiency. Moreover,***HN19***[] there is no requirement that the underlying "anticompetitive acts" give rise to an independent tort action. *Cont'l Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 707, 82 S. Ct. 1404, 8 L. Ed. 2d 777 (1962)* (it is "well settled that acts which are in themselves legal lose that character when they become [part] of an unlawful scheme").

c. Infringement of trademarks and use of improper restrictive covenants

Dodge Data alleges that Defendants' conduct was designed to adversely **[*868]** affect competition in the relevant market. Defendants maintain that the alleged trademark infringement cannot be anticompetitive conduct, because the products associated with the infringed trademarks are in a different product market. However, ***HN20***[] anticompetitive conduct only requires that the conduct be designed to have an anticompetitive effect on the relevant **[**19]** market. *Tops Mkts, Inc., 142 F.3d at 100* (tortiously interfering with a contract to purchase land (real estate market), to stop plaintiff from finding a location to open a grocery store, was anticompetitive conduct affecting the grocery store market).

d. Mergers and attempted mergers

Finally, Dodge Data argues that iSqFt attempted to acquire every player in the relevant market, including Dodge Data. Defendants maintain, however, that Dodge Data does not and cannot allege that iSqFt planned to acquire both Dodge Data and CMD, as opposed to just one of them.

Ultimately, considering "the entire sum of [alleged] unlawful exclusionary practices and their impact" and construing the facts in the light most favorable to Dodge Data, it has pleaded numerous instances of anticompetitive conduct and specific intent to monopolize.[13] *See* Areeda & Hovenkamp at ¶ 310c7.

3. Dangerous probability of success[14]

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[12] If iSqFt/CMD were interested in maximizing profits, there was no reason to resort to prices that were so drastically below that which Dodge Data was offering. Therefore, Dodge Data offers sufficient facts to allege that iSqFt/CMD's pricing strategy was more concerned with eliminating Dodge Data's revenue and driving it from the relevant market than it was with its own short-term profitability.

[13] ***HN21***[] "Specific intent" for an attempted monopolization claim may be inferred from the existence of anticompetitive acts. *See, e.g.., Arthur S. Langenderfer, Inc., 917 F.2d at 1432*.

[14] ***HN22***[] A "dangerous probability of success" requires "market strength that approaches monopoly power" and an examination of "barriers to entry." *White & White, Inc. v. Am. Hosp. Supply Corp., 723 F.2d 495, 507 (6th Cir. 1983)*.

HN23[] The final element of the predatory pricing analysis is whether there **[**20]** is a dangerous probability of recoupment, or whether Defendants could "obtain enough market power to set higher than competitive prices, and then [could] sustain those prices long enough to earn in excess profits what they earlier gave up in below-cost prices." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 590-91, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*. In conducting this analysis, a court should analyze the predatory pricing scheme to determine whether the scheme alleged could plausibly "produc[e] the intended effects on the firm's rivals . . . [by] driving them from the market," and then analyze "the structure and conditions of the relevant market" in order to determine whether defendants could plausibly maintain *supra*-competitive prices after it has eliminated its rival from the market. *Brooke Group Ltd., 509 U.S. at 225-27*. Since this analysis is a "particularly fact-intensive inquiry," "[c]ourts typically should not resolve [it] at the pleading stage." *Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 318 (3d Cir. 2007)*.

The predatory pricing scheme that Dodge Data alleges could plausibly result in a market where there is a "dangerous probability" that iSqFt/CMD would have monopoly power, including the power to charge *supra*-competitive prices, reduce output, decrease innovation, and otherwise damage competition. For example, the alleged predatory pricing scheme caused Dodge Data to lose **[**21]** customers with millions of dollars in annual sales volume. (Doc. 28 at ¶ 63). Further, Dodge Data has allegedly lost millions in "price erosion," where it has been forced to discount to unsustainable and unprofitable levels. (*Id.*)[15]

[*869] iSqFt/CMD has approximately 50% share of the relevant market, which is sufficient to evidence recoupment.

> HN24[] A lesser degree of market power may be sufficient to establish an attempted monopolization claim than that needed to establish a completed monopolization claim. Under this lesser standard, courts will generally find a dangerous probability for success where the defendant has a market share of fifty percent or more. On the other end of the spectrum, a market share of thirty percent is presumptively insufficient to establish a dangerous probability of success. Those with market shares between thirty and fifty percent may be found to have a dangerous probability **[**22]** of success if other factors are present.

Defiance Hosp., Inc. v. Fauster-Cameron, Inc., 344 F.Supp.2d 1097, 1116-117 (N.D. Ohio 2004).[16]

Furthermore, Dodge Data maintains that this is a highly concentrated two-competitor market. HN26[] A "dangerous probability" of achieving market power is more likely in a two-competitor market where each market participant has approximately an equal share, than in a market with numerous other players. In a two-player, "50%-50% market," the elimination of the plaintiff would leave the defendant with 100% of the market. *Domed Stadium Hotel, Inc. v. Holiday Inns, Inc., 732 F.2d 480, 490 (5th Cir. 1984)*.

Additionally, Dodge Data argues that having achieved monopoly power and the ability to charge *supra*-competitive prices, iSqFt/CMD would be able to maintain those prices because there are significant barriers to entry in this market. **[**23]** Dodge Data maintains that "[i]n the past 100 years, no company other than Dodge or CMD has occupied this market, other than in a *de minimis* way." (Doc. 28 at ¶ 55). *See, e.g., White & White, Inc. v. Am. Hosp. Supply Corp., 723 F.2d 495, 507 (6th Cir. 1983)* (HN27[] "[t]he fact that it is difficult for a new firm to enter the industry, or that no new competitors have entered the market for a number of years, may be very important factors"). Thus, Dodge Data has pleaded sufficient facts to show that Defendants could "obtain enough market

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[15] Defendants argue that there is some possibility that if their predatory pricing scheme continues that they, instead of Dodge Data, will exit the market. However, Defendants fail to cite any case law where a court dismissed an attempt to monopolize claim because the plaintiff attempted to survive that scheme.

[16] Defendants argue that a 50% market share is insufficient to support an attempted monopoly claim. However, HN25[] there are dozens of cases stating that market shares of 50% are "generally" sufficient to support such a claim, and much lower market shares may support such a claim when there are strong barriers to entry. *See, e.g., Smith Wholesale Co. v. Philip Morris USA, Inc., No. 2:03cv221, 2005 U.S. Dist. LEXIS 18078 (E.D. Tenn. Aug. 16, 2005)*, *aff'd*, *219 F. App'x 398 (6th Cir. 2007)* (Philip Morris' market share of 49-56% was sufficient to establish market power for an attempted monopolization claim).

power to set higher than competitive prices, and then [could] sustain those prices long enough to earn in excess profits what they earlier gave up in below-cost prices." Matsushita Elec. Indus. Co., 475 U.S. at 590-91.[17]

Finally, Defendants argue that Dodge Data's sole basis for pleading barriers to entry is its claim that there are high fixed costs, and that for there to be "substantial" barriers to entry, there must be some structural aspect unique to the market aside from cost alone. However, **HN28**[] there is no requirement that substantial barriers to entry consist **[**24]** of more than high fixed costs. Furthermore, Dodge Data pleaded that a firm seeking to enter the relevant market would need: (i) a network of individuals to secure the necessary plans and specifications; (ii) a salesforce with ties throughout **[*870]** the United States and Canada to BPMs; and (iii) a software solution. (Doc. 28 at ¶ 54). Dodge Data argues that these items take years to develop, and there are a limited number of people with sufficient experience, contacts, and knowledge to effectively sell Nationwide CPI to BPMs. The ultimate question is whether "new entry is easy." Brooke Group, Ltd., 509 U.S. at 226.

Accordingly, Dodge Data has alleged a dangerous probability of success sufficient to maintain a claim for attempted monopolization in violation of Section 2 of the Sherman Act.

C. Conspiracy

Dodge Data alleges two antitrust conspiracy claims: (1) Defendants violated Section 2 of the Sherman Act by conspiring to monopolize the relevant market (Doc. 28 at ¶¶ 105-11); and (2) Defendants conspired to unreasonably restrain trade in violation of Section 1 of the Sherman Act (Id. at ¶¶ 112-17). **HN29**[] To survive the motion to dismiss, Dodge Data must allege that: "(1) two or more entities engaged in a conspiracy, combination, or contract, (2) to effect a **[**25]** restraint or combination prohibited per se (wherein the anticompetitive effects within a relevant geographic and product market are implied), (3) that was the proximate cause of [Dodge Data's] antitrust injury." Expert Masonry, Inc. v. Boone Cnty., 440 F.3d 336, 342-43 (6th Cir. 2006).

First, Defendants argue that the conspiracy claims fail because Dodge Data only alleges unilateral conduct. However, Dodge Data alleges a multilateral conspiracy between four entities — iSqFt, CMD, BidClerk, and CDC. (Doc. 28 at ¶¶ 45-48). Specifically, Dodge Data alleges that these entities are attempting to jointly drive Dodge Data from the market and otherwise restrain trade, by offering customers predatory pricing, trademark infringement, and by using of Dodge Data's stolen customer information to tortiously interfere with its customers. (Id. at ¶¶ 58-64, 67-94)

Next, Defendants argue that commonly held entities cannot conspire among themselves. However, **HN30**[] where the original purpose of a merger was to restrain trade or monopolize a market (as is alleged here), the prohibition against intra-company conspiracies no longer applies.

> It has long been clear that a pattern of acquisitions may itself create a combination illegal under § 1, especially when an original anticompetitive **[**26]** purpose is evident from the affiliated corporations' subsequent conduct. The *Yellow Cab* passage is most fairly read in light of this settled rule. In *Yellow Cab*, the affiliation of defendants was irrelevant because the original acquisitions were themselves illegal. An affiliation "flowing from an illegal conspiracy" would not avert sanctions. Common ownership and control were irrelevant because restraint of trade was "the primary object of the combination."

Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 761, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984). Even if the original purpose of the merger were not to unreasonably restrain trade or to monopolize a market, a merger does not insulate parties from joint actions taken before the merger. Omnicare, Inc. v. UnitedHealth Group, Inc., 629 F.3d 697 (7th Cir. 2011) (examining pre-merger conduct to determine if there was a combination or conspiracy). Moreover, whether the defendant entities have actually merged, when that merger took place (if at all), and the form

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[17] Defendants argue that a few years ago several smaller competitors began to emerge. "None of these competitors, however, was successful in obtaining more than a *de minimis* share of the relevant market for Nationwide CPI." (Doc. 28 at ¶ 41).

of that merger (if it happened) are unclear. As of the date of the Amended Complaint, each defendant existed as a separate legal entity, maintained separate and distinct websites, and continued to appear as separate, **[*871]** competitive entities in the marketplace. (Doc. 32 at 37). Whether and to what extent Defendants have integrated is a fact-specific **[**27]** inquiry inappropriate for determination on the pleadings. *See, e.g., Med. Ctr. at Elizabeth Place v. Atrium Health Sys., No. 3:12-cv-26, 2012 U.S. Dist. LEXIS 123408 at *22 (S.D. Ohio Aug. 30, 2012)* (denying motion to dismiss and noting that "[d]efendants fail to point to any case whether a court has decided this factually-driven issue [of a single entity status] on a motion to dismiss").

Accordingly, Dodge Data has alleged sufficient facts (*see supra* Sections III.A&B) to maintain claims for antitrust conspiracy.

D. Trademark Claims

HN31[] To state a claim of trademark infringement, "a plaintiff must allege facts establishing that: (1) [the plaintiff] owns the registered trademark; (2) the defendant used the mark in commerce; and (3) the use was likely to cause confusion." *Hensley Mfg. v. ProPride, Inc., 579 F.3d 603, 609 (6th Cir. 2009)* (citing *15 U.S.C. § 1114(1)*). "The touchstone of liability [for trademark infringement] is whether the defendant's use of the disputed mark is likely to cause confusion among consumers regarding the origin of the goods offered by the parties." *Id. at 610*. "Generally, dismissal for failure to state a claim upon which relief can be granted is appropriate in only the most extreme trademark infringement cases, such as where goods are unrelated as a matter of law, since the likelihood of confusion is generally a question of fact." **[**28]** *Id. at 613*.[18]

The Sweets Mark: With respect to Sweets, Dodge Data asserts two types of trademarks. First, it asserts the Sweets registered marks, which consist of a stylized, block-letter "S" inside a solid circle. (Doc. 28, Ex. A). Since these marks are depicted in black and white (and do not contain any markings indicating color), they are not limited to any specific color. *See 37 C.F.R. § 2.52 (2016)*; 3 McCarthy on Trademarks and Unfair Competition § 19:58 (4th ed. 2016). Second, Dodge Data asserts common law rights in the same block-letter "S" symbol where the "S" symbol is depicted in white and set inside a solid distinctive green circle. (Doc. 28 at ¶¶ 73-75, 126-32). The offending Sweets mark consists of the same "S" element—a block-letter, stylized "S"—and adds small tabs to the top and bottom of the "S" in order to turn the "S" into a dollar sign.[19] This symbol is then set upon a solid green circle that is allegedly the same shade of green used by Dodge Data for decades. (*Id.*)

Here, Dodge Data has sufficiently alleged that the marks in question are similar, that the goods are sold in the same market, and that a purchaser could mistake the marks for the wrong product. These allegations meet the low standard in *Hensley* and are enough to survive a motion to dismiss. *See, e.g., Tovey v. Nike, Inc., No. 1:12cv448, 2013 U.S. Dist. LEXIS 16084, at *15 (N.D. Ohio Feb. 6, 2013)*.

The "Dodge BidPro" Mark: With respect to the BidPro mark, Dodge Data asserts two types of trademark rights: those arising out of its registered "Dodge BidPro" **[*872]** mark and those arising out of the common law. (Doc. 28 at ¶¶ 139-154).

The BidPro registered mark is***HN32***[] a standard character mark, which means it is not limited "to a particular font, style, size, or color." (Doc. 28., Ex. B). *Citigroup Inc. v. Capital City Bank Group, Inc., 637 F.3d 1344, 1349 (Fed. Cir. 2011)* (standard character marks "are not limited to any particular presentation"). The offending Bid Pro

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[18] *See also Just Enters., Inc. v. Nurenberg Paris Heller & McCarthy Co., No. 1:07cv1544, 2008 U.S. Dist. LEXIS 39281, at *4 (N.D. Ohio May 12, 2008)* (holding that "the question of likelihood of confusion is best resolved after discovery on summary judgment").

[19] Defendants argue that the dollar sign **[**29]** used on CDC's website cannot be confused with Dodge Data's "S" or the advertisement that it is inviting customers to "Advertise with Construction Data" Corporation (CDC), not in the Sweets catalog. (Doc. 28 at ¶ 77).

mark is "Invitation to Bid Pro" and is used by CDC to mark a product that "directly competes" with "Dodge's BidPro." (Doc. 28 at ¶¶ 85-87). Dodge Data argues that **[**30]** the construction of the offending Bid Pro mark is such that it actually appears to be inviting the reader to use Dodge Data's service and has caused at least one instance of actual confusion. (*Id. at ¶ 88*).

Defendants argue that Dodge Data's misleading use of "BidPro" to describe its mark is improper because the registered mark is "Dodge BidPro," not merely "BidPro." CDC's product is called "Invitation to Bid Pro." Furthermore, Defendants argue that Dodge Data's customers are different than CDC's customers. Specifically, the purchasers of Dodge Data's product are "subcontractors," while CDC's customer base constitutes individuals who want access to subcontractors and suppliers. (Doc. 28 at ¶ 80). Therefore, Defendants argue that there is no likelihood of confusion by Dodge Data's subcontractor customers.

First, the fact that Dodge Data's mark includes the word "Dodge" -- but the offending Bid Pro mark does not -- is irrelevant because ***HN33***[] the mark need not be identical; it need only cause a likelihood of confusion. Second, Dodge Data alleges that CDC uses BidPro "to promote a product that directly competes with [Dodge] BidPro" (Doc. 28 at ¶ 87), so Defendants' allegation that the products **[**31]** do not actually compete is a factual issue, and, therefore, improper for resolution on a motion to dismiss. Moreover, the offending Bid Pro mark has already caused at least one instance of actual confusion. (Doc. 28 at ¶ 88). *See* *Daddy's Junky Music Stores, Inc. v. Big Daddy's Family Music Ctr., 109 F.3d 275, 284 (6th Cir. 1997)* (while the lack of actual confusion "is rarely significant," the existence of actual confusion is the "best evidence of likelihood of confusion").

Accordingly, Dodge Data has alleged claims for trademark infringement.

E. State Law Claims

1. Choice of law analysis

HN34[] When considering the state-law claims, a court must first determine which state's law applies. This Court, as a federal district court sitting in Ohio, applies Ohio's choice-of-law rules. *Glennon v. Dean Witter Reynolds, Inc., 83 F.3d 132, 136 (6th Cir. 1996)*. Ohio "follows the Restatement (Second) of Conflict of Laws in making choice-of-law determinations in tort actions." *MV Circuit Design, Inc. v. Omnicell, Inc., No. 1:14cv2028, 2015 U.S. Dist. LEXIS 37688, at *37 (N.D. Ohio Mar. 24, 2015)*. Accordingly, ***HN35***[] "a presumption is created that the law of the place of the injury controls unless another jurisdiction has a more significant relationship to the lawsuit." The burden of proving this conflict rests with the party disputing the application of local law. *Akro-Plastics v. Drake Indus., 115 Ohio App. 3d 221, 685 N.E.2d 246, 248 (Ohio 1996)*. If, after applying the relevant factors, either state would be appropriate, **[**32]** the court should apply the law of the forum state. *Carder Buick-Olds Co., Inc. v. Reynolds & Reynolds, Inc., 148 Ohio App. 3d 635, 2002 Ohio 2912, 775 N.E.2d 531, 544 (Ohio App. 2002)*.

HN36[] Within the context of tort actions, to determine the state with the most significant relationship to the cause **[*873]** of action, Ohio courts consider "(1) the place of the injury; (2) the place where the conduct causing the injury occurred; (3) the domicile, residence, nationality, place of incorporation, and place of business of the parties; [and] (4) the place where the relationship between the parties, if any, is located." *Nicula v. Nicula, No. 84049, 2009 Ohio 2114, 2009 Ohio App. LEXIS 1773, at *16 (Ohio App. May 7, 2009)*.[20]

Dodge Data claims that New York law applies because the place of injury is New York, where Dodge Data is based and where its customer database is maintained. Defendants maintain that Ohio law applies, because Ohio has a more significant relationship to the lawsuit since: (1) the pricing decisions and use of confidential customer information occurred in Ohio (Doc. 28 at ¶¶ 58-64); and (2) four of the five parties have their principal place of

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[20] The place where the tortious conduct occurred is the place where the relationship, if any, between the parties centered. *Amon v. Grange Mut. Cas. Co., 112 Ohio App. 3d 407, 678 N.E.2d 1002, 1005 (Ohio 1996)*.

business in Ohio (*Id. at ¶¶ 8-11*). Considering these facts, Dodge Data's express statements that Defendants' tortious acts "arise, and have caused injury, in **[**33]** Ohio,"[21] and that the forum state is favored where either state's law would be appropriate, the Court finds that Dodge Data has not met its burden of establishing that New York law applies.

2. Tortious interference

HN37[] Under Ohio law, "[t]he tort of interference with a business relationship occurs when a person, without a privilege to do so, induces or otherwise purposely causes a third person not to enter into or continue a business relationship with another." *Harris v. Bornhorst, 513 F.3d 503, 523 (6th Cir. 2008)*. To state a claim for tortious interference with business relations, a plaintiff must allege: (1) a business relationship; (2) the tortfeasor's knowledge of the relationship; (3) an intentional interference causing a breach or termination of the relationship; and (4) damages. *Dolan v. Glouster, 173 Ohio App. 3d 617, 2007 Ohio 6275, 879 N.E.2d 838, 847 (Ohio App. 2007)*.

Here, Dodge Data alleges that Defendants intentionally interfered with its prospective business relations with numerous customers by using "dishonest, unfair, and improper means." (Doc. 28 at ¶¶ 171-76). Specifically, Dodge Data alleges that both Defendants' use of the stolen customer information to identify and solicit customers, and Defendants' predatory pricing, tortuously interfered with Dodge Data's prospective business relations. (Doc. **[**34]** 28 at ¶¶ 171-176). *See, e.g., Guinn, 2012 U.S. Dist. LEXIS 24353 at 35-37*.

In response, Defendants first maintain that this claim should be dismissed because Dodge Data has failed to identify a single customer that it has lost which is an essential element to its interference claim. However, Dodge Data identifies nine customers that it Alleges it lost as a result of Defendants' below-cost sales. (Doc. 28 at ¶ 61).[22]

Next, Defendants argue that "below cost pricing" cannot provide the necessary wrongful conduct to support a claim for tortious interference. However, ***HN38***[] conduct that is in violation of antitrust provisions may be improper conduct sufficient to support tortious interference. *Restatement (Second) of Torts § 767 cmt. a* (2015).

Accepting Dodge Data's allegations as true, and drawing all justifiable inferences **[*874]** in its favor, the Court concludes that Dodge Data has sufficiently pleaded a claim for tortious interference with business relationships.

3. Trespass to Chattels

Dodge Data claims that Defendants physically interfered with the use of Dodge Data's customer information by stealing it and using it to target Dodge Data's customers. (Doc. 28 at ¶¶ 178-179). **[**35]** Dodge Data maintains that Defendants use of the stolen information constitutes a trespass and interference with Dodge Data's rights. (*Id. at ¶ 181*).

HN39[] "A trespass to chattel occurs when one intentionally disposes another of their personal property." *Mercer v. Halmbacher, 2015- Ohio 4167, 44 N.E.3d 1011, 1017 (Ohio App. 2015)*.

> One who commits a trespass to a chattel is subject to liability to the possessor of the chattel if, but only if, (a) he dispossesses the other of the chattel, or (b) the chattel is impaired as to its condition, quality, or value, or (c) the possessor is deprived of the use of the chattel for a substantial time, or (d) bodily harm is caused to the possessor, or harm is caused to some person or thing in which the possessor has a legally protected interest.

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[21] (Doc. 28 at ¶¶ 15-18).

[22] Defendants do not cite any case law that requires a plaintiff to identify customers that it lost at the pleading stage.

CompuServe Inc. v. Cyber Promotions, Inc., 962 F. Supp. 1015, 1021-22 (S.D. Ohio 1997) (citing Restatement (Second) of Torts § 218 (1965)).[23] "An unprivileged use or other intermeddling with a chattel which results in actual impairment of its physical condition, quality or value to the possessor makes the actor liable for the loss thus caused." Id. at 1022. "[T]he word 'chattels' is ordinarily limited to visible, tangible, movable personable property, although it 'may be used in the broader sense." Universal Tube & Rollform Equip. Corp. v. YouTube, Inc., 504 F. Supp.2d 260 (N.D. Ohio 2007).[24]

Defendants maintain that Dodge Data's trespass to chattels claim fails because trespass to chattels relating to improper access of a computer database requires that there be some "physical damage" to the database.[25] However, in *CompuServe*, the court found that ***HN40***[] physical damage was not required where the value of the chattel diminished. 962 F. Supp. at 1022. Here, Dodge Data has alleged that it was injured as a result of Defendants' conduct. The Court's discussion of that conduct and subsequent injury (*see supra* at Section III, A-C) supports a finding that the alleged damage sustained by Dodge Data is sufficient to maintain an action for trespass to chattels. *See* CompuServe, 962 F. Supp. at 1023.

[*875] F. Declaratory Relief

Dodge Data seeks declaratory judgment finding that the restrictive covenants that Defendants require their employees to sign are overly broad, unreasonable, and invalid. (Doc. 28 at ¶¶ 184-89).

First, Defendants argues that their restrictive covenants are legal and enforceable in each state in which they are consummated: Ohio, Florida, Georgia, and Illinois. However,***HN42***[] none of these states has a rule that restrictive covenants are always valid, instead each holds that only restrictions that are "reasonable" in scope are valid and enforceable. *See, e.g.,* Rotex Global, LLC v. CPO Wirecloth & Screens, Inc., No. 1:16cv244, 2016 U.S. Dist. LEXIS 24540, at *5 (S.D. Ohio Feb. 29, 2016) ("[n]oncompetition and nonsolicitation agreements that are reasonable are enforced"); *GPS Indus., LLC v. Lewis, 691 F. Supp. 2d 1327, 1333 (M.D. Fla. 2010)* (Florida statute "permits the enforcement of contracts restricting **[**38]** or prohibiting competition during or after the term of the restrictive covenant so long as such contacts are reasonable in time, area, and line of business"); Ga. Code Ann. § 13-8-53 (2012) (permitting restrictive covenants only when they meet certain conditions); Cambridge Eng'g, Inc. v. Mercury Partners 90 BI, Inc., 378 Ill. App. 3d 437, 879 N.E.2d 512, 522, 316 Ill. Dec. 445 (Ill App. 2007) (noting that "[f]or a restrictive covenant to be valid and enforceable in Illinois, the terms must be 'reasonable and necessary to protect a legitimate business interest of the employer.'"). "In determining whether restrictive covenants should be enforced, the facts of each case are paramount," and therefore it is inappropriate to decide these issues on a motion to dismiss. Rotex Global, LLC, 2016 U.S. Dist. LEXIS 24540 at 12 (denying motion to dismiss relating to restrictive covenants).

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[23] "While authority under Ohio law respecting an action for trespass to chattels is extremely meager, it appears to be an actionable **[**36]** tort." Id. at 1021.

[24] Trespass to chattels has been described as the "little brother to conversion." State v. Herbert, 49 Ohio St. 2d 88, 358 N.E.2d 1090, 1106 (Ohio 1976).

[25] ***HN41***[] "The interest of a possessor of a chattel in its inviolability, unlike the similar interest of a possessor of land, is not given legal protection by an action for nominal damages for harmless intermeddlings with the chattel. In order that an actor who interferes with another's chattel may be liable, his conduct must affect some other and more important interest of the possessor. Therefore, one who intentionally intermeddles with another's chattel is subject to **[**37]** liability only if his intermeddling is harmful or if the possessor is deprived of the use of the chattel for a substantial time, or some other legally protected interest of the possessor is affected . . . Sufficient legal protection of the possessor's interest in the mere inviolability of his chattel is afforded by his privilege to use reasonable force to protect his possession against even harmless interference." Restatement (Second) of Torts § 218, Comment e (2015).

Second, Defendants maintain that Dodge Data's declaratory judgment claim is too hypothetical, because iSqFt/CMD did not threaten litigation, but only advised Dodge Data that iSqFt's former employees may not solicit iSqFt's customers and employees. ***HN43***[] The standard is whether the "facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 127, 127 S. Ct. 764, 166 L. Ed. 2d 604 (2007)*. Considering all of **[**39]** the circumstances in the light most favorable to Dodge Data, the Court finds that Dodge Data has alleged sufficient facts to meet this standard.

Finally, Defendants argue that Dodge Data failed to plead any specific facts about any specific covenant, which highlights the absence of an actual controversy as required by the *Declaratory Judgment Act*. *28 U.S.C. § 2201*. However, Dodge Data alleged that it did not hire any of Defendants' former employees who were subject to restrictive covenants "due to the uncertainty" created by the restrictive covenants. (Doc. 28 at ¶ 186). Defendants have clearly taken a contrary position. (*Id.*, Ex. C). Dodge Data is in the position of pursuing "arguably illegal behavior" or "abandoning its right to do [so]." *MedImmune, Inc., 549 U.S. at 129*. ***HN44***[] The "dilemma" created by "putting the challenger to the choice between abandoning his rights or risking prosecution" is "'a dilemma that it was the very purpose of the *Declaratory Judgment Act* to ameliorate.'" *Id.*

Accordingly, Dodge Data has stated a claim for declaratory judgment.

[*876] IV. CONCLUSION

For these reasons, Defendants' motion to dismiss (Doc. 29) is **DENIED**.

IT IS SO ORDERED.

Date: 4/28/16

/s/ Timothy S. Black

Timothy S. Black

United States District Judge

In re Pool Prods. Distrib. Mkt. Antitrust Litig.

United States District Court for the Eastern District of Louisiana

April 29, 2016, Decided; April 29, 2016, Filed

MDL NO. 2328 SECTION: R(2)

Reporter

2016 U.S. Dist. LEXIS 57390 *; 2016-1 Trade Reg. Rep. (CCH) P79,607

IN RE: POOL PRODUCTS DISTRIBUTION MARKET ANTITRUST LITIGATION

Subsequent History: Motion denied by *In re Pool Prods. Distrib. Mkt. Antitrust Litig., 2016 U.S. Dist. LEXIS 62992 (E.D. La., May 12, 2016)*

Prior History: *In re Pool Prods. Distrib. Mkt. Antitrust Litig., 2016 U.S. Dist. LEXIS 20974 (E.D. La., Feb. 22, 2016)*

Core Terms

Pool, conspiracies, Manufacturer, vertical, conspiracy claim, summary judgment, horizontal, antitrust, Products, monopolization, anticompetitive, aggregate, cases, rule of reason, Practices

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Judges: SARAH S. VANCE, UNITED STATES DISTRICT JUDGE. MAG. JUDGE WILKSON.

Opinion by: SARAH S. VANCE

Opinion

THIS DOCUMENT RELATES TO ALL DIRECT-PURCHASER PLAINTIFF CASES

ORDER AND REASONS

Defendants Pool Corporation, SCP Distributors LLC, and Superior Pool Products (collectively, "Pool"), move for summary judgment on Direct Purchaser Plaintiffs' (DPPs') vertical conspiracy claims, as well as Indirect Purchaser Plaintiffs' (IPPs') analogous state-law claims.[1] DPPs have alleged that Pool maintained an unlawful vertical agreement with each Manufacturer Defendant—Hayward Industries, Inc., Pentair Water Pool and Spa, Inc., and Zodiac Pool Systems, Inc. For the following reasons, the Court grants the motion.

I. BACKGROUND

This is an antitrust case that direct-purchaser plaintiffs (DPPs) and indirect-purchaser plaintiffs (IPPs) filed against Pool and the Manufacturer Defendants. Pool is the country's largest **[*4]** distributor of products used for the construction and maintenance of swimming pools (Pool Products).[2] The Manufacturer Defendants are the three largest manufacturers of Pool Products in the United States: Hayward, Zodiac, and Pentair.[3] As defined in DPPs' Second Consolidated Amended Class Action Complaint and IPPs' Third Amended Class Action Complaint, Pool Products are the equipment, products, parts, and materials used for the construction, renovation, maintenance, repair, and service of residential and commercial swimming pools. Pool Products include pumps, filters, covers, drains, fittings, rails, diving boards, and chemicals, among other goods. Pool buys Pool Products from manufacturers, including the three the Manufacturer Defendants, and in turn sells them to DPPs, which include pool builders, pool retail stores, and pool service and repair companies (collectively referred to as "Dealers").[4] IPPs are pool owners who indirectly purchased Pool Products manufactured by the Manufacturer Defendants and distributed by Pool.[5]

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[1] R. Doc. 504 (Motion for Summary Judgment on Claim of Vertical Conspiracy Between Pool and Hayward); R. Doc. 506 (Motion for Summary Judgment on Claim of Vertical Conspiracy Between Pool and Zodiac); R. Doc. 517 (Motion for Summary Judgment on Claim of Vertical Conspiracy Between Pool and Pentair).

[2] R. Doc. 284, ¶ 39.

[3] *Id.* ¶ 28.

[4] *Id.* ¶ 31.

[5] *See* R. Doc. 290.

DPPs filed two consolidated amended complaints—the first on June 29, 2012[6] and the second on June 21, 2013[7]—each of **[*5]** which defendants moved to dismiss. Following the Court's orders on those motions, DPPs were left with the following five claims: (1) a *Section 1* claim under the *per se* rule involving a horizontal agreement between the Manufacturer Defendants and Pool to fix free freight minimums; (2) three *Section 1* claims under the rule of reason involving three separate vertical conspiracies (one between Pool and each Manufacturer Defendant) to exclude Pool's competitors; and (3) a *Section 2* attempted monopolization claim against Pool.[8] Pool has moved for summary judgment on these five claims. In addition, DPPs have moved for class certification. Both Pool and DPPs have also moved in limine to exclude the opposing party's experts.

The Court dismissed DPPs' *Section 1* horizontal conspiracy claim on summary judgment.[9] The Court also excluded in part the testimony of DPPs' expert, Dr. Gordon Rausser.[10] Specifically, the Court excluded Dr. Rausser's aggregated causation analysis to demonstrate the supposed anticompetitive effects of Pool's alleged vertical conspiracies with each Manufacturer Defendant.[11]

IPPs initially alleged that the conduct of Pool and the Manufacturer **[*6]** Defendants violated various antitrust and deceptive trade practices laws of California, Arizona, Florida, and Missouri. Specifically, IPPs alleged violations of California's ***antitrust law***, the Cartwright Act, *Cal. Bus. & Prof. Code § 16720, et seq.*; the Unfair Competition Law, *Cal. Bus. & Prof. Code §§ 17200, et seq.*; the state antitrust provisions of *Ariz. Rev. Stat. §§ 44-1401, et seq.*; the consumer protection provisions of the Florida Deceptive and Unfair Trade Practices Act, *Fl. Stat. §§ 501.201, et seq.*, including *§ 501.204*; and the consumer protection provisions of the Missouri Merchandising Practices Act, *Mo. Rev. Stat. §§ 407.010, et seq.*[12] IPPs based their claims on allegations of the same underlying conduct that DPPs alleged in their *Sherman Act* claims.

On May 24, 2013, the Court dismissed IPPs' claims under the California Unfair Competition Law, Florida Deceptive and Unfair Trade Practices Act, and Missouri Merchandising Practice Act that were based on the theory that defendants engaged in fraud or misrepresentation. The Court also dismissed IPPs' illegal group boycott claim under the Cartwright Act because IPPs failed to allege a horizontal agreement.[13] IPPs were left with the following claims: California Unfair Competition Law and rule of reason Cartwright Act claims involving three vertical conspiracies (one between Pool and each Manufacturer Defendant); **[*7]** Arizona Antitrust Act claims involving three vertical conspiracies and a claim of attempted monopolization against Pool; Florida Deceptive and Unfair Trade Practices Act claims involving three vertical conspiracies and a claim of attempted monopolization against Pool; and Missouri Merchandising Practice Acts claims based on defendants' alleged anticompetitive agreements to exclude Pool's rivals and Pool's attempted monopolization.[14]

The Court now analyzes whether plaintiffs have sufficient evidence to proceed on their vertical conspiracy claims.

II. LEGAL STANDARD

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[6] R. Doc. 107.

[7] R. Doc. 284.

[8] *See generally* R. Doc. 250.

[9] R. Doc. 700.

[10] R. Doc. 701.

[11] *Id.* at 53-59.

[12] R. Doc. 149 at 2 (Second Amended Class Action Complaint).

[13] R. Doc. 250 at 19-20.

[14] *Id.* at 21-30, 35.

Summary judgment is warranted when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also* Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); Little v. Liquid Air Corp., 37 F.3d 1069, 1075 (5th Cir. 1994). When assessing whether a dispute as to any material fact exists, the Court considers "all of the evidence in the record but refrain[s] from making credibility determinations or weighing the evidence." Delta & Pine Land Co. v. Nationwide Agribusiness Ins. Co., 530 F.3d 395, 398-99 (5th Cir. 2008). All reasonable inferences are drawn in favor of the nonmoving party, but "unsupported allegations or affidavits setting forth 'ultimate or conclusory facts and conclusions of law' are insufficient to either support or defeat a motion **[*8]** for summary judgment." Galindo v. Precision Am. Corp., 754 F.2d 1212, 1216 (5th Cir. 1985); *see also* Little, 37 F.3d at 1075. "No genuine dispute of fact exists if the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." EEOC v. Simbaki, Ltd., 767 F.3d 475, 481 (5th Cir. 2014).

III. DISCUSSION

A. DPPs' *Sherman Act* Claims

Liability in a private antitrust action requires the plaintiff to prove that the defendants violated the antitrust laws, that the violation injured the plaintiff's business or property, and that the plaintiff has some indication of the amount of damage done. *See* El Aguila Food Prods., Inc. v. Gruma Corp., 131 F. App'x 450, 452 (5th Cir. 2005); Kestenbaum v. Falstaff Brewing Corp., 514 F.2d 690, 694 (5th Cir. 1975).

Here, DPPs allege that Pool has violated Section 1 of the Sherman Act through three vertical agreements (one with each Manufacturer Defendant) "to restrict rivals' access to supply from the Manufacturer Defendants and to foreclose rivals from selling to PoolCorp's customers."[15]

Section 1 of the Sherman Act forbids every contract, combination, or conspiracy that unreasonably restrains trade. *See* 15 U.S.C. §1; NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 133, 119 S. Ct. 493, 142 L. Ed. 2d 510 (1998). Courts test the unreasonableness, and thus the illegality, of a vertical restraint by the rule of reason. Leegin Creative Leather Prods, Inc. v. PSKS, Inc., 551 U.S. 877, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007). Under the rule of reason, whether a challenged restraint "unreasonably restrains trade" refers to whether it caused an "injury to competition." PSKS, Inc. v. Leegin Creative Leather Prods., Inc., 615 F.3d 412, 417 (5th Cir. 2010) (quoting Doctor's Hosp., Inc. v. Se. Med. Alliance, Inc., 123 F.3d 301, 307 (5th Cir. 1997)). Courts must balance

> the anticompetitive evils of a restrictive **[*9]** practice . . . against any procompetitive benefits or justifications within the confines of the relevant market. Proof that the defendant's activities, on balance, adversely affected competition in the appropriate product and geographic markets is essential to recovery under the rule of reason.

Doctor's Hosp., 123 F.3d at 307 (citing Hornsby Oil Co. v. Champion Spark Plug Co., 714 F.2d 1384, 1392 (5th Cir. 1983)). When assessing the effect on competition of a vertical conspiracy in a case that includes multiple "discrete conspiracies," a court must evaluate each alleged agreement individually:

> [E]ach . . . agreement must be treated as a separate conspiracy, and only acts taken in furtherance of that alleged conspiracy are appropriately considered in determining the adverse effects of the claimed restraints on trade, not acts of one conspirator taken in furtherance of other possible, distinct conspiracies. . . . Indeed, to hold otherwise would be to suggest that the distinction between a single conspiracy and multiple conspiracies involving a common defendant is one without a difference.

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[15] R. Doc. 584 at 1.

Dickson v. Microsoft Corp., 309 F.3d 193, 210-11 (4th Cir. 2002) (citations omitted). If, on balance, the challenged conduct in furtherance of a particular agreement injures competition, then that agreement violates *Section 1*; if not, then not.

In support of summary judgment on each of DPPs' **[*10]** vertical conspiracy claims, Pool argues that DPPs cannot show that any of Pool's alleged agreements with Hayward, Zodiac, or Pentair injured competition and therefore cannot show that an antitrust violation occurred.

DPPs depend on Dr. Rausser's aggregated causation analysis to prove that the three alleged vertical conspiracies had an anticompetitive effect on the relevant market. DPPs ask the Court to consider Pool's separate vertical agreements with each Manufacturer Defendant collectively in analyzing the competitive effects. DPPs also ask the Court to consider Pool and the Manufacturer Defendants' alleged horizontal agreement, a claim the Court has since dismissed on summary judgment for lack of evidence of horizontal collusion.

According to DPPs, "[t]he[] restraints operated collectively and . . . collectively gave rise to the reduction in competition and the artificial elevation in prices . . . ."[16] But the Court has excluded Dr. Rausser's aggregate causation analysis in aid of DPPs' vertical conspiracy claims, finding that it did not fit the legal standard applicable to a vertical conspiracy claim. This standard tasks the Court with separately considering the competitive effect of each **[*11]** alleged conspiracy, rather than the aggregate effect of all allegedly unlawful conduct, as Dr. Rausser has done.

The cases on which DPPs rely in urging the Court to consider the aggregate effect of all alleged conspiracies are distinguishable. In those cases, the courts considered the effect of various conduct taken in furtherance of a single conspiracy, not the combined competitive effect of multiple alleged conspiracies to prove that any one conspiracy, on its own, was anticompetitive. *See, e.g., Cont'l Ore v. Union Carbide & Carbon Corp., 370 U.S. 690, 82 S. Ct. 1404, 8 L. Ed. 2d 777 (1962)* (single conspiracy to monopolize claim); *LePage's Inc. v. 3M, 324 F.3d 141 (3d Cir. 2003)*; *In re High Fructose Corn Syrup Antitrust Litig., 295 F.3d 651 (7th Cir. 2002)* (single horizontal conspiracy claim); *Taylor Publishing Co. v. Jostens, Inc., 216 F.3d 465 (5th Cir. 2000)* (single attempted monopolization claim); *Southway Theatres, Inc. v. Georgia Theatre Co., 672 F.2d 485 (5th Cir. 1982)* (single horizontal conspiracy claim); *Associated Radio Serv. Co. v. Page Airways, Inc., 624 F.2d 1342 (5th Cir. 1980)* (single attempted monopolization claim).

DPPs' reliance on exclusive dealing cases, like *Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346, 42 S. Ct. 360, 66 L. Ed. 653 (1922)* and *Standard Oil Co. v. United States (Standard Stations), 337 U.S. 293, 69 S. Ct. 1051, 93 L. Ed. 1371 (1949)*, and horizontal boycott cases, like *Toys "R" Us, Inc. v. FTC, 221 F.3d 928 (7th Cir. 2000)*, is also misplaced. First, as the Court explained in its order partially excluding the opinion of Dr. Rausser, the Court dismissed DPPs' boycott claim on the pleadings and granted summary judgment on DPPs' horizontal price-fixing claim for lack of evidence of horizontal collusion. DPPs' continued arguments on the issue do not preclude summary judgment. Moreover, because **[*12]** this case does not involve exclusive dealing agreements, cases detailing how these agreements may be anticompetitive are unhelpful. It is undisputed that Pool did not maintain an exclusive distributorship with any Manufacturer Defendant. Pool's preferred vendor program required that vendors conduct $2 million worth of business with Pool, while manufacturers could and did do business with other distributors. DPPs' own expert Dr. Rausser confirms that the three Manufacturer Defendants conducted the majority of their business with entities other than Pool.[17]

Without evidence that any of the alleged vertical conspiracies injured competition, DPPs cannot prove the antitrust violation necessary to sustain their vertical conspiracy claims.

B. IPPs' State-Law Claims

[16] *Id.* at 56.

[17] Rausser Initial Report, April 10, 2014, at 40-42.

Pool argues that IPPs state-law vertical conspiracy claims "suffer from the same deficiencies [and] legal insufficienc[ies]" as DPPs' *Sherman Act* claims.[18] It is undisputed that IPPs rely on the aggregated effects of Pool's conduct with all three Manufacturer Defendants to establish injury to competition, which allegedly resulted in supra-competitive prices for Pool Products. Thus, IPPs' vertical conspiracy **[*13]** claims are likewise subject to summary judgment.

IV. CONCLUSION

For the foregoing reasons, the Court GRANTS Pool's motions for summary judgment on plaintiffs' claims of vertical conspiracies between Pool and Hayward, Pool and Zodiac, and Pool and Pentair.

New Orleans, Louisiana, this 29th day of April, 2016.

/s/ Sarah S. Vance

SARAH S. VANCE

UNITED STATES DISTRICT JUDGE

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[18] *See, e.g.*, 506-4 at 32.

Eisai, Inc. v. Sanofi Aventis U.S., LLC

United States Court of Appeals for the Third Circuit

January 13, 2015, Argued; May 4, 2016, Opinion Filed

No. 14-2017

Reporter
821 F.3d 394 *; 2016 U.S. App. LEXIS 8148 **; 2016-1 Trade Reg. Rep. (CCH) P79,615

EISAI, INC., Appellant v. SANOFI AVENTIS U.S., LLC; SANOFI U.S. SERVICES, INC. f/k/a Sanofi-Aventis U.S. Inc.

Prior History: [1]** On Appeal from the United States District Court for the District of New Jersey. (D. C. Civil Action No. 3-08-cv-04168). District Judge: Honorable Mary L. Cooper.

Eisai Inc. v. Sanofi-Aventis United States, LLC, 2012 U.S. Dist. LEXIS 24507 (D.N.J., Feb. 27, 2012)
Eisai Inc. v. Sanofi-Aventis U.S., LLC, 2014 U.S. Dist. LEXIS 46791 (D.N.J., Mar. 28, 2014)

Core Terms

customers, prices, discount, products, rival, drugs, market share, foreclosure, anticompetitive, competitors, bundling, switch, anticoagulant, antitrust, discovery, purchases, foreclosed, practices, rule of reason, price-cost, formulary, consumer, rebate, anticompetitive conduct, summary judgment, indications, manufacturer, above-cost, compete, volume

LexisNexis® Headnotes

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

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

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

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

The appellate court employs a de novo standard of review to grants of summary judgment, applying the same standard as the district court. The appellate court views the underlying facts and all reasonable inferences therefrom in the light most favorable to the party opposing the motion.

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

HN2[] **Entitlement as Matter of Law, Appropriateness**

A court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.

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

Civil Procedure > Discovery & Disclosure > Discovery

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

The appellate court reviews discovery decisions for abuse of discretion.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason

HN4[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

To establish an actionable antitrust violation, a plaintiff must show both that the defendant engaged in anticompetitive conduct and that the plaintiff suffered antitrust injury as a result. Courts employ either a per se or a rule of reason analysis to determine whether conduct is anticompetitive. The per se illegality rule applies when a business practice on its face, has no purpose except stifling competition. When conduct does not trigger a per se analysis, the court applies a rule of reason test, which focuses on the particular facts disclosed by the record.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > State Regulation

HN5[] **Trade Practices & Unfair Competition, State Regulation**

The New Jersey Antitrust Act shall be construed in harmony with ruling judicial interpretations of comparable federal antitrust statutes.

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

HN6[] **Exclusive & Reciprocal Dealing, Exclusive Dealing**

One form of potentially anticompetitive conduct is an exclusive dealing arrangement, which is an express or de facto agreement in which a buyer agrees to purchase certain goods or services only from a particular seller for a certain period of time. While exclusive dealing arrangements may deprive competitors of a market for their goods, they can also offer consumers various economic benefits, such as assuring them the availability of supply and price stability. As such, an exclusive dealing arrangement does not constitute a per se violation of the antitrust laws and is instead judged under the rule of reason.

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

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason

HN7[] Exclusive & Reciprocal Dealing, Exclusive Dealing

An exclusive dealing agreement is illegal under the rule of reason only if the probable effect of the arrangement is to substantially lessen competition, rather than merely disadvantage rivals. While there is no set formula for making this determination, the court must consider whether a plaintiff has shown substantial foreclosure of the market for the relevant product. The court also analyzes the likely or actual anticompetitive effects of the exclusive dealing arrangement, including whether there was reduced output, increased price, or reduced quality in goods or services.

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

HN8[] Exclusive & Reciprocal Dealing, Exclusive Dealing

To demonstrate substantial foreclosure, a plaintiff must both define the relevant market and prove the degree of foreclosure. Although the test is not total foreclosure, the challenged practices must bar a substantial number of rivals or severely restrict the market's ambit. There is no fixed percentage at which foreclosure becomes substantial and courts have varied widely in the degree of foreclosure they consider unlawful. In analyzing the amount of foreclosure, the court's concern is not about which products a consumer chooses to purchase, but about which products are reasonably available to that consumer. For example, if customers are free to switch to a different product in the marketplace but choose not to do so, competition has not been thwarted, even if a competitor remains unable to increase its market share. One competitor's inability to compete does not automatically mean competition has been foreclosed.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization

HN9[] Regulated Practices, Monopolies & Monopolization

In certain circumstances, courts have recognized that a monopolist may use its power to break the competitive mechanism and deprive customers of the ability to make a meaningful choice.

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

HN10[] Actual Monopolization, Anticompetitive & Predatory Practices

A bundling arrangement generally involves discounted rebates or prices for the purchase of multiple products.

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

HN11[] Actual Monopolization, Anticompetitive & Predatory Practices

Bundling is anticompetitive when it could foreclose portions of the market to a potential competitor who does not manufacture an equally diverse group of products and who therefore cannot make a comparable offer.

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

HN12[] **Price Fixing & Restraints of Trade, Tying Arrangements**

Tying is an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition

HN13[] **Regulated Practices, Trade Practices & Unfair Competition**

While false or deceptive statements may violate the antitrust laws in rare circumstances, at minimum, a plaintiff must show that such statements induced or were likely to induce reasonable reliance by consumers.

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

HN14[] **Anticompetitive & Predatory Practices, Predatory Pricing**

Unlawful predatory pricing occurs when a firm reduces its prices to below-cost levels to drive competitors out of the market and, once competition is eliminated, reduces output and raises its prices to supracompetitive levels. Reducing prices to only above-cost levels, however, generally does not have an anticompetitive effect because the exclusionary effect of prices above a relevant measure of cost reflects the lower cost structure of the alleged predator, and so represents competition on the merits. While there may be situations where above-cost prices are anticompetitive, it is beyond the practical ability of a judicial tribunal to ascertain this without courting intolerable risks of chilling legitimate price-cutting. In light of this economic reality, a plaintiff can succeed on a predatory pricing claim only if it can show that (1) the rival's low prices are below an appropriate measure of its costs and (2) the rival had a dangerous probability of recouping its investment in below-cost prices. This is known as the price-cost test.

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

HN15[] **Anticompetitive & Predatory Practices, Predatory Pricing**

When a competitor complains that a rival's sales program violates the antitrust laws, the court must consider whether the conduct constitutes an exclusive dealing arrangement or simply a pricing practice. Defendants may argue that the challenged conduct is fundamentally an above-cost pricing scheme and therefore the price-cost test applies, ultimately dooming a plaintiff's claims, but not all contractual practices involving above-cost prices are per se legal under the antitrust laws. The price-cost test may be utilized as a specific application of the rule of reason only when price is the clearly predominant mechanism of exclusion. Where a dominant supplier enters into de facto exclusive dealing arrangements with every customer in the market, other firms may be driven out not because they cannot compete on a price basis, but because they are never given an opportunity to compete, despite their ability to offer products with significant customer demand.

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

HN16[] **Anticompetitive & Predatory Practices, Predatory Pricing**

When pricing predominates over other means of exclusivity, the price-cost test applies. This is usually the case when a firm uses a single-product loyalty discount or rebate to compete with similar products. In that situation, an equally efficient competitor can match the loyalty price and the firms can compete on the merits. More in-depth factual analysis is unnecessary because the balance always tips in favor of allowing above-cost pricing practices to stand.

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Judges: Before: AMBRO, FUENTES and ROTH, Circuit Judges.

Opinion by: ROTH

Opinion

[*398] ROTH, Circuit Judge:

The antitrust laws are concerned with "the protection of competition, not **[*399]** competitors."[1] Eisai complains that the conduct of Sanofi Aventis U.S., LLC, and Sanofi U.S. Services, Inc., (Sanofi) jointly and severally harmed competition in the market for anticoagulant **[**2]** drugs by preventing hospitals from replacing Lovenox, one of Sanofi's drugs, with competing drugs. The facts, however, do not bear out Eisai's characterization of market events. For the reasons stated below, we conclude that what Eisai calls "payoffs" were, in reality, discounts offered by Sanofi to its customers; what Eisai calls "agreements with hospitals to block access" were, in reality, provisions proscribing customers from favoring competing drugs over Lovenox; what Eisai calls "a campaign of 'fear, uncertainty, and doubt'" was, in reality, Sanofi's marketing of Lovenox. Analyzing Eisai's claims under the rule of reason, we find no evidence that Sanofi's actions caused broad harm to the competitive nature of the anticoagulant market. To the extent that Sanofi's conduct caused damage to its competitors, that is not a harm for which Congress has prescribed a remedy. We will therefore affirm the order of the District Court, granting summary judgment in favor of Sanofi.

I.

A.

Lovenox is an anticoagulant drug used in the treatment and prevention of deep vein thrombosis (DVT), a condition in which blood clots develop in a person's veins. Lovenox belongs to a category of injectable, anticoagulant **[**3]** drugs known as low molecular weight heparin (LMWH). Lovenox was the first LMWH approved by the Food and Drug Administration and has been sold by Sanofi in the United States since 1993. Lovenox has at least seven FDA-approved uses (known as indications), including the treatment of certain severe forms of heart attack.

Fragmin is a competing injectable LMWH, which Pfizer, Inc., initially sold only abroad. In September 2005, Pfizer sold Eisai an exclusive license to market, sell, and distribute Fragmin in the United States. Fragmin has five FDA-approved indications, some of which overlap Lovenox's indications. Fragmin is also indicated to reduce the reoccurrence of symptomatic venous thromboembolism in cancer patients, while Lovenox is not. Lovenox, however, is indicated for treating certain more severe forms of heart attack, an indication that Fragmin does not have.

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[1] *Brown Shoe Co v. United States, 370 U.S. 294, 320, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*.

The relevant product market also consists of two other injectable anticoagulant drugs, Innohep and Arixtra. Innohep, a LMWH, was manufactured and sold by LEO Pharma Inc. in the United States from 2000 to 2011. Arixtra is an injectable anticoagulant approved by the FDA in 2001 and sold in the United States by GlaxoSmithKline **[**4]** from 2005 to 2010. While not a LMWH, Arixtra is clinically comparable to LMWHs in its treatment of DVT.

Relevant to Eisai's claims is the market for Lovenox, Fragmin, Innohep, and Arixtra in the United States from September 27, 2005 (when Eisai was able to begin selling Fragmin) until July 25, 2010 (when Sanofi ended certain marketing practices after a generic entered the market). During that time, Lovenox had the most indications of the four drugs, the largest sales force, and maintained a market share of 81.5% to 92.3%. Fragmin had the second largest market share at 4.3% to 8.2%.

[*400] B.

Eisai's antitrust claims relate to Sanofi's marketing of Lovenox to U.S. hospitals. Most hospitals are members of group purchasing organizations (GPOs), which negotiate drug contracts and discounts from pharmaceutical companies on behalf of their members. From September 2005 until July 2010, Sanofi offered GPOs the "Lovenox Acute Contract Value Program" (Program), featuring a contractual offer to sell Lovenox on certain terms and conditions. Eisai's allegations of anticompetitive conduct relate to three elements of this program: (1) market-share and volume discounts, (2) a restrictive formulary access clause, **[**5]** and (3) aggressive sales tactics used to market the program.

(1) Under the terms of the Program, hospitals received price discounts based on the volume of Lovenox they purchased and their market-share calculation tied to their purchases of the four anticoagulant drugs.[2] The Program generally treated a GPO's members as individual customers when determining the volume and market share. When a hospital's purchases of Lovenox were below 75% of its total purchases of LMWHs, it received a flat 1% discount regardless of the volume of Lovenox purchased. But when a hospital increased its market share above that threshold, it would receive an increasingly higher discount based on a combination of the volume purchased and the market share. For example, in 2008, the discount ranged from 9% to 30% of the wholesale price. Additionally, if certain criteria were met, a multi-hospital system could have the hospitals' volumes and market shares calculated as one entity. For a multi-hospital system, the discount started at 15% for a market share meeting the threshold, and increased to 30%.

Although this discount structure motivated GPOs to purchase more Lovenox, they were not contractually obligated to do so. The consequence of not obtaining 75% market share was that a customer would receive only the 1% discount. If a customer chose to terminate the contract, it was required to give thirty days' notice and could still purchase Lovenox "off contract" at the wholesale price.

(2) The Program also included a formulary access clause that limited a hospital's ability to give certain drugs priority status on its formulary. Generally, a hospital maintains a formulary, a list of medications approved for use in the hospital based on factors such as a drug's cost, safety, and efficacy. The formulary access clause in the Lovenox contract required customers to provide Lovenox with unrestricted formulary access for all FDA-approved Lovenox indications so that the availability of Lovenox was not more restricted or limited than the availability of Fragmin, Innohep, or Arixtra. Hospitals were also forbidden by the contract to adopt any restrictions or limitations on marketing **[**7]** or promotional programs for Lovenox. In essence, the contract did not prohibit members from putting other anticoagulant drugs on their formularies, but did prohibit them from favoring those drugs over Lovenox. Noncompliance with the contract did not limit a customer's access to Lovenox; it merely caused a customer's discount to drop to the 1% base level.

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[2] Specifically, the market share was defined as the rolling four months of Lovenox units purchased by the hospital divided **[**6]** by the rolling four months of all units purchased within the market for Lovenox, Fragmin, Arixtra, and Innohep.

(3) According to Eisai, Sanofi further engaged in a long-term campaign to discredit Fragmin by spreading "fear, uncertainty and doubt" about its safety and **[*401]** efficacy. Eisai asserts that the so-called "FUD" campaign consisted of the following conduct: Sanofi paid doctors to publish articles attacking Fragmin on false grounds, without properly disclosing such payments, and distributed those articles broadly; Sanofi paid doctors to present educational programs regarding the medical and legal risks of switching from Lovenox, casting doubt on Fragmin's effectiveness and promoting a belief that Fragmin use would expose hospitals to malpractice liability; Sanofi's representatives claimed that Lovenox was superior to other drugs, in violation of FDA regulations; and Sanofi promoted Lovenox for non-indicated cancer-related uses, also in violation **[**8]** of FDA regulations.

C.

Eisai commenced this action on August 18, 2008, in the U.S. District Court for the District of New Jersey, asserting (1) willful and unlawful monopolization and attempted monopolization in violation of *Section 2* of the Sherman Act;[3] (2) *de facto* exclusive dealing in violation of *Section 3* of the Clayton Act;[4] (3) an unreasonable restraint of trade in violation of *Section 1* of the Sherman Act;[5] and (4) violations of the New Jersey Antitrust Act.[6] Sanofi moved to dismiss the complaint for failure to state a claim and for being untimely under the applicable statute of limitations. After a hearing, the District Court denied the motion and referred the case to a magistrate judge for further proceedings.

The parties then engaged in extensive discovery. On one particularly contentious discovery issue, Eisai moved to compel discovery of deposition transcripts from a 2003 antitrust lawsuit brought by Organon Sanofi-Synthelabo (OSS) against Aventis Pharmaceuticals (Sanofi's predecessor) relating to a contractual offer similar to the terms of the Lovenox Program. On February 27, 2012, the Magistrate Judge denied Eisai's motion on the basis that the 2003 transcripts were irrelevant to the current **[**9]** action and unlikely to lead to the discovery of admissible evidence, and because the burden or expense of the discovery outweighed its likely benefit. The District Court affirmed the order.

Both parties subsequently moved for summary judgment. Eisai relied largely on an expert report by Professor Einer Elhauge, who determined that customers occupying a certain spectrum of market share would not save money by partially switching to a rival drug, even if the rival drug was cheaper than Lovenox. According to Professor Elhauge, the Lovenox Program restricted rival sales by bundling each customer's contestable demand for Lovenox (the units that the customer is willing to switch to rival products) with the customer's incontestable demand for Lovenox (the units that the customer is less willing to switch to rival products). The incontestable demand for Lovenox was based, at least partially, on its unique cardiology indication, which no other anticoagulant in the market possessed and which hospitals needed to treat certain of their patients. Based on Lovenox's and Fragmin's April 2007 prices, Professor Elhauge determined that bundling resulted in an enormous "dead zone" spanning Fragmin's market **[**10]** share: For any system choosing to increase its Fragmin market share from 10% to any amount less than 62%, it would actually cost hospitals more to switch from Lovenox to Fragmin despite **[*402]** Fragmin's lower price. Professor Elhauge also determined that the Program foreclosed between 68% and 84% of the relevant market.

On March 28, 2014, the District Court granted Sanofi's motion for summary judgment. The District Court held first that price was the predominant mechanism of exclusion under Sanofi's practices, and therefore Eisai's antitrust claims could not succeed because Sanofi's prices were above cost. Next, the court held that, even when analyzed

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[3] *15 U.S.C. § 2*.

[4] *15 U.S.C. § 14*.

[5] *15 U.S.C. § 1*.

[6] *N.J. Stat. Ann. §§ 56:9-3* and *56:9-4*.

under an exclusive dealing framework, Eisai's claims still failed because the evidence could not support Eisai's contention that Sanofi engaged in unlawful exclusive dealing. Eisai also could not satisfy the antitrust-injury requirement because it could not establish that its lower market share was attributable to anticompetitive conduct by Sanofi as opposed to other factors.

II.

The District Court had jurisdiction over this case pursuant to *28 U.S.C. §§ 1331* and *1337*. We have appellate jurisdiction under *28 U.S.C. § 1291*.

HN1[] We employ "a *de novo* standard of review to grants of summary **[**11]** judgment, 'applying the same standard as the District Court.'"[7] We "view the underlying facts and all reasonable inferences therefrom in the light most favorable to the party opposing the motion."[8] ***HN2***[] A court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[9] ***HN3***[] We review discovery decisions for abuse of discretion.[10]

III.

A.

The applicable law is the same for each of Eisai's four claims.[11] ***HN4***[] To establish an actionable antitrust violation, Eisai must show both that Sanofi engaged in anticompetitive conduct and that Eisai suffered antitrust injury as a result.[12] Courts employ either a *per se* or a rule of reason analysis to determine whether conduct is anticompetitive.[13] The "*per se* illegality rule applies when a business practice 'on its face, has no purpose except stifling competition.'"[14] When conduct does not **[*403]** trigger a *per se* analysis, we apply a rule of reason test, which focuses on the "particular facts disclosed by the record."[15]

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[7] *Montone v. City of Jersey City, 709 F.3d 181, 189 (3d Cir. 2013)* (quoting *Pa. Coal Ass'n v. Babbitt, 63 F.3d 231, 236 (3d Cir. 1995))*.

[8] *Id.* (internal quotation marks omitted).

[9] *Fed. R. Civ. P. 56(a)*.

[10] *Country Floors, Inc. v. P'ship Composed of Gepner & Ford, 930 F.2d 1056, 1062 (3d Cir. 1991)*.

[11] *See* *ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 269 n.9, 281 (3d Cir. 2012)* (analyzing claims under *Sections 1* and *2* of the Sherman Act and *Section 3* of the Clayton Act); *State v. New Jersey Trade Waste Asso., 96 N.J. 8, 472 A.2d 1050, 1056 (N.J. 1984)* (***HN5***[] "[T]he New Jersey Antitrust Act **[**12]** shall be construed in harmony with ruling judicial interpretations of comparable federal antitrust statutes.").

[12] *See* *Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 339-40, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)*; *ZF Meritor, 696 F.3d at 269 n.9*.

[13] *W. Penn Allegheny Health Sys., Inc. v. UPMC, 627 F.3d 85, 99 (3d Cir. 2010)*.

[14] *Burtch v. Milberg Factors, Inc., 662 F.3d 212, 221 (3d Cir. 2011)* (quoting *Eichorn v. AT&T Corp., 248 F.3d 131, 143 (3d Cir. 2001))*; *see, e.g.*, *N. Pac. R.R. Co. v. United States, 356 U.S. 1, 5, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958)* ("Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are price fixing, division of markets, group boycotts, and tying arrangements." (internal citations omitted)).

HN6[] One form of potentially anticompetitive conduct is an exclusive dealing arrangement, which is an express or *de facto* "agreement in which a buyer agrees to purchase certain goods or services only from a particular seller for a certain period of time."[16] While exclusive dealing arrangements may deprive competitors of a market for their goods, they can also offer consumers various economic benefits, such as assuring them the availability of supply and price stability.[17] As such, an exclusive dealing arrangement does not constitute a *per se* violation of the antitrust laws and is instead judged under the rule of reason.[18]

Eisai argues that Sanofi's conduct, as a whole, operated as a *de facto* exclusive dealing arrangement that unlawfully hindered competition. *HN7*[] An exclusive dealing agreement is illegal under **[**13]** the rule of reason "only if the 'probable effect' of the arrangement is to substantially lessen competition, rather than merely disadvantage rivals."[19] While there is no set formula for making this determination, we must consider whether a plaintiff has shown substantial foreclosure of the market for the relevant product.[20] We also analyze the likely or actual anticompetitive effects of the exclusive dealing arrangement, including whether there was reduced output, increased price, or reduced quality in goods or services.[21]

1.

HN8[] To demonstrate substantial foreclosure, a plaintiff "must both define the relevant market and prove the degree of foreclosure."[22] Although "[t]he test is not total foreclosure," the challenged practices must "bar a substantial number of rivals or severely restrict the market's ambit."[23] "There is no fixed percentage at which foreclosure becomes 'substantial' and courts have varied widely in the degree of foreclosure they consider unlawful."[24] In analyzing the amount of foreclosure, our concern is not about which products a consumer chooses to purchase, but about which products are reasonably available to that consumer.[25] For example, if **[**14]** customers are free to switch to a different product in the marketplace but choose not to do so, competition has not

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[15] *Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 467, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)*.

[16] *ZF Meritor, 696 F.3d at 270*; *see* *LePage's, Inc. v. 3M, 324 F.3d 141, 157 (3d Cir. 2003)* (en banc).

[17] *See* *ZF Meritor, 696 F.3d at 270-71*.

[18] *See* *id. at 271*.

[19] *See id.* (quoting *Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 329, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961)*); *United States v. Dentsply Int'l, Inc., 399 F.3d 181, 191 (3d Cir. 2005)*.

[20] *See* *ZF Meritor, 696 F.3d at 271*.

[21] *See id*; *W. Penn Allegheny Health Sys., 627 F.3d at 100*; *see also* *Virgin Atl. Airways Ltd. v. British Airways PLC, 257 F.3d 256, 264 (2d Cir. 2001)*.

[22] *United States v. Microsoft Corp., 253 F.3d 34, 69, 346 U.S. App. D.C. 330 (D.C. Cir. 2001)* (en banc) (per curiam).

[23] *Dentsply, Int'l, Inc., 399 F.3d at 191*.

[24] *ZF Meritor, 696 F.3d at 327* (Greenberg, J., dissenting); *see* *McWane, Inc. v. FTC, 783 F.3d 814, 837 (11th Cir. 2015)*.

[25] *See* *S.E. Mo. Hosp. v. C.R. Bard, Inc., 642 F.3d 608, 616 (8th Cir. 2011)*.

been thwarted—even if a competitor remains unable to increase its market share.[26] One competitor's inability to **[*404]** compete does not automatically mean competition has been foreclosed.

HN9[] In certain circumstances, however, we have recognized that a monopolist "may use its power to break the competitive mechanism and deprive customers of the ability to make a meaningful choice."[27] That was the case in *LePage's Inc. v. 3M*, where we held that the use of bundled rebates, when offered by a monopolist, foreclosed portions of the market to competitors that did not offer an equally diverse line of products.[28] Similarly, in *United States v. Dentsply International, Inc.*, we held that a dominant manufacturer of prefabricated teeth hindered competition when it prohibited dealers from adding competing tooth lines to their product offerings and retained the ability to terminate the dealer relationships at will.[29] Finally, in *ZF Meritor*, we found the defendant's conduct to be anticompetitive when the defendant leveraged **[**15]** its position as a dominant supplier of necessary products to force manufacturers into long term agreements and there was proof that the manufacturers were concerned that they would be unable to meet consumer demand without doing so.[30] Although consumers had a choice between products in *LePage's, Dentsply*, and *ZF Meritor*, in each case the defendant's anticompetitive conduct rendered that choice meaningless.

Eisai argues that Sanofi's practices substantially foreclosed the market for anticoagulant drugs because hospitals had no choice but to purchase Lovenox despite its increasing price. In support, Eisai points to what it characterizes as "extensive evidence" of hospitals that wanted to purchase Fragmin but allegedly were prevented from doing so due to Sanofi's conduct. But identification of a few dozen hospitals out of almost 6,000 in the United States is not enough to demonstrate "substantial foreclosure"[31] — particularly, if the reason a hospital did not change to Fragmin was due to price, *i.e.*, the loss of the discounts offered by the Program.

Eisai also relies on the findings of Professor Elhauge, who described two purported examples of "foreclosure." First, Professor Elhauge claims that the discount offered by Sanofi foreclosed rivals from 68% to 84% of the LMWH market. Professor Elhauge calculated this percentage by "treat[ing] as restricted any customer that was receiving loyal Lovenox prices and thus would have been penalized with higher Lovenox prices if they purchased a higher percentage of their LTC drugs from rivals." In other words, Professor Elhauge assumed that all Lovenox customers utilizing the discount program were foreclosed from switching to another LMWH drug. Second, Professor Elhauge asserts that the Lovenox discount created a "dead zone" that prevented customers from increasing their Fragmin purchases to anywhere between 10% and 62% of their LMWH needs. Again, Professor Elhauge focuses on consumer preference as the basis **[*405]** for foreclosure. Specifically, he calculates this "dead zone" based **[**17]** on the fact that "many customers are willing to switch only a portion of their Lovenox purchases to rival LTC drugs."

Professor Elhauge's examples of foreclosure ultimately derive from a theory of bundling of Lovenox demand. But ***HN10***[] a bundling arrangement generally involves discounted rebates or prices for the purchase of multiple products.[32] For example, in *LePage's*, the plaintiffs alleged that 3M, a dominant seller of transparent tape in the

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[26] *See, e.g., Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp. LP, 592 F.3d 991, 997 (9th Cir. 2010)*; *Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039, 1059 (8th Cir. 2000)*.

[27] *ZF Meritor, 696 F.3d at 285*.

[28] *See 324 F.3d at 154-58*.

[29] *See 399 F.3d at 185*.

[30] *See 696 F.3d at 285*.

[31] *See McWane, Inc., 783 F.3d at 837* ("Traditionally, a foreclosure percentage of at least 40% has been a threshold for liability in exclusive dealing cases." **[**16]** (citing Jonathan M. Jacobson, *Exclusive Dealing, "Foreclosure," and Consumer Harm*, 70 Antitrust L.J. 311, 362 (2002)); *but see id.* ("However, some courts have found that a lesser degree of foreclosure is required when the defendant is a monopolist." (citing *Microsoft, 253 F.3d at 70*)).

United States, used its monopoly to gain a competitive advantage in the private label tape portion of the transparent market by offering a "multi-tiered 'bundled rebate' structure, which offered higher rebates when customers purchased products in a number of 3M's different product lines."[33] Analogizing this practice to tying, which is *per se* illegal, we found such ***HN11***[] bundling anticompetitive because it could "foreclose portions of the market to a potential competitor who does not manufacture an equally diverse group of products and who therefore cannot make a comparable offer."[34] In *ZF Meritor*, we limited the reasoning in *LePage's* "to cases in which a single-product producer is excluded through a bundled rebate program offered by a producer of multiple products, **[**18]** which conditions the rebates on purchases across multiple different product lines."[35] Significantly, Eisai does not claim that Sanofi conditioned discounts on purchases across various product lines, but on different types of demand for the same product. **[*406]** Such conduct does not present the same antitrust concerns as in *LePage's*, and we are aware of no court that has credited this novel theory.

We are not inclined to extend the rationale of *LePage's* based on the facts presented here. Even if bundling of different types of demand for the same product could, in the abstract, foreclose competition, nothing in the record indicates that an equally efficient competitor was unable to compete with Sanofi. Professor Elhauge defines incontestable demand as the "units that the customer is less willing to switch to rival products" because of "unique indications, departmental preferences, and doctor habit." Of course, obtaining an FDA indication requires investing a significant amount of time and resources in clinical trials. But Eisai does not offer evidence demonstrating that fixed costs were so high that competitors entering the market were unable to obtain a cardiology indication. In fact, Eisai has its own unique cancer indication, which it presumably obtained because of its calculated decision to focus on that area, above others. Nor does Eisai explain what percentage of incontestable demand for Lovenox was based on its unique cardiology indication as opposed to the other factors. While Professor Elhauge certainly explains why, in theory, a customer might hesitate to **[**21]** switch from Lovenox to one of its lower priced

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[32] *See, e.g.,* ***Cascade Health Solutions v. PeaceHealth, 515 F.3d 883, 894 (9th Cir. 2008)*** ("Bundling is the practice of offering, for a single price, two or more goods or services that could be sold separately."); *Virgin Atl. Airways Ltd., 257 F.3d at 270* ("[A] bundling arrangement offers discounted prices or rebates for the purchase of multiple products, although the buyer is under no obligation to purchase more than one item."); *Concord Boat, 207 F.3d at 1062* ("[B]undling or tying . . . 'cannot exist unless two separate product markets have been linked.'" (quoting *Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 21, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984)*); *see also* *LePage's, 324 F.3d at 155* ("'In the anticompetitive case [of package discounting], . . . the defendant rewards the customer for buying its product *B* rather than plaintiff's *B*, not because defendant's *B* is better or cheaper. Rather, the customer buys the defendant's *B* in order to receive a greater discount on *A*, which the plaintiff does not produce.'" (quoting Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust*** **[**19]** ***Law*** ¶ 794, at 83 (Supp. 2002))).

[33] *324 F.3d at 145*.

[34] *See* *id. at 155*. ***HN12***[] "Tying" is "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." *Eastman Kodak, 504 U.S. at 461-62* (internal quotations omitted); *see* *Warren Gen. Hosp. v. Amgen Inc., 643 F.3d 77, 80 (3d Cir. 2011)*.

[35] *696 F.3d at 274 n.11*. While *LePage's* remains the law of this Circuit, it has been the subject of much criticism. *See, e.g.,* ***Cascade Health Solutions, 515 F.3d at 899-903*** ("Given the endemic nature of bundled discounts in many spheres of normal economic activity, we decline to endorse the Third Circuit's definition of when bundled discounts constitute the exclusionary conduct proscribed by *§ 2* of the Sherman Act."); *LePage's, 324 F.3d at 179* (Greenberg, J., dissenting) (arguing that the majority's opinion "risks curtailing price competition and a method of pricing beneficial to customers because the bundled rebates effectively lowered [the seller's] costs"); Antitrust Modernization Comm'n, Report and Recommendations 94, 97 (2007), *available at* *http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf* ("The lack of clear standards regarding bundling, as reflected in *LePage's v. 3M*, may discourage conduct that is procompetitive or competitively neutral and thus may actually harm consumer welfare."); *see also* *FTC v. Church & Dwight Co., Inc., 665 F.3d 1312, 1316-17, 398 U.S. App. D.C. 449 (D.C. Cir. 2011)* (collecting academic criticisms **[**20]** of *LePage's*).

competitors, Eisai fails to tie Professor Elhauge's model to concrete examples of anticompetitive consequences in the record. Accordingly, we cannot credit Eisai's bundling claims, at least on the facts before us.[36]

Eisai's reliance on our holdings in *ZF Meritor* and *Dentsply* is also misplaced. As a preliminary matter, although Eisai cites extensively to these cases for the proposition that Lovenox customers lacked any meaningful ability to switch products, its supposed evidence of foreclosure is grounded in Professor Elhauge's unsupported bundling theory. Moreover, Sanofi's conduct is distinguishable from the anticompetitive practices at issue in *ZF Meritor* and *Dentsply*. In *ZF Meritor*, the plaintiff "introduced evidence that compliance with the market penetration targets was mandatory because failing to meet such targets would jeopardize the [customers'] relationships with the dominant manufacturer of transmissions in the market." **[**22]** [37] If customers did not comply with the targets for one year, they had to repay all contractual savings.[38] We observed that the situation was similar to *Dentsply*, where we applied an exclusive dealing analysis because "the defendant threatened to refuse to continue dealing with customers if customers purchased rival's products."[39] The threat to cut off supply ultimately provided customers with no choice but to continue purchasing from the defendants.

Here, Lovenox customers did not risk penalties or supply shortages for terminating the Lovenox Program or violating its terms. The consequence of not obtaining the 75% market share threshold or meeting the formulary requirements was not contract termination; rather, it was receiving the base 1% discount. If a customer **[*407]** chose to terminate the contract entirely, it could still obtain Lovenox at the wholesale price. In fact, nothing in the record demonstrates that a hospital's supply of Lovenox would be jeopardized in any way or that discounts already paid would have to be refunded. Attempting to draw a comparison with *ZF Meritor*, Eisai argues that the threat of not obtaining a higher discount (ranging up to 30% off) "handcuffed" hospitals **[**23]** to the Lovenox Program. Yet, Eisai points to no evidence of this. Moreover, the threat of a lost discount is a far cry from the anticompetitive conduct at issue in *ZF Meritor* or *Dentsply*. On the record before us, Eisai has failed to point to evidence suggesting the kind of clear-cut harm to competition that was present in these earlier cases. Accordingly, Eisai fails to demonstrate that hospitals were foreclosed from purchasing competing drugs as a result of Sanofi's conduct.

2.

Eisai also cannot demonstrate that Sanofi's conduct, as a whole, caused or was likely to cause anticompetitive effects in the relevant market. Eisai claims that the District Court ignored "proof" of reduction of output, denial of consumer choice, and increasing price. As to output, Eisai relies on two pages of Professor Elhauge's description of the annual growth rate in the anticoagulant market as more than doubling after generic entry. Because there was a large reduction in promotional spending that year, Professor Elhauge concluded that Sanofi *must* have previously been reducing output. Such an assumption cannot serve as a substitute for actual evidence at the summary judgment stage. Moreover, Eisai fails to **[**24]** identify any record evidence in support of its argument that Sanofi's conduct restricted consumer choice, instead presumably relying on its theory of foreclosure.

Eisai's sole example of actual or likely anticompetitive effect is that Lovenox's price increased from 2005 until a generic entered the market in 2010. According to Eisai, the rising price is particularly significant considering Sanofi's long-term monopoly in the market and therefore provides ample basis for us to find a likelihood of anticompetitive effect. Specifically, Sanofi had as high as a 92% share of the market and Lovenox's price was the highest in the market. For example, in 2009, the average price per converted unit of Lovenox was $162.72 compared to $140.28

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[36] *Accord* Virgin Atl. Airways Ltd., 257 F.3d at 264 ("Although [the expert's] affidavit purports to be useful in interpreting market facts affecting this litigation, expert testimony rooted in hypothetical assumptions cannot substitute for actual market data.").

[37] 696 F.3d at 278.

[38] Id. at 265.

[39] Id. at 278 (citing Dentsply, 399 F.3d at 189-96).

for Fragmin. While these figures certainly suggest that Lovenox's prices were high, we have no reason to believe that Sanofi's allegedly anticompetitive conduct was the cause. In fact, Sanofi's list prices increased at a rate similar to Eisai's prices and the Pharmaceutical Producer Price Index. As a result, we find little evidence to suggest that Sanofi's practices caused or were likely to cause anticompetitive effects.

Without evidence of substantial foreclosure **[**25]** or anticompetitive effects, Eisai has failed to demonstrate that the probable effect of Sanofi's conduct was to substantially lessen competition in the relevant market, rather than to merely disadvantage rivals.[40] Unlike in *LePage's,* ***[*408]*** *Dentsply*, and *ZF Meritor*, Lovenox customers had the ability to switch to competing products. They simply chose not to do so. We will therefore affirm the District Court's grant of summary judgment in favor of Sanofi under a rule of reason analysis.

B.

Turning to Safofi's argument that its discounts amounted to no more than price-based competition and Eisai's suit must be dismissed under the so-called price-cost test, we disagree. We are not persuaded that Eisai's claims fundamentally relate to pricing practices.

HN14[] Unlawful predatory pricing occurs when a firm reduces its prices to below-cost levels to drive competitors out of the market and, once competition is eliminated, reduces output and raises its prices to supracompetitive levels.[41] Reducing prices to only above-cost levels, however, generally does not have an anticompetitive effect because "the exclusionary **[**27]** effect of prices above a relevant measure of cost . . . reflects the lower cost structure of the alleged predator, and so represents competition on the merits."[42] While there may be situations where above-cost prices are anticompetitive, it "is beyond the practical ability of a judicial tribunal" to ascertain this "without courting intolerable risks of chilling legitimate price-cutting."[43] In light of this "economic reality," a plaintiff can succeed on a predatory pricing claim only if it can show that (1) the rival's low prices are below an appropriate measure of its costs and (2) the rival had a dangerous probability of recouping its investment in below-cost prices.[44] This is known as the price-cost test.

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[40] *See* *ZF Meritor, 696 F.3d at 281*; *see also* *Tampa Elec., 365 U.S. at 328-29*. Eisai's allegations regarding the so-called "FUD" campaign are more properly analyzed under the law of deceptive marketing. ***HN13***[] While false or deceptive statements may violate the antitrust laws in "rare[]" circumstances, *see* *W. Penn Allegheny Health Sys., 627 F.3d at 109 n.14*; *see also* *Santana Prods., Inv. v. Bobrick Washroom Equip., Inc., 401 F.3d 123, 132 (3d Cir. 2005)*, at minimum, a plaintiff must show that such statements induced or were likely to induce reasonable reliance by consumers, *see, e.g.,* *National Asso. of Pharmaceutical Mfrs., Inc. v. Ayerst Laboratories, Div. of/and American Home Products Corp., 850 F.2d 904, 916-17 (2d Cir. 1988)*; *Am. Prof'l Testing Serv., Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publ'ns, Inc., 108 F.3d 1147, 1152 (9th Cir. 1997)*. The District Court held that Eisai failed to put forth evidence demonstrating reliance and Eisai does not explicitly challenge this finding. Eisai's brief, in passing, provides only a handful of examples of hospitals that decided not to switch to Fragmin after their representatives attended meetings presented by Sanofi or its consultants. **[**26]** But, even if these examples were enough to demonstrate reliance, Eisai has given us no reason to believe that it could not have corrected Sanofi's misstatements by supplying the hospitals with accurate information. *See* *Santana Prods., Inv., 401 F.3d at 133* (holding that a defendant did not violate *Section 1* of the Sherman Act by criticizing a competitor's partitions, in part, when the plaintiff "remain[ed] free to tout its products to the [customers] and remain[ed] equally free to reassure them that its partitions are superior to [defendant's] partitions and to prove [defendant] wrong with respect to the flammability of [its] partitions").

[41] *See* *Weyerhaeuser v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 318, 127 S. Ct. 1069, 166 L. Ed. 2d 911 (2007)*; *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222-24, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993)*; *see also* *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 584-85, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*.

[42] *Brooke Grp., 509 U.S. at 223*.

[43] *Id.*

[44] *Weyerhaeuser, 549 U.S. at 318*; *see also* *Brooke Grp., 509 U.S. at 222-24*.

HN15[] When a competitor complains that a rival's sales program violates the antitrust laws, we must consider whether the conduct constitutes an exclusive dealing arrangement or simply a pricing practice. Defendants may argue that the challenged conduct is fundamentally an above-cost pricing scheme and therefore the price-cost test applies, ultimately dooming a plaintiff's claims. But not all contractual **[*409]** practices involving above-cost prices are *per se* legal **[**28]** under the antitrust laws.[45] We previously explained in *ZF Meritor* that the price-cost test may be utilized as a "specific application of the 'rule of reason'" only when "price is the clearly predominant mechanism of exclusion."[46] There, the defendant urged us to apply the price-cost test because the plaintiff's claims were, "at their core, no more than objections to . . . offering prices . . . through its rebate program."[47] We declined to adopt this "unduly narrow characterization of the case as a 'pricing practices' case."[48] We explained that price itself did not function as the exclusionary tool: "Where, as here, a dominant supplier enters into *de facto* exclusive dealing arrangements with every customer in the market, other firms may be driven out not because they cannot compete on a price basis, but because they are never given an opportunity to compete, despite their ability to offer products with significant customer demand."[49]

Under *ZF Meritor*, ***HN16***[] when pricing predominates over other means of exclusivity, the price-cost test applies. This is usually the case when a firm uses a single-product loyalty discount or rebate to compete with similar products.[50] In that situation, an equally efficient **[**29]** competitor can match the loyalty price and the firms can compete on the merits. More in-depth factual analysis is unnecessary because we know that "the balance always tips in favor of allowing above-cost pricing practices to stand."[51] As a result, we apply the price-cost test as an application of the rule of reason in those circumstances and conclude that the above-cost pricing at issue is *per se* legal. But our conclusion may be different under different factual circumstances. Here, for example, Eisai alleges that its rival, having obtained a unique FDA indication, offered a discount that bundled incontestable and contestable demand. On Eisai's telling, the bundling — not the price — served as the primary exclusionary tool. Because we have concluded that Eisai's claims are not substantiated and that they fail a rule of reason analysis, we will not opine on when, if ever, the price-cost test applies to this type of claim.

IV.

Eisai also argues that the District Court abused its discretion in holding that discovery of deposition transcripts from the OSS litigation was irrelevant and unduly burdensome. Assuming the transcripts were relevant, Eisai must still show that the order resulted in "actual and substantial prejudice."[52] Eisai cannot show prejudice when it appears to have engaged in ample discovery in this case: Sanofi claims that Eisai took over thirty depositions, **[*410]** received millions of pages of documents, and subpoenaed approximately 350 third parties. Eisai was free to elicit information

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45 *ZF Meritor, 696 F.3d at 278*.

46 *Id. at 273, 275*.

47 *Id. at 273*.

48 *Id. at 269*.

49 *Id. at 281*.

50 *See, e.g., NicSand, Inc. v. 3M Co., 507 F.3d 442, 452 (6th Cir. 2007)* (en banc); *Concord Boat Corp., 207 F.3d at 1061-63*; *Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 236 (1st Cir. 1983)*.

51 *ZF Meritor, 696 F.3d at 273*; *see Brooke Grp., 509 U.S. at 223*; *see also ZF Meritor, 696 F.3d at 275* ("[W]hen price is the clearly predominant mechanism of exclusion . . . so long as the price is above-cost, the procompetitive justifications for, and the benefits of, lowering prices far outweigh any potential **[**30]** anticompetitive effects.").

52 *See Cyberwold Enter. Tech., Inc. v. Napolitano, 602 F.3d 189, 200 (3d Cir. 2010)*.

regarding the OSS litigation during this extensive discovery process and—in fact—did so by deposing at least one witness from that litigation. We therefore conclude that the District Court did not abuse its discretion in denying Eisai's request for production of the 2003 OSS deposition transcripts.

V.

For the foregoing reasons, we will affirm the District Court's order, granting summary judgment in favor of Sanofi, and its order denying Eisai's motion to compel discovery of transcripts from a prior litigation.

Kent v. R.L. Vallee, Inc.

Superior Court of Vermont, Chittenden Unit, Civil Division

May 6, 2016, Decided

Docket No. 617-6-15 Cncv

Reporter
2016 Vt. Super. LEXIS 12 *

JACOB R. KENT, et al., Plaintiffs v. R.L. VALLEE, INC., et al., Defendants

Core Terms

conspiracy, prices, allegations, price-fixing, gasoline, defendants', stations, factors, antitrust, costs, fraudulent concealment, plaintiffs', wholesale, retail, class period, gas station, cases, retail price, gas price, profits, motion to dismiss, unjust enrichment, meetings, infer, statute of limitations, legislative hearing, market share, price fixing, pled, high prices

Judges: **[*1]** Helen M. Toor, Superior Court Judge.

Opinion by: Toor, J.

Opinion

RULING ON DEFENDANTS' MOTION TO DISMISS

Toor, J.

In this class action, plaintiffs allege price-fixing by defendants, who are wholesale and retail sellers of unleaded gasoline in Chittenden, Franklin, and Grand Isle counties. Specifically, plaintiffs claim violations of the Vermont Consumer Protection Act (VCPA) (*9 V.S.A. § 2453*) as to wholesale gasoline (Count I) and retail gasoline (Count II), as well as unjust enrichment (Count III). Defendants have moved to dismiss pursuant to *V.R.C.P. 12(b)(6)*, and also on statute of limitations grounds. Each defendant has filed a separate motion to dismiss, with generally overlapping arguments.

PLAINTIFFS' ALLEGATIONS

The following facts are alleged by plaintiffs in their complaint.[1] The court makes no findings as to their accuracy.

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[1] Throughout this decision, "complaint" or "compl." refers to plaintiffs' First Amended Complaint, filed on July 30, 2015, unless otherwise indicated.

Plaintiffs bring this action individually and on behalf of the class, which consists of Vermont citizens and businesses who purchased unleaded gasoline at retail gasoline stations in Chittenden, Franklin, and Grand Isle counties (the "class area") during the class **[*2]** period (January 1, 2005 through the present). Compl. ¶ 2. The defendants are four Vermont corporations: R.L. Vallee, Inc., S.B. Collins, Inc., Champlain Farms/Wesco, Inc., and Champlain Oil Company, Inc. *Id.* ¶ 1.

Average retail gasoline prices in the class area have been inexplicably and persistently higher than elsewhere in the state—such as Middlebury and Rutland—and other areas of the Northeast and the United States. *Id.* ¶ 5. Defendants' gross wholesale and retail profits have periodically been: (1) twice the national average; (2) second highest out of 450 gasoline markets measured in the country; and (3) highest within New England. *Id.* Plaintiffs claim the high prices and profits are the result of a price-fixing agreement among defendants. *See id.* ¶ 34.

The class area contains a highly concentrated wholesale and retail gasoline market. Defendants collectively own or control at least four of the six meaningful gas suppliers, a 67% market share, and at least 64% of all class area gas stations. Additionally, defendants own and lease back gas pumps at several independently owned stations. Thus, defendants control wholesale pricing and as a result retail pricing at their stations and **[*3]** at several independent stations, with those stations passing on defendants' wholesale prices to consumers. *Id.* ¶ 6.

Several phenomena persist in the class area and during the class period that generally do not exist in competitive, non-collusive markets. One example alleged by plaintiffs is that defendants' wholesale and retail prices have been nearly identical, and the stations supplied by defendants have adjusted retail prices in direct relation to defendants' wholesale prices. *Id.* ¶¶ 7, 60-62. More specifically, defendants' wholesale prices have increased and decreased by the same or similar amounts on the same days. *Id.* ¶ 61. Likewise, retail prices at defendants' stations and stations they supply in the class area (over 100 stations) moved virtually in lockstep. *Id.* ¶ 62. During the class period, S.B. Collins typically sold gas at its Chittenden County station two cents above prices at Champlain Oil and Wesco stations, and three cents above stations owned by R.L. Vallee. *Id.* ¶ 71. This suggests, plaintiffs allege, that retail prices at Chittenden County stations were simply following collectively fixed wholesale prices. *Id.* Defendants directly charged a higher price to the independently **[*4]** owned gas stations they supplied, forcing them to charge higher prices to the class. *Id.* ¶¶ 72-73. If a co-conspirator had an incentive to take market share and profits by lowering its price, the other defendants could simply threaten to lower wholesale prices, thus reducing retail prices and "enforc[ing] the terms of the cartel." *Id.* ¶ 73.

Market prices often have not been logically related to terminal rack costs.[2] Market prices have: (1) increased or remained unchanged in times of declining cost, (2) increased when costs have not changed, and (3) decreased at a disproportionately smaller amount and pace than the decline in costs. *Id.* ¶ 7. Specifically, plaintiffs allege that from 2010 to 2015, there were six distinct periods of declining terminal rack prices, where defendants increased the price spread between Chittenden County and Rutland. *Id.* ¶ 69. The average time span of the six distinct periods was 94 days, including one 210-day span where the price spread quadrupled. *Id.*

Defendants have earned outsized gross profits, often in the top 10 of 450 gasoline markets measured in the United States. *Id.* ¶ 7. **[*5]** Defendants were able to achieve "abnormal and exorbitant" profits on the sale of gasoline within the class area. *Id.* ¶ 63. Their profit margins exceeded the margins realized by comparable gas stations outside of the class area within comparative markets in Vermont and throughout the United States. *Id.* ¶ 64. The Oil Price Information Service, a company that tracks the terminal and retail prices of gasoline throughout the country, found that the Burlington area was the most profitable gasoline market for retailers in the northeast United States and often in the top ten nationwide. *Id.* ¶ 8.

Defendants have maintained their wholesale and retail market shares despite numerous opportunities to compete on price to acquire market share. *Id.* ¶ 7. In competitive markets and during periods of declining costs, profit-motivated competitors would typically decrease prices to take more market share. *Id.* ¶ 67. However, that did not happen among defendants during the class period and within the class area. *Id.*

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[2] "Terminal rack cost" refers to the price at which defendants acquire gasoline. Compl. ¶ 7.

Defendants have frequently acquired real property on which they have imposed deed restrictions barring future use as gas stations to further limit competition or dilution of market share. *Id.* ¶ **[*6]** 7. Additionally, defendants have used Vermont environmental laws to obstruct the entry of low-cost gasoline providers and to extract unreasonable covenants that prevent or limit competition. *Id.*

With regard to those barriers to entry, plaintiffs allege two examples within the class area. First, in 2010 R.L. Vallee opposed Walmart's bid to build a discount store in Franklin County until it was written into the permit that "there shall be no sale of gasoline for automobiles." *Id.* ¶ 50. Second, R.L. Vallee has partnered with Wesco since 2007 to oppose Costco's plans to build a filling station in Colchester, Vermont. *Id.* ¶ 51. The entry of Costco into the market "would have meant the addition of a major low cost player acting outside of the cartel." *Id.* Plaintiffs allege three additional examples, all of them outside of the class area. Two involved deed and permitting restrictions at gas stations in Plainfield in 2012 and 2013-2014, while the other involved the closing of a gas station in St. Johnsbury in 2014. *See id.* ¶¶ 52-54.

When confronted by federal and state elected officials, Defendants have given pretextual or plainly false explanations for their pricing behavior, such as claiming **[*7]** they did not make a profit, or that they lost money on gasoline for substantial periods within the class period. *Id.* ¶¶ 7, 75, 80-81. While the issue at the legislative hearings was why a certain area of Vermont had higher prices than elsewhere in the state, defendants tried to confuse the issue by interjecting: (1) factors that apply throughout Vermont; (2) irrelevant comparisons between Vermont and other states; and (3) other "nonsensical red-herrings" that could not have explained the high price of gasoline within the class area. *Id.* ¶ 82. This was a "blatant attempt at misdirection" to conceal ongoing price coordination. *Id.* ¶ 83.

The proffered justifications for high gas prices provided by defendants at the hearings included freight differences, the high cost of living in Vermont, high terminal costs, fluctuation in wholesale price with limited turnover, overhead which can vary from location to location, labor costs, environmental compliance, repair costs, health insurance, utility costs, credit card fees, cost of crude available in Vermont, law enforcement authority reluctance to pursue people stealing gas, property taxes, costs to build gas stations and replace underground storage **[*8]** tanks, variable sales volumes, amenities such as hot coffee and made-to-order food, and clean bathrooms with fresh flowers. *Id.* ¶¶ 84-85. Additionally, the R.L. Vallee CEO gave an "irrelevant speech" about alleged environmental violations of a possible competitor, and how much his company is appreciated in the community. *Id.* ¶ 86. The hearing testimony summarized above, plaintiffs allege, does not explain the high price of unleaded gasoline in the class area, and only further demonstrates that defendants engaged in a price-fixing conspiracy. *Id.* ¶¶ 75, 80-87.

Additionally, the Federal Trade Commission concluded that gas prices in the greater Burlington area in late June 2012 were 10 to 43 cents a gallon higher than the FTC's computer model predicted they should be. *Id.* ¶ 9. Plaintiffs allege further evidence of collusive behavior in that defendants temporarily reduced their prices and profit margins before August 2012 and January 2013 legislative hearings investigating high gas prices in northwestern Vermont. *Id.* ¶ 74. These price reductions were executed despite rising costs for the purpose of masking illegally high prices charged at all other times, and demonstrates that defendants **[*9]** had control of the market. *Id.*

Plaintiffs allege that this evidence "does not support the possibility of innocent, independent pricing decisions" and "instead points directly to an extensive price-fixing scheme of long duration" perpetrated by defendants. *Id.* ¶ 15. More specifically, plaintiffs allege, the facts and data show that: (1) defendants agreed to set their wholesale prices at nearly identical levels to maintain retail prices at virtually all stations in the class area at illegally high levels; (2) defendants agreed to increase, decrease, and maintain their prices at or near the same time and by the same amount; (3) defendants' wholesale price-fixing directly inflated prices both at their stations and at the independent stations they supply; and (4) the class paid illegally inflated prices at defendants' stations and at the stations they supply. *Id.* Plaintiffs allege defendants might have pilfered over $100 million from the class during the class period. *Id.* ¶ 16.

In sum, "[p]laintiffs allege that during the Class Period, Defendants conspired to fix, raise, maintain, and/or stabilize unleaded gasoline prices being charged at wholesale and to all Vermont citizens who purchased gasoline in **[*10]** the Class Area. Because of Defendants' unlawful conduct, Plaintiffs paid artificially-inflated prices for unleaded gasoline, and, as a result, suffered monetary damages." *Id.* ¶ 34.

In the complaint, plaintiffs allege that defendants discussed and formed their anticompetitive agreements during "secret meetings and conversations, often conducted at undisclosed, out-of-the-way locations." *Id.* ¶ 79. However, during oral argument, plaintiffs retreated from their "secret meeting" allegation, instead relying on their assertion that defendants had the opportunity to meet. *See* Tr. of Hr'g on Mots. to Dismiss at 43-44; Compl. ¶ 59.[3] Specifically, the complaint alleges such opportunities through membership in the Vermont Petroleum Association by all defendants, which convened regular trade association meetings and more informal events like an annual golf tournament which "some or all of the [d]efendants" might have attended. *Id.* Plaintiffs also allege that the fact that defendants collectively agreed to one agent for representation at legislative hearings in 2012, 2013, and 2015, further demonstrates such opportunity to meet. *See id.*

Plaintiffs allege that they did not discover their cause of action earlier than immediately before the filing of this lawsuit because of defendants' fraudulent concealment of their conspiracy. *Id.* ¶ 89. Thus, plaintiffs assert the tolling of the statute of limitations. *Id.* ¶ 91.

DISCUSSION

I. *Statute of Limitations*

First, the court addresses the statute of limitations issue raised by Champlain Oil and Wesco. Those defendants contend the six-year statute of limitations has run because the class period started in 2005, and plaintiffs were in possession of enough facts to pursue and investigate their claim at that point. Plaintiffs' complaint alleges that despite due diligence during the class period, plaintiffs did not and could not discover their cause of action until immediately before the filing of this lawsuit in 2015 due to defendants' fraudulent concealment. Compl. ¶¶ 76-91.

In their opposition memo, Plaintiffs argue that the conspiracy was discovered in 2012. *See* Pl.'s Opp'n to Defs.' Mots. to Dismiss at 16 n.8 (filed Nov. 2, 2015). They also argue that the statute **[*12]** of limitations issue cannot be resolved on a motion to dismiss, arguing that this is a fact-intensive question that must be resolved by a jury. *Id.* While it is true that disputed facts regarding the time of discovery must go to a jury, plaintiffs are still required to *plead* facts that, if proved, would establish their tolling claim.

Defendants contend that discovery of the alleged conspiracy occurred simply by reviewing publicly available pricing data from 2005 and concluding that it amounted to a conspiracy. Thus, defendants argue, plaintiffs were on inquiry notice because the pricing data existed for years before the statute of limitations ran, and they point to no fact discovered in 2012 that could not have been discovered earlier. Retail gas prices are publicly posted on large signs, and public hearings were held regarding gas prices. Defendants further argue that by alleging no facts that would support a claim or inference of fraudulent concealment, plaintiffs fail to satisfy the heightened pleading standard for fraud contained in *Rule 9(b)* ("In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.").

"If properly pleaded, **[*13]** fraudulent concealment can vitiate the statutory bar of the limitations defense." *Fercenia v. Guiduli, 2003 VT 50, ¶ 14, 175 Vt. 541, 830 A.2d 55* (citing *S. Burlington Sch. Dist. v. Goodrich, 135 Vt. 601, 606, 382 A.2d 220 (1977))*. The Vermont Supreme Court has applied the same pleading rule in cases where the fraud is pled to avoid the statute of limitations rather than as a separate, affirmative claim. *Id.* ("Allegations of fraud . . . must be pled with particularity."); *Standard Packaging Corp. v. Julian Goodrich Architects, Inc., 136 Vt. 376, 380-81, 392 A.2d 402 (1978)*; *see also* *In re Elec. Carbon Products Antitrust Litig., 333 F. Supp. 2d 303, 315 (D.N.J. 2004)* (plaintiffs seeking to toll statute of limitations based on defendant's fraudulent concealment must allege underlying

[3] In a separate order, the court is today granting defendants' motion to strike **[*11]** paragraph 79 of the complaint, which had alleged the secret meetings. Thus, the court treats paragraph 79 as deleted.

acts of fraudulent concealment with particularity as required by heightened pleading standard for fraud claims); Boland v. Consol. Multiple Listing Serv., Inc., 868 F. Supp. 2d 506, 518 (D.S.C. 2011); Doe v. Order of St. Benedict, 836 F. Supp. 2d 872, 877 (D. Minn. 2011).

In the antitrust context, courts have generally held that a plaintiff must allege three elements of fraudulent concealment to avoid the statute of limitations: (1) affirmative acts by defendant to fraudulently conceal its conduct, (2) failure of plaintiff to discover the facts forming the basis of its claim within the limitations period, and (3) plaintiff's exercise of due diligence in attempting to discover those facts. State of N.Y. v. Hendrickson Bros., 840 F.2d 1065, 1083 (2d Cir. 1988); In re Ciprofloxacin Hydrochloride Antitrust Litigation, 261 F. Supp. 2d 188, 222 (E.D. N.Y. 2003); In re Nine West Shoes Antitrust Litigation, 80 F. Supp. 2d 181, 192 (S.D. N.Y. 2000); J. Miles, 1 Health Care and Antitrust L. § 9:10 n.32 (2016) (listing cases).

With respect to the first element, price-fixing and bid-rigging are considered "self-concealing" conspiracies, whose **[*14]** natures are "inherently secret." *Miles, 1 Health Care and Antitrust* L. § 9:10 and n.35 (listing cases). Thus, merely alleging a price fixing conspiracy is sufficient as to that element, and plaintiffs need not plead that defendants took independent, affirmative steps of concealment. *See* Hendrickson Bros., 840 F.2d at 1083-84; Hinds Cty., Miss. v. Wachovia Bank N.A., 620 F. Supp. 2d 499, 520 (S.D.N.Y. 2009); Nine West Shoes, 80 F. Supp. 2d at 193.

As to the second element, plaintiffs have pled that they "did not discover their cause of action until immediately before the filing of this lawsuit because [d]efendants' fraudulent concealment of their conspiracy was effective." Compl. ¶ 89. Some federal cases have found such allegations insufficiently particular under Rule 9(b). In Hinds, the plaintiffs failed to plead the second prong of fraudulent concealment where they alleged that "Plaintiffs and the Class members did not discover . . . that Defendants and their coconspirators were violating the antitrust laws until shortly before this litigation was commenced." 620 F. Supp. 2d at 520. The complaint in Hinds did "not specify when any Named Plaintiffs or Class members became aware of the antitrust violations, and therefore [did] not state 'with particularity the circumstances constituting fraud or mistake.'" *Id.* (citing F.R.C.P. 9(b)); *see also* In re Magnetic Audiotape Antitrust Litig., No. 99 Civ. 1580, 2002 U.S. Dist. LEXIS 8366, 2002 WL 975678, at *3 (S.D.N.Y. May 9, 2002) (allegation that knowledge about the alleged antitrust **[*15]** violation "was obtained 'shortly before April 1999' is very vague. Such a general allegation, without more, fails to satisfy the second prong of the fraudulent concealment test.").

Plaintiffs' allegations of the second element of fraudulent concealment is similar to the Hinds allegation, which that court found insufficient. Vermont case law suggests the same conclusion. In a case involving an action for damages resulting from the collapse of portions of a building, the plaintiffs[4] alleged negligent installation of steel structural supports for the building's roof and sprinkler system. *See* Standard Packaging Corp. v. Julian Goodrich Architects, Inc., 136 Vt. 376, 377-78, 392 A.2d 402 (1978). The complaints charged that the defendants "'actively concealed' the defective work, which 'was not apparent to [plaintiff] in the exercise of reasonable diligence and was a latent rather than a patent defect.'" Id. at 378. The complaints also stated that the defective construction was discovered only when the building's roof collapsed. *Id.* The Supreme Court held that these allegations were sufficient to raise the issue of fraudulent concealment and bring the complaint within the applicable six year limitations period. Id. at 381.

In *Standard Packaging*, the complaint pled when and how plaintiff discovered the cause of action. In contrast, plaintiffs here have alleged merely that they "did not discover their cause of action earlier than immediately before the filing of this lawsuit." Compl. ¶ 89. This does not rise to the level of pleading with particularity under Rule 9(b). Plaintiffs do not state exactly when they discovered the cause of action, even though such information is presumably based on their actual knowledge and readily available.

[4] The plaintiffs in *Standard* were actually third-party plaintiffs, the complaints third-party **[*16]** complaints, and defendants third-party defendants. However, this court refers to them as plaintiffs, complaints, and defendants for ease of discussion.

As to the third element, plaintiffs pled that although they "exercised due diligence" during the class period, they "could not have discovered the self-concealing . . . conspiracy at an earlier date" because of defendants' fraudulent concealment. *Compl*. ¶ 90. In Hinds, the court found the allegations as to the third element insufficient to satisfy *Rule 9(b)*. There, the plaintiffs did not allege that they performed any kind of due diligence, only that "Plaintiffs and Class members did not discover, nor could have discovered through reasonable **[*17]** diligence, that Defendants and their co-conspirators were violating the antitrust laws until shortly before this litigation was commenced, because Defendants and their co-conspirators used deceptive and secret methods to avoid detection and affirmatively conceal their violations." *620 F. Supp. 2d at 521-22*. The court concluded that a "brief reference to 'reasonable diligence,' coupled with general allegations of secrecy and deception directed towards the first prong of fraudulent concealment," was not enough.[5] *Id. at 522*; *see also* *Nine West Shoes, 80 F. Supp. 2d at 193* ("Plaintiffs must plead due diligence with specificity.").

This court finds the Hinds analysis persuasive under the heightened pleading standard for fraud. Here, plaintiffs do not provide any detail as to how they exercised due diligence. They do not state whether they discovered their cause of action from retail prices alone, or examination of retail prices together with wholesale prices and profits after a particular investigation, or through some other means. Without any particularity, plaintiffs cannot rely on the fraudulent concealment exception to avoid the statute of limitations.[6]

However, plaintiffs' failure to plead fraudulent concealment with particularity does not doom their entire action. The statute of limitations excludes only that portion of the class period before the six-year period immediately prior to the filing of the lawsuit. Plaintiffs do not allege merely a single agreement that took place in 2005 or a conspiracy that ended more than six years before the suit was filed. Rather, they allege an on-going price-fixing conspiracy between 2005 and 2015. The allegations as a whole, if sufficient to suggest a price fixing conspiracy, would place that conspiracy—at least in part—during the limitations period.

The original complaint in this suit was filed on June 22, 2015. Therefore, any alleged conspiratorial acts or injuries which occurred prior to June 22, 2009 are time-barred.[7]

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[5] The Hinds court observed that the case law regarding the third prong is "not entirely consistent":

> The third prong has been characterized as requiring a showing that the plaintiff's ignorance of the claim "was not the result of lack of diligence," *Hendrickson Bros., 840 F.2d at 1083*. It has also been characterized as a requirement that a plaintiff show "due diligence in pursuing discovery of the claim," *National Group, 420 F.Supp.2d at 265*; *see also* *Merrill Lynch, 154 F.3d at 60*.

620 F. Supp. 2d at 522. Finding the first formulation "problematic" because it "allows the allegations required to satisfy the first prong of fraudulent concealment to also satisfy the third prong" and "is difficult to characterize . . . as pleading with particularity," the Hinds **[*18]** court noted that it agreed with other courts that in this context, "[g]eneral assertions of ignorance and due diligence without more specific explanation . . . will not satisfy the[ ] pleading requirements." *Id.* (alterations in original). Thus, "[d]ue diligence is not adequately pled if plaintiffs 'did not allege in the [complaint] that they exercised due diligence' or if they 'make no allegation of any specific inquiries of [defendants], [or] detail when such inquiries were made, to whom, regarding what, and with what response.'" *Id.* (quoting *Merrill Lynch, 154 F.3d at 60*) (alterations in original).

[6] Plaintiffs' attorney described their investigation in some detail at oral argument. *See* Tr. at 37-41. **[*19]** However, that is irrelevant if not pled in the complaint.

[7] At oral argument, plaintiffs also claimed that the alleged price-fixing constitutes a "continuing violation," and that that saves the entire class period from the statute of limitations. Tr. at 51. It is far from clear that the "continuing violation" theory would save the entire class period. *See* *Klehr v. A.O. Smith Corp., 521 U.S. 179, 189-90, 117 S. Ct. 1984, 138 L. Ed. 2d 373 (1997)* ("***Antitrust law*** provides **[*20]** that, in the case of a 'continuing violation,' say, a price—fixing conspiracy that brings about a series of unlawfully high priced sales over a period of years, 'each overt act that is part of the violation and that injures the plaintiff,' *e.g.*, each sale to the plaintiff, 'starts the statutory period running again, regardless of the plaintiff's knowledge of the alleged illegality at much earlier times.' But the commission of a separate new overt act generally does not permit the plaintiff to recover for the injury caused by old overt acts outside the limitations period.") (quoting 2 P. Areeda & H. Hovenkamp, ***Antitrust Law*** ¶ 338b, p. 145 (rev. ed.1995)) (citations omitted); Hanover *Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 502 n. 15, 88 S. Ct.*

II. *First Amendment Protected Activity*

Some of the conduct alleged by plaintiffs includes lobbying, permitting activity, and testimony before public hearings. The parties agree that this activity cannot form the basis of an antitrust violation under the *Noerr-Pennington* doctrine. *See* Prof'l *Real Estate Inv'rs, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 56, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993)* ("Those who petition government for redress are generally immune from antitrust liability.") (citing *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961))*; *Mine Workers v. Pennington, 381 U.S. 657, 669, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965))*. However, **[*21]** as plaintiffs correctly observe, evidence of such activity might be admissible to demonstrate the purpose and character of the alleged conspiracy. *Pennington, 381 U.S. at 670 n.3*; *see also, e.g., Steward Health Care Sys., LLC v. Blue Cross & Blue Shield of Rhode Island, 997 F. Supp. 2d 142, 163 (D.R.I. 2014)* ("a plaintiff may properly include evidence of immune lobbying activity in its antitrust allegations insofar as that evidence serves to illustrate the context and motive underlying the alleged anticompetitive conduct"); *Evans v. Lorillard Tobacco Co., 465 Mass. 411, 457, 990 N.E.2d 997 (2013)* ("Here, the plaintiff did not allege at trial that Tisch's testimony before the congressional subcommittee was the basis of any of the plaintiff's claims. Rather, portions of Tisch's testimony were offered as evidence in support of these claims.").

Thus, the court will consider below plaintiffs' allegations of defendants' lobbying, permitting activity, and testimony not as a basis for the claimed violation, but to the extent that those activities provide factual support for the price-fixing claim.

III. *The Pleading Standard*

The crux of the motions to dismiss is whether plaintiffs have adequately pled a price-fixing conspiracy by defendants so as to avoid dismissal for failure to state a claim. However, a preliminary inquiry deals with the pleading standard itself.

The burden on plaintiffs under Vermont law **[*22]** is "exceedingly low" at the pleading stage. *Prive v. Vermont Asbestos Group, 2010 VT 2, ¶ 14, 187 Vt. 280, 992 A.2d 1035*. Motions to dismiss for failure to state a claim are "disfavored and should be rarely granted." *Bock v. Gold, 2008 VT 81, ¶ 4, 184 Vt. 575, 959 A.2d 990*. Complaints are intended to give enough notice to the defendant to allow a response, but need not lay out every detail of the facts supporting the claim. *See Colby v. Umbrella, Inc., 2008 VT 20, ¶ 13, 184 Vt. 1, 955 A.2d 1082* ("The complaint is a bare bones statement that merely provides the defendant with notice of the claims against it."). As our Supreme Court has noted, the goal is to "strike a fair balance, at the early stages of litigation, between encouraging valid, but as yet underdeveloped causes of action and discouraging baseless or legally insufficient ones." *Id.*

The U.S. Supreme Court has rejected the federal standard on which *Colby* was based, finding that the "no set of facts" language had "puzzl[ed] the profession for 50 years" and had "earned its retirement." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 562-63, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. Instead, *Twombly* speaks of pleading sufficient facts to make the plaintiff's claims not just possible, but "plausible." *Id. at 556, 570*. The decision is confusing, as it seems at times to be creating a "more likely than not" standard, yet denies it is doing so. *Id. at 556-57*; *see also In re Text Messaging Antitrust Litig., 630 F.3d 622, 629 (7th Cir. 2010)* (observing that Court's explanation of plausibility standard is "a little unclear," but perhaps **[*23]** is best described as "a nonnegligible probability that the claim is valid[.]"). The *Twombly* standard, the Court later explained, is "not akin to a 'probability requirement.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*.

One defendant (S.B. Collins) argues in its briefings that the court should adopt *Twombly's* "plausibility" pleading standard for antitrust cases in Vermont.[8] *Twombly* held that stating an antitrust claim "requires a complaint with

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2224, 20 L. Ed. 2d 1231 (1968); *Morton's Mkt., Inc. v. Gustafson's Dairy, Inc., 198 F.3d 823, 827-29 (11th Cir. 1999)*; *Hinds, 620 F. Supp. 2d at 519*. In any event, this issue was not addressed in the pleadings or the briefs. Therefore, the court will not consider it.

[8] This argument was not raised at oral argument, so it appears S.B. Collins has backed away from it. To the extent S.B. Collins still relies on that argument, the court addresses it here for clarification.

enough factual matter (taken as true) to suggest that an agreement was made." 550 U.S. at 556. Therefore, "an allegation of parallel conduct and a bare assertion of conspiracy will not suffice. Without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality." *Id. at 556-57*.[9] Adopting the *Twombly* standard, defendant argues, would alleviate concerns about expensive and expansive discovery that is unique to antitrust cases. *See* *id. at 558-89*.

The Vermont Supreme Court has twice declined to adopt *Twombly's* pleading standard. *See* *Colby v. Umbrella, Inc., 2008 VT 20, ¶ 5 n.1, 184 Vt. 1, 955 A.2d 1082* ("[W]e . . . are in no way bound by federal jurisprudence in interpreting our state pleading rules. We recently reaffirmed our minimal notice pleading standard . . . and are unpersuaded by the dissent's argument that we should now abandon it for a heightened standard.") (citations omitted); *Bock v. Gold, 184 Vt. 575, 2008 VT 81, ¶5, 959 A.2d 990* n.*, *184 Vt. 575, 959 A.2d 990* ("As we noted recently, our dissenting colleagues' reliance on [Twombly] is misplaced.").[10] S.B. Collins tries to distinguish those cases, noting that *Colby* involved a *section 1983* discrimination claim by a disabled state employee, while Bock involved a civil rights suit against DOC by a prisoner. In those cases, defendant argues, there was a much greater disparity of resources between the plaintiffs and the state, plaintiffs there had difficulty articulating their claims, and discovery was not overly burdensome. Thus, S.B. Collins argues that the Court's rationale is inapplicable here.

It is true that the Court has not addressed the question of whether there should be a higher pleading standard for antitrust cases. However, the Court has not rested its decisions on the type of cases it was considering. The Court has repeatedly rejected adoption of the heightened *Twombly* pleading standard, and has not indicated it would be appropriate in any different context. Moreover, even in federal court the *Twombly* standard is not a special standard for antitrust cases, but applies to all types of cases. *See* *Ashcroft v. Iqbal, 556 U.S. 662, 684, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. This court therefore has no basis for creating a special standard based upon the nature of this case. Whatever *Twombly* actually says about pleading, it is not the law in Vermont, and this court will not import its standards without explicit direction from our Supreme Court.

The court will address defendants' motions under **[*26]** the traditional Vermont pleading standard: whether "it appears beyond doubt that there exist no facts or circumstances that would entitle the plaintiff to relief." *Davis v. American Legion, Dept. of Vermont, 198 Vt. 204, 2014 VT 134, ¶ 12, 114 A.3d 99* (quoting *Alger v. Dep't of Labor & Indus., 2006 VT 115, ¶ 12, 181 Vt. 309, 917 A.2d 508*); *see also* *Prive v. Vermont Asbestos Grp., 2010 VT 2, ¶ 15, 187 Vt. 280, 992 A.2d 1035* (the rule in this state is that when plaintiffs have not yet had an "opportunity to develop the case" through discovery, all that is required is a short and plain statement of the claim.) (internal quotation omitted). The court must take factual allegations in the complaint—though not legal conclusions—as true, and determine whether such facts could prove plaintiffs' case. *Dernier v. Mortgage Network, Inc., 2013 VT 96, ¶ 23, 195 Vt. 113, 87 A.3d 465* ("We assume that all factual allegations pleaded in the complaint are true, accept as true all reasonable inferences that may be derived from plaintiffs pleadings, and assume that all contravening assertions in defendant's pleadings are false.").

IV. *Price-Fixing Claims*

Plaintiffs allege that defendants engaged in price-fixing in violation of the VCPA, which prohibits "[u]nfair methods of competition . . . and unfair or deceptive acts or practices in commerce . . . ." *9 V.S.A. § 2453(a)*. Only one significant Vermont antitrust decision is on point, in which the Supreme Court described price-fixing as follows:

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[9] "Hence, when allegations of parallel conduct are set out in order to make a[n **[*24]** antitrust] claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action." *Twombly, 550 U.S. at 557*.

[10] There is also considerable disagreement as to whether *Twombly* ***[*25]*** actually imposed a heightened pleading standard, or merely clarified the already existing standard under *Conley v. Gibson, 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)*. *See* *Colby, 184 Vt. 1, 2008 VT 20, ¶ 5 n.1, 955 A.2d 1082*; *id. ¶ 19 n.3* (Burgess, J., dissenting); Wright & Miller, 5 Fed. Prac. & Proc. Civ. §§ 1202, 1216 (3d ed.). It is not clear that the decision in *Twombly* would actually change the result in any *pre-Twombly* antitrust decisions involving motions to dismiss.

> Proof of a price-fixing conspiracy need not be direct. **[*27]** While particularly true of price-fixing conspiracies, it is well recognized law that any conspiracy can ordinarily only be proved by inferences drawn from relevant and competent circumstantial evidence , including the conduct of the defendants charged. Parallel business behavior, although not itself illegal, is admissible circumstantial evidence from which the fact finder may infer agreement.
> [U]niformity of price may be and has been considered some evidence tending to establish an illegal agreement. Price uniformity among competitors does not, of itself, violate the antitrust laws, however. If it is the result of independently reached pricing decisions, the element of "agreement" necessary to establish an illegal price-fixing combination or conspiracy is absent. But it does permit an inference that the defendant's conduct stemmed from an agreement, tacit or express, rather than from independent business decisions.

State v. Heritage Realty of Vermont, 137 Vt. 425, 429-30, 407 A.2d 509 (1979) (quotations and citations omitted) (alteration in original).

Heritage involved a price-fixing claim against real estate brokers in violation of the consumer fraud act. In that case, the State's complaint alleged that during February 1977, most members of a county board of realtors attended **[*28]** a meeting where they voted to set the commission for residential real estate sales at seven percent, a change from the previous six percent. *137 Vt. at 427-28*. The trial court granted summary judgment for defendants based on both parties' affidavits, but the Supreme Court reversed, holding that plaintiff should have been allowed to further develop its case because its affidavits indicated that discovery might produce a genuine issue of materia l fact. *Id. at 430*.

By itself, *Heritage* does not resolve the exact issue here. It involved a summary judgment motion rather than a motion to dismiss. Further, the allegations of a meeting in the complaint were more specific than in this case. However, *Heritage* does provide guidance as to the type of evidence from which a price fixing conspiracy may be inferred. *See id. at 429-30*.

Plaintiffs urge the court to decide this motion solely based on Vermont law. However, there is insufficient guidance in Vermont law to determine the antitrust issues raised in this case.[11] The court must look to federal substantive ***antitrust law*** for guidance in construing the VCPA. *See id. § 2453(b)* ("It is the intent of the Legislature that in construing *subsection (a)* of this section, the courts of this State will be guided by the **[*29]** construction of similar terms contained in *Section 5(a)(1) of the Federal Trade Commission Act* as from time to time amended by the Federal Trade Commission and the courts of the United States.");[12] *Heritage, 137 Vt. at 429-30* (relying on federal antitrust decisions). Therefore, the court will be guided by substantive federal ***antitrust law*** in determining what inferences may be drawn from what facts. Given the low pleading standard, however, if this case presents a close

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[11] As argued by plaintiffs, a literal reading of *Heritage* might suggest that an allegation of parallel pricing alone could be enough to survive a motion to dismiss. *See* Pls.' Opp'n at 2, 13-15; *Heritage, 137 Vt. at 427-28* ("Parallel business behavior, although not itself illegal, is admissible circumstantial evidence from which the fact finder may infer agreement. . . . [U]niformity of price may be and has been considered some evidence tending to establish an illegal agreement."). However, given the citation in *Heritage* of federal law to the contrary, as well as the practical result of allowing any complaint alleging mere parallel business pricing to proceed to discovery, such a literal interpretation cannot possibly be what the Supreme **[*30]** Court intended.

[12] The statute refers to the Federal Trade Commission Act, *15 U.S.C.A. § 45*, which prohibits "[u]nfair methods of competition . . . and unfair or deceptive acts or practices," and not the Sherman Act, *15 U.S.C.A. § 1*, which prohibits "[e]very contract, combination . . . , or conspiracy, in restraint of trade." *See* *Elkins v. Microsoft Corp., 174 Vt. 328, 335-37, 817 A.2d 9 (2002)*. However, the U.S. Supreme Court has held that any violation of the Sherman Act also violates the FTC Act. *California Dental Ass'n v. Fed. Trade Comm'n, 526 U.S. 756, 762, 119 S. Ct. 1604, 143 L. Ed. 2d 935 (1999)* ("The FTC Act's prohibition of unfair competition and deceptive acts or practices, *15 U.S.C. § 45(a)(1)*, overlaps the scope of *§ 1* of the Sherman Act, *15 U.S.C. § 1*, aimed at prohibiting restraint of trade . . . ."); *Fed. Trade Comm'n v. Indiana Fed'n of Dentists, 476 U.S. 447, 454, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986)* ("standard of 'unfairness' under the FTC Act . . . encompass[es] . . . practices that violate the Sherman Act and the other antitrust laws"); *Fed. Trade Comm'n v. Cement Inst., 333 U.S. 683, 689-95, 68 S. Ct. 793, 92 L. Ed. 1010, 44 F.T.C. 1460 (1948)*.

call, the court will err on the side of denying the motion to dismiss. Bock, 184 Vt. 575, 2008 VT 81, ¶ 4, 959 A.2d 990.

(1) *Concious Parallelism and Plus Factors*

It is well settled that conscious parallelism is not in itself unlawful. Heritage, 137 Vt. at 429-30; Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 227, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993); Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 540-41, 74 S. Ct. 257, 98 L. Ed. 273 (1954). Conscious parallelism has been described as a "phenomenon of oligopolistic markets in which firms 'might in effect share monopoly power, setting their prices at a profit-maximizing, supracompetitive level by recognizing their shared economic interests and their interdependence with respect to price and output decisions.'" *White v. R.M. Packer Co.,* 635 F.3d 571, 575 (1st Cir. 2011) (quoting Brooke Grp., 509 U.S. at 227).[13] "Each producer may independently decide **[*31]** that it can maximize its profits by matching one or more other producers' price, on the hope that the market will be able to maintain high prices if the producers do not undercut one another." *Id.* Plaintiffs here do not argue that mere parallel behavior forms the basis for their claims, however. Instead, they claim that the parallel behavior is one of several facts that together provide circumstantial evidence of an agreement among defendants to fix prices.

Because parallel pricing behavior may well be the result of independent, rational, and perfectly legal business conduct, plaintiffs must allege additional "plus factors" which suggest that the parallel pricing results from a price fixing agreement. *See* Apex Oil Co. v. DiMauro, 822 F.2d 246, 253-54 (2d Cir. 1987) (to infer a conspiracy from parallel pricing, "a plaintiff must show the existence of additional circumstances, often referred to as 'plus' factors, which, when viewed in conjunction[ ] with the parallel acts, can serve to allow a fact-finder to infer a conspiracy"); In re Ins. Brokerage Antitrust Litig., 618 F.3d 300, 323 (3d Cir. 2010) ("plaintiffs relying on parallel conduct must allege facts that, if true, would establish at least one 'plus factor,' since plus factors are, by definition, facts that 'tend[ ] to ensure that courts punish concerted action—an actual agreement—instead of the unilateral, independent conduct of competitors.'") (quoting In re Flat Glass Antitrust Litig., 385 F.3d 350, 360 (3d Cir. 2004)) (alteration in original). The **[*33]** plus factors serve to distinguish between behavior that results from an agreement and behavior that results from independent business conduct. Flat Glass, 385 F.3d at 360 ("plus factors" are "proxies for direct evidence of an agreement").[14]

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[13] The First Circuit has defined an "oligopolistic market" as follows:

> "An oligopoly market is one in which a few relatively large sellers account for the bulk of the output." 2B Areeda, Hovenkamp, & Solow, ***Antitrust Law*** ¶ 404a, at 9 (3d ed. 2007). By contrast to a competitive market, in which no single producer has the power to affect the market price, in an oligopolistic market each of the major sellers can affect the market price by changing its output. By contrast to a monopolized market, "no one firm can unilaterally determine market price by varying its output" because rivals are large enough to affect the market price by doing the same. *Id.* at 10. As a result, "the distinctive characteristic of oligopoly is recognized interdependence among **[*32]** the leading firms: the profit-maximizing choice of price and output for one depends on the choices made by others." *Id.*

White v. R.M. Packer Co., 635 F.3d 571, 576 n.4 (1st Cir. 2011); *see also* E.I. du Pont de Nemours & Co. v. F.T.C., 729 F.2d 128, 139 (2d Cir. 1984) ("The mere existence of an oligopolistic market structure in which a small group of manufacturers engage in consciously parallel pricing of an identical product does not violate the antitrust laws.").

[14] Even under *pre-Twombly* ***antitrust law***, an allegation of parallel conduct alone has never been enough to defeat a motion to dismiss. The *Twombly* dissent acknowledges this. *See* Twombly, 550 U.S. at 580 n.6 (Stevens, J., dissenting) ("For example, had the amended complaint in this case alleged *only* parallel conduct, it would not have made the required 'showing.' Similarly, had the pleadings contained *only* an allegation of agreement, without specifying the nature or object of that agreement, they would have been susceptible to the charge that they did not provide sufficient notice that the defendants may answer intelligently. Omissions of that sort instance the type of 'bareness' with which the Federal Rules are concerned.") (citation omitted) (emphasis in original). There is no reason to suppose the Vermont Supreme Court would find a mere allegation of parallel conduct sufficient.

Courts have disagreed over what constitutes a "plus factor" and how much weight particular plus factors should be given. The Third **[*34]** Circuit has observed that "[t]here is no finite set of such criteria; no exhaustive list exists." *Id.* However, that same court has broadly categorized plus factors into three distinct groups: "(1) evidence that the defendant had a motive to enter into a price fixing conspiracy; (2) evidence that the defendant acted contrary to its interests; and (3) "evidence implying a traditional conspiracy." *Id.*

The first two factors can be problematic, the Third Circuit explained, because they "largely restate the phenomenon of interdependence." *Id.* But they are still "important to a court's analysis, because their existence tends to eliminate the possibility of mistaking the workings of a competitive market . . . with interdependent, supracompetitive pricing." *Id. at 361*; *see also id. at 361 n.12* ("Neither factor is strictly necessary . . . nor sufficient to conclude that sufficient proof of an agreement exists to preclude summary judgment, but it is relevant and courts should as a general matter consider it.") (internal quotations omitted). With respect to the first factor, evidence that the defendant "had a motive to enter into a price fixing conspiracy" means "evidence that the industry is conducive to oligopolistic price **[*35]** fixing, either interdependently or through a more express form of collusion. In other words, it is 'evidence that the structure of the market was such as to make secret price fixing feasible.'" *Id. at 360* (quoting *In re High Fructose Corn Syrup Antitrust Litigation, 295 F.3d 651, 655 (7th Cir.2002))*. As to the second factor, evidence that the defendant "acted contrary to its interests" means "evidence of conduct that would be irrational assuming that the defendant operated in a competitive market." *Id. at 360-61*.[15]

The Third Circuit considered the third factor most important, and stated that it would "generally be non-economic evidence 'that there was an actual, manifest agreement not to compete." *Id. at 361* (quoting *High Fructose Corn Syrup, 295 F.3d at 661*). "That evidence may involve 'customary indications of traditional conspiracy,' or 'proof that the defendants got together and exchanged assurances of common action or otherwise adopted a common plan even though no meetings, conversations, or exchanged documents are shown.'" *Id.* (quoting **[*36]** Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** ¶ 1434b, at 243 (2nd ed.2000)); *see also In re Ins. Brokerage Antitrust Litig., 618 F.3d 300, 321-22 (3d Cir. 2010)*.[16]

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[15] "In a competitive industry, for example, a firm would cut its price with the hope of increasing its market share if its competitors were setting prices above marginal costs. Put differently, in analyzing this factor a court looks to 'evidence that the market behaved in a noncompetitive manner.'" *Flat Glass, 385 F.3d at 361* (quoting *High Fructose Corn Syrup, 295 F.3d at 655*).

[16] Courts and commentators have organized and described "plus factors" in numerous ways. For example, one commentator has outlined the "chief" plus factors as follows:

- Actions contrary to each defendant's self-interest unless pursued as part of a collective plan.
- Phenomena that can be explained rationally only as the result of concerted action.
- Evidence that the defendants created the opportunity for regular communication.
- Industry performance data, such as extraordinary profits, that suggest successful coordination.
- The absence of a plausible, legitimate business rationale for suspicious conduct (such as certain communications with rivals) or the presentation of contrived rationales for certain conduct.

W. Kovacic, et. al., *Plus Factors and Agreement in* ***Antitrust Law***, *110 Mich. L. Rev. 393, 405-06 (2011)*. Another commentator has written that the plus factor "most often considered" by courts in determining whether parallel behavior is the result of an agreement is the "business-justifications test." M. Vaska, *Conscious* Parallelism *and Price Fixing: Defining the Boundary*, *52 U. Chi. L. Rev. 508, 509 (1985)*. Under that test, "a price-fixing agreement may be **[*37]** inferred from parallel conduct if firms cannot show legitimate independent business reasons for engaging in such practices." *Id. See also In re Travel Agent Comm'n Antitrust Litig., 583 F.3d 896, 907 (6th Cir. 2009)* ("We concluded the following 'plus factors' were important when evaluating circumstantial evidence of concerted action: '(1) whether the defendants' actions, if taken independently, would be contrary to their economic self-interest; (2) whether defendants have been uniform in their actions; (3) whether defendants have exchanged or have had the opportunity to exchange information relative to the alleged conspiracy; and (4) whether defendants have a common motive to conspire. Ordinarily, an affirmative answer to the first of these factors will consistently tend to exclude the likelihood of independent conduct.'") (quoting *Re/Max Int'l, Inc. v. Realty One, Inc., 173 F.3d 995, 1009 (6th Cir. 1999))*; E.I. *du Pont de Nemours & Co. v. F.T.C., 729 F.2d 128, 140 n.10 (2d Cir. 1984)* ("The 'plus factor' may be conduct that is contrary to the

(2) *Plus Factors Alleged by Plaintiffs*

Plaintiffs have alleged parallel pricing and a number of "plus factors" from which, they argue, one can infer **[*38]** a conspiracy among defendants to fix retail and wholesale gasoline prices in the class area. For purposes of organization, the court has categorized the allegations into three broad groups based on how they are presented in the complaint: (1) product/market structure, (2) parallel pricing and behavior, and (3) barriers to entry.

i. *Allegations Concerning Product/Market Structure*

As to the product, plaintiffs allege that unleaded gasoline is a necessary commodity, and no other fuel type is a substitute for such gasoline used in automobiles. *See In re High Fructose Corn Syrup Antitrust Litig., 295 F.3d 651, 657 (7th Cir. 2002)* (Posner, J.) ("no close substitutes" for high fructose corn syrup). The demand for gasoline is highly inelastic and thus changes little in response to price changes. *See White v. R.M. Packer Co., 635 F.3d 571, 582 (1st Cir. 2011)* ("High barriers to entry and inelastic demand are two hallmarks of oligopolistic markets susceptible to successful parallel pricing practices, but neither helps to distinguish between agreement and mere conscious parallelism as the root cause of those practices.").

Regarding the geographic market, plaintiffs allege that gas stations and drivers that purchase gas (either through wholesale or retail) from defendants in the class area cannot reasonably and cost-effectively turn to **[*39]** areas of supply outside the class area. The cost and time of seeking gas from outside the class area outweighs any benefit from lower prices.

Plaintiffs also allege a highly concentrated market, where defendants have a 67 percent market share of the wholesale market, and own or control at least 64 percent of all class area gas stations. Compl. ¶ 6. Because of their control of the wholesale market, plaintiffs allege defendants also control retail pricing at independent stations. *Id.* Other courts have found that a highly concentrated market makes price fixing more feasible. *See In re Text Messaging Antitrust Litig., 630 F.3d 622, 628 (7th Cir. 2010)* (four defendants controlled 90 percent of text messaging market); Starr *v. Sony BMG Music Entm't, 592 F.3d 314, 323-24 (2d Cir. 2010)* (defendants controlled over 80% of digital music sold to end purchasers in U.S.); *see also id.* (citing 7 Phillip R. Areeda and Herbert Hovenkamp, ***Antitrust Law*** § 1431a (2d ed. 2003) ("[E]mpirical studies considering many industries have suggested that noncompetitive pricing [that may be the result of price coordination] is likely to appear when the four leading firms account for some 50 to 80 percent of the market.") (alterations in original); *High Fructose Corn Syrup, 295 F.3d at 656* (five defendants accounted for 90 percent of product sales).

However, a concentrated market, by itself, could also **[*40]** demonstrate mere parallel conduct in an oligopolistic market. As one court has observed:

> A firm in a concentrated industry typically has reason to decide (individually) to copy an industry leader. After all, a higher-than-leader's price might lead a customer to buy elsewhere, while a lower-than-leader's price might simply lead competitors to match the lower price, reducing profits for all. One does not need an agreement to bring about this kind of follow-the-leader effect in a concentrated industry.

Reserve Supply Corp. v. Owens—Corning Fiberglas Corp., 971 F.2d 37, 53 (7th Cir.1992); *see also In re Travel Agent Comm'n Antitrust Litig., 583 F.3d 896, 910 (6th Cir. 2009)* (holding that each defendant's decision to match a new commission cut was arguably a "reasoned, prudent business decision"). Plaintiffs' allegations here about the product and the market structure make price-fixing feasible in the class market, but by themselves are not enough to defeat the motion to dismiss.[17]

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defendants' independent self-interest, the presence or absence of a strong motive on a defendants' part to enter an alleged conspiracy, or the artificial standardization of products . . . .") (internal citations omitted).

[17] Champlain Oil also points out that defendants are only four of the six major gas wholesalers in the class area. The complaint does not explain why the other two wholesalers did not take market share by pricing at allegedly competitive levels. This, Champlain Oil contends, demonstrates that higher prices are more likely explained by conscious parallelism **[*41]** rather than a conspiracy to fix prices. However, this fact does not necessarily negate an inference of a price-fixing agreement. It is entirely

ii. *Allegations Concerning Parallel Pricing and Behavior*

Plaintiffs allege that retail prices in the class area are inexplicably and persistently higher than elsewhere in the State, such as Middlebury and Rutland, and other areas of the northeast and the United States.[18] These prices have allegedly been nearly identical and moved in lockstep fashion among defendants. Further, they allege that defendants have earned "abnormal and exorbitant" gross wholesale and retail profits, often in the top 10 of 450 gasoline markets measured in the United States. Plaintiffs allege that no rational explanation has been offered for such high prices and profits.[19]

Of course, parallel pricing alone is insufficient to infer a price fixing conspiracy. Plaintiffs allege additional facts, some of which move them closer to a context that suggests a conspiracy. First, they allege that retail prices have not been logically related to terminal rack costs. According to plaintiffs, prices have repeatedly increased or remained unchanged in times of declining cost, increased when costs have not changed, and decreased at a disproportionately smaller amount and pace than the decline in costs. *See* *Starr v. Sony BMG Music Entm't, 592 F.3d 314, 323-24 (2d Cir. 2010)* (allegation that none of defendants reduced prices for Internet music despite dramatic cost reductions, taken together with other allegations, placed parallel conduct in context that suggested price-fixing agreement); *In re Text Messaging Antitrust Litig., 630 F.3d 622, 628 (7th Cir. 2010)* (Posner, J.) (complaint alleged that "in the face of steeply falling costs, the defendants increased their prices").[20]

Second, defendants have allegedly maintained their wholesale and retail market shares despite numerous opportunities to compete on price to acquire market share. Evidence of stable market shares suggests anticompetitive conduct, because such stability "is just what one would expect of a group of sellers who are all charging the same prices for a uniform product and trying to keep everyone happy by maintaining the relative sales positions of the group's members." *High Fructose Corn Syrup Antitrust Litig., 295 F.3d at 659 (7th Cir. 2002)*; *see*

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possible that the two non-party wholesalers and/or those stations they supply independently imitated defendants' allegedly fixed prices. In any event, as the court has already stated, the fact of a concentrated market does not by itself suggest a price-fixing conspiracy.

[18] Defendants argue that plaintiffs have not alleged that Rutland is an appropriate comparable market. Though plaintiffs' attorney stated **[*42]** at oral argument that both the class area and Rutland County are oligopolistic markets and insisted that plaintiffs had made that specific allegation in their complaint, *see* Transcript at 38:4-19, the complaint does not contain such a specific allegation. The closest the complaint comes to alleging that Rutland is a comparable market is in Paragraph 64 ("Profit margins realized by Defendants in the Class Area exceeded the margins realized by comparable gas stations outside of the Class Area within comparative markets in the State of Vermont and throughout the United States."), Paragraph 68 ("There is little justification for the price differential for gasoline between the Class Area and the City of Rutland. Major costs . . . vary little or not at all. To the extent some costs in Rutland are lower . . ., those difference cannot explain the price differential.) and in Paragraph 70 ("There is no competitive market explanation for the magnitude and substantial duration of the retail price differentials between Chittenden and Rutland during periods of declining costs."). However, this does not doom plaintiffs' complaint. There is a clear implication in the complaint of an apples-to-apples **[*43]** comparison. Moreover, the complaint alleges that the class area has higher prices than not only Rutland, but other areas of Vermont, the Northeast, and the country.

[19] With regard to parallel pricing behavior, defendants argue that the FTC document relied upon by plaintiffs in their complaint undercuts their allegations. Specifically, R.L. Vallee argues that the FTC data does not show excessive pricing or profit-taking, but instead shows that prices were within the predicted range for all but a few weeks. *See* Ex. A to R.L.'s Vallee's Reply. Indeed, the FTC data purportedly shows that from the period between January 2010 and June 2012, gas prices in Burlington, Vermont were within the "expected range" except for the last four weeks. *See id.* However, this is not the only allegation of parallel pricing behavior offered by plaintiffs. They allege unreasonably high retail prices, wholesale prices, and profits throughout the class period. Presumably, they will offer evidence supporting those allegations during discovery. The FTC chart covers only part of the class period. Furthermore, it is unclear from the chart exactly how the FTC determined the "expected range." The FTC chart does not meaningfully **[*44]** undermine plaintiffs' allegations.

[20] As Judge Posner further explained, "[t]his is anomalous behavior because falling costs increase a seller's profit margin at the existing price, motivating him, in the absence of agreement, to reduce his price slightly in order to take business from his competitors, and certainly not to increase his price." **[*45]** *Text Messaging, 630 F.3d at 628*.

also White v. R.M. Packer Co., 635 F.3d 571, 582 ("stable market shares over time may suggest in some factual contexts that the firms 'eliminated competition[] among themselves") (quoting R. Posner, ***Antitrust Law*** 79 (2d ed. 2001)).

Third, and perhaps most damning to defendants, is the allegation that they temporarily reduced their prices and profit margins before August 2012 and January 2013 legislative hearings investigating high gas prices in northwestern Vermont, despite rising costs at the time. If true, as the court must assume for purposes of this motion, the timing is highly suspicious and suggests an agreement to temporarily reduce prices in order to mask high prices charged at other times. The fact that defendants did so despite rising costs—again, as **[*46]** the court must assume to be true—further suggests a conspiracy. *See* Starr, 592 F.3d at 323-24; Text Messaging, 630 F.3d at 628.

Plaintiffs also allege that defendants had the opportunity to meet and conspire through membership in the Vermont Petroleum Association, which held regular trade association meetings and an annual golf tournament. The court deems this to be of limited persuasive value in determining whether a conspiracy can be inferred from the allegations. Virtually any profession like that of defendants has a trade association which holds meetings and other events. Mere membership in the Vermont Petroleum Association demonstrates nothing. As other cases have demonstrated, something more—like specific dates and topics covered at meetings—is generally necessary for trade association membership or communications among defendants to be a plus factor. *Compare* Text Messaging, 630 F.3d at 628 (complaint sufficiently pled price-fixing where it alleged that, among other allegations, "defendants belonged to a trade association and exchanged price information directly at association meetings" and "met with each other in an elite 'leadership council' within the association . . . [whose] stated mission was to urge its members to substitute 'co-opetition' for competition"), **[*47]** Apex Oil Co. v. DiMauro, 822 F.2d 246, 255-58 (2d Cir. 1987) (reasonable inference could be drawn that notebook entries memorializing telephone conversations between defendants evidenced an agreement), *and* In re Static Random Access Memory (SRAM) Antitrust Litig., 580 F. Supp. 2d 896, 903 (N.D. Cal. 2008) (where complaint cited specific email communications between defendants that suggested conspiracy, court noted that "allegations regarding [d]efendants' participation in various trade organizations . . . cannot alone support Plaintiffs' claims, but such participation demonstrates how and when [d]efendants had opportunities to exchange information or make agreements"), *with* Mayor and City Council of Baltimore v. Citigroup, Inc., 709 F.3d 129, 139-40 (2d Cir. 2013) (rejecting plaintiffs' allegation of "specific communications" between defendants where most communications alleged were internal to individual defendants, and the only two actual communications between competitors were "vague references to isolated discussions among only three defendants"), *and* In re Graphics Processing Units Antitrust Litig., 527 F. Supp. 2d 1011, 1023 (N.D. Cal. 2007) ("Attendance at industry trade shows and events is presumed legitimate and is not a basis from which to infer a conspiracy, without more.") (citing In re Citric Acid Litig., 191 F.3d 1090, 1098 (9th Cir.1999)).

That defendants collectively had one agent who represented them at legislative hearings is similarly unavailing. That a group of businesses would have common legislative interests does not support any untoward conspiracy.

One additional allegation offers **[*48]** further support for the inference of a conspiracy: that of defendants' "pretextual" or "plainly false" explanations for pricing behavior, consisting generally of testimony presented at legislative hearings conducted to investigate high gas prices in northwestern Vermont.[21] According to the complaint, defendants claimed they did not make a profit, or that they lost money on gasoline for substantial periods within the class period. Compl. ¶¶ 7, 75, 80-81. Defendants allegedly tried to confuse the issue at the legislative hearings by interjecting: (1) factors that apply throughout Vermont; (2) irrelevant comparisons between Vermont and other states; and (3) other "nonsensical red-herrings" that could not have explained the high price of gasoline

[21] R.L. Vallee argues that whether the legislative testimony is admissible as evidence of intent to conceal a conspiracy depends upon some initial pleading of facts to show the testimony's falsity, which it claims plaintiffs have not done. *See* R.L. Vallee's Reply at 18. However, plaintiffs have pled that, for **[*49]** various reasons, defendants' testimony does not provide an explanation for the high gas prices, which was the purpose of the legislative hearings. *See* Compl. ¶¶ 80-87. Additionally, plaintiffs' pleading of excessive profits undermines defendants' statement that they were losing money. *Id.* ¶ 63. The court deems that sufficient.

within the class area. *Id.* ¶ 82. Plaintiffs allege this was a "blatant attempt at misdirection" to conceal ongoing price coordination. *Id.* ¶ 83.

Defendants proffered several justifications for high gas prices at the hearings, but plaintiffs allege none of them explain the high price of unleaded gasoline in the class area, and only further demonstrate that defendants engaged in a price-fixing conspiracy. *Id.* ¶¶ 75, 80-87. The lack of an explanation for high gas prices is itself significant, and the lack of a rational explanation given the opportunity to present one even more so. In one federal case, the Second Circuit held that plaintiffs failed to plead additional facts beyond mere parallel conduct to plausibly suggest an agreement where defendants"'*en masse* flight from a collapsing market in which they had significant downside exposure[ ]made perfect business sense. . . . [A]bandoning bad investments was not just *a* rational business decision, but the *only* rational business decision." *Mayor of Baltimore, 709 F.3d at 138* (italics and emphasis in original). **[*50]** Here, in contrast, there is no clear rational explanation for the high gas prices that would counter the inference of a price-fixing agreement as opposed to rational, legitimate, and independent parallel conduct.[22]

iii. *Allegations Concerning Barriers to Entry*

Plaintiffs allege several so-called "barriers to entry" which, they claim, also suggest a price-fixing conspiracy. Most of these allegations, however, add nothing to their argument. They make vague reference to a need to obtain environmental permits, legal limitations on the number of gas stations in the class area, the cost and complexity of gasoline storage and operation of stations, and defendants' "threats" against anyone who attempts to open a competing gas station. However, they include no additional detail or facts explaining the nature of these allegations or how these operate to prevent entry into the market. Without more context, those allegations are simply insufficient.

Other alleged barriers to entry are more fact-specific, but do not suggest a price-fixing conspiracy in **[*52]** the class area. For example, plaintiffs allege that defendants have "frequently" acquired real property on which they imposed deed restrictions barring future use as gas stations to further limit competition or dilution of the market share. *Id.* ¶ 7. However, the only examples are actions solely by R.L. Vallee in Plainfield and St. Johnsbury, outside of the class area. *Id.* ¶¶ 52, 54. It is difficult to see how those particular activities, if true, support an inference of a conspiracy to fix prices between the four defendants in the class area.

Another allegation is that defendants misused Vermont environmental laws to obstruct the entry of low-cost gasoline providers and to extract unreasonable covenants that prevent or limit competition. *Id.* ¶ 7. Only two examples are provided. First, in 2010 R.L. Vallee opposed Walmart's bid to build a discount store in Franklin County until it was written into the permit that "there shall be no sale of gasoline for automobiles." *Id.* ¶ 50. Second, R.L. Vallee has partnered with Wesco since 2007 to oppose Costco's plans to build a filling station in Colchester, Vermont. *Id.* ¶ 51. However, it is perfectly reasonable for a business to try independently **[*53]** to discourage competitors; such conduct does not necessarily show a conspiracy. Furthermore, the Walmart opposition was

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[22] The court emphasizes that it is not placing a burden on defendants to produce an explanation for parallel pricing at the pleading stage. Rather, the court merely recognizes, as other courts have, that the existence or absence of an obvious alternative explanation for the parallelism that suggests independent conduct rather than an illegal agreement is an important factor. *See In re Ins. Brokerage Antitrust Litig., 618 F.3d 300, 322-23 (3d Cir. 2010)* (quoting *Twombly, 550 U.S. at 567*) ("allegations of conspiracy are deficient if there are 'obvious alternative explanation[s]' for the facts alleged"); *In re Travel Agent Comm'n Antitrust Litig. ("Tam Travel"), 583 F.3d 896, 908-09 (6th Cir. 2009)* (airlines' historical failures at independently cutting commission rates without prior agreements with other airlines did not suggest collusion, because defendants offered a "reasonable, alternative explanation": each airline could have reasonably calculated that a successful commission cut would yield greater net revenue); LaFlamme *v. Societe Air France, 702 F. Supp. 2d 136, 151-52 (E.D.N.Y. 2010)* ("rapidly rising jet fuel prices" provided an obvious independent explanation for the alleged parallel **[*51]** behavior); *In re Graphics Processing Units Antitrust Litigation, 527 F.Supp.2d 1011, 1022 (N.D. Cal. 2007)* (allegations of parallel conduct were equally consistent with conspiracy and lawful conduct where certain characteristic of chip industry provided "independent innocent explanation" for conduct); *Cf. Interstate Circuit v. United States, 306 U.S. 208, 224, 59 S. Ct. 467, 83 L. Ed. 610 (1939)* (defendant's letter provided evidence of conspiracy, particularly because defendants could offer no alternative reason for parallel pricing demands).

action taken solely by R.L. Vallee, while the Costco opposition involved only two of the four defendants. The court deems these allegations to be of very limited persuasive value.[23]

(3) *Analysis*

In determining whether plaintiffs have adequately pled facts from which a price-fixing conspiracy could be inferred, the court must examine the allegations in the complaint as a whole. Plaintiffs have alleged parallel pricing, as well as product and market structure factors demonstrating that the class area was conducive to a price-fixing conspiracy. Those allegations alone are insufficient because they merely demonstrate an oligopolistic market. However, plaintiffs also allege certain plus factors which suggest that the parallel conduct might have resulted from an agreement and is not merely consistent with independent action. The discrepancy **[*54]** between retail prices and terminal rack costs, the temporary price reductions before the legislative hearings at a time of rising costs, and the lack of a rational explanation for the pricing behavior at the legislative hearings, when considered together with the parallel pricing and market structure, suggest a price-fixing agreement.

Defendants claim that plaintiffs must identify the specific time, place, or person related to the conspiracy allegation. This is incorrect, even under the *post-Twombly* federal pleading standard. The Second Circuit has interpreted *Twombly* as not requiring such specificity where the claim of agreement rests on parallel conduct. *See* *Starr, 592 F.3d at 325* (citing *Twombly, 550 U.S. at 565 n.10*); *see also* *Allen v. Dairy Farmers of Am., Inc., 748 F. Supp. 2d 323, 333 n.2 (D. Vt. 2010)*. Instead, allegations of parallel conduct "must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action." *Starr, 592 F.3d at 322* (citing *Twombly, 550 U.S. at 557*). Examples of a parallel conduct allegation that would suffice under this standard include "parallel behavior that would probably not result from chance, coincidence, independent responses to common stimuli, or mere interdependence unaided by an advance understanding among the parties." *Id.* (citing *Twombly at 556 n.4*). **[*55]**

Defendants, and particularly R.L. Vallee, also repeatedly point to footnote six in Vallee's December 11th reply memorandum, where Vallee cites nine federal antitrust cases that were, according to Vallee, "dismissed at the pleading stage because they suffered from the same deficiency as Plaintiffs' Complaint: they failed to allege facts supporting the inference that an unlawful agreement among competitors to fix prices, rather than legitimate business behavior, was responsible for parallel market activity." R.L. Vallee's Reply at 9 n.6 (citing *SD3, LLC v. Black & Decker (U.S.) Inc., 801 F.3d 412 (4th Cir. 2015)*; *Mayor of Baltimore, 709 F.3d 129*; *Insurance Brokerage, 618 F.3d 300*; *In re Travel Agent Comm'n Antitrust Litig. ("Tam Travel"), 583 F.3d 896 (6th Cir. 2009)*; *Hu v. Huey, 325 Fed. Appx. 436 (7th Cir. 2009)*; *Allen v. Dairy Farmers of America, Inc., 748 F. Supp. 2d 323 (D. Vt. 2010)*; *LaFlamme v. Societe Air France, 702 F. Supp. 2d 136 (E.D.N.Y. 2010)*; *In re Static Random Access Memory Antitrust Litigation, 580 F.Supp.2d 896 (N.D. Cal. 2008)*; *In re Graphics Processing Units Antitrust Litigation, 527 F.Supp.2d 1011 (N.D. Cal. 2007))*.

While those cases provide guidance as to what allegations can be used as "plus factors" from which an inference of a conspiracy can be drawn, they were all decided under the federal, *post-Twombly* pleading standard. Moreover, the cases are inconsistent and impossible to harmonize. In any case, each is fact-specific and provides no broad guidance here. For instance, while some of the cited cases observe that meetings between defendants must be alleged with some level of specificity in order to suggest a conspiracy, *see* *SD3, 801 F.3d at 429-30*; *Mayor of Baltimore, 709 F.3d at 139-40*; *Tam Travel, 583 F.3d at 910-11*; *LaFlamme, 702 F. Supp. 2d at 147-48*, an allegation of meetings is not strictly **[*56]** necessary to survive a 12(b)(6) motion, nor is it even necessary to allege a specific time or place of the conspiracy. *See* *Starr, 592 F.3d at 325*.

Defendants also point to *pre-Twombly* federal cases in an attempt to show that even under our lower pleading standard, plaintiffs have failed to adequately allege a conspiracy to fix prices. In *Estate Construction. Co. v. Miller & Smith Holding Co.*, the Fourth Circuit held that dismissal of an antritrust conspiracy complaint was appropriate

[23] Plaintiffs allege one other example involving a new filling station in Plainfield, outside of the class area. *Id.* ¶ 53. Because it is outside of the class area, it has no relevance to an alleged price-fixing conspiracy inside the class area.

where the plaintiffs failed to provide "any factual support" for their allegations of a conspiracy. 14 F.3d 213, 221 (4th Cir. 1994). The complaint there, however, was entirely conclusory, stating no facts and only legal conclusions. *Id.*[24]

Lombard's, Inc. v. Prince Mfg., Inc., 753 F.2d 974, 975 (11th Cir. 1985) also involved an entirely conclusory complaint. Though notice pleading was all that was required for a valid antitrust complaint in that case, "[n]evertheless, enough data must be pleaded so that each element of the alleged antitrust violation can be properly identified." *Id.* (quotations omitted). The complaint in *Lombard's* stated only a conclusory allegation that there was a conspiracy in violation of the Sherman Act, and Prince was the only defendant named. *Id.* "Thus not only are no facts alleged to demonstrate the conspiracy but the specific participants of the conspiracy are not even identified. Such pleading is inadequate to give the defendant fair notice of Lombard's claim." *Id.*[25]

Defendants also point to *In re Currency Conversion Fee Antitrust Litigation* as an example of a sufficiently pled antitrust complaint under the *pre-Twombly* federal pleading standard. In that case, though the parallel conduct by MasterCard and VISA in establishing currency conversion fees was not enough by itself **[*59]** to infer an antitrust conspiracy, plaintiffs also alleged plus factors which prevented dismissal. 265 F. Supp. 2d 385, 418-19 (S.D.N.Y. 2003). Those plus factors included allegations that certain fees were against the defendants' economic self-interest absent collusion, a dual governance structure facilitated the conspiracy, and the actions of one organization's board were disseminated to members of both organizations. *Id.* (Thus, "each of the associations is a fishbowl and officers and board members are aware of what the other is doing, much more so than in the normal corporate environment.") *Id.* Another example of a sufficiently pled antitrust complaint is *In re Mid-Atlantic Toyota Antitrust Litigation,* 525 F.Supp. 1265, 1280-81 (D. Md. 1981), where the plaintiff "carefully documented a series of meetings . . . includ[ing] the persons in attendance . . ., the topics discussed, and the impact these meetings had on the alleged conspiracy . . . ."

Defendants are correct that plaintiffs' "plus factor" allegations in this case are not as strong as those in *Currency Conversion* or *Mid-Atlantic*. On the other hand, plaintiffs' allegations are not as "bare bones" as those offered in *Estate Construction* and *Lombard's*. Unlike *Lombard's*, which failed to specify the participants in the conspiracy,

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[24] The complaint provided:

> Providence combined and/or conspired with the Miller & Smith defendants, Gordon V. Smith, Calloway, Conner, Jack B. Conner Associates, Inc. and others to restrain trade unreasonably in the real estate development business in the Washington, D.C. metropolitan area by combining and/or conspiring to deprive the Pattersons of The Property, cause The Property to be sold in foreclosure at a price that would leave the Pattersons with no assets, and otherwise to drive them and Estate Construction out of the real **[*57]** estate development business in the Washington, D.C. metropolitan area. The combination and/or conspiracy produced adverse, anticompetitive effects within the relevant product and geographic market. The objects and conduct of the combination and/or conspiracy were illegal.

Estate Constr., 14 F.3d at 221 n.15.

[25] The relevant paragraphs of the complaint in *Lombard's* provide:

> 10. Upon information and belief, PRINCE, together with PRINCE dealers and others at this time unknown to LOMBARD'S, conspired to maintain the resale prices of the "Prince Precision Graphite," **[*58]** the "Prince J/R Pro" and the "Prince Magnesium Pro" tennis racquets and terminate price-cutters. In furtherance of that conspiracy, and in response to dealer complaints, PRINCE has prevented LOMBARD'S from making wholesale and mail order sales of the three (3) new tennis racquets by refusing to fill LOMBARD'S purchase orders for these new tennis racquets.
>
> 11. Upon information and belief, PRINCE, together and with PRINCE dealers and others at this time unknown to LOMBARD'S, have attempted, and are now attempting, to prevent LOMBARD'S from making wholesale and mail order sales of the "Prince Precision Graphite," the "Prince J/R Pro" and the "Prince Magnesium Pro" tennis racquets not to achieve any legitimate business objectives, but for the sole purpose of unlawfully preventing LOMBARD'S from engaging in intrabrand price competition with other dealers in those same tennis racquets.

Lombard's, 753 F.2d at 975.

plaintiffs here **[*60]** specify the four named defendants as the participants. Furthermore, unlike the *Estate Construction* complaint which "lack[ed] completely any allegations of communications, meetings, or other means through which one might infer the existence of a conspiracy," plaintiffs here allege price increases at a time of declining costs, price changes immediately before legislative hearings to investigate high gas prices, and the lack of a rational explanation for the high gas prices. Considering those factors along with the allegations of parallel pricing behavior and a market structure and product that make price-fixing feasible, plaintiffs' complaint offers something more than a mere conclusory allegation of a price-fixing conspiracy.

In essence, defendants argue that because there may well be a perfectly legitimate explanation for all of the facts alleged by plaintiffs, the complaint is insufficient. The court concludes that this is not the law at the pleading stage. Instead, if the allegations could also be explained by a tacit agreement to fix prices, the complaint is sufficient. *See, e.g., Heritage, 137 Vt. at 430* (evidence compels neither inference of price-fixing nor "an inference of no agreement"); SD3, *801 F.3d at 425* ("[I]t is not our **[*61]** task at the motion-to-dismiss stage to determine whether a lawful alternative explanation appear[s] more likely from the facts of the complaint. Post-*Twombly* appellate courts have often been called upon to correct district courts that mistakenly engaged in this sort of premature weighing exercise in antitrust cases.") (internal citation omitted); *Starr, 592 F.3d at 325* (allegations adequate at pleading stage if they "suggest" that an agreement was made).[26]

This is a motion to dismiss, based solely upon allegations. It could be that no evidence exists that reasonably supports the allegations. It is possible that discovery will turn up insufficient evidence to support plaintiffs' claims, and the case will not survive summary judgment. However, that is not the question to be resolved here. *Starr, 592 F.3d at 329* (Newman, J., concurring) ("Even in those contexts in which an allegation of parallel conduct will not suffice to take an antitrust plaintiff's case to the jury, it will sometimes **[*62]** suffice to overcome a motion to dismiss and permit some discovery . . . ."). Plaintiffs' allegations of parallel conduct and plus factors are enough to survive a 12(b)(6) motion to dismiss under Vermont's "exceedingly low" pleading standard.

V. *Unjust Enrichment*

Unjust enrichment rests on the principle that one should "not be allowed to enrich himself unjustly at the expense of another." *Shattuck v. Peck, 2013 VT 1, ¶ 11, 193 Vt. 123, 70 A.3d 922*. "[T]he inquiry is whether, in light of the totality of circumstances, it is against equity and good conscience to allow [a party] to retain what is sought to be recovered. . . . It must be a realistic determination based on a broad view of the human setting involved." *Id.* (quoting *Weed v. Weed, 2008 VT 121, ¶ 17, 185 Vt. 83, 968 A.2d 310*). Thus, unjust enrichment is present only if: "(1) a benefit was conferred on defendant; (2) defendant accepted the benefit; and (3) defendant retained the benefit under such circumstances that it would be inequitable for defendant not to compensate plaintiff for its value." *Kellogg v. Shushereba, 2013 VT 76, ¶ 31, 194 Vt. 446, 463, 82 A.3d 1121* (quoting *Center v. Mad River Corp., 151 Vt. 408, 412, 561 A.2d 90 (1989))* (alterations in original).

Plaintiffs allege that during the class period, defendants' price-fixing conspiracy resulted in plaintiffs paying artificially inflated prices for unleaded gasoline, and that defendants have retained the benefit of those **[*63]** excess profits. *See* Compl. ¶¶ 4, 7, 10, 16, 34, 56-75, 106-108. Defendants contend that plaintiffs' unjust enrichment claim fails because there is no allegation that defendants did not "compensate" or "pay" plaintiffs for the benefit they received, "i.e., that [d]efendants did not give [p]laintiffs gasoline in exchange for money." R.L. Vallee's Mot. to Dismiss at 31. To support this argument, defendants quote *Ray Reilly's Tire Mart, Inc. v. F.P. Elnicki, Inc., 149 Vt. 37, 39, 537 A.2d 994 (1987)*, which states that "[t]he retention of a benefit is not unjust where defendants have paid for it."

The issue here, however, is whether the amount plaintiffs paid for the product was unreasonably high and thus whether defendants obtained a greater benefit than the value of the product. *See, e.g., In re Processed Egg*

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[26] As one treatise notes, *Twombly* cannot mean "that the plaintiff must disprove all nonconspiratorial explanations for the defendants' conduct," even at the summary judgment stage. P. Areeda & H. Hovenkamp, Fundamentals of ***Antitrust Law*** § 14.03[B] at 14-25 (4th ed. 2015 supp.).

Products Antitrust Litig., 851 F. Supp. 2d 867, 927 (E.D. Pa. 2012) (plaintiffs sufficiently alleged that purchasers had conferred benefit on defendants since any purchase of eggs at artificially inflated prices stemming from price-fixing conspiracy "allowed [d]efendants to obtain the benefit of 'increased revenues and profits from their sales of eggs'"); In *re TFT-LCD (Flat Panel) Antitrust Litig., 599 F. Supp. 2d 1179, 1190 (N.D. Cal. 2009)* (plaintiffs alleged that they conferred benefit on defendants by paying higher prices for LCD products than they would have in absence of alleged price-fixing conspiracy).

Defendants also claim that the unjust enrichment claim fails because **[*64]** plaintiffs have failed to adequately allege a price-fixing conspiracy. In light of the court's resolution of the price-fixing claims above, the court rejects defendants' argument. *See generally* D. Karon, *Undoing the Otherwise Perfect Crime - Applying Unjust Enrichment to Consumer Price-Fixing Claims*, *108 W. Va. L. Rev. 395, 431 (2005)* (arguing that unjust enrichment always has applied to situations like consumer price-fixing claims).

However, the statute of limitations issue addressed above applies equally to the unjust enrichment claim. *See Stankiewicz v. Estate of LaRose, 151 Vt. 453, 456, 561 A.2d 400 (1989)* (six-year statute of limitations under *12 V.S.A. § 511* applies to unjust enrichment claim). Plaintiffs may not proceed on any unjust enrichment which may have occurred before June 22, 2009.

Order

Defendants' motions to dismiss are granted in part and denied in part. The motions are granted on statute of limitations grounds with respect to the period before June 22, 2009. They are denied in all other respects. The parties are directed to submit a proposed discovery schedule by May 24.

Dated at Burlington this 7th day of May, 2016.

Helen M. Toor

Superior Court Judge

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